EFFICIENCY THEMES IN TORT LAW FROM ANTIQUITY

M Stuart Madden

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ABSTRACT

As human societies developed, a bedrock necessity was the identification of expectations and norms that protected individuals and families from wrongful injury, property damage, and taking. Written law, dating to the Babylonian codes and early Hebrew law, emphasized congruent themes. Such law protected groups and individuals from wrongful injury, depredation of the just deserts of labor, interference with the means of individual livelihood, and distortion of the fair distribution of wealth.

Hellenic philosophers assessed the goals of society as being the protection of persons and property from wrongful harm, protection of the individual’s means of survival, discouragement of self-aggrandizement, and the elevation of individual knowledge that would carry forward and perfect such principles. Roman law was replete with proscriptions against forced taking and unjust enrichment, and included rules for ex ante contract-based resolution of potential disagreement. Customary law perpetuated these efficient economic tenets within the Western World and beyond. The common law has nurtured many of the same ends. From the translation of the negligence formula of Judge Learned Hand into a basic efficiency model to the increasing number of judicial opinions that rely explicitly upon economic analysis, efficiency themes enjoy a conspicuous place in modern tort analysis.

1 M. Stuart Madden is a former Distinguished Professor of Law, Pace University School of Law
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I. INTRODUCTION

Tort law represents a society’s revealed truth as to the behaviors it wishes to encourage and the behaviors it wishes to discourage.\(^1\) From causes of action for the simple tort of battery to the more elegant tortuous interference with prospective advantage, the manner in which individuals or groups can injure a protected interest of others seems almost limitless. Despite the amplitude of interests protected by tort law, from its earliest exercise in prehistoric groups up to

\(^1\) There will be some rarified instances of behavior that tort law would not discourage, such as abnormally dangerous activities, but instead may wish to modify or limit, and in any event, assign strict liability.
its modern implementation, there have existed a finite number of goals of tort law, whether the “law” referred to be an unwritten norm, a judicial decision, or a modern statute.

There is general agreement that these objectives, however imperfectly accomplished, include: (1) returning the party who has suffered a loss to the position he enjoyed before the wrongful activity; (2) requiring the wrongdoer to disgorge the monetary or imputed benefit derived from his actions; and (3) by the remedy meted out, or by its example, deterring the wrongdoer and others in a similar situation from engaging in the same wrongful and injurious pursuit. Another manner of describing tort goals has been to order them as serving either goals of (4) “corrective justice and “morality”; or (5) “efficiency and deterrence.”

Aligning tort rules to be consistent exclusively with any one of these five goals requires some ungainly packaging, as each of the five themes described actually also serves the other four. This is to say, for example, a remedy that focuses on corrective justice will serve simultaneously the goals of disgorgement of unjust enrichment, morality, efficiency, deterrence, and so on. More specifically, the goal of returning the injured party to the status quo ante, the objective most closely associated with corrective justice, is ordinarily reached by a decree ordering the wrongdoer to return to the plaintiff in money the equivalent to what the plaintiff lost. But damages calculated in this way also may be seen as an inexact surrogate for what the wrongdoer gained, actually or by imputation, by perpetrating the wrong. Further, whereas the wrongdoer’s disgorgement of his gain often provides corrective justice for the claimant, it also, importantly, punishes the wrongdoer for failing to achieve the plaintiff’s ex ante approval of the transaction – an omission deemed to be inefficient by exponents of efficiency theory. So it is not surprising that although many suggest that tort rules and remedies aligned with economic and efficiency models provide the most deterrence for civil wrongs, most agree that the tort rules recognized by the corrective justice-morality school also deter in measurable ways. Indeed, in the inexact taxonomy employed by tort scholars, there are so many instances of overlap between what tort goals are claimed to serve corrective justice-morality, but that serve simultaneously goals of efficiency and deterrence, that the legal pragmatist would be

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2 When the loss is personal injury or property damage, a rough estimation of this inefficiency (or waste) may often be the combined amount of the claimant’s economic and noneconomic damages. Of course the theme of punishment deterrence is but the flip side of a theme of creating an incentive for efficient behavior. As suggested by Professors David W. Barnes and Lynn A. Stout, “Tort law may be viewed as a system of rules designed to maximize wealth by allocating risks so as to minimize the costs associated with engaging in daily activities.” David W. Barnes & Lynn A. Stout, Cases and Materials on Law and Economics 85 (1992).
tempted to characterize them as functionally equivalent. Even conceding the absence of neatness in any attempt at categorization, the division of tort goals along these or similar lines is nevertheless illuminating and predictive.

Accident law is a model of social expectations, and these social expectations are at once moral and economically efficient. Emphasizing for present purposes the economic aspect, it can be shown that in broad terms, written or unwritten rules pertaining to civil wrongs cleave to an ethos of efficiency. This efficiency norm has, in turn, an organizing principle of waste avoidance, the protection of persons and their property from injury and wrongful appropriation, the preservation of the integrity of individual or collective possessions or prerogatives from wrongful interference, and the prudent marshaling of limited resources. Although the corrective justice-morality objectives of many tort norms will often, for what appears initially, eclipse any apparent underpinnings of efficiency, still and all, subtle economic themes of efficiency and deterrence can be recognized in almost all tort-type customs, expectations, and rules. Indeed, as this article will demonstrate, the parallel and harmonious impetus for almost all of what today we call tort law today can be found in principles of economic efficiency.

This article examines preliminarily a selection of past and contemporary societal choices regarding identification, assignment, and implementation of remedies for civil wrongs. Rather than exploring each of the five principal themes of tort analysis noted earlier, I devote this examination solely to tort rules revealing economic themes. Although there are only a limited number of such rules that reveal an economic analysis on the surface, in the examples this article summons the economic goals can be teased readily to the surface.

Evaluation of accident law as it has evolved during the period of written history is by any assessment a prodigious task. Even with modern translation, there are numerous gaps in the historical record. The potential for analytical error in bridging these gaps is compounded by the difficulties legal scholars and legal historians confront in reading the legal-historical record within the only context that may reveal it reliably: the cultural and political circumstances of its origins. As to prehistoric man, no more than a small part of the history of the earliest human societies may ever be scientifically reconstructed, because of natural loss, or frequently deliberate or inadvertent later human meddling. Forever lost are countless ancient remnants that might suggest the societal norms employed to

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3 Put another way, both corrective justice and efficiency principles must be regarded as “true” in that they hold significant, albeit nonexclusive, predictive value in anticipating the development of tort law. See M. Stuart Madden, Selected Federal Tort Reform and Restatement Initiatives Through the Lenses of Corrective Justice and Efficiency, 32 Ga. L. Rev. 1017 (1998) at nn. 297–98 and accompanying text.
make group decisions based on what behaviors would bring collective benefit and what would not.

The adoption of durable writing or imagery accelerated our modern understanding of ancient legal norms. The discovery and translation of the first integrated legal codes from the sites that were within ancient Babylonia, a codification of what was surely the customary law that preceded it, provided the first written evidence of regularized norms for civil behavior, identification of civil wrongs, and the remedies for such wrongs. However, even anticipating the development of permanent written records, much regarding human norms and customs may be deduced logically. Taking into account the difficulties in identifying the customs of early humans, experts are of one view that the success and survival of early social groupings bore a more or less exact correlation to their adoption of norms that furthered advancement of knowledge, material comfort, and economic stability. For all human groups, achievement of these attributes would, from prehistory onward, be characterized as “good.”

It follows that early family clans, and the tribes and ever larger social aggregations that would follow, have shared one sentiment: to pursue such “good” for their members.

Philosophers have disagreed as to whether man in his natural state was innately “good,” but any original impulse for good stood no meaningful chance for survival as human concentrations grew and evolved. Group order and expectations in the form of norms, and the subscription to such norms by individuals and families, became necessary for communal survival. It will be seen that at its core, tort law, together with its unwritten normative antecedents, bears witness to the fundamental social need for self-limitation. To the sociologist Emile Durkheim, the peaceful process of society has always depended on the individual’s submission to inhibitions of or restrictions on personal “inclinations and instincts.” Whether the “venerable respect” tendered to a collective “moral authority” is faith-dependent or not, Durkheim continues, “social life would be impossible” without general subscription to such limitations. And so by necessity, social groups developed expectations, norms, customs, and, eventually, laws that (1) encouraged behaviors that contributed to the common good and economic success of the community; and (2) discouraged individualistic pursuit

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4 Robert Redfield, *Maine’s Ancient Law in the Light of Primitive Societies*, The Western Political Quarterly 3, 586-89 (1950), in which Redfield writes of primitive societies: “[E]conomic systems are imbedded in social relations. Men work and manufacture not for motives of gain. They tend to work because working is part of the good life . . . .”

5 By “members” is meant the collective, for, as Maine observed: “Ancient Law . . . knows next to nothing of Individuals. It is concerned not with Individuals, but with Families, not with single human beings but groups.” Henry Sumner Maine, *Ancient Law* 229 (1861).

of personal aggrandizement to the extent that the same involved disavowal of community responsibility.

Accordingly, human experience of the ages has demonstrated that man as a social animal has turned almost invariably to structures and norms consistent with defined and enforced standards of “good” as would further the innate and overarching instinct for individual and group survival. By virtue of this ascendant sentiment of most societies of all historical epochs to attain both group and individual “good,” the collective conclusions as to what constitutes “good” evolved gradually to this: what is “good” has always been, as it is today, what is just, moral and equitable. Encouragement of “good” conduct has been logically accompanied by discouragement of “bad” conduct, which is to say, behavior considered to be unjust, immoral, or inequitable. And all such systems, save the brashest of totalitarian societies, have included standards by which a person might seek the correction of or compensation for harm caused by the wrongful acts of another. Initially established as practices, then as norms and customs, and eventually as law, evolving social strictures would operate to either cabin or punish the behaviors of those succumbing to the seemingly irresistible human appetite for bad, wrongful, and harmful behavior.

