Introduction

Why tort? Worse yet, why philosophy of tort? The reason here is certainly not to achieve an elegant, theoretical model or to transform tort as an entire area into a coherent and consistent whole. In fact, it is not clear how either of these understandings could be accomplished, as it is far from certain that the disparate matters we call "tort" fall into a single, discrete category. They are much more, to use Wittgenstein's famous metaphor, like a group of individuals sharing family resemblances, with remote cousins looking quite different than siblings.[1] Securities fraud is not very much like an auto accident, but an accounting malpractice matter might share a number of important features with each. In any case, from antitrust to civil rights cases, from toxic cleanup to defamation, from defective products to converted goods, there are enough features in common – imposed duties, private remedies, compensatory damages, proximate cause requirements, defenses of contributing or assuming or misusing fault, jury findings largely final and related concepts of intentionality – to be able to speak coherently about tort law as a field.

The idea of using philosophy to analyze law, particularly tort law, is one too easily reflexively protested. Such a protest would be misguided for two reasons. First, law is a contingent social activity, with few necessary constraints or required structures. Put simply, it can always be otherwise than it is. Philosophy of law has been labeled "descriptive sociology,"[2] and there is a strong suggestion of the contingent, empirical, political, and even irrational in all of law. One indication of all those things is the fact that, after decades or even centuries, any particular legal doctrine may be ever more unsettled and controversial. If some internal rationalizing or ameliorating force were at work, we would expect fewer legal disagreements, not more. Yet explaining this remains, and remains the task largely of theory. Without such theory, not only does law look chaotic, its force as a civilizing, equitable, just, and peace-making possibility

[1] Ludwig Wittgenstein, Philosophical Investigations §67 (1953).
[2] H. L. A. Hart, The Concept of Law vii (1961).

disappears. This theory need not be grand, but its does call upon us to make consistent the scattered legal fragments and to create a common set of justifications across disparate legal fields. Second, most legal philosophy is dissimilar from the philosophy conducted in universities and academic journals. The conceptual apparatus, semantic analysis, truth-theory consideration, quantification to propositional logic, and comfort with the most abstruse concepts is missing. Rather, philosophical tools and methods are used to illuminate (or at least attempt to illuminate) a field cluttered by practitioners and politicians (judicial or legislative) motivated to achieve certain ends often without concern of how they get there. Put differently, bad theory and shoddy logic are the prevailing practice, and bringing them to light provides a method to dislodge it.

Law is very much ends-driven, with talk of process values a fog to keep concealed a conflation of weak theory and facts delivered by those hired to prove them. American law has various actors who play the roles that provide the jerky dialogue of the action, but consider for a moment who they are and how they are picked. Parties to a suit may speak of justice, but they are driven almost entirely by self-interest. They participate because they are at the wrong end of a contract breach, an automobile accident, a property controversy, a failed sale, an employment dispute and, not unnaturally, they want what is best just for them. They hire lawyers as their agents to do that. Assertions that the advocate/adversary system – pitting championed opposing clients, washed through a system of procedural regularities and third-party remedy agents – aims at either truth or justice are just plain false. It aims at winning, and truth or justice (or both) may be, in some times and some places, a partial by-product. If the matter is tried, balancing tactical and financial decisions about what evidence to introduce and how thorough or lengthy to be in presenting that evidence on the one hand, with concerns about the quality, competence, attentiveness, thoroughness, and neutrality of the trier of fact on the other are the mundane concerns of legal participation. They are enormous matters, and involve huge factual swings. Arriving at the truth, if something better than a random activity, still remains largely a matter of chance.

