

EFFICIENCY THEMES IN TORT LAW FROM ANTIQUITY

ABSTRACT

As human societies developed, a bedrock necessity was the identification of expectations and norms that protected individuals and families from wrongful injury, property damage, and takings. Written law, dating to the Babylonian codes and early Hebrew law, emphasized congruent themes. Such law protected groups and individuals from physical or financial insult, depredation of the just deserts of labor, interference with the means of individual livelihood, and distortion of the fair distribution of wealth.

Hellenic philosophers assessed the goals of society as being the protection of persons and property from wrongful harm, protection of the individual's means of survival, discouragement of self-aggrandizement, and the elevation of individual knowledge that would carry forward and perfect such principles. Roman law was replete with proscriptions of forced takings and unjust enrichment, and went so far as to include rules for ex ante contract-based resolution of potential disagreement. Unwritten customary law within the Western world and beyond perpetuated these tenets, based at once in morality and aversion to wasteful behavior.

In addition to the corrective justice-morality underpinnings of the law governing civil wrongs, or torts, the common law has nurtured rules implicating economic and efficiency themes. Efficiency themes enjoy a conspicuous place in modern tort analysis: from the risk-utility analysis and implicit social cost evaluations of numerous common law courts in accident cases, to the translation of the negligence formula of Judge Learned Hand into a basic efficiency model, to the increasing number of judicial opinions that rely explicitly upon economic analysis.

* Former Distinguished Professor of Law, Pace University School of Law. Email address: mstuartmadden@yahoo.com.

I INTRODUCTION

Tort law represents a society's revealed truth as to the behaviors it wishes to encourage and the behaviors it wishes to discourage.¹ From causes of action for the simple tort of battery to the more elegant tortious interference with prospective advantage, the manner in which individuals or groups can injure another seems limitless. Despite the amplitude of interests protected by tort law, from its earliest exercise in prehistoric groups up to its modern implementation, there have existed a finite number of goals of tort law, whether the 'law' referred to be an unwritten norm, a judicial decision, or a modern statute.

There is general agreement that these objectives, however imperfectly accomplished, include: (1) returning the party who has suffered a loss to the position he enjoyed before the wrongful activity; (2) requiring the wrongdoer to disgorge the monetary or imputed benefit derived from his actions; and (3) by the remedy meted out, and by its example, deterring the wrongdoer and others in a similar situation from engaging in the same wrongful and injurious pursuit. Another manner of describing tort goals has been to order them as serving either goals of (4) 'corrective justice' and 'morality'; or (5) 'economic efficiency and deterrence'.

Nonetheless, the philosophical underpinnings of tort rules is not the syncretic hotchpotch it may initially appear, even though aligning the rules exclusively with any one of the five goals requires some ungainly packaging. Each of the five themes described actually furthers the other four. This is to say, a remedy that focuses on corrective justice will serve simultaneously the goals of disgorging the wrongdoer of his unjust enrichment, morality, efficiency, deterrence, and so on. More specifically, the goal of returning the injured party ('plaintiff') to the status quo ante, the objective most closely associated with corrective justice, is ordinarily reached by a decree ordering the wrongdoer to pay to the plaintiff the money equivalent of what the plaintiff lost, with damages calculated in this way operating as an inexact surrogate for what the wrongdoer gained, actually or by imputation, by perpetrating the wrong. Further, while the wrongdoer's forfeiture of his gain not only provides corrective justice for the plaintiff, it also punishes the wrongdoer for failing to achieve the plaintiff's ex ante approval of the transaction — an omission deemed by economic theorists to be inefficient.² Although it is not surprising that many suggest that tort rules and remedies aligned with economic and efficiency models provide optimal

¹ There will be some rarified instances of behavior for which tort law would not encourage elimination, such as abnormally dangerous activities ranging from construction blasting to aerial application of pesticides, but instead may wish to modify or limit, and in any event, to assign strict liability. See *Indiana Harbor Belt Railroad Co v American Cyanamid Co*, 916 F 2d 1174, 1177 (7th Cir, 1990); see generally Steven Shavell, 'Strict Liability versus Negligence' (1980) 9 *Journal of Legal Studies* 1.

² When the loss is personal injury or property damage, a rough estimation of this inefficiency (or waste) may often be the combined amount of the claimant's economic and non-economic damages. Of course the themes of punishment and deterrence are but the flip side of the goal of creating an incentive for efficient behavior. As suggested by Professors David W Barnes and Lynn A Stout, '[t]ort law may be viewed as a

deterrence for civil, tort-type wrongs, the following discussion confirms that the tort rules recognized by the corrective justice-morality school also deter in measurable ways. Indeed, in the inexact taxonomy employed by tort scholars, there are so many instances of overlap between tort goals that are claimed to serve corrective justice-morality, but simultaneously serve goals of efficiency and deterrence, that the legal pragmatist would be tempted to characterize them as functionally equivalent.³ Even conceding the absence of neatness in any attempt at categorization, the division of tort goals along these or similar lines is nevertheless illuminating and predictive.

Tort law is a model of social expectations, and these social expectations are at once moral and economically efficient. The goal of this article is not to elevate the consideration of economic objectives over those of corrective justice and morality, or the reverse. Rather, the author seeks to survey the ample social and legal record, revealing that, over history, written or unwritten rules pertaining to civil wrongs have cleaved as readily to an ethos of efficiency as such rules have promoted goals of corrective justice and morality.

This efficiency norm has organizing principles of waste avoidance, the protection of persons and their property from injury and wrongful appropriation, the preservation of the integrity of individual or collective possessions or prerogatives from wrongful interference, and the prudent marshaling of limited resources. Even when the corrective justice-morality objective of any tort rule may appear on its face to eclipse any efficiency underpinnings, subtle economic themes of efficiency and deterrence can be recognized in almost all tort-type customs, expectations, and rules. This article will demonstrate that the parallel and harmonious impetus for almost all of what we call tort law today can be found in principles of corrective justice and economic efficiency, and that individually, corrective justice and efficiency are each necessary, but neither sufficient, premises for explaining past and current tort rules.

In any evaluation, social or scientific, as it has evolved during the period of written history, there are inevitable gaps in the record. As regards this socio-legal history, the potential for analytical error is compounded by the difficulties legal scholars and historians confront in reading the historical record within the only context that may reveal it reliably, which is to say, the cultural and political circumstances of its origins. Moreover, as to pre-history, no more than a small part of the record of the earliest human societies may ever be scientifically reconstructed, because of natural loss or later human meddling. Forever inaccessible are countless ancient remnants that might suggest the social norms employed to make group decisions based on what behaviors would bring collective benefit and what would not.

system of rules designed to maximize wealth by allocating risks so as to minimize the costs associated with engaging in daily activities': David W Barnes and Lynn A Stout, *Cases and Materials on Law and Economics* (West Publishing, 1992) 82.

³ Put another way, both corrective justice and efficiency principles must be regarded as 'true' in that they hold significant, albeit non-exclusive, predictive value in anticipating the development of tort law. See M Stuart Madden, 'Selected Federal Tort Reform and Restatement Proposals Through the Lenses of Corrective Justice and Efficiency' (1998) 32 *Georgia Law Review* 1017, nn 297–8 and accompanying text.

The adoption of durable writing or imagery accelerated our modern understanding of ancient legal rules. The discovery and translation of the first integrated legal codes from the sites that were within ancient Babylonia, codifications of what was surely the customary law that preceded it, provided the first written evidence of regularized standards for individual behavior, identification of civil wrongs, and the remedies for such wrongs.

Hobbes described survival as man's strongest moral imperative, and that all pursuit of justice and right is founded in man's rational pursuit of self-preservation.⁴ Experts are of one view that the success and survival of early social groupings bore a more or less exact correlation to their adoption of rules that furthered advancement of knowledge, material comfort, and economic stability. Achievement of these attributes would, from pre-history onward, be characterized as 'good'.⁵ It follows that early family clans, and the tribes and ever-larger social aggregations that would follow, shared one sentiment: to pursue such 'good' for their members.⁶ Philosophers have disagreed as to whether man in his natural state was innately 'good', but any original impulse for good stood no meaningful chance for survival as human concentrations grew and evolved. Group order and expectations in the form of norms, and the subscription to such norms by individuals and families, became necessary for communal survival. It will be seen that at its core, tort law, together with its unwritten normative antecedents, bears witness to the fundamental social need for self-limitation. To the sociologist Emile Durkheim, the peaceful process of society has always depended on the individual's submission to inhibitions of or restrictions on personal 'inclinations and instincts'. To Durkheim, 'social life would be impossible'⁷ without general subscription to such limitations, and this would hold true whether the 'venerable respect' tendered to a collective 'moral authority' is faith-dependent or not.⁸ And so by necessity, social groups developed expectations, norms, customs, and, eventually, laws that encouraged behaviors that contributed to the common good and economic success of the community; and

⁴ Thomas Hobbes, *Leviathan* (Bobbs-Merrill, first published 1651, 1958 ed), discussed in Francis Fukuyama, *The End of History and the Last Man* (Free Press, 1992) 156; Leo Strauss, *Natural Rights and History* (University of Chicago Press, 1953) 187–8.

⁵ See generally Robert Redfield, 'Maine's Ancient Law in the Light of Primitive Societies' (1950) 3 *Western Political Quarterly* 574, 586–9, in which Redfield writes of primitive societies: 'economic systems are imbedded in social relations. Men work and manufacture not for motives of gain. They tend to work because working is part of the good life'.

⁶ Erich Fromm confirmed 'the strength of the strivings for happiness and health that are part of the natural equipment of man'. Erich Fromm, *Man for Himself: An Inquiry Into the Psychology of Ethics* (Fawcett Publications, 1947) viii. By 'members' is meant the collective. As Maine observed: 'Ancient Law ... knows next to nothing of Individuals. It is concerned not with Individuals, but with Families, not with single human beings but groups': Henry Sumner Maine, *Ancient Law: Its Connection With the Early History of Society and Its Relation to Modern Ideas* (John Murray, 1861) 229.

⁷ Emile Durkheim, *The Elementary Forms of Religious Life* (Free Press, first published 1912, 1965 ed) 237.

⁸ Subscription to this logic will not be found among those who believe that faith is merely an attempt to put some structure on the chaos that surrounds the human experience.

discouraged individualistic pursuit of personal aggrandizement to the extent that it involved disavowal of community responsibility.

Accordingly, human experience of the ages has demonstrated that man as a social animal has turned almost invariably to structures and norms consistent with defined and enforced standards of 'good' as would further the innate and overarching instinct for individual and group survival. By virtue of this ascendant sentiment of most societies of all historical epochs to attain both group and individual 'good', the collective conclusions as to what constitutes 'good' evolved gradually to this: what is 'good' has always been, as it is today, what is just, moral and equitable.⁹ Encouragement of 'good' conduct has been logically accompanied by discouragement of 'bad' conduct, which is to say, behavior considered to be unjust, immoral, or inequitable. And all such systems, save the brashest of totalitarian societies, have included standards by which a person might seek the correction of or compensation for harm caused by the wrongful acts of another. Initially established as practices, then as norms and customs, and eventually as law, evolving social strictures would operate to either cabin or punish the behaviors of those succumbing to the seemingly irresistible human appetite for bad, wrongful, and harmful behavior.

In this sense, tort law past and present, has operated as the societal super-ego, a generally subscribed-to social compact in which most persons rein in such impulses as might lead them to trammel the protected rights of others, inasmuch as the norms of tort law require rectification operating post hoc to restore the wronged person to the position previously enjoyed. This restoration may be perfect, such as when it is in the form of returning goods where there has been a trespass to chattels and there has been no diminution in value, or when there has been a misappropriation. Or it may be imperfect, such as in settings involving a wrongful physical injury, as to which rectification in the form of money can never truly restore the injured party to the status quo ante. As suggested initially, whatever the corrective justice limitations of money damages, they do serve other objectives identified with tort law, which include deterrence of the same or similar conduct by the actor or others similarly situated.¹⁰ Money damages also, in an economic sense, command a transfer of wealth that achieves a figurative rectification of the wrongdoer's 'forced taking' of the injured party's bodily integrity. The money damages also, at least conceptually, deprive the wrongdoer of the 'unjust enrichment' achieved by creating a tear in the fabric of consensual or contract-based social interaction.

