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THE VITAL COMMON LAW: ITS ROLE IN A STATUTORY AGE

*M. Stuart Madden**

“[T]he common law is not static; its life and heart is its dynamism—its ability to keep pace with the world while constantly searching for just and fair solutions to pressing societal problems.”¹

I. INTRODUCTION

This article discusses the common law, the judge-made law of property, contracts, torts and beyond. Common law observers and commentators have been rightly jarred by the claim of professional, academic and judicial authors who state that the common law is dead, or at least in retreat;² that

* James D. Hopkins Professor of Law, Pace University School of Law. The author expresses his appreciation to Professor David G. Owen for his beneficial comments, and to Matthew Ross and Kemberly Weston for their valuable research assistance.

1. *Harrison v. Montgomery County Bd. of Educ.*, 456 A.2d 894, 903 (Md. 1983) (citing *Felder v. Butler*, 438 A.2d 494 (Md. App. 1981)), quoted with approval in *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143, 1150 (Md. 1985).

2. Academic authors periodically announce the death, or at least the paralysis, of one or another common law doctrines. See, e.g., GRANT GILMORE, *THE DEATH OF CONTRACT* (1974); Conference: *Is the Common Law Dead?* *University of Maine School of Law* (1977) [hereinafter *Maine Conference*]; Victor Brudney, *Association, Advocacy and the First Amendment*, 4 WM. & MARY BILL OF RIGHTS L.J. 1, 85 (1995) (“The consequence of [the described electoral] regulation has been substantially to diminish the parties’ ‘nearly autonomous common law status.’” (citation omitted)); Calvin R. Dexter & Teresa J. Schwarzenbart, Note, *City of Milwaukee v. Illinois: The Demise of the Federal Common Law of Water Pollution*, 1982 WIS. L. REV. 627; Richard E. Levy, *Escaping Lochner’s Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 391 (1995) (“When the liberal Court rejected *Lochner*, it implicitly rejected the view that property rights are natural rights that exist independently of government action in favor of the recognition that property rights are created by the common law, which is merely one of many possible regulatory system regimes. The resulting erosion of the common-law constitutional baseline was consistent with liberal ideology.”)

Cf., Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601 (1992). As to the statutory impetus for these phenomena, see e.g., Martha Middleton, *A Changing Landscape*, 81 A.B.A. J. 56, 57 (Aug. 1995), quoting Prof. David G. Owen as observing that “tort law has been changed in a variety of significant ways in many states,” and noting particularly “substantial alteration” to the basic doctrines of products liability and medical malpractice. The author states further that “[m]any reformers claim that federal legislation is the only way to bring uniformity to the patchwork structure of 50 different state tort systems.” *Id.* at 58.

we live in a "statutory era";³ and that the "orgy of statutemaking,"⁴ state and federal, since 1960 effectively occludes the common law horizon.⁵

This pessimistic vision is that of a common law marginalized, relegated to the desuetude of a secondary role in American jurisprudence; the common law as a test track for eventual statutory solutions⁶ or a lexicon for statutory terms;⁷ the common law as background music for a modern statutory lyric.

Most would describe this as an ignominious path for the once dominant common law tradition, one that for 800 years has alternately woven and cobbled together the custom and morality of English speaking nations into the fairest dispute resolution mechanism ever devised. Even so, advocates of the robust common law role must concede that (1) the common law, with its "principles . . . embedded in masses of report[ed] cases, [and] not always to be reconciled with another,"⁸ does not rise to the level of a rudimentary or even proto-science; (2) the system of common law judging vests enormous power in presiding judges, a power that can lead to unseemly subjectivity in interpreting law to apply that may be at quite a remove from, although frequently more progressive than, contemporary societal perceptions of justice;⁹ and (3) a jury's prerogatives on such important issues as damages can lead to results not easily squared with proven loss, and can occasionally be openly hostile to business.¹⁰

There is no substantial dispute that common law adjudication has experienced a "revolution" in the twentieth century.¹¹ The issue is whether

3. Daniel A. Farber & Phillip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875 (1991).

4. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES, 169 (Harvard 1982) [hereinafter CALABRESI, AGE OF STATUTES] (citing GRANT GILMORE, THE AGES OF AMERICAN LAW 95 (1977)).

5. The vigor of statutory development is not exclusively a twentieth century phenomenon. At least as early as the late nineteenth century, "utilitarian" jurists "concentrate[d] on codification as the instrument of legal reform." RICHARD A. COSGROVE, OUR LADY THE COMMON LAW: AN ANGLO-AMERICAN COMMUNITY 1870-1930, 39 (1987) [hereinafter COSGROVE, OUR LADY].

6. E.g., OHIO ADMIN. CODE 3745-15-07(A)(1995)(public nuisance).

7. E.g., Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601, 9607(b)(3) (1994) (due care standard for third-party defenses regarding hazardous waste disposal).

8. COSGROVE, OUR LADY, *supra* note 5, at 39.

9. Cf., Mary J. Davis, *Individual and Institutional Responsibility: A Vision of Comparative Fault in Products Liability*, 39 VILL. L. REV. 281, 330 (1994) (judge's decisions may be "subject to influence by his or her own personal predilections").

10. See, e.g., Charles Allen, *Lawsuit Fight Over More Than Spilled Coffee*, PHOENIX GAZETTE, March 29, 1995, at B-9.

11. Justice Ellen Ash Peters, *Common Law Judging in a Statutory World: An Address*, 43 U. PITT. L. REV. 995 (1982). Justice Peters estimated that only ten percent of the cases

that revolution has been prudent and progressive, or nihilistic. Has the common law itself become more scientific, or are efforts to assign a science to it, as one critic put it, "crude Baconianism at best,"¹² a supernal *ipse dixit*? Has the common law of the latter twentieth century ratified or repudiated Roscoe Pound's admission that "[a] composite of the law of [then] forty-eight American states cannot, in the nature of things, be the logical unity in which Langdell believed"?¹³

This article, developed from the 1996 James D. Hopkins Lecture, will open by summarizing the antecedents and historical role of the common law, and in so doing describe the accepted common law doctrinal goals—some moral, some economic, but each in its way pragmatic. The discussion will not attempt to assign ascendancy, much less victory, to one or more of the common law objectives, as each, and all together, are essential to gaining an integrated understanding to the common law's modern contribution.¹⁴

The article continues by giving some detail to the common law decision making, a process the author describes as one of *enlightened gradualism*, resourcefulness and adaptability. Specific examples of this process at work will be drawn from the common law of contract, domestic relations, torts, criminal law and evidence.

Critical to this analysis will be a development of the distinctions between common law and statutory approaches, including their respective strengths and the weakness, in policy objectives and in application. The article will conclude with my prognosis of the health of the common law as we enter the twenty-first century.

before her Connecticut Supreme Court were "purely common law," with statutes being "relevant [to] if not determinative" of the balance. *Id.* at 996.

12. "[T]he Baconian scientists of the first part of the nineteenth century believed that their research revealed truth. Indeed, their work was revelation. The principles they adumbrated were real and true because, in the end, they were expressions of the Creator." WILLIAM P. LAPIANA, *THE ORIGIN OF AMERICAN LEGAL EDUCATION* 32 (Oxford 1994).

13. COSGROVE, *OUR LADY*, *supra* note 5, at 37 (quoting Roscoe Pound to Pollack (May 23, 1934), in *ROSCOE POUND PAPERS*, Harvard Law School Library).

14. See, e.g., James A. Henderson, Jr., *Process Constraints in Tort*, 67 *CORNELL L. REV.* 901 (1982) ("Fierce debates have raged in recent years over the objectives reflected in the tort-law system. A growing number of observers insist that tort law reflects efforts to achieve allocative efficiency and wealth maximization. A somewhat smaller, but no less intensely committed number insist that tort law primarily reflects fairness concerns." (citations omitted)). *Id.* at 901.

II. THE MODERN INTERFACE OF STATUTORY AND COMMON LAW

A. Generally

Let us define our subject. What is the common law? It represents the largest proportion of the law of property, contracts¹⁵ and torts.¹⁶ The common law is often called "judge-made" law, to distinguish it from statutes, regulations and ordinances, which are enacted by state and federal legislatures, agencies and political subdivisions. Richard Posner describes common law broadly as "any body of law created primarily through judges by their decisions rather than by the framers of statutes or constitutions,"¹⁷ and "the body of English and American judge-made rules, many of great antiquity, governing torts (civil wrongs that result in personal injury or property damage), contracts, property, crimes, and many other fields of private conduct."¹⁸ In 1821, Maryland's Chief Judge Chase described it more elegantly as "a system of jurisprudence founded on the immutable principles of justice, and denominated by the great luminary of the law of England, the perfection of reason."¹⁹ Lastly and functionally, Arthur Corbin suggests that the common law is not so grand, luminescent or sacred as

15. This observation depends in part upon acceptance of the characterization of the Uniform Commercial Code as a crystallization of the common law of sales, negotiable instruments, secured interests, and the like.

See discussion of Charles Fried's "moral institution" theory of contract doctrine as "based on the moral obligation to keep one's promises . . . and that contract's doctrines reflect that obligation[.]" in Vincent A. Wellman, *Conceptions of the Common Law: Reflections on a Theory of Contract*, 41 U. MIAMI L. REV. 925, 926 & n.9, 970 (1987); see also CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981).

16. Of the relationship between American common law and its forebear, English common law, the New Jersey Supreme Court wrote:

The common law consists of judicial opinions and as such they are only 'evidence of what is common law;' the law and the opinions of the judges are not always convertible terms (Jones' Blackstone, p. 122). Our [New Jersey] Constitution does not obligate the courts of this state to follow or adopt the reasoning and decisions of the English common law courts. It is the principles of the common law which we in common with most of the states have adopted generally, and not necessarily the decisions of the English courts in exposition of the common law.

New Jersey v. Culver, 129 A.2d 715, 720 (N.J. 1957) (quoting Heise v. Earle, 35 A.2d 880, 885 (N.J. 1943)).

17. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 247 (1990) [hereinafter POSNER, PROBLEMS].

18. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* vii (1987) [hereinafter LANDES & POSNER, *ECONOMIC STRUCTURE*].

19. Allen v. State, 605 A.2d 960, 966 (Md. App. 1992), (quoting State v. Buchanan, 5 H.& J. 317, 362 (1821)(Chase, C.J., separate opinion)).

some state. To Corbin, “[t]he common law is not a body of rules; it is a method. It is the creation of law by the inductive process.”²⁰

Whatever individual or aggregate definition you accept, today you cannot understand American law regarding a broad subject, be it privacy, employment relations or environmental harm, by looking solely at statutes, or solely at the common law. The symbiosis between common law doctrine and statutory law pervades our jurisprudence. In most circumstances, the state or federal statute is concerned only with enforcement of state public policy, civil or criminal, and leaves individual pursuit of monetary or injunctive relief to existing common law.²¹ In many settings, such as privacy,²² products liability,²³ or public nuisance,²⁴ state statutes essay to codify common law causes of action, conserving them, either conservatively or progressively, as the vehicle for personal actions for money damages or injunctive relief. In still other matters, a defendant’s conformity with a statutory standard may either hinder or preclude a plaintiff’s common law claim;²⁵ while noncompliance with a statutory standard may all but vouchsafe a plaintiff’s suit for damages.²⁶

20. COSGROVE, OUR LADY, *supra* note 5, at 33 (quoting ARTHUR L. CORBIN, WHAT IS THE COMMON LAW? 75).

21. *E.g.*, Clean Water Act of 1972, 33 U.S.C. § 1319(c)(1)(B) (1994).

22. *E.g.*, N. Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1995) (statutory right of privacy) *discussed in* Haelan Lab., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953) (involving defendant’s alleged invasion of “plaintiff’s exclusive right” to use photographs of baseball players).

23. For example, state statutes in Delaware, Idaho, Iowa, Kansas, Kentucky, Maryland, Minnesota, Missouri, North Carolina, North Dakota, Ohio, Tennessee and Washington “bar an action for strict [products] liability depending on whether jurisdiction may be obtained against the manufacturer and whether the manufacturer is able to satisfy a judgment.” RESTATEMENT OF THE LAW (THIRD) TORTS: PRODUCTS LIABILITY § 1 cmt. e, Reporters’ Note (Tentative Draft No. 2, 1995) [hereinafter Tentative Draft No.2].

24. *E.g.*, ARIZ. REV. STAT. ANN. § 36-601(A) (1995) (setting forth “conditions” that constitute “public nuisances dangerous to the public health”); OHIO ADMIN. CODE 3745-15-07-(A)(1995), stating as follows:

[T]he emission or escape into the open air from any source or sources whatsoever, of smoke, ashes, dust, dirt, grime, acids, fumes, vapors, odors, or any other substances, or combination of substances, in such a manner or in such amounts as to endanger the health, safety or welfare of the public, or cause unreasonable injury or damage to the health, safety or welfare of the public, is hereby found and declared to be a public nuisance.

Id.

25. Tentative Draft No. 2, *supra* note 23, § 7(b) (“Effects of Compliance and Non-compliance with Applicable Products Safety Statutes or Regulations”).

26. Tentative Draft No. 2, *supra* note 23, § 7a.

B. Distinctions Between Statutory and Common Law

For their frequent coalescence, there exist important distinctions between statutory law and common law. I will describe some of the prominent discriminating markers.

From the beginning, customary law or common law operated independently of the development of political rights, which give rise to "public law." In the nineteenth century, the "jurisprudential roots" distinguishing the common law from statutory law, a conceptual segregation of so called "private law" from "public law," permitted the conclusion that common law pertained to protection of pre-political rights, such as those involving property or autonomy interests, against personal injury or property loss.²⁷ Public law, in turn, "consisted of government compulsions *restricting* private freedom[,]"²⁸ while the common law identified and *protected* private freedom and autonomy. Over time, we will see preservation of individual freedom and autonomy as the pole star of the developing common law.

Accordingly, although in application statutory and common law approaches sometimes converge, blurring the distinctions between the two,²⁹ the roles of statutory and common law are differentiable. Conventionally, legislatures have been considered responsible for effecting public policy through the passage of *ex ante* rules, while courts have occupied themselves with entry of *ex post* justice between private litigants.³⁰ By *ex ante* legislative rules is meant rules of prospective application, such as a statute requiring a manufacturer to report a product that creates or may create a substantial product hazard.³¹ *Ex post* rules of law entered by judges applying the common law typically evaluate disputes, injuries or losses already suffered, and resolve the issue of where the loss should finally rest—with the injured party or the actor. In common law matters, prior to acting it may not be crystal clear to individuals whether their actions will incur liability, for example, whether their statements are defamatory, whether they may peaceably repossess property, or whether they may erect a fence that obscures their neighbor's view. This uncertainty has given rise to acerbic observations like that of Jeremy Bentham, who wrote: "Common law judges make law as a man makes laws for his dog. When a dog does

27. Indeed, aspects of common law tort are thought to antedate not only early statutes but even the modern state. LANDES & POSNER, *ECONOMIC STRUCTURE*, *supra* note 18, at 1.

28. Farber & Frickey, *supra* note 3, at 886 (emphasis added).

29. *Id.* at 876. The authors comment upon the increased and confessed policy making pursuits and *ex ante* approaches of common law courts.

30. *Id.*

31. Consumer Product Safety Act § 15, 15 U.S.C. § 2064 (1994).

anything you want to break him of, you wait till he does it, and then you beat him for it.”³²

Another distinguishing characteristic of common law is that it is conceptual, while statutory law can be described as textual.³³ This distinction is played out in the markedly different tasks before the court applying statutory law as opposed to applying common law. In Posner’s words, “[j]ust as statutory concepts must be justified by demonstrating their provenance in statutory texts, so common law concepts must be justified by demonstrating their provenance in sound public policy.”³⁴

Accordingly, unlike a statute, the common law permits a contextual evaluation of conduct. This is to say that the judge’s inquiry does not end at reaching an answer as to whether the defendant’s conduct was prohibited, or permitted, by the state. Rather, the inquiry involves evaluation of whether the conduct conformed with, or exceeded, the developed and normative standards of the common law. In property law the contextual inquiry might be whether a landowner’s use of her property is compatible with customary neighboring uses. In tort law the question might be whether the defendant acted as we would expect a reasonable man, or whether the injured plaintiff took ordinary precautions to protect himself from harm.

