The Public Life of Private Law: Tort Law as a Risk Regulation Mechanism

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Abstract

Against the backdrop of contemporary climate change lawsuits, this article presents preliminary research findings regarding a remarkable and underappreciated moment in the common law pre-history of modern environmental, health, and safety regulation. The findings complicate the conventional academic story about the limited capabilities of tort law and its inevitable displacement by more institutionally robust and sophisticated forms of regulation. Section I offers a brief introduction, followed in Section II by a review of existing academic literature on the pros and cons of utilising tort law as a regulatory device. As will be seen, the consensus view seems to be that tort law is a clumsy and imperfect mechanism for addressing most environmental, health, and safety risks. Section III argues that the debate over tort law's potential as a risk regulation mechanism ignores the distinctively private law history and character of that body of law, essentially asking tort to serve a purpose for which it was neither intended nor designed. Section IV then presents a case study of nuisance litigation in which the tort system achieves a remarkable and underappreciated risk regulation effect precisely by focusing narrowly on the traditional task of adjudicating alleged wrongs between private parties. Section V concludes.

I. Introduction

Scientists expect the coming century to be one in which environmental hazards – such as floods, droughts, wildfires, and hurricanes – occur with increasing regularity and severity. According to the Intergovernmental Panel on Climate Change's most recent scientific assessment, concentrations of greenhouse gases in the earth's atmosphere currently stand at levels not seen for at least 800,000 years.[1] This increase has led, and will continue to lead, to surface level warming of the planet and drastic accompanying changes to earth systems. Indeed, scientists believe that the last time atmospheric greenhouse gas concentrations reached this level, the oceans were as much as 100 feet

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[1] Intergovernmental Panel on Climate Change, "Climate Change 2014: Synthesis Report" (2014) <www.ipcc.ch/report/ar5/> accessed 4 January 2018.

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higher and global average surface temperatures as much as 11°F warmer than today. In short, humanity is entering an epoch with no analogue in its recorded or remembered history.

The impacts of climate change will be widespread, difficult to predict, and frequently devastating. Legal systems must address such challenges both proactively – by attempting to plan for, reduce, or avoid environmental threats – and reactively – by addressing the loss, damage, and recovery needs brought about by environmental threats when they do eventuate. It is important to note that, although dramatic in scale and complexity, these features of climate change do not render it altogether distinct from more mundane subjects of environmental, health, and safety regulation. In all such cases, societies confront the difficulty of managing risk amidst complications such as limited information, scientific and technological complexity, plural values, countervailing economic interests, political failures, and jurisdictional constraints. Those same complications also confound efforts to respond in an equitable manner *ex post* to those whose interests have been harmed by the results of *ex ante* decision making. Even when attributed to "natural" or otherwise non-culpable causes, suffering still demands a collective response, if for no other reason than to affirm the responsiveness of the collective and the continuing solidarity of the political community.[2]

Historically, tort law in the Anglo-American tradition has not been understood as a mechanism for the former task, of regulating risk.[3] Instead, it has been understood to provide a private law forum for the airing of grievances, the declaration of norms, and the redress of wrongs. As a practical matter, the threat of liability in tort might provide incentives for actors to alter their behaviour, but that possibility has not traditionally been identified as a central goal of tort law. Over the past half-century, however, scholars influenced by legal economic theory have come to view tort law as implicitly serving a prospective, risk regulation function. Their project has been so successful that most observers now view tort law's deterrent *effect* as its primary *purpose*. Hence, arguments about whether and how to deploy, reform, or repeal tort law often are premised on a belief that the tort system's comparative success as a risk regulation mechanism is an appropriate – indeed, a decisive – criterion for evaluation.[4]

This intellectual venture strays from Anglo-American tort law's core historical role as a mechanism for the provision of civil recourse. As Peter Cane puts it, "[t]he justification for tort law in the regulatory state must rest on its role as a mechanism for imposing obligations of repair on the basis of ideas of personal responsibility," not on its supposed

[2] See RH Weaver and DA Kysar, "Courting Disaster: Climate Change and the Adjudication of Catastrophe" Notre Dame L Rev (forthcoming 2017).

[3] Although this article focuses on the Anglo-American tort law tradition, its lessons regarding the catalytic potential of civil litigation in relation to other departments of government need not be limited to the common law context. Indeed, civil law jurisdictions might offer even greater catalytic potential inasmuch as they sometimes afford litigants wide latitude to assert claims on behalf of the public interest and subject government to broad-sweeping affirmative duties of care. See, eg, *Urgenda Foundation v The State of the Netherlands (Ministry of Infrastructure and the Environment) District Court of The Hague, The Netherlands* Case No C/09/456689 (2015) (appeal pending) [hereinafter *Urgenda*].

[4] For a seminal contribution, see S Shavell, "Liability for Harm versus Regulation of Safety" (1984) 13 The Journal of Legal Studies 357. The viewpoint need not be limited to scholars of a law-and-economics bent. See, eg,WH van Boom, "Efficacious Enforcement in Contract and Tort" (Inaugural Lecture at Erasmus University, Rotterdam, 21 April 2006) 14 (stating that the efficacious *enforcement* of duties is the primary object of tort law and that, as such, "tort law must either aspire to help preventing wrongs or surrender this task to other instruments of behaviour modification").

regulatory effects.[5] Still, as this article will argue, the detour affords important insights even assuming a non-regulatory understanding of tort. In forcing scholars to consider tort law as an implicit regulatory device, law-and-economics and related schools of thought have focused attention on the regulatory possibilities of tort within a system of horizontally and vertically fractured power. Such a comparative institutional perspective generally casts doubt on tort law's desirability as a risk regulation mechanism. Indeed, through the lenses of risk assessment and social welfare maximisation, it is difficult to understand why safety planning and risk spreading should be achieved through the tort system at all, given that public-law mechanisms such as regulation and social insurance – or perhaps the market itself – seem better situated to achieve those ends.