In this sense tort law, past and present, has operated as the societal superego, a generally subscribed-to social compact in which most persons rein in such impulses as might lead them to trammel the protected rights of others, inasmuch as the norms of tort law require rectification operating post hoc to restore the wronged person to the position previously enjoyed. This restoration may be perfect, such as when it is in the form of returning goods where there has been a trespass to chattels and there has been no diminution in value, or when there has been a misappropriation. Or it may be imperfect, such as in settings involving a wrongful physical injury, as to which rectification in the form of money can never truly restore the injured party to the status quo ante. As suggested initially,

7 Conceding that Socrates wrote from beyond the spheres of governing power, it is telling that Socrates’ ethics are suffused with the goal of avoiding doing harm, and with the argument that a principal marker of “justice” is the simple “returning what was owed.” ANTHONY GOTTLEIB, THE DREAM OF REASON: A HISTORY OF PHILOSOPHY FROM THE GREEKS TO THE RENAISSANCE 164 (2000).

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 doing 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.

whatever the corrective justice limitations of money damages, they do serve other objectives identified with tort law, which include deterrence of the same or similar conduct by the actor or others similarly situated. Money damages also, in an economic sense, command a transfer of wealth that achieves a figurative rectification of the wrongdoer’s “forced taking” of the injured party’s bodily integrity. The money damages also, at least conceptually, deprive the wrongdoer of the “unjust enrichment” achieved by creating a tear in the fabric of consensual or contract-based social interaction.

My objective in this article is to examine this question: In the norms, rules, and philosophical bases for early tort law through and including its modern representations, can there be found a continuous vein of the goals of (1) efficiency and (2) deterrence? It will not surprise students of tort law that numerous social, philosophical, and legal systems, from past to present, are redolent of the economic norms of waste avoidance and the discouragement of unconscionable-to-taking. I will discuss a spare, but illustrative, selection of groups and societies the organization of which followed written and unwritten norms so showing. I also will touch on modern philosophical and legal tenets that inform us regarding the tenacity of economic efficiency themes in tort law and theory. The article will conclude with observations as to how this abundant history of human recognition of these economic considerations augurs for the future of tort law.

II. ECONOMIC IMPERATIVES IN EARLY SOCIAL GROUPINGS

A. Generally

The raw and primal imperative of simple human survival has required of each successful community the ordered pursuit of “good” for its members, including necessarily standards to discourage or interdict activity that interrupted or compromised pursuit of a “good” social order. In the shadow of such overarching needs, the norms or apparatus of “justice” and “morality” would necessarily be subordinate to the collective pursuit of economic stability, growth, and the elevation of human knowledge. Retaining a focus on the three goals of elevation of human knowledge, material comfort, and economic stability, it follows that within the context of pre-history, of particular pertinence to the furtherance of each goal was the creation and preservation of group circumstances in which persons could expect to live peaceably without physical injury at the hands of others. It also was expected that the community would provide congruent protection against wrongful taking or damage of the property justly acquired by its members. It was collectively thought necessary that man would gradually impose on his groups, and eventually civilizations and states, norms and rules that served to
protect the personal physical autonomy and security of group members, and also protect their belongings, against wrongful interference. The group visualization of these norms, and their progressive imposition, would assume the aura of inevitability, and the gravitas of a cultural imperative. For successful social groupings, principal among such norms was the expectation there would be some form of remediation for an impermissible intrusion on physical or property interests, including common property rights.9 And, finally, along this line of civilizing thought, the ideation of society was that this remediation ought properly come from the malefactor.

B. A Pre-Symbolic Scenario

At some distant time in the African veldt, the birthplace of modern man, homo sapiens formed family-based social groups or clans. From the time of early family groupings to the development of ever-more complex communities, all successful human gatherings developed work specializations inter se.10 For example, a group depending on fishing for its sustenance would need individuals to prepare nets or baskets for the catch. Others in the group would dedicate themselves to the actual fishing, and travel to the water source with, let us say, spherical fishing baskets that contained a hole on one side that lured fish seeking shade. Swift retrieval of the basket would catch the fish and provide food for the community. Naturally, the entire community would not survive if the actual fishing specialists arrogated to themselves the catch, and so there developed norms of allocative efficiency, a so-called “generosity” norm, that would ensure that all in the community, including infants and the aged, would be provided for adequately.11 This allocation of goods constituted a micro prototype of efficiency-based exchange of goods that recognized duties owed by the community to its individuals, duties owed by community members to others,


10 As Darwin pointed out for flora and fauna and as Durkheim noted in the case of human societies, an increase in numbers when area is held constant (i.e., an increase in density) tends to produce differentiation and specialization, as only in this way can the area support increased numbers.

11 “[F]or example, the [primitive] Australian hunter who kills a wild animal is expected to give one certain part of it to his elder brother, other parts to his younger brother and still other parts of the animal to defined relatives. He does this knowing that [the other brothers] will make a corresponding distribution of meat to him.” Robert Redfield, Maine’s Ancient Law in the Light of Primitive Societies, in J. C. Smith and David N. Weissstub, The Western Idea of Law 81 (1983).
and the common interest in non-wasteful behavior that would characterize all societies to follow.

This economic cooperation characteristic of primitive communities was the antithesis of economic self-interest, and understandably, Karl Polanyi writes that in tribal society, “[the individual’s economic interest is rarely paramount, for the community keeps all its members from starving unless it is itself borne down by catastrophe.”\(^\text{12}\) Moreover, in the circumstances of tribal society, past and present alike, exclusive pursuit of economic self-interest was itself contrary to the economic survival of the group. Early task assignment and economic differentiation within a clan or a small social group required, by “code of honor” or “generosity,” recognition that each member of the community served the whole. From the earliest hunting and gathering communities to the later agricultural groupings, task allocation was accompanied by mutual expectancies that the bounty in food or materials gathered by one group would be shared with the others. The others would include, nonexclusively, the homemakers, children, and the elderly. For the vital hunting population to forsake its obligation to return from the hunt with food to share with the family, clan, or tribe would sabotage the very existence of the social group. Failure to share with the homemaker and the children would bring about the speedy end of the bloodline. As to elders, with some exceptions, tribal groups recognized that the aged acted as secondary caregivers and essential repositories of the group’s oral history and traditions.

In time, with the increase in population and in the course of the proved northward migration of many human groups,\(^\text{13}\) early man found that the working norms for family, clan and single community survival would be taxed by contact with other families or groups. For an untold time, the response of the principal family was simply that of preserving territorial integrity, familial safety, or both. An intruder would be frightened away, or if necessary, beaten\(^\text{12}\) or killed. If the intruder or his group prevailed in any contest, the principal family, with its injured or killed, would abdicate its territory.

In a succession of discrete and unidentifiable moments, this motif would change. Increased populations, changes in climate that made one area more hospitable than another, or migratory patterns of available prey, made contact with other groups more frequent. A group’s choices were essentially two. They might preserve their reflexive and potentially mortal repulsion of competition. However

\(^{12}\) \textit{Primitive, Archaic and Modern Economies: Essays of Karl Polanyi} 7 (George Dalton, ed. 1968).

\(^{13}\) Such extraordinary migrations as would take man out of Africa and eventually permit his species’ dispersal throughout all but one continent was facilitated by his evolved ability to walk on two feet, to travel long distances, and to carry objects and infants. J. M. Roberts, \textit{The New History of the World} 5 (2003).
losses suffered in non-cooperative contact with other groups might have stimulated a group’s conclusion that preservation of pristine territorial integrity was perhaps a pearl of too great a price. And so, alternatively, their response to other communities might begin to partake of peaceable aspects. Non-combative resolution of intra-familial allocative tensions might have served as a model for introduction of cooperative behavior in interfamilial matters. As to the latter, cooperation would lessen or eliminate the enormous waste and cost of violent response to intrusion.

Perhaps at the instigation a group elder, families and tribes eventually developed behaviors and expectations that could coexist within the context of available resources in such ways as to achieve a tenable resource-based economic stasis. Should, for example, our hypothesized fishing community come into contact with a hunting community, the sharing of territory, and perhaps even barter, might well become recognized for its very significant benefit in reducing the group’s loss of its ablest members to combat, and thus become a common ideal or norm.

Historians have recognized the similar options presented to later agricultural communities, with the permissible inference of the peaceable and efficient resolution of such options. In the description of J. M. Roberts: \“As the population rose, more land was taken to grow food. Sooner or later men of different villages would have to come face to face with others intent on reclaiming marsh which had previously separated them from one another. . . . There was a choice: to fight or to cooperate. . . . Somewhere along the line it made sense for men to band together in bigger units than hitherto for self-protection and management of the environment.\” Of necessity the norms developed within such larger social groups reflected the wisdom of not only ex ante resource allocation but also of strictures intended to discourage disruption of such allocation by forced takings or otherwise.

The above hypothetical yet historically realistic example gives to us our first chance to measure highly plausible human behavior, and attendant norms, by a yardstick of human economic efficiency. Although multiple economic models are available, one that seems well suited is that propounded by Vilfredo Pareto in the early 1900s. The Pareto analysis imagines a setting in which all goods have been

14 Of course the genetic significance of intergroup coexistence is inestimable, but would, in any event be unknown to early man until the development of the incest taboos.

15 J. M. Roberts, supra note 13 at 49–50. These early incentives toward political and economic cooperation weigh in against the more pessimistic vision of Garrett Hardin. Garrett Hardin, The Tragedy of the Commons, 62 SCIENCE 1243, 1244 (Dec. 13, 1968) (arguing that “ruin is the destination toward which all men rush, each pursuing his own best interest.”).
previously allocated, and permits an evaluation of different approaches to reallocation of such goods. A reallocation that left one or more individuals better off, but no one worse off, would be considered a Pareto Superior change.\textsuperscript{16} Even better, from a wealth-maximization perspective, is a result in which with the reallocation of goods or resources all affected parties are better off – a result described as Pareto Optimal or Pareto Efficient.\textsuperscript{17}

Applying the Pareto approach to early man’s described movement away from territorial combat to gradually more peaceable allocations of land and other resources presents this question: Is such rational cooperation efficient? A syllogism posed in a coarse correlation between competition and efficiency may be, on these facts, misleading. That syllogism would go: competition is, generally speaking, efficient. The antithesis of competition is cooperation. Therefore, cooperation is inefficient. However in the example given earlier, rational cooperation between early human social groups regarding the sharing of limited land resources was not only efficient, it also can be seen to be the only means by which early societies could flourish. The alternative was either the continuation of wasteful combat, or the relegation of some groups to a continued nomadic life, or both. Thus, cooperation, and its concomitant benefits to participants in agricultural communities, was Pareto Optimal.