To hypothesize, if we were to have a statute, or a regulation pursuant to a statute, defining the proper method of taking one’s seat when operating ride-on farm equipment, an operator injured after falling off equipment while operating it from a standing position would, we can suppose, find any potential tort recovery reduced or eliminated because of this departure from the statutory standard of care. Under the common law of torts, however, the evaluation of the operator’s conduct would be contextual.³⁵ A contextual

32. Jeremy Bentham, *quoted in* LAWRENCE M. FRIEDMAN, *AMERICAN LAW* 93 (1984).

33. POSNER, *PROBLEMS*, *supra* note 17, at 247.

34. POSNER, *PROBLEMS*, *supra* note 17, at 249. By way of example, there are salient differences between the structure and workings of the common law system pertaining to environmental torts and the structure of statutory environmental laws. As summarized by Professor Gerald W. Boston and the author:

The law of nuisance consists of general, broad and abstract principles of unreasonable interferences, applicable to any activity. The regulatory structure, in contrast, is highly particularized, detailed and expected to govern well-defined kinds of activity. In nuisance, plaintiff’s rights are exclusively determined by courts of general jurisdiction. To be contrasted, the regulatory structure is drafted, enforced and adjudicated within regulatory agencies and under the supervision of officials commanding technical expertise in particular, and often quite specialized, areas of regulation.

GERALD W. BOSTON & M. STUART MADDEN, *THE LAW OF ENVIRONMENTAL AND TOXIC TORTS: CASES, MATERIALS AND PROBLEMS* 213-214 (West 1994).

35. “The question what a prudent man would do under given circumstances is then equivalent to the question what are the teachings of experience to the dangers of this or that

approach would permit, though not require, a fact finder to conclude that it was unreasonable for a middle-aged Brookfield, Connecticut ophthalmologist to operate a rider-mower in a standing position, but perhaps reasonable for an experienced thirty-year-old Iowa farm employee to do so on a thresher.

An additional distinction between common law and statutory regimes is their respective responsiveness to development, amendment, or withdrawal. A trial court's entry of an improvident common law interpretation is subject to one or often two tiers of appellate review. A judge's unwarranted constriction or enlargement of rules can be corrected. Where a state's high court has countenanced a new rule, the political process provides for a legislative veto.³⁶ Because of their prerogatives to turn aside rules whose former utility cannot be demonstrated in a modern setting, common law judges can discard outdated rules with far greater ease than outdated legislation can be set aside.³⁷

III. STATUTORY AND COMMON LAW FOIBLES

A. Statutory Shortcomings

There are demonstrable limitations to both statutory and common law approaches. I begin with observations about the limitations of statutory approaches.

Statutes do not readily distinguish hues. As a general proposition, a statutory solution is confined by the four corners of the statute's language. As the British authority, Craies, put it in *Statute Law*, "a statute may not be extended to meet a case for which provision has clearly and undoubtedly not

conduct under these or those circumstances; and as the teachings of experience are matters of fact, it is easy to see why the jury should be consulted with regard to them." OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 150 (1923) [hereinafter HOLMES, *THE COMMON LAW*].

36. *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143 (Md. 1985).

37. As Wheeler, J., *concurring*, wrote in *Dwy v. Connecticut Co.*, 92 A. 883, 891 (Conn. 1915):

The court best serves the law which recognizes that the rules of law which grew up in a remote generation may in the fullness of experience be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society, and considerable property rights have become vested in reliance upon the old rule. It is thus great writers upon the common law have discovered the source and method of its growth, and in its growth found its health and life. It is not and should not be stationary. Change of this character should not be left to the Legislature.

Id.

been made.”³⁸ As conduct is either approved or forbidden, generally there is no opportunity for equitable adjustment of the conflicting interests, or for consideration of the comparative responsibility of opposing parties for the harm or inequity.

A concomitant limitation is that where a statute specifically describes an approach or remedy to be taken by the court, it will admit of no departure from it. The problems with the inflexibility of such an approach have been manifest in the recent application of the Federal Sentencing Guidelines,³⁹ requiring sentences of definite ranges to be given defendants filling certain bright line criteria. The appalling inappropriateness of some of the required sentencing, and the incapacity of the sentencing judge to consider the exigencies of particular cases in fashioning a sentence, have led at least one federal trial judge to deflect statutory sentencing restrictions.⁴⁰

Statutory responses to societal problems are also vulnerable to what Locke called “the dangers of enthusiasm,”⁴¹ and the invariable fellow traveller of enthusiasm, haste.⁴² In contemporary terms, what better example

38. P. S. Atiyah, *Common Law and Statute Law*, 48 MOD. L. REV. 1, 8 (1985) (quoting CRAIES ON STATUTE LAW 102) [hereinafter Atiyah, *Common Law*].

39. See The Comprehensive Federal Crime Control Act of 1984, 18 U.S.C. §§ 3551-3693 (1994), 28 U.S.C. §§ 991-998 (1994). The underlying Senate Report stated the goal of the statute as the elimination of “unwarranted dispar[ities] and uncertainty” in sentencing. S. Rep. No. 225, 98th Congress, 1st Sess. 49 (1983) (discussed in Symposium, *The Tennessee Supreme Court: Judicial Activists?*, 24 MEM. ST. U. L. REV. 297 & n.2 (1994)).

40. Peter Bowles, *Judge Ignores Ruling*, NEWSDAY, Dec. 3, 1994, at A-26 (“Utilizing a loophole in the law, U.S. District Court Judge Jack Weinstein this week ignored a higher-court mandate to sentence an admitted heroin addict to 10 years in prison and instead imposed the 26 months she already had served.”). *Id.*

In a June 4, 1994 column, journalist Nat Henthoff quotes District Court Judge Jack Weinstein as stating that the sentencing guidelines “require, in the main, cruel imposition of excessive sentences.” Nat Henthoff, *Judge Breyer: Lots of Room for Dissent*, THE WASHINGTON POST, June 4, 1994, at A-19.

41. Locke wrote:

Enthusiasm, though founded neither on reason nor divine revelation, but rising from the conceits of a warmed or over-weening brain, works yet, where it once gets footing, more powerfully on the persuasions and actions of men than either of those two, or both together, men being most forwardly obedient to the impulses they receive from themselves; and the whole man is sure to act more vigorously, where the whole man is carried by a natural motion. For strong conceit, like a new principle, carries all easily with it, when got above common sense, and freed of all restraint of reason, and check of reflection, it is heightened into a divine authority, in concurrence with our own temper and imagination.”

JOHN LOCKE, LOCKE SELECTIONS 17 (Sterling P. Lamprecht ed., 1956).

42. In THE EDUCATION OF HENRY ADAMS, in the chapter titled “A Law of Acceleration,” Adams writes, “In every age man has bitterly and justly complained that nature hurried and hustled him[.]” HENRY BROOKS ADAMS, THE EDUCATION OF HENRY ADAMS 493 (1946) [hereinafter EDUCATION OF HENRY ADAMS].

A corollary of haste is inattention to detail. Richard Posner writes:

of the perilous "enthusiasm" described by Locke is available than in the realm of recent hastily-considered and unseasoned limitations upon the government's ability to promulgate land use restrictions in the public interest? A growing number of states have passed legislation requiring that the state or governmental subdivision provide compensation to landowners for restrictions on their use of land, in many settings where the landowner's use historically has been proscribable under the doctrine of public nuisance.⁴³ Representative is the Florida statute, entitled the "Private Property Rights Protection Act," providing sweepingly that "[w]hen a specific action of a governmental entity has inordinately burdened an existing use of real property * * * the property owner * * * is entitled to relief, which may include compensation for the actual loss to the fair market value of the real property caused by the action of government[.]"⁴⁴

Such statutes provide an alarming example of the risks of the sometimes hasty legislative and political process, as they hobble the effectiveness of land use regulation by levying upon the state a monetary cost to what was previously a simpler public interest predicate for such restrictions. Let us imagine a Maryland state environmental agency contemplating a public nuisance initiative against a Chesapeake Bay marina operator whose jet ski rentals cause shore erosion, damage oyster beds, and disturb the serenity of migratory fowl. Regulations pursuant to historical public nuisance authority would not require compensation to the marina operator.

If, in contrast, Maryland had a law such as Florida's, the agency could no longer be guided solely by considerations of whether requiring the marina operator to moderate this land use will serve the public interest, or is in furtherance of state public nuisance authority to enjoin activities corrosive to the public health, welfare and safety, a conventional zoning and

The basic reason why statutes are so frequently ambiguous in application is not that they are poorly drafted—though many are—and not that the legislators failed to agree on just what they wanted to accomplish in the statute—though often they do fail—but that a statute necessarily is drafted in advance of, and with imperfect appreciation for the problems that will be encountered in, its application.

Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 811 (1983).

43. E.g., ARIZ. REV. STAT. ANN. §§ 9-500.12, 9-500.13, 11-810, 11-811 (1995); COLO. REV. STAT. ANN. § 24-68-105(1)(1995); FLA. STAT. ch. 163.3184 (1995); IDAHO CODE § 67-8001 - 8003 (1995); 1995 Kan. Sess. Laws 2015; LA. REV. STAT. ANN. § 3:3621-3624 (1995); N.D. CENT. CODE § 42-01-06 (1995); TEX. GOV'T CODE ANN. § 2007 (West 1995); VA. CODE ANN. § 9-6.14:7 (Michie 1995); WYO. STAT. § 9-5-301 to 9-5-305 (1995).

44. H.B. 863, 1995, Reg. Sess., 1995 Fla. H.B. 863, available in LEXIS Legis Library, Sttext File. The statute defines "existing use" as including "reasonably foreseeable" uses. *Id.* at § (2)(b).

public nuisance balancing of individual hardship and public interest. Under such new land use regulations, the regulator's pragmatic concern will be largely financial, for example, whether the state of Maryland is prepared to pay the marina operator the \$1 million or more her attorneys will demand in just compensation. It requires no elaboration to recognize that such legislation acts as a strong disincentive to those charged with protecting the environment.

What are the legislative enthusiasms that permit such laws to be passed, and how is it that they prevail over widespread public commitment to environmental protection? The answer is found in simple principles of political economy. In the Florida setting, a large proportion of Florida residents own or aspire to own property. They can readily imagine land use initiatives, by the law of public nuisance, a clean water act or otherwise, that will trammel their prerogatives to use their land as they wish. In contrast to this sprawling, politically alert, and anxious proportion of the electorate, only a small and politically inefficient number of Florida residents have reflected deliberately upon the predicament such compensation statutes create for this generation and the next.

Another example of improvident legislative enthusiasm might be the push during the 104th Congress for a so-called "loser pays" approach to civil litigation. For years tort reform proponents have discussed various "loser pays" approaches, whereby a losing plaintiff, or one who rejects a settlement offer that turns out to be more generous than his ultimate reward, if any, would be liable for some measure of the opposing party's marginal counsel fees. H.R. 10, the Common Sense Legal Reform Act of 1995, had such a provision, applicable to suits brought in state courts and alleging violation of state liability laws. Apart from the gross overinclusiveness of such approaches, in that they would deter frivolous litigation only by means of discouraging much meritorious litigation, a loser pays protocol represents a "fee shifting" approach which has been demonstrated repeatedly to be ineffective, inefficient, and unfair in working its purported goal.⁴⁵

45. See Keith N. Hylton, *Fee Shifting and Incentives to Comply With the Law*, 46 VAND. L. REV. 1069 (1993); Judith L. Maute, *Peevyhouse v. Garland Coal and Mining Co. Revisited: The Ballad of Willie and Lucille*, 89 NW. U. L. REV. 1341, 1439 (1995); Peter Charles Coharis, *A Comprehensive Market Strategy for Tort Reform*, 12 YALE J. ON REG. 435, 525 & n.142 (1995); Clinton F. Beckner, III & Averly Katz, *The Incentive Effects of Litigation Fee Shifting When Legal Standards are Uncertain*, 15 INT'L REV. L. & ECON. 205 (1995) ("Our analysis shows that when legal standards are administered imperfectly, the efficiency of fee shifting is a problem of the second best. . . . We conclude that just as there is no reason to believe that the British rule generally reduces the procedural costs of litigation, there is also no good reason to think that it generally promotes efficient substantive behavior.").

While statutory solutions may be improvidently hasty, they may also arrive too late in the day. A statutory answer is not normally sought until a problem has erupted in the public consciousness, when a societal dilemma has achieved such a level of gravity and tenacity that "social convention" demands "community voting."⁴⁶ As Benjamin Cardozo observed, "[a]ll history demonstrates that legislation intervenes only when a definite abuse has disclosed itself, through the excess of which public feeling has finally been aroused."⁴⁷ In contrast, the common law judge is not encumbered by any political need that a critical mass of public concern have been reached before justice can be entered in an individual case. The common law judge must consider and resolve a societal conflict when presented early in its maturation. With neither a governing statute nor a controlling common law rule, the judge can nevertheless enter a judgment illuminated by the refracted light of parallel or related common law principles. In so doing, in Professor Marshall Shapo's words, the common law judge "semiconsciously capture[s] society's ideas about justice in legal issues framed by specific disputes."⁴⁸

A related shortcoming of the statutory approach is that statutes typically have no provision for the subtle and particularized application of accepted principles to individual circumstances, a model Professor John Siliciano describes as one of "individualized justice."⁴⁹ Dean John Wade wrote that unlike common law tort decisions, which "requir[e] a careful and judicious balancing of the conflicting interests of the various parties," legislation typically involves "tradeoffs" which "can produce varying results that may combine to establish a reasonably fair average, but the average often comes from many specific instances in which one or the other party is treated unfairly."⁵⁰ Accepting the necessity of such tradeoffs, statutes are notorious for omitting to state clearly their rationale, and thus attorneys and judges are often left adrift in determining a statute's applicability.⁵¹

46. Marshall S. Shapo, *In the Looking Glass: What Torts Scholarship Can Teach Us About the American Experience*, 89 NW. U. L. REV. 1567, 1569 (1995).

47. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 144 (Yale 1921) [hereinafter CARDOZO, *JUDICIAL PROCESS*].

48. Shapo, *supra* note 46, at 1569.

49. John A. Siliciano, *Corporate Behavior and the Social Efficiency of Tort Law*, 85 MICH. L. REV. 1820 (1987) [hereinafter Siliciano].

50. John J. Wade, Book Review, 47 LA. L. REV. 691 (1987) (reviewing WEX S. MALONE, *ESSAYS ON TORTS* (1987)). In *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring), Justice Stevens corroborated Dean Wades's assessment of the legislative process, describing "governmental action" as "frequently the product of compromise, of collective decision making, and . . . of mixed motivation."

51. McNollgast, *Legislative Intent: The Use of Political Theory in Statutory Interpretation*, 57 L. & CONTEMP. PROBS. 3, 13 (1994).

Finally, and with particular reference to the current state and congressional emphasis on statutory alteration of common law liability rules, it is not by any stretch clear that increased codification of the common law gains the commonality, uniformity or predictability that its proponents desire.⁵² In the words of tort observer Victor E. Schwartz: "The fact is that over the past twenty years state tort law has grown further apart, not closer together. The advent of so-called 'tort reform' has augmented this trend. This year alone, approximately one dozen states have enacted tort reform statutes; yet none of them are the same. A nuance in any one of them could be major and outcome determinative."⁵³

In the end, as Professor Lawrence M. Friedman writes, "the legislative process is neither as good at accommodating everybody as some have thought, nor as elitist and undemocratic as the worst of the cynics has described it. Rather, it is rough, complex and imperfect."⁵⁴

B. Common Law Shortcomings

What is a clear-eyed look at the inherent limitations of common law jurisprudence? A primary objection to modern common law development, and an impetus for current statutory modification, is that, in crafting a remedy, the common law judge has no meaningful disincentive to the temptation to subtly gratify his or her own philosophical or social predilections. An element of this is unassailably true,⁵⁵ and it may be that in the

52. Cf., Saul Levmore, *Rethinking Comparative Fault: Variety and Uniformity in Ancient and Modern Tort Law*, 61 TUL. L. REV. 235 (1986).

53. Victor E. Schwartz, 'Class Action' Reform: Endless Clashes of Values of Constructive Results?, MASS TORT LITIG. REP., Aug. 1995, *3. Schwartz states:

As someone who has studied the law of torts for a while, I am troubled by generalizations about tort law being 'in common' throughout the United States. The pressure to more litigation forward for the 'round-up' tend to lead even the most thoughtful of judges to see American tort law as somehow capable of being placed in a Cuisinart(TM), where differences of law are lost in a blended product that somehow represents both plaintiff and defendant interests.

Id. at *3.

54. LAWRENCE M. FRIEDMAN, AMERICAN LAW 106 (1984). Professor Friedman continues: "Blacks and consumers have, for example, a much greater chance to win the ear of legislators than was true some fifty years ago."