If lawyers are not hired to find truth, what of the other actors? Before we can consider judges, federal, state or local, we need to return to the matter of legal theory. Jurisprudence, the theory or philosophy or science of law, is concerned with the larger, conceptual questions of law and legal systems. Done well, it provides insight on the one hand and a basis for criticism and reform on the other. However, in America, it is only a slight exaggeration to suggest that it is hardly done at all. It has been replaced or superseded by constitutional law theory, with a number of disturbing consequences. Consider, first, what is missing. The entire range of theoretical inputs – from logic, anthropology, history, economics, science, and, of course, philosophy – is included if and only if they bear on some theory of constitutional interpretation, and then only through the filter of that interpretation. Thus, although instruction in jurisprudence

is virtually required, often several times, in law schools throughout most of the world, not only is it nowhere required in America, it is often not even offered. Instead, constitutional law courses abound, with various offshoots covering individual rights, federal jurisdiction, and particular Amendments offered widely and repeatedly.

But crowding the field is just part of the problem. The practice of constitutional law involves an element of the interpretation of holy writ, with federal judges the priests and priestesses uttering the authoritive, if delphic, meanings. Ultimately, this involves an argument not from reason but authority, that of the text and its gospel writers. Aside from the insane task of divining who thought what and why, when they argued, compromised, dissented, kept silent, promoted private agendas, traded votes, or failed to show up – and whatever we make of the thoughts, largely unrecorded, of a small, unrepresentative, white, male, Christian, slaveholding, prosperous group of oligarchs – the question is: why should those thoughts and that text be the end of the matter? Should we be at all concerned as to what Madison really would think, after providing for separate constitutional treatments for patents and copyrights of how to categorize computer source codes. Because we read, is it more like a book or because we use it to run a computer, is it more like a machine? Even if this process might be relevant (Madison turned electrical engineer), why is it (largely) the beginning and end of the process?

If neither the Constitution nor federal judges were granted authority from a deity atop a mountain, despite murmurings to the contrary, then the validity, morality, utility and completeness of the text is also open to question. For example, how should we treat the Declaration of Independence, or the intent of its author or authors?[3] What significance should we afford the term "equality" when the text included mentions of slaves and the requirement to count their potential votes as three-fifths of a human, with rights assigned their masters?

This is not a matter of doing better constitutional theory alone. What is required is more than a sharper self-examination in the constitutional mirror, more than a self-referential logic. It requires a metatheory, a philosophy, or theory of constitutional law. For example, among candidates representing shades of homage to textual authority – similarly (perhaps, given the politics, suspiciously, so) to Biblical textual exegesis and the arguments spanning the

[3] Being originalist about the Declaration of Independence is no easier, conceptually, than being originalist about the Constitution. The draft was largely the product of Jefferson, with large changes made by the Continental Congress, enough that Jefferson refused to allow it as part of his gravestone epitaph (unlike the Virginia Constitution or his founding of the University of Virginia). Moreover, Jefferson's own ideas were lifted as a social contract theory based on the (capitalist, anti-Church of England, subject countrymen) Scottish Enlightenment thinkers. Should we put these ideas back in their natural habitat to understand them and make David Hume and Francis Hutcheson founding fathers? The problems are well set out by Garry Wills, Inventing America: Jefferson's Declaration of Independence (2002).

range from liberal theology to fundamentalist belief – which should be used, why and when? What other authority counts, why and when? To pick just one problem, suppose an imaginary couple, George and Martha, who were married in 1759 in the Virginia Colony. One of their neighbors, John, took several of their horses in 1775; a second neighbor, Quincy, ran over Martha with his wagon in 1777; whereas a third, Sam, called George a traitor in a local Loyalist newspaper in 1780. The Declaration of Independence was signed in 1776, the British surrendered at Yorktown in 1781, the Constitution was ratified in 1789. The Articles of Confederation left most legal (and all tort) matters to the states, whereas state statutes explicitly deferred to the laws of England as their sovereign. In 1782, George files suit against John and Sam for conversion of his property and defamation, and also files a consortium case for his financial and other losses to Martha against Quincy. What law applies? If English law survives, then the wrong George is about to be made President. If American law applies, pursuant to what authority, and what in the world is it? If it is Virginia law, how can we explain the statutes of the Virginia Colony turned Commonwealth to the contrary? As for the torts, they arise in part as a consequence of breaching the King's peace, hardly noticeable given the large carnage of the American Revolutionary War.[4]