Furthermore, as to the theme of surplus, and surplus accumulation, it is widely proposed that the development of agriculture and animal husbandry created the first human experience of surplus.\textsuperscript{18} This surplus, in turn, accelerated the development of specialization of labor.\textsuperscript{19} Specialization of labor affected the reciprocal entitlements and obligations of three principal groupings: (1) those engaged in agriculture; (2) artisans; and (3) those to whom fell domestic and child-rearing obligations. Those engaged in agriculture had, of course, the duty to efficiently and productively produce and to husband the resources and the comestible rewards entrusted to them. Unlike the expectations typical of the hunting and gathering communities, the development of agriculture both permitted and required that what was produced not be consumed immediately, and that when it was consumed, that it not be consumed exclusively by those who produced it. Rather, the expectation for and the duty of those tilling the fields or

\textsuperscript{16} The Pareto criteria for wealth maximization analysis are summarized in DAVID W. BARNES & LYNN A. STOUT, THE ECONOMIC ANALYSIS OF TORT LAW 11 (1992).

\textsuperscript{17} MARK SEIDENFIELD, MICROECONOMIC PREDICATES TO LAW AND ECONOMICS 49 (1996). For a general description of Pareto optimality principles, see ROBIN PAUL MALLOY, LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE (1990).

\textsuperscript{18} Agriculture and animal husbandry will be referred to collectively as “agriculture.”

\textsuperscript{19} J.M Roberts, supra note 13, at 51.
tending the animals was to harvest the crops and to preserve the harvest, or to
slaughter the livestock and to preserve the meat through salting or otherwise, for
distribution among the entire community. The artisans were expected to perform
such tasks as the creation of the specialized tools that might be associated with
chopping, sewing, tilling, the making of clothing, the building of shelter, and
more. The artisans’ expectation was that, in exchange for their labor, they would
partake of the agricultural production of the fields.

The homemakers also might not participate directly in agricultural
production, or if they did, they might do so to a lesser extent than those to whom
that task would fall principally. The homemakers’ primary tasks would include the
bearing, raising, and nurturance of children, and the maintenance of a habitable
home site, thus freeing both the laborers in the field and the artisans to pursue their
work unimpeded of at least the most time consuming obligations of home and
child. In return for these responsibilities, the homemakers would rely on the
sowers and the reapers, and also the artisans, to share on an equivalence what
they had produced.

The significance of these simple group structures, duties, and expectations
lay in their promise of and similarity to the more complex duties and expectations
that would develop as agriculture permitted the development of larger and more
concentrated communities. These larger social or societal groupings would, with
the advent of writing and symbolic communication, become the earliest instance of
what is now called civilization. And it is in the writings of the earliest civilizations
responsibility for wrongdoing, or tort law.

III. DEVELOPING HISTORICAL EXAMPLES OF EFFICIENT FORM
AND FUNCTION

A. Mesopotamian Law

The watershed discovery and translation of approximately three
thousand years of law from the cradle of civilization, framed by the Tigris and
the Euphrates Rivers, permitted research, evaluation, and legal synthesis of myriad
legal matters. Mesopotamian ancients were, many claim, the first to write
their laws in an organized and lasting manner.20 As discovered by later
archaeologists, these laws were collected in the Laws of Hammurabi, the Laws of
Ur-Nammu, and the Laws of Lipit-Ishtar.21 The epoch contemplated by these

20 RUSS VERSTEEG, EARLY MESOPOTAMIAN LAW 3 (2000). Several of the references to the
principal Mesopotamian codes derive from this work.

21 Id.
principal bodies of law is approximately 4600 B.C. to 1600 B.C., or three millennia. Although these legal codes were promulgated, published, and republished under the aegis of different rulers and over such a long period of time, scholars suggest that the “similarities” in the form of the “academic tradition,” and the provisions themselves, “suggest enduring commonalities in the customary law of Babylonia.” For present purposes, the legal themes and systems to be discussed will be those of such form and substance as the ancients devoted to systems of customary, normative, and eventually statutory law governing the rights of individuals to be free from wrongful injury, property damage, or coerced takings initiated by others.

For all that is apparent, Hammurabi himself intended that his law reconcile wrongs and bring justice to those aggrieved. His unmistakable goal was the economic stability and enhancement of his people. Before the laws of Hammurabi there were published the laws of King Ur-Nami (2112–2095 B.C.). In the Mesopotamian law collections, the provisions characteristically begin with an “if” clause (the prothesis), and end with a “then” clause (the apodasis). Thus, the prothesis identifies a circumstance or activity that the lawmakers concluded needed a legal rule, whereas the apodasis describes the legal consequences for the creation of such a circumstance or the engagement in such activity. This approach bears significant markings of code-based law throughout the ages and is widely followed today.

Review by scholars has revealed examples of remedies for civil wrongs in which Mesopotamian law responded to the delict by penalizing, by money judgment, the wrongful disposition (or eradication) of another’s right or vested expectancy. This approach was of particular and felt economic significance in instances when the wronged individual was in a weaker social or economic position than the wrongdoer. Thus, the laws of Ur-Nami provided that a father whose daughter is promised to a man, but who gave the daughter in marriage to another, must compensate the disappointed man twice the property value of what the promisee of marriage had brought into the household.

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24 Id.

25 Id. at 11.

26 Ur-ami 9.
As was true particularly of early legal formulations, the law of Mesopotamia emphasized the protection of person, property, and commerce from forced divestiture of a right or a prerogative. Regarding navigation, a collision between two boats on a body of water having a perceptible upstream and downstream would trigger a presumption of fault on the part of the upstream captain, on the logic – faulty or not – that the upstream captain had a greater opportunity to reduce avoidable accidents than did his counterpart, as the former would be traveling at a slower speed.27

A subtle interplay between norms of duty, nuisance and causation is evident in the following rule: Neighbors were bound by a rule that served to deter letting one’s unoccupied land elevate a risk of trespass or burglary to the neighboring property. The Law of Lipit-Ishtar provided that upon notice from one neighbor that a second neighbor’s unattended property provided access to the complainant’s property by potential robbers, that should a robbery occur, the inattentive neighbor would be liable for any harm to the complainant’s home or property.28 Particularly harsh legal consequences might be visited on the landowner who failed to contain his irrigation canals, as flooding of the water might “result not only in leaving crops and cattle dry and parched in one point, but also widespread floods in another part of the district.”29 In the simple case involving only damage to grain, replacement of a like amount might give sufficient remedy. But an unmistakable deterrence of more severe consequences would be clear to those knowing that should the careless farmer be unable to replace the grain, the neighbors might be permitted to sell his property and to sell him into slavery to achieve justice.30

B. Early Religion – The Law of the Torah

It is accepted that much of modern society was suckled at the breast of faith, and that much of mankind’s law and morality “were born of religion.”31 Often this faith partook of earlier myth, and transformed it to suit the extant needs of the

27 DRIVER AND MILLS, BABYLONIAN LAW § 431–32, referenced in VERSTEEG at 130.

28 Lipit-Ishtar § 11.

29 DRIVER AND MILLS, BABYLONIAN LAW 50, from VERSTEEG at 136.

30 Hammurabi § 54. See also Raymond Westbrook, Slave and Master, 70 CHICAGO-KENT L. REV. 1631, 1644 (1995).

31 ELEMENTARY FORMS supra note 6 at 87.
time and the place. And, invariably, the adopted faith adopted strictures against conduct that was inconsistent with the bountiful sustenance of the whole.

The Law of the Torah, with its accompanying interpretation in the Talmud, cannot be described as either ancient or modern, as it is both. It represents the longest continuum of international private law that exists. The domain of the Law of the Torah is, strictly speaking, the population of observing Jews. It is, though, of a piece with the same Mosaic law that is the foundation of Christianity, and thus its influence has always reached and continues to reach populations and cultures greatly exceeding in number its Jewish adherents.

Israel, and its law, did not differentiate “between the secular and religious realms.” Rather, all of Jewish life “was to be lived under Yahweh’s command, within his covenant.” Included among the contributions of Hebraic law to western legal development was the recognition that man-made law must give way to God-given, moral law should the two be in conflict. The Torah and its interpretations guide Jews in a very broad spectrum of individual and common pursuits. Naturally, this article is devoted only to such strictures as pertain to the identification of (1) civil wrongs to others; (2) the remedies for such wrongs; and (3) the sensitivity of such written or traditional law to norms of economic efficiency, and deterrence.

The Torah includes the word of God as revealed in the books of Genesis, Exodus, Leviticus, Numbers, and Deuteronomy. These writings, the socio-legal bedrock of Judaism, contain copious treatments, sometimes systematized, of how society ought respond to civil wrongs, and the reasons therefore. Whereas much Western law, particularly modern Western law, is

32 Fittingly, religious law – including but not limited to the Law of the Torah – continues to this day to be a part of the weave of both customary law and of national legislation. For example, HON H. W. TAMBIAH QC, PRINCIPLES OF Ceylon Law III (1972) (“Religion is a source of law through custom or legislation. Difficult questions arise as to the relations between general law and special customary law.”).

33 The gravitational interplay between Hebrew scripture and Greek philosophy is well treated in other works. For example, BERTRAND RUSSELL, A History of Western Philosophy 326–27 (1945).

34 BERNARD W. ANDERSON, UNDERSTANDING THE OLD TESTAMENT 96 (2d ed.) (1966). See also Dennis Lloyd, supra note 9 at 49–50 (explaining that Hebrew law, revealed law of the Almighty God and embodied in the Law of Moses and later prophets, “showed that merely man-made laws could not stand or possess any validity whatever in the face of divine laws which the rulers themselves were not competent to reveal or interpret.”

35 LLOYD, supra note 9 at 50.

36 This corresponds to what Christians would later recognize as the first five and similarly named Books of their First Covenant.
phrased in prohibitory terms, Halakhic law is more apt to treat its society of believers in terms of duty, or put otherwise, “The observant Jew should . . .”37 Many of these duties are remarkably fuller and more demanding than those recognized in other systematized bodies of law. For example, within the Torah, Leviticus states that a person who stands by while another is put at risk commits a “crime of omission.”38 In the United States and the majority of other legal systems, there is no ab initio duty to come to another’s aid; rather, such a duty arises only in particular circumstances. The approach stated in Leviticus doubtless describes the higher and more moral road. But might its rationale also resonate in some other social premium important to Jewish society? Apart from obedience to God, another central and seemingly perpetual goal of Jews has been mere survival. It requires no particular boldness to recognize that violence to the persons or the property of members of the Jewish community has always been a closely-held awareness of Jewish communities.39

A predicate to the advancement of the welfare, progress, and justice of a social group or a state is of course that the group survive as a human community. As the chosen people with no property of their own, it is proven that the historical Jews were set on by army after army, and it is quite certain that what behavior, from simply cruel to savage, that was not visited on them collectively was surely inflicted on them in discrete, individual and unrecorded incidents. An interpretation that the Law of God required spontaneous protection of other Jews from danger might be seen as a simple and justifiable requirement of the survival of Judaism and its believers.