55. As Cardozo wrote:

There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James' phrase of 'the total push and pressure of the cosmos,' which, when reasons are

natural law foundation of the common law we will find the basis for the modern criticism that judicial tinkering with common law principles invites, or even requires, manipulation of policy objectives, rules, and outcomes in order to harmonize results with the views of individual judges. After all, what could be more problematic than the question of what rights and obligations are the original and inalienable of modern men and women?

As has been suggested, the common law is ideally suited to resolving claims arising at the borders of societal and business dynamics, whether the issue is promissory estoppel or damages for emotional distress. Ironically, it is just this role of deciding cases at the margins of modern experience that enlarges the vulnerability of common law adjudication to the individual views of the sitting judge. A judge's own ideological gloss, the argument goes, is most likely to be detected where "preexisting doctrinal propositions do not provide a clear answer."⁵⁶ Examples of modern causes of action in which unsettled doctrine has stimulated and will continue to stimulate the normative orientations of sitting judges are the developing law affecting the old, but now eroding, doctrine of employment at will, and the gestational rights of children *in utero*.⁵⁷

Common law courts are also criticized for the sometimes seemingly cavalier approach taken to the doctrine of stare decisis, i.e., the rule that courts should ordinarily follow the substantive rule of law recognized to that point by previous holdings of equal or higher courts in that jurisdiction. For its seemingly plain and overarching imperative, implementation of stare decisis has perplexed the finest legal minds in common law history. Considering the role of stare decisis, Benjamin Cardozo ruminated:

What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice or morals?⁵⁸

nicely balanced, must determine where choice shall fall.

CARDOZO, JUDICIAL PROCESS, *supra* note 47, at 12.

56. Stephen M. Bainbridge, *Social Propositions and Common Law Adjudication*, 1990 U. ILL. L. REV. 231, 232 (reviewing MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* (1988)).

57. See *infra* notes 230-244 and accompanying text. See also TERRENCE F. KIELY, *MODERN TORT LIABILITY: RECOVERY IN THE '90'S* § 6.6 (1990).

58. CARDOZO, JUDICIAL PROCESS, *supra* note 47, at 10. Jurists have long recognized

Consistent with Cardozo's implicit thesis that common law decisions bear the stamp of judicial individualism, much of the modern common law vulnerability to statutory "correction" can be attributed to common law rules that are arguably, to use a baseball metaphor, "ahead of the curve" of the "community's sense of justice."⁵⁹ For example, Professor Martin Kotler characterized recent and ongoing state and federal products liability reform as a statutory rebuff to so-called "strict" products liability, with the reform statutes showing a consistent commitment to returning liability rules to the older predicate finding of fault.⁶⁰

Further developing Professor Kotler's point, common law approaches may also be subject to statutory correction where there is neither public nor legislative consensus that the common law rule satisfies an instrumentalist objective—an objective either to encourage worthy conduct, or to deter harmful or wasteful conduct. An example of a common law rule with a precarious instrumentalist basis might be the widespread common law rule that nonmanufacturing sellers are subject to liability without fault, or strict products liability, even though most wholesalers and retailers are not parties to the design process or the crafting of warnings or instructions for products, and thus are not in a position to efficiently remove unsafe products—at least not prior to an accident—or to influence better behavior on the part of their manufacturing suppliers. One cannot, therefore, be surprised that recent

that precedent is a necessary, but not sufficient, source of the law. Cardozo wrote:

I do not mean that precedents are ultimate sources of the law, supplying the sole equipment that is needed for the legal armory, the sole tools, to borrow Maitland's phrase, "in the legal smithy." Back of precedents are the basic juridical conceptions which are the postulates of judicial reasoning, and farther back are the habits of life, the institutions of society, in which these conceptions had their origin.

Id. at 19.

59. Martin A. Kotler, *Utility, Autonomy and Motive: A Descriptive Model of the Development of Tort Doctrine*, 58 U. CIN. L. REV. 1231, 1240 (1990) (citations omitted).

60. *Id.* at 1239. Using the example of statutory abrogation of strict liability rules in products liability, Kotler explains:

Given that there probably has never been a social consensus in favor of the instrumentalist values underlying strict liability in tort for defective products, the wave of product liability reform legislation proposed or enacted within the past few years was probably inevitable. Although some features of this body of legislation appear to be solely a product of industry lobbying, it is worth noting that the most important features serve to immunize defendants from liability where the harm caused cannot fairly be said to have been their fault. This legislative insistence on the existence of fault as a condition for the imposition of liability is serving to bring tort doctrine back into line with the community's sense of justice.

Id. at 1239-40.

proposed products liability reform legislation would in most circumstances return the negligence standard to products liability for nonmanufacturing sellers.⁶¹ The bills recently before both the House of Representatives and the Senate recognize the unfairness and illogic of imposing "strict" liability upon retailers and wholesalers who neither participate in the design process for products they sell, nor create warnings or instructions for a product.

Noteworthy is the parallel readjustment occurring in the American Law Institute's draft Restatement (Third) of Torts: Products Liability, a reinterpretation taking place a mere thirty years following publication of its strict products liability provision, Restatement (Second) of Torts § 402A. The proposed Restatement tethers a finding of design or informational (warnings) defects to a risk-utility analysis that fully examines the prudence, foresight, and vigor of a manufacturer's conduct.⁶² In all settings but the primitive manufacturing defect, liability will no longer be "strict" in any important sense, but rather tied to a manufacturer's failure to conform to society's expectation of a manufacturer's professionalism, or conversely the manufacturer's substandard, blameworthy or culpable conduct.

While common law responses may have been ahead of the curve in a doctrine such as strict products liability, elsewhere the common law has been behind the curve, or tardy, in its incremental response to changing conditions. Professor David R. Hodas provides the illustration of the special

61. S. 565, Product Liability Fairness Act of 1995 § 5(a)(2), 104th Cong., 2d Sess. 1995 [hereinafter Fairness Act]. The Fairness Act adopts three liability standards for non-manufacturing sellers. There is liability where the claimant proves that: (1) the product causing the harm was sold by the defendant; (2) the defendant failed to exercise reasonable care; and (3) this failure to exercise reasonable care was a proximate cause of the claimant's harm. There may also be liability if the seller has given an express warranty, and, far less frequently, if the seller has engaged in intentional wrongdoing.

The Fairness Act states that liability cannot be based solely upon "an alleged failure to inspect a product if the product seller had no reasonable opportunity to inspect the product that allegedly caused harm to the claimant." See generally Products Liability: Hearings on S. 565 Before the Senate Comm. on Commerce, Science and Transportation, 104th Cong., 2d Sess., 1995 WL 152027 (1995) (testimony of M. Stuart Madden).

These observations are not intended to address potential liability issues raised by private labelers, such as Sears, who engage manufacturers to produce products under the Sears trademark or other trademarks proprietary to Sears.

62. Reporters James A. Henderson, Jr. and Aaron D. Twerski explain the adoption of a risk-utility analysis for design defects and for warnings defects in §§ 2(a) & (b) in a Note comment reading in part:

Scholarly commentary agrees overwhelmingly with the . . . risk-utility approach adopted. . . . See, e.g., MADDEN, PRODUCTS LIABILITY vol. 1 at 299 (2d ed. 1988)("[T]he majority rule posits that plaintiff cannot establish a prima facie case of defective design without evidence of a technologically feasible, and practicable, alternative to defendant's product that was available at the time of manufacture.")

Tentative Draft No. 2, *supra* note 23, § 2, commentary at 83.

injury rule for bringing a claim in public nuisance. Describing the public nuisance private claimant's obligation to show a harm qualitatively different from that suffered by the public at large,⁶³ Hodas states the while the special injury rule "may have made sense in an era when misuse of existing technology affected only people in the immediate vicinity," such concerns "pale in comparison to modern worries about an accident at a chemical plant . . . , [or] an oil spill."⁶⁴ These modern risks, which can cause severe and sprawling damages and which "prompted a revolution in statutory environmental law," Hodas notes, have spurred no similar reexamination of the restrictive special injury requirement,⁶⁵ which indeed has been adopted in numerous state statutes treating public nuisance.⁶⁶

This review would not be complete without mention that while the common law has sometimes developed a right or a remedy that has yet to command significant public approval, it has also sometimes worked in seeming conflict with the development of progressive jurisprudence. Indeed, common law doctrine has often "worked . . . as a tool for those with sufficient resources to influence the legal system."⁶⁷ During the 1950s and the early 1960s, the common law was employed by certain states "to sanction . . . discriminatory treatment."⁶⁸ Moreover, many twentieth century statutory modifications of the common law were motivated by a desire to ameliorate the harshness of common law rules perceived as unfair to plaintiffs. An example is the Federal Employer's Liability Act of 1908,⁶⁹ which eliminated such common law barriers to railworker claims as

63. See RESTATEMENT (SECOND) OF TORTS § 821C(1) (1979), which provides that "[i]n order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference."

64. David R. Hodas, *Private Actions for Public Nuisance: Common Law Citizen Suits for Relief From Environmental Harm*, 15 *ECOLOGY L.Q.* 833, 884 (1989).

65. *Id.* at 884-85.

66. *E.g.*, CAL. CIV. CODE § 3493 (West 1993) ("A private person may maintain an action for public nuisance if it is specially injurious to himself, but not otherwise."); ALA. CODE § 6-5-123 (1993) ("If a public nuisance causes a special damage to an individual in which the public does not participate, such special damage gives a right of action.").

The tendency towards stasis of judge-made common law may also stem from the processes in which judges are appointed, a process in which "the normal criteria of judicial fitness have been an eager acceptance of the American past rather than an eager interest in the American future." HAROLD J. LASKI, *THE AMERICAN DEMOCRACY: A COMMENTARY AND AN INTERPRETATION* 31 (1949) [hereinafter LASKI, *AMERICAN DEMOCRACY*].

67. Abner J. Mikva, *The Shifting Sands of Legal Topography*, 96 *HARV. L. REV.* 534, 540 (1982) (reviewing GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982)).

68. *Bell v. Maryland*, 378 U.S. 226, 308 (1964).

69. 35 Stat. 65 (1908) (current version at 45 U.S.C. § 51-60).

assumption of the risk, contributory negligence, and the fellow servant rule.⁷⁰

III. ANTECEDENTS AND HISTORICAL ROLE OF THE COMMON LAW

A. Natural Law and Custom

The origins of the common law can be traced at least from Aristotle⁷¹ and Cicero⁷² through the Book of Exodus.⁷³ It is generally supposed that much of the animating basis for early common law derived from an innate, elemental, and sometimes theocratic concept of justice often termed "natural law."⁷⁴

What is "natural law"? Conceding the lack of a single and generally agreed to definition,⁷⁵ Benjamin Fletcher Wright, Jr. offered three alternative definitions: (1) "rules which are statements of the basic laws of the universe, or of man's constitution, or of social and political relationships";⁷⁶ (2) "principles of right, principles which are established or which should be established if justice is to prevail";⁷⁷ and (3) "either a set of standards or ideals, [or] a set of limitations imposed upon men by some superhuman power."⁷⁸

70. Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, at 430.

71. ARISTOTLE, *THE NICHOMACHEAN ETHICS*, Book V (1947).

72. Cicero wrote in DE LEGIBUS II:

Of all these things about which learned men dispute there is none more important than clearly to understand that we are born for justice, and that right is founded not upon opinion but in nature. There is indeed a true law, right reason, agreeing with nature and diffused among all, unchanging, everlasting, which calls to duty by commanding, deters from wrong by forbidding. . . It is not allowed to alter this law nor to deviate from it. Nor can it be abrogated. Not can we be released from this law either by the senate or by the people. Nor is any person required to explain or interpret it.

BENJAMIN FLETCHER WRIGHT, JR., *AMERICAN INTERPRETATIONS OF NATURAL LAW: A STUDY IN THE HISTORY OF POLITICAL THOUGHT* 5 (1931) [hereinafter WRIGHT, INTERPRETATIONS] (quoting CICERO, DE LEGIBUS II, 4, 10).

73. See, e.g., James J. Restivo, Jr., *Insuring Punitive Damages*, NAT'L L.J., July 24, 1995, at C-1 ("[I]n Exodus 22:9 . . . it is prescribed that one found guilty of taking another's property be required to pay back double what was taken.").

74. WRIGHT, INTERPRETATIONS, *supra* note 72, at 33-35. See also SURYA PRAKASH SINHA, *WHAT IS LAW?: THE DIFFERING THEORIES OF JURISPRUDENCE* 92-106 (1989).

75. WRIGHT, INTERPRETATIONS, *supra* note 72, at 3.

76. WRIGHT, INTERPRETATIONS, *supra* note 72, at 3.

77. WRIGHT, INTERPRETATIONS, *supra* note 72, at 3.

78. WRIGHT, INTERPRETATIONS, *supra* note 72, at 3.

For those persons ascribing to a power greater than themselves as the giver of natural law, Thomas Aquinas offered this theocratic description:

[G]ranted that the world is ruled by Divine Providence, . . . that the whole community of the universe is governed by Divine Reason. Wherefore the very Idea of the government of things in God the Ruler of the universe, has the nature of a law. And since the Divine Reason's conception of things is not subject to time but is eternal, according to Prov. viii. 23, therefore it is that this kind of law must be called eternal.⁷⁹

With expected succinctness, Richard Posner, in turn, has offered the secular observation that equates natural law to "basic political morality."⁸⁰

Such rights as were recognized as "natural" to man, and thus cognizable to English common law, were not limited by those recognized by Roman law or English Royal law. As explained by the thirteenth century British jurist, Bracton, a nuisance imposes a servitude upon the land of another. It is "an attack upon the ordinary amenities of land-holding, or, in the now established if optimistic phrase, upon 'natural rights.'"⁸¹

Of course what an age has considered to be a right "natural" to society is doubtless affected by custom. Custom too has long been considered a building block of the common law.⁸² In modern common law, the role of custom is recognized not as a reference principally to custom of the community, as it was in earlier times, but rather to the doctrinal custom of hundreds of years of common law, developed by accretion like a coral reef.

Nevertheless, societal and professional customs still play a recognizable role in the development of common law doctrine. For example, the custom of an industry may be referred to for determination of whether a brewery owner would, in the exercise of ordinary care, place mats upon slippery floors, even though such evidence would not preclude a finding of negligence if the *laissez faire* approach, even if generally countenanced, of no mats were concluded to be negligent.⁸³ Likewise, such concepts as the

79. St. Thomas Aquinas, *The Suma Theologica, Part II*, in READINGS IN JURISPRUDENCE 29 (Jerome Hall ed., 1938) [hereinafter READINGS IN JURISPRUDENCE].

80. POSNER, PROBLEMS, *supra* note 17, at 230.

81. C. H. S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 8 & n. 26 (1970) [hereinafter FIFOOT, HISTORY] (citing HOLDSWORTH, HISTORY OF ENGLISH LAW VII 328-33).

82. RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 25-26 (1981).

83. See *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932) (Hand, J., dictum), *cert. denied*, 287 U.S. 662 ("[A] whole calling may have unduly lagged in the adoption of new and available devices."); Richard A. Epstein, *The Path to the T.J. Hooper: The Theory and History of Custom in the Law of Torts*, 21 J. LEGAL STUD. 1, 38 (1992) ("There are many competitors for this questionable honor, but Hand's famous bon mot is perhaps the most influential, and mischievous, sentence in the history of the law of torts.").

prudent man standard for evaluating the conduct of a fiduciary is, of course, pregnant with consideration of customary investment and related practices.⁸⁴

B. Early Environmental Torts

Long before the modern rapture with comprehensive statutory schemes, common law courts weighed costs and benefits, and mediated disputes between private interest and societal goals. Not surprisingly, much early common law rights balancing concerned the reconciliation of competing property interests. The societal commitment to a freeholder's liberty to develop his land was early limited to development that did not impair the rights of neighboring landowners to quietly or profitably enjoy their own property. As Bracton wrote:

If a servitude is imposed upon a man's land by the law, though not by the grant of a man, whereby he is forbidden to do on his own land what may harm his neighbor, as if he should raise the level of a pond on his own land or make a new one whereby his neighbor is harmed, as for example if his neighbor's land is thus flooded, this will be an injurious nuisance of his neighbor's freehold unless his neighbor has given him permission to do it.⁸⁵

Solicitude for the rights of the ordinary landholder as against development by more economically powerful neighbors continued into this century. In the early New York decision of *Whalen v. Union Bag & Paper Co.*,⁸⁶ the court reinstated an injunction against a pulp mill, employing hundreds of persons and representing a then substantial \$ 1 million investment, that was polluting the waters of a downstream neighbor whose actual annual damages the jury calculated at \$312 per year. Rejecting defendant's claim that the injunction should not stand in that plaintiff's alleged actual injury was "small as compared with the great loss which will be caused by the issuance of the injunction,"⁸⁷ the Court of Appeals stated:

See also Clarence Morris, *Custom and Negligence*, 42 COLUM. L. REV. 1147 (1941); *Mayhew v. Sullivan Mining Co.*, 76 Me. 100, 112 (1884) ("If the defendants had proved that in every mining establishment that has existed since the days of Tubal-Cain, it has been the practice to cut ladder-holes in their platforms, . . . without guarding or lighting them, and without notice to contractors or workmen, it would have no tendency to show that the act was consistent with ordinary prudence.")

