

MAKERS OF TORT LAW*

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Unlike some of the earlier Clifford Symposia that Steve Landsman has organized, this one is inhabited, so far as I am aware, entirely by law professors and judges. Sheltered from the appraisal of skeptical outsiders, it is easy to indulge our professional deformation by sliding into well-worn models of what law and lawmaking are, models that we do not literally believe but that fit so comfortably the law school view of the world of which we are complaining but compliant captives.

We slip easily into regarding the law as an orderly hierarchy in which appellate judges interpret, and occasionally make, legal rules, trial judges apply them and lawyers attempt to make or defeat claims in terms of their alignment with these rules.¹ So if we set out in quest of tort lawmakers our inquiry gravitates to a search for appellate judges making new bits of tort doctrine *à la* Cardozo or Traynor.

But we are also children of legal realism. At least some of the time we take the “tort law” in the title of this Symposium as much more than just the substantive law of torts declared by appellate judges. In those moments, we are also concerned with the outcomes of cases before the courts and in lawyers’ offices, with the signals that actors incorporate in their outlook and markers they guide themselves by or take into account. In this broader reading tort law is not just tort doctrine, but is enmeshed with procedure, evidence, institutional practice, the organization of law practices, the strategies of lawyers, the proclivity to claim, and much more. Research technologies, emerging fields of knowledge, bodies of experts and public perceptions of injury and assignments of responsibility, all affect the bringing of tort claims and the response to them and ultimately the practices that tort regulates.

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1. I have tried to elaborate on this in *The Future of Law and Social Sciences Research*, 52 N.C. L. REV. 1060 (1974); *The Portable Soc 2; Or What to Do Until the Doctrine Comes*, in GENERAL EDUCATION IN THE SOCIAL SCIENCES: CENTENNIAL REFLECTIONS ON THE COLLEGE OF THE UNIVERSITY OF CHICAGO (J. MacAloon ed., 1992). For a new and intriguing critique, see Lynn LoPucki & Walter Weyrauch, *A Theory of Legal Strategy* (forthcoming Duke Law Journal, 2000).

Tort doctrine is only part of a far larger complex of rules, institutions, practices and beliefs.

We swing between these two poles of (1) the image of tort as a body of doctrine; and (2) the inclusive fuzzy picture of what we may call the embodied tort process. If we inquire about judges as tort lawmakers, the answers we will find depend on whether we are asking about the doctrinal core or about the embodied process. If we ask about the embodied tort process, we will find that the respective roles of appellate judges and trial judges are quite different that if we ask only about the core. If we ask about the doctrinal core, appellate judges loom large as the authors of tort law. But if we widen our view to the entire process, the outcome-determinative power of the doctrinal formulations of judges shrinks as public perceptions, parties' resources, and lawyers' strategies come into play. As Lynn Lopucki and Walter Weyrauch put it: "one can no more predict the outcome of a case from the facts and the law, than one can predict the outcome of a game of chess from the positions of the pieces and the rules of the game. In either case, one needs to know who is playing."²

Since the days of Cardozo or even Traynor, there is much more law: more law-makers, more rules and doctrine, more lawyers, and more legal actors who devote more resources to legal activity.³ As the system of rules becomes more complex—with the multiplication of decision points and in their train higher transaction costs—the discretion of those who combine and apply them is increased. As Mirjan Damaska observes, "there is a point beyond which increased complexity of law, especially in loosely ordered normative systems, objectively increases rather than decreases the decision-maker's freedom. Contradictory views can plausibly be held and support found for almost any position."⁴ Rather than making the law more certain by tying outcomes to the mandates of doctrine, the proliferation of law enlarges both judicial discretion and the scope for lawyer strategy by multiplying the opportunities for innovative juxtaposition. Whether these opportunities will be availed of depends on the resources of the parties. "[T]he depth of clients' pockets determines, in important part, the complexity of the legal issues with which their lawyers will be permitted to deal."⁵

2. LoPucki & Weyrauch, *supra* note 1.

3. Marc Galanter, *Law Abounding: Legalisation Around the North Atlantic*, 55 *MOD. L. REV.* 1 (1992).

4. Mirjan Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 *YALE L.J.* 480, 528 (1975).

5. HEINZ & LAUMANN, *CHICAGO LAWYERS* 129 (1982).

Like lawyers, judges are supplied with incentives to innovate and impress.⁶ The hierarchy in which they are arrayed is not a bureaucracy.⁷ Courts are, of course, bureaucracies in the loose sense of an organization with division of labor, some hierarchic directions and standardized work routines for serving clients according to specified formulae. But judicial hierarchies lack many of the salient features of bureaucratic control. As the late Herbert Jacob observed:

Appellate courts are usually not true hierarchic superiors to trial courts . . . [t]hey may overrule trial court decisions [but t]heir review . . . is initiated by litigants. It is not motivated by a policy focus of the higher courts, nor does it constitute a systematic quality control of the work of the trial courts. . . . Supreme Courts often promulgate procedural rules that govern trial courts, but they exercise no continuous supervision over day-to-day trial work and almost none over the flow of cases that trial courts process. They almost never hire, transfer, or fire trial judges or other trial courtroom personnel. They have little or no influence over trial court budgets.