⁹ Conceding that Socrates wrote from beyond the spheres of governing power, it is telling that Socrates' ethics are suffused with the goal of avoiding doing harm, and with the argument that a principal marker of 'justice' is the simple 'returning what was owed': Anthony Gottlieb, *The Dream of Reason: A History of Philosophy from the Greeks to the Renaissance* (Norton, 2000) 164.

¹⁰ 'The true explanation of the reference of liability to a moral standard ... is not that it is for the purpose of improving men's hearts, but that it is to give a man a fair chance to avoid doing the harm before he is held responsible for it. It is intended to reconcile the policy of letting accidents lie where they fall, and the reasonable freedom of others with the protection of the individual from injury': Oliver Wendell Holmes, *The Common Law* (Belknap Press of Harvard University Press, 1963) 115.

II ECONOMIC IMPERATIVES IN EARLY SOCIAL GROUPINGS

A Generally

The raw and primal imperative of simple human survival has required of each successful community the ordered pursuit of wellbeing for its members, necessarily including standards to discourage or interdict activity that interrupted or compromised pursuit of a social order consistent therewith. Interdependent with such overarching needs, the norms or apparatus of ‘justice’ and ‘morality’ too would sensibly harmonize with the collective pursuit of economic stability, growth, and the elevation of human knowledge. Retaining a focus on the three goals of elevation of human knowledge, material comfort, and economic stability, it follows that within the context of pre-history, of particular pertinence to the furtherance of each goal was the creation and preservation of group circumstances in which persons could expect to live peaceably without physical injury at the hands of others. It also was expected that the community would provide congruent protection against wrongful taking or damage of the property justly acquired by its members. It was collectively thought necessary that man would gradually impose on his groups, and eventually civilizations and states, norms and rules that served to protect the personal physical autonomy and security of group members, and also protect their belongings, against wrongful interference. The group visualization of these norms, and their progressive imposition, would assume the aura of inevitability, and the gravitas of a cultural imperative. For successful social groupings, principal among such norms was the expectation there would be some form of remediation for an impermissible intrusion on physical or property interests, including common property rights.¹¹ And, finally, along this line of civilizing thought, the ideation of society was that the burden of an avoidable harm ought not rest with the innocent victim but rather with the wrongdoer.

B A Pre-Symbolic Scenario

At some distant time in Africa, the birthplace of modern man, homo sapiens formed family-based social groups or clans. From the time of early family groupings to the development of ever-more complex communities, all successful human gatherings developed work specializations inter se.¹² For example, a group depending on fishing for its sustenance would need individuals to prepare nets or baskets for the catch. Others in the group would dedicate themselves to the actual fishing, and travel to the water source with, let us say, spherical fishing baskets that contained a hole on one side that lured fish to the shade. Swift retrieval of the basket would catch the fish and provide food for the community. Naturally, the entire community would not survive if the actual fishing specialists arrogated to themselves the catch, and so there

¹¹ Dennis Lloyd, *The Idea of Law* (Penguin Books, 1976) 49, referencing, inter alia, Mosaic law.

¹² As Darwin pointed out for flora and fauna, and as Durkheim noted in the case of human societies, an increase in numbers when area is held constant (ie an increase in density) tends to produce differentiation and specialization, as only in this way can the area support increased numbers.

developed norms of allocative efficiency, a so-called 'generosity' norm, that would ensure that all in the community, including infants and the aged, would be provided for adequately.¹³ This allocation of goods constituted a corpuscular prototype of efficiency-based exchange of goods that recognized duties owed by the community to its individuals, duties owed by community members to others, and the common interest in non-wasteful behavior that would characterize all societies to follow.

This economic cooperation characteristic of primitive communities was the antithesis of economic self-interest, and understandably, Karl Polanyi writes that in tribal society, '[the individual's economic interest is rarely paramount, for the community keeps all its members from starving unless it is itself borne down by catastrophe]'.¹⁴ Thus in the circumstances of tribal society, a member's exclusive pursuit of economic self-interest was itself contrary to the economic survival of the group. Early task assignment and economic differentiation within a clan or small social group required, by 'code of honor' or 'generosity', recognition that each member of the community served the whole. From the earliest hunting and gathering communities to the later agricultural groupings, task allocation was accompanied by mutual expectations that the bounty in food or materials gathered by one group would be shared with the others. The others would include, nonexclusively, the homemakers, children, and the elderly. For the vital hunting population to forsake its obligation to return from the hunt with food to share with the family, clan, or tribe would sabotage the very existence of the social group. Failure to share with the homemaker and the children would bring about the speedy end of the bloodline. As to elders, with some exceptions, tribal groups recognized that the aged acted not only as secondary caregivers but also as essential repositories of the group's oral history and traditions.

In time, with the increase in population and in the course of the proved northward migration of many human groups,¹⁵ early man found that the working norms for family, clan and single community survival would be taxed by contact with other families or groups. For an untold time, the response of the principal family was simply that of preserving territorial integrity, familial safety, or both. An intruder would be frightened away, or if necessary, beaten or killed. If the intruder or his group prevailed in any contest, the principal family, with its injured or killed, would abdicate its territory.

¹³ 'For example, the [primitive] Australian hunter who kills a wild animal is expected to give one certain part of it to his elder brother, other parts to his younger brother and still other parts of the animal to defined relatives. He does this knowing that [the other brothers] will make a corresponding distribution of meat to him': Robert Redfield, 'Maine's Ancient Law in the Light of Primitive Societies' in J C Smith and David N Weisstub, *The Western Idea of Law* (Butterworths, 1983) 81.

¹⁴ George Dalton (ed), *Primitive, Archaic and Modern Economies: Essays of Karl Polanyi* (Beacon Press, 1968) 7.

¹⁵ Such extraordinary migrations as would take man out of Africa and eventually permit his species' dispersal throughout all but one continent was facilitated by his evolved ability to walk on two feet, to travel long distances, and to carry objects and infants: J M Roberts, *The New History of the World* (Oxford University Press, 4th ed, 2003) 5.

In a succession of discrete and unidentifiable moments, this motif would change. Increased populations, changes in climate that made one area more hospitable than another, or migratory patterns of available prey, made contact with other groups more frequent. A group had essentially two choices. They might preserve their reflexive and potentially mortal repulsion of competition. However, losses in injuries or death suffered in non-cooperative contact with other groups might have stimulated a group's conclusion that preservation of pristine territorial integrity was perhaps a pearl of too great a price. And so, alternatively, their response to other communities might begin to partake of peaceable aspects. Non-combative resolution of intra-familial allocative tensions might have served as a model for introduction of cooperative behavior in interfamilial or inter-clan matters. Cooperation would lessen or eliminate the enormous waste and cost of violent response to intrusion.

Perhaps at the instigation a group elder, families and tribes eventually developed behaviors and expectations that could coexist within the context of available resources in such ways as to achieve a tenable resource-based economic stasis.¹⁶ Should, for example, our hypothesized fishing community come into contact with a hunting community, the sharing of territory, and perhaps even barter, might well become recognized for its very significant benefit in reducing the group's loss of its ablest members to combat, and thus become a common ideal or norm.

Historians have recognized the similar options presented to later agricultural communities, with the permissible inference of the peaceable and efficient resolution of such options. In the description of J M Roberts:

As the population rose, more land was taken to grow food. Sooner or later men of different villages would have to come face to face with others intent on reclaiming marsh which had previously separated them from one another ... There was a choice: to fight or to cooperate ... Somewhere along the line it made sense for men to band together in bigger units than hitherto for self-protection and management of the environment.¹⁷

Of necessity, the norms developed within such larger social groups reflected the wisdom of not only *ex ante* resource allocation but also of strictures intended to discourage disruption of such distribution by forced takings or otherwise.

The above hypothetical, yet historically realistic, scenario offers our first chance to measure highly plausible human behavior, and attendant norms, by a yardstick of human economic efficiency. Although multiple economic models are available, one that seems well-suited is that propounded by Vilfredo Pareto in the early 1900s. The

¹⁶ Of course the genetic significance of intergroup coexistence is inestimable, but would, in any event be unknown to early man. Early intimations of the risks of sustained familial interbreeding might well be manifest in the development of the incest taboos.

¹⁷ Roberts, above n 15, 49–50. These early incentives toward political and economic cooperation weigh in against the more pessimistic vision of Garrett Hardin. See Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 *Science* 1243, 1244, arguing that 'ruin is the destination toward which all men rush, each pursuing his own best interest'.

Pareto analysis imagines a setting in which all goods have been previously allocated, and permits an evaluation of different approaches to reallocation of such goods. A reallocation that left one or more individuals better off, but no one worse off, would be considered a Pareto Superior change.¹⁸ Even better, from a wealth-maximization perspective, is a result in which, with the reallocation of goods or resources, all affected parties are better off — a result described as Pareto Optimal or Pareto Efficient.¹⁹

Applying the Pareto approach to early man's described movement away from territorial combat to gradually more peaceable distribution of land and other resources presents this question: is such rational cooperation efficient? A syllogism posed in a coarse correlation between competition and efficiency may be, on these facts, misleading. That syllogism would go: competition is, generally speaking, efficient. The antithesis of competition is cooperation. Therefore, cooperation is inefficient. However, in the example given earlier, rational cooperation between early human social groups regarding the sharing of limited land resources was not only efficient, it also can be seen to be the only means by which early societies could flourish. The alternative was either the continuation of wasteful combat, or the relegation of some groups to a continued nomadic life, or both. Thus, cooperation, and its concomitant benefits to participants in agricultural communities, would be Pareto Optimal.

It is widely proposed that the development of agriculture and animal husbandry created the first human experience of surplus.²⁰ This surplus, in turn, accelerated the development of specialization of labor.²¹ Specialization of labor affected the reciprocal entitlements and obligations of three principal groupings: (1) those engaged in agriculture; (2) artisans; and (3) those who undertook domestic and child-rearing obligations. Those engaged in agriculture had, of course, the duty to efficiently and productively produce and to husband the resources and the comestible rewards entrusted to them. Unlike the expectations typical of the hunting and gathering communities, the development of agriculture both permitted and required that what was produced not be consumed immediately, and that when it was consumed, that it not be consumed exclusively by those who produced it. Rather, the expectation for and the duty of those tilling the fields or tending the animals was to harvest the crops and to preserve the harvest, or to slaughter the livestock and to preserve the meat through salting or otherwise, for distribution among the entire community. The artisans were expected to perform such tasks as the creation of the specialized tools that might be associated with chopping, sewing, tilling, the making of clothing, the building of shelter, and more. The artisans' expectation was that, in exchange for their labor, they would partake of the agricultural production of the fields.

¹⁸ The Pareto criteria for wealth maximization analysis are summarized in David W Barnes and Lynn A Stout, *The Economic Analysis of Tort Law* (West Publishing, 1992) 11.

¹⁹ Mark Seidenfield, *Microeconomic Predicates to Law and Economics* (Anderson Publishing, 1996) 49. For a general description of Pareto optimality principles, see Robin Paul Malloy, *Law and Economics: A Comparative Approach to Theory and Practice* (West Publishing, 1990).

²⁰ Agriculture and animal husbandry will be referred to collectively as 'agriculture'.

²¹ Roberts, above n 15, 51.

The homemakers also might not participate directly in agricultural production, or if they did, they might do so to a lesser extent than those to whom that task would fall principally. The homemakers' primary tasks would include the bearing, raising, and nurturance of children, and the maintenance of a habitable home site, thus freeing both the laborers in the field and the artisans to pursue their work unimpeded of at least the most time consuming obligations of home and child. In return for these responsibilities, the homemakers would rely on the sowers and the reapers, and also the artisans, to share in an equivalence what they had produced.