Preoccupation with constitutional law has not only made us soft and clumsy with large legal issues, it also has caused an outlook best described as constitutional reductionism. A basic look at the problems of tort serves as a ready antidote to this. It also reminds us of how much is missing from a pure constitutional focus. Many of the notions we prize most – privacy, equality in the workplace, rights to travel and procreate and choose one's mate, freedom from sexual or racial harassment – came late to constitutional law, whereas others – the right to a safe environment, to choose one's own death, to clean air and water – remain on the constitutional horizon. Many of these matters are tested in tort – privacy, nuisance, and harassment all come to mind – and the reasoning there becomes the basis, often coopted, for constitutional decisions.

[4] Of course, they also arise as a result of the creativity, expansions, embellishments, jurisdictional turf wars, and political battles of the various English courts: King's (not people's) Bench, Common Pleas, Exchequer (of the Crown), the (King's Chancellor's, never an office in the United States) Equity Court and a writ system originating from the King's Court itself. How these facts would help solve the question of "what is the law" is at least as puzzling as solving the "trespass protecting the King's peace" first cut of the problem. One early court was clear about the disconnect between the systems:

> In all these respects, the policy and spirit of our Laws are the reverse of those of the English Laws. We have no appeal, in which the right to a civil action can merge. We have no forfeiture to the public, of the stolen goods or even of those of the felon; no fresh suit, or active prosecution, on the part of the injured person, is required by our Laws, to entitle him to restitution. We have no Law of waifs, nor any subjecting the Hundred to make satisfaction in any case; and our Law, upon the whole rather *discourages* then *invites* individual prosecutions. *Allison v. Farmers' Bank*, 6 Rand. (Va.) 204, 223 (1828).

So, part of the motivation for this book is to present ideas and methods successful outside law to straighten out a number of legal issues that a (purposely) biased process and the hegemony of constitutional law fails to address. But the motivation is not just to be contentious. Constitutional history is often understood to be largely explanatory of American history, from the Marshall Court's establishment of federalism through and past the Warren Court's emphasis on civil liberties. Indeed, it is. But even as legal history, it is only part of the picture. Just concentrating on the statutory reforms of tort law by Congress since the Civil War is evocative and explanatory of many of America's social upheavals and much of its history. Consider just a few acts by the federal government in an area that is universally conceded to be primarily a state concern.

Following the Civil War, neither freed slaves nor previously emancipated men were safe to work, to go to school, to vote, even to exist in the former Confederacy. With some success early, the Civil Rights Acts of 1871 and 1875 protected these individuals when little else (short of the quickly withdrawn Union troops) did.[5] These acts allowed former slaves to sue in tort in federal courts for deprivation of federal and Constitutional Rights. Later in the nineteenth century, national markets and small businesses appeared endangered by combinations, cartels, trusts, and monopolies that conspired to fix prices, divide the marketplace, eliminating fair competition. Thus, in 1890, the Sherman Antitrust Act was signed.[6] Early in the next century, America's largest employer, the railroads, saw high numbers of its workers maimed, disabled, or killed, with no real remedy or available compensation. Thus, in order to provide a safe workplace, some compensation, and perhaps to promote industrial peace, in 1908, Congress enacted the Federal Employers Liability Act (FELA) to protect railroad workers.[7]

After stabs at civil rights, enterprise rights, and workers' rights in the late nineteenth and early twentieth centuries, Congress went on to enact various pieces of legislation to correct the social ills witnessed in the remainder of the twentieth century through tort legislation (or legislation with private remedies as part of a larger statute). Both Democratic and Republican administrations promoted such legislation. The undermining of the integrity of large companies, in the face of the market crash of 1929 and ensuing depression, was addressed by the Roosevelt administration in sponsoring the passage of the Securities Exchange Act of 1934, allowing recovery under §10b-5 for price manipulation, insider trading and fraudulent securities practices.[8] President Johnson signed the Voting Rights Act of 1965, protecting minority rights.[9]

[5] These, essentially, are now part of 42 U.S.C. §1983 and 28 U.S.C. §1343(3).
[6] The Sherman Antitrust Act is 15 U.S.C. §1 *et seq.* Section 7 allows private suits and treble damages.
[7] FELA is 45 U.S.C. §51 *et seq.*
[8] 15 U.S.C. §78j.
[9] 42 U.S.C. §1973.