The Code of the Covenant, set out at Exodus 24: 3–8, describes rights and restrictions regarding “slaves, cattle, fields, vineyards and houses.”40 The civil code-like provisions therein are replete with strictures that provide guidance to the community regarding permissible and impermissible community conduct as it affects land, material, and economic transactions. One borrowing another’s cloak

37 J. David Bleich, Contemporary Halakhic Problems 204 n. 15, referenced in CONTRASTS IN AMERICAN AND JEWISH LAW 226 (Daniel Pollack, ed.) (2001).

38 CONTRASTS, id. at 226 (Ch. 6, Daniel Pollack, Naphtali Harcztark, Erin McGrath, Karen R. Cavanaugh, The Capacity of a Mentally Retarded Person to Consent: An American and a Jewish Legal Perspective).


40 Roland De Vaux, Ancient Israel 143 (1961), from Smith and Weisstub, supra note 11 at 197.
must return it by nightfall.\textsuperscript{41} Should one’s bull gore a man, the bull is to be stoned.\textsuperscript{42} Even an unworthy thought process that might lead to wasteful bickering or more is enjoined in the admonition “Thou shalt not covet thy neighbor’s house, . . . nor his ass[.]”\textsuperscript{43}

The Talmud and harmonious rabbinical writings are explicit in the condemnation of waste. The “waste of the resources of this universe [are] prohibited because of bal tashit.”\textsuperscript{44} Such prohibitions include the wasting of food or fuel, the burning of furniture, and the unnecessary killing of animals.\textsuperscript{45}

IV. EARLY PHILOSOPHICAL TEMETS OR IDEAL INDIVIDUAL AND COLLECTIVE PURSUITS

A. Hellenic

For a philosophical epoch of greater significance than any other, the Hellenists defined virtue, morality, and ethics in terms that remain the foundation of Western philosophy. Putting aside only a few proponents of distracting philosophic anomalies, the Greek philosophers first identified an ideal of individual behaviors that accentuated study, modesty in thought and deed, and respect of law. Second, the Hellenist thinkers envisioned a society (at that point a city state) of harmony, accepted strata of skill and task, and, naturally again, respect of law.

However utopian may have been the imagination of such a city state as being led by a politically detached, supremely wise Philosopher-King, the more important instruction is that the Hellenist image of a society and its individual participants was one of social harmony, rewards in the measure of neither more nor less than one’s just deserts, and subordination to law. Although undemocratic in many respects, and indeed slave-holding, for a pre-democratic,

\begin{itemize}
  \item[\textsuperscript{41}] Exodus 22: 25.
  \item[\textsuperscript{42}] Exodus 18: 28.
  \item[\textsuperscript{43}] Exodus 20: 17.
  \item[\textsuperscript{44}] CONTRASTS, supra note 38 at 110 (Ch. 4, Daniel Pollack, Jonathan Reis, Ruth Sonshine, Karen R. Cavanaugh, Liability for Environmental Damage: An American and a Jewish Legal Perspective).
  \item[\textsuperscript{45}] Shabbat 67b; 129a; Chullin 7b; Sanhedrin 100b at id.
\end{itemize}
progressive and just ideal evaluated in recognition of its time, the Greece of this era measures up respectably.

Hints of the political circumstances in which Stoics found themselves can be found in the graphics handed down to us from antiquity that portray the various philosophers either speaking to small groups or, from all that appears, to no one at all. There are no representations of them speaking in political groups, or advising political representatives. The reason for this seeming isolation of the philosophers from the political process is that by the time of much of the enduring work of the most influential Greek philosophers, political power in the Greek mainland had passed over to the Macedonians. This political powerlessness necessarily affected the focus of many of the philosophers from the politically tinted “How can men create a good state?” to such generally moral issues such as “individual virtue and salvation” and the attendant question “How can men be virtuous in a wicked world, or happy in a world of suffering.”

The end sought by Socrates was happiness. How can a philosophy grounded in the pursuit of “happiness” influence its adherents, much less any larger population, in the ways of efficient civil justice, the ostensible theme of this article? The answer is that to Socrates and other mainstream Hellenic thinkers, happiness could only be achieved through pursuit of the virtuous life, and both the vision and the reality of the virtuous life are suffused with themes of justice, waste avoidance, and deterrence of unjust enrichment. The entire structure of Socrates’ ethics is permeated by the principle of avoidance of doing harm; and (2) in parts of his lectures Socrates hypothesizes that perhaps the identifying marker of all acts of “justice” were simply “returning what was owed.” For the individual, justice pertained not to the “outward man” but, rather, to the “inward man.” The just man “sets in order his own inner life, and is his own master and his own law, and [is] at peace with himself.” For the just man, reason governs “spirit” and “desire.”

To Socrates, self-knowledge was the very essence of virtue. Without such self-knowledge, any man’s accumulation of wealth or power would leave one “baffled[,] . . . disappointed[,] . . . and unable to profit . . . ” from any success. Rejecting the Sophists’ lax attitudes toward generalizable moral or ethical standards, Socrates thought that to be effective self-knowledge must become so

47 Id. at 164.
48 Id. at 159–60.
49 Bertrand Russell, A History of Western Philosophy 230 (1945).
familiar to the adherent that it, and its attendant guidance in virtuous and ethical matters, would be worn like one’s very skin. To Socrates, wisdom, or self-knowledge, was to be found, at least in one’s early years, through the teaching of wise men. And according to Socrates’ account there was a broad-based societal subscription to this goal. As all men “have a mutual interest in the justice and virtue of one another,” Plato records, “this is the reason why every one is so ready to teach justice and the laws[.]”

To Socrates, temperance conveyed a meaning different than the modern implication of simple forbearance, be it avoidance of alcohol or any other ine-briant. Instead, temperance meant the avoidance of “folly” or acting “foolishly.” He nevertheless wonders whether virtue was the sum of the parts “justice,” “temperance,” and “holiness” when he spoke in these words to Protagoras: “[W]ether virtue is one whole, of which justice and temperance and holiness are parts; or whether all these are only names of one and the same thing: that is the doubt which still lingers in my mind.”

Further to the question of why a man should choose the path of justice over injustice, Socrates termed the tension as one of “comparative advantage.” He posed the issue as this: “Which is the more profitable, to be just and to act justly and practice virtue whether seen or unseen by gods and men, or to be unjust and act unjustly, if only unpunished and unreformed?” Socrates hypothesized the “tyrannical” man, one in whom “the reasoning . . . power is asleep[,]” and asked “[H]ow does he live, in happiness or in misery?” Here Socrates imagines a man of pure impulsivity, a man capable of any “folly or crime[.]” He follows the sad and desperate path of this man, and states that his “drunken, lustful, [and] passionate” habits will require “feasts and carousals and revelings” to satisfy him. Soon such revenues as he may have are spent. In order to continue to feed his uncontrolled desires, the tyrannical man seeks to “discover whom he can defraud of his money, in order that he may gratify [his desires].” If his parents do not voluntarily


51 Plato, Protagoras, in Plato, at 69, supra note 50

52 Id. at 72, 75 - 76.


54 Plato’s Republic, Book IX, id. at 625, 628.
submit to his demands, he will try “to cheat and deceive them[,]” and if this fails, he will “use force and plunder them.”

The intemperate and unjust man is doomed to a spiral of ever-worsening degradation, Socrates warns. This tyrannical man, Socrates and Adeimantus conclude, is “ill governed in his own person” knows no true friends, as when they have “gained their point” from another “they know them no more”; and never knows “true freedom,” as he is a simple instrument of his desires, and is “the most miserable” of men.

Socrates’ encomium of temperance in all pursuits is of course quite analogous to the recognition in later tort theory of the central role of self-restraint. Socrates characterizes as “invalids” those who “have no self-restraint, [and] will not leave of their habits of intemperance.” In essence, Socrates thought temperance could be achieved by “a man being his own master,” which is to say, “the ordering or controlling of certain pleasures or desires,” and the avoidance of “the meaner desires.”

Socrates compares evil to bodily illness. As a bodily illness can corrupt and destroy bodily health, so, too, can evil destroy a man’s soul: “Does the injustice or other evil which exists in the soul waste and consume her?,” and do they not “by attaching to the soul and inhering in her at last bring her to her death, and so separate her from the body?”