Nevertheless, despite tort's limitations from the narrow perspective of comparative institutional analysis, its strengths become apparent when we examine tort as part of a larger ecosystem of governance institutions. When tort addresses its core mission of providing a forum for the airing of grievances and the redress of wrongs, ancillary benefits inure to the larger political complex within which tort operates. These ancillary benefits are not necessarily deterrence and risk-spreading functions of the sort that legal economists have traditionally emphasised. Instead, they run toward more subtle benefits of problem articulation, norm amplification, and intergovernmental signalling of the sort that would be difficult to situate within an abstract model of risk assessment and social welfare maximisation.[6] Even when a plaintiff's case fails on the merits, judicial engagement with the details of her claim helps to frame her suffering as a legible subject of public attention and governance. Conversely, even when a regulatory program has been established that purports to "optimise" the balance between prevention and expense, some mechanism for seeking acknowledgment of residual suffering ought to remain open as a check on governmental complacency. In short, the private law of tort does have a public life, but it is not the one generally assumed.

Section II of this article surveys literature on tort law as a risk regulation mechanism. Although not without some strengths, the tort system generally is regarded as a cumbersome and incomplete response to the societal need for environmental, health, and safety regulation. Section III argues that the preceding literature confuses matters by viewing tort law through the public law lenses of deterrence and risk-spreading. Rather than an instrumentalist mechanism for risk assessment and social welfare maximisation, tort is better understood as a decidedly private law system by which parties seek recognition and redress of their injuries in an impartial judicial venue. As two leading commentators put it, "[t]o study torts is to learn what sort of conduct our legal system defines as wrongfully injurious toward another such that, when committed, the victim is entitled to exact something from the wrongdoer."[7] Although ancillary impacts of tort may include deterrence of future wrongful conduct, scholars should not expect such side effects to supply the core function or justification for the tort system.

Section IV revisits the question of tort law's efficacy as a risk regulation mechanism while staying true to this private law understanding of tort's essence. As will be seen, the

[5] P Cane, "Using Tort Law to Enforce Environmental Regulation?" (2002) 41 Washburn Law Journal 427, 466.

[6] See B Ewing and DA Kysar, "Prods and Pleas: Limited Government in an Era of Unlimited Harm" (2011) 121 Yale Law Journal 350.

[7] JCP Goldberg and BC Zipursky, "Torts as Wrongs" (2010) 88 Texas Law Review 917, 919.

tort system *does* play a significant role in the governance of risk, simply by holding open a forum for the self-presentation of grievances and the declaration of norms of right and responsibility which rest on reason, principle, precedent, and evidence. As Section IV will detail, the direct regulatory effects of this traditional role of tort law can be significant, notwithstanding apparent scholarly consensus that "[m]odern statutory-based environmental liability developed ... largely in response to the inadequacies of the traditional common law rules."[8] Moreover, among the many side effects of tort law's core function is the possibility that common law adjudication can shine a light on threats of suffering that are under-attended to by the more recognisably political branches of government. Put differently, the larger hydraulics of governance may be catalysed simply by virtue of the common law judges' task of forthrightly addressing the merits of claims before them ... and nothing more. With that understanding, it becomes all the more critical that judges avoid the temptation to shy from tort claims that abut significant, complex, or politically sensitive issues like climate change. Fraught though they may seem, such moments are precisely when tort may be needed most.

II. Tort law as risk regulation

Frustrated with the pace of ongoing climate change policy negotiations, commentators and activists increasingly have called for resort to courts to establish baseline principles of responsibility for harms caused or exacerbated by anthropogenic climate change. Such calls have targeted domestic courts and the common law of torts,[9] as well as constitutional tort-like obligations of governments.[10] In addition, international tribunals and the customary international law of transboundary harm have been cited as promising vehicles for norm development.[11] In all these cases advocates seek to position climate change as a problem best addressed through principles of law and justice, rather than merely politics and power. They hope to begin a process whereby reducing the threat of climate change comes to be seen as a legal responsibility of dominant actors, rather than merely a gesture of charity toward weak and distant neighbours.

Their efforts have attracted vehement opposition. Much of that opposition has focused on the institutional strengths and weaknesses of tort law (and adjudication more broadly) as a mechanism for the regulation of risk. Critics draw on a large body of literature that assesses tort law in relation to environmental, health, and safety regulation, the general tenor of which is pessimistic. Scholars tend to regard tort law as an expensive, haphazard, and inexpert apparatus for the identification, assessment, and regulation of risk. Judges tend to agree: as Judge Bergan, writing for the New York Court of Appeals in the landmark case of *Boomer v Atlantic Cement Co*, opined, "the judicial

[8] KS Abraham, *The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11* (Harvard University Press 2008) 149.

[9] See DA Kysar, "What Climate Change Can Do About Tort Law" (2010) 41(1) Environmental Law 1 (describing and analysing cases).

[10] See *Urgenda*, supra, note 3; *Ashgar Leghari v Federation of Pakistan*, Lahore High Court Green Bench, Pakistan Case No. 25501 (2015).

[11] See DA Kysar, "Climate Change and the International Court of Justice" (2013) Yale Law School Public Law Research Paper No 315 <papers.ssrn.com/sol3/papers.cfm?abstract_id=2309943> accessed 4 January 2018.

establishment is neither equipped … nor prepared to lay down and implement an effective policy for the elimination of air pollution."[12] This section surveys the relevant academic literature, cataloguing commonly identified pros and cons of tort law as a method of regulating risk.[13] It does so without scrutinising the assumption, largely implicit in the literature, that tort law and public regulation serve as substitutes rather than complements.[14]

To begin with, judges often are criticised as normatively inappropriate decision makers for the sensitive societal tradeoffs involved in environmental, health, and safety decision making. The question of representativeness and legitimacy arises here in a pronounced way: an aggrieved plaintiff seeks only a discrete and particularised remedy to her harm, but the act of resolving such a dispute necessarily implicates larger societal conundrums. What authority, one might ask, do judges (often unelected) have to drive societal decision-making through the limited and indirect forum of a private law tort suit? Importantly, such political objections need not have a specific valence. For instance, the near exclusive concern of the private law with protecting specific, acknowledged persons and property before a court,[15] rather than larger societal or natural resources as such, suggests that the tort system is a highly imperfect tool for calibrating the delicate collective tradeoffs necessitated by environmental, health, and safety decision making. Thus, both those who favour and who oppose the protection of life over competing interests have reason to be concerned about the role of tort law in the requisite societal balancing exercise.

Similarly, the geographically – and jurisdictionally – expansive nature of many environmental, health, and safety threats means that presiding judges cannot typically approach the full scale of the threat when fashioning relief. Adjudication of private disputes is not geared toward the setting of aggregate environmental, health, and safety goals but rather toward settling matters of right and responsibility within a particular, localised relationship. The possibility for incomplete and inconsistent judgments is therefore rife within the use of tort law to serve environmental, health, and safety objectives.

