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## Re-Enchanting Torts

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## I. INTRODUCTION

Is tort law, as claimed in a recent *Vanderbilt Law Review* article by Professor John C.P. Goldberg, “unloved”?<sup>1</sup> Is it true that “notwithstanding its continued presence in the first-year curriculum, tort is a department of the law that has fewer serious champions than any comparable subdiscipline”?<sup>2</sup> In a breathtaking spate of recent writings, Professor Goldberg has sought to re-energize tort law and to spur twenty-first century tort scholars to return to respecting—and hopefully *loving*—this formerly venerated body of the law.<sup>3</sup> In his 2002 essay *Unloved: Tort in the*

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1. John C.P. Goldberg, *Unloved: Tort in the Modern Legal Academy*, 55 VAND. L. REV. 1501, 1503 (2002).

2. *Id.* at 1502.

3. See generally John C.P. Goldberg, *Tort*, in THE OXFORD HANDBOOK OF LEGAL STUDIES 21 (Peter Cane & Mark Tushnet eds., 2003) (focusing on the conception of tort law as accident and regulatory law in twentieth century scholarship); Goldberg, *supra* note 1 (asserting that tort law deserves a rebirth as a loveable and embraceable field of legal theory); John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513 (2003) (outlining the five most prominent approaches to tort law in the twentieth century and suggesting measures to improve academic discourse in this area).

*Modern Legal Academy*, he eloquently described how academic lawyers of yore, like William Blackstone, embraced tort law “as a small piece of what he took to be the gorgeous mosaic of the liberal state’s complex system of law.”<sup>4</sup> Goldberg elaborated:

Just as the structure of English government—King, Parliament, and common law—helped protect rights against official tyranny, so [Blackstone loved] tort [for] defin[ing] and defend[ing] the right not to be battered, detained, defamed, dispossessed or otherwise injured by others. Tort therefore helped fulfill the social contract. Upon entering civilized society, individuals give up their natural right to wreak vengeance on their wrongdoers in exchange for the positive legal power to invoke the apparatus of the state to obtain legal redress from them.<sup>5</sup>

After Blackstone’s love affair with torts in the eighteenth century, the youthful Oliver Wendell Holmes Jr. had what Goldberg suggested was a dalliance with tort law during the second half of the nineteenth century.<sup>6</sup> “Holmes was the first modern theorist of tort. As such, he presided over its reorientation around the tort of negligence, as well as its corresponding elevation to the status of a major department of the law.”<sup>7</sup> With some wry jocularly, Professor Goldberg acknowledged that while “it is a bit of a stretch to describe Holmes as a lover of tort, for he seems not to have been a lover of anything or anyone,” Holmes “mustered at least as much affection for tort as for anything else in his life.”<sup>8</sup>

According to Goldberg, with the advent of the twentieth century, tort gained two more intellectual suitors in Francis Bohlen and Benjamin Cardozo.<sup>9</sup> “Both men devoted themselves to recrafting the common law of tort to better fit the new age of industrial and motorized vehicle accidents.”<sup>10</sup> Indeed, Cardozo “saw in the concepts and byways of the common law all the resources necessary to adapt

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Goldberg and his co-authors imply in the preface to their casebook that tort law is venerable because it is so rich and adaptable:

This book adopts a perspective on [tort] law that we hope is refreshing. It is, of course, vital that first-year law students come to appreciate that “the law” is not a rule book—that there is play in its joints and deep tensions in its soul. Yet it is equally important that students not be left with the skeptical lesson that [tort] law is nothing more than what a particular judge or jury says it is. Thus, in these materials, we strive to help students grasp how the key concepts of tort—concepts such as “reasonable care,” “causation,” and “intent”—structure and organize legal analysis even as they point it in new directions. A good lawyer, we hope to demonstrate, is one who appreciates both the limits and the flexibility of tort doctrine; one who has a sense of how to make innovative and progressive arguments from *within the law*.

John C.P. Goldberg et al., *Preface to TORT LAW: RESPONSIBILITIES AND REDRESS* xx (2004).

4. Goldberg, *supra* note 1, at 1504.

5. *Id.* at 1504–05.

6. *See id.* at 1505–06.

7. *Id.*

8. *Id.* at 1506 (citing GRANT GILMORE, *THE AGES OF AMERICAN LAW* 48–49 (1977)).

9. *See id.*

10. Goldberg, *supra* note 1, at 1506 (citing George Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 465–68 (1985)).

Blackstone's law of private redress to the wrongs perpetrated by railroad owners, automobile drivers, and product manufacturers.<sup>11</sup>

But, as explained by Professor Goldberg, tort law began to encounter ridicule and disrespect a few decades into the twentieth century.<sup>12</sup> Tort scholars like Fleming James and Albert Ehrenzweig "explicitly condemned tort" for its slowness in according relief to accident victims and for its arbitrariness in deciding cases.<sup>13</sup> According to Goldberg, later scholars such as Mark Franklin and Jeffrey O'Connell picked up this line of explicit dirision toward tort.<sup>14</sup> Moreover, another group of twentieth century tort scholars, led by Leon Green and William Prosser, exploited tort law for the power and influence it could provide "armchair policymakers (law professors)."<sup>15</sup> As Goldberg described it, these tort gold-diggers did not "love[ ] tort law for what it is," but for its "blank check" propensity "to confer jurisdiction" and to legitimize "de novo 'social engineering.'"<sup>16</sup> A prominent contemporary exploiter of tort law, in Goldberg's view, is Judge Richard A. Posner.<sup>17</sup> Contrasting Posner's conservative exploitation of tort with the ideas of those whom he views as contemporary liberal exploiters of tort, like Professors Thomas H. Koenig and Michael L. Rustad, Goldberg opined as follows:

If, for Koenig and Rustad, the great thing about tort is that it permits judges and juries to adopt the role of unappointed corporate ombudsmen, for Posner the great thing about tort is that it permits judges to act as roving efficiency commissioners charged with the task of identifying and achieving the cost-efficient mix of precaution and injury.<sup>18</sup>

Professor Goldberg perceived other modern tort scholars like Richard Epstein and Jules Coleman as unlovers of tort, at worst, and cool, detached proponents of tort law, at best—both refusing to embrace tort law for what it is instead of what it might become, as refashioned to meet their own idiosyncratic philosophical critiques.<sup>19</sup> And, even Professor Ernest J. Weinrib, in Goldberg's view, while

11. *Id.* (citing John C.P. Goldberg, *The Life of the Law*, 51 STAN. L. REV. 1419, 1455–74 (1999)).

12. *See id.* at 1509–13.

13. *Id.* at 1509 (citing Priest, *supra* note 10, at 470–83).

14. *Id.*

15. *Id.* at 1510.

16. Goldberg, *supra* note 1, at 1510–11 (quoting WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 3, at 15 (1st ed. 1941)).

17. *Id.* at 1512.

18. *Id.* (footnote omitted). Goldberg's discussion of Koenig and Rustad focuses on their book: THOMAS H. KOENIG & MICHAEL L. RUSTAD, *IN DEFENSE OF TORT LAW* (2001). According to Goldberg, in reference to this book, "[p]erhaps a better title would have been *The Political Usefulness of Tort Law*." Goldberg, *supra* note 1, at 1511 n.41. In reference to Posner, Goldberg asserts that efficiency as a primary Posnerian focus is "the clear implication of Posner's rejection of the idea that law and moral principles constrain adjudication, his corresponding overt embrace of open-ended, policy-based judicial decisionmaking, and his belief that aggregate efficiency is, at a minimum, the prime policy consideration to which he . . . attends and should attend." *Id.* at 1512 n.45. For this author's view that Judge Posner's judicial opinions (including some tort opinions) express a more nuanced, multi-faceted judicial philosophy than mere efficiency and wealth-maximization, see Robert F. Blomquist, *Dissent, Posner-Style: Judge Richard A. Posner's First Decade of Dissenting Opinions, 1981-1991—Toward an Aesthetics of Judicial Dissenting Style*, 69 MO. L. REV. 73 (2004) or Robert F. Blomquist, *Playing on Words: Judge Richard A. Posner's Appellate Opinions, 1981-82—Ruminations on Sexy Judicial Opinion Style During an Extraordinary Rookie Season*, 68 U. CIN. L. REV. 651 (2000).

19. *See* Goldberg, *supra* note 1, at 1513–15.

saying that tort law is “‘just like love,’”<sup>20</sup> does not truly love tort law; if Weinrib was a true lover of tort, he would have higher aspirations for his beloved instead of being resigned, as Goldberg seemed to see Weinrib, to fatalistically accepting the content of modern tort law as an ingrained and unmalleable part of the human practice and heritage of corrective justice.<sup>21</sup>

Professor Goldberg trumpeted a call for those with a deep love for tort law—for its content and for its power; for its substance as well as its form—to offer up their affection and future aspiration for tort. Although his call is magnetic, this Article quibbles with both his critique of Weinrib and his aspirational insistence on doctrinal coherence for tort. In speaking up for tort law, on one level, this Article sounds a bit schmaltzy—like Ricky Ricardo, striking up his band to play the theme song for the 1950s TV program, *I Love Lucy*. Yet, on another level, Goldberg’s article creates an irresistible challenge accepted in this Article—the product of a torts professor of eighteen years and a sometimes practitioner in the field—to pick up the gauntlet and join him in an effort to defend and to re-enchant this beloved subject.