Socrates subscribes fully to the existence of a heaven and a hell, as is illustrated by the story he tells Glaucon of Er, the son of Armenius, whose body, after he has fallen in battle, is seemingly uncorrupted by death. On the twelfth day, and prior to his burial, heakens and tells a tale of men being summoned to justice in a mysterious place in which men’s deeds are “fastened on their backs.” The good and the just are led to a “meadow, where they encamped as at a festival[,]” whereas those found unjust or evil are thrown into a hell in which their

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55 PLATO’S REPUBLIC, Book X, id. at 680.
56 PLATO’S REPUBLIC, Book IX, id. at 637.
57 Id. at 631, 632
58 PLATO’S REPUBLIC, Book X, id. at 680.
59 Id.
punishments are tenfold the average of a man’s years, or ten times one thousand in the mythical account.60

Plato’s Socrates “argued for the identity of law and morality.”61 Reverence for the law followed from recognition of an implied agreement, to Dennis Lloyd, “an early form of social contract,” for adhering to the law irrespective of the consequences.62 Morality, by contrast, would never override the articulated law of the State. While morality might persuade the individual to conclude that the existing law was immoral or unjust, when the two were in conflict, the disputant’s “duty” is “confined to trying to persuade the state of its moral error.”63 In the Hellenic dialogues of Socrates, it is evident that justice entails calling into “account” the transgressor, or a pre-Aristotelian expression of corrective justice. As the Sophist Protagoras suggests in Plato’s Protagoras, the City stands in the shoes of the schoolmaster in giving to “young men” the laws to be followed. “[T]he laws,” states Protagoras, “which were the invention of good lawgivers living in the olden time; these were given to the young man in order to guide him in his conduct whether he is commanding or obeying[.]” “[H]e who transgresses them[,]” Protagoras continues, “is to be corrected, or in other words, called into account.”64

Socrates himself speaks even more forcefully of the corrective importance of the defect of misbehavior, and of the deterrent value of punishment. In Book XI of Plato’s Republic, Socrates tells Glaucon, no man “profits” from “undetected and unpunished” wrongdoing, as such a man “only gets worse[.]” To Socrates, it is better that the man be detected and punished in order that “the brutal part of his nature [be] silenced and humanized[,]” and that “the gentler element in him is liberated[.]” The man’s “whole soul is perfected and ennobled by the acquirement of justice and temperance and wisdom[,]”65 Socrates discouraged in the most direct terms individual miserliness, hoarding, and a spirit of contention and ungoverned ambition. To him, these unworthy characteristics in men were “due to the prevalence of the passionate or spirited element,” uncontained by temperance and reason.66

60 PLATO’S REPUBLIC, Book X, in PLATO, supra note 50 at 687, 688.

61 DENNIS LLOYD, supra note 9 (emphasis added).

62 Id.

63 Id.

64 PLATO’S REPUBLIC, Book IV, in PLATO, supra note 50 at 432.

65 PLATO’S REPUBLIC, Book IX, id. at 655.

66 PLATO’S REPUBLIC, Book VIII, id. at 592.
To Socrates, the ideal “State” was largely an extrapolation of the ideal man. The State should, Socrates states, have “political virtues” of “wisdom, temperance, [and] courage” that could stand on a parity with Socrates’ ideal for the individual.\textsuperscript{67} For Socrates, however, identification and description of the fourth virtue, “justice,” was more rarified and elusive, and Socrates comments tellingly: “The last of those qualities which make a state virtuous must be justice, if only we knew what that was.”\textsuperscript{68} A life of virtue and ethics could only be sustained in “a law abiding and orderly society.”\textsuperscript{69} Whatever such state-sanctioned justice might be, Socrates commended abidance with existing law, a commitment that ultimately led to his rejection of opportunities to flee his death sentence.

Hellenist thinking cannot be reduced to the aphorism “virtue is its own reward.” Rather, there were specific rewards associated with a life of virtue, as well as real or imagined disincentives to the adoption of a baser life and the collateral degrading pursuits associated therewith. Time and time again the philosophers stated that a life of excess, be it eating, drinking, or both, incapacitated the actor from realization of the contributions available to and expected of citizens of virtue.\textsuperscript{70}

To both Plato and Socrates, the just man would be content, if not happy, and the unjust man miserable.\textsuperscript{71} In addition, and more specifically, such excesses invited physical illness and impairment, a certain departure from God’s, or a god’s, charge to mankind.

For those who might be tempted to depart from a good life, Hellenic writing portrayed strong deterrents, a Sword of Damocles writ large. At an individual level, the writings repeatedly allude to the dissipating results of a life of excess, to wit, personal physical deterioration, coupled with personal and communal moral degradation. At such time as man should shed his mortal coil, Socrates and other believers in reincarnation wrote of another reason why a man should choose the path of good. Incapable of disproof and widely believed, Socrates and others propounded the belief that they had lived before

\textsuperscript{67} PLATO’S REPUBLIC, Book IV, in PLATO, supra note 50 at 422, 425, 430–31, 434.

\textsuperscript{68} Id. at 434.

\textsuperscript{69} Id. at 59.

\textsuperscript{70} To Protagoras Socrates spoke of the physical dangers of excess, stating that “pleasure for the moment . . . lay[s] up for your future life diseases and poverty, and many other similar evils[,]” Pla to’s Lysis, in SOCRATIC DISCOURSE BY PLATO AND XENOPHON 288 (J. Wright transl.) (A.D. Lindsay, ed.) (1925).

\textsuperscript{71} ANTHONY GOTTLIEB, supra note 7 at 174.
in other forms, and that after their demise they would be reincarnated in some animal form.\textsuperscript{72} If a person had led a virtuous life, he would be reincarnated in the form of an animal respected by man, such as a horse. If in his life a man had strayed from the life of virtue, his just desserts might well be reincarnation as an insect, perhaps even a dung beetle.

In Plato’s version of Socrates’ words, even if the definition of “justice” might be elusive, that “justice” is efficient is quite clear. Even more specifically, the lasting philosophy of this age stated that individual good and justice were, in fact, more than efficient—they were \textit{profitable}. Socrates states just this: “On what ground, then, can we say that it is profitable for a man to be unjust or self-indulgent or to do any disgraceful act which will make him a worse man, though he can gain money and power?” Happiness and profit inure to the man who, alternatively, “tame[s] the brute” within, and is “not be carried away by the vulgar notion of happiness being keeping up an unbounded store[,]” but instead follows the rule of wisdom and law encouraging “support to every member of the community, and also of the government of children[.]”\textsuperscript{73}

A principal means to the end of justice, to Plato, was education to such a level of legal sophistication that the individual would learn understanding of and respect for the legal process, including such legal process as might pertain to the redress of injury. This is revealed in Socrates’ dialogue with Adeimantus in Book IV of The Republic. Here Socrates states plainly that it is through education that the individual learns “about the business of the agora, and the ordinary dealings between man and man, or again about dealings with artisans; about insult and injury, or the commencement of actions, and the appointment of juries[,]”\textsuperscript{74}

Returning what was owed, in effect giving up the actual or conceptual unjust enrichment associated with a wrongful taking, is of course a core model for the appropriate remediation of unconsented-to harm, a concept that is the darling of corrective justice and efficiency advocates alike. It is also part and parcel to the analysis of Aristotle, in Nichomachean Ethics Book V, Ch. 2, in which “The Thinker” is credited with laying the corner-stone of the corrective justice principles of today’s common law,\textsuperscript{75} although as suggested the logic has

\textsuperscript{72} \textit{See discussion of the choices for their future reincarnation by a panoply of demigods by Socrates in his recitation of the story of Er. Book X, PLATO’S REPUBLIC, in PLATO, supra note 50 at 694–95.}

\textsuperscript{73} \textit{THE REPUBLIC OF PLATO} 318–320 (Francis McDonald Cornford, transl.) (1969).

\textsuperscript{74} \textit{PLATO’S REPUBLIC, Book IV, in PLATO, supra note 50 at 421–422.}

\textsuperscript{75} “[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 154 (J.
equivalent bearing on economic considerations. Aristotle’s understanding was
that corrective justice would enable restoration to the victim of the *status quo ante
major*, insofar as a monetary award or an injunction can do so. Under the
Aristotelian principle of *diorthotikos*, or “making straight,” “at the remedy phase
the court will attempt to equalize things by means of the penalty, taking away
from the gain of the wrong-doer.” Whether the wrongdoer’s gain is monetary,
measured in property, or the community’s valuation of a personal physical
injury consequent to the defendant’s wrongful act, by imposing a remedy
approximating the actor’s wrongful appropriation and “loss” to the sufferer, “the
dudge restores equality. . .”

Aristotle classified among the diverse “involuntary” transactions
that would invite rectification of “clandestine” wrongs “theft, adultery,
poisoning, . . . false witness[,]” and “violent” wrongs, including “assault,
imprisonment, . . . robbery with violence, . . . abuse, [and] insult.” He proceeds to
distinguish between excusable harm and harm for which rectification may
appropriately be sought. For an involuntary harm, such as when “A takes B’s hand
and therewith strikes C[,]” or for acts pursuant to “ignorance,” a more nuanced
legal response is indicated. Even for such involuntary acts as “violate proportion
or equality,” Aristotle suggests opaquely, some should be excused, whereas others
should not be excused. As to voluntary and harmful acts attributable to ignorance,
Aristotle distinguishes between acts in which the ignorance is excusable and acts in
which the ignorance is not. The former, which we might today characterize as
innocent, would not prompt remediation, whereas the latter would. Thus,
Aristotle describes an act from which injury results “contrary to reasonable
expectation” as a “misadventure,” and forgivable at law. To Aristotle, an
unintentional act that causes harm, but in which such harm “is not contrary to
reasonable expectation[,]” constitutes not a misadventure but a “mistake.”

Welldon trans., 1987), discussed in David G. Owen, The Moral Foundations of Punitive Damages, 40 ALA.

76 “Therefore the just is intermediate between a sort of gain and a sort of loss, *viz*., those which are
involuntary; it consists in having an equal amount before and after the transaction.” Id. at Ch. 4, p. 407.


78 Aristotle, Nicomachean Ethics Bk. 5, Ch. 2 in INTRODUCTION TO ARISTOTLE 402 (Richard

79 Id. at Ch. 8, at 414.

80 Id. at 415.

81 An act that “does not implicate vice[,]” Id.
Aristotle, “mistake” is a fault-based designation. The example used is redolent of the sensibility of what would be termed “negligence” in today’s nomenclature, e.g., a man throwing an object “not with intent to wound but only to prick[].” This man, although not acting with an intent to wound another in any significant way, would nonetheless be subject to an obligation in indemnity, for to Aristotle, when “a man makes a mistake[,] . . . the fault originates in him[].”

Aristotle’s famous “Golden Mean” hypothesizes that virtue analyzed linearly is the mean between two extremes. Either extreme is a vice. So, for example, if appropriate self-sustenance is a virtue, then it follows that, at one extreme, self-denial to the point of ill health is a vice. At the other extreme, gluttony is a vice. Importantly, Aristotle does not propose distributive justice, in the sense that a man may remedy his antecedent unequal position vis-a-vis another. Rather, only the prospect of corrective justice is a fool that is so confined as to provide that the only remedies available to the judge are those that work to rectify the marginal inequality that the wrongdoing has imposed.

B. Roman Law

It is recognized generally that the Romans added little to the metaphysics of law. Nevertheless, Roman law represents the watershed between the law of ancient society and that of modern society. As suggested by Sir Henry Sumner Maine, the rights and the duties under law of ancient society derived from status, or “a man’s position in the family,” whereas under Roman law and thereafter, “rights and duties derived from bilateral arrangements.”

Regarding delicts, or harms that were neither crimes nor grounded in contract, it became the special province of Roman lawyers and lawmakers to record and categorize a sprawling array of specific wrongs and consequent remedies. This approach of Roman law would become the origin of code-based law that governs European lawmaking to this day.