84. *Salem v. Central Trust Co.*, No. C-930932, 1995 WL 238936, at *3 (Ohio Ct. App. 1995).

85. *FIFOOT, HISTORY*, *supra* note 81, at 8 (citations omitted).

86. 101 N.E. 805 (1913).

87. *Id.* at 805-06.

Although the damage to the plaintiff may be slight as compared with the defendant's expense of abating the condition, that is not a good reason for refusing an injunction. Neither courts of equity nor law can be guided by such a rule, for if followed to its logical conclusion it would deprive the poor litigant of his little property by giving it to those already rich.⁸⁸

IV. THE COMMON LAW IN THE TWENTIETH CENTURY

A. Modern Common Law Goals

1. *Social Utility; Wealth Maximization*

From the earliest jurisprudential writings through and including modern law and economic theorists, there has existed consensus that a proper goal of law, common law and statutory law alike, is the reconciliation of the public welfare with private rights. In modern terms, this measurement has been termed alternately as one of social utility and wealth maximization.⁸⁹ This inclusive analysis of the role of law measures a law's justice by the answer to this question: "Has the law worked the greatest good for the greatest number?"

a. Social Utility

Essentially, a social utility or utilitarian approach posits that conduct is acceptable, if not salutary, if its expected benefits to the actor and to society together outweigh its expected hardship upon another in particular or society more generally.⁹⁰ Demonstration of this principle is found in the legal disputes following the death of Elvis Presley, involving the issue of whether the designees of Presley's estate could control the singer's "right of

88. *Id.* at 806.

89. Although complementary, the two concepts enjoy an important distinction. According to Richard A. Posner, the utilitarian analysis may essay to calculate the benefit to society of a general good, such as equality of economic opportunity, or preservation of green space in urban areas, without reference to the presence or absence of the proponents' willingness to pay for such objectives. A "wealth maximization" efficiency approach, on the other hand, counts only those "preferences backed by a willingness to pay." Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 499 (1980) [hereinafter Posner, *Ethical and Political Basis*].

90. Cf. David C. Owen, *The Moral Foundation of Product Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427 (1993), discussed in Tentative Draft No. 2, *supra* note 23, at 48; David G. Owen, *Products Liability: Principles of Justice for the 21st Century*, 11 PACE L. REV. 63 (1990).

publicity” as against all others—or, more prosaically, could the estate’s designees forever profit from others’ use of his likeness.⁹¹ The Sixth Circuit decided to leave undisturbed the traditional common law rule that heirs may not retain exclusive control over an ancestor’s name or likeness, commenting in words redolent of economic concerns:

It does not seem reasonable to expect that [changing the common law rule] would enlarge the stock or quality of the goods, services, artistic creativity, information, invention or entertainment available. Nor will it enhance the fairness of our political and economic system. It seems fairer and more efficient for the commercial, aesthetic, and political use of the name, memory and image of the famous to be open to all rather than to be monopolized by a few.⁹²

The rest is history. As readily as if they had set up a card table with Elvis paraphernalia on Manhattan’s Lexington Avenue, the Sixth Circuit anointed the modern Elvis industry, an American apotheosis of wealth maximization.

Such litigation illustrates that a guiding principle of modern economic analysis of the law is that the public good is enhanced when the expected benefits derived by a rule—benefits to the actor together with benefits to society more broadly—outweigh the expected costs, both monetary and social. A rule of law achieving this goal is termed “efficient.” The economic analysis of law to evaluate its efficiency is often called “utilitarian.”⁹³

What is meant by social utility, or a utilitarian role of law?⁹⁴ In a general sense, it may be described as law’s role in promoting what is just, with the implicit expectation that what is just promotes the general welfare. Aquinas states the idyllic proposition that “we call those legal matters just, which are adapted to produce and preserve happiness and its parts for the body politic; since the state is a perfect community[.]”⁹⁵ James Barr Ames expressed the apogee of the utilitarian ethos in these words: “The law is utilitarian. It exists for the realization of the reasonable needs of the

91. *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir. 1980), *cert. denied* 449 U.S. 953 (1980).

92. *Id.* at 959-60.

93. See generally James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 110 (1908); Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40 (1915).

94. Cf., John C. Goodman, *An Economic Theory of the Evolution of Common Law*, 7 J. LEGAL STUD. 393 (1978).

95. READINGS IN JURISPRUDENCE, *supra* note 79, at 28. See generally DAVID G. OWEN, *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* (1995). Early “scientific” utilitarian analyses “drew upon several trends in Victorian intellectual history for [their] roots.” COSGROVE, *OUR LADY*, *supra* note 5, at 39.

community. If the interest of an individual runs counter to this chief object of the law, it must be sacrificed.”⁹⁶

Writing that law is “forward looking,” a “servant of human needs,”⁹⁷ Richard Posner and others call for a scientific ethic of wealth maximization, a so-called “efficiency norm.”⁹⁸ Many have responded to this call, with one influential commentator concluding that “much (though by no means all) of modern tort law is at least roughly consistent with a Posnerian economic analysis.”⁹⁹

Arguing the point, Posner enlists the law of battery—the common law rule concerning liability for harmful or offensive touching. Quite apart from the corrective justice, moral, and fairness attributes of the doctrine of tortious battery, the law and economics argument states that an efficient doctrine should “deter persons from engaging in activities that a reasonable person would view . . . socially wasteful.”¹⁰⁰ Thus in *Garratt v. Dailey*,¹⁰¹ remembered as the case in which the nearly six-year-old Dailey pulled away the lawn chair as his, until that point, affectionate aunt was sitting down, tort liability in battery would serve efficiency principles irrespective of whether Dailey received any psychic or material benefit from the act. If the harm to the aunt exceeded any benefits to Dailey, a simple utilitarian analysis would support imposition of liability. If, on the other hand, Dailey derived benefits that exceeded any physical or psychological injury to his aunt, pulling out the chair was wasteful or inefficient. Why wasteful? Because the transaction (the act and the harm) without the aunt’s consent would, and did, generate a laborious lawsuit in which great expense, or transaction costs, were unnecessarily devoted to determining liability. In Posner’s words:

[T]orts like simple battery . . . involve a . . . coerced transfer of wealth to the defendant occurring in a setting of low transaction costs. Such conduct is inefficient because it violates the principle . . . that where market transaction costs are low, people should be required to use the market if they can and to desist from the conduct if they can’t. [I]t is inefficient to permit the market to be bypassed in this way.¹⁰²

96. Ames, *supra* note 93, at 110.

97. POSNER, Problems, *supra* note 17, at 29.

98. See, e.g., Posner, *Ethical and Political Basis*, *supra* note 89.

99. Gary T. Schwartz, *Reality in Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 381 (1994).

100. JAMES A. HENDERSON, JR. ET AL., THE TORTS PROCESS (4th ed. 1994) (discussing RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 191-195 (3d ed. 1986)).

101. 279 P.2d 1091 (Wash. 1955).

102. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 192-193 (2d ed. 1977) [hereinafter POSNER, ECONOMIC ANALYSIS].

Numerous analysts have identified a common law tropism towards efficiency.¹⁰³ Importantly, scholars have also concluded that efficient rules of law actually predict efficient litigation strategies, including settlement strategies. As stated by Ramona L. Paetzold and Steven L. Willborn, "[w]here both parties to a dispute have a continuing interest in precedent, the parties will settle if the existing precedent is efficient, but litigate if the precedent is inefficient."¹⁰⁴ Wes Parsons, even while disputing these premises, collected scholarship revealing, in fact, the broad range of cost internalization achievements of evolving common law doctrine.¹⁰⁵ Included in Parsons's review was scholarly attribution to the common law of accidents as promoting "efficient resource allocation,"¹⁰⁶ the efficiencies of the common law of rescue, salvage, and Good Samaritan assistance;¹⁰⁷ the efficiency of the common law damages rule for anticipatory repudiation of a contract;¹⁰⁸ and the efficiency of the economic loss rule in tort.¹⁰⁹

A primitive but greatly persuasive, evaluative standard was offered in a negligence context by Judge Learned Hand in the opinions in *United States v. Carroll Towing Co.*¹¹⁰ and *Conway v. O'Brien*.¹¹¹ In those two cases, the court stated that "the degree of care appropriate to a situation is the result of the calculus using three factors: the likelihood that the conduct will injure others, multiplied by the seriousness of the risk if it happens, balanced against the burden of taking precautions against the risk." In formula, the calculation is known to many as B (Burden) < P (Probability of Harm) x L (Magnitude of Loss Should It Occur).¹¹² The Learned Hand

103. E.g., George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977); Ramona L. Paetzold & Steven L. Willborn, *The Efficiency of the Common Law Reconsidered*, 14 GEO. MASON. U. L. REV. 157 (1991).

104. Paetzold & Willborn, *supra* note 103, at 157.

105. Wes Parsons, Note, *The Inefficient Common Law*, 92 YALE L.J. 862 (1983).

106. William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851, 852 (1981).

107. William A. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 128 (1977).

108. Thomas H. Jackson, 'Anticipatory Repudiation' and the Temporal Element of Contract Law: An Economic Inquiry into Contract Damages in Cases of Prospective Nonperformance, 31 STAN. L. REV. 69, (1978) ("Compensating the aggrieved party for its entire expectation loss, without overcompensating it, is an economically sound principle in that it facilitates the movement of goods and services to their higher value user.")

109. W. Bishop, *Economic Loss in Tort*, 2 OXFORD J. LEGAL STUD. 1, 2-3 (1982).

110. 159 F.2d 173 (2d Cir. 1947).

111. 111 F.2d 611, 612 (2d Cir. 1940), *rev'd* 312 U.S. 492 (1941).

112. Of Hand's formula, Posner writes:

This is an economic test. The burden of precautions is the cost of avoiding the accident. The loss multiplied by the probability of the accident is the expected accident cost, i.e., the cost that the precautions would have averted. If a larger cost could have been avoided by incurring a smaller cost, efficiency requires that

approach can be conformed to more modern utilitarian analysis by visualizing B, or the Burden upon the actor, as encompassing not only the particular burden of precautionary measures upon the actor, but also the burden upon society if the conduct must either be eliminated due to liability rules, or made more expensive, and therefore beyond the economic reach of many, and then asking would the precautionary measures be undertaken.¹¹³

A leading exponent of the efficiency role of the common law of tort was Professor, now Judge, Guido Calabresi, who argued persuasively that in matters of compensation for accidents, civil liability should ordinarily be laid at the door of the "cheapest cost avoider," the actor who could most easily discover and inexpensively remediate the hazard. Together with A. Douglas Melamed, Calabresi states persuasively that, particularly in the setting of environmental harm, considerations of economic efficiency dictate placing the cost of accidents "on the party or activity which can most cheaply avoid them."¹¹⁴ Validation of this approach came in the Ninth Circuit decision in *Union Oil Co. v. Oppen*,¹¹⁵ a California coastal oil spill case in which the court allowed commercial fishermen to recover their business losses caused by lost fishing opportunity during a period of pollution. The court followed Calabresi's suggestion that it "exclude as potential cost-avoiders those groups\activities which could avoid accident costs only at extremely high expense,"¹¹⁶ a consideration militating against the conclusion that the cost of preventing or repositioning the loss be borne directly by consumers (fishermen or seafood purchasers) in the form of precautionary measures (whatever they might hypothetically be), or by first party insurance. Rather, the court found justice and efficiency were served by placing responsibility for the loss on the "best cost avoider," in this setting the defendant oil company, reasoning:

[T]he loss should be allocated to that party who can best correct any error in allocation, if such there be, by acquiring the activity to which the

the smaller cost be incurred.

POSNER, *ECONOMIC ANALYSIS*, *supra* note 102, at 122 (citations omitted).

113. Likewise in keeping with a utilitarian view that transcends the concerns of the individual plaintiff and defendant, consideration of the factors P (Probability of Harm) and L (Magnitude of the Loss should it occur) would be enlarged to contemplate the likelihood of harm to others, and the magnitude of the potential harm, not only in terms of the individual plaintiff but also to the population exposed to the risk.

114. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View at the Cathedral*, 85 HARV. L. REV. 1089, 1096-97 (1972). See also MARK C. RUDERT, COVERING ACCIDENT COSTS: INSURANCE, LIABILITY AND TORT REFORM 29, 32-33 (1995).

115. 501 F.2d 558 (9th Cir. 1974).

116. *Id.* at 569.

party has been made liable. The capacity "to buy out" the plaintiffs if the burden is too great is, in essence, the real focus of Calabresi's approach. On this basis, there is no contest—the defendants' capacity is superior.¹¹⁷

A utilitarian analysis also influences modern rules governing issuance of injunctions, but here the accepted standards have in effect forced a marriage of utilitarian principles with those of corrective justice. Again in the setting of environmental harm, notions of corrective justice and utilitarianism have coexisted uneasily for decades. Put most simply, courts then and today must wrestle with choices between (1) corrective justice (putting remediation of plaintiff's wrongfully-caused harm as the most prominent objective); or (2) utilitarian justice, pursuant to which the court may permit defendant to continue all or part of the injurious conduct, most often accompanied by a requirement that plaintiffs be indemnified for their involuntary hardship.

Originally, and due in some measure to the sanctity in which the common law of property held interests in land, even the most economically powerless landholder could seek and secure an injunction against a neighboring activity that interfered substantially with the plaintiff's use of his property. Against a defendant's argument that its smelter, or its pulp mill, employed hundreds of people and brought great wealth to the community, in deciding whether or not to issue an injunction an early court responded that it was unwilling to "balance" injuries. The court would not weigh the defendant's cost and the community hardship in losing the industry, against the often modest provable harm to plaintiff's ordinarily small and noncommercial property. As the New York Court of Appeals stated in *Whalen*,¹¹⁸ to fail to grant the small landowner an injunction solely because the loss to him, in absolute terms, is less than would be the investment-backed loss to the nuisance-creating business and lost employment of the community, would "deprive the poor litigant of his little property by giving it to those already rich."¹¹⁹ By "giving it," the court of course means "requiring plaintiff to endure ongoing environmental servitudes imposed by defendant."¹²⁰

117. *Id.* at 570 (citing GUIDO CALABRESI, *THE COST OF ACCIDENTS* (1970)).

118. 101 N.E. 805 (1913).

119. *Id.* at 806.

120. *Id.* See also *McCleery v. Highland Boy Gold Mining Co.*, 140 F. 951 (D. Utah 1904) (reaching a comparable corrective justice conclusion, and granting the injunction against defendant's mine and smelter).

Whalen,¹²¹ together with *Madison v. Ducktown Sulphur Copper & Iron Co.*,¹²² in a mirror image judicial response, pose the dilemma presented by a plaintiff's environmental claim against the conduct of an entity enjoying economic influence in the community. Contrasted with the *Whalen* court's unabashedly populist sentiment, the modern rule of environmental injunctions might seem coldly utilitarian. The Restatement (Second) of Torts section 936 factors for injunction issuance expressly include weighing of "the nature of the interest to be protected,"¹²³ thus, presumably inviting an elevation of plaintiff's bona fides where the court considers the activity meritorious, perhaps a Camp Fire Girls campground, and a devaluation where the court deems it less valuable, perhaps an automobile scrapyards. Along similar lines, hardship to the defendant of ceasing or changing its activity and "the interests of third persons or the public" are proper considerations.¹²⁴ To this observer, Mr. Whalen would have difficulty today in obtaining his injunction.

*Boomer v. Atlantic Cement Co.*¹²⁵ involved a widescale and conceded industrial nuisance in the form of airborne cement dust emanating from an upstate New York cement plant. In the lower court, a nuisance was found, and temporary damages awarded, but plaintiffs' application for an injunction was denied. Before the New York Court of Appeals, Judge Bergen's opinion early identified the policy issue most troublesome to the court: to what extent should the court in deciding a justiciable controversy between private litigants simultaneously decide broad policy issues (in this case air quality) often thought the proper province of legislation?¹²⁶

Recognizing that to deny the injunction would depart from *Whalen*'s corrective justice--no balancing approach, discussed above, the court nevertheless adopted a utilitarian approach that weighed the hardships

121. 101 N.E. 805 (1913).