\* \* \*

The lusty month of May! I sit grading bluebooks in my Bahama blue-colored study in my Frank Lloyd Wright-inspired 1915 condominium building in Oak Park, Illinois, which I share with my wife. During moments like these (mostly dispiriting), I often think I might be inclined to agree with the dismal assessment made by the unlovers of tort identified by Professor Goldberg. Too many of my students tend to throw in everything-but-the-kitchen-sink-type arguments while groping their way through their final torts examinations. When I read these bluebooks, I wonder whether tort law really might be as incoherent and unlovable as some of the tort unlovers claim, either explicitly or implicitly. But occasionally, I come upon a bluebook that identifies nuanced issues in the problems presented; delineates key tort concepts, doctrines and principles that might help resolve the issues; and boldly concludes its analysis with specific advice for a client or arguments for a court. The latter, of course, merits the *A* in the course (and even the course honors) since they portray the law of torts as modestly intelligible, socially useful, and worthy of our affection.

\* \* \*

The goal in this Article is to spark the re-enchantment of tort for the twenty-first century. Part II consists of a short but wide ranging discussion of a philosophical model of love for tort law. As part of this rumination, this Article attempts to diagnose the general cause for the tort unlovers’ malaise, identified by Professor Goldberg, as first being rooted in a misunderstanding of Ernest Weinrib’s conception of tort law as non-functional, private law. Thus, on this point, Professor Goldberg might harbor a mild disapproval for the structure of tort law which, hopefully, he will overcome. Then, to help tort unlovers better appreciate the intrinsic attractiveness of tort, Part III delves into the robust aesthetics, both functionalist and non-functionalist, of modern tort law. Finally, the goal in Part IV is to explain why modern tort law is aesthetically worthy of being loved, even though it has disappointed many scholars in certain respects.

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20. *Id.* at 1501 (quoting ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 6 (1995)).

21. *Id.* at 1515–17.

## II. A STARTING POINT FOR A PHILOSOPHY OF LOVE FOR TORT LAW

A. *On the General Nature of Love and Disappointed Love for Tort Law*

The object of the emotion love is a beloved. While humans are accustomed to thinking of other persons as the potential objects of their love—attractive by virtue of qualities such as beauty and goodness—humans also come to love, or not to love, non-human objects. Thus, humans regularly consider loving concrete objects: for example, a girl named Teresa, a guy named Jack, a sculpture by Picasso, a new Ferrari, or a rose garden. But more rarely do humans consider loving abstract objects: freedom, democracy, or education, for example.

As philosopher Sam Keen expressed in his book *To Love and Be Loved*, “[c]lassical philosophers and theologians . . . insisted that love can thrive only in combination with other virtues.”<sup>22</sup> “For the Buddha, compassion was necessarily linked to wisdom. For Saint Paul, the trinity was faith, hope, and love. For Paul Tillich, love, power, and justice stand or fall together.”<sup>23</sup> Indeed, “[m]ost premodern theories consider love to be an elixir that gradually dissolves the boundaries we erect between the self and others and progressively drives the ego beyond individualism, beyond the sanctuary of intimacy, into a more and more inclusive community.”<sup>24</sup> On one hand, according to Keen, all “unhappy love stories”—those involving disappointment and disillusionment—“are all the same.”<sup>25</sup> All unhappy love stories “exhibit the same endlessly repeated, boring pattern of resentment, bickering, withholding, blame, disrespect, inattention, abuse, and so on.”<sup>26</sup> On the other hand, happy love stories “are all creative and unique”<sup>27</sup> and “[w]hen we love, we live in a reenchanting world that is governed more by what may yet happen than by what has already happened, by possibilities that lie beyond our wildest imagination.”<sup>28</sup>

Professor Goldberg has performed a great service by describing how various tort scholars of recent decades are really tellers of an unhappy love story about tort law because tort law has disappointed them in its substantive payoff. As Goldberg indicated, these unlovers apparently resent tort because of its often ad hoc,<sup>29</sup> policy-driven ways<sup>30</sup> of resolving disputes that sometimes “smack too much of crude vengeance”<sup>31</sup> and its tort stories<sup>32</sup> that are “too grim [and] too preposterous.”<sup>33</sup> More specifically, Goldberg explained that many tort scholars are jilted lovers of tort who do not want to embrace modern tort law because, for them, it has “become awkward for at least three reasons”:<sup>34</sup> (1) “we have asked too much of it”;<sup>35</sup> (2)

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22. SAM KEEN, *TO LOVE AND BE LOVED* 15 (1997).

23. *Id.*

24. *Id.*

25. *Id.* at 17.

26. *Id.*

27. *Id.*

28. KEEN, *supra* note 22, at 217.

29. See Goldberg, *supra* note 1, at 1518 n.63 (observing that “while the tort system can serve to provide sporadic advances toward distributive justice, this sort of ‘ad hoc-ery’ generates hostility not only to tort (hence modern tort reform), but to the perceived beneficiaries of the system, i.e., the persons who stand to benefit from a more above-the-board system of redistribution”).

30. See *infra* notes 118–39 and accompanying text.

31. Goldberg, *supra* note 1, at 1517.

32. See *infra* notes 141–53 and accompanying text.

33. Goldberg, *supra* note 1, at 1518.

34. *Id.*

35. *Id.*

“modern academics have tended to gauge tort on a set of rigged criteria”;<sup>36</sup> and (3) tort scholars “have sucked much of the law out of tort, leaving institutional actors, particularly judges, with a diminished sense of professional self when confronting tort suits.”<sup>37</sup>

In my attempt to amplify and build on Professor Goldberg’s optimistic manifesto of love for tort law, I contend that many scholarly unlovers of tort fail to see the potential in modern tort law for a re-enchanted law of torts because they are locked into the discourse of telling an unhappy love story—replete with blame, disrespect, withholding, and abuse—and because they fail to appreciate the essential goodness, resilience, adaptability and beauty of modern tort doctrine.<sup>38</sup> For similar reasons, I contend that unlovers of tort law fail to see the trajectory of modern tort law and its promising future evolutionary possibilities.<sup>39</sup>

### B. *What Ernest Weinrib Really Meant*

Professor Goldberg cited Professor Ernest Weinrib for the proposition that private law—which includes contract, restitution, property, and tort—is “just like love.”<sup>40</sup> According to Goldberg, what Weinrib meant by this cryptic comparison is that “tort law is like love in that it cannot be understood by reference to its purpose or function” and thus cannot be made intelligible by reference to “the social functions it happens to perform.”<sup>41</sup> Goldberg claimed that “tort to Weinrib resembles sport. The sports fan appreciates how the rules, practices, and participants in a game like baseball or basketball come together to create a distinctive enterprise,” but the sports fan, like the lover, according to Goldberg, “does not ask what is the point or purpose of the sport.”<sup>42</sup>

Recall Professor Weinrib’s seminal 1995 book,<sup>43</sup> upon which Professor Goldberg relied to describe Weinrib as an unlover of tort.<sup>44</sup> How did Professor Weinrib really describe tort law? How did Weinrib compare tort law to love? What did Goldberg leave out of his description of Weinrib’s analysis of tort law as a type of private law?

#### 1. *The Importance of Tort Law*

Professor Goldberg failed to mention Professor Weinrib’s view on the importance of tort law as a key component—along with property law, contract law, and the law of restitution—in what he terms “private law.”<sup>45</sup> On the first page of his book, Weinrib extolled the importance of private law as “a pervasive phenomenon of our social life, a silent but ubiquitous participant in our most common transactions.”<sup>46</sup>

36. *Id.*

37. *Id.*

38. See *infra* notes 161–66 and accompanying text.

39. See *infra* notes 167–73 and accompanying text.

40. Goldberg, *supra* note 1, at 1501 (quoting ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 6 (1995)).

41. *Id.* at 1502.

42. *Id.*

43. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995).

44. See generally Goldberg, *supra* note 1, at 1502 (discussing how Weinrib, by stating “that tort is just like love,” actually demonstrates that tort is unloved).

45. See WEINRIB, *supra* note 43, at 1.

46. *Id.*

[Private law] is the public repository of our most deeply embedded intuitions about justice and personal responsibility. Private law is also among the first subjects that prospective lawyers study. Its position in law school curricula indicates the consensus of law teachers that private law is the most elementary manifestation of law, its reasoning paradigmatic of legal thinking, and its concepts presupposed in more complex forms of legal organization.<sup>47</sup>

Based on this thesis, then, Weinrib would not be inclined—as Goldberg contended he would—to equate “love” of sport with love of a beloved *inamorato*.<sup>48</sup> Tort law for Weinrib is different in kind from mere sport; to him tort law is, like a romantic lover, of the highest importance worthy of total commitment.

## 2. *The Non-Functional Aesthetic Value of Tort Law*

Professor Goldberg did not give enough attention to Professor Weinrib’s contrarian, non-functional view of tort law as a component of private law. While Goldberg alluded to Weinrib’s “idea of the internal intelligibility”<sup>49</sup> of tort law as a species of private law,<sup>50</sup> Goldberg’s explanation oversimplifies the nuanced points that Weinrib made about the intrinsic aesthetic beauty of private law in general, and tort law in particular. Moreover, Weinrib’s account is richer than Goldberg implied. Based on Weinrib’s view, tort law (along with property law, unjust enrichment law, and contract law) is worthy of love because, as private law, it: (a) is “an autonomous body of learning,”<sup>51</sup> (b) is distinct from politics,<sup>52</sup> (c) consists of key concepts that should be “taken seriously and in [their] own right,”<sup>53</sup> and (d) is a distinct enterprise from the realm of public law.<sup>54</sup> Weinrib explained this idea more fully:

In asserting that the sole purpose of private law is to be private law, I aim to undermine [functionalist] assumptions. I . . . argue that private law construes the litigating parties as immediately connected to each other. Interaction so conceived is categorically distinct from that of public law, which relates persons only indirectly through the collective goals determined by state authority. The different mechanisms for enunciating legal norms—adjudication and legislation—broadly reflect the different contours of these two modes of interaction. The autonomy of private law as a body of learning is a consequence of the distinctiveness of private law as a mode of interaction. To understand private law, we must take seriously its fundamental concepts, which, far from being surrogates for the operation of independently justifiable collective purposes, are the juridical markers of the immediate connection between the parties.