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82 Id.

83 To Aristotle: “Justice (contrary to our own view) implies that members of the community possess unequal standing. That which ensures justice, whether it is with regard to the distribution of the prizes of life or the adjudication of conflicts, or the regulation of mutual services is good since it is required . . . for the continuance of the group. Normativity, then, is inseparable from actuality.” Essais of Karl Polanyi, supra note 12, at 83.

84 Nicomachean Ethics, supra note 79, Ch. 3 at 403: “[A]wards should be made “according to merit”; for all men agree that what is just in distribution must be according to merit in some sense, though they do not all specify the same sort of merit[].”

85 Essais of Polanyi, supra note 12 at 82–83.
Cicero, the Roman orator, wrote of the truth of an ethic that sounded simultaneously in terms of corrective justice and efficiency-deterrence. In *On Moral Duties* he wrote that even after “retribution and punishment” have been dealt to the transgressor, the person who has been dealt the wrong owes a duty to bring a close to any such misadventure by permitting a gesture such as repentance or apology. From the extension to the wrongdoer of the opportunity to apologize or to repent could be reaped the immediate good of reducing the likelihood that he would “repea[t] the offense,” as well as the broader and eventual good of “deter[ing] others from injustice.”

Cicero further propounded a cluster of maxims that if followed could conduce to Pareto Superior changes, in the sense that the actor would be no worse off and the affected party or parties would be better off. As to persons beyond a benefactor’s core family or kinship group, to Cicero there existed a duty to the entire world as to such things “we receive with profit and give without loss.” Thus, in order that we may receive such blessings as are identified in the maxims such as “Keep no one from a running stream[;]” or “Let anyone who pleases take a light from your fire[;]” or “Give honest advice to a man in doubt[;]” Cicero writes, it follows that we must be willing to give likewise of the same in order to “contribute to the common weal.”

Two of the *delicts* of greatest importance were damage to property, real and personal, and personal physical harm to others, giving rise to the *action injuriarum*. The victim could bring an action for “profitable amends,” or money damages, or “honorable amends,” which is to say, a formal and public apology. The latter remedy would most likely arise in a setting of a dignitary tort, such as defamation. Roman jurists and the Roman legal community were committed to the identification of the delineation between what is “just and what unjust,” and therefore the Institutes of Justinian and other sources of Roman law reflected an endeavor to “give each man his due right,” and comprise “precepts” to all Romans “to live justly, not to injure another and to render to each his own.”

The Institutes included rules that reveal numerous strictures against the imposition of one’s will over the rights of a neighbor, and strong deterrents for the disregard thereof. Specifically as to urban estates, in Book III, Title II Para. 2 there

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86 *On Moral Duties* 16, in *BASIC WORKS OF CICERO* 16 (Moses Hadas, ed.) (1951).

87 *Id.* at 23.

was a prohibition on the obstruction of a neighbor’s view, a rule bearing a resemblance to one recognized today that limits a neighbor’s liberty to interfere with “ancient lights.” In another notable example, pertaining to what would today be called the law of private nuisance or trespass, a provision of Roman law goes so far as to detail a preference that adjoining landowners bargain in advance for agreement as to contemporaneous uses of land that might trigger dispute. In Book III Para. 4, the Institutes provide that one “wishing to create” such a right of usage “should do so by pacts and stipulations.” A testator of land may impose such agreements reached on his heirs, including limitations on building height, obstruction of light, or introduction of a beam into a common wall, or the construction of a catch for a cistern, an easement of passage, or a right of way to water.

These last two examples reflect a clear preference for ex ante bargaining over economically wasteful ex post dispute resolution. The provision permitting the testator to bind his heirs to any such agreement is additionally efficient in a manner akin to the approach that was taken later and famously by Justice Bergen in the cement plant nuisance case of Boomer v. Atlantic Cement Co., Inc., in which the court’s award of damages ensured that its disposition of the matter would be indeed a one-time resolution of the dispute by requiring that the disposition of the claim be entered and recorded as a permanent servitude on the land.

VI. MODERN ASSIGNMENT OF ECONOMIC NORMS

A. Customary Law

The organized law of the modern state is a fairly recent phenomenon when compared to the existence of effective and nuanced customary law around which pre-modern societies organized. For both ancient and modern societies, and irrespective of whether that society developed a written law, written or unwritten law is affected by “underlying social norms which determine much of its functioning.” This customary law has been described as “living law.”

89 The Digest (or Pandects) Book III Title II para. 2., para. 3 supra note 89, at id.

90 THE INSTITUTES OF JUSTINIAN Book III para. 4, supra note 89 at 84, 85.

91 257 N.E.2d 870 (N.Y. 1970).

92 DENNIS Lloyd, supra note 9 at 227 (citation omitted).
In the historical development of tort law, customary law has regularly followed social norms in giving form, context and content to socio-legal principles. That such law must for the most part conform to societal custom was urged by writers as early as Thomas Aquinas. At such later time as a culture or a nation-state has begun to render its law in the form of written adjudicatory rulings, or legal codes, customary law characteristically diminishes in its significance as an engine for resolution of disputes. For example, in England during the period of the conquest of Scotland, approximately 1290-1305, there arose a “lawyer class” that was a moving force in “hardening customary [law] into legal rights[.]” With notable French influence, the theories of Roman law became ascendant, and the recitation of and reliance upon customary norms receded proportionately. And yet it will be seen that in many cultures customary law continued to, it does today, inform legal development. In some settings, customary law sets parameters for later legal development, or even precludes later law that would contradict earlier custom.

The influence of Roman law on the development of European, Latin American, and Anglo-American law is commonly acknowledged. A concise tour of the lasting effects of customary law, Roman law, and its hybrid, Roman-Dutch law, on a particular national community—Ceylon—well illustrates the systemic commitment to wealth maximization, avoidance of waste, and deterrence of behaviors inconsistent therewith.

For Ceylonese customary law to be considered valid for the purposes of modern adjudication, it must be (1) reasonable; (2) consistent with common law; (3) universal in application; and (4) grounded in antiquity. Although the first and second standards might at first glance seem to subordinate customary law into insignificance, an additional look makes this approach appear more sensible. This is so because (1) as with common-law adjudication, as no court is required to apply common law that is unreasonable, it would be illogical to require application of customary law that was not reasonable; and (2) as both common law and customary law claim lineage in a society’s reasoned conclusions as to legal standards best suited to societal well-being, customary law that was at war with common law on the same or similar subject would be presumptively defective in either its rationality or in its claimed representational authenticity.

93 Id. (discussion of the sources and growth of custom).

94 J. R. Green, A SHORT HISTORY OF THE ENGLISH PEOPLE 204 (1878).

In some legal systems, legal scholars remain oracles of greater or lesser significance. This was true of the Roman-Dutch tradition, in which schools of legal scholarship, or the scholars themselves were influential. There existed two schools of writers: (1) Grotius, van Leeuwen and Voet, who emphasized the Roman law antecedents of the developing hybrid law; and (2) an “historical school” that emphasized custom as the appropriate principal source of the law.  

Although the Napoleonic Code superseded the Roman-Dutch law in Holland itself in the early nineteenth century, the great Dutch East and West Indian Trading Companies carried Roman-Dutch law into their settlements. So strong was the influence of custom in the Roman-Dutch tradition that, in principle at least, a statute could be rendered nugatory or obsolete by sufficient proof of a conflicting custom.

Under the so-called Lex Aquilia of Roman-Dutch law, the Aquilian action required the claimant’s showing of a wrongful act, patrimonial loss, and the defendant’s fault, because of either the intentional nature of the act or negligence. Borrowing from British law applicable to nonintentional injuries, the law courts of Ceylon adopted the British concept that the plaintiff’s claim in negligence must include proof that the defendant owed to plaintiff a duty.

In Aquilian actions, no compensation would be awarded in the absence of physical injury, with physical injury classically defined as excluding emotional distress or dignitary harm. Regarding redressable injuries caused by the positive act of the defendant, should a person be in possession of a thing, including a chattel or an instrumentality, that had the potential for causing harm if not stowed with care, the actor, owner, or manager would have a positive duty to exercise such care. Should another be injured because of the failure to take such care, liability could be imposed. Even a mere omission to act might be a stimulus to liability if the actor’s omission was “connected with some prior positive act.” Accord- ingly, a remedy might be available under the Lex Aquilia if the defendant had earlier “created a potentially dangerous state of things,” and the failure to correct that caused the claimant’s harm.

Various dimensions in the Roman-Dutch tradition recognized the society’s commitment to the integrity of persons and property from forced takings. Assault was an injuria, and therefore redressable, on a showing of contumelia. For

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96 H. W. TAMBIAH, at id; J. R. Green, supra note 94 at 148. The opinions most often referenced could be found in Johannes Voet, Commentarius Ad Pandectas (1698, 1704); Hugo Grotius, Inleiding Tot de Hallanesche Rechtsgeleertheid (2d ed.) (R. W. Lee ed.) (1953); and Simon Van Leeuwen’s Commentaries on Roman-Dutch Law (J. G. Kotze trans.) (1886).

97 Id.

98 Id. at 399.
grazing animals that damaged another’s property, if the animal’s transgression involved the “animal acting contrary to nature of its class,” the owner might be required to pay damages, or even be confronted with the potentially stronger deterrent of giving up the animal. Surely, too, a strong message of deterrence is found in the rule that a person finding another’s animals on that person’s property could impound them.  

For “intentional” wrongs, the intentional torts of today, the requisite intent, or dolus, was provided by the defendant’s desire to accomplish the act, irrespective of whether he was aware that the act constituted an invasion of the plaintiff’s rights. “Culpa” was interpreted as a “violation of a duty that [is] imposed by law[,]” an approach revealing the influence of the British common law requirement that the tort plaintiff prove duty. The respondent could avoid liability by showing that the injury could not have been avoided even by the exercise of reasonable care. Furthermore, in order to avoid unjust enrichment, persons could not recover for claims arising from acts or activities to which they consented voluntarily.