The significance of these simple group structures, duties, and expectations lay in their promise of and similarity to the more complex duties and expectations that would develop as agriculture permitted the development of larger and more concentrated communities. These larger social or societal groupings would, with the advent of writing and symbolic communication, become the earliest examples of what is now called civilization. And it is in the writings of these early societies that we find articulations of civil responsibility for wrongdoing, or tort law.

III DEVELOPING EXAMPLES OF EFFICIENT FORM AND FUNCTION

A Mesopotamian Law

The watershed discovery and translation of approximately three thousand years of law from the cradle of civilization, framed by the Tigris and the Euphrates Rivers, permitted research, evaluation, and legal synthesis of myriad legal matters. Mesopotamian ancients were, many claim, the first to reduce customary law to written form in an organized and lasting manner.²² The most influential of these laws were collected in the Laws of Hammurabi,²³ the Laws of Ur-Nammu, and the Laws of Lipit-Ishtar.²⁴ The epoch contemplated by these principal bodies of law is approximately 4600 BC to 1600 BC. Although these legal codes were promulgated, published, and republished under the aegises of different rulers and literally millennia, scholars suggest that the 'similarities'²⁵ in the form of the 'academic tradition', the provisions themselves, 'suggest enduring commonalities in the customary law of Babylonia'.²⁶

²² Russ Versteeg, *Early Mesopotamian Law* (Carolina Academic Press, 2000) 3. Several of the references to the principal Mesopotamian codes derive from this work, as well as the translation by L W King: L W King, *The Code of Hammurabi* (Kessinger Publishing, 2004) <<http://eawc.evansville.edu/anthology/Hammurabi.htm>> and C H W Johns, 'The Code of Hammurabi' in *Babylonian and Assyrian Laws, Contracts and Letters* (Kessinger Publishing, 2004).

²³ Versteeg, above n 22. Hammurabi intended that his law reconcile wrongs and bring justice to those aggrieved, with the goal of furthering the economic stability and enhancement of his people.

²⁴ Ibid.

²⁵ Ibid 5, quoting Raymond Westbrook, 'Slave and Master in Ancient Near Eastern Law' (1995) 70 *Chicago-Kent Law Review* 1631, 1634.

²⁶ Versteeg, above n 22, 5, quoting Robert C Ellickson, Charles D A Thorland, 'Ancient Land Use Law: Mesopotamia, Egypt, Israel' (1995) 71 *Chicago-Kent Law Review* 321, 331 (citations omitted).

For present purposes, the legal themes and systems to be discussed will be those of such form and substance as the ancients devoted to systems of customary, normative, and eventually statutory law governing the rights of individuals to be free from wrongful injury, property damage, or coerced takings initiated by others.

Before the Laws of Hammurabi, there were published the Laws of King Ur-Nami (2112–2095 BC). In all of the Mesopotamian law collections, the provisions characteristically begin with an ‘if’ clause (the *prostasis*), and end with a ‘then’ clause (the *apodasis*). Thus, the *prostasis* identifies a circumstance or activity that the lawmakers concluded needed a legal rule, whereas the *apodasis* describes the legal consequences for the creation of such a circumstance or the engagement in such activity.²⁷ This approach bears significant markings of code-based law throughout the ages and is widely followed today.

Review by scholars has revealed numerous examples of remedies for civil wrongs in which Mesopotamian law responded to the *delict* by penalizing, by money judgment, the wrongful disposition (or eradication) of another’s right or vested expectancy. This approach was of particular economic significance in instances where the wronged individual was in a weaker social or economic position than the wrongdoer. Thus, the Laws of Ur-Nami provided that a father whose daughter was promised to a man, but who gave the daughter in marriage to another, must compensate the man (to whom the promise of marriage was made) twice the property value of the property he had brought into the household.²⁸

Similarly, the law emphasized the protection of person, property, and commerce from forced divestiture of a right or a prerogative. Regarding navigation, a collision between two boats on a body of water having a perceptible upstream and downstream would trigger a presumption of fault on the part of the upstream captain, on the logic — faulty or not — that the upstream captain had a greater opportunity to reduce avoidable accidents than his counterpart, as the former would be traveling at a slower speed.²⁹

A subtle interplay between norms of duty, nuisance and causation is evident in the following rule: neighbors were bound by a rule that served to deter letting one’s unoccupied land elevate a risk of trespass or burglary to the neighboring property. The Laws of Lipit-Ishtar provided that where notice had been given by one neighbor that a second neighbor’s unattended property provided access to the complainant’s property by potential robbers, if a robbery occurred, the inattentive neighbor would be liable for any harm to the complainant’s home or property.³⁰ Particularly harsh legal consequences might be visited on the landowner who failed to contain his irrigation canals, as flooding of the water might ‘result not only in leaving crops and cattle dry and parched in one point, but also widespread floods in another part of the

²⁷ Versteeg, above n 22, 11.

²⁸ Versteeg, above n 22, Ur-Nami 9.

²⁹ G R Driver and John C Mills, *The Babylonian Laws* (Clarendon Press, 1952) §§ 431–2, cited in Versteeg, above n 22, 130.

³⁰ King, above n 22, Lipit-Ishtar § 11.

district'.³¹ In the simple case involving only damage to grain, replacement of a like amount might give sufficient remedy. But an unmistakable deterrence of more severe consequences would be clear to those knowing that should the careless farmer be unable to replace the grain, the neighbors might be permitted to sell his property and to sell him into slavery to achieve justice.³²

B Early Religion — The Law of the Torah

It is accepted that much of modern society was suckled at the breast of faith, and that much of mankind's law and morality 'were born of religion'.³³ Often this faith partook of earlier myth, and transformed it to suit the extant needs of the time and the place. And, invariably, the adopted faith adopted strictures against conduct that was inconsistent with the bountiful sustenance of the whole.

The Law of the Torah, with its accompanying interpretation in the Talmud, cannot be described as either ancient or modern, as it is both.³⁴ It represents the longest continuum of international private law that exists. The domain of the Law of the Torah is, strictly speaking, the population of observing Jews. It is, though, of a piece with the same Mosaic law that is the foundation of Christianity,³⁵ and thus its influence has always reached and continues to reach populations and cultures greatly exceeding in number its Jewish adherents.

Israel, and its law, did not differentiate 'between the secular and religious realms'. Rather, all of Jewish life 'was to be lived under Yahweh's command, within his covenant'.³⁶ Included among the contributions of Hebraic law to Western legal development was the recognition that man-made law must give way to God-given, moral law, should the two be in conflict.³⁷ The Torah and its interpretations guide Jews in a very broad spectrum of individual and common pursuits. Naturally, this article is devoted only to such strictures as pertain to the identification of civil wrongs to

³¹ Driver and Mills, above n 29, 50, cited in Versteeg, above n 22, 136.

³² Versteeg, above n 22, Hammurabi § 54. See also Westbrook, above n 25, 1644.

³³ Durkheim, above n 7, 87.

³⁴ Fittingly, religious law — including but not limited to the Law of the Torah — continues to this day to be a part of the weave of both customary law and of national legislation. For example, H W Tambiah states: 'Religion is a source of law through custom or legislation. Difficult questions arise as to the relations between general law and special customary law'. H W Tambiah, *Principles of Ceylon Law* (H W Cave, 1972) 111.

³⁵ The gravitational interplay between Hebrew scripture and Greek philosophy is well-treated in other works. For example, Bertrand Russell, *A History of Western Philosophy* (Simon & Schuster, 1945) 326–7.

³⁶ Bernhard W Anderson, *Understanding the Old Testament* (Prentice-Hall, 2nd ed, 1966) 96. See also Lloyd, above n 11, 49–50, explaining that Hebrew law, revealed law of the Almighty God and embodied in the Law of Moses and later prophets, 'showed that merely man-made laws could not stand or possess any validity whatever in the face of divine laws which the rulers themselves were not competent to reveal or interpret'.

³⁷ Lloyd, above n 11, 50.

others; the remedies for such wrongs; and the sensitivity of such written or traditional law to norms, often distinct in form but typically similar in guidance, of corrective justice and economic efficiency.

The Torah includes the word of God as revealed in the Books of Genesis, Exodus, Leviticus, Numbers, and Deuteronomy.³⁸ These writings, the socio-legal bedrock of Judaism, contain copious treatments, sometimes systematized, of how society ought respond to civil wrongs, and the reasons therefore. Whereas much Western law, particularly modern Western law, is phrased in prohibitory terms, Halakhic law is more apt to treat its society of believers in terms of duty, or put otherwise, 'The observant Jew should ...'.³⁹ Many of these duties are remarkably fuller and more demanding than those recognized in other systematized bodies of law. For example, within the Torah, Leviticus states that a person who stands by while another is put at risk commits a 'crime of omission'.⁴⁰ In the United States and the majority of other legal systems, there is no *ab initio* duty to come to another's aid; rather, such a duty arises only in particular circumstances. The approach stated in Leviticus doubtless describes the higher and more moral road. But might its rationale also resonate in some other social premium important to Jewish society? Apart from obedience to God, another central and seemingly perpetual goal of Jews has been mere survival. It requires no particular boldness to recognize that violence to the persons or the property of members of the Jewish community has always been the subject of closely-held awareness in Jewish communities.⁴¹

A predicate to the advancement of the welfare, progress, and justice of a social group or a state is of course that the group survive as a human community. As the chosen people with limited property of their own, it is proven that the historical Jews were set on by army after army, and it is quite certain that what behavior, from simply cruel to savage, that was not visited on them collectively was surely inflicted on them in discrete, individual and unrecorded incidents. An interpretation that the Law of God required spontaneous protection of other Jews from danger might be seen as a simple and justifiable requirement of the survival of Judaism and its believers.

The Code of the Covenant, set out at Exodus 24:3–8, describes rights and restrictions regarding 'slaves, cattle, fields, vineyards and houses'.⁴² The civil code-like

³⁸ This corresponds to what Christians would later recognize as the first five and similarly named Books of their First Covenant.

³⁹ J David Bleich, *Contemporary Halakhic Problems* (KTAV Publishing House, 1977) 204, n 15, cited in Daniel Pollack (ed), *Contrasts in American and Jewish Law* (KTAV Publishing House, 2001) 226.

⁴⁰ Daniel Pollack et al, 'The Capacity of a Mentally Retarded Person to Consent: An American and a Jewish Legal Perspective' in Daniel Pollack (ed), *Contrasts in American and Jewish Law* (KTAV Publishing House, 2001) 226.

⁴¹ Compare Ernest J Weinrib, 'The Case for a Duty to Rescue' (1980) 90 *Yale Law Journal* 247.

⁴² Roland De Vaux, *Ancient Israel: its Life and Institutions* (John McHugh trans, McGraw-Hill, 1961) 143, cited in Smith and Weisstub, above n 13, 197.

provisions therein are replete with guidance to the community regarding permissible and impermissible community conduct as it affects land, material, and economic transactions. One borrowing another's cloak must return it by nightfall.⁴³ Should one's bull gore a man, the bull is to be stoned.⁴⁴ Even an unworthy thought process that might lead to wasteful bickering or more is enjoined in the admonition 'thou shalt not covet thy neighbor's house ... nor his ass'.⁴⁵

The Talmud and harmonious rabbinical writings are explicit in the condemnation of waste. The 'waste of the resources of this universe is prohibited because of *bal tashit*'.⁴⁶ Such prohibitions include the wasting of food or fuel, the burning of furniture, and the unnecessary killing of animals.⁴⁷

IV EARLY PHILOSOPHY OF IDEAL INDIVIDUAL AND COLLECTIVE PURSUITS

A Hellenic

For a philosophical epoch of greater significance than any other, the Hellenists defined virtue, morality, and ethics in terms that remain the foundation of Western philosophy. Putting aside only a few proponents of distracting philosophic anomalies, the Greek philosophers first identified an ideal of individual behaviors that accented study, modesty in thought and deed, and respect of law. Second, the Hellenist thinkers envisioned a society (at that point a city state) of harmony, accepted strata of skill and task, and, naturally again, respect of law.