During the Nixon administration, to combat the influence of organized crime or simply those ethically challenged, Congress passed the Racketeer Influenced and Corrupt Organizations Act (RICO)[10] in 1970. The issue of encouraging vaccines to come to market, even imperfect ones, for the greater good, and in light of the achievement of the polio vaccines, was signed by President Reagan as the National Childhood Vaccine Act of 1986.[11]

Congress, having protected those who own stock, belong to a minority, might become ill, or are victims of mobsters, finished the century improving the lot of the worst and best off in the nation. It passed the Americans with Disabilities Act (ADA), protecting employment and access to the least healthy in the country in 1990.[12] Pursuing the Contract with America, Congress, over a presidential veto, passed the Securities Litigation Uniform Standards Act (SLUSA).[13] It protected corporations from shareholder suits prompted by problematic changes in the corporate stock price.

Not only, then, does tort cut across a myriad of issues, but as these issues become more central to the core of the civil society, they move from state to national attention and from judicial to legislative action. However, substance aside let us take one final, brief look at the other actors in the systems: politicians and academics. The politicians come in two flavors, judges and legislators. American judges are chosen in a manner often indifferent to talent, experience, qualifications, or independence. Once on the job, they are thrown in without training or apprenticeship and, at the trial level, immediately judged by their success at docket clearing. The present system is in extended overdrive from the criminal docket, with its endless drug cases and violent crimes of young and directionless men of the underclass, demoting civil law to the status of the neglected stepchild of the court system.[14] More importantly, any resolution is as good (in general) as any other. Finally, the larger factors that count in any full analysis of a particular issue may or may not have been illuminated by the parties and the controversy, and might remain unknown or obscure to the judge. As to legal review, appellate courts are explicitly formed to examine error from below, but not to go beyond that. Thus, although the occasional

[10] RICO, 18 U.S.C. §1961 *et seq.*

[11] 42 U.S.C. §300 *et seq.*

[12] 42 U.S.C. §12101 *et seq.* The act has basically been gutted by hostile courts as part of the tort wars. See, for example, *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service*, 527 U.S. 516 (1999) and *Albertson's Inc. v. Kirkenbur*, 527 U.S. 555 (1999).

[13] 15 U.S.C. §780-4 *et seq.*

[14] There are exceptions, such as parts of Texas and New York City, where the civil side has a separate judiciary from the criminal. The pressure against extending that reasonable division of labor, and judicial talent and inclination associated with it, comes from a telling place: the criminal defense bar. It is their, no doubt accurate, perception that former prosecutors so harsh on their clients and their rights would gravitate to the criminal bench, while those more moderate on sentencing and cognizant of defense rights are originally trained at the civil end and would likely want to continue to be there.

brilliant jurist – Coke, Mansfield, Marshall, Holmes, Hand, or Traynor – transforms legal doctrine, the perspective is almost always that of an actor allowed to embellish a script and add some crucial asides or extemporaneous words, but always circumscribed within the original story. Finally, there are the legal academics, a group treated in Chapter 3. Often armed with little more than an undergraduate law degree, given scant training in any outside methodology (not even comparative or historical law, perhaps critical if one wants to understand one's own system), and required to publish in journals run by students with little greater knowledge of the world than children, they write at a pretheoretic level with a sheltered and parochial insidedness, analyzing bits of law cast adrift from any social moorings and larger conceptual concerns, all the while oblivious to their isolation. Meanwhile, the need for theory remains entirely unaddressed.