For intentional torts such as false imprisonment, the third requirement of the Lex Aquila, that of foreseeability, would be satisfied by a showing that the defendant intended the act. Then, as it is today, a reflection of the rigorous economic guardianship of customary law, Roman law, and Dutch law attached primacy to protection of property and economic rights, and imposed an almost automatic requirement of disgorgement of any unjust enrichment associated with the wrongful interference therewith. Trespass, or the willful and forcible entry into another’s property, constituted injuria. As has been true for any successful socio-economic unit, the Roman-Dutch tradition recognized the rights of a person to protect his property from any form of unjust interference.  

At the same time, it was recognized that a landlord owed a duty to his tenants to take reasonable steps to protect them from injury caused by unsafe  

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99 Id. at 392–95, 399, 418, 420. For damage caused by trespassing dogs, the claimant would be required to show scienter. Within this approach there could be seen a strong overlay of moral blameworthiness: “It is doubtful whether Roman and Roman-Dutch writers regarded negligence objectively or subjectively, but partly under the influence of canon law, and its offspring natural law, the modern systems based on Roman law took culpa to imply moral blameworthiness.” Id. at 39

100 Within this approach there could be seen a strong overlay of moral blameworthiness: “It is doubtful whether Roman and Roman-Dutch writers regarded negligence objectively or subjectively, but partly under the influence of canon law, and its offspring natural law, the modern systems based on Roman law took culpa to imply moral blameworthiness.” Id. at 397

101 Id. at 142, 397, 399, 418.
conditions on the land.\textsuperscript{102} In what could be loosely styled as a public nuisance proscription, the Roman-Dutch customary law removed earlier Praetorian edicts prohibiting certain animals from sharing public places, and put in place of such strict prohibitions rules requiring the payment of damages.\textsuperscript{103} Private nuisance, in turn, was seemingly remediable in an action for damages or for equitable relief.\textsuperscript{104}

Roman-Dutch customary law includes at least one example of the law and its official apparatus not being required to stand idly by to await the social costs of an accident that will occur or that will continue to occur in circumstances in which the parties had not reached a prior agreement as to risks and rewards. Should a neighbor come to fear that a dangerous condition existed in his neighbor’s house that, left unabated, might cause damage to the property of the complainant, the complainant could bring an action in what might today be called anticipatory nuisance demanding the neighbor’s payment of security against such prospective and potential harm.\textsuperscript{105}

B. Modern United States Assignment of Efficiency-Based Norms

The analysis of tort law has long emphasized its original and lasting tenets in the logic of corrective justice and morality. Another model, more recent but already essential to legal analysis, is that of economic efficiency. Economists, political scientists and legal scholars resort with increasing frequency and interest to the examination of economic truths within the function of injury law. This examination has included evaluation of evolving decisional law against the measure of whether such decisions adhere, explicitly or silently, to goals of economic efficiency.

Chronologically, the Anglo-American development of the doctrine of liability for negligent acts causing harm to others or to their property followed a lengthy legal devotion to liability without fault, or strict liability.\textsuperscript{106} Some scholars associated the perfection of fault-based liability, or negligence, with the

\textsuperscript{102} Id. at 399.

\textsuperscript{103} Id. at 422.

\textsuperscript{104} Id. at 396.

\textsuperscript{105} Id. at 422.

Industrial Revolution in England. However, observers seem not to have established satisfactorily whether the availability of negligence liability was a gesture of socio-legal benevolence to persons and chattels or quite the contrary: a legal prophylaxis that reduced the potential liability of businesses by requiring the putative plaintiff to prove not only injury and causation but also that the actor had proceeded with an absence of due care under the circumstances.

It is established that (1) tort law is devoted to the protection of persons and property from unreasonable risk of harm; and (2) the actor’s liability in tort is limited by concepts of reasonable foreseeability. Putting aside the cabined domain of truly strict liability, modern accident law is concerned primarily with the provision of reparations to persons suffering personal injury or property loss because of fault, with fault conventionally defined as a failure of others to act with due care under the circumstances.

Numerous analysts have identified a common-law tropism towards efficiency. Importantly, scholars have also concluded that efficient rules of law actually predict efficient litigation strategies, including settlement strategies. Wes Parsons, even while disputing these premises, collected scholarship revealing in fact the broad range of cost internalization achievements of evolving common-law doctrine. Included in Parson’s review was scholarly

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107 The development of negligence law “was probably stimulated a good deal by the enormous increase of industrial machinery and by the invention of railways in particular.” Percy H. Wingeld, The Province of the Law of Torts 404 (5th ed. 1950).


109 Compare Winfield, id. (“At that time railway trains were notable for neither speed nor for safety. They killed any object from a Minister of State to a wandering cow, and this naturally reacted upon the law.”) with Robert J. Kazorowski, The Common-Law Basis of Nineteenth-Century Tort Law, 51 OHIO S. L. J. 1 (1990) (referencing scholarly proponents of theory that negligence liability arose in a court-stimulated effort to moderate the liability of businesses and to permit devotion of industrial capital to production rather than to satisfaction of legal liability).


110 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.” Paetzold & Willborn, id.

attrition to the common law of accidents as “promot[ing] efficient resource allocation”;\textsuperscript{112} the efficiencies of the common law of rescue, salvage and Good Samaritan assistance;\textsuperscript{113} and the efficiency of the economic loss rule in tort.\textsuperscript{114}

A leading exponent of the efficiency role of the common law of tort has been Dean, and now Senior Judge, Guido Calabresi. Calabresi has 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 has written that considerations of economic efficiency dictate placing the cost of accidents “on the party or activity which can most cheaply avoid them [.]”\textsuperscript{115}

Ordinary economic rationales also have described the role of compensatory damages as an effective means of discouraging a potential tortfeasor from bypassing the market, and by their substandard or risk-creating conduct injuring an unconsenting third party. Such conduct is wasteful, it is both posited and can be proved, in terms of identifiable accident costs. Better, theoretically at least, to pressure the actor into bargaining with any willing and knowing other for the right to expose him or her to risk.\textsuperscript{116}

A lucid adoption of Calabresi and Melamed’s approach is found in the Ninth Circuit decision of Union Oil Co. v. Oppen,\textsuperscript{117} a California coastal oil spill case in which the court allowed commercial fishermen to recover from the defendant their business losses caused by lost fishing opportunity during a period of pollution. Noting some difficulties in applying the “best or cheapest cost avoider” approach in concrete circumstances, the court followed Calabresi and Melamed’s predicate that it “exclude as potential cost avoiders those group activities which could avoid accident costs only at extremely high expense.”\textsuperscript{118} This approach, to the mind of the appeals court, militated against the conclusion


\textsuperscript{116} Today, one cannot help but think of the newest “trash” TV shows and derivatives therof.

\textsuperscript{117} 501 F.2d 558 (9\textsuperscript{th} Cir. 1974).

\textsuperscript{118} Id. at 569.
that the cost of preventing or repositioning the loss should 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. The court explained its reasoning:

[T]he loss should be borne by the party who can best correct any error in allocation, if such there be, by acquiring the activity to which the 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 defendant’s capacity is superior.119

Referencing a 1991 American Law Institute Reporters’ Study, Steven D. Sugarman noted tartly “one of the last places to find lucid thinking about the desirable direction of tort law is in the published opinions of state and federal judges.”120 Although his complaint surely represents hyperbole for effect, Sugarman is correct in observing that discussion of tort principles in the decisional law is frequently colloquial, with courts often doing no more than lumping together as coextensive such objectives as expeditious claims resolution, reduced transaction costs, and efficiency. In congressional endeavors to normalize diverse segments of tort law, too, the discussion and fact-finding, in turn, frequently have been more polemic than informative.

Explicit judicial adoption of the tenets of either corrective justice or law and economics has been sporadic, and even when mentioned in decisions, either the expression or the application of the two theories is often inexact. Nevertheless, some courts have consciously elevated their jurisdiction’s awareness of economic concepts in fashioning tort law. Illustrative is the Third Circuit’s decision in Whitehead v. St. Joe Lead Co.,121 a lead poisoning case in which the defendants included the suppliers of lead to plaintiff’s industrial employer. Reversing summary judgment for defendants, the court observed:

[I]t may well be that suppliers, acting individually or through their trade associations, are the most efficient cost avoiders. Certainly it could be found to be inefficient for many thousands of lead processors to

119 Id. at 569–570.

121 729 F.2d 238 (3d Cir. 1984).
individually duplicate the industrial hygiene research, design, and printing costs of a smaller number of lead suppliers.

Of like effect is the decision of the Wyoming Supreme Court in *Schneider National, Inc. v. Holland Hitch Co.* 122 There the court explicitly relied upon Richard Posner’s “alternative care joint tortfeasor” evaluation to reach the conclusion that indemnity should not be available “where both actors have a ‘joint care’ obligation to avoid the injury.” The court noted, however, that when the actors’ culpability varied, that is, they were not *in pari delicto*, the higher relative fault of one defendant, the “lower cost avoider,” would vest indemnity rights in the other tortfeasor. 123

In the insurance declaratory judgment context, the dissenting opinion in *Insurance Co. of North America v. Forty-Eight Insulations, Inc.* 124 proposed a “discoverability” rule for triggering insurance carrier coverage of asbestos claims, asserting that this approach would, relying on a least cost avoider rationale, provide incentives within the insured-insurer relationship that could hold the promise of reducing accident costs. Specifically, the dissent reasoned:

The more “early” insurers that are liable upon a victim’s exposure, the more likely it is that the potential harm will be discovered and the public warned. If an insurer sees that the product poses some risks, he may raise premiums accordingly. This may ultimately cause the manufacturer to remove the product from the market or to give better warnings in order to lower insurance premiums. This in turn reduces accident costs.

Whichever gloss is placed on economic analysis – its deterrent effect, or its ability to reduce accident costs – its concepts can be understood “even at the rudimentary level of jurists,” at least according to Judge Patrick


123 *Id.* at 575. *See also Ogle v. Caterpillar Tractor Co.*, 716 P.2d 334, 342 (Wyo. 1986). There the court stated:

> When a defective article enters the stream of commerce and an innocent person is hurt, it is better that the loss fall on the manufacturer, distributor or seller than on the innocent victim. . . . They are simply in the best position to either insure against the loss or spread the loss among all consumers of the product.