However utopian may have been the imagination of such a city state as being led by a politically detached, supremely wise Philosopher-King, the more important instruction is that the Hellenist image of a society and its individual participants was one of social harmony, rewards in the measure of neither more nor less than one's just deserts, and subordination to law. Although undemocratic in many respects including slave-holding, for a pre-democratic, progressive and just ideal evaluated in recognition of its time, the Greece of this era measures up respectably.

Hints of the political circumstances in which Stoics found themselves can be found in the graphics handed down to us from antiquity that portray the various philosophers either speaking to small groups or, from all that appears, to no one at all. There are no representations of them speaking in political groups, or advising political representatives. The reason for this seeming isolation of the philosophers from the political process

⁴³ Exodus 22:25.

⁴⁴ Exodus 18:28.

⁴⁵ Exodus 20:17.

⁴⁶ Daniel Pollack et al, 'Liability for Environmental Damage: An American and a Jewish Legal Perspective' in Daniel Pollack (ed), *Contrasts in American and Jewish Law* (KTAV Publishing House, 2001) 110.

⁴⁷ Shabbat 67b; 129a; Chullin 7b; Sanhedrin 100b at id.

is that by the time of much of the enduring work of the most influential Greek philosophers, political power in the Greek mainland had passed over to the Macedonians. This political powerlessness necessarily affected the focus of many of the philosophers from the politically tinted ‘how can men create a good state?’ to such generally moral issues such as ‘individual virtue and salvation’ and the attendant question ‘how can men be virtuous in a wicked world, or happy in a world of suffering?’⁴⁸

The end sought by Socrates was happiness, which invites the question, a theme of this article, ‘how can a philosophy grounded in the pursuit of “happiness” influence its adherents, much less any larger population, in the ways of moral and efficient civil justice?’ The answer is that to Socrates and other mainstream Hellenic thinkers, happiness could only be achieved through pursuit of the virtuous life, and both the vision and the reality of the virtuous life are suffused with themes not only of morality and justice but also of waste avoidance, and deterrence of unjust enrichment. Socrates’ ethics are permeated by the principle not only of avoidance of doing harm,⁴⁹ but also that the identifying marker of all acts of ‘justice’ was simply ‘returning what was owed’.⁵⁰ For the individual, justice pertained not to the ‘outward man’ but, rather, to the ‘inward man’. The just man ‘sets in order his own inner life, and is his own master and his own law, and [is] at peace with himself’. For the just man, reason governs ‘spirit’ and ‘desire’.⁵¹

To Socrates, self-knowledge was the very essence of virtue. Without such self-knowledge, any man’s accumulation of wealth or power would leave one ‘baffled ... disappointed ... and unable to profit’ from any success. Rejecting the Sophists’ lax attitudes toward generalizable moral or ethical standards, Socrates thought that to be effective, self-knowledge must become so familiar to the adherent that it, and its attendant guidance in virtuous and ethical matters, would be worn like one’s very skin.⁵² To Socrates, wisdom, or self-knowledge, was to be found, at least in one’s early years, through the teaching of wise men. And according to Socrates’ account, there was a broad-based societal subscription to this goal. As all men ‘have a mutual interest in the justice and virtue of one another’, Plato records ‘this is the reason why every one is so ready to teach justice and the laws’.⁵³

To Socrates, temperance conveyed a meaning different from the modern implication of simple forbearance, be it avoidance of alcohol or any other inebriant. Instead, temperance meant the avoidance of ‘folly’ or acting ‘foolishly’. He nevertheless wonders whether virtue was the sum of the parts ‘justice’, ‘temperance’ and ‘holiness’ when he spoke in these words to Protagoras:

⁴⁸ Plato, ‘The Republic: Book IV’, in Scott Buchanan (ed), *The Portable Plato* (Penguin Books, 1977) 448–9.

⁴⁹ Ibid 164.

⁵⁰ Ibid 159–60.

⁵¹ Russell, above n 36, 230.

⁵² Newton P Stallknecht and Robert S Brumbaugh, *The Spirit of Western Philosophy* (Longmans Green and Co, 1950) 53, 54.

⁵³ Plato, ‘Protagoras’ in Scott Buchanan (ed), *The Portable Plato* (Penguin Books, 1977) 69.

[W]hether virtue is one whole, of which justice and temperance and holiness are parts; or whether all these are only names of one and the same thing: that is the doubt which still lingers in my mind.⁵⁴

Further to the question of why a man should choose the path of justice over injustice, Socrates termed the tension as one of ‘comparative advantage’. He posed the issue as this:

Which is the more profitable, to be just and to act justly and practice virtue whether seen or unseen by gods and men, or to be unjust and act unjustly, if only unpunished and unreformed?⁵⁵

Socrates imagined the ‘tyrannical’ man, one in whom ‘the reasoning ... power is asleep’, and asked ‘how does he live, in happiness or in misery?’ Here Socrates imagines a man of pure impulsivity, a man capable of any ‘folly or crime’. He follows the sad and desperate path of this man, and states that his ‘drunken, lustful, [and] passionate’ habits will require ‘feasts and carousals and revelings’ to satisfy him. Soon such revenues as he may have are spent. In order to continue to feed his uncontrolled desires, the tyrannical man seeks to ‘discover whom he can defraud of his money, in order that he may gratify [his desires]’.⁵⁶ If his parents do not voluntarily submit to his demands, he will try ‘to cheat and deceive them’, and if this fails, he will ‘use force and plunder them’.⁵⁷

The intemperate and unjust man is doomed to a spiral of ever-worsening degradation, Socrates warns. This tyrannical man, Socrates and Adeimantus conclude, is ‘ill governed in his own person’⁵⁸ and knows no true friends, as when they have ‘gained their point’ from another ‘they know them no more’; he never knows ‘true freedom’, as he is a simple instrument of his desires, and is ‘the most miserable’ of men.⁵⁹

Socrates’ encomium of temperance in all pursuits is of course quite analogous to the recognition in later tort theory of the central role of self-restraint. Socrates characterizes as ‘invalids’ those who ‘hav[e] no self-restraint, [and] will not leave of their habits of intemperance’. In essence, Socrates thought temperance could be achieved by ‘a man being his own master’, which is to say, ‘the ordering or controlling of certain pleasures or desires’, and the avoidance of ‘the meaner desires’.⁶⁰

⁵⁴ Ibid, 72, 75–6.

⁵⁵ Plato, above n 48, 451.

⁵⁶ Plato, ‘The Republic: Book IX’ in Scott Buchanan (ed), *The Portable Plato* (Penguin Books, 1977) 625, 628.

⁵⁷ Plato, ‘The Republic: Book X’ in Scott Buchanan (ed), *The Portable Plato* (Penguin Books, 1977) 680.

⁵⁸ Plato, above n 56, 637.

⁵⁹ Ibid 631, 632.

⁶⁰ Ibid.

Socrates compares evil to bodily illness. As a bodily illness can corrupt and destroy bodily health, so, too, can evil destroy a man's soul: 'Does the injustice or other evil which exists in the soul waste and consume her?',⁶¹ and do they not 'by attaching to the soul and inhering in her at last bring her to her death, and so separate her from the body?'⁶² He also subscribes fully to the existence of a heaven and a hell, as is illustrated by the story he tells Glaucon of Er, the son of Armenius, whose body, after he has fallen in battle, is seemingly uncorrupted by death. On the twelfth day, and prior to his burial, he awakens and tells a tale of men being summoned to justice in a mysterious place in which men's deeds are 'fastened on their backs'. The good and the just are led to a 'meadow, where they encamped as at a festival', whereas those found unjust or evil are thrown into a hell in which their punishments are tenfold the average of a man's years, or ten times one thousand in the mythical account.⁶³

Plato's Socrates 'argued for the identity of law and morality'.⁶⁴ Reverence for the law followed from recognition of an implied agreement, to Dennis Lloyd, 'an early form of social contract', for adhering to the law irrespective of the consequences.⁶⁵ Morality, by contrast, would never override the articulated law of the State. While morality might persuade the individual to conclude that the existing law was immoral or unjust, when the two were in conflict, the disputant's 'duty' is 'confined to trying to persuade the state of its moral error'.⁶⁶ In the Hellenic dialogues of Socrates, it is evident that justice entails literally 'called into account' the transgressor, or a pre-Aristotelian expression of corrective justice. As the Sophist Protagoras suggests in Plato's *Protagoras*, the City stands in the shoes of the schoolmaster in giving to 'young men' the laws to be followed. '[T]he laws', states Protagoras, 'which were the invention of good lawgivers living in the olden time; these were given to the young man in order to guide him in his conduct whether he is commanding or obeying'. '[H]e who transgresses them', Protagoras continues, 'is to be corrected, or in other words, called into account'.⁶⁷

Socrates himself speaks even more forcefully of the importance of correcting the defect of misbehavior, and of the deterrent value of punishment. In Book XI of Plato's *Republic*, Socrates tells Glaucon no man 'profits' from 'undetected and unpunished' wrongdoing, as such a man "only gets worse". To Socrates, it is better that the man be detected and punished in order that 'the brutal part of his nature [be] silenced and humanized', and that 'the gentler element in him is liberated'. The man's 'whole soul is perfected and ennobled by the acquirement of justice and temperance and wisdom'.⁶⁸ Socrates discouraged in the most direct terms individual

⁶¹ Plato, above n 57, 680.

⁶² Ibid.

⁶³ Plato, above n 57, 687, 688.

⁶⁴ Lloyd, above n 11 (emphasis added).

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Plato, above n 48, 432.

⁶⁸ Plato, above n 56, 655.

miserliness, hoarding, and a spirit of contention and ungoverned ambition. To him, these unworthy characteristics in men were ‘due to the prevalence of the passionate or spirited element’, uncontained by temperance and reason.⁶⁹

To Socrates, the ideal ‘State’ was largely an extrapolation of the ideal man. The State should, Socrates states, have ‘political virtues’ of ‘wisdom, temperance, [and] courage’ that could stand on an equivalence with Socrates’ ideal for the individual.⁷⁰ Identification and description of the fourth virtue, ‘justice’, was more rarified and elusive, and Socrates comments tellingly: ‘[t]he last of those qualities which make a state virtuous must be justice, if only we knew what that was’.⁷¹ A life of virtue and ethics could only be sustained in ‘a law abiding and orderly society’.⁷² Whatever such state-sanctioned justice might be, Socrates commended abidance with existing law, a commitment that ultimately led to his rejection of opportunities to flee his death sentence.

Hellenist thinking could not be reduced to the aphorism ‘virtue is its own reward’. Rather, there were specific rewards associated with a life of virtue, as well as real or imagined disincentives to the adoption of a baser life and the collateral degrading pursuits associated therewith. Time and time again the philosophers stated that a life of excess, be it eating, drinking, or both, incapacitated the actor from realization of the contributions available to and expected of citizens of virtue.⁷³

To both Plato and Socrates, the just man would be content, if not happy, and the unjust man miserable.⁷⁴ In addition, and more specifically, such excesses as invited physical illness and impairment represented a certain departure from God’s, or a god’s, charge to mankind.

For those who might be tempted to depart from a good life, Hellenic writing portrayed strong deterrents. At an individual level, the writings repeatedly allude to the dissipating results of a life of excess, to wit, personal physical deterioration, coupled with personal and communal moral degradation. At such time as man should shed his mortal coil, Socrates and other believers in reincarnation wrote of another reason why a man should choose the path of good. Incapable of disproof and widely

⁶⁹ Plato, ‘The Republic: Book VIII’ in Scott Buchanan (ed), *The Portable Plato* (Penguin Books, 1977) 592.

⁷⁰ Plato, above n 48, 422, 425, 430–1, 434.

⁷¹ Ibid 434.

⁷² Ibid 59.

⁷³ Plato, *Protagoras* (C C W Taylor trans, Oxford University Press, rev ed 1975) 46: To Protagoras, Socrates spoke of the physical dangers of excess: ‘Don’t you maintain that ... in some circumstances ... when you are conquered by the pleasures of food and drink and sex, you do things though you know them to be wrong?’ ‘Yes’. ... ‘Do you suppose, Protagoras, that they would give any other answer than that they are bad not because they produce immediate pleasure, but because of what comes later, diseases and the like?’ ... And surely in causing diseases they cause pains, and in causing poverty they cause pains.