However, tort has hardly been forgotten. In fact, it has become highly politicized. One interest group after another, first potential plaintiffs, then defendants, have pled their case not in the courts, but robustly in the media and before the legislatures. One can see much of the tort law of the last century or so as matters of special pleadings. The injured potentially casting themselves as victims looking to correct uncompensated wrongs – workplace injuries, discrimination everywhere, unfavorable treatment by governments, lack of access for the disabled, securities shenanigans, consumer fraud – have successfully seen their lobbying result in waves of workers' compensation, civil rights, disability rights, blue sky, and lemon laws. The potentially injuring tort feasors have also cast themselves as victims, and achieved real success in this role, particularly more recently. Tort reform of medical malpractice and product liability, SLUSA – and Private Securities Legislation Reform Act (PSLRA) – curtailing securities suits, and Class Action Fairness Act (CAFA) regulating class actions: each involves successes in shutting down or greatly restricting tort suits.[15] That said, much of the talk in favor of or against particular reforms is disingenuous, as economic, political, and personal goals supercede the ideals of truth, candor, and accuracy. The extent to which tort talk is far from straight talk is addressed in Chapter 4.

Returning, however, to the congressional statutes: they are instructive, not least because they at once point to a perceived failure of the existing system, an unwillingess to trust precedent and "the rule of law" to correct systemic excesses, and a willingness to balkanize the legal system, leaving little in the way either of organizing principles or a mandate to treat similar cases similarly. These reforms provide a hodgepodge of statutes of limitations for indistinguishable claims, require prescribed cases to be venued in certain courts (presumably in the hope of tamer judges), cap damages for specific wrongs but not for others

[15] PSLRA is the Private Securities Litigation Reform Act of 1995, 15 U.S.C. §772-1 *et. seq.* CAFA is the Class Action Fairness Act of 2005, Pub. C. No. 109-2, 119 Stat. 4.

(leaving otherwise identical victims more or less prosperous or impoverished), and change levels of intention, proof, and defenses. No justification other than the thinnest pretext of grand justice is given, with interest group politics usually the transparent motivating force. But the politics are instructive. The legislation is meant to open or close the courthouse to entire sets of claims but not by going to those who might best understand the entrance parameters, namely those who work there. Instead, through the usual political lobbying methods of accusing vilification and claiming victimization and of mischaracterizing rules and characterizing particular outcomes, a wide swath of change occurs.

Tort is politicized with such heat, from the Sherman Antitrust Act to the Americans with Disabilities Act to state tort reform legislation, not because rulings and verdicts are fallible. It is politicized because tort is so important. Some of these political concerns are addressed in Chapters 6 and 7, whereas the centrality of tort to ordinary affairs is addressed in Chapter 1. The purpose here is reformist in that (some small part of) the cant, inconsistencies, improper shortcuts and inadequate justifications are addressed in the larger context of measuring ideals against results and various methods by the metric of clarity and consistency. The ultimate test is whether we can produce a civil society that defuses the small conflicts – whether arising because of unfairness, violence, greed, indifference, overreaching, undue influences, corruption, bigotry, sloth, or even malice – by solving them in a tort system sufficiently trusted and sufficiently trustworthy to resolve conflicts as tort and not as social wars. Perhaps the secret of doing so lies in the wisdom of Socrates and Gladstone, the subject of Chapter 2. Let us hope that somehow we can pass the test.