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47. *Id.*

48. See *supra* notes 41–42 and accompanying text.

49. WEINRIB, *supra* note 43, at 6.

50. Goldberg, *supra* note 1, at 1502.

51. WEINRIB, *supra* note 43, at 6.

52. *Id.* at 7.

53. *Id.*

54. *Id.*



Understood in this way, private law is a juridical, not a political, phenomenon. By thus jettisoning the functionalist assumptions we can return to the idea that private law is to be understood from within.<sup>55</sup>

Moreover, Professor Weinrib's account of tort law as a critical component of private law<sup>56</sup>—under-appreciated in Professor Goldberg's synopsis—focuses on tort law's aesthetic attractiveness and three-part, mutually-reinforcing internal coherence: (a) the "immanently intelligible" theoretical framework,<sup>57</sup> (b) the "Aristotle[an] conception of corrective justice as the unifying structure that renders private law relationships immanently intelligible,"<sup>58</sup> and (c) the "normative force" of the corrective justice paradigm.<sup>59</sup>

### 3. *The Praiseworthy Bipolarity of Tort Law's Proper Focus on Corrective Justice*

Professor Goldberg misunderstood Professor Weinrib's discussion of corrective justice in tort law as a tribal "fidelity to 'our' tort law" that is "powerful, almost

55. *Id.* at 8.

56. Weinrib placed particular emphasis on "the treatment of accidental injuries in the common law of torts," in explicating his theory of private law. *Id.* at 20. Weinrib did this "[b]ecause the negligent defendant's culpability seems morally detachable from the fortuity of injury, liability for negligence poses a particularly severe challenge to the stringent notion of coherence" he claimed exists in private law. WEINRIB, *supra* note 43, at 20. Accordingly, Weinrib argued that "[i]f formalism illuminates negligence law, it presumably illuminates less problematic bases of liability as well," *id.*, such as liability for breach of contract or unjust enrichment.

57. *Id.* at 18. Weinrib fully described the theoretical framework:

The first thesis concerns the theoretical framework. An internal account of private law sets in opposition to contemporary functionalism the thesis that private law is immanently intelligible. Building on the jurist's understanding of private law as a distinctive and coherent ensemble of characteristic features, the thesis integrates the distinctiveness, the coherence, and the character of private law into a single theoretical approach. Underlying this integration is the notion that one understands a legal relationship through its unifying structure, or "form." Applied to private law, the thesis of immanent intelligibility is a version of legal formalism.

*Id.*

58. *Id.* at 19. Weinrib contended that his second thesis "identifies Aristotle's conception of corrective justice as the unifying structure that renders private law relationships immanently intelligible":

Corrective justice is the pattern of justificatory coherence latent in the bipolar private law relationship of plaintiff to defendant. By abstractly schematizing this pattern, Aristotle made manifest the distinctive rationality of private law. And by decisively distinguishing corrective from distributive justice, Aristotle established the categorical difference between private law and other legal orderings.

*Id.*

59. WEINRIB, *supra* note 43, at 19. Weinrib described his third thesis:

The third thesis concerns the normativeness of corrective justice. Corrective justice is the justificatory structure that pertains to the immediate interaction of one free being with another. Its normative force derives from Kant's concept of right as the governing idea for relationships between free beings. For Kant, freedom itself implies juridical obligation. On this view, the doctrines, concepts, and institutions of private law are normative inasmuch as they make a legal reality out of relations of corrective justice.

*Id.*

moving," but "is not love precisely because of its fatalistic undertones."<sup>60</sup> Goldberg was mistaken when he argued the following:

Weinrib says that we must attend to corrective justice because we are who we are; we can do no other. In so saying, he fails to capture the ineliminable aspirational aspect of love. One cannot love something that one does not respect, admire, or embrace, at least a little bit. A person or thing must contain at least a shadow or flickering of the good before it can become the object of our affection. It is not enough that he, she, or it is simply ours.<sup>61</sup>

As explained above, Weinrib admired and embraced the internal coherence of tort law as an aspect of private law.<sup>62</sup> The focal point of Weinrib's enthusiastic love for tort law is tort law's doctrinal requirement for a bipolar linking of the tort claimant with the tort defendant, as exemplified by negligence law, to "consider the entitlement of this particular plaintiff to reparation from this particular defendant."<sup>63</sup> Indeed, Weinrib's theoretical description of modern negligence law contains much more than "a shadow or flickering of the good,"<sup>64</sup> according to Goldberg. Weinrib beamed with Newtonian exuberance<sup>65</sup> about the internal dynamics of negligence law:

[C]orrective justice is immanent in the most fundamental concepts of negligence law. By tracing different aspects of the progression from the doing to the suffering of harm, these concepts coalesce into a single normative sequence and thus instantiate corrective justice. Throughout, negligence law treats the plaintiff and the defendant as correlative to each other: the significance of doing lies in the possibility of causing someone to suffer, and the significance of suffering lies in its being the consequence of someone else's doing. Central to the linkage of plaintiff and defendant is the idea of risk, for "risk imports relation." The sequence starts with the potential for harm inherent in the defendant's wrongful act (hence the standard of reasonable care) and concludes with the realization of that potential in the plaintiff's injury (hence the role of misfeasance and factual causation). The concepts of duty of care and proximate cause link the defendant's action to the plaintiff's suffering through judgments about the generality of the description of the action's potential consequences. Each of the negligence concepts traces an actual or potential connection between doing and suffering, and together they translate into juridical terms the movement of effects from the doer to the sufferer. In this way the negligence

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60. Goldberg, *supra* note 1, at 1517.

61. *Id.*

62. See *supra* notes 45–59 and accompanying text.

63. WEINRIB, *supra* note 43, at 170; see also *id.* at 63–66 (discussing the bipolarity of corrective negligence law).

64. Goldberg, *supra* note 1, at 1517.

65. See generally JAMES GLEICK, ISAAC NEWTON (2003) (examining the life and unpublished writings of Sir Isaac Newton, British scientist and philosopher who devoted his life to the study of physics, optics, and calculus and whose work, most prominently his three laws of motion, revolutionized scientific thought in the seventeenth century).

concepts form an ensemble that brackets and articulates a single normative sequence.<sup>66</sup>

Weinrib criticized some aspects of modern strict liability tort doctrine.<sup>67</sup> But Weinrib concluded with a lover's lament that "the theoretical case for basing tort liability on the causation of harm without fault is inconsistent with the equality and correlativity of corrective justice and with the concept of agency that underlies Kantian right."<sup>68</sup> Moreover, Weinrib thought it a good thing that four tort doctrines associated with strict liability "do not exemplify liability on causation alone."<sup>69</sup> Indeed, "[1] [r]espondant superior and [2] liability for abnormally dangerous activities can be understood as extending the operation of fault,"<sup>70</sup> while "[3] nuisance law and [4] the incomplete privilege regarding the preservation of property embody corrective justice in the relationship of one property owner to another."<sup>71</sup>

### III. A ROBUST AESTHETICS OF MODERN AMERICAN TORT LAW

#### A. *Pierre Schlag's Aesthetics of American Law*

Professor Pierre Schlag made an apt observation in his landmark 2002 article, *The Aesthetics of American Law*<sup>72</sup>: "Law is an aesthetic enterprise. Before the ethical dreams and political ambitions of law can even be articulated, let alone realized, the aesthetics of law have already shaped the medium within which those projects will have to do their work."<sup>73</sup> Schlag broke new ground in his article by arguing for what might be called a *robust aesthetics* of American law. Moving beyond what he characterized as "a conventional understanding of aesthetics as the province of beauty and fine art,"<sup>74</sup> leading to "a moral idealization of aesthetics or a romanticization of law (or both),"<sup>75</sup> Schlag based his project on articulating a "description of those recurrent forms that shape the creation, apprehension, and identity of the law."<sup>76</sup>

Professor Schlag's aesthetically robust descriptive scheme of American law clarifies the multiple (and often unruly) dimensions of modern American tort law and encourages better appreciation of Ernest Weinrib's more limited, traditional aesthetic of tort law.<sup>77</sup> From this enhanced comprehension, perhaps, some scholars

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66. WEINRIB, *supra* note 43, at 168–69 (footnote omitted) (quoting *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99, 100 (N.Y. 1928)).

67. *See id.* at 171–203.

68. *Id.* at 203.

69. *Id.*

70. *Id.*

71. *Id.*

72. Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1049 (2002).

73. *Id.* at 1049.

74. *Id.* at 1050.

75. *Id.* at 1051.