⁷⁴ Gottlieb, above n 9, 174.

believed, Socrates and others believed that they had lived before in other forms, and that after their demise they would be reincarnated in some animal form.⁷⁵ If a person had led a virtuous life, he would be reincarnated in the form of an animal respected by man, such as a horse. For the man who strayed, his just deserts might well be reincarnation as an insect, perhaps even a dung beetle.

In Plato's version of Socrates, that 'justice' is not just moral but also efficient is quite clear. Even more specifically, the lasting philosophy of this age stated that individual good and justice were, in fact, more than efficient — they were profitable. Socrates states just this: '[o]n what ground, then, can we say that it is profitable for a man to be unjust or self-indulgent or to do any disgraceful act which will make him a worse man, though he can gain money and power?' Happiness and profit inure to the man who, alternatively, 'tame[s] the brute' within, and is 'not be carried away by the vulgar notion of happiness being heaping up an unbounded store', but instead follows the rule of wisdom and law encouraging 'support to every member of the community, and also of the government of children'.⁷⁶

A principal means to the end of justice, to Plato, was education to such a level of legal sophistication that the individual would learn understanding of and respect for the legal process, including such legal process as might pertain to the redress of injury. This is revealed in Socrates' dialogue with Adeimantus in Book IV of *The Republic*. Here Socrates states plainly that it is through education that the individual learns

about the business of the agora, and the ordinary dealings between man and man, or again about dealings with artisans; about insult and injury, or the commencement of actions, and the appointment of juries[.]⁷⁷

Returning what was owed, in effect giving up the actual or conceptual unjust enrichment associated with a wrongful taking, is of course a core model in modern tort for remediation of unconsented-to harm, a concept that is the darling of corrective justice and efficiency advocates alike. It is also part and parcel to the analysis of Aristotle, in *Nicomachean Ethics* Book V, Ch 2, in which 'The Thinker' is credited with laying the corner-stone of the corrective justice principles of today's common law,⁷⁸ although as suggested, the logic has equivalent bearing upon economic

⁷⁵ See discussion of the choices for their future reincarnation by a panoply of demigods by Socrates in his recitation of the story of Er: Plato, above n 57, 694–9.

⁷⁶ Plato, *The Republic of Plato* (Francis McDonald Cornford trans, Oxford University Press, 1969) 318–20.

⁷⁷ Plato, above n 48, 421–2.

⁷⁸ [T]he law ... treats the parties as equal, and asks only if one is the author and the other the victim of injustice or if the one inflicted and the other has sustained an injury. Injustice in this sense is unfair or unequal, and the endeavor of the judge is to equalize it.

Aristotle, *Nicomachean Ethics* (J Welldon trans, Prometheus Books, 1987) 154, discussed in David G Owen, 'The Moral Foundations of Punitive Damages' (1989) 40 *Alabama Law Review* 705, 707–8, n 6.

considerations. Aristotle's understanding was that corrective justice would enable restoration to the victim of the status quo ante, insofar as a monetary award or an injunction can do so.⁷⁹ Under the Aristotelian principle of *diorthotikos*, or 'making straight', 'at the remedy phase the court will attempt to equalize things by means of the penalty, taking away from the gain of the wrong-doer'. Whether the wrong-doer's gain is monetary, or measured in property, or the community's valuation of a personal physical injury consequent to the defendant's wrongful act, by imposing a remedy approximating the actor's wrongful appropriation and 'loss' to the sufferer, 'the judge restores equality'.⁸⁰

Aristotle classified among the diverse 'involuntary' transactions that would invite rectification of 'clandestine' wrongs 'theft, adultery, poisoning ... false witness' and 'violent' wrongs, including 'assault, imprisonment ... robbery with violence ... abuse, [and] insult'.⁸¹ He proceeds to distinguish between excusable harm and harm for which rectification may appropriately be sought. For an involuntary harm, such as when 'A takes B's hand and therewith strikes C', or for acts pursuant to 'ignorance', a more nuanced legal response is indicated. Even for such involuntary acts as 'violat[e] proportion or equality', Aristotle suggests opaquely, some should be excused, whereas others should not be excused. As to voluntary and harmful acts attributable to ignorance, Aristotle distinguishes between acts in which the ignorance is excusable and acts in which the ignorance is not.⁸² The former, which we might today characterize as innocent, would not prompt remediation, whereas the latter would. Thus, Aristotle describes an act from which injury results 'contrary to reasonable expectation' as a 'misadventure', and forgivable at law.⁸³ To Aristotle, an unintentional act⁸⁴ that causes harm, but in which such harm 'is not contrary to reasonable expectation' constitutes not a misadventure but a 'mistake'. To Aristotle, 'mistake' is a fault-based designation. The example used is redolent of the sensibility of what would be termed 'negligence' in today's nomenclature, eg a man throwing an object 'not with intent to wound but only to prick'. This man, although not acting with an intent to wound another in any significant way, would nonetheless be subject to an obligation in indemnity, for to Aristotle, when 'a man makes a mistake ... the fault originates in him'.⁸⁵

⁷⁹ Aristotle, above n 78, 407: 'Therefore the just is intermediate between a sort of gain and a sort of loss, viz, those which are involuntary; it consists in having an equal amount before and after the transaction'.

⁸⁰ Aristotle, *The Complete Works of Aristotle* (Princeton University Press, the revised Oxford translation, 1984) 786.

⁸¹ Aristotle, *Nicomachean Ethics* (book 5, chapter 2), cited in Richard McKeon (ed), *Introduction to Aristotle* (University of Chicago Press, 1947) 402.

⁸² Ibid 414.

⁸³ Ibid 415.

⁸⁴ An act that 'does not imply vice': *ibid*.

⁸⁵ *Ibid*.

Aristotle's famous 'Golden Mean' hypothesizes that virtue analyzed linearly is the mean between two extremes. Either extreme is a vice. So, for example, if appropriate self-sustenance is a virtue, then it follows that, at one extreme, self-denial to the point of ill health is a vice. At the other extremity, gluttony is a vice. Importantly, Aristotle does not propose distributive justice, in the sense that a man may remedy his antecedent unequal position vis-à-vis another.⁸⁶

B Roman Law

It is recognized generally that the Romans added little to the metaphysics of law. Nevertheless, Roman law represents the watershed between the law of ancient society and that of modern society. As suggested by Sir Henry Sumner Maine, the rights and the duties under law of ancient society derived from status, or 'a man's position in the family', whereas under Roman law and thereafter, rights and duties 'derived from bilateral arrangements'.⁸⁷

Regarding *delicts*, or harms that were neither crimes nor grounded in contract, it became the special province of Roman lawyers and lawmakers to record and categorize a sprawling array of specific wrongs and consequent remedies. This approach of Roman law would become the origin of code-based law that governs European and Latin American lawmaking to this day.

Cicero, the Roman orator, wrote of an ethic that sounded simultaneously in terms of corrective justice and efficiency-deterrence. In *On Moral Duties* he wrote that even after 'retribution and punishment' have been dealt to the transgressor, the person who has been dealt the wrong owes a duty to bring a close to any such misadventure by permitting a gesture such as repentance or apology. From the extension to the wrongdoer of the opportunity to apologize or to repent could be reaped the immediate good of reducing the likelihood that he would 'repea[t] the offense', as well as the broader and eventual good of 'deter[ing] others from injustice'.⁸⁸

Cicero further propounded a cluster of maxims that, if followed, could conduce to Pareto Superior changes, in the sense that the actor would be no worse off and the affected party would be better off. As to persons beyond a benefactor's core family or kinship group, to Cicero there existed a duty to the entire world as to such things 'we receive with profit and give without loss'. Thus, in order that we may receive such blessings as are identified in the maxims such as 'keep no one from a running

⁸⁶ To Aristotle:

Justice (contrary to our own view) implies that members of the community possess unequal standing. That which ensures justice, whether it is with regard to the distribution of the prizes of life or the adjudication of conflicts, or the regulation of mutual services is good since it is required ... for the continuance of the group. Normativity, then, is inseparable from actuality.

Polanyi, above n 14, 83.

⁸⁷ Polanyi, above n 14, 82–3.

⁸⁸ Cicero, 'On Moral Duties' in Moses Hadas (ed), *The Basic Works of Cicero* (Modern Library, 1951) 16.

stream' or 'let anyone who pleases take a light from your fire' or 'give honest advice to a man in doubt', Cicero writes, it follows that we must be willing to give likewise of the same in order to 'contribute to the common weal'.⁸⁹

Under Roman law, two of the *delicts* of greatest importance were damage to property, real and personal, and personal physical harm to others, giving rise to the *action injuriarum*. The victim could bring an action for 'profitable amends', or money damages, or 'honorable amends', which is to say, a formal and public apology. The latter remedy would most likely arise in a setting of a dignitary tort, such as defamation. Roman jurists and the Roman legal community were committed to the identification of the delineation between what is 'just and what unjust', and therefore the Institutes of Justinian and other sources of Roman law reflected an endeavor to 'give each man his due right', and comprise 'precepts' to all Romans 'to live justly, not to injure another and to render to each his own'.⁹⁰

The Institutes included numerous strictures against imposing one's will over the rights of a neighbor, and strong deterrents for the disregard thereof. As to urban estates, in Book III, Title II Para 2 there was a prohibition on the obstruction of a neighbor's view,⁹¹ a rule bearing a resemblance to a former English and American rule that limited a neighbor's liberty to interfere with 'ancient lights'.⁹² In another notable example, pertaining to what would today be called the law of private nuisance or trespass, Roman law detailed a preference that adjoining landowners bargain in advance for agreement as to contemporaneous uses of land that might trigger a dispute. In Book III Para 4, the Institutes provide that one 'wishing to create' such a right of usage 'should do so by pacts and stipulations'. Further, a testator of land might impose such agreements on his heirs, including limitations on building height, obstruction of light, or introduction of a beam into a common wall, or the construction of a catch for a cistern, an easement of passage, or a right of way to water.⁹³

These last two examples reflect an encouragement of *ex ante* bargaining over economically wasteful *ex post* dispute resolution. Additionally, permitting the testator to bind his heirs to any such agreement was economically efficient in a manner akin to the approach taken later and famously by Justice Bergen in the cement plant nuisance case of *Boomer v Atlantic Cement Co.*⁹⁴ In *Boomer*, discussed below, the court's award of damages ensured that there would be a one-time resolution of the dispute by requiring that the disposition of the claim be entered and recorded as a permanent servitude on the land.

⁸⁹ Ibid 23.

⁹⁰ J A C Thomas (ed), *The Institutes of Justinian: Text, Translation and Commentary* (North-Holland Publishing, 1975) Book I, Preamble, [1], [3], 84, 85.

⁹¹ Ibid, The Digest (or Pandects) Book III Title II [2], [3].

⁹² See, eg, *Robeson v Pittinger*, 2 NJ Eq 57 (NJ Eq 1838). The doctrine is no longer followed generally in American law.

⁹³ Ibid, Book III [4], 84, 85.

⁹⁴ 26 NY 2d 219 (NY, 1970) ('*Boomer*').

VI MODERN ASSIGNMENT OF ECONOMIC NORMS

A Customary Law

The organized law of the modern state is a fairly recent phenomenon when compared to the existence of effective and nuanced customary law around which pre-modern societies organized. For ancient and modern societies alike, and be the law written or unwritten, law represents a cohering of the ‘underlying social norms which determine much of its functioning’. This customary law has been described as ‘living law’.⁹⁵

In the history of tort law, customary law has from time before time given effect to group norms and other socio-legal principles.⁹⁶ At such later time as a culture or a nation-state has begun to render its law in the form of written adjudicatory rulings, or legal codes, customary law characteristically diminishes in its significance as an engine for resolution of disputes. With notable French influence, the theories of Roman law became ascendant,⁹⁷ and the recitation of and reliance upon customary norms receded proportionately. Yet in many societies, even today, customary law continues to inform legal development. In some settings, customary law sets parameters for later legal development, or even precludes later law that would contradict earlier custom.