122. 83 S.W. 658 (Tenn. 1904). *Ducktown Sulphur* involved a state supreme court's reversal of a trial court's injunction, where the high court assigned great weight to defendant's showing that an injunction would render useless defendant's property, valued at many multiples the value of plaintiff's property and representing the largest single contribution to county revenues, as well as turn out of work hundreds of employees. The court observed that it is often true "in a case of conflicting rights, . . . that neither party can enjoy his own without in some measure restricting the liberty of the other." *Id.* at 667.

123. RESTATEMENT (SECOND) OF TORTS § 936 (a) (1979).

124. RESTATEMENT (SECOND) OF TORTS § 936 (e), (f), (g) (1979).

125. 257 N.E.2d 870 (N.Y. 1970).

126. *Id.* Even without resolution of the question of whether or when it is appropriate to exercise "judicial power to use a decision in private litigation as a purposeful mechanism to achieve direct public objectives greatly beyond the rights and interests before the court," Judge Bergen observed that the resolution of air quality issues "is likely to require massive public expenditure and to demand more than any local community can accomplish and to depend on regional and interstate controls." *Id.* at 871.

imposed upon plaintiffs against the economic consequences, for Atlantic Cement and for regional employment, of the requested injunction:

The ground for denial of injunction, notwithstanding the finding both that there is a nuisance and that plaintiffs have been damaged substantially, is the large disparity in economic consequences of the nuisance and of the injunction.¹²⁷

2. *Corrective Justice*

The moral authority of natural law, and its successor the common law, turns upon the perception and the reality that its tenets lead to "just" results.¹²⁸ What is meant by "justice?" In Aquinas's words, "a thing is said to be just, from being right, according to the rule of reason."¹²⁹ Most contemporary observers would agree that a core consideration in any modern contemplation of "justice" is the goal of "corrective" justice, i.e., a result that, to the extent money damages can, deprives the wrongful party of their gain, and restores the injured party to the position they enjoyed before the harm.¹³⁰ Holmes, contemplating torts, explained:

Be the exceptions more or less numerous, the general purpose of the law of torts is to secure a man indemnity against certain forms of harm to

127. *Id.* at 872. Authentic questions may be raised about the reach of *Boomer*. It is possible that *Boomer* is an anomaly in that Atlantic Cement was a big economic contributor to the region and, for the purposes of the suit, the conduct of its business operations was Simon pure. Cf. *Little Joseph Realty v. Town of Babylon*, 363 N.E.2d 1163, 1167 (N.Y. 1977), in which the same New York Court of Appeals issued an injunction against an asphalt plant operating contrary to zoning ordinances, and distinguished *Boomer* as a case involving "no zoning violation, or for that matter, [no] violation of any other statute."

128. As Augustine says (De Lib. Arb. i.5), "[t]hat which is not just seems to be no law at all: wherefore the force of a law depends on the extent of its justice. Now in human affairs a thing is said to be just, from being right, according to the rule of reason. But the first rule of reason is the law of nature. . . . Consequently, every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law." READINGS IN JURISPRUDENCE, *supra* note 79, at 37. Cf., Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMM. 93, 105-113 (1995).

129. READINGS IN JURISPRUDENCE, *supra* note 79, at 37.

130. I say "to the extent possible" because the majority of common law remedies involve the award of money damages, and money damages do not restore to their pre-incident condition a person who has suffered personal physical injury, or the dignitary injury of a defamation or an invasion of privacy. Likewise it is only by flight of the imagination that we suppose the payment of money damages deprives a defendant of a "gain" achieved by a tortious battery or medical malpractice. In these settings, the justification of common law remedies will depend heavily upon connections with other goals, such as deterrence, individual autonomy and liberty, and instrumentalism.

person, reputation, or estate, at the hands of his neighbors, not because they are wrong, but because they are harms.¹³¹

In Book Five, chapter two of Nicomachean Ethics, Aristotle is credited with laying the cornerstone of the corrective justice principles of the common law.¹³² Under the Aristotelian corrective principle of *diorthotikos*, or “making straight,” at the remedy phase the court will attempt “to equalize things by means of the penalty, taking away the gain from the assailant. For the term ‘gain’ is applied generally to such cases, even if it be not a term appropriate to certain cases, e.g., to the person who inflicts a wound—and ‘loss’ to the sufferer. . . . The judge restores equality.”¹³³

3. *Instrumentalism and Morality*

a. Instrumentalism

The instrumental role of common law doctrines comprises its effect upon social and business behavior. A rule having a successful instrumental role will convey simultaneously an exhortative, hortatory message, lauding behavior deemed beneficial, together with a message intended to discourage or deter behavior deemed bad by whatever measure (utilitarian or rights-based). As an abstract proposition, a just and effective common law rule will encourage positive and productive behavior and discourage negative activity.

Often the instrumental objectives of a rule may not be apparent on its face, and are evident only upon their salutary realization in risk reduction,

131. HOLMES, *THE COMMON LAW*, *supra* note 35, at 144.

132. Considered synonymous with the terms “rectificatory” or “commutative.” POSNER, *PROBLEMS*, *supra* note 17, at 313. “[T]he law . . . treats the parties as equal, and asks only if one is the author and the other the victim of injustice or if the one inflicted and the other has sustained an injury. Injustice in this sense is unfair or unequal, and the endeavor of the judge is to equalize it.” ARISTOTLE, *NICOMACHEAN ETHICS* 146 (J. Welldon trans., 1912), *discussed in* DAVID G. OWEN, *THE PHILOSOPHICAL FOUNDATIONS OF FAULT IN TORT LAW* (1995).

133. 2 ARISTOTLE, *THE COMPLETE WORKS OF ARISTOTLE* 1786-87 (Jonathan Barnes ed., 1984). “It is for this reason,” Aristotle continues, “that it is called just [*dikaion*], because it is a division into two parts [*dika*] . . . and the judge [*dikastes*] is one who bisects [*dichastes*] Therefore the just . . . consists in having an equal amount before or after the transaction.” *Id.*

See generally Richard W. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625 (1992).

loss prevention or the like.¹³⁴ The empirical failure of a common law doctrine may likewise manifest itself.

i. *Discouragement of Harmful Conduct*

Imposition of an external standard of conduct, it has been argued, serves less to buy, affect or co-opt the moral position of the population than to put persons on notice of the behavior expected of them to avoid liability. In Holmes' words:

The true explanation of the reference of liability to a moral standard . . . is not that it is for the purpose of improving men's hearts, but that it is to give a man a fair chance to avoid the harm before he is held responsible for it. It is intended to reconcile the policy of letting accidents lie where they fall, and the reasonable freedom of others with the protection of the individual from injury.¹³⁵

Just what is Holmes' "fair chance to avoid" behavior before being held responsible for it? In tort, for example, the triggering event for imposition of responsibility for another's loss takes "knowledge" as the "starting point," followed by examination of the "circumstances" that "would have led a prudent man to perceive danger, although not necessarily to foresee the specific harm."¹³⁶ What are such circumstances? Holmes answers "experience."¹³⁷

The goal of deterrence has seemingly been torts' perpetual and faithful companion. As early as 1890 an academic author wrote of the goals of the negligence action in these words:

The really important matter is to adjust the dispute between the parties by a rule of conduct which shall do justice if possible in the particular case, but which shall also be suitable to the needs of the community, and tend to prevent like accidents from happening in [the] future.¹³⁸

134. The instrumentalism of law was recognized by Aquinas: "A thing may be known in two ways: first, in itself; secondly, in its effect, wherein some likeness of that thing is found: thus someone not seeing the sun in its substance, may know it by its rays." READINGS IN JURISPRUDENCE, *supra* note 79, at 31.

135. HOLMES, THE COMMON LAW, *supra* note 35, at 144.

136. *Id.*

137. *Id.*

138. William Schofield, *Davies v. Mann: Theory of Contributory Negligence*, 3 HARV. L. REV. 263, 269 (1890).

Even those who question whether tort law, for example, “does in fact deter as thoroughly as economic models suggest”¹³⁹ concede it delivers a “moderate amount of deterrence.”¹⁴⁰

ii. *Encouragement of Useful Conduct*

The instrumental quality of law, be it positive (statutory) law or common law, lies in its capacity to influence behavior. Thus, by hypothesis (1) following the notorious verdict involving the woman scalded by McDonald’s coffee, it might be predicted that fast food restaurants would serve coffee at lower temperatures; (2) following the English decision in *Lumley v. Gye*,¹⁴¹ a rival theater owner might be disinclined to importune a leading singer away from her existing contractual obligations; and (3) after the verdict arising from the spill of the Exxon Valdez, tanker owners might be more probing in their evaluation of the fitness of vessel captains.

b. The Moral Promontory: Mores and Morality

Ronald Dworkin has been called a “chief evangelist” of the proposition that judges should advance a right-based jurisprudence rooted in moral precepts,¹⁴² a proposition that begs the question: “To whose moral precepts do we refer?” In periods of our country’s past in which populations were less heterogenous and political power less pluralistic, the guiding precepts were those of white Christian males. Many academic analyses have concluded that nineteenth century judges unabashedly used tort law as a device for inducing morally suitable behavior.¹⁴³

Does morality remain an identifiable fixture of modern common law doctrine? Ernest J. Weinrib answers affirmatively, pointing to tort doctrine as common law in which wrongdoing is a necessary, if not by itself sufficient, component of liability.¹⁴⁴ How is a moral position to be determined? Rawls claimed that “one of the aims of moral philosophy is to

139. Schwartz, *supra* note 99, at 379.

140. Schwartz, *supra* note 99, at 379.

141. 118 Eng. Rep. 749 (1853).

142. Vincent A. Wellman, *Conceptions of the Common Law: Reflections on a Theory of Contract*, 41 U. MIAMI L. REV. 925, 925 n.1 (1987) (citing RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 1-130 (1977)).

143. E.g., Robert J. Kaczorowski, *The Common Law Background of Nineteenth Century Tort Law*, 51 OHIO ST. L.J. 1127, 1128 (1990).

144. Ernest J. Weinrib, *The Morality of Tort Law*, Address at the Tort Law Section, Association of American Law Schools Annual Meeting (Jan. 9, 1988), *discussed in* Kotler, *supra* note 59, at 1231 n.2, 1240.

look for possible bases of agreement where none seem to exist. [Moral philosophy] must attempt to extend the range of existing consensus."¹⁴⁵

To some, the modern surge towards strict tort liability, even though receding in some settings, is reflective of a moralistic conception of indemnity obligations, i.e., behavioral and compensatory obligations unaffected by utilitarian weighing or even, when taken to the extreme, comparative causal contribution. Richard Posner explained the shift (until quite recently at least) from negligence based criteria for accident compensation to strict liability in these words: "The need for compensation is unaffected by whether the participants in the accident were careless or careful[,] and we have outgrown a morality that would condition the right to compensation upon a showing that the plaintiff was blameless and the defendant blameworthy."¹⁴⁶

4. *Individual Autonomy and Liberty*

What do we mean by the terms autonomy and liberty? "Autonomy" has been defined as "independence or freedom."¹⁴⁷ Liberty, in turn, is defined as "[f]reedom from external control of interference, obligations, etc., freedom to choose."¹⁴⁸ Some have argued that among the first tasks of a common law doctrine such as torts "is to define the boundaries of individual liberty."¹⁴⁹ The "justice" rationale of private property, in turn, "is [that it] enhances [the owner's] reasonable autonomy."¹⁵⁰

145. JOHN RAWLS, *A THEORY OF JUSTICE* 582 (1971). As Holmes explained, describing the common law antecedents of the modern law of misrepresentation:

[t]he common law . . . preserves the reference to morality by making fraud the ground on which it goes. It does not hold that a man always speaks at his peril. But starting from the moral ground, it works out an external standard of what would be fraudulent in the average prudent member of the community, and requires every member at his peril to avoid that.

HOLMES, *THE COMMON LAW*, *supra* note 35, at 137.

Holmes likewise identified a moral basis for the common law action in malicious prosecution. "The legal remedy here, again, started from the moral basis, the occasion for it, no doubt, being similar to that which gave rise to the old law of conspiracy, that a man's enemies would sometime seek his destruction by setting criminal law in motion against him." HOLMES, *THE COMMON LAW*, *supra* note 35, at 141.

146. Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 29-30 (1972).

147. THE RANDOM HOUSE COLLEGE DICTIONARY 92 (rev. ed. 1975).

148. *Id.* at 772.

149. Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 203 (1973).

150. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 173 (1980), *discussed in* David G. Owen, *Products Liability: Principles of Justice for the Twenty-first Century*, 11 PACE L. REV. 63, 65 & n.4 (1990).

In *The Morality of Freedom*, Joseph Raz writes that “[a]utonomy requires that many morally acceptable options be available to a person.”¹⁵¹ Our society’s commitment to a legal system vouching safe individual autonomy and liberty is expressed in the earliest interpretations of its organizing principles in the Constitution. In his dissent in the *Slaughter-House Cases*,¹⁵² Mr. Justice Field described the import of the Privileges and Immunities Clauses of Article IV, Section 2 and Section 1 of the Fourteenth Amendment as ensuring that “which of right belong[s] to the citizens of all free governments. Clearly, among these must be placed the right to pursue lawful employment in a lawful manner, without other restraint than such as equally affects all persons.”¹⁵³ As our society recognizes a fundamental right to pursue lawful activity without wrongful interference of others, it likewise has recognized the right to do so with relative safety from personal physical harm. Another’s autonomy or liberty interest extends, as it were, to the tip of your nose and no further. As Professor Richard Epstein has explained: “[T]he law of tort does not end with the recognition of individual liberty. Once a man causes harm to another, he has brought himself within the boundaries of the law of tort.”¹⁵⁴

Economists, in turn, might cast the sentiments of individual autonomy and liberty in terms of avoiding involuntary or coerced transfers of wealth. A manufacturer of amplified sound systems who loses customers as a result of a trade libel¹⁵⁵ or a theater owner whose premier singer under contract is lured away by a rival theater,¹⁵⁶ each suffers lost profits. The rival theater owner may actually realize a money profit from the wrongful interference with the singer’s contractual obligations. The author of the trade libel may gain increased sales of his or her business commentary, or may merely realize a nonpecuniary increase in wealth—whatever satisfaction one might derive from having harshly and erroneously criticized a large corporation. The economist argues that the theater’s suit for interference with contractual relations, or the manufacturer’s suit for trade libel, operate simply to correct a coerced transfer of wealth. If those lost profits are left unmediated by a

151. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 378 (1986).

152. 83 U.S. (16 Wall.) 36 (1872).

153. *Id.* at 97 (Field, J., dissenting).

154. Epstein, *supra* note 149, at 208. Professor Epstein continues: “It does not follow, however, that he will be found liable in each and every case in which it can be showed that he caused harm, for it may still be possible for him to escape liability, not by an insistence upon his freedom of action, but upon a specific showing that his conduct was either excused or justified.” Epstein, *supra* note 149, at 208.

155. *Bose Corp. v. Consumers Union of United States, Inc.*, 446 U.S. 485 (1984).

156. *Lumley v. Gye*, 118 Eng. Rep. 749 (1853).

remedy for money damages, they represent an involuntary and inefficient transfer of wealth from the injured party to the injurer.

C. The Process of Enlightened Gradualism

Let us now turn to a broader consideration of the systems, mechanisms and means by which the common law effects its goals of justice and efficiency. By trial, error, experiment, expansion, and correction, the common law has hewn to an objective of advancing the public welfare. Making obeisance in turn to principles of corrective justice, individual autonomy, instrumentalism and efficiency, courts hearing common law claims receive and resolve disputes that ordinarily are not the subject of statute or regulation. Reconciling the nominally divergent goals of corrective justice and efficiency—the incongruity between which is more formal than real¹⁵⁷—the common law proceeds along a course of enlightened gradualism. I use the term enlightened to describe common law judges' identification and consideration of evolving societal needs, examined through the lens of developed principles of modern justice, sociology and economics. The term gradualism connotes recognition of the common law court's constant reference in existing doctrine and precedent, providing it with a genuine but moderated capacity to mold new doctrine.

What have been the principal methodologies of the common law capacity for growth? This section discusses but a few.

1. *Conditional Stare Decisis*

An original assessment of a court's obligation to follow germane prior decisions, or precedent, of its own or superior courts, commonly called the rule of stare decisis, left some common law judges with the perception that theirs was a limited charge of the application of precedent to new disputes.¹⁵⁸ As early as 1833, English Jurist Baron Parke stated the theory of case law in these words: "It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the

157. LANDES & POSNER, *ECONOMIC STRUCTURE*, *supra* note 18, at 9. "[I]n the absence of a more precise specification of fairness we find no necessary incompatibility between a positive theory [of torts] that stresses fairness and one that stresses efficiency." LANDES & POSNER, *ECONOMIC STRUCTURE*, *supra* note 18, at 19.