76. *Id.*

77. *See supra* notes 40–71 and accompanying text. Indeed, Weinrib's conception of tort law as a non-functional body of law resembles the art theory doctrine of aestheticism, which postulates "that art should be valued for itself alone and not for any purpose or function it may happen to serve"; thus, this "idea of art for art's sake is associated with a cult of beauty, which had its roots in Kantian aesthetics and the Romantic movement, although its potential application is wider than that." A COMPANION TO AESTHETICS 6 (David Cooper ed., 1992).

and lawyers can—as discussed below—actually come to love modern American tort law with its many (functional and non-functional) layers of complexity.<sup>78</sup>

Schlag provided a four-part aesthetic of American law: (1) a grid aesthetic, (2) an energy aesthetic, (3) a perspectivist aesthetic, and (4) a dissociative aesthetic.<sup>79</sup> Before describing these four aesthetics in the context of American tort law, this Article will set forth Professor Schlag's general theories about them. First, the grid aesthetic pictures law as follows:

[The grid is a] two-dimensional area divided into contiguous, well-bounded legal spaces. These spaces are divided into doctrines, rules, and the like. Those doctrines, rules, and the like are further divided into elements, and so on and so forth. The subjects, doctrines, elements, and the like are cast as "object-forms." They exhibit the characteristic features of objects: boundedness, fixity, and substantiality. They have insides and outsides that are separated by well-marked boundaries. The resulting structure—the grid—feels solid, sound, determinate. Law is etched in stone. The grid aesthetic is the aesthetic of bright-line rules, absolutist approaches, and categorical definitions.<sup>80</sup>

Second, in the Schlagian energy aesthetic, "law is cast in the image of energy. Conflicting forces of principle, policy, values, and politics collide and combine in sundry ways."<sup>81</sup> Moreover, "[p]recedents expand or contract in accordance with the push and pull of policy and principle. Legal rules, principles, policies, and values have magnitudes that must be quantified, measured, and compared. Movement and flux are the orders of the day."<sup>82</sup> Third, with the perspectivist aesthetic Schlag theorized the following:

the identities of law and laws mutate in relation to point of view. As the frame, context, perspective, or position of the actor or observer shifts, both fact and law come to have different identities. Accordingly, the social or political identity of the legal actor or observer becomes the crucial situs of law and legal inquiry.<sup>83</sup>

Finally, according to Schlag, the dissociative aesthetic plays the role of trickster in law:

[As] identities collapse into each other. Nothing is what it is, but is always already something else. Any attempt to refer to X is frustrated, as even the most minimal inquiry reveals that X is an unstable glomming-on of many other things that cannot be subsumed or stabilized within any one thing. The crucial contributions of the prior aesthetics—the grid (and its fixed identities), energy (and its quantifiable magnitudes), and

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78. See *infra* notes 79–85 and accompanying text.

79. Schlag, *supra* note 72, at 1051–52.

80. *Id.* at 1051.

81. *Id.*

82. *Id.* at 1051–52.

83. *Id.* at 1052.

perspective (and its identifiable relations)—have all collapsed.  
No determinable identities, relations, or perspectives survive.<sup>84</sup>

Professor Schlag's theory of a robust aesthetics of American law provides an exciting springboard for a preliminary sketch (or painting) of the aesthetics of modern American tort law.<sup>85</sup>

## B. Tort Law Aesthetics

### 1. Grid Aesthetics

Modern tort law has three key axes: intentional torts, negligent torts, and strict liability torts. Interspersed along these three axes are an assortment of specific torts, including battery, false imprisonment, and conversion (plotted off the intentional axis); common law negligence, statutorily-rooted negligence per se, and medical malpractice (extended off the negligence axis); and defective products liability, abnormally dangerous activity liability, and respondeat superior (charted off the strict liability axis).

Imagine this plotting experiment as taking place on reticulated graph paper (the kind of paper one might have used in a high school geometry class). Each of the discrete torts (for example, battery from the intentional tort axis) can be represented as a rather large rectangular figure made of many smaller rectangles on the graph paper, although the area of each rectangle will vary depending upon the relative complexity of each substantive tort and its subsumed doctrines and principles. Imagine taking out a box of crayons and boldly outlining each tort rectangle with a distinct color. Consider the following thought experiment. If battery were a color, for example, it would be cardinal red. As explained by Victoria Finlay in her wonderful book *Color: A Natural History of The Palette*:<sup>86</sup> "In our modern language of metaphors, red is anger, it is fire, it is the stormy feelings of the heart, . . . it is the god of war, and it is power."<sup>87</sup> Assault, while close to battery's emotive sensibility, would be tropical fish orange, a color more attuned to the mental feature of a potential harmful or offensive touching, the apprehension of blows yet-to-come. "Orange is a warning color—dangerous parts of machinery are deliberately painted with it, the theory being that it is the most eye-catching color

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84. *Id.* Schlag asserted that, while these four aesthetics of American law are not "exhaustive of the aesthetics that can be discerned in American law," they are, in his opinion, "the most important." Schlag, *supra* note 72, at 1052 n.13.

85. Schlag provided a rich description of his aesthetics project for American law. See *id.* at 1052–54. One of his more important general insights is as follows:

These aesthetics are "legal," not in the sense that they are exclusive to law (they are not). Rather, they are legal in the sense that they are instanced in the traditional legal materials, the usual canonical texts, sites, and scenes of law: appellate opinions, rules, doctrines, and the like. They are integrated aesthetics in the weak sense that each is a prototypical coalescence of:

- Images and schemas,
- Rhetorical forms,
- Metaphors and other tropes,
- Perceptual modes and sensibilities,
- Dramatic tensions,
- Sensory impressions, and
- Emotions and feelings.

*Id.* at 1052–53 (footnotes omitted).

86. VICTORIA FINLAY, *COLOR: A NATURAL HISTORY OF THE PALETTE* (2002).

87. *Id.* at 142.

and people will see it and jump out of the way.”<sup>88</sup> Ochre (iron oxide) would border the rectangle of trespass to land—and perhaps the rectangle of its close relation trespass to chattels—because these torts are among the oldest and most familiar, and they bespeak a Paleolithic connection with the earth and objects made from the earth. Indeed, these torts resonate with the ancient vintage color of ochre, which was “the first color paint.”<sup>89</sup> Finlay explained this color’s importance:

[Ochre] has been used on every inhabited continent since painting began, and it has been around ever since, on the palettes of almost every artist in history. In classical times the best of it came from the Black Sea city of Sinope, in the area that is now Turkey, and was so valuable that the paint was stamped with a special seal . . . . The first white settlers in North America called the indigenous people “Red Indians” because of the way they painted themselves with ochre (as a shield against evil, symbolizing the good elements of the world, or as protection against the cold in winter and insects in summer), while in Swaziland’s Bomvu Ridge . . . archaeologists have discovered mines that were used at least forty thousand years ago to excavate red and yellow pigments for body painting. The word “ochre” comes from the Greek meaning “pale yellow,” but somewhere along the way the word shifted to suggest something more robust—something redder or browner or earthier. Now it can be used loosely to refer to almost any natural earthy pigment, although it most accurately describes earth that contains a measure of hematite, or iron ore.<sup>90</sup>

The common law tort of negligence—a largely nineteenth century invention that has evolved into a law and economics utilitarian, risk-balancing calculus<sup>91</sup>—would be sky blue, the color of clarity and cool calculation.<sup>92</sup> The perimeter of the adjacent rectangle on the graph paper symbolizing the statutorily-inspired tort of negligence per se would be colored cobalt blue (a more directive and insistent hue than sky blue).<sup>93</sup>

In the various strict liability tort boxes on our grid-chart, the vicarious-based tort of respondeat superior would be charcoal black because black is a derivative color from the absorption of other colors.<sup>94</sup> By way of contrast, a yellow border

88. *Id.* at 195.

89. *Id.* at 26.

90. *Id.* at 26–27 (endnotes omitted).

91. For an early case applying the reasonable person standard of negligence law, see *Vaughan v. Menlove*, 132 Eng. Rep. 490 (C.P. 1837). The classic negligence law risk-balancing test was crafted by Judge Learned Hand in *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

92. See FINLAY, *supra* note 86, at 304 (describing how John Tyndall, nineteenth century British scientist, stated that he thought best while walking in the mountains, enjoying the clarity of the sky).

93. Finlay described origins of cobalt:

[C]obalt had been used in paint for years, but in its purer form it didn’t reach European paint boxes until the nineteenth century, when a scientist called Louis-Jacques Thénard managed to make it into a pigment. If he had been living today, Michelangelo would have liked this blue best. It is expensive, and leans toward violet. It was the Persians who really first found how good cobalt was a glaze—they used it for the blue tiles of their mosques . . . .

*Id.* at 296–97. The Ming-era Chinese “coveted” cobalt and used it as a glaze on exquisitely refined pottery. *Id.* at 297.

94. *Id.* at 71.

would surround the tort of abnormally dangerous activity liability because of the ambiguity of the balancing factors used in determining whether an activity is abnormally dangerous<sup>95</sup> and the resemblance of some of these factors to negligence-like risk–utility analysis.<sup>96</sup> Like the tort of strict liability for abnormally dangerous activity, of all the colors, “yellow gives some of the most mixed messages of all.”<sup>97</sup> Thus, yellow

is the color of pulsating life—of corn and gold and angelic haloes—and it is also at the same time a color of bile, and in its sulphurous incarnation it is the color of the Devil. In animal life, yellow—especially mixed with black—is a warning. Don’t come near, it commands, or you will be stung or poisoned or generally inconvenienced. In Asia yellow is the color of power—the emperors of China were the only ones allowed to sport sunshine-colored robes. But it is also the color of declining power. A sallow complexion comes with sickness; the yellow of leaves in autumn not only symbolizes their death, it indicates it. The change shows that the leaves are not absorbing the same light energy that they used to take in when they were green and full of chlorophyll. It shows they no longer have what it takes to nourish them.<sup>98</sup>

In considering the more specific doctrines, rules, tests, and even the more specific elements associated with each discrete tort,<sup>99</sup> it would be interesting to attempt to imitate the artistic enterprise of artists like Piet Mondrian. Consider the common law tort of negligence, for example. To refine and subdivide the sky blue rectangle symbolizing the tort,<sup>100</sup> the “experimenter” might aesthetically depict the characteristics of negligent conduct on the grid of tort law by assorted rectangles within rectangles, each with differing shapes and areas. In this regard, first of all, an image of Mondrian’s 1942 canvas entitled *New York City I* comes to mind: a painting of “primary colors—yellow, but also red and blue—[that] traverse the square canvas, interweaving with each other.”<sup>101</sup> Mondrian’s numerous, different-

95. See RESTATEMENT (SECOND) OF TORTS §§ 519–20 (1977) (utilizing terms such as “common usage,” “inappropriateness,” and “value”).

96. See RESTATEMENT (SECOND) OF TORTS §§ 292–93 (1965) (outlining factors the trier of fact should consider in determining the utility and the risk of an actor’s conduct).