Tort law's classical dyadic structure also creates difficulties from the regulatory perspective as it provides a poor epistemic fit for contemporary understandings of risk. The conceptual heart of Anglo-American tort law remains very much fixed on the paradigmatic tort of *A* wrongfully injuring *B*. In this simple fact setting, two private individuals residing within the same political community engage in a brief, blunt, and contained encounter. Adjudication of the dispute is simplified because the relationship of the parties and the cause and extent of the harm are believed to be clearly identifiable.

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[12] *Boomer v Atlantic Cement Co* 257 NE 2d 870, 871 (NY 1970).

[13] See also KS Abraham, "The Relation Between Civil Liability and Environmental Regulation: An Analytical Overview" (2002) 41 Washburn Law Journal 379; KN Hylton, "When Should We Prefer Tort Law to Environmental Regulation?" (2002) 41 Washburn Law Journal 515; CH Schroeder, "Lost in the Translation: What Environmental Regulation Does that Tort Cannot Duplicate" (2002) 41 Washburn Law Journal 583; TO McGarity, "Regulation and Litigation: Complementary Tools for Environmental Protection" (2005) 30 Columbia Journal of Environmental Law 371, 373; ADK Abelkop, "Tort Law as an Environmental Policy Instrument" (2014) 92 Oregon Law Review 381.

[14] For an important exception, see MG Faure, "The Complementary Roles of Liability, Regulation and Insurance in Safety Management: Theory and Practice" (2014) 17 Journal of Risk Research 689.

[15] Cane, supra, note 5, 443.

The encounter typically is thought to pose no spillover effects on other individuals. From this perspective, the role of tort law appears relatively circumscribed, existing primarily to offer redress for the occasional wrongful harms that occur in an otherwise self-regulating sphere of private relations and interactions between individuals in liberal society. To the extent that something more dramatic or broad-sweeping is needed in the way of legal intervention, citizens are expected to direct their concerns to the political branches.

It hardly bears noting that changes in social and economic relations, as well as advances in scientific knowledge and understanding, strain this classical conception of tort law. For instance, the development of sophisticated epidemiological and toxicological methods of causal inference have led to situations in which courts can know with great certainty that a substance causes harm at an aggregate, population-wide level, but still be quite uncertain whether any *particular* plaintiff's harm was caused by the substance at issue. Those whose lives are framed in statistical terms – the millions of children around the world, for instance, who grow up with asthma because of poor air quality – are a disfavoured category in the common law. They are a product of scientific methods and understandings that far outpace common law legal categories. For statistical lives, there are no A's and B's to match tort law's classic A-hits-B scenario. Statistical lives represent all of us and none of us at once. Yet, because so much of the political and legal theory underwriting the common law is individualistic in orientation, it is not capable of perceiving "all of us" as an interest holder.

Similarly, in many contemporary tort law contexts, harm may be known to have been caused by a specific good or activity that several defendants produced, but no victim can identify the particular defendant or defendants that afflicted them. In rare circumstances courts have adopted doctrinal innovations to aid recovery in such unidentified defendant situations. In general, however, plaintiffs must be able to trace their grievances back to the activities and decisions of *particular* actors. Even with reliable tracing, moreover, many regulatory contexts bedevil causal attribution simply through the sheer number of actors involved. In the climate change context, for instance, any individual harm will be seen as the result of greenhouse gas emissions by literally billions of alleged wrongdoers, likely including the plaintiff herself. Such problems of defendant numerosity are at the very heart of the public policy challenge posed by climate change. Tort seems to offer only meagre resources to overcome them.

Finally, even when a plaintiff can identify her particular harm-doer and convincingly demonstrate the causal connection between defendant's actions and her injury, the harm may have unfolded over such a long time period that the tort system denies relief due to statutes of limitation, statutes of repose, poor evidentiary records, and other such litigation barriers. Lengthy latency periods are associated with many of the risks of concern in environmental, health, and safety regulation; the tort system has struggled to adapt as the "eye of scientific vigilance" has so dramatically lengthened its gaze.[16] Climate change, for instance, is barely comprehensible within standard temporal frameworks. Feedback loops, latency periods, tipping points, and other such vexing

[16] *Cf Palsgraf v Long Island Railroad Co* 248 NY 339, 162 NE 99 (NY 1928) (fixing the scope of defendant's duty of reasonable care to what the "eye of ordinary vigilance" would perceive as a foreseeable risk from defendant's conduct).

phenomena render the climate system resistant to conventional, linear and near-term understandings of causation – precisely the understandings that most strongly characterise tort law's approach to causation.

Given these many reasons for pessimism, tort law conventionally is viewed as a weak device for grappling with diffuse, uncertain environmental, health, and safety risks that plague us now. Still, despite these limitations, tort law does have some features to recommend it, even from the narrow instrumentalist perspective of risk regulation. First, unlike legislators and executive branch officials, common law judges *must* provide an answer to citizens' demands for relief. The courts are, in the language of the constitutional provisions that demand it, "open," and citizens hold a corresponding "right to a remedy."[17] What these provisions mean in practice is that judges must respond to complaining parties and – importantly – they must respond using the kind of appeals to reason, principle, precedent, and evidence that underwrite the legitimacy of adjudication. What that means, in turn, is that common law tort actions can offer a decentralised and citizen-empowering means of formulating and addressing regulatory goals. Rather than relying solely on government agencies to find and sanction harmful activities, society can enlist the actions of private plaintiffs who may be in a good position to recognise their harms and bring them forward for official scrutiny.[18] Each individual dispute, in turn, can be addressed with specific care and concern by the judge and jury who evaluate it. Broad principles structure the resolution of the dispute, but the court remains equipped to take account of individual nuances in every case. The resulting patchwork of decisions feeds into a bottom-up process of normative clarification and solidification.