158. In 1890 one author described a modest court prerogative: "The office of the judge is not to make [the law] . . . but to find it, and, when it is found, to affix to it his official mark, by which it becomes more certainly known and authenticated." JAMES C. CARTER, *THE IDEAL AND THE ACTUAL IN THE LAW* 231, *quoted in* COSGROVE, *OUR LADY*, *supra* note 5, at 32.

determination of the particular case, but for the interests of law as a science.”¹⁵⁹

Unlike legislatures, which may shed prior policies as a snake sheds its skin, courts applying common law principles are at least nominally constrained by stare decisis.¹⁶⁰ Professor Eisenberg, in *The Nature of the Common Law*, offers this modern description of the doctrine and its contemporary role, emphasizing support and replicability as its central tenets:

Under [the principle of stare decisis,] as it is traditionally formulated, the ‘ratio decidenti’ (ground of decision), ‘holding,’ or ‘rule’ of a precedent is binding in subsequent cases, within broad limits. . . . Under the principles of *support* and *replicability*, the courts must establish and apply rules that are supported by the general standards of society, . . . and must adopt a process of reasoning that is replicable by the profession. Reasoning from precedent satisfies both those principles.¹⁶¹

For Professor Eisenberg’s distillation of stare decisis into the twin goals of support and replicability, stare decisis has always represented more of an aspirational goal than a rule of any rigidity. Perhaps the bloom of stare decisis was off the rose when Lord Gardner, Lord Chancellor of England, was reported in the *New York Times* as announcing the Law Lords’ abandonment of a rule observed for six decades that the body was powerless to alter its own decisions. Henceforth, Lord Gardner stated, the Law Lords would be free to “depart from a previous decision when it appears right to do so.”¹⁶²

159. ARTHUR R. HOGUE, *ORIGINS OF THE COMMON LAW* 231 (1966) [hereinafter HOGUE, *ORIGINS*] (quoting *Morehouse v. Rennell*, 1 C1 & F., 527, 546).

160. See RUPERT CROSS, *PRECEDENT IN ENGLISH LAW* 103 (3d ed. 1977); ABNER J. MIKVA, *THE SHIFTING SANDS OF LEGAL TOPOGRAPHY* (reviewing CALABRESI, *AGE OF STATUTES*, *supra* note 4). See also HOGUE, *ORIGINS*, *supra* note 159, at 231:

Our Common Law system consists in the applying to new combinations of circumstance those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency, and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised.

HOGUE, *ORIGINS*, *supra* note 159, at 231 (quoting *Morehouse*).

161. MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* 47 (1988) [hereinafter EISENBERG, *NATURE OF THE COMMON LAW*] (emphasis added).

162. *N.Y. TIMES*, July 31, 1966, § E. at 6, *quoted in* *White & White v. King*, 223 A.2d 763, 766 n.1 (Md. App. 1966).

Our own courts have repeatedly confirmed that stare decisis imposes no more than a rebuttable obligation, which obligation is released when competing public policy beckons persuasively. In one court's words,

[n]otwithstanding the great importance of the doctrine of stare decisis, we have never construed it to inhibit us from changing or modifying a common law rule by judicial decision where we find, in light of changed conditions or increased knowledge, that the rule has become unsound in the circumstances of modern life, a vestige of the past, no longer suitable to our people.¹⁶³

And as a Maryland Court of Special Appeals stated: "[t]his Court has manifested a willingness to change common law rules which have 'become unsound in the circumstances of modern life.'"¹⁶⁴ Thus the animating principle for abandoning an established rule of common law is that where the reasons for a rule have changed, the law too should change.¹⁶⁵

Whether or not a given common law rule will be scrutinized for modification or rejection is a function of the whether the court considers the rule just. The enduring "justice" of a given common law rule is revealed

163. *Boblitz v. Boblitz*, 462 A.2d 506, 526 (Md. 1983) (abandoning spousal immunity bar as applied to a vehicular tort claim brought by a woman against her estranged husband).

164. *Jones v. Maryland*, 486 A.2d 184, 188 (Md. 1985) (abrogating common law rule precluding conviction of an accessory before the fact of a higher crime than that for which the principal has been convicted). The court in *Jones* noted further that another common law rule discarded once it became "obsolete" was that of precluding trial of an accessory until the principal was tried. *Id.* at 188 (citations omitted).

165. *New Jersey v. Culver*, 129 A.2d 715, 724 (N.J. 1957) ("As long ago as 1609, in *Milborn's Case*, 7 Coke 7a (K.B. 1609), Lord Coke stated that the reason for the law is the soul of the law, and if the reason for the law has changed, the law is changed.") Along similar lines, Mr. Justice Holmes wrote "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." OLIVER WENDELL HOLMES, JR., *COLLECTED PAPERS* 187 (1920).

Cf., *White*, 223 A.2d 763 (involving an automobile guest statute and a choice of law issue). While declining appellant's request that the court abandon Maryland's *lex loci delicti* rule the court nevertheless states:

The doctrine of stare decisis, important as it is, is not to be construed as preventing us from changing a rule of law if we are convinced that the rule has become unsound in the circumstances of modern life. While it is important, in our legal system, that persons should know the probable consequences of their acts, that consideration has little bearing on the commission of unintentional torts. . . . It is characteristic of our legal system that the emergence of a new doctrine depends for its clarification on the case-to-case decisions, as its application to different factual situations presents new difficulties to be resolved and new factors to be weighed. ~

White, 223 A.2d at 766.

in the degree of acceptance accorded it in ensuing decisions, for it will be the decisions that follow which reveal the community's adoption or rejection of the rule. Cardozo identified the paradox that it is the very reality that a judge's expansion or contraction of existing doctrine may be rejected on appeal or in later decisions should liberate the court to apply its independent reasoning to the case before it. In Cardozo's words: "I sometimes think that we worry ourselves overmuch about the enduring consequences of our errors. . . . In the endless process of testing and retesting, there is a constant rejection of the dross."¹⁶⁶

Have courts succumbed to the heady recognition that they can depart from established precedent seemingly at will? The decisions suggest that they have not. For example, courts have rejected invitations to decree new public policy judicially, particularly where a new policy would fly in the face of manifest legislative intent. In one Maryland decision, *Felder v. Felder*,¹⁶⁷ a drunk driving case, the court was asked to countenance a claim against a tavern owner who sold liquor to a visibly intoxicated person, who was later involved in an accident. Rejecting the invitation, it concluded: "[W]e should virtually usurp legislative power if we should declare plaintiff's contentions to be the law of Maryland. . . . On few subjects are legislators kept better informed of legislation in other states."¹⁶⁸

Does such a malleable interpretation of stare decisis doctrine throw the common law and broader jurisprudential goal of predictability, or Professor Eisenberg's support and replicability, into a cocked hat? Are the interests of those engaged in or contemplating business or private pursuits disserved for being denied a clear common law expression of what conduct is permitted and what is penalized? Are common law rules truly formed as a man might make rules for his dog, by waiting for an excess or an omission and then punishing defendant for it?

To the argument that the very qualities of flexibility we have ascribed to the common law work unfairly against the actor who may not know in advance he may be liable in reparations for his conduct, Cardozo responds that "even when there is ignorance of the rule, the cases are few in which ignorance has determined conduct."¹⁶⁹ Other courts and commentators have parsed it according to whether potentially affected activity is a private one, or one that is commercial or public. Common law judges are more reluctant to give greater amplitude to an existing law affecting business matters, in reliance upon which investment-based decisions have been made, than upon

166. CARDOZO, JUDICIAL PROCESS, *supra* note 47, at 179.

167. 438 A.2d 494 (Md. App. 1981).

168. *Id.* at 496 (quoting *State v. Hatfield*, 78 A.2d 754 (Md. Ct. App. 1951)).

169. CARDOZO, JUDICIAL PROCESS, *supra* note 47, at 145.

common law rules affecting personal conduct. Developing this distinction, the court in *Woods v. Lancet*¹⁷⁰ stated:

[R]ules of law on which men rely in their business dealings should not be changed in the middle of the game, but what has that to do with bringing to justice a tort-feasor who surely has no moral or other right to rely on a decision of the New York Court of Appeals? Negligence law is common law, and the common law has been molded and changed and brought up to date in many another case. Our court [has] . . . not only the right, but the duty to reexamine a question where justice demands it.¹⁷¹

2. *Flexibility and Particularized Determination*

One of the most distinctive qualities of common law adjudication is its path of deductive reasoning, i.e., the following or forging of a path from general principles to a conclusion specific to the case before it.¹⁷² In the most liberal sense, the process is scientific. As Cornelius J. Peck explains: “[F]requent encounters with a general problem, presented in various contexts that an endless variety of fact patterns provides, give courts a type of experimental program in which they can formulate and test a governing rule.”¹⁷³

Where precedent is seemingly sound and the facts presented by a particular case are neither novel nor noteworthy, the process followed by the common law judge is similar in ways to that followed by a judge applying a statute.¹⁷⁴ True, however, to its distinctive role as the forum for resolving conflicts as to which there is not yet consensus, or at least a brokered legislative solution, it is the common law jury to which litigants repair for

170. 102 N.E.2d 691 (N.Y. 1951).

171. *Id.* at 694.

172. “Deduction” is defined as “the act or practice of deducing; reasoning from a known principle to an unknown; from the general to the specific, or from a premise to a conclusion.” WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 383 (College Ed. 1962).

173. Cornelius J. Peck, *The Role of Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265, 297 (1963), discussed in Carl T. Bogus, *War on the Common Law: The Struggle at the Center of Products Liability*, 60 MO. L. REV. 1, 65 (1995).

174. “[U]nless [exceptional] conditions are present, the work of deciding cases in accordance with precedents that plainly fit them is a process similar in its nature to that of deciding cases in accordance with a statute. It is a process of search, comparison, and little more[.]” a mechanistic endeavor comparable to “match[ing] the colors of the case at hand against the colors of many sample cases spread out upon their desk.” CARDOZO, JUDICIAL PROCESS, *supra* note 47, at 20.

answers to “complicated and doubtful cases[.]”¹⁷⁵ Using the model of products liability, Professor Marshall Shapo has ably described the fact-sensitive and particularized evaluation that characterizes the incremental development of design defect, informational obligation and other dimensions of the common law of products liability:

Products liability is highly fact oriented, a phenomenon manifest in the case law on defect, issues of liability as they pertain to the position of parties in the distributional chain, the problems involving alleged failure to warn, and in questions of proof. In part because of this orientation, and also in this way reflecting the general law of torts, products law requires incremental development. It is a classic of case-by-case construction of lines of precedents, which courts constantly test against their own jurisprudence on the subject and indeed against the bodies of law developing in other states. It is the very model of the cross-country conversation about the law that is a salutary feature of American jurisprudence.¹⁷⁶

3. *Adaptive Ability*

To Arthur R. Hogue, “[t]he survival of the [English] common law has depended in large part on the ability of its practitioners to adapt the legal system to new conditions—and adaptation has meant growth. Bold judges have created precedents adding new rules to meet new social and economic circumstances.”¹⁷⁷ Has the American experience been similar? The Maryland Court of Appeals decision in *Kelley v. R.G. Industries, Inc.*¹⁷⁸ is emblematic.

a. *Kelley v. R. G. Industries*

A microcosm of the qualities, and the liabilities, of common law growth is *Kelley*, which involved the painful and modern problem of injury and death caused by criminal use of small, concealable handguns, often called “Saturday-Night Specials.” In this suit, a convenience store employee who was wounded in a Maryland holdup sued the West German manufacturer of the Rohm revolver. The complaint alleged that the manufacture and distribution of the gun was an abnormally dangerous activity, and that the

175. HOLMES, THE COMMON LAW, *supra* note 35, at 160.

176. Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631 (1995).

177. HOGUE, ORIGINS, *supra* note 159, at 233.

178. 497 A.2d 1143 (Md. App. 1985).

gun itself was defective within the meaning of products liability law because of its negligent or incautious "marketing, promotion, distribution and design."¹⁷⁹

The Maryland Court of Appeals found itself obligated to reject these two counts. The handgun could not be considered "abnormally dangerous" under the rule in Restatement (Second) of Torts §§ 519-520 because Maryland courts, in line with courts of other jurisdictions, had not extended the doctrine beyond its original precincts, i.e., imposition of liability only upon owners or occupiers of land.¹⁸⁰ Neither could the gun be considered defective inasmuch as it functioned precisely as it had been designed to perform, and as the user had expected it to perform.

In terms of conventional dialectic, the thesis accepted by the Maryland court was that the sale of so-called Saturday Night Specials posed a grave and nonreciprocal danger to urban safety, and must therefore be deterred. The antithesis comprised two prongs: (1) extant products liability law posed obstacles to finding such handguns "defective" where they did, in fact, perform as was expected; and (2) existing law governing liability for abnormally dangerous activities had not been extended to encompass products that were, at the time of injury, no longer in the actual or constructive control of the manufacturer.

What avenues, then, were open to the *Kelley* court? It could not declare "all handguns or handgun usage . . . inconsistent with Maryland public policy" as that would be at a clear variance with the state's "comprehensive regulatory scheme concerning the wearing, carrying and transporting of handguns."¹⁸¹ No such obstacle existed, however, to the declaration of liability for certain gunshot injuries caused by a small subset of firearms used in the course of criminal conduct. In the court's words:

There is, however, a limited category of handguns which clearly is not sanctioned as a matter of public policy. To impose strict liability upon the manufacturers and marketers of these handguns, in instances of gunshot wounds caused by criminal use, would not be contrary to the policy embodied in the enactments of the General Assembly. This type of handgun, commonly known as a 'Saturday Night Special,' presents particular problems for law enforcement.¹⁸²

179. *Id.* at 1145.

180. *Id.* at 1147.

181. *Id.* at 1151, 1153 (discussing MD. ANN. CODE art. 27, § 36B-36G (Cum. Supp. 1984)).

182. *Kelley*, 497 A.2d at 1153. The court continued with a definition of "Saturday Night Specials" as "characterized by short barrels, light weight, easy concealability, low cost, use of cheap quality materials, poor manufacture, inaccuracy and unreliability. These characteristics render the Saturday Night Special particularly attractive for criminal use and virtually

The *Kelley* crafting of common law liability for manufacturers of inexpensive, concealable handguns was soon overturned by the Maryland legislature.¹⁸³ Yet the seed planted will doubtless continue to sprout elsewhere until a lasting common law response to this form of urban violence is achieved. Has the *Kelley* experience prompted courts in any other jurisdictions to refashion common law remedies to respond to these risks? Only recently a California court, weighing the negligence and strict tort liability cases arising from a San Francisco law firm office massacre, found that the victims' claims against the manufacturer of the semi-automatic assault weapon used in the killings could be pursued under California law of ultrahazardous activities.¹⁸⁴

C. Specific Demonstrations of Common Law Polycentric Justice

Numerous other examples exist of common law developments that successfully redress societal need, and which do so where legislatures have ceded the terrain to common law growth, or have failed to act for want of broad-based political will to do so. These common law developments each manifest, in varying degrees, some or each of the central propositions of judge-made law: corrective justice, morality, instrumentalism, efficiency, and capacity for growth.

1. *Comparative Fault*

The common law rule of contributory negligence precludes a plaintiff from recovery for wrongfully caused harm where the plaintiff's lack of ordinary care for her own safety contributed to that harm.¹⁸⁵ An early and influential expression of both the rule and its perceived logic was given in *Butterfield v. Forrester*,¹⁸⁶ the early nineteenth century decision where the plaintiff rode his horse into a pole left in the road by defendant. Lord Ellenborough explained the court's logic in denying judgment for plaintiff:

A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do[es] not himself

useless for the legitimate purposes of law enforcement, sport, and protection of persons, property and businesses." *Id.* at 1153-54

183. MD. CODE ANN. art. 3A, § 36-I(h) (1992).

184. *In re 101 California Street*, No. 959316, 63 U.S.L.W. 2652 (BNA) (Cal. Super. Ct. April 10, 1995).

185. 2 M. STUART MADDEN, PRODUCTS LIABILITY § 13.1 (2d ed. 1988 & Supp. 1995 with K. Northern).