The influence of Roman law on the development of European, Latin American, and Anglo-American law is commonly acknowledged. The lasting effects of customary law, including Roman law, and one of its hybrids, Roman-Dutch law, are well-illustrated in the experience of Ceylon (modern Sri Lanka), the customary law of which reveals a systemic commitment to wealth maximization, avoidance of waste, and deterrence of behaviors inconsistent therewith.

For Celanese customary law, and for that matter any customary law, to be considered valid for the purposes of modern adjudication, it must be (1) reasonable; (2) consistent with the law contemporary to that society; (3) universal in application; and (4) grounded in antiquity.⁹⁸ Although the first and second standards might at first glance seem to subordinate customary law into insignificance, an additional look makes this approach appear more sensible. This approach can be justified on two grounds. First, as with common-law adjudication, as no court is required to apply common law that is unreasonable, it would be illogical to require application of customary law that was not reasonable. Secondly, as both common law and customary law claim lineage in a society’s reasoned conclusions as to legal standards best suited to societal wellbeing, customary law that was at war with common law on the same or a similar subject would be presumptively defective in either its rationality or in its claimed representational authenticity.

⁹⁵ Lloyd, above n 11, 227 (citation omitted).

⁹⁶ Ibid, discussing the sources and growth of custom.

⁹⁷ John Richard Green, *A Short History of the English People* (Macmillan, 1874) 204.

⁹⁸ Tambiah, above n 34, 87–9. See generally, Tambyah Nadaraja, *The Legal System of Ceylon in its Historical Setting* (Brill Archive, 1972).

In some legal systems, legal scholars remain oracles of greater or lesser significance. This was true of the Roman-Dutch tradition, in which schools of legal scholarship, or the scholars themselves were influential. There existed two schools of writers: (1) Grotius, van Leeuwen and Voet, who emphasized the Roman law antecedents of the developing hybrid law; and (2) an ‘historical school’ that emphasized custom as the appropriate principal source of the law.⁹⁹ Although the Napoleonic Code superseded the Roman-Dutch law in Holland itself in the early nineteenth century, the great Dutch East and West Indian Trading Companies carried Roman-Dutch law into their settlements. So strong was the influence of custom in the Roman-Dutch tradition that, in principle at least, a statute could be rendered nugatory or obsolete by sufficient proof of a conflicting custom.¹⁰⁰

Under the so-called *Lex Aquilia* of Roman-Dutch law, the Aquilian action required the claimant’s showing of a wrongful act, patrimonial loss, and the defendant’s fault, because of either the intentional nature of the act or negligence. Borrowing from British law applicable to unintentional injuries, the law courts of Ceylon adopted the British concept that the plaintiff’s claim in negligence must include proof that the defendant owed a duty to the plaintiff.¹⁰¹

In Aquilian actions, no compensation would be awarded in the absence of physical injury, with physical injury classically defined as excluding emotional distress or dignitary harm. Regarding injuries caused by the positive act of the defendant, should a person be in possession of a thing, including a chattel or an instrumentality, that had the potential for causing harm if not stewarded with care, the actor, owner, or manager would have a positive duty to exercise such care. Should another be injured because of the failure to take such care, liability could be imposed. Even a mere omission to act might be a stimulus to liability if the actor’s omission was ‘connected with some prior positive act’. Accordingly, a remedy might be available under the *Lex Aquilia* if the defendant had earlier ‘created a potentially dangerous state of things’, and the failure to correct that caused the claimant’s harm.

Various dimensions in the Roman-Dutch tradition recognized the society’s commitment to the integrity of persons and property from forced takings. Assault was an *injuria*, and therefore redressable, on a showing of *contumelia*. For grazing animals that damaged another’s property, if the animal’s transgression involved the ‘animal acting contrary to nature of its class’, the owner might be required to pay damages, or even be confronted with the potentially stronger deterrent of giving up

⁹⁹ Tambiah, above n 34, 87–9; Green, above n 96, 148. The opinions most often referenced can be found in Johannes Voet, *Commentarius Ad Pandectas* (William Stoney trans, Oxford University Press, 1896) [trans of: *Commentarius Ad Pandectas* (first published 1704)]; Hugo Grotius, *Inleiding tot de Hallanesche Rechtsgeleertheyd* (R W Lee trans, Clarendon Press, 1953) and Simon Van Leeuwen, *Simon Van Leeuwen’s Commentaries on Roman-Dutch Law* (J G Kotze trans, Sweet and Maxwell, 1921).

¹⁰⁰ Tambiah, above n 34.

¹⁰¹ Ibid 99.

the animal. Surely, too, a strong message of deterrence is found in the rule that a person finding another's animals on that person's property could impound them.¹⁰²

For 'intentional' wrongs, the intentional torts of today, the requisite intent, or *dolus*, was provided by the defendant's desire to accomplish the act, irrespective of whether he was aware that the act constituted an invasion of the plaintiff's rights. '*Culpa*' was interpreted as a 'violation of a duty that [is] imposed by law',¹⁰³ an approach revealing the influence of the English common law requirement that the tort plaintiff prove duty. The respondent could avoid liability by showing that the injury could not have been avoided even by the exercise of reasonable care. Furthermore, in order to avoid unjust enrichment, persons could not recover for claims arising from acts or activities to which they consented voluntarily.

For intentional torts such as false imprisonment, the third requirement of the *Lex Aquila*, that of foreseeability, would be satisfied by showing that the defendant intended the act. Then, as it is today, a reflection of the rigorous economic guardianship of customary law, Dutch-Roman law gave primacy to protection of property and economic rights, and imposed an almost automatic requirement of disgorgement of any unjust enrichment associated with the wrongful interference therewith. Trespass, or the willful and forcible entry into another's property, constituted *injuria*. As has been true for any successful socio-economic unit, the Roman-Dutch tradition recognized the rights of a person to protect his property from any form of unjust interference.¹⁰⁴

At the same time, it was recognized that a landlord owed a duty to his tenants to take reasonable steps to protect them from injury caused by unsafe conditions on the land.¹⁰⁵ In what could be loosely styled as a proscription of public nuisance, the Roman-Dutch customary law removed earlier Praetorian edicts prohibiting certain animals from sharing public places, and replaced the strict prohibitions with rules requiring the payment of damages.¹⁰⁶ Private nuisance, in turn, was seemingly remediable in an action for damages or for equitable relief.¹⁰⁷

Roman-Dutch customary law includes at least one example of the law and its official apparatus not being required to stand idly by to await the social costs of an

¹⁰² Ibid, 392–5, 399, 418, 420. For damage caused by trespassing dogs, the claimant would be required to show scienter. Within this approach there could be seen a strong overlay of moral blameworthiness:

It is doubtful whether Roman and Roman-Dutch writers regarded negligence objectively or subjectively, but partly under the influence of canon law, and its offspring natural law, the modern systems based on Roman law took culpa to imply moral blameworthiness:

Ibid, 397.

¹⁰³ Ibid 397.

¹⁰⁴ Ibid 142, 397, 399, 418.

¹⁰⁵ Ibid 399.

¹⁰⁶ Ibid 422.

¹⁰⁷ Ibid 396.

accident that will occur or that will continue to occur in circumstances in which the parties had not reached a prior agreement as to risks and rewards. Should a neighbor come to fear that a dangerous condition existed in his neighbor's house that, left unabated, might cause damage to the property of the complainant, the complainant could bring an action in what might today be called anticipatory nuisance demanding the neighbor's payment of security against such prospective and potential harm.¹⁰⁸

B Modern United States Accident Law

The analysis of tort law has long emphasized its original and lasting tenets in the logic of corrective justice and morality. Nevertheless, economists, political scientists and legal scholars repair with increasing frequency and interest to the examination of economic truths within the function of injury law, including evaluation of evolving decisional law against the measure of whether such decisions adhere, explicitly or silently, to goals of economic efficiency.

It is established that tort law is devoted to the protection of persons and property from unreasonable risk of harm; and the actor's liability in tort is limited by concepts of reasonable foreseeability. Putting aside the cabined domain of truly strict liability, modern accident law is concerned primarily with the provision of reparations to persons suffering personal injury or property loss because of fault, with fault conventionally defined as a failure of others to act with due care under the circumstances.

Much of United States negligence law in accident cases has ordained a finding of liability in negligence upon the plaintiff establishing duty, breach, legal (or proximate) cause, and damages. While each of the four aspects of the plaintiff's prima facie case are influenced by economic considerations, it is breach that is most suited to the polycentric efficiency considerations of the individual and social benefits, together with the individual and societal burdens, of the actor's conduct (or its cessation).¹⁰⁹

Courts in numerous jurisdictions employ the formulation of Judge Learned Hand, or a harmonious risk-utility model. This primitive but enormously influential calculus

¹⁰⁸ Ibid 422.

¹⁰⁹ From the start, the concept of negligence has been based on the notion of 'reasonableness', predicated on the idea that proper decisions involve selecting the proper balance of expected advantages and disadvantages, of expected benefits and costs. David G Owen, 'Defectiveness Restated: Exploding the "Strict" Products Liability Myth' (1996) *University of Illinois Law Review* 743, 7545. See American Law Institute, *Restatement (Third) of Torts: Products Liability* (1998) reporters' notes to cmt (a). See, eg, *Rodriguez v Spencer*, 902 SW 2d 37, 46 (Tex Ct App, 1995), a negligence suit brought against the parent of a minor who engaged in a fatal beating of a homosexual. The Court factored in the social utility of the parent's conduct in the context of there being no evidence that 'created a genuine issue of fact material to Spencer's duty to prevent her son from engaging in behavior so unforeseeable as the atrocity against Paul Broussard'.

was offered in a negligence context by Hand J in the opinions in *United States v Carroll Towing Co.*¹¹⁰ and *Conway v O'Brien*.¹¹¹ In those two cases, the court stated that 'the degree of care appropriate to a situation is the result of the calculus using three factors: the likelihood that the conduct will injure others, multiplied by the seriousness of the risk if it happens, balanced against the burden of taking precautions against the risk'. The formula is known to many as B (burden) < P (probability of harm) L (magnitude of loss, should it occur). The Learned Hand approach can be conformed to a utilitarian analysis by visualizing B as encompassing not only the particular burden of precautionary measures upon the actor, but also the burden upon society if the conduct must either be eliminated due to liability rules, or made more expensive by requiring precautionary measure and therefore beyond the economic reach of many.

Applying Hand J's negligence heuristic device, a precaution is efficient when its cost is lower than its expected benefit. A party behaves unreasonably if she would have been able to avoid the harm by investing in an efficient precaution and did not, while no more efficient precautions were available to other parties.¹¹² Of Hand J's formula, Posner states plainly: '[t]his is an economic test',¹¹³ a conclusion widely endorsed.¹¹⁴

Judge Posner claims further that most tort law rules further economic efficiency. He does not claim that judges write opinions 'in the language of welfare economics or social cost, or even that judges consciously employ rules to maximize the size of the

¹¹⁰ 159 F 2d 169, 173 (2nd Cir, 1949).

¹¹¹ 111 F 2d 611, 612 (2nd Cir, 1940).

¹¹² Ehud Guttel, 'The (Hidden) Risk of Opportunistic Precautions' (2007) 93 *Virginia Law Review* 1389, 1390.

¹¹³ Richard A Posner, *Economic Analysis of Law* (Little, Brown and Co, 2nd ed, 1977) 122 (citations omitted). He continues:

The burden of precautions is the cost of avoiding the accident. The loss multiplied by the probability of the accident is the expected accident cost, ie, the cost that the precautions would have averted. If a larger cost could have been avoided by incurring a smaller cost, efficiency requires that the smaller cost be incurred.