Second, depending on the jurisdiction and applicable rules of procedure, plaintiffs pursuing tort claims may avail themselves of ample discovery rights. Indeed, in some cases, tort plaintiffs may have greater ability to scrutinise a defendant's records, agents, activities, and products than government agencies. The Clean Water Act in the United States, for instance, fails to grant subpoena power to the country's Environmental Protection Agency. Any tort plaintiff who survives dismissal motions, on the other hand, will be entitled to broad discovery rights backed by the judiciary's inherent power to enforce the integrity of its processes. Such authority should not be underestimated. As Robert Rabin notes, plaintiffs working in pursuit of compensation have strong incentives to uncover risk information, including information that may not have been disclosed to regulators.[19]

Consider one dramatic illustration of the power of tort litigation to unearth transformative social facts.[20] Tobacco defendants in the United States had faced some 300 lawsuits over a period of 40 years regarding the dangerousness of their products without losing a single case or surrendering any amount through settlement. Suing on

[17] See infra text accompanying note 28.

[18] Note, however, that this potential advantage only exists with regard to those harms that avoid the difficulties of "fit" with tort law's paradigm described above.

[19] RL Rabin, "Reassessing Regulatory Compliance" (2000) 88 Georgetown Law Journal 2049.

[20] See generally "Minnesota Litigation and Settlement" (Public Health Law Center at Mitchell Hamline School of Law, Minnesota Litigation and Settlement) <publichealthlawcenter.org/topics/tobacco-control/tobacco-control-litigation/minnesota-litigation-and-settlement> accessed 4 January 2018.

behalf of the state of Minnesota, attorney general Skip Humphrey alleged a civil conspiracy on the part of tobacco defendants to defraud Americans about the health hazards of smoking, to suppress the development of safer alternatives to their products, and to target children through unlawful and manipulative marketing practices. During discovery, the state requested some 40,000 pages of documents. When the defendants' efforts to resist the discovery request were denied by the presiding judge, they instead attempted to bury Minnesota by producing an avalanche of some 35 million pages of documents. The plan backfired: the documents were made publicly available, became the basis of hundreds of academic articles, government reports, and media exposes, and helped shift public perceptions of the tobacco industry into a negative light. Indeed, the Minnesota tort litigation is credited with catalysing the global public health campaign that led to the World Health Organization's Framework Convention on Tobacco Control, which has been joined by 180 nations.

Third, in a jurisdiction such as the United States which permits contingency fees and does not shift attorney's fees onto losing parties, tort law can be seen as incentivising a market-driven system of private attorneys general. Seen positively, such rules expand access to civil justice by enabling plaintiffs to enlist professional advocates irrespective of their ability to pay. Ideally, such access serves as a vital counterbalance to power dynamics that infect the operations of other branches of government. For instance, a frequent question raised regarding the efficacy of administrative agencies is their ability to withstand the informational and political capture threatened by regulated industries. Tort law's immunity to such critiques wanes as the selection of judges becomes increasingly subject to popular elections and, more generally, to politicisation. Nevertheless, regardless of how a judge obtains and retains her post, when she is presented with a complaint sounding in tort law, she *must* respond. This obligation distinguishes her role from nearly all others within the modern governmental complex. Her responsiveness to the dispute before the court makes her generative, whether she admits so or not.

III. Tort law as private law

The literature surveyed in the previous section views tort law as a form of implicit regulation, and assesses its merits as one would assess any other policy mechanism that aims to promote environmental, health, and safety goals. This perspective is not unusual. From early 20th century legal pragmatist and legal realist accounts of tort law as a tool of social engineering to contemporary legal economic accounts of tort law's apparent incentive effects, this "public law" model has at times dominated judicial and scholarly understandings of the field.[21] As this section will argue, however, the problem with such public law accounts is that they fail to explain central features of tort law's history, practice, and structure. Indeed, on close inspection, attempts to evaluate the private law of tort through public law notions of risk assessment and social welfare maximisation appear to represent what philosophers refer to as a category mistake.

[21] See Goldberg and Zipursky, supra note 7, 921–925.

As first noted by corrective justice torts theorists, instrumentalist "public" law accounts of tort law fail to explain why the field focuses on rights and duties that exist between particular parties.[22] If tort law were concerned only with minimising the costs of injuries and deterring socially wasteful conduct, then it might easily be replaced with criminal and regulatory law. Instead, as corrective justice theorists note, there is something distinctive about tort law's focus on the particular relationship of wrongdoing that exists between a plaintiff and defendant.[23] When a wrong has occurred, corrective justice requires that it be addressed as a matter of repair between the particular parties involved. Thus, if one person owes a duty to another and, in breaching that duty, injures a third, the third person generally may not recover unless she identifies an independent duty owed directly to her.[24]

Much of tort law that appears mysterious from the instrumentalist viewpoint becomes quite understandable when this basic insight of corrective justice is kept in mind. It explains, for instance, why tort law generally requires actual causation of harm, rather than mere creation of a risk of harm. It explains why the defendant's level of punishment is tied to the plaintiff's level of harm, and why damages awards are paid directly to plaintiffs rather than to a public fund. It explains the reluctance shown by common law judges to embrace nakedly probabilistic notions of harm-doing such as those embodied in market share liability, enhanced risk, or loss of chance doctrine. It explains a similar hesitancy shown by tort judges in the context of bystander emotional harms, pure economic losses, or liability claims that seek to overlook the intervening conduct of other, more culpable actors. These contexts are all ones in which courts are asked to move beyond a neat *A*-wrongfully-injures-*B* dyadic framework to recognise more complex and interrelated webs of causation and responsibility.

In recent years, a number of scholars have built upon the work of corrective justice theorists to offer a significant perspective on tort law, one that has been referred to as the "civil recourse" school.[25] Civil recourse theorists agree with many of the corrective justice school's arguments, but they still do not think that corrective justice gets to the heart of the tort system. After all, corrective justice might still be accomplished without tort law: A powerful "corrective justice agency" could be created with the ability to award compensation to victims from the general tax fund and the authority to fine or otherwise punish wrongdoers in an effort to annul wrongs. What, then, can be said on behalf of tort law as a distinctive practice? Civil recourse theorists emphasise the fact that tort law does not merely aim to address a carefully delineated set of wrongs done between parties; it does so specifically by empowering aggrieved individuals to seek redress against their particular wrongdoers. Thus understood, tort law is a form of *private law*, designed and intended to work within an overall system of limited government and a political culture of liberalism that are characteristic of the Anglo-American legal tradition.

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[22] See RA Epstein, "A Theory of Strict Liability" (1973) 2 Journal of Legal Studies 151; JL Coleman, "The Structure of Tort Law" (1988) 97 Yale Law Journal 1233 (book review); EJ Weinrib, "Understanding Tort Law" (1989) 23 Valparaiso University Law Review 485.