97. FINLAY, *supra* note 86, at 203.

98. *Id.*

99. See *supra* note 80 and accompanying text.

100. See *supra* notes 91–93 and accompanying text.

101. HANS L.C. JAFFÉ, PIET MONDRIAN 122–23 (1985) [hereinafter MONDRIAN]. See Figure 1 below.

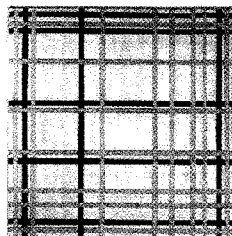


Figure 1: Piet Mondrian's  
*New York City I*

sized and shaped rectangles-within-rectangles vividly convey the structure of the assorted characteristics of negligent conduct within the common law tort of negligence, even though Mondrian's primary color scheme in this work might not accurately depict the emotive force of the specific characteristics of the common law tort of negligence.<sup>102</sup> Thus, for instance, the objective test of a defendant's conduct in a common law negligence action—whether the defendant's conduct conformed to the conduct of a hypothetical “reasonable man”<sup>103</sup>—is nicely depicted in Mondrian's *New York City I* by one of the larger rectangles running around the perimeter of his canvas; the objective test is an important concept and serves to explain many of the more specific aspects of the common law tort of negligence which smaller rectangles within those larger rectangles might represent. The aspects might include, for example, the knowledge, experience, and perception which a reasonably prudent person would have perceived under the circumstances as well as those things which a reasonable person knows about the community.<sup>104</sup>

Take a second example: the tort of battery. A second grid-aesthetic example seems appropriate: Mondrian's more basic 1936 canvas, *Composition With Red and Black*, consisting of “an enclosed square” that is “further subdivided and enlivened by” horizontal lines; the “squares are brought together into larger units or, if you will, in which larger squares are divided up into [a few] smaller units.”<sup>105</sup> Again, putting aside Mondrian's specific palette choices in this painting (which we might want to modify to show the emotive force of specific characteristics of this intentional tort),<sup>106</sup> Mondrian's minimalist, subdivided rectangles convey the structure of the spare elements and the associated doctrines of the tort of battery: the two manifestations of intent, which include a defendant's desire to cause a harmful or offensive contact with the plaintiff or the plaintiff's apprehension of imminent contact, or defendant's knowledge that the consequences are substantially certain to result from defendant's conduct;<sup>107</sup> the concept of the plaintiff's “person” including those things in contact with it or closely connected and identified with it;<sup>108</sup> the rule that the plaintiff need not be aware of the defendant's contact at the

102. See *supra* notes 86–98 and accompanying text.

103. RESTATEMENT (SECOND) OF TORTS § 283 (1965).

104. *Id.* §§ 289–90.

105. MONDRIAN, *supra* note 101, at 116–17. See Figure 2, below.

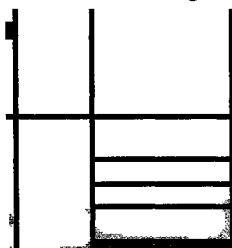


Figure 2: Piet Mondrian's  
*Composition with Red and  
Black*

106. See *supra* notes 86–87 and accompanying text.

107. See RESTATEMENT (SECOND) OF TORTS §§ 8A, 13, 14, 16, 18, 20 (1965).

108. *Id.* § 18 cmt. c.



time;<sup>109</sup> the definition of harmful contact<sup>110</sup> and the more expansive definition of offensive contact;<sup>111</sup> and various privileges, or defenses, to battery such as consent,<sup>112</sup> self-defense,<sup>113</sup> defense of others,<sup>114</sup> and the like.

For more esoteric torts—like negligent infliction of emotional distress, defamation, and invasion of privacy, for example—the rectilinear limitations of the grid aesthetic in conveying the complexity and nuances of assorted doctrines and definitions and rules tempts consideration of artists like Vasily Kandinsky (in particular his final, “biomorphic” phase).<sup>115</sup> Indeed, Kandinsky’s 1936 *Composition IX*, with its “superimposed planes” and “hard-edged, diagonal stripes” and “floating rectangles, squares, and several circles at both ends,”<sup>116</sup> captures the multiple dimensions of these three complex torts.<sup>117</sup> Thus, utilizing complex imagery like

109. *Id.* § 18 cmt. d.

110. *Id.* § 15. Harmful contact is actionable if it produces bodily harm. This includes any physical damage, however slight, to any part of the plaintiff’s body (such as a cut or a bruise) or even so-called “beneficial” contacts (like plastic surgery). *Id.* § 15 cmt. a.

111. *Id.* § 19. An offensive contact is one which “offends a reasonable sense of personal dignity.” RESTATEMENT (SECOND) OF TORTS § 19 (1965).

112. *See id.* §§ 49–62, 167–75, 252–56; RESTATEMENT (SECOND) OF TORTS §§ 892, 892A–892D (1979).

113. *See* RESTATEMENT (SECOND) OF TORTS §§ 63–68, 261 (1965).

114. *See id.* §§ 76, 156.

115. *See* THOMAS M. MESSER, VASILY KANDINSKY (James Leggio ed., 1997) [hereinafter KANDINSKY]. According to Messer, Kandinsky’s art is characterized by three distinct phases:

In this first phase, with its ever more intense expressivity, the emerging distinction between a kind of painting that has gradually stripped itself of mimetic vestiges and one that has embraced, from the outset, a non-objective mode, becomes increasingly significant. In Kandinsky’s subsequent development, roughly from the early 1920s to the early 1930s the figurative element was virtually excluded, and pictorial content was conveyed through quasi-geometric means. The expressive component of painting was reduced in favor of rational construction. The artist’s final major phase, in the last ten years of his life, revealed a painter largely freed from dogmatic prescriptions and capable therefore of responding to fresh stimuli. He found inspiration for a new kind of biomorphic form that allowed him to strike a balance between the objective and the non-objective, the expressive and the rational.

*Id.* at 8–10 (emphasis added).

116. *Id.* at 118–19. See Figure 3 below.



117. First, the tort of negligent infliction of emotional distress has special rules for bystanders and direct victims, with various proximate cause limitations to limit emotional distress recovery. *See* RESTATEMENT (SECOND) OF TORTS § 905 (1979); RESTATEMENT (SECOND) OF TORTS §§ 306, 312, 313, 436, 436A, 456 (1965). Second, the tort of defamation is characterized by multiple rules for what is defamatory, the degree of fault a plaintiff must show on the part of the defendant in knowing or failing to ascertain the falsity of a statement, and the need for proof of special damages for some defamatory statements versus special damages rules being “actionable per se” for other defamatory statements. *See* RESTATEMENT (SECOND) OF TORTS §§ 558–623 (1977). Third, the tort of invasion of privacy, as it has developed in the caselaw to date, involves separate rules and doctrines for four distinct wrongs: (1) appropriation of one’s name or likeness; (2) intrusion upon another’s privacy or private affairs; (3) public disclosure of private facts about the plaintiff and (4) placing the plaintiff in a false light in the public eye. *See id.* §§ 652A–652E.

paintings by Mondrian and Kandinsky might enable the experimenter to portray the linear dimensions of tort law on the grid. But the complexities of modern tort law yield vital insight by shifting the experiment to the energy aesthetic.

## 2. *Energy Aesthetics*

Modern tort law is also characterized by constantly shifting forces of policy, values, and principles that coalesce and then recombine in endless ways. The numerous policies that press and pull on tort doctrine, rules, and outcomes bracingly illustrate the multiple force fields of tort law. One current torts casebook,<sup>118</sup> for example, articulates a dozen separate policies for modern tort law:

1. "Liability should be based on 'fault.'"<sup>119</sup>
2. "Liability should be proportional to fault."<sup>120</sup>
3. "Liability should be used to deter accidents."<sup>121</sup>
4. "The costs of accidents should be spread broadly."<sup>122</sup>

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118. VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* (2d ed. 1999).

119. *Id.* at 7.

The fault principle has been strongly influential for more than a century, and it accounts for much of the law of negligence, and other tort rules as well. In part, it is intended to allow individuals a maximum sphere of action free of the risk of tort liability. According to the fault principle, only where the defendant's conduct is blameworthy should liability be imposed. In general, the term "fault" is used in torts to encompass situations where harm is the product of intentionally tortious conduct or failure to exercise care.

*Id.*

120. *Id.*

The proportionality principle seeks to limit or refine application of the fault principle. In part, it holds that liability should not be levied on an individual tortfeasor, even if fault is shown, if doing so would expose the defendant to a burden that is disproportionately heavy or perhaps unlimited. In addition, the principle of proportionality holds that where the tortious conduct of two or more persons contributes to the production of harm, liability for the loss should be allocated among the actors in accordance with the degree to which their conduct has precipitated the damage.

*Id.*

121. *Id.*

The deterrence principle recognizes that tort law is concerned not only with fairly allocating past losses, but also with minimizing the costs of future accidents. According to this principle, tort rules should discourage persons from engaging in those forms of conduct which pose an excessive risk of personal injury or property damage. In some cases, this means nothing more than that liability should be imposed on those who deliberately inflict injury or cause harm by ignoring foreseeable risks. In other situations, such as those where a risk of harm is equally foreseeable to more than one person, the policy of deterrence favors placing the threat of liability on the party best situated to avoid the loss, or, as some might say, the cheapest cost avoider.

JOHNSON & GUNN, *supra* note 118, at 7.