Trial court judges have broad, unreviewed (and perhaps unreviewable) discretion.⁸ The situation was summed up incisively by Judge Scott when he quipped that “As appellate judges we get to reverse a holding of a trial judge every two or three years, but they reverse us every day.”⁹ Trial court discretion has been greatly enlarged by modern procedure. “[T]he discretion of trial judges has expanded—partly because of increased complexity—but even more so from the multiplication of discretionary procedural, evidentiary and management deci-

6. Anthony D'Amato, *Legal Uncertainty*, 71 CAL. L. REV. 1 (1983).

7. Herbert Jacob, *Courts as Organizations*, in EMPIRICAL THEORIES ABOUT COURTS 193 (K. Boyum & L. Mather eds., 1983). As the late Forrest Dill put it “courts are loosely connected units enjoying substantial autonomy from each other and from units at higher levels of the system.” Forrest Dill, *Contradictions in Judicial Structure: Law and Bureaucracy in American Criminal Courts*, Paper presented at the Conference on Social Science Research in the Courts, Denver Co, Jan. 20, 1977. See also the observation of Mirjan Damaska that the judges who preside in the decentralized American courts systems that these observers have in mind are invested with personal authority emanating from their offices, not by delegation from the top. Damaska, *supra* note 4, at 515.

8. Stephen B. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631.

9. A century ago, a similar observation was attributed to “Fighting Bob” Bowling, a Kansas City justice of the peace, who

made a ruling in the trial of a case that was not acceptable to the attorney on one side, and he demurred to the decision of his Honor

“Your Honor, you are overruling the Supreme Court,” said the lawyer.

“I do that every day, my friend; sit down,” replied the justice, and his decision was recorded.

Facetiae, 11 THE GREEN BAG 599 (1899).

sions.”¹⁰ The expansion of managerial judging enlarges the discretion of trial judges and diminishes the control of appellate judges:

Managerial decision involve a different, and more expansive, sort of discretion than purely legal decisions. For one thing, a judge’s managerial decisions typically are insulated from appellate review, because they are interlocutory in nature, often are made off the record, and, in any event, typically are subject to a lenient “abuse of discretion” standard of review. But the difference between legal decisions and managerial ones runs much deeper. When “judges make legal decisions, the parties have an opportunity to marshal arguments based on an established body of principles.” . . . [m]anagerial discretion is different in nature. Judges deciding how to manage cases on their dockets have a wide array of tactics available and, indeed, choose to exercise their supervisory discretion in widely disparate ways, even when handling the same exact case.¹¹

The vast majority of tort cases, along with cases of almost every other kind, terminate by settlement.¹² Settlements entail “bargaining in the shadow of the law,”¹³ so the influence of tort doctrine is present, but is thoroughly mixed with considerations of expense, delay, publicity and confidentiality, the state of the evidence, the availability and attractiveness of witnesses, and a host of other contingencies that lie beyond the substantive rules of tort law. It is “the law” in its broad processual sense that casts the shadow, not merely its doctrinal core.

Indeed, the portion of the shadow cast by formal adjudication may be shrinking. The percentage of cases going to trial continues to decline.¹⁴ In the federal courts from 1961 to 1998, the portion of termi-

10. See, e.g., Michael D. Green, *The Road Less Well Traveled (And Seen): Contemporary Law Making in Products Liability*, 49 DEPAUL L. REV. 377 (1999) (on trial judges deciding to exclude experts and eliminate cases). Molot argues that this is the smaller part of trial judge discretion: “[W]hile judicial leeway in deciding legal questions may contribute to litigation uncertainty, this uncertainty pales in comparison to that generated by purely discretionary management decisions. . . .” Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 VA. L. REV. 955, 963 (1998) (emphasis added).

11. Molot, *supra* note 10, at 1004-05. On activism among trial judges, see Marc Galanter et al., *The Crusading Judge: Judicial Activism in Urban Trial Courts*, 52 S. CAL. L. REV. 699 (1979).

12. Marc Galanter & Mia Cahill, “Most Cases Settle:” *Judicial Promotion and Regulation of Settlements*, 46 STANFORD L. REV. 1339 (1994).

13. Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering and Indigenous Law*, 19 J. LEGAL PLURALISM 1 (1981).