[23] See, eg, J Coleman, "Doing Away with Tort Law" (2008) 41 Loyola of Los Angeles Law Review 1149; EJ Weinrib, *The Idea of Private Law* (Oxford University Press 1995).

[24] See *Sinram v Pa RR Co* 61 F 2d 767, 769-71 (2d Cir 1932) (Hand, J).

[25] See, eg, BC Zipursky, "Rights, Wrongs, and Recourse in the Law of Torts" (1998) 51 Vanderbilt Law Review 1; BC Zipursky, "Civil Recourse, Not Corrective Justice" (2003) 91 Georgetown Law Journal 695; JCP Goldberg and BC Zipursky, "Torts as Wrongs" (2010) 88 Texas Law Review 917.

For most of its history, a bedrock feature of this legal tradition has been the entitlement of injured parties to seek to persuade impartial courts that they hold a right of action against their wrongdoers.[26] Chief Justice Marshall clearly embraced such a view in the foundational US constitutional law case of *Marbury v Madison* when he stated that "[t]he very essence of civil liberty ... consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."[27] For centuries in the Anglo-American tradition, one manner in which governments have fulfilled this duty to provide a venue for the airing of grievances has been through the common law of tort. Indeed, many US states expressly confer a right of access to a civil justice system through "open courts" and "right to remedy" provisions in their constitutions.[28] Such provisions often are relied upon by state supreme courts to strike down so-called "tort reform" measures that seek to limit the availability of the tort system as a means of private redress.[29]

As one can see, the civil recourse approach to tort law resonates with classical liberalism and its focus on the self-reliance of individuals and the importance of "private" over "public" methods of social ordering.[30] The general idea is that allowing individuals to press their grievances through the tort system furthers liberal goals by respecting litigants as agents who can assert rights, make arguments, and demand redress, rather than merely as passive beneficiaries of protective regulations imposed from above.[31] Similarly, even defendants are afforded a form of respect through the torts process, in that they participate in procedural mechanisms that affirm the mutual answerability of private individuals within society. Such mechanisms of civil recourse "vindicate[] the notion of a community of equals who are answerable to one another and expected to treat one another with equal respect."[32]

Seen properly, then, tort law is a pillar of private law whereby parties are empowered to seek redress against their wrongdoers using the authority of the state. Far from a general purpose regulatory device,[33] tort law adjudicates claims of *specific* victims that they have been injured by the conduct of one or more *specific* wrongdoers. Such a mechanism helps, inter alia: (1) to constitute an ongoing principled determination of the content of our primary duties of harm avoidance;[34] (2) to at least partially repair the

[26] See JCP Goldberg, "The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs" (2005) 115 Yale Law Journal 524.

[27] 5 US (1 Cranch) 137, 163 (1803).

[28] See, eg, D Schuman, "The Right to a Remedy" (1992) 65 Temple Law Review 1197; JM Hoffman, "By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions" (1995) 74 Oregon Law Review 1279.

[29] See, eg, *Wall v Marouk* 302 P3d 775 (Okla 2013).

[30] JCP Goldberg and BC Zipursky, "Accidents of the Great Society" (2005) 64 Maryland Law Review 364, 369.

[31] ibid 406 ("Although the existence of a private right of action relies upon the state's willingness to play its role, the state is not in the driver's seat").

[32] JM Solomon, "Equal Accountability Through Tort Law" (2009) 103 Northwestern University Law Review 1765, 1771.

[33] See GP Fletcher, "Fairness and Utility in Tort Theory" (1972) 85 Harvard Law Review 537 (criticising efforts "to convert the [tort system] into a makeshift medium of accident insurance or into a mechanism for maximizing social utility").

[34] See GC Keating, "Is the Role of Tort to Repair Wrongful Losses?" in D Nolan and A Robertson (eds), *Rights and Private Law* (Hart Publishing 2012).

harmful effects of wrongful conduct according to tenets of corrective justice;[35] (3) to reinforce ideals of social equality and individual responsibility;[36] and (4) to afford a vital procedural mechanism whereby parties acknowledge their mutual accountability to one another.[37] One might add that the mechanism, most basically, helps to consolidate the state's monopoly on violence, encouraging parties to bring their grievances to a neutral forum rather than engage in potentially escalating measures of self-help.

Such a perspective makes sense of tort suits even in a dramatic and seemingly unmanageable factual context such as climate change. Rather than an attempt to obtain in the courtroom what has not been won through legislation or regulation, a tort action seeks instead to hold actors accountable for alleged violations of *common law* duties. Hence, even climate change lawsuits remain unequivocally *tort* actions inasmuch as plaintiffs seek only to demonstrate that defendants are wrongfully harming them according to principles of the common law. Even though the "fit" of climate-related harms within the paradigm of tort law remains problematic, adjudication of climate change plaintiffs' claims would still serve all of the purposes described in the previous paragraph: (1) it would clarify through reasoned analysis whether the duty to avoid creating or contributing to a harm extends to the emission of greenhouse gases; (2) it would confirm the responsibility of courts to provide a remedy in the event that a tortious, harm-producing wrong has in fact occurred between the specific parties at bar; (3) it would acknowledge that the principles of liberty and security sometimes conflict, and therefore demand forthright, respectful arbitration in order to reinforce the ideals of equality and responsibility; and (4) it would enable those who are suffering a harm and those who have contributed to that harm to face one another in a process that is dignifying to both rather than being denigrating to either. Such is the essence of the private law of tort.

IV. The public life of private law

Imagine that you represent a community of fruit growers whose livelihood has been threatened by the arrival of a large industrial facility in the bucolic river valley where the growers reside and farm. Attracted to the valley by the same ample water supply as the farmers, the facility is one of the largest producers of primary aluminium in the country, built originally to provide raw materials to the national government during wartime and continuing to operate now to serve a burgeoning postwar economy. The facility represents a capital cost of tens of millions of dollars and employs several hundred area residents. The facility also emits significant quantities of fluoride, in the form of gaseous hydrogen fluoride, and sodium and aluminium fluorides, and unused cryolite as particulates. The resulting fumes regularly drift onto your clients' orchards, causing crop damage and potential health impacts of uncertain form and magnitude.

[35] See Weinrib, supra, note 23; SR Perry, "The Moral Foundations of Tort Law" (1992) 77 Iowa Law Review 449; Jules L Coleman, *Risks and Wrongs* (Oxford University Press 2002).