¹¹⁴ See, eg, Michael D Green, 'Negligence = Economic Efficiency: Doubts >' (1997) 75 *Texas Law Review* 1605, 1612: 'the economic cost of that untaken precaution and the expected accident toll if the precaution is not taken ... must be compared with each other in a risk-benefit test'. See also Bruce Chapman, 'Corporate Tort Liability and the Problem of Overcompliance' (1996) 69 *South Carolina Law Review* 1679, 1690:

in a negligence action the plaintiff is required to show, first, that some untaken precaution would have prevented the injury had it been taken and, second, that it was reasonable to require that such a precaution be taken (for example, that the taking of the precaution would pass ... a Learned Hand test).

See further, Mark F Grady, 'Discontinuities and Information Burdens: A Review of The Economic Structure of Tort Law by William M Landes and Richard A Posner' (1988) 56 *George Washington Law Review* 658, 661, showing that performing risk-utility analysis in tort cases is conventionally understood to require exploring the efficiency of untaken precautions.

society's pie'. Rather, he contends that 'people can apply the principles of economics intuitively — and thus "do" economics without knowing they are doing it'.¹¹⁵

Of particular economic significance is the Hand formulation's explicit reference to the 'social utility' of the injury-producing conduct. Thus conduct of a high social utility is incrementally more likely to satisfy the standard of 'breach' than an activity of lesser significance. Inclusion of 'social utility' among the economic considerations identified here is pregnant with the converse question: what would be the societal burden if the activity were barred or made more expensive by virtue of liability awards? Ambitiously, the Louisiana Supreme Court in *Pepper v Triplet*¹¹⁶ compared the a court's task in a negligence action to that of a lawmaker, charged with task of

taking into account all of the social, moral, economic and other considerations as would a legislator regulating the matter, [an] analysis [that] is virtually identical to the risk-utility balancing test used in both *negligence* and products liability theories.¹¹⁷

Thus, separate mention is properly made of products liability actions in which many courts have concluded that any 'social utility' evaluation must take into account the possibility that the costs of reducing a risk may result in the social costs of pricing a product out of the market altogether. In *Thibault v Sears, Roebuck & Co.*,¹¹⁸ a suit arising from the plaintiff's injury when his foot slipped under a lawn mower carriage during operation, when evaluating social utility and the cost of preventative measures, the New Hampshire Supreme Court made clear that cost was not merely a question of the unit cost of adding a more protective feature, but also the cost to the public at large should the remediation require a higher cost, and the cost to the public should such an elevated cost put the product out of reach of a proportion of the consuming public, rendering the design change economically infeasible.¹¹⁹

In accident cases applying ordinary negligence principles, courts routinely apply a risk-utility standard of interrelated factors tracing to a greater or lesser extent that

¹¹⁵ See generally William M Landes and Richard A Posner, *The Economic Structure of Tort Law* (Harvard University Press, 1987) 23. Today law and economics 'is like the air you breathe. It's just pervasive', according to David Weisbach, a University of Chicago Law professor: Peter Coy, 'Will Success Spoil the Chicago School?', *Bloomberg Business Week*, 7 June 2012 <<http://www.businessweek.com/articles/2012-06-07/will-success-spoil-the-chicago-school>>.

¹¹⁶ 864 So 2d 181, 1923 (La, 2004), citing *Boyer v Seal*, 553 So 2d 827, 834–6 (La, 1989).

¹¹⁷ *Pepper v Triplet* 864 So 2d 181, 192–3 (La, 2004).

¹¹⁸ 395 A 2d 843 (NH, 1978).

¹¹⁹ In determining unreasonable danger, courts should consider factors such as *social utility* and desirability: John W Wade, 'On the Nature of Strict Tort Liability for Products' (1973) 44 *Mississippi Law Journal* 825, 837. At 845:

[t]he utility of the product must be evaluated from the point of view of the public as a whole, because a finding of liability for defective design could result in the removal of an entire product line from the market.

employed in *Gonzalez v O'Brien*,¹²⁰ a negligence action arising from a farm tractor incident. While finding against the plaintiff, the court described a risk-utility test that included consideration of 'the social utility of the O'Brien brothers' conduct [as] high (running a ranch)'.

Commentators by now commonly identify a common law tropism towards efficiency.¹²¹ Importantly, scholars have also concluded that efficient rules of law actually predict not only efficient litigation, but also settlement, strategies,¹²² the common law of rescue, salvage, Good Samaritan assistance,¹²³ and the economic loss rule.¹²⁴

A leading exponent of the efficiency role of the common law of tort has been Guido Calabresi. Calabresi has argued persuasively that in matters of compensation for accidents, civil liability should ordinarily be laid at the door of the 'cheapest cost avoider', the actor who could most easily discover and inexpensively remediate the hazard. Together with A Douglas Melamed, Calabresi has counseled that considerations of economic efficiency dictate placing the cost of accidents 'on the party or activity which can most cheaply avoid them'.¹²⁵ Ordinary economic rationales also have described the role of compensatory damages as an effective means of

¹²⁰ 305 SW 3d 186 (Tex Ct App, 2009). In *Ambrose v McLaney*, 959 So 2d 529, 538 n 11 (La Ct App, 2007), a premises liability suit brought by a tenant who sustained injuries in a fall down an exterior stairway, the court applied risk-utility considerations that included '(1) the utility of the complained-of condition; ... and (4) the nature of the plaintiff's activities in terms of its social utility or whether it is dangerous by nature' (citations omitted).

¹²¹ See, eg, George L Priest, 'The Common Law Process and the Selection of Efficient Rules' (1977) 6 *Journal of Legal Studies* 65; Ramona L Paetzold and Steven L Willborn, 'The Efficiency of the Common Law Reconsidered' (1991) 14 *George Mason University Law Review* 157.

¹²² Wes Parsons collected scholarship revealing in fact the broad range of cost internalization achievements of evolving common-law doctrine, including commendation of the common law of accidents as 'promot[ing] efficient resource allocation'. Wes Parsons, 'The Inefficient Common Law' (1983) 92 *Yale Law Journal* 862.

¹²³ William A Landes and Richard A Posner, 'Salvors, Finders, Good Samaritans and Other Rescuers: An Economic Study of Law and Altruism' (1978) 7 *Journal of Legal Studies* 83, 128.

¹²⁴ William Bishop, 'Economic Loss in Tort' (1982) 2 *Oxford Journal of Legal Studies* 1, 2–3.

¹²⁵ Guido Calabresi and A Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 *Harvard Law Review* 1089, 1096–7. See also Mark C Rahdert, *Covering Accident Costs: Insurance, Liability and Tort Reform* (Temple University Press, 1995) 29, 32–3. Marco Jimenez considers:

Under this approach ... a court need 'merely calculate the costs and the benefits of an activity to decide whether an injurer [is] negligent', and need not be concerned with determining what a virtuous or reasonable person in the defendant's position would have foreseen, or whether a tortfeasor's actions were intrinsically right or wrong. Rather ... a court need only determine which party is the 'cheapest cost avoider' (ie, 'the actor who

discouraging a potential tortfeasor from bypassing the market, and by their substandard or risk-creating conduct, injuring an unconsenting third party. Such conduct is wasteful in terms of identifiable accident costs as it is better, theoretically at least, to pressure the actor into bargaining with any willing and knowing other for the right to expose him or her to risk.¹²⁶

The Ninth Circuit in *Union Oil v Oppen*¹²⁷ adopted Calabresi and Melamed's 'least cost avoider' approach. *Oppen* was a California coastal oil spill case in which the court allowed commercial fishermen to recover from the defendant their business losses caused by lost fishing opportunity during a period of pollution. Applying the 'best or cheapest cost avoider' approach, the Appeals Court followed Calabresi and Melamed's predicate that it 'exclude as potential cost avoiders those group activities which could avoid accident costs only at extremely high expense'.¹²⁸ This approach militated against imposing the cost of prevention or repositioning the loss upon the consumers (fishermen or seafood purchasers) in the form of precautionary measures (whatever they might hypothetically be), or by first party insurance. Placing responsibility for the loss on the defendant oil company, the court explained:

the loss should be borne by the party who can best correct any error in allocation, if such there be, by acquiring the activity to which the party has been made liable. The capacity to 'buy out' the plaintiffs if the burden is too great is, in essence, the real focus of Calabresi's approach. On this basis, there is no contest — the defendant's capacity is superior.¹²⁹

Illustrative too is the Third Circuit's decision in *Whitehead v St Joe Lead*,¹³⁰ a lead poisoning case in which the defendants included the suppliers of lead to plaintiff's industrial employer. Reversing summary judgment, the court concluded that

it may well be that suppliers, acting individually or through their trade associations, are the most efficient cost avoiders. Certainly it could be found to be inefficient for many thousands of lead processors to individually duplicate the

¹²⁵ *cont'd*

could most easily discover and inexpensively remediate the hazard'), and then place the cost of accident prevention on this person to encourage them to take only those precautions that are economically feasible:

Marco Jimenez, 'Finding the Good in Holmes's Bad Man' (2011) 79 *Fordham Law Review* 2069, 2094–5 (citations omitted).

¹²⁶ Today, one cannot help but think of the newest 'trash' television shows and derivatives thereof. Cf Guido Calabresi, 'The Decision for Accidents: An Approach to Nonfault Allocation of Costs' (1965) 78 *Harvard Law Review* 713, 716.

¹²⁷ 501 F 2d 558 (9th Cir, 1974).

¹²⁸ *Ibid* 569.

¹²⁹ *Ibid* 569–70.

¹³⁰ 729 F 2d 238 (3rd Cir, 1984).

industrial hygiene research, design, and printing costs of a smaller number of lead suppliers.¹³¹

Whichever gloss is placed on economic analysis — its deterrent effect, or its ability to reduce accident costs — its concepts can be understood ‘even at the rudimentary level of jurists’, according to Judge Patrick Higgenbotham. In *Louisiana ex rel Guste v M/V Testbank*,¹³² the renowned vessel collision case involving claims for economic loss not accompanied by physical damage to a proprietary interest, the Fifth Circuit Court of Appeals justified its refusal to permit such recovery and continued its adherence to the economic loss doctrine of *Robins Dry Dock & Repair v Flint*.¹³³ The court reasoned that permitting liability for the ‘unknowable’ amounts that might be posed as economic loss claims arising from any substantial mishap would erode the efficient deterrent effect of such a tort rule, as a rational, wealth-maximizing actor would be unable to gauge the optimal precautionary measures for avoidance of a predictable accident cost. In Judge Higgenbotham’s words:

it is suggested that placing all the consequence of its error on the maritime industry will enhance its incentive for safety. While correct, as far as such analysis goes, such *in terrorem* benefits have an optimal level. Presumably, when the cost of an unsafe condition exceeds its utility there is an incentive to change. As the costs of an accident become increasing multiples of its utility, however, there is a point at which greater accident costs lose meaning, and the incentive curve flattens.

¹³¹ Ibid 575. See also *Ogle v Caterpillar Tractor*, 716 P 2d 334, 342 (Wyo, 1986) (‘Ogle’). The court stated:

When a defective article enters the stream of commerce and an innocent person is hurt, it is better that the loss fall on the manufacturer, distributor or seller than on the innocent victim ... They are simply in the best position to either insure against the loss or spread the loss among all consumers of the product.

Ogle was later described by the Wyoming Supreme Court as an indication of how strict liability ‘introduced economic analysis to tort law’: *Schneider National v Holland Hitch*, 843 P 2d 561 (Wyo, 1992) (‘lowest cost avoider’). The Court in *Schneider National* proceeded to analogize *Ogle*’s ‘risk allocation’ theory to a ‘cheapest cost avoider’ approach. See also *Wilson v Good Humor*, 757 F 2d 1293, 1306 n 13 (DC Cir, 1985), identifying but not pursuing cheapest cost avoider analysis in an action brought by parents of a child who was fatally injured while crossing a street to meet an ice cream vending truck.