186. 103 Eng. Rep. 926 (K.B. 1809).

use common sense and ordinary caution to be in the right. . . . One person being in fault will not dispense with another's using ordinary care for himself.¹⁸⁷

The defense's logic and application was widely embraced by a nineteenth century judiciary that was solicitous of early industry's desire to avoid hobbling liability rules, as well as by its conceptual reluctance, or incapacity, to contemplate that a harm might have more than one proximate cause.¹⁸⁸

Whatever might endure of the contributory negligence doctrine's original and facial logic, it can be seen to be in conflict with principles of corrective justice, instrumentalism and efficiency. For a plaintiff to be stripped of any remedy whatever due to any substandard conduct on his part, however inconsequential, permits considerations of formalism, even scholasticism, to override fairness. The orthodox rule of contributory negligence also fails to serve instrumental goals. It over deters a plaintiff's behavior by seemingly offering only the unilluminating admonition "don't do anything that might later be considered wrong," while providing no intelligible encouragement of useful conduct. For the potential defendant, contributory negligence under deters, by providing the message that for a substantial number of the defendant's wrongfully-caused harms, it will avoid all liability by a mere showing of some incautious conduct of plaintiff. Lastly, the contributory negligence rule is inefficient, as it contains no obligation to apportion the cost of detecting and ameliorating risk along the lines of the parties' comparative causal contribution to the loss. In this way it imposes substantial external costs upon parties who are not, with regard to the totality of the risk, the cheapest cost avoiders.

Today, comparative fault, in either its pure or its modified form, is "firmly entrenched in American law."¹⁸⁹ Where not implemented by statute,¹⁹⁰ the doctrine of pure comparative fault is a model of an efficient common law rule. By levying accident costs upon participants in proportion

187. *Id.* at 927.

188. Mary J. Davis, *Individual and Institutional Responsibility: A Vision for Comparative Fault in Products Liability*, 39 VILL. L. REV. 281, 284 & n.5 (1994) (citing Fleming S. James, Jr., *Contributory Negligence*, 62 YALE L.J. 691 (1953); Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946)).

189. See Michael Steenson, *Comparative Negligence in Minnesota*, 9 WM. MITCHELL L. REV. 299, 303 (1983), for a valuable exposition of the legislative and judicial enactment of comparative fault in Minnesota and other states.

190. See *Harrison v. Montgomery County Board of Education*, 456 A.2d 894, 906 (Md. 1983)(Davidson, J., dissenting) ("In this country, 39 states have abandoned the doctrine of contributory negligence and have adopted the doctrine of comparative negligence—31 by legislative enactment and 8 by judicial decision.").

to their causal contribution to the harm, pure comparative fault fairly apportions the cost of accident prevention, and the burden of failing to prevent accidents, between the actor and the victim. The comparative fault approach also achieves the binary instrumental role lacking in pure contributory negligence in that the rational actor, no longer completely exculpated by even a small level of substandard behavior on the plaintiff's part, will govern her conduct in the knowledge that as the author of an injury-causing activity, she will bear some, and more often than not most, of any indemnification obligation.

2. *Criminal Law*

The dynamism of the common law is revealed not only in matters of civil litigation, but also in criminal law. Maryland courts have shown particular intrepidity in discarding common law doctrine that has outlived its logic or utility, i.e., law that no longer serves the public welfare. For example, in *Pope v. State*,¹⁹¹ the court abandoned the common law doctrine of misprision of a felony. While the passage of time without any significant employment of the doctrine does not, without more, require its abandonment, the court conceded that "non-use, we believe, is not without significance. When an offense has lain virtually dormant for over two hundred years, it is difficult to argue that the preservation of society and the maintenance of law and order demand recognition of it."¹⁹² On substantially similar logic, in *Jones v. State*¹⁹³ the Maryland Special Court of Appeals abrogated the common law rule "that an accessory could not be convicted of a greater crime than that of which his principal was convicted."¹⁹⁴

191. 396 A.2d 1054 (Md. 1979).

192. *Id.* at 1074. The court went on to explain: "[m]isprision of a felony at common law is an impractically wide crime, a long standing criticism which remains unanswered. . . . It has an undesirable and indiscriminating width." *Id.*

193. 486 A.2d 184 (Md. 1985).

194. *Id.* at 185. In so doing, the court offered this reasoning:

[m]erely because the evidence in the principal's trial may have been different, or the principal may have agreed to a favorable plea bargain arrangement, or the jury in the principal's trial may have arrived at a compromise verdict, is not a good reason for allowing the accessory to escape the consequences of having committed a particular offense.

Id. at 188.

3. Immunities

a. Spousal

The common law rule precluding one spouse from suing the other was derived from the legal fiction that husband and wife were "one person in law,"¹⁹⁵ a fiction described as an "outgrowth" of "various legal disabilities" that were placed upon women, and which also included the vesting, upon marriage, of a married woman's personal property with that of her husband, a wife's incapacity to make contracts in her own name, and the husband's entitlement to his wife's services.¹⁹⁶

Courts evaluating the common law question of whether or not to retain the rule of spousal immunity provide particularly revealing examples of courts' interest and willingness to adopt the better rule of law as reflected in the decisions of courts and legislatures of other states. *Shook v. Crabb*¹⁹⁷ was an Iowa general aviation wrongful death claim that followed an accident in which the husband, as pilot, and the wife, as passenger, perished. The suit was brought by the estate of a wife against the estate of her husband, and claimed that while he may have been a good husband, he was a poor pilot. Iowa at that time observed spousal immunity, a doctrine immunizing a spouse from tort actions arising from the non-intentional torts of another, a policy arising from the same legal fiction of husband and wife unity mentioned above.

The Iowa court prefaced its comments with this statement:

[W]hen a doctrine or rule is of judicial origin, we would "abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule." An appellate court would be remiss in its duties if it did not from time to time reexamine the analysis underlying its precedents.¹⁹⁸

Deciding to abrogate the common law doctrine, the court was influenced by its review of the law of other jurisdictions, which "evidence[d] a definite trend toward abolishing in toto or limiting in part application of the doctrine

195. "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband. . . . If the wife be injured in her person or her property, she can bring no action for redress without her husband's concurrence." 1 WILLIAM BLACKSTONE, COMMENTARIES 442-43, *quoted in* *Boblitz v. Boblitz*, 462 A.2d 506, 507 (Md. 1983).

196. *Condore v. Prince George's County*, 425 A.2d 1011, 1013 (Md. 1981).

197. 281 N.W.2d 616 (Iowa 1979).

198. *Id.* at 617 (citations omitted).

of interspousal immunity due to the fundamental policy consideration of providing judicial redress of an otherwise cognizable wrong.”¹⁹⁹

4. Tort

a. The Common Law Relation to the Due Process and Takings Clauses

Modern tort law is generally agreed to be “the offspring” of the fourteenth century “action on the case.”²⁰⁰ It is a fitting genealogy, for as “action on the case” freed the ancient remedy in trespass to redress more subtle and indirect injury in an increasingly interdependent and urbanized English society,²⁰¹ so modern tort law continues to mediate claims for civil wrongdoing that are at the margins of modern life.

The common law role as the engine of corrective justice is seen in bold relief where Constitutional remedies either fall short or are an incomplete arbiter of Constitutionally-addressed liberty or property interests. The common law’s past role, and its future potential, as a surrogate avenue for claims stymied by interpretation of Due Process rights under the Fourteenth Amendment is evidenced in holdings on constitutional claims involving such varied settings as (1) a public official’s failure to act permitting injury to a person remanded in some measure to their care; (2) an official reproof that has defamed a private individual; and (3) school-administered corporal punishment of a student.

The common law has reflected a societal recognition that new circumstances require new responses. One such common law initiative is evidenced in *Tarasoff v. Regents of University of California*,²⁰² in which the California Supreme Court held that under certain circumstances “a psychotherapist has a duty to protect third parties from a threat of serious harm posed by a patient under his care.”²⁰³

199. *Id.* at 618 (collecting authority of 34 jurisdictions). More generally, gender-based immunities continue to fall by the common law wayside. As Professor Larry Levine has written, “[i]n many instances, duty determinations reflect a judge’s views of society’s paramount interests at a specific time. Thus, the duty determination is a dynamic and evolving concept.” JOHN L. DIAMOND, LAWRENCE C. LEVINE, M. STUART MADDEN, UNDERSTANDING TORTS § 304[C], 57-59 (1996).

200. FIFOOT, HISTORY, *supra* note 81, at 3.

201. See *Stanley v. Powell*, 1 Q.B. 86 (1891); JOSEPH W. LITTLE, TORTS: THE CIVIL LAW OF REPARATION FOR HARM DONE BY WRONGFUL ACT 14 (1985).

202. 551 P.2d 334 (Cal. 1976).

203. Alan A. Stone, *The Tarasoff Decisions: Suing Psychotherapists to Safeguard Society*, 90 HARV. L. REV. 358 (1976).

In contrast with *Tarasoff* are the results reached within the confines of statutory or constitutional language. For example, in *DeShaney v. Winnebago County Department of Social Services*,²⁰⁴ brought on behalf of a four-year-old boy repeatedly beaten by his father until he lapsed into irreversible retardation, appointed representatives for the injured child were rebuffed in their suit claiming that the Due Process Clause of the Fourteenth Amendment was violated by social workers' systematic failure to protect the child. The Supreme Court concluded as follows:

[N]othing in the language of the Due Process Clause itself requires the state to protect the life, liberty and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security."²⁰⁵

A like example of the common law of tort's role filling the gaps in Constitutional remedies is shown in private litigation challenging the occasional and churlish municipal practice of using public posting to discourage so-called "active" shoplifters. In *Paul v. Davis*,²⁰⁶ Davis, the petitioner, sought an injunction against Louisville, Kentucky police to stop their circulation to Louisville merchants of a flier to that effect. Although prosecuted for the offense more than once, Davis had never been convicted of shoplifting. He claimed in his lawsuit that the fliers inhibited him "from entering business establishments for fear of being suspected of shoplifting and possibly apprehended, and would seriously impair his future employment opportunities,"²⁰⁷ constituting a deprivation of his Fourteenth Amendment Due Process liberty interest.

The Court rejected the Due Process claim, holding that a right to one's reputation, standing alone,²⁰⁸ did not invest in Davis any liberty interest that would trigger procedural Due Process guarantees. Rather, the Court concluded, his remedy, if any, lay in a common law action for libel, explaining that "his interest in reputation is simply one of a number which the state

204. 489 U.S. 189 (1989).

205. *Id.* at 195.

206. 424 U.S. 693 (1976).

207. *Id.* at 697.

208. The Court contrasted *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), granting Due Process relief to a woman subjected to official posting in liquor stores forbidding sale of alcoholic beverages to her for a period of one year, as involving an actionable deprivation of a "right previously held under state law—the right to purchase or obtain liquor in common with the rest of the citizenry." *Paul*, 424 U.S. at 708.

may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions.”²⁰⁹

Lastly, in circumstances of school-administered corporal punishment, the Supreme Court has held that the common-law claim of tortious battery, and the ancient limited privilege of school administrators and teachers to administer corporal punishment, together act as both a shield and a sword. In *Ingraham v. Wright*,²¹⁰ a procedural Due Process and an Eighth Amendment “cruel and unusual punishment” challenge to school corporal punishment, the Court conceded that physical punishment involved a “constitutionally protected liberty interest.”²¹¹ Even so, the Court concluded, the constitutional claim was obviated by the presence of “common law constraints and remedies.”²¹² The Court explained “Were it not for the common-law privilege permitting teachers to inflict reasonable corporal punishment on children in their care, and the availability of traditional remedies for abuse, the case for requiring advance procedural safeguards would be strong indeed.”²¹³

In *Lucas v. South Carolina Coastal Council*, the Court, evaluating the Takings Clause limitations upon a state’s land use authority, held that “[a]ny limitation so severe [as to prohibit all economically beneficial use of land] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”²¹⁴

The Court’s guideline invites, but does not require, the interpretation that continued development of the law of public nuisance as it affects land use will be closely reviewed for Takings Clause concerns, at least where the owner can make the claim that the state’s interpretation of permissible land use operates to deprive the owner of all or practically all beneficial use of the land. In so doing, the *Lucas* Court reaffirmed the vitality of the common law of public nuisance as permitting, generally, continued state prohibition of uses historically found to be public nuisances. Without, perhaps, intending to do so, Mr. Justice Scalia simultaneously preserved the

209. *Paul*, 424 U.S. at 712.

210. 430 U.S. 651 (1977).

211. *Id.* at 672.

212. RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES 378 (4th ed. 1993).

213. *Ingraham*, 430 U.S. at 674.

214. 505 U.S. 1003, 1029 (1993). Regarding public nuisance, Professor John Humbach has written that “[t]he common law of public nuisance is, if anything, even more indeterminate than private nuisance in the range of behavior to which it can potentially apply.” John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1, 12 (1993).

role of the common law of nuisance, trespass, and liability for abnormally dangerous activities as pivotal in future land use regulation. By finding constitutionally unobjectionable those land use restrictions footed in ancient public nuisance prerogatives of regulators, the Court ensured for the time vigorous refamiliarization, by regulators and developers alike, with the metes and bounds of these common law doctrines. Hopefully, the ongoing Restatement (Third) of Torts project will closely evaluate the effect of *Lucas* upon common law development of public nuisance.

b. The Adaptive Quality of Common-Law Remedies

An exemplary demonstration of the adaptive ability of the common law is in the development of the cause of action for negligently inflicted emotional distress. In an early decision permitting such recovery to a woman who rationally feared future cancer from a severe radiodermatitis that followed excessive radiation treatments for bursitis, the New York Court of Appeals in *Ferrara v. Galluchio*,²¹⁵ while conceding the "valid objections" that such a cause of action created the risk of "vexatious suits and fictitious claims,"²¹⁶ concluded, nevertheless, that "[f]reedom from mental disturbance is now a protected interest in this State."²¹⁷

Courts continue to "exhibit significant concern over whether claims for emotional or mental distress are legitimate."²¹⁸ The traditional common law rule provided that damages for emotional distress occasioned by mere negligence required "impact" or evidence of physical injury.²¹⁹ As the early decision in *Ferrera* explained,

[n]ot only fright and shock, but other kinds of mental injury are marked by definite physical symptoms, which are capable of medical proof. It is entirely possible to allow recovery only upon satisfactory evidence and deny it when there is nothing to corroborate the claim, or to look for some guarantee of genuineness.²²⁰

In many jurisdictions, the "impact" rule has been loosened to permit tort recovery where plaintiff "actually feared for her own safety," the so-called "zone of danger" rule.²²¹ The watershed decision in *Dillon v. Legg*²²²

215. 152 N.E.2d 249 (N.Y. 1958).

216. *Id.* at 252.

217. *Id.*

218. Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136, 172 (1992).

219. *E.g.*, *Champion v. Gray*, 420 So. 2d 348 (Fla. Dist. Ct. App. 1982); *Little v. Williamson*, 441 N.E.2d 974 (Ind. Ct. App. 1982).

220. *Ferrara*, 152 N.E.2d at 252.

221. *Gnirk v. Ford Motor Co.*, 572 F. Supp. 1201, 1202 n.3 (C.D.S.D. 1983). In *Gnirk*,

involved a claim for damages for a mother who witnessed an automobile fatally injure her infant daughter. Rejecting the "zone of danger" rule as "hopeless[ly] artificia[l],"²²³ and denoting "foreseeability of risk" as the paramount gauge of duty,²²⁴ the court announced the following approach:

In determining . . . whether defendant should reasonably foresee injury to plaintiff, or, in other terminology, whether defendant owes plaintiff a duty of due care, the courts will take into account such factors as the following: (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.²²⁵

Dillon stands as an example of the common law's refraction of social change. One interpretive ray refracted is modern feminist theory. Specifically, feminist theorists have argued effectively that an array of inequalities in political power²²⁶ throughout the common law reflect "male gender bias."²²⁷ Regarding emotional distress claims particularly, the argument goes, the distinctions, mandated by the "impact" rule and even its successor, the "zone of danger" rule "marginalize the interests of women."²²⁸

Thus, *Dillon*'s enlargement of recovery for fright-based injury operates to redefine the "reasonable man" standard of tort law to include the reasonable mother. As Professors Chamallas and Kerber explain, "[w]hen a mother's fear for her child is acknowledged as a cause of her own physical harm we can glimpse the beginnings of a feminization of tort law.

plaintiff, a mother whose son drowned while strapped in an automobile that, due to a defective transmission, shifted from Park to reverse and submerged in a stock dam, was permitted to recover even though she was not in the "zone of danger." The court reasoned that no such restriction ought apply where she was a "user" of a product, under RESTATEMENT (SECOND) OF TORTS § 402A, rather than a bystander.

222. 441 P.2d 912 (Cal. 1968).

223. *Id.* at 915 (noting that "we can hardly justify" permitting recovery to one witness and denying it to another due solely to the "happenstance" of one being "some few yards closer to the accident").

224. *Id.* at 919.