[36] See A Ripstein, *Equality, Responsibility, and the Law* (Cambridge University Press 2001).

[37] See S Hershovitz, "Harry Potter and the Trouble with Tort Theory" (2010) 63 Stanford Law Review 67.

Because this conflict has arisen prior to the advent of robust legislative and regulatory controls on air pollution, you turn to the common law of nuisance and trespass for relief. Your complaint seeks monetary damages for past crop losses and prospective injunctive relief against the defendant's continuing invasions. Because you recognise the economic and political heft of the defendant, you do not seek an injunction against the facility operating at all. Rather, you seek an injunction narrowly tailored to address the harm alleged by your clients. Specifically, your complaint requests an order directing the defendant to install pollution controls or undertake such other operational changes as necessary to stop the imposition of significant harm on your clients' properties. Although their crop losses amount to only tens of thousands of dollars per harvest – a minor amount in relation to the annual revenues of the aluminium smelter – the losses represent a substantial hardship to the plaintiffs. Thus, you are committed to advocate their interests with an especial zeal.

The defendant immediately challenges your clients' claim on causation grounds, arguing that the fumes emitted from its facility tend to be carried away from the plaintiffs' orchards by prevailing winds and that those fumes which do drift toward the plaintiffs' lands arrive too diluted to cause substantial harm. Fortunately, your clients have formed a growers' cooperative to fund the litigation; thus, you are able to hire a team of experts to combat the defendants' arguments and to verify pertinent engineering, biological, meteorological, and economic aspects of your clients' claims. You are aided by the fact that recent national legislation in support of scientific research regarding air pollution has led to the establishment of a team of university scientists nearby who are studying the impacts of fluoride emissions on crop plants. Finally, as you will come to find out, the judge presiding over your complaint lives in the eastern part of your state and travels regularly by car to the state's more populated western region down the very river valley at issue. On those trips, the judge personally makes note of the defendant's fumes, observing them on many occasions trailing directly to your clients' orchards.

Lawyers for the aluminium facility also contend that no superior control technology or operational practices exist that would mitigate the harmful emissions. The defendant's gambit is to create the impression that nothing short of a complete shutdown can alleviate the situation, reasoning that the judge will not venture to undertake such an economically impactful move. Even though the court orders the defendant to bear the burden of production on the question of remediability, the company drags its heels, offering only the self-serving testimony of a plant manager who opines that nothing more can be done. You naturally contest this claim and cite the existence of alternative, more effective fume control systems at other plants. Specifically, the defendant's facility uses a plant-wide gas collection system installed on the facility ceiling, while other facilities utilise a series of dedicated hoods above each electrolytic cell used in the aluminium smelting process. You believe that the latter technology is far more efficient at capturing and mitigating harmful emissions, and you successfully persuade the court of this fact at trial. Citing the defendant's activities as a continuing trespass, the court orders the defendant to adopt measures within one year that will eliminate the harm to your clients.

Unsurprisingly, the defendant appeals. But the defendant also files an extraordinary motion before the appellate court, seeking to have the suit dismissed as moot because – the defendant claims – all harmful emissions from the plant have recently been

eliminated through operational changes. Without surrendering general jurisdiction, the appellate court remands the case to the trial judge and orders further fact-finding to verify the defendant's claim. Sensing something amiss, you obtain electricity usage data for the defendant's facility from the local public utility. You discover that the plant's energy usage dwindled to virtually nothing during the time periods when the defendant happened to be recording and reporting its fluoride emissions levels. In other words, the defendant fabricated the appearance of a successful pollution reduction program by simply shutting its factory down at certain time periods and recording the emissions levels of dormant facility.

Confronted with this evidence, the trial judge suggests that he would find the defendant in contempt if he retained general jurisdiction. Instead, the case is sent back to the appellate court which, helpfully, is similarly aggrieved by the defendant's malfeasance. The appellate court upholds the trial judge's original order, awards you substantial attorney's fees, and further directs the defendant to reimburse you for all travel and administrative expenses you reasonably require in order to develop a record regarding the availability and efficacy of alternative pollution control technologies. The trial judge lends additional support by directing the defendant to provide you with an advance of $100,000, which you utilise to research the pollution control practices of aluminium facilities in Germany, Japan, and other nations throughout the world. In short order, you develop a record that demonstrates unequivocally the feasibility and superiority of alternative technologies to the defendant's pollution control system.

Based on this evidence, the judge directs the defendant to install the precise pollution control technology system you requested in order to avoid the imposition of further harms on your clients. An arbitration system is established by consent decree in which neutral experts are tasked with calculating your clients' past damages and with monitoring the defendant's facility to ensure that its emissions will be appropriately controlled. For the next ten years, this arbitral panel will find only one violation of the consent decree, for which the defendant promptly pays a substantial penalty. Confident that rights and responsibilities have been securely established, you and your clients eventually allow the consent decree to be dissolved, at which point the then-presiding judge opines that he never expected ten years of silence from such a significant and complex arbitral facility. All told the litigation consumes years of costly and at times tendentious proceedings, but the result is precisely the one your clients initially sought when they contacted your firm: to be able to continue farming free of wrongfully inflicted injury from the defendant.

Similarly aggrieved property owners throughout the country turn to your law firm for representation in disputes with other aluminium facilities. Over the same time period, scientific understanding and public concern regarding pollution increases, prompting the passage of major national air and water pollution legislation. At the heart of the new legislation is a requirement that major industrial facilities install the "best available technology" to combat pollution, which regulators interpret to mean those technologies that reduce pollution most effectively without leading to complete shutdown of a given industry. Knowing that your litigation on behalf of fruit growers pioneered just such an inquiry with respect to aluminium facilities, state and federal policymakers turn to you for guidance and expertise as they begin to implement the sweeping new legislation.

Indeed, a neighbouring state appoints you as an assistant attorney general specifically to help negotiate consent decrees with various aluminium, copper, and lead smelting facilities to ensure that their operations incorporate best environmental and technological practices.

* * *

This story, if it were true, would complicate significantly both the conventional "public" and "private" law accounts of tort. With respect to law and economics, for instance, the story demonstrates that plaintiffs do not necessarily regard their tort law remedies in the way that law and economics scholars do. For the latter, tort law reduces to liability rules, which reduce to taxes, which reduce to incentives for polluters to achieve efficient levels of harm reduction. Property rules are preferred to liability rules whenever transaction costs are low because they are thought to serve as a prelude to private bargaining: The party holding the property rule entitlement can determine whether to trade it away in exchange for an amount of money that they themselves accept as adequate, rather than some level of ex post compensation estimated by a court or regulator to provide sufficient redress.