Consistent authority is found in the insurance declaratory judgment context. The dissenting opinion in *Insurance Co of North America v Forty-Eight Insulations*, 633 F 2d 1212 (6th Cir, 1980) proposed a ‘discoverability’ rule for triggering insurance carrier coverage of asbestos claims, asserting that this approach would, relying on a least cost avoider rationale, provide incentives to reduce accident costs. Specifically, the dissent reasoned:

The more ‘early’ insurers that are liable upon a victim’s exposure, the more likely it is that the potential harm will be discovered and the public warned. If an insurer sees that the product poses some risks, he may raise premiums accordingly. This may ultimately cause the manufacturer to remove the product from the market or to give better warnings in order to lower insurance premiums. This in turn reduces accident costs.

¹³² 728 F 2d 748 (5th Cir, 1985) (‘Testbank’).

¹³³ 275 US 303 (1927).

When the accident costs are added in large but unknowable amounts the value of the exercise is diminished.¹³⁴

In the setting of environmental harm, notions of corrective justice and utilitarianism (or efficiency and equity¹³⁵) have long coexisted uneasily. Originally, even the most economically powerless landholder could seek and secure an injunction against a neighboring activity that interfered substantially with the plaintiff's use of property. Numerous early decisions evidenced a judicial unwillingness to 'balance' injuries, that is, to weigh the defendant's cost and the community hardship in losing the industry against the often modest provable harm to plaintiff's often ordinarily small and noncommercial property. As the New York Court of Appeals stated in *Whalen v Union Bag & Paper*,¹³⁶ to fail to grant the small landowner an injunction solely because the loss to him, in absolute terms, was less than would be the investment-backed loss to the nuisance-creating business and lost employment within the community, would 'deprive the poor litigant of his little property by giving it to those already rich'.

In contrast, the modern rule governing injunctions, including environmental injunctions, might seem coldly utilitarian. The *Restatement (Second) of Torts* § 936 lists factors for injunction issuance, which expressly include weighing of 'the nature of the interest to be protected', thus presumably inviting an elevation of plaintiff's bona fides in cases in which the court considers the activity meritorious (perhaps a recreational area for Alzheimer's patients) and a devaluation in which the court deems it less valuable (perhaps an automobile scrapyard). Along similar lines, hardship to the defendant of ceasing or changing its activity, and 'the interests of third persons and of the public' are proper considerations.¹³⁷ The reference to potential burdens upon third persons and the public represent a clear invitation to introduce concepts of social costs into environmental damage litigation.

Representative of such an approach is the result reached in *Boomer*,¹³⁸ a decision known to legions of law students. *Boomer* involved a large-scale industrial nuisance in the form of airborne cement dust emanating from an upstate New York cement plant. In the lower court, a nuisance was found, and temporary damages awarded, but the plaintiffs' application for an injunction was denied. Recognizing that to deny the injunction would depart from *Whalen*'s corrective justice/no balancing approach discussed earlier, the court nevertheless adopted a utilitarian approach that weighed the hardships imposed on the plaintiffs against the economic consequences of the requested injunction. In what might be described as a split decision, the court denied

¹³⁴ *Testbank* 728 F 2d 748, 1029 (5th Cir, 1985).

¹³⁵ See A Mitchell Polinsky, 'From Political Philosophy to Game Theory' in A Mitchell Polinsky, *An Introduction to Law and Economics* (Little, Brown and Co, 2nd ed, 1989).

¹³⁶ 208 NY 1 (1913).

¹³⁷ *Restatement (Second) of Torts* § 936(1)(e)–(g).

¹³⁸ 26 NY 2d 219 (1970).

the injunction and awarded permanent, one-time damages that would be recorded as a continuing servitude on the land. The court explained:

The ground for denial of injunction, notwithstanding the finding both that there is a nuisance and that [the] plaintiffs have been damaged substantially, is the large disparity in economic consequences of the nuisance and of the injunction.¹³⁹

Boomer permits examination of modern nuisance law in terms of a cost-benefit or utilitarian rationale that vindicates what the New York court concluded were the overall best economic interests of the community. However, other important elements to an economic analysis of nuisance law are at play, to wit, the elements of social cost. In the introductory paragraph to *The Problem of Social Cost*,¹⁴⁰ Ronald H Coase illustrates the operation of social cost analysis by employing the example of a factory emitting demonstrably *harmful* pollutants — in this sense an important distinction with *Boomer*. Coase suggests that application of pure economic principles might prompt economists to conclude that it might be desirable to have the factory pay damages, proportionate or otherwise, or even to have the factory shut down. Such results, he proposes, may be ‘inappropriate, in that they lead to results which are not necessarily, or even usually, desirable’.¹⁴¹

It is received wisdom that in order to be efficient, any tort rule associated with a phenomenon compensable in tort, in this case nuisance, should encourage a resolution that keeps the matter out of litigation. Returning to the economically preferable approach of contract-based solutions, in a pollution scenario, the most efficient course of conduct will be where the polluter and the complainant reach an *ex ante* agreement regarding the level of harm the complainant is willing to sustain in return for the payment of money. This result, reached through cooperation and which avoids litigation, offers the lowest possible transaction costs, and the most efficient resolution.

¹³⁹ A tort rule that did not limit the complainant to one-time damages, and preclude future recovery by subsequent owners, *Boomer* suggests, would be inefficient. Subjecting the polluter to serial recoveries and indeterminate liability would constitute over-deterrence on the model of *Boomer*. Indeterminate liability would potentially fail to cap Atlantic Cement’s potential financial responsibility at a level that would permit it to continue to conduct business, and would thereby be inconsistent with the rule expressed in *Restatement (Second) of Torts* § 826(b), which permits the finding of nuisance even when the utility of the actor’s conduct outweighs the damage suffered by the complainant, so long as the damages are not set at a level that would prevent the defendant from continuation of its business. Additionally, an absence of the ‘one-time damages’ provision of *Boomer* would unjustly enrich the property owners, as they would recover first from *Atlantic Cement*, and then recover again by the sale of overvalued property, which is to say, property priced at a level that failed to take into account the chronic low-level future pollution.

¹⁴⁰ R H Coase, ‘The Problem of Social Cost’ (1960) 3 *Journal of Law and Economics* 1, reprinted in Saul Levmore (ed), *Foundations of Tort Law* (Foundation Press, 1994) 3 ff.

¹⁴¹ *Ibid.*

VI CONCLUSION

An optimal tort rule is just, moral and efficient. It advises those within its compass what is expected, what is discouraged, and the consequences of departure from the desirable. It does not compensate excessively but rather in proportion to the harm, and it does not undercompensate, as only through justifiable compensation is the rule's deterrent value most effective. It stands in the stead of ex ante agreements as to condoned or expected behavior in situations where contract would be impossible.¹⁴² At the same time, and by the same means, tort rules encourage safer behavior.

A so-called 'law of progress', affecting all disciplines from biology to law to history, is discussed by the influential R G Collingwood, who proposes that progress in history means simply that man builds his knowledge on the incidents of his experience and that of others.¹⁴³ Be it 'law' or not, a positivist social expectation of historical progress¹⁴⁴ has been foundational to the development of man's ethical and economic life. Success, social and political development are achieved when man has been informed as fully as possible of the past in such measure as will permit him to avoid its errors. Such change does not necessarily involve replacement of the bad with the good. As often, it will be the replacement of the good with the better.¹⁴⁵ A contemporary view that history reveals a linear progression propelled by good governance is urged by philosopher and neuroscientist Nayef Al-Rodhan, who argues that history may be defined as 'a durable progressive trajectory' in which the quality of life is

¹⁴² As Jules Coleman put it: '[t]ort law is not simply a necessary response to the impossibility of contract, but a genuine alternative to contract as a device for allocating risk': Jules L Coleman, *Risks and Wrongs* (Oxford University Press, 1992) 203.

¹⁴³ R G Collingwood, *The Idea of History* (Jan Van Der Dussen (ed)) (Oxford University Press, rev ed 1992) 322–3. This ageless improvement of tort law over time would be predicted by Socrates, in his constant references to the imperative of man's path of enhancing the life of the individual and the polity of man. 'Man does not and will not know that he participates in this progress': at 331.

¹⁴⁴ Many social historians urge that the path of history is one of steady improvement — herein of the modern idealists Hegel, Comte and others, first in Germany, then Europe, England and America, the disciples of 'progress' over 'providence' and of man's innate intellectual evolution. See Karl Lowith, *Meaning in History* (University of Chicago Press, 1949) 52, 67. French philosopher Auguste Comte, sometimes considered to be the founder of modern sociology, considered progress through gradual change inevitable, although he would have entrusted guidance of the polity to an elite of political experts, similar in ways to Plato's Philosopher-King. Marquis de Condorcet wrote on behalf of Philosophes that the 'perfectibility of man' is 'absolutely indefinite'. Thomas Jefferson subscribed to the Whiggish view advanced by leading British Unitarians in 'the indefinite perfectibility of man'. Only somewhat more modestly, DeToqueville wrote that in America at least, the concept of equality was strongly suggestive of a societal belief in the indefinite perfectibility of man.

¹⁴⁵ See Fukuyama, above n 4, 57, 58, 61, 145, referencing positivist arguments of, *inter alia*, Bernard Le Bovier de Fontenelle, Condorcet, Kant, Hobbes, Hegel and Locke.

premised on the human dignity needs of ‘reason, security, human rights, justice, and equality’.¹⁴⁶

Tort law has always been apiece with human optimism, and confidence in the capacity of man to improve himself and by so doing, improve society.¹⁴⁷ Tort law’s history, and ours, is that of the dialectic tension between self-aggrandizement¹⁴⁸ and self-abnegation. No other legal or ethical schema has so consistently hewn to the magisterial human experiment of justice, moderation, fairness, efficiency and equality in social groupings.

In this article are found multiple examples of both prophylaxes against and responses to wrongful infliction of harm to individuals or to the social collective. Such examples have ranged from the Babylonian response to the flooding of another’s land; to Socrates’ and Aristotle’s injunctions against unconsented-to taking; to Roman development of the law of nuisance; to Talmudic rules regarding waste. The development of tort rules over the ages reveals a theme of progress, rather than providence. It is seen that to the inexorable and permeating tort goals of fortifying morality and pursuing corrective justice can be fairly added objectives of economic efficiency, avoidance of waste, and cultivation of circumstances in which persons may preserve and protect their physical autonomy and their property — tort precepts by now evident in almost all cultures. As importantly, both corrective justice, with its moral underpinnings, and economic efficiency, have been routinely reconciled in greater or lesser harmony.¹⁴⁹ These dual objectives of tort law have been and will continue to be its elevation in comprehensiveness, its shedding of error, and its ongoing self-instruction guiding it to what is denominated sometimes as a ‘right fit’ in its time and culture.

¹⁴⁶ Nayef R F Al-Rodhan, *Sustainable History and the Dignity of Man: A Philosophy of History and Civilisational Triumph* (Lit Verlag, 2010). In ways comparable are Ghandi’s ‘Law of Progression’ and Alexis de Toqueville’s association of the American articulation of equality to a correlative belief in ‘the indefinite perfectibility of man’. Alexis de Tocqueville, ‘How Equality Suggests to the Americans the Indefinite Perfectibility of Man’ in *Democracy in America* (Vintage/Random House 1945) vol 2, ch 7.

¹⁴⁷ That modern man may overindulge this and other optimisms, see Robert Kurzban, *Why Everyone (Else) Is A Hypocrite* (Princeton University Press, 2010) 116–19, which may temper but does not vitiate this point.

¹⁴⁸ For thoughts representative of a laissez-faire social construct: ‘[i]t is an undeniable maxim that everyone by the light of nature and reason will do that which makes for him his greatest advantage’. Russell, above n 36, 624.

¹⁴⁹ Even avid exponents of an economic underpinning of nearly all tort rules recognize that such theories have prompted a ‘pushback’ from other social historians. Richard Posner wrote in the University of Chicago alumni magazine in 2011 that economic analysis of the law may have fallen victim of its own success, ‘becoming too esoteric, too narrow, too hermetic, too out of touch with the practices and institutions that it studies’: Peter Coy, *Will Success Spoil the Chicago School?* (7 June 2012) Bloomberg Businessweek <<http://www.businessweek.com/articles/2012-06-07/will-success-spoil-the-chicago-school>>. See also Coy, above n 114.