225. *Id.* at 920.

226. See THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 4 (David Kairys ed., rev. ed. 1990).

227. ROBERT L. RABIN, PERSPECTIVES ON TORT LAW 305 (4th ed. 1995).

228. Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990), quoted in RABIN *supra* note 227, at 307.

Relational interests become a constituent feature of one's own physical integrity."²²⁹

5. *Contract*

a. *Employment*

One of the most extraordinary common law transformations of the legal landscape of recent years is that involving employee rights, and the ancient doctrine of employment at will. At common law, and unaffected by statutory initiative in most states, an employee serves at the will of her employer.²³⁰ She may be released for any reason, bona fide or otherwise, or for no reason at all, "even if such action was purely arbitrary or morally suspect."²³¹ Where preserved, the doctrine has been justified in part by the logic that the employee's freedom to depart from the employment relationship at any time requires bestowal of a reciprocal freedom to the employer, sometimes referred to as a theory of "mutuality."²³²

Recognition of a germinal liberty interest in the continuation of employment, absent dismissal for cause or for economic reasons, has led to the growth of a tort remedy for "unjust discharge."²³³ The remedy, a hybrid of tort and contract, is also referred to as "retaliatory discharge" or "wrongful termination."²³⁴

229. Chamallas & Kerber, *supra* note 228, at 862. See also, RABIN, *supra* note 227, at 318.

230. The rule was described in HORACE G. WOOD, TREATISE ON THE LAW OF MASTER AND SERVANT (1877):

With us the rule inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much as a day, week, month, or year, no time being specified, is an indefinite hiring, and no presumption attaches that it is for a day even, but only at the rate fixed for whatever time the party may serve.

Id. at 134.

231. TERRENCE F. KIELY, MODERN TORT LIABILITY: RECOVERY IN THE '90S §1.18, at 47 (1990) [hereinafter KIELY, MODERN TORT LIABILITY].

232. *Cf.*, *Palmateer v. International Harvester Co.*, 421 N.E.2d 876, 878 (1981) ("Recent analysis has pointed out the shortcomings of the mutuality theory. With the rise of large corporations conducting specialized operations and employing relatively immobile workers who often have no other place to market their skills, recognition that the employer and employee do not stand on equal footing is realistic.").

233. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56 (1988); *Reuther v. Fowler & Williams, Inc.*, 386 A.2d 119 (Pa. Super. Ct. 1978); *Sheets v. Teddy's Frosted Foods, Inc.* 427 A.2d 385 (Conn. 1980).

234. KIELY, MODERN TORT LIABILITY, *supra* note 231, at §1.18 ("Retaliatory Discharge").

The speed of the change has been breathtaking. Only two decades ago, employment at will was the practically universal common law rule.²³⁵ Today, judicial decisions in over eight percent of the jurisdictions "have unilaterally, and without legislative sanction, expanded their common law governing the master-servant relationship to limit employers' discretion to terminate employees."²³⁶ These common law modifications have relied variously upon three approaches: (1) public policy; (2) contract theory; and (3) the covenant of good faith and fair dealing.²³⁷

The most conspicuous fissure in the previously monolithic doctrine of employment at will has been the so-called "public policy" exception. Wisconsin, for example, has redelineated an employee's discharge remedy to "balance employers' needs for 'sufficient flexibility to make needed personnel decisions' against employees' 'job security interests' and the public interest in protecting employee actions that advance 'well established public policies.'"²³⁸ In that state, the "public policy" unjust discharge remedy turns upon (1) identification of a specific statutory or regulatory policy; and (2) a determination that the employee's discharge resulted from his refusal to violate that policy.²³⁹

Just what are such "public policies" sufficient to trigger this incremental common law foray? Revealing is *Wilcox v. Niagara of Wisconsin Paper Corp.*,²⁴⁰ an unjust discharge claim following the firing of Kenneth Wilcox, the company's longstanding director of computer operations. In the five days preceding his discharge, repair exigencies spurred by a computer malfunction caused Wilcox to work some 61 hours, 35 of them on the last two days of the workweek. Wilcox, who had heart surgery less than two years before, left work that Friday at 9:30 P.M. after experiencing angina pains.

Later that evening his manager called and told Wilcox he would be expected to work both Saturday and Sunday. Wilcox explained his situation, and that he still felt ill, but assured his superior the system would be functioning by Wednesday, the first day it would be needed. He warned Wilcox he would be dismissed if he did not work the weekend. Wilcox was hospitalized, and released Saturday with instructions to "take it easy." Returning to work Monday, Wilcox did, in fact, see the computer system to

235. Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment at Will: The Case Against "Tortification" of Labor and Employment Law*, 74 B.U. L. REV. 387 (1994).

236. *Id.* (collecting authority).

237. KIELY, MODERN TORT LIABILITY, *supra* note 231, at 48.

238. *Beam v. IPCO Corp.*, 838 F.2d 242, 245 (7th Cir. 1988) (quoting *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 841 (Wisc. 1983)).

239. *Bushko v. Miller Brewing Co.*, 396 N.W.2d 167, 169-171 (Wisc. 1986).

240. 965 F.2d 355 (7th Cir. 1992).

satisfactory functioning by Wednesday. Nevertheless, he was fired the following day.²⁴¹

In his ensuing action for breach of contract, Wilcox alleged that his discharge violated the public policy set out in the Wisconsin statutes,²⁴² an interpretation the court found to "reflect the public policy of the State of Wisconsin."²⁴³ Finding that Wilcox's claim fell "squarely within the bounds of the public policy exception," the court explained that "compliance with the manager's demand for still more hours over the weekend would have required Wilcox to work 'for such a period of time . . . as [was] dangerous or prejudicial to [his] life, health, safety or welfare.'"²⁴⁴

The public policy exception to the employment at will doctrine is a clear-cut example of an efficient judge-made rule. In utilitarian terms, in today's employment environment, a discharge based upon an employee's refusal to obey an unlawful command works an emotional hardship upon the employee, together with potentially devastating economic consequences. The benefit to the employer of maintaining such a prerogative is psychological at most, and of no identifiable social value. Thus a rule discouraging such discharges deters wasteful conduct while imposing no material workplace or social cost.

Indeed, the exception to the employment at will doctrine can be considered *pareto optimal*. A rule is *pareto optimal* when its effects benefit all parties, in essence a win-win proposition. The rule discussed is *pareto optimal*, or win-win, in that the employee gains in economic security and individual autonomy. The employer gains in that it is more efficient to desist in capricious firing practices than it is to defend a regulatory enforcement action brought by a state or federal discrimination or labor standards unit. Lastly, the broader public welfare is advanced as the common law rule works in effective synergy with the statutory goal.

241. *Id.* at 357-58.

242. *Id.* at 358. *See also* WIS. STAT. ANN. § 103.02 (West 1988), which reads in part: "No person may be employed or be permitted to work in any place of employment for such period of time during any day, night or week, as is dangerous or prejudicial to the person's life, health, safety or welfare" *Id.*

243. *Id.* at 360.

244. *Id.* at 363.

6. Evidence

a. Spousal Privilege

It is in the evidence rules and policies governing the spousal testimonial privilege that we find a noteworthy example of the common law's progressive incrementalism.

The law of evidence, at both the state and federal level, has been subject to pervasive codification. In federal courts, the Federal Rules of Evidence specifically excised from their coverage several evidentiary topics, notably the evidence rules concerning testimonial privileges, leaving these subjects to the substantive law of the states.²⁴⁵ Rule 501 of the *Federal Rules of Evidence* enjoins the federal courts to shepherd the evolution of testimonial privilege in criminal trials "governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience."²⁴⁶

The evidentiary rule that a husband or a wife could, by claim of spousal privilege, prevent their spouse from giving testimony against them in a criminal trial was recited in 1628 by Lord Coke, who stated, "[I]t hath been resolved by the Justices that a wife cannot be produced either against or for her husband."²⁴⁷ As the Supreme Court has explained the rule,

[t]his spousal disqualification sprang from two canons of medieval jurisprudence: first, the rule that an accused was not permitted to testify in his own behalf because of his interest in the proceeding; second, the concept that husband and wife were one, and that since the woman had no recognized separate legal existence, the husband was that one. From those two now long-abandoned doctrines, it followed that what was inadmissible from the lips of the defendant-husband was also inadmissible from his wife.²⁴⁸

Identified in modern evidence law as a rule of privilege rather than one of disqualification, the modern rationale for a spousal privilege against giving criminal testimony against the marital partner "is its perceived role in fostering the harmony and sanctity of the marriage relationship."²⁴⁹

Criticized by no less authority than Professor Wigmore as "the merest anachronism in legal theory and an indefensible obstruction to truth in

245. FED. R. EVID. 501 advisory committee's note.

246. FED. R. EVID. 501.

247. 1 E. COKE, A COMMENTARY UPON LITTLETON 6b (1628).

248. *Trammel v. United States*, 445 U.S. 40, 44 (1980).

249. *Id.* at 44.

practice,”²⁵⁰ the Supreme Court in *Hawkins v. United States*²⁵¹ nevertheless turned back a prosecution request that the privilege be modified to vest only in the witness-spouse,²⁵² although it did emphasize that its decision should not “foreclose whatever changes in the rule may eventually be dictated by ‘reason and experience.’”²⁵³

Two decades later, noting the sea change in state evidence rules, demonstrating a clear conversion to a more limited privilege,²⁵⁴ and the unquestioned ascent of women in the cultural and political perception,²⁵⁵ the court in *Trammel v. United States* held that

the existing rule should be modified so that the witness-spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying. This modification—vesting the privilege in the witness-spouse—further the important public interest in marital harmony without unduly burdening legitimate law enforcement needs.²⁵⁶

The Supreme Court’s ruling in *Trammel* evinces a non-normative commitment to principles of justice and fairness, as well as an unspoken obeisance to efficiency. By non-normative commitment to principles of justice is meant that the court is not noticeably stirred by any distaste for felonious, conspiratorial husbands who have embroiled their wives in lawless pursuits—although we might forgive the Court had it been. Rather, the Court seems to have recognized that anterior to just judicial resolution are facts, and that the old rule operated simply as an obstruction of facts.²⁵⁷ Whether the probandum is criminal culpability or civil liability for money damages, liberal access to evidence is the hallmark of modern adjudication. As the Court stated in *United States v. Bryan*,²⁵⁸ “the public . . . has a right to every man’s evidence.”²⁵⁹

250. *Id.* at 45 (quoting 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2228, at 221 (3d ed. 1961)).

251. 358 U.S. 74 (1958).

252. By the time of the decision in *Hawkins*, the American Law Institute’s MODEL CODE OF EVIDENCE Rule 215 (1942) had rejected the common law rule, as had the UNIF. R. EVID. Rule 23(2). *Trammel*, 445 U.S. at 45.

253. *Hawkins*, 358 U.S. at 79.

254. *Trammel*, 445 U.S. 40, 49-50 & nn.9, 10.

255. *Id.* at 52.

256. *Id.* at 53.

257. *Id.* at 44.

258. 339 U.S. 323 (1950).

259. *Id.* at 331 (quoting 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2192 (3d ed. 1961)).

Trammel can also be harmonized with principles of efficiency. In all litigation, information costs are considerable. Here, the Supreme Court's holding is consonant with an "informational asymmetry policy" described by Professor Eisenberg, suggesting that "the applicability of a legal rule should not depend upon information that will characteristically be in the hands of only one of the parties."²⁶⁰ It likewise conforms to Professor Eisenberg's described "opportunism policy," which posits that "legal rules should not encourage exploitative conduct."²⁶¹

VI. CONCLUSION

Has the common law comprised a resolute, patient, faithful and effective engine of social change for three hundred years? Has the "revolution" on common law judging resulted in a vital, supple common law capable of a continued, integral jurisprudential role, a system of law and judging to which the public will continue to look to resolve the critical case, the case at the perimeters of societal change?²⁶² In the common law is there yet reposed our legal system's best instrument for responding to "changes in social values"?²⁶³ Or has the common law embarked on a course of marginalization and irrelevance that will reduce its contribution in the new century?

The New York Court of Appeals put it well in *Schenectady Chemicals*,²⁶⁴ approving application of the doctrine of public nuisance against the generator of waste even though the defendant did not own the premises constituting the nuisance: "The common law is not static. Society has repeatedly been confronted with new inventions . . . that, through foreseen and unforeseen events, have imposed dangers upon society."²⁶⁵

260. EISENBERG, NATURE OF THE COMMON LAW, *supra* note 161, at 28.

261. EISENBERG, NATURE OF THE COMMON LAW, *supra* note 161, at 28.

262. KARL N. LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA 99 (Paul Gewertz ed. & Michael Ansaldi trans., 1989).

Legal uncertainties arise far more when *nonlegal* norms in society are in conflict, [Conflicts among interest groups] are *fact situations* that arise because the margins of growth keep shifting in real life, and for that very reason they shift the law's margins of growth too. . . . The critical case always involves a fact situation not from the stable core but from the growth zone of life waiting to be regulated.

Id. (discussed in John R. Nolan, *Footprints in the Shifting Sands of the Isle of Palms: A Practical Analysis of Regulatory Takings Cases*, 8 J. LAND USE & ENVTL. L. 16 (1992)).

263. Farber & Frickey, *supra* note 3, at 875.

264. *New York v. Schenectady Chemicals, Inc.*, 459 N.Y.S.2d 971 (N.Y. Sup. Ct. 1983), *aff'd as modified* 479 N.Y.S.2d 1010 (N.Y. App. Div. 1984).

265. *Schenectady*, 459 N.Y.S.2d at 977. In environmental and toxic torts, for example, tort law "has addressed various manifestations of uncertainty" with resultant "movement

Particularly in the twentieth century, with two global wars, there has been much to belie any "fiction that society [has] educated itself, or aimed at a conscious purpose."²⁶⁶ In my view, our common law represents just such an example of a sustained societal pursuit of a common purpose. Dispute will always be stimulated by the means selected by a particular common law doctrine—especially new doctrine. Should the waistband be pulled in as to what constitutes trade puffing? Should child psychologists and school administrators be under a duty to report potential child abuse? These questions, at the perimeters of our social and business dealings, will be resolved only with the passage of time, and with the entry of two or three score more common law judgments entered on the basis of individualized facts and able lawyering. The core of the common law, however, represents an unequalled American commitment to personal freedom, business opportunity, dignity, and mutual expectations leavened by two centuries of cultural development.

The debate over the proper goals of the common law continues, with some arguing that its principal objective should be fairness, while others seem to be suggesting that efficiency should reign. In the perception of this author and others, goals of economic efficiency and corrective justice fairness have proved their compatibility as complementary societal commitments supporting the progressive development of common law justice.

What are the potential common law initiatives of the future? Intentional infliction for emotional distress for racial discrimination?²⁶⁷ A nuisance-based foundation for land use law that responds to Mr. Justice Scalia's instruction that litigants seeking to immunize land use regulation enforcement from Takings obligations find a common law nuisance or trespass based foundation for the prohibition? An enduring tort response (1) to the unconscionable manufacture and distribution of handguns and automatic weapons with no plausible purpose other than to kill and maim; or (2) to rights of the unborn, with the implications of such doctrine to highly-charged political and religious issues? As the twentieth century closes, the common law thrives. Its vitality does not depend upon adherence

away from notions of unicity and toward systemic or multiple causation and accountability." Levit, *Ethereal Torts*, *supra* note 218, at 137.

266. EDUCATION OF HENRY ADAMS, *supra* note 42, at 483.

267. See, e.g., *Curtis v. Loether*, 415 U.S. 189, 195 n.10 (1974). The "contours of the [intentional infliction] tort are still developing, and it has been suggested that 'under the logic of the common law development of a law of insult and indignity, racial discrimination might be treated as a dignitary tort.'" *Id.* (quoting C. GREGORY & H. KALVEN, *CASES AND MATERIALS ON TORTS* 961 (2d ed. 1969)), *cited in* *Rickel v. Commissioner*, 900 F.2d 655, 663 (3d Cir. 1990).

to the claims of others that any constraint of existing remedies is unjust. Mindful of political pressures, but a thrall to no ideology, the common law enters the next century much as it did the last—representing a conjunction of ancient principles of corrective justice with modern, developed consideration of individual autonomy, social efficiency and fairness.

Observers past and present offer agreement that “in relating law to the totality of social relationships it is difficult to feel that America now has any rival[.]”²⁶⁸ A partner, with statutory law, in that system of social justice, our common law is more than a legacy of jurisprudence. Progressive, protean and dynamic, American common law is a reflection of our society’s better self.

268. LASKI, *AMERICAN DEMOCRACY*, *supra* note 66, at 66.