The story recounted above rejects this simplified, transactional vision. The judge in the aluminium case recognises an entitlement at common law for individuals to be free from substantial harm imposed by neighbouring property owners. The right and the remedy in the case are tightly coupled in that the remedy demands harm reduction while stopping short of eliminating use of the defendant's *own* property. The injunction, then, is not simply a prelude to bargaining in the Coasean sense: It is an affirmation of relative rights. Likewise, so long as they are bearable, the heavy costs of corrective devices for aluminium smelters offer no reason why your clients should be made to stand by and suffer substantial damage to their own property. Your clients seek to preserve a way of living and they have pressed their grievances against the defendant through common law processes in order to have that desire fulfilled. And they won. As such, theirs is a distinctively liberal, "private" law accomplishment.

It bears repeating that the remedy sought by your clients was not the contractual one of "making the plaintiff whole" or even the corrective justice one of "putting the plaintiff in the position she was in before the wrongdoing." From the civil recourse perspective, one does not begin with the thought that a plaintiff's harm in tort can be adequately compensated or undone by monetary damages. Instead, what the plaintiff seeks is simply *satisfaction* – legally mandated satisfaction – from a particular defendant, the wrong doer.[38] The satisfaction does not annul a wrongdoing, as corrective justice proponents sometimes suggest, for nothing will bring back the fruit that has been sacrificed. Instead, satisfaction is the remedy required to collectively acknowledge and address a defendant's wrongdoing and the harm it inflicted. In the story above, the injunction sought is not to shut down the factory, but rather to order the factory to stop inflicting significant harm. The judgment being made is not a "public law" judgment about social priorities and how to trade off economic and environmental values. Rather, the judgment is a narrow and focused investigation into the conduct of the defendant and its impact on plaintiff's acknowledged right to be free from significant, avoidable harm.

[38] BC Zipursky, "Civil Recourse, Not Corrective Justice" (2003) 91 Georgetown Law Journal 695.

Of course, saying that tort law is not driven by a desire to regulate in a "public law" fashion does not mean that tort law has no implicit regulatory effects. Indeed, the above story – if it were true – would suggest that tort law can in fact produce remarkable regulatory effects, despite the conventional wisdom that courts are undesirable institutions for the pursuit of societal risk regulation goals. Typically, we regard trespass and nuisance pollution suits as simply a useful preliminary phase in the development of modern environmental law,[39] one that helped draw attention to the problem of environmental degradation, develop pertinent facts regarding the impacts of pollution, and spur other branches of government into taking more sweeping and effective regulatory action. In the above story, however, we see judges, lawyers, and clients achieving results that go beyond such indirect effects. To generate the evidentiary record supporting their request for injunctive relief, the plaintiffs demonstrated the feasibility and effectiveness of alternative pollution control technologies. Their approach mirrors the "best available technology" requirements that now are familiar and pervasive throughout modern environmental law. Indeed, though much maligned by law-and-economics scholars, the "best available technology" requirements at the heart of the Clean Air Act in the US are responsible for saving tens of thousands of lives and generating hundreds of billions of dollars in net benefits for society every year.[40] No other environmental law, anywhere on the planet, has achieved such demonstrated results.

Still, such "public law" aspirations do not drive the story's outcome. Instead, the pursuit of best feasible control technologies is driven by plaintiff's demand to be free from wrongfully imposed harm and by the common law's desire to accommodate competing interests and avoid a complete cessation of defendant's activity. By shifting the burden of production onto the defendant after its initial subterfuge, and then by ordering financial support of the plaintiff's own research process, the judges respond to matters of power, right, and responsibility within the relationship of the specific parties before them. Once the evidentiary record is developed which shows that harm can be avoided in a way that is economically feasible, the trial judge then has a path forward to honour – simultaneously – the competing guarantees of the common law to liberty of action and freedom from harm. The path happens to be one that foreshadows the best available technology requirements and feasibility analyses that would come to dominate modern pollution law and that – it must be stressed again – have achieved extraordinary social welfare benefits. But the origins of the path lie in the quintessentially "private law" task of helping adverse parties to live together, justly and peacefully, in the same valley.

* * *

The story recounted above *is* true. The plaintiffs were farmers in the United States who for decades had grown cherries, prunes, peaches, and apricots in Wasco County, Oregon, adjacent to the mighty Columbia River as it reaches toward the Pacific Ocean. The defendant was Harvey Aluminum, Inc., the trial judge was John Francis Kilkenny, and the plaintiffs' lawyers included Arden E Shenker, James W Morrell, and

[39] See supra text accompanying note 8.

[40] See "Benefits and Costs of Clean Air Act", *EPA* (4 January 2017) <www.epa.gov/clean-air-act-overview/benefits-and-costs-clean-air-act> accessed 4 January 2018.

Lamar Tooze, Jr.[41] Save for a few scholarly treatments,[42] the story has largely been ignored in the debate over tort law's merits as a risk regulation device. Yet the story's implications for the conventional understanding of environmental law's history are profound: rather than common law litigation being displaced by more sophisticated regulatory approaches, the latter instead may well have depended on the former for their sophistication.

Nor are the two legal approaches seen as substitutes in the way that the contemporary academic debate often assumes. To be sure, Judge Kilkenny recognises that the lawsuit before him raises larger societal issues: "While we are not dealing with the public as such, we must recognise that air pollution is one of the great problems now facing the American public."[43] But, unlike Judge Bergan from the famous *Boomer* case quoted above,[44] Judge Kilkenny does not let the potential "publicness" of the issues distract him. His opinion remains tightly focused on the particular relationship of wrongdoing at bar and he does not fret over whether the remedy ordered could more effectively be promoted through legislative or administrative means. Such a focus is critical, for tort law and regulation are complements rather than substitutes – an idea all too often forgotten in the debate over how best to govern the causes and consequences of environmental, health, and safety threats.