1
Digesting Torts: An Explanation

Consider a blizzardy Monday morning at 8:30. Our hero, not finding his morning paper, snatches his neighbor's, but not before his neighbor's dog takes a bite out of him. Blood-stained, paper in hand, our hero drives to the local café secretly to meet his main rival's CEO, John D., to discuss dividing the market. Bad news awaits. John D. fails to appear, while the morning paper reveals the entry into the market of a new competitor, Standard Nonsense. He is shocked by the news, particularly as Standard Nonsense's president, J. P., told him yesterday on the back nine, off-the-record, of huge inventory losses. Our hero is irate, labels J. P. a liar and criminal to all within earshot, and flings his cup, striking the cashier. Muttering apologies, our hero leaves and, not noticing the icy build-up from the café's broken gutter, slips, badly bruising himself. Yet more upset, he enters his car, calls his broker to sell his shares in Standard Nonsense and to short Standard Nonsense further. Paying scant attention to the road, our hero runs a stop sign, slams into a conductor on the commuter train, and then sideswipes another car. Finally, arriving at work and needing caffeine (having thrown his portion at the cashier), he screams for his elderly secretary to make fresh coffee pronto and, when her age and orthopedic problems prevent her from scurrying fast enough, he calls her sexually offensive names and fires her. He then phones John D. to discuss a strategy to keep Standard Nonsense out of the market. They agree to keep prices down temporarily and, in a series of e-mails, discuss dividing the market between them. Well-satisfied, our hero signs the tax returns prepared by his outside accountant, failing to notice that profits from certain exercised warrants are improperly treated as income rather than losses, and then heads to his doctor to treat the bruises from the bite, the fall, and the auto accident. His physician overestimates the risk of infection, forgets our hero's reaction to certain medications, and orders needless and hazardous tests. Our hero goes upstairs to the lab for, and is provided, one such medication, which makes him violently ill. He is then given a new drug for nausea but, poorly tested, the drug renders him unconscious. The city's EMS

is called, connects him to an ancient life support system, which sparks a fire, burning our hero to death. It is 9:30, an hour full of torts.

We might look at the events swirling around our hero. They seem to involve a number of acts that have no easily discernable organizing principles: taking a newspaper, being bit by a dog, hitting a car, throwing a coffee cup, firing a secretary, slipping on ice, price-fixing, missing a tax break, being medically mistreated, dying of an adverse reaction to a poorly tested product (and these are but a few). The number of different tortious actions is not intended to be some sort of law school problem for the benefit (or to continue with the law school metaphor, humiliation) of the readers. Rather, it is the ordinariness coupled with the breadth of actions that is interesting. Torts, if not ubiquitous, are everywhere in the air.

Let us then walk through tort's phenomenological thicket, attempting to gain a sense of not only the geography, but perhaps the logic, order, and even odors of the place.[1] How, then, did our hero's day start? With the most primitive of torts, a trespass, followed by a theft and an attack from an animal. Our hero looked outside for his newspaper, either misdelivered, buried under snow, or perhaps taken by a fellow thief, and not finding it, trespassed on his neighbor's property and took ("converted" in tort parlance) his neighbor's paper. However, his conversion has the downside of a dog bite, the emaciated remnant of the more widespread panorama of medieval animal torts. Should the neighbor have the right to sue and should our hero have the right to sue back?

First of all, was our hero's neighbor harmed by the walk across the lawn? If not because of any substantial property damage, what about an expectation of privacy or a property right to exclude that, if unpunished, puts one on a slippery slope to extinction? This presents the threshold and thorny problems in tort law of what interests should be protected. Crunching an icy lawn is inconsistent with full and constant use of a property right by its owner, but that right is neither vested nor capable of full, ongoing, and constant use. Property rights are not only complex and differentiable (e.g., right to include, use indefinitely, use for a period of years, lease, traverse, mine, farm, log), they are, as John Locke's famous failure demonstrates,[2] nearly impossible to justify with any

[1] There is something of an allusion here to Daniel Dennett in his Consciousness Explained (1991), but only as a borrowing of the terminology and storytelling, not as to methodology or theory.

[2] John Locke, in §27 of The Second Treatise of Government (1690), allows each person to have "property in his own person," the "labor of his body and the work of his hand" and other property involving his labor so long as "there is enough and as good left in common for others." Essentially, he can improve or leave matters even for others, but not make things worse. Putting that together with use of land, resources, liberties, and pollution, to name just a few matters private property infringes upon, in a way that meets Locke's criteria has proven impossible. Nozick's attempt in his Anarchy, State, and Utopia (1974) is probably the best known effort to save Locke, though it is riddled with problems. One devastating attack on any method of saving Locke, including that of Nozick, is Onora O'Neill, *Nozick's Entitlements*, in Reading Nozick 305 (Jeffrey Paul, ed., 1981).