122. *Id.*

The idea underlying the "spreading" rationale is that the financial burden of accidents may be diminished by spreading losses broadly so that no person is forced to bear a large share of the damages. For example, some argue that when a defective product unforeseeably causes injury to a consumer, it is best to place the loss on the manufacturer, even in the absence of fault, for unlike the unfortunate consumer, the manufacturer can distribute the loss to a large segment of the public by incrementally adjusting the price of its products. Losses can be spread not only through increases in the costs of goods and services, but through other devices such as taxation and insurance. Though controversial, the spreading

5. "The costs of accidents should be shifted to those best able to bear them."<sup>123</sup>
6. "Those who benefit from dangerous activities should bear resulting losses."<sup>124</sup>
7. "Tort law should foster predictability in human affairs."<sup>125</sup>
8. "Tort law should facilitate economic growth and the pursuit of progress."<sup>126</sup>
9. "Tort law should be administratively convenient and efficient, and should avoid intractable inquiries."<sup>127</sup>
10. "Tort law should discourage the waste of resources."<sup>128</sup>
11. "Courts should accord due deference to co-equal branches of government."<sup>129</sup>
12. "Accident victims should be fully compensated."<sup>130</sup>

principle, in recent years, has revolutionized the law of products liability and has catalyzed other changes in tort doctrine.

*Id.*

123. *Id.*

Although this principle is not concerned with identifying which persons are in a good position to spread liability, the "shifting" rationale is closely related to the spreading principle insofar as it seeks to use the process of loss allocation to minimize the economic burden of accidents. According to this view, a loss will be less severely felt if it is placed on one with substantial resources than on one with limited wealth, and therefore losses should be shifted to those financially able to bear them. Proponents of this view argue, for example, that it is undesirable to force an accident victim with only \$100 in assets to bear the full amount of a \$100 loss, for doing so means that [sic] the accident will have a devastating financial impact. In contrast, shifting the same loss to a defendant with a million dollars in assets may be desirable, for then the loss will not really be felt by either the plaintiff or the defendant. To be sure, the law has never held that a poor person should always be able to recover from a rich one, or that a wealthy person is precluded from seeking damages from one financially less well to do. Indeed, in many quarters, there is great reluctance to applying one law to the rich and another to the poor. Yet, the shifting rationale—sometimes pejoratively referred to as the search for the "deep pockets"—has not been without influence. However, its impact on tort doctrine has been less overt than the impact of many other policy considerations.

*Id.* at 7–8.

124. *Id.* at 8.

125. JOHNSON & GUNN, *supra* note 118, at 8.

126. *Id.*

127. *Id.*

Only a limited amount of resources can be devoted to the administration of justice in any society. This principle holds that tort rules should be shaped so that the dollars spent on accident compensation are efficiently employed. Thus, legal standards should not be so complex or uncertain that their application entails an undue expenditure of judicial resources or imposes unnecessarily high litigation costs on parties. So, too, convenience and efficiency discourage the pursuit of what might be called intractable inquiries, matters where the facts are such that even after expenditure of considerable time and money, there is a substantial risk that an erroneous result will be reached.

*Id.*

128. *Id.*

129. *Id.*

130. JOHNSON & GUNN, *supra* note 118, at 8.

There is a strong public interest in insuring that accident victims obtain the financial resources needed to overcome the injuries they have sustained. Proponents of this view argue that tort rules should be crafted and applied with an eye toward this goal, even if that means diminished respect for the fault or proportionality principles or other tort policies. A corollary to the compensation

The push and pull of these tort policies are “sometimes antagonistic.”<sup>131</sup> By way of illustration, “[a]dherence to the fault principle may mean that an actor will not be held liable for an unforeseeable injury, but also that the victim of that accident will not be compensated.”<sup>132</sup> But this is not always the case:

[I]t is often possible for a decision on issues of accident compensation to advance more than one tort goal. For example, a court may hold that a driver who causes an auto accident by exceeding the prescribed speed limit is liable to an injured pedestrian for all resulting damages. In that case, it may be said that the decision bases liability on fault (because the conduct was unreasonable and the harm was foreseeable), deters future accidents by this driver or others (by showing that violators will be held liable), fully compensates the victim (by imposing liability for resulting damages), embraces a predictable standard (namely the posted speed limit), and defers to the legislature’s judgment as to the maximum reasonable speed on the road (by holding that violation of the speed limit constitutes actionable negligence).<sup>133</sup>

These competing and sometimes complementary policies of modern tort law bring to mind orreries—the clockwork, astronomical apparatuses of eighteenth century natural philosophers. These orreries depicted the various planets of our solar system, along with their various moons, moving in fixed orbits that occasionally align with other planets.<sup>134</sup> In a related way, modern tort law’s seemingly chaotic policies may be better envisioned as akin to the free-form sculptural works created by Alexander Calder, which came to be labeled “mobiles” by fellow artist Marcel Duchamp.<sup>135</sup> Calder’s 1956 mobile, *Red Lily Pads*, owned by the Guggenheim museums, is apropos in representing the potential multifarious juxtapositions and energy tensions among various tort policies in influencing jurisprudential outcomes and in shaping doctrine, rules, and principles.<sup>136</sup> Reading the following description of Calder’s mobile sculptures encourages better appreciation of those policies of modern tort law, such as the fault, deterrence, or full compensation principles<sup>137</sup> which, like Calder’s art, can be experienced as “anthropomorphic metaphors”:

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principle is the argument that a system which awards compensation on a regular, predictable, and consistent basis is preferable to one in which doctrinal and administrative vicissitudes render the availability of compensation a matter of chance.

*Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. See generally I. BERNARD COHEN, *SCIENCE AND THE FOUNDING FATHERS: SCIENCE IN THE POLITICAL THOUGHT OF JEFFERSON, FRANKLIN, ADAMS, AND MADISON* 80–86 (1995) (describing various orreries admired by Thomas Jefferson, and explaining that the first orreries were constructed in London in 1713 and showed only the motions of the Earth and Moon, but by mid-century orreries displayed the orbital motions of planets and their satellites).

135. GUGGENHEIM MUSEUM: A TO Z 59 (Nancy Spector ed., 1992) [hereinafter GUGGENHEIM COLLECTION].

136. See *id.* at 58–59.

137. See JOHNSON & GUNN, *supra* notes 119–30 and accompanying text.

[The mobile] is now a vernacular art form, but when Calder invented it the mobile was viewed as an avante-garde achievement, a sculptural counterpart to Joan Miró's paintings of buoyant, biomorphic figures and Jean Arp's abstract reliefs. Although they are nonfigurative, Calder's hanging mobiles, particularly the monumental yet delicate *Red Lily Pads*, retain references to the natural world: the dancing and spinning of the disks evoke the intangible qualities of the air that propels them. According to art historian Rosalind Krauss, the mobiles—as interconnected vertical structures in space—create a sense of volume analogous to that of the human body. In their surrender to the pull of gravity and their displacement of space through motion, the mobiles become anthropomorphic metaphors.<sup>138</sup>

Alternatively, meditation on Brancusi's wooden sculptures (such as *Adam and Eve*, *The Sorceress*, and *King of Kings*), the dynamic interaction of various shaped spheres, hollowed-out cubes, blocks, and curvilinear forms spark recognition of the charged energy field of modern tort policies.<sup>139</sup>

The grid aesthetic and the energy aesthetic<sup>140</sup> can deepen understanding of the structure of modern tort law and the interacting forces affecting modern tort law. But a transition to the perspectivist aesthetic is necessary to put human faces on modern tort disputes.

### 3. *Perspectivist Aesthetics*

What are the various frames of reference, contexts, or perspectives of the actors or observers in tort cases? What are their social identities? Their political identities? The perspectivist aesthetic allows commentators to move from consideration of tort grids and tort energies to consider what one recent book refers to as “torts stories”.<sup>141</sup>

Behind each notable case are a host of concerns and considerations that are hidden even from the discerning eye, focused as it is on the court's selective recitation of the facts and its characterization of the issues and arguments presented to it. Often, much more can be learned from digging beneath the surface to find out more about the parties, the events giving rise to the claimed injury, and the corresponding context of socio-economic circumstances in which the case arose. And then the lawyers enter the picture. How did they perceive and present the case—what were their lawyering strategies and how did they shape the way the case ultimately turned out? So, too, what of roles played by the trial judge, and in some instances, an intermediate appellate court?

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138. GUGGENHEIM COLLECTION, *supra* note 135, at 58.

139. *See id.* 52–53. Interestingly, Brancusi intended his abstract wooden sculptures to be a “poetic evocation of spiritual thought.” *Id.* at 52. *Cf.* Robert F. Blomquist, *Law and Spirituality: Some First Thoughts on an Emerging Relation*, 71 UMKC L. REV. 583 (2003) (encouraging the emergence of law and spirituality as a new interdisciplinary field of scholarship).

140. *See supra* notes 86–139 and accompanying text.

141. *See TORTS STORIES* (Robert L. Rabin & Stephen D. Sugarman eds., 2003).

As these lines of inquiry are meant to suggest, every tort case begins with a particular misadventure of its own, and runs the course of a system in which distinct contributions are made by a variety of participants along the way to final resolution. To view these elements in fine detail is to understand the dynamic character of tort law—indeed, the dynamic character of the common law, more generally—in a fashion that by its very nature cannot be fully conveyed in an appellate judicial opinion.<sup>142</sup>

Going beyond the published appellate opinions in tort cases to examine and appreciate the economic situation of a tort plaintiff, like part-time janitor and part-time cleaning woman Helen Palsgraf in the famous case of *Palsgraf v. Long Island Railroad Co.*,<sup>143</sup> clarifies the role of economic class in early twentieth century America, and the insensitivities of the upper-middle-class judges to serious injuries and inability to earn a living.<sup>144</sup>

Ascertaining the character of a tort plaintiff demonstrates the risks that good samaritans often face in the real world. Take, for example, Donald MacPherson, plaintiff in the celebrated case of *MacPherson v. Buick Motor Co.*,<sup>145</sup> who was on “a mission of mercy” to transport his friend to a far-off hospital for hand surgery when one of the wheels of his automobile collapsed.<sup>146</sup> Then consider the seemingly all-American Iowa farm couple Mr. and Mrs. Edward Briney in *Katko v. Briney*,<sup>147</sup> forced to pay considerable compensatory and punitive damages to the thief Marvin Katko, who was severely injured by a 20-gauge spring shotgun, set earlier by the Brineys, when he broke into their vacant farm house near Oskaloosa, Iowa.<sup>148</sup> Fathoming the full, gritty, oppressive magnitude of the legal consequences visited upon them enables society to sympathize with the hapless suffering of well-intentioned, but imperfect, property owners, while also feeling the pain of a common thief who, nevertheless, deserved a tort remedy for injuries received from protective measures taken by property owners out of all proportion to decency and good sense.<sup>149</sup>

142. *Id.* at 1.