Merits adjudication in cases like *Harvey Aluminum* ensures the continued availability and operation of tort law as a critical forum for the articulation of public understandings of morality. Entertaining the substance of boundary-pushing causes of action also gives tort an opportunity to fulfil a crucial institutional role too often neglected in the debate over how tort law compares with regulation "proper." In adjudicating tort disputes, courts can, do, and should interact with other branches of government. Judge Kilkenny understood as much when he noted that "[p]inpointing the ever increasing problem of air pollution is the great concern of our national and state legislatures,"[45] even as he continued to adjudicate the merits of the discrete nuisance claim before him. Deference to the representativeness of legislatures and the expertise of agencies need not be seen as a reason for withdrawing tort law as a traditional avenue for the pursuit of civil redress. The systems are complements, not substitutes.

Legislative and regulatory approaches may work well on a prospective, industry-wide or economy-wide basis, but they often contain no compensatory provisions at all for those particular parties who have suffered or will continue to suffer. Likewise, such generalist approaches may demonstrate little sensitivity to the details of the relationship between parties causing and enduring harm. Part of the lesson of the *Harvey Aluminum* story is that the defendant not only harmed the plaintiffs through pollution but also disrespected them through behaviour in the litigation process that was deceitful and

[41] For the most significant published opinion from the litigation, see *Renken v Harvey Aluminum Inc* 226 F Supp 169 (D Or 1963). For further details, see H Stein, "The Law, Legal Practice, and Lamar Tooze, Jr" (2010) 23 Western L History 155; Interview with Arden E Shenker, Partner, Shenker & Bonaparte LLP (New Haven, Connecticut, USA, 16 November 2016).

[42] See, eg, WH Rodgers Jr, *Corporate Country: A State Shaped to Suit Technology* (Rodale Press 1973); N Morag-Levine, *Chasing the Wind: Regulating Air Pollution in the Common Law State* (Princeton University Press 2005).

[43] *Renken*, 226 F Supp at 172.

[44] See supra text accompanying note 12.

[45] *Renken*, 226 F Supp at 176.

suggestive of a failure to acknowledge the parties' equal accountability before the law.[46] Judge Kilkenny's ability to successfully address the asymmetries of information and power that existed between the parties in the *Harvey Aluminum* litigation derived from his granular understanding of this relationship and his focused assessment of the defendant's behaviour. Those perspectives served to legitimate his shifting of the burden of production onto the defendant within a liberal legal environment that otherwise generally resists such precautionary governance.

By creatively utilising their equitable powers, Judge Kilkenny and the appellate court judges in the *Harvey Aluminum* litigation leveraged the defendant's resources and the plaintiff's initiative to produce an impressive evidentiary record regarding international "best available technology" practices in the aluminium industry. Indeed, at the time this record was second to none: Over the next several years, state and federal regulators often relied on the in-house wisdom of the plaintiffs' lawyers as the modern air pollution legal regime emerged.

V. Conclusion

Much of contemporary debate over tort law boils down to a difference of view over whether tort represents an implicit regulatory device or a traditional private law system for the pursuit of civil justice. Such debate reaches its most fevered pitch when addressing climate change tort actions, for those suits seem to extend as far from a private law model as one could conceivably reach. Defenders of the regulatory view naturally argue that courts using common law principles and judicial remedies are ill-equipped to combat societal risk challenges such as climate change. Their arguments, however, beg an essential question, for whether or not courts appear inferior to other institutions in addressing problems such as climate change depends first on how one understands the nature of the "problems" being presented to common law courts.

The most appropriate construction of the problems raised by climate change tort suits is one that can be addressed *only* by courts: Have the actions of named defendants violated the common law entitlement of plaintiffs to be free from wrongful injury? Other branches of government can speak to the judiciary's institutional limitations by taking on the myriad regulatory tasks that are necessitated by climate change as a public policy problem, but it remains emphatically the role of the courts to interpret core common law principles in relation to the particular parties and disputes before them, even when those disputes arise against the backdrop of a complex phenomenon like climate change. Indeed, no other branch of government is capable of addressing the crux of a climate change plaintiff's claim: the assertion that she has a grievance actionable *at common law* and that *she* is the one pressing the claim. Receiving a remedy through statutory or regulatory means is simply not equivalent to the personal and distinctively liberal achievement of persuading a judge and a jury of one's peers that a wrong has been committed which demands repair.

[46] Indeed, one wonders whether the same result would have obtained in the suit absent the defendant's wrongful conduct within the litigation itself. Still, every tort dispute arises in a social context and every social context entails relations of power. The common law judge's ability to be sensitive to such situational details is a significant and distinctive feature of her role.

Critics of climate change lawsuits misconstrue the aim and structure of tort law, arguing that the inability of courts to bind all relevant greenhouse gas emitters "automatically makes them institutionally ill-suited to entertain lawsuits concerning problems this irreducibly global and interconnected in scope."[47] Such a view ignores the fact that courts are well-suited – indeed uniquely suited – to address the narrow, manageable, and traditional issues of right and responsibility that are raised by climate change tort suits as *tort* suits. Far from a "ubiquitously useful device[] for making the world a better place,"[48] tort law seeks only to resolve whether plaintiffs are entitled to the specific relief sought against the specific parties named on the specific grounds alleged in a complaint. That the causal mechanism involved in climate change tort suits is vast and complex does not somehow transform the suits into regulatory actions that demand judicial forbearance. Indeed, rather than counselling against common law adjudication, the enormity and complexity of the climate change problem actually counsel in its favour, simply in order that baseline norms of responsibility – whatever their content – may be more clearly specified as public and private actors embark on what will be a decades-long struggle to deal with greenhouse gas emissions and their impacts.

The sky *is* warming, but it is not falling. Even when faced with tort suits that raise profoundly complex and controversial matters of risk regulation policy, judges should, as they have for centuries, judge. Partly a classical liberal guarantee of official avenues for individuals to seek civil redress, tort law also represents a vital mechanism whereby limited government is forced to perceive the consequences of its own limitations. At bottom, every genuine tort complaint is a cry for help and every tort adjudication an opportunity to consider whether the cry merits official response, whether from the court or elsewhere. To deny such a mechanism of problem articulation, norm generation, and intra-governmental signalling is to deny a powerful, yet strangely forgotten history.

[47] LH Tribe, JD Branson and TL Duncan, "Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine" (2010) Washington Legal Found Critical Legal Issues Series No 169, 21 <www.wlf.org/Upload/legalstudies/workingpaper/012910Tribe_WP.pdf> accessed 4 January 2018.

[48] ibid 2.