14. Tort cases go to trial with greater frequency than almost any other kind of dispute. A study of courts of the nation’s 75 largest counties in 1996 found that fully two thirds of cases disposed of by trial were torts. Indeed, most of the civil jury trials in this country are of tort cases. CAROL J. DEFRAnces & MARIKA F.X. LITRAS, *CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 1996: CIVIL JUSTICE SURVEY OF STATE COURTS* (Bureau of Justice Statistics, 1999).

nations that were by trial dropped from 11% to 2.5%.¹⁵ Although the number of appeals has increased, the number subject to intensive full dress review has declined. Appellate courts decide many more of their cases without published opinions or without any opinion at all.¹⁶ And increasingly they ratify what the courts below have done.

The papers in this Symposium depict continuing innovation by appellate judges¹⁷ though few full blown new torts¹⁸ and even some retreat from earlier innovations.¹⁹ The decline in initiative by appellate judges, and their intellectual cousins, law professors, does not mark an end to the dynamic change of torts law. "Control of litigation," Stephen Yeazell argues, "has moved further down the legal food chain,—from appellate to trial courts and from trial courts to lawyers."²⁰

So we move from Cardozo and Prosser to entrepreneurial trial judges like Jack Weinstein and Thomas Lambros and entrepreneurial adjuncts like Francis McGovern and Kenneth Feinberg. The claims they encounter are posed by entrepreneurial lawyers, more sophisticated and better resourced than their counterparts of half a century ago. Unlike rights movements on behalf of discrete minorities (like ethnic groups, the disabled, or gays) tort recovery involves relatively rare events, so potential beneficiaries of the protection and remedy afforded by tort tend to have low awareness of any given tort rule and low incentives to invest in reforming it.²¹ Movements to establish new rights in judicial forums depend on the organizational and financial resources of enduring groups of advocates.²² Apart from instances where widespread and highly salient grievances enter the political process, as in the recent legislative battles over a "patients' bill of rights," tort beneficiaries tend to participate in the tort policy arena through

15. Marc Galanter, *The Regulatory Function of the Civil Jury*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 63 (Robert E. Litan ed., 1993); Administrative Office of the Courts, Annual Report.

16. Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 B.Y.U. L. REV. 3; William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (1996); Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, 61 L. & CONTEMP. PROBS. 157 (1998).

17. Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435 (1999).

18. Anita Bernstein, *The New-Tort Centrifuge*, 49 DEPAUL L. REV. 413 (1999).

19. Stephen D. Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience With "New" Torts*, 49 DEPAUL L. REV. 455 (1999).

20. Yeazell, *supra* note 8, at 647.

21. NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY* ch. 6 (1994).

22. CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998). For application of this perspective to prison reform litigation, see Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994 (1999).

surrogates like consumer organizations and especially plaintiffs' lawyers. This is worrisome because the latter have cross-cutting incentives not to eliminate uncertainty and risk from the remedy process. In this Symposium, Jeffrey O'Connell worries that enrichment of the upper strata of the plaintiffs bar by the tobacco and other mass tort settlements will result in a disastrous "one issue" lobby that will distort the political process forever. The magnitude of such a danger exists seems exaggerated in view of the far greater institutionalization of the anti-remedy lobby.

In short, today appellate judges are not the authors (if they ever were) of change in tort law, but its editors and publishers. They are the carpenters, not the architects, devising solutions to problems put before them by lawyers, who construct these problems from the demands of claimants. The dynamic force that generates the problems is not produced by judges, but by changing perceptions of injustice and remedy.²³

Tort law is driven by and dependent on the production of injustice. As the risks of everyday life have declined dramatically for most people, there is a widespread sense that science and technology can produce solutions for at least many of the remaining problems.²⁴ (Of course, this is illusory inasmuch as people are capable of identifying or inventing problems as quickly as they are solved.) But as more things are capable of being done by human institutions, the line between unavoidable misfortune and imposed injustice shifts. The realm of injustice is enlarged. Once, having an incurable disease was an inalterable misfortune; now a perception of insufficient vigor in pursuing a cure or insufficient readiness to provide care can give rise to a claim of injustice. As the scope of possible interventions broadens, more and more terrible things become defined by the incidence of that intervention. Thus famine or social subordination or a flawed appearance is not inalterable fate, but a matter of appropriate interventions. What *was* seen as fate may be seen as inappropriate policy.²⁵ Advances in human capability and rising expectations result in a moving frontier of injustice. With more knowledge and education and advances in communication, moral entrepreneurs will construct, identify, and define new injustices—and solicit remedies for them in legislative, adminis-

23. These, in turn arise within a culture suffused with themes crystallized in legal doctrine that stimulate, limit, and channel the formulation of problems and solutions.

24. LAWRENCE FRIEDMAN, *TOTAL JUSTICE* (1985).

25. JUDITH SHKLAR, *THE FACES OF INJUSTICE* (1990).

trative and judicial forums.²⁶ In torts as elsewhere, the supply of unanswered questions increases in tandem with the supply of answers.

26. Richard Abel suggests that courts may be more responsive than legislatures to such solicitation than legislatures. Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DEPAUL L. REV. 533 (1999).