143. 162 N.E. 99 (N.Y. 1928) (Andrews, J., dissenting).

144. See Robert L. Rabin & Stephen D. Sugarman, *Introduction to TORTS STORIES* 2–8 (Robert L. Rabin & Stephen D. Sugarman eds., 2003); see also JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW* 111–51 (1976) (noting Cardozo’s disturbingly concise statement of the facts in *Palsgraf*, shedding no light upon the individual players in the case and the ensuing disappearance of the personalities behind the shadow of emerging tort theory); RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 33–48 (1990) (discussing *Palsgraf*’s celebrity, due in part to Cardozo’s economical statement of the facts, which omits all extraneous details of Mrs. Palsgraf’s background).

145. 111 N.E. 1050 (N.Y. 1916).

146. James A. Henderson, Jr., *MacPherson v. Buick Motor Company: Simplifying the Facts While Reshaping the Law*, in *TORTS STORIES*, *supra* note 141, at 41–43.

147. 183 N.W.2d 657 (Iowa 1971).

148. *Id.* at 658–59 (Larson, J., dissenting).

149. The Iowa Supreme Court affirmed Katko’s jury verdict of \$20,000 in actual damages and \$10,000 in punitive damages. *Id.* at 658, 662. The rest of the story is fascinating and painful to contemplate. “Katko pled guilty to petty larceny and received a 30-day suspended sentence and a \$50 fine,” JOHN W. WADE ET AL., *CASES AND MATERIALS ON TORTS* 109 (9th ed. 1994), for breaking and entering the Briney’s vacant property with intent to steal old bottles and fruit jars which he thought were antiques. *Katko*, 183 N.W.2d at 658. “The Brineys had to sell 80 acres of their 120-acre farm in order to pay the judgment in this case.” WADE ET AL., *supra*, at 109. Moreover, “[a] strange development later arose between the parties:”

When the 80 acres were put up for judgment sale and there were no bids above the minimum price of \$10,000, three neighbors borrowed money to purchase the

Looking at a case from the standpoint of race, ethnicity, or gender considerations afford some illuminating insights. Take for example, Mary O'Brien, the Irish immigrant woman who sued a steamship line for battery because the ship surgeon gave O'Brien a vaccination before she came ashore to her new home in the United States.<sup>150</sup> In *O'Brien v. Cunard*, the Supreme Judicial Court of Massachusetts affirmed the directed verdict in favor of the Cunard Steam-Ship Company based on the privilege of apparent consent.<sup>151</sup> But why did the American courts dispense such harsh judgment on a female Irish immigrant?<sup>152</sup> From her perspective, Ms. O'Brien likely felt intimidated and powerless to speak up, as the other 200 immigrant passengers no doubt felt. Was the judiciary correct to assume that Ms. O'Brien was literate and could read the various "notices" of the quarantine regulations about the need to obtain a vaccination?<sup>153</sup>

The perspectives of lawyers in a tort case such as the Woburn, Massachusetts groundwater contamination toxic tort case, *Anderson v. Cryovac, Inc.*,<sup>154</sup> reflect the different versions of reality involved in that dispute.<sup>155</sup> From the perspective of the plaintiffs' lawyer, Jan Schlichtmann, the litigation process which resulted in a bifurcated trial—with the groundwater contamination causation tried first—led to a lengthy, expensive, and unjust result.<sup>156</sup> From the perspective of the defendant W.R. Grace & Co.'s lawyer, William Cheeseman, the way the case unfolded supported his client's view that "no credible scientific evidence [existed] that the

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land for a dollar more, expecting to hold it for the Brineys until they won their appeal. When they did not win, the neighbors leased the land back to them for enough to pay taxes and interest costs on the money the neighbors had borrowed. Several years later when land values rose, the neighbors offered to sell it back to [the] Brineys at a price they could not afford. One of the neighbors then bought the property from the others for \$16,000 and sold it to his son for \$16,500. [The] Briney[s] and Katko, to whom the Brineys still owed money from the judgment, then sued the neighbors, arguing that the land was being held in trust for the Brineys and that they were entitled to the profit from the increase in value. Just before the case came to trial, it was settled for a sum large enough to pay the remainder of [the] Brineys' judgment to Katko.

*Id.* "A public outcry about the decision resulted in the introduction of 'Briney Bills' in several state legislatures." *Id.*

150. *O'Brien v. Cunard S.S. Co.*, 28 N.E. 266, 266 (Mass. 1891).

151. *Id.* at 266–67.

152. See generally Ann C. Shalleck, *Feminist Legal Theory and the Reading of O'Brien v. Cunard*, 57 MO. L. REV. 371 (1992) (one of many articles in a symposium edition on the *O'Brien* case).

153. *Id.* at 375–77.

154. 862 F.2d 910 (1st Cir. 1988), *aff'g* 96 F.R.D. 431 (D. Mass. 1983).

155. See generally LEWIS A. GROSSMAN & ROBERT G. VAUGHN, A DOCUMENTARY COMPANION TO A CIVIL ACTION (rev. ed. 2002) (compilation of documents from the *Anderson v. Cryovac* case, with introductory writings by the primary lawyers for each of the parties involved).

156. Schlichtmann expressed his perspective as follows:

I suggest one way to judge the Rules and their application in the Woburn case is by reference to the first rule: Rule 1 of the Federal Rules of Civil Procedure provides that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." Judged by this yardstick, how did the application of the Civil Rules to the Woburn case measure up? Can nine years of litigation be called "speedy"? Can litigation that consumed tens of thousands of hours of work by hundreds of people at the cost of tens of millions [of] dollars be fairly characterized as "inexpensive"? And can the resolution be termed "just"? It was a resolution that involved a trial at which no family member was allowed to tell his or her story; legal judgments about the world which facts and the passage of time have demonstrated were clearly wrong; and a record that was admittedly corrupted.

Jan Richard Schlichtmann, *Introduction* to LEWIS A. GROSSMAN & ROBERT G. VAUGHN, A DOCUMENTARY COMPANION TO A CIVIL ACTION, at xxvi (rev. ed. 2002).

Grace chemicals could have reached the municipal wells before the wells were taken out of service” and “no evidence [showed] that these chemicals are capable of causing” childhood leukemias and other physical maladies.<sup>157</sup>

And, from the perspective of Jerome P. Facher, lawyer for the defendant Beatrice Foods Company, the result of the *Anderson* case was appropriate because Beatrice Foods did not legally cause the plaintiffs’ injuries and deaths. Facher explained his view:

I am always surprised by those who can comfortably rush to the conclusion that a “deep pocket” defendant, once accused of wrongdoing, must or should somehow be liable for a plaintiff’s serious personal injuries. In doing so, their conclusions—whether motivated by sympathy, compassion or outrage—ignore the legal necessity to prove that the defendant’s conduct caused the plaintiff’s injuries. In *Anderson*, the plaintiffs brought their claim to the civil justice system for resolution by a jury on the facts and the law. Their lawyers knew that, in that system, liability is based on fault, that fault is established by evidence, and that no loss can be shifted from an injured party to a defendant without first showing that the defendant’s conduct caused that loss. It is still one of the basic principles of our civil justice system that no party should pay for losses it did not cause, no matter how serious the injury. In *Anderson*, that basic principle was reaffirmed by the very system the plaintiffs chose to decide their dispute.<sup>158</sup>

#### 4. Dissociative Aesthetics

Sometimes, those that talk about tort law have difficulty providing coherent forms; sometimes, commentators try to dissolve tort law forms. Professor Schlag said, “The experience of dissociation might be described as the unraveling of a secure identity to the point at which we really do not know what it is anymore.”<sup>159</sup> His reasoning is as follows:

One concept lapses into the next as the differentiations dissipate. In the dissociative aesthetic, the state, legal rules, custom, and psychological dispositions are not external to each other; they are already glommed onto each other. In the dissociative aesthetic, one comes to recognize that various identities—to wit, law, the state, rules, custom, psychological disposition, and more—are already so conjoined that no conceptual work can separate them out. *The sensation here is of conceptual quicksand, of distinctions that dissipate—a kind of*

157. William J. Cheeseman, *Introduction* to LEWIS A. GROSSMAN & ROBERT G. VAUGHN, A DOCUMENTARY COMPANION TO A CIVIL ACTION, at xiv (rev. ed. 2002).

158. Jerome P. Facher, *Introduction* to LEWIS A. GROSSMAN & ROBERT G. VAUGHN, A DOCUMENTARY COMPANION TO A CIVIL ACTION, at xxiii (rev. ed. 2002); see also Robert F. Blomquist, *Bottomless Pit: Toxic Trials, the American Legal Profession, and Popular Perceptions of the Law*, 81 CORNELL L. REV. 953 (1996) (reviewing Jonathon Harr’s *A Civil Action*, and specifically, the problem of “indeterminate defendants”).

159. Schlag, *supra* note 72, at 1097.



*virtual jurisprudential reality in which identities morph into each other.*<sup>160</sup>

Considering Professor Goldberg's description of the scholarly displeasure with modern American tort law,<sup>161</sup> this frustration and unwillingness to love tort law is likely due to tort scholars being stranded in a dissociative aesthetic that sees no rhyme or reason, no coherence, and no utility for tort law grids, energies, and perspectives. Scholarly tort unlovers' understanding might be labeled a pessimistic dissociative aesthetic that is wedded to logic and therefore, is dismayed at the "hypertrophied differentiation" of modern tort law and experiences "a moment at which the accumulation of differentiations comes crashing down, leaving the legal self flailing around in intellectual mush."<sup>162</sup> But, this scholarly pessimistic dissociative aesthetic overlooks a more optimistic dissociative aesthetic that unleashes creativity in formulating and reconstructing new tort law:

[To] appreciate the ways in which legal identities can collapse into a multitude of associations allows the advocate or judge to reconstruct those identities in desired ways. *This breakdown and reconstruction is perhaps the most intense aesthetic moment in law*—the point at which the legal profession is creating law.<sup>163</sup>

An optimistic dissociative aesthetic for modern tort law, therefore, allows advocates, judges, and legal scholars, in extraordinary cases, to contemplate "new torts": new concepts, new doctrines, new rules, and even new causes of action.<sup>164</sup> In less extraordinary tort cases, an optimistic dissociative aesthetic, drawing upon insights from legal realism, moral theory, and critical legal studies, can empower advocates and judges to reformulate and reconstruct tort law doctrines, moral justifications, and social visions.<sup>165</sup> Even in ordinary tort cases, an optimistic dissociative aesthetic allows advocates and judges to shape the "facts," and therefore, the dispositive tort "law" of the dispute:

[An optimistic dissociative aesthetic] knows that "the law" and "the facts" are created in light of each other. Practicing lawyers know that, in an important sense, "the facts" are effects of sundry performances: recollections, statements, behaviors, affects, linguistic performances of clients, witnesses, experts, and more. They know, as well, that the law is, in an important sense, an amalgamation of signs, beliefs, events, linguistic expressions, habits, perceptions, and prejudices that the lawyer helps compose for the occasion: for the client, the judge, and other relative

160. *Id.* (emphasis added).

161. See *supra* notes 29–37 and accompanying text.

162. Schlag, *supra* note 72, at 1101.

163. *Id.* at 1098 (emphasis added) (footnote omitted).

164. See generally Robert F. Blomquist, "New Torts": A Critical History, Taxonomy, and Appraisal, 95 DICK. L. REV. 23, 129 (1990) ("At its essence . . . the term 'new tort,' as used by American courts and commentators over the past one hundred years, is an indication, an item of circumstantial evidence, that a court is being requested to or has decided to use judicial creativity to alter existing tort law.").

165. See, e.g., HENRY J. STEINER, MORAL ARGUMENT AND SOCIAL VISION IN THE COURTS: A STUDY OF TORT ACCIDENT LAW (1987) (exploring the evolution of tort accident law and the background influences of moral justifications and social vision on judicial opinions).

audiences. The lawyer knows that both law and facts are, in important ways, productions. In experiencing the fluidity of law and fact, the lawyer is enacting the [optimistic] dissociative aesthetic. It is, of course, often her job, as she writes her brief or her closing argument, to reduce this fluidity to the crystal clarity of a grid or to the moving force of energy.<sup>166</sup>

#### IV. LEARNING TO LOVE TORTS

Based on the insights of Professor Goldberg, legal scholars should learn to champion and love modern American tort law for five reasons. First, loving torts allows scholars to appreciate the complexity of the facts and legal constructs that compromise this unruly branch of the law without conditioning our approval on any particular aesthetic or aesthetics. This appreciation can allow boundaries to dissolve and legal activity to thrive.<sup>167</sup>

Second, the grid aesthetic of tort law—compromising the marvelous cubbyholes of separately named torts along with the accompanying doctrines, principles, rules—is an abstract thing of beauty and some ugliness, harmony and some disharmony, and order and some disorder,<sup>168</sup> that constitutes the system of private law that governs social relations.<sup>169</sup> The grid aesthetic, on which Professor Weinrib focuses with majestic insight, reveals the goodness, normative force, and internal intelligibility of tort law's concern for non-functionalist corrective justice.<sup>170</sup> Such aesthetic form is worthy of admiration—and love.

Third, the energy aesthetic of tort law—consisting of the multiple policies that expand, compress, or reconfigure the tort grid in interesting ways—should instill in observers of tort law the excitement and love for the vibrating forces that pull and push (in the artistic physics of functional, public law) on tort categories and presuppositions.<sup>171</sup>

Fourth, the perspectivist aesthetic of tort law, with its different views, diverse experiences, and multiple interests, should inspire fondness, fancy, and devotion to listening, telling, and re-telling of tort stories.<sup>172</sup> Loving torts from the perspectivist aesthetic, however, requires both a detached and unconditional appraisal of the mix of tort stories and the cultivation of a taste for plaintiffs' tort stories, defendants' tort stories, and non-litigant institutional tort stories.

Fifth, the dissociative aesthetic of tort law, with its incoherent forms, dissolution of categories, and sense of collapse, is often jarring, disorienting, and frightening, but can lead legal scholars to transformational experiences in thinking

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166. Schlag, *supra* note 72, at 1098 (footnotes omitted). "In a tough case, however, it will often be a better brief and a better closing argument if she has experienced the dissociative aesthetic (before engaging in the reduction)." *Id.*

167. See *supra* notes 22–24 and accompanying text.

168. See *supra* notes 86–117 and accompanying text.

169. See *supra* notes 40–61 and accompanying text.

170. See *supra* notes 49–71 and accompanying text.

171. See *supra* notes 118–40 and accompanying text; see generally Robert F. Blomquist, *Goals, Means, and Problems for Modern Tort Law: A Reply to Professor Priest*, 22 VAL. U. L. REV. 621 (1988) (criticizing Professor George Priest's article *Modern Tort Law and Its Reform*, 22 VAL. U. L. REV. 1 (1987), and its focus on a limited number of goals tort law serves in this modern, diverse society).

172. See *supra* notes 141–58 and accompanying text.

about tort law and, in the final analysis, can coax “tough love” and appreciation for the catalytic potential of legal deconstruction as a prelude to legal construction.<sup>173</sup>

## V. CONCLUSION

In a follow-up article to his *Vanderbilt Law Review* essay about the “unloved” quality of modern tort law,<sup>174</sup> Professor Goldberg wrote about twentieth-century tort theory.<sup>175</sup> Interestingly, he suggests that one possible response to tort law theory is to “adopt a stance of congenial pluralism” because modern “[t]ort law is a multifaceted enterprise, so . . . each theory brings something to the table” and “[e]ach . . . highlights factors that matter to tort law, and we should embrace them all.”<sup>176</sup> Goldberg, however, ultimately rejects “congenial pluralism”—at least for tort scholars, while suggesting that judges might benefit from this approach—because, while “congenial pluralism is surely appropriate as an antidote to dogmatism,” ultimately, “it leaves academics with nothing more to do than to talk past one another.”<sup>177</sup> Suggesting that academics “[c]ould . . . do a little better than that,”<sup>178</sup> Professor Goldberg offered a set of critical “methodological guidelines” for the development of twenty-first century tort law.<sup>179</sup>

Perhaps, Goldberg wants to fully love tort law but is afraid to validate (and, therefore, love) each and every aspect of tort law because of concerns about “coherence—a demand rooted in elemental notions of fairness, predictability, and efficacy.”<sup>180</sup> Goldberg wants tort scholars (and presumably tort students, judges, and legislators) to talk with one another instead of past one another; but, by implication, Goldberg wants to discredit and undermine (and, therefore, not fully love) what he views as incoherent accounts of tort law. These accounts, which presumably for him, would attempt to merely “explain or defend tort in terms of beauty or elegance.”<sup>181</sup>

Humbly, this Article suggests that learning to love torts—in all its capaciousness and messiness—is a necessary condition to creatively reformulating tort law for the twenty-first century.<sup>182</sup> And, learning to appreciate and to validate the four aesthetics of modern tort law—the grid, energy, perspectivist, and dissociative, whether they reveal beauty or elegance, ugliness or disorder, coherence

173. See *supra* notes 159–66 and accompanying text.

174. Goldberg, *supra* note 1.

175. Goldberg, *Twentieth-Century Tort Theory*, *supra* note 3.

176. *Id.* at 578.

177. *Id.* at 581.

178. *Id.*

179. *Id.* at 581–82.

180. *Id.* at 580.

181. Goldberg, *Twentieth-Century Tort Theory*, *supra* note 3, at 580.

182. The following describes one of the greatest literary works on love:

Lucretius opens his poem *On The Nature of Things* with an invocation to Venus, “the life-giver”—without whom nothing “comes forth into the bright coasts of life, nor waxes glad nor lovely.” Nor is it only the poet who speaks metaphorically of love as the creative force which engenders things and renews them, or as the power which draws all things together into a unity . . . . The imagery of love appears even in the language of science. The description of magnetic attraction and repulsion borrows some of its fundamental terms from the vocabulary of the passions; Gilbert, for example, refers to “the love of the iron for the loadstone.”

1 THE GREAT IDEAS: A SYNTOPICON OF GREAT BOOKS OF THE WESTERN WORLD 1051 (Mortimer J. Adler & William Gorman eds., 1952) (Volume 2 of GREAT BOOKS OF THE WESTERN WORLD (Robert Maynard Hutchins ed., 1952)).

or incoherence—is a necessary condition to loving torts. Thinking about tort law should be more in the nature of assembling collectibles—like biscuit tins, chewing gum wrappers, comics, art deco, ink wells, napkin rings, spittoons, or Civil War memorabilia. Many collectibles, in their own time, were “unfamiliar, and very possibly unloved or misunderstood.”<sup>183</sup> But over time, many collectibles became cutting-edge, interesting, and loved. Before we judge it, let us *truly* learn to love tort law.

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183. CAROL PRISANT, *ANTIQUES ROADSHOW 20TH CENTURY COLLECTIBLES* xxv (2003).