124 Ogle was later described by the Wyoming Supreme Court as an indication of how strict liability “introduced economic analysis to tort law.” *Schneider Nat’l*, supra note 123 at 580. The *Schneider Nat’l* court proceeded to analogize Ogle’s “risk allocation” theory to a “cheapest cost avoider” approach. *Id. See also Wilson v. Good Humor Corp.*, 757 F.2d 1293, 1306 n.13 (D.C. Cir. 1985) (identifying but not pursuing cheapest cost avoider analysis in action brought by parents of child fatally injured while crossing street to meet ice cream vending truck).

124 633 F.2d 1212 (6th Cir. 1980).
Higgenbotham. In *Louisiana ex rel. Guste v. M. V. Testbank*, the renowned vessel collision case involving claims for economic loss not accompanied by physical damage to a proprietary interest, the Fifth Circuit Court of Appeals justified its refusal to permit such recovery and continued its adherence to the economic loss doctrine of *Robins Dry Dock & Repair Co. v. Flint*. The court relied on reasoning that permitting liability for the “unknowable” amounts that might be posed as economic loss claims arising from any substantial mishap would erode the efficient deterrent effect of such a tort rule, as a rational, wealth-maximizing actor would be unable to gauge the optimal pre-cautionary measures for avoidance of a predictable accident cost. In Judge Higgenbotham’s words:

That the [economic loss] rule is identifiable and will predict outcomes in advance of the ultimate decision about recovery enables it to play additional roles. Here we agree with plaintiffs that economic analysis, even at the rudimentary level of jurists, is helpful both in the identification of such roles and the essaying of how the roles play. Thus it is suggested that placing all the consequence of its error on the maritime industry will enhance its incentive for safety. While correct, as far as such analysis goes, such *in terrorem* benefits have an optimal level. Presumably, when the cost of an unsafe condition exceeds its utility there is an incentive to change. As the costs of an accident become increasing multiples of its utility, however, there is a point at which greater accident costs lose meaning, and the incentive curve flattens. When the accident costs are added in large but unknowable amounts the value of the exercise is diminished.

Even without explicit recognition of economic, utilitarian, or corrective justice concerns, other influential decisions have adopted and promoted such precepts, sometimes distending these established tort principles into ungainly hybrids. In the setting of environmental harm, notions of corrective justice and utilitarianism (or efficiency and equity) have coexisted uneasily for decades. Originally, 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 property. Numerous early decisions evidenced a judicial unwillingness to “balance” injuries, that is, to weigh the defendant’s cost

125 752 F.2d 109 (5th Cir. 1985).

126 275 U.S. 303 (1927).

127 *Testbank*, 752 F.2d at 1029.

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 v. Union Bag & Paper Co.,*129 to fail to grant the small landowner an injunction solely because the loss to him, in absolute terms, was less than would be the investment-backed loss to the nuisance-creating business and lost employment within the community, would “deprive the poor litigant of his little property by giving it to those already rich.”

In contrast, the modern rule governing injunctions, including environmental injunctions, might seem coldly utilitarian. The Restatement (Second) of Torts § 936 lists factors for injunction issuance, which expressly include weighing of “the nature of the interest to be protected,” thus presumably inviting an elevation of plaintiff’s bona fides in cases in which the court considers the activity meritorious (perhaps a recreational area for Alzheimer’s patients) and a devaluation in which the court deems it less valuable (perhaps an automobile scrapyard). Along similar lines, hardship to the defendant of ceasing or changing its activity, and “the interests of third persons and of the public” are proper considerations.130 The reference to third persons and the public represent a clear invitation to introduce concepts of social costs into environmental damage litigation.

Representative of such an approach is the result reached in *Boomer v. Atlantic Cement Co.,*131 a decision known to legions of law students. *Boomer* involved a large-scale 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. Recognizing that to deny the injunction would depart from *Whalen*’s corrective justice – no balancing approach discussed earlier, the court nevertheless adopted a utilitarian approach that weighed the hardships imposed on plaintiffs against the economic consequences of the requested injunction. In what might be described as a split decision, the court denied the injunction and awarded permanent, one-time damages that would be recorded as a continuing servitude on the land. The court explained: “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.”

129 101 N.E.2d 870 (N.Y. 1913).

130 *Restatement (Second) of Torts* § 936(1)(e)–(g).

Boomer permits examination of modern nuisance law in terms of a cost-benefit or utilitarian rationale, and the decision stands as a vindication of what the New York court concluded were the overall best economic interests of the community. However, other important elements to an economic analysis of nuisance law are at play, to wit, the elements of social cost. In the introductory paragraph to The Problem of Social Cost, Ronald H. Coase illustrates the operation of social cost analysis by employing the example of a factory emitting demonstrably harmful pollutants—in this sense an important distinction with Boomer. Coase suggests that application of pure economic principles might prompt economists to conclude that it might be desirable to have the factory pay damages, proportionate or otherwise, or even to shut down. Such results, he proposes, may be “inappropriate, in that they lead to results which are not necessarily, or even usually, desirable.”

In a pollution scenario, the most efficient course of conduct will be where the polluter and the complainant reach an *ex ante* agreement regarding the level of harm the complainant is willing to sustain in return for the payment of money. This result, reached through cooperation and which avoids litigation, offers the lowest possible transaction costs, and the optimal, or most efficient resolution. It is received wisdom that any tort rule associated with a redressable phenomenon, in this case nuisance, to be efficient, should encourage a resolution that keeps the matter out of litigation. Thus, the question arises: What is the tort rule in nuisance that elevates to the highest likelihood the parties’ disposition of the dilemma by negotiation, rather than by litigation?

A. Mitchell Polinsky advances Coase’s analysis in its nuisance law context. He first employs the methodology of Calabresi and Melamed in which the authors identify two steps in conceptualizing a nuisance claim: first, an *entitlement* must be established; and, second, a conclusion must be reached as to how to vindicate that entitlement. One approach, Polinsky writes, is that of the injunction. Injunctive relief was rejected in its pure form in Boomer, as the court permitted the low-level polluter to continue to cause damage, and to “buy off” the

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133 *Id.*

134 POLINSKY, *supra* note 129 at 11, 15.

property owners holding the entitlement. Using the example of one polluter and one resident, Polinsky describes the pollution in units, the factory’s profits, and the resident’s damages. For one unit of pollution, the factory’s profits are $10,000, and the resident’s damages $1,000. If the factory pays $1,000 in damages, its net profit is $9,000. If the factory doubles its production, and it pollution, to two units, Polinsky assigns a net additional profit to the factory of $4,000. Yet, at the same time the resident’s damages actually may not rise arithmetically, but rather in multiples, to, say, $15,000. Two conclusions are evident. First, under a “payment of damages—avoid an injunction” approach the factory is best served by maintaining and not increasing either its level of pollution or its level of production. Second, the Boomer requirement that the factory pay one-time damages in order to secure the right to continue its operation at current levels is the efficient solution.

Key to the efficient operation of a nuisance remedy is the assignment of nuisance damages that equal the complainant’s actual loss. An impediment to this goal may arise when one or both parties engage in “strategic” behavior in which either the polluter or the complainant adopts a litigation or settlement strategy that is inconsistent with the optimal payment of actual loss, that is, the polluter seeks to pay less than the proved damages, or the complainant seeks to recover more than his actual damages.

Moreover, a tort rule that did not limit the complainant to one-time damages, and preclude future recovery by subsequent owners, would be inefficient. Subjecting the polluter to serial recoveries into the indefinite future would constitute over-deterrence on the model of Boomer. Indeterminate liability would potentially fail to cap Atlantic Cement’s potential financial responsibility at a level that would permit it to continue to conduct business, and would thereby be inconsistent with the rule expressed in Restatement (Second) of Torts § 826(b), which permits the finding of nuisance even when the utility of the actor’s conduct outweighs the damage suffered by the complainant, so long as the damages are not set at a level that would prevent the defendant from continuation of its business. Additionally, an absence of the “one-time damages” provision of Boomer would unjustly enrich the property owners, as they would recover first from Atlantic Cement, and then recover again by the sale of overvalued property, which is to say, property priced at a level that failed to take into account the chronic low-level future pollution.

VI CONCLUSION

An optimal tort rule – and coincidentally one that is both just and moral – is efficient. It advises those behaving under its regimen of what is expected, of what is discouraged, and of the consequences of departure from the desirable. It
does not compensate excessively but, rather, in proportion to the harm. Neither does it undercompensate, as only through justifiable compensation is the rule’s deterrent value most effective. It stands in the stead of ex ante agreements as to condoned or expected behavior in situations where contract would be impossible. As Jules Coleman put it: “The rules of tort liability allocate risk, but they do not do so on the model of private contract. Tort law is not simply a necessary response to the impossibility of contract, but a genuine alternative to contract as a device for allocating risk.” At the same time, and by the same means as tort law discourages extra-contractual elevation of risk, tort rules encourage safer behavior.

Tort law has always been apiece with human optimism, and confidence in the capacity of man to improve himself and by so doing, improve society. No other legal, ethical, or moral schema has so consistently hewn to the magisterial human experiment of moderation, fairness, efficiency, equal- ity, and justice in social groupings. Any recitation of the path of tort law identifies objectives consonant with those described in a contemporary self-identification of a major liberal philanthropy, the pursuit of “a just, equitable, and sustainable society.”

This history of tort law is the history of the tension between self-aggrandizement and self-abnegation. In this article are found multiple examples, from disparate groups, of both prophylaxes against and responses to wrongful infliction of harm to individuals or to the social collective. In historical contexts, such groupings, and such examples, have ranged from the Babylonian response to the flooding of another’s land; to Socrates’ and Aristotle’s injunctions against unconsented-to taking; to Roman development of the law of nuisance; to Talmudic rules regarding waste. With conspicuous reference to the law of nuisance, modern U.S. decisional law demonstrates the continued fidelity to the goal of mediating between these two extremes.

Moreover, the inexorable and permeating nature of these precepts of eco- nomic efficiency, avoidance of waste, and cultivation of circumstances in which persons may preserve and protect their physical autonomy and their property, is by now evident in almost all cultures. These goals have been effected by rules reflecting societal expectations of personal liberty as leav- ened


137 As to the former, see BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 624 (1945), in which is found a 1656 quotation attributed to one Joseph Lee, and which is representative of a laissez-faire social construct: “It is an undeniable maxim that everyone by the light of nature and reason will do that which makes for him his greatest advantage. . . . The advancement of private persons will be the advantage of the public.”
by personal responsibility. And as is seen, such rules, be they norms or written strictures, have been in greater or lesser harmony. This direction of tort law has been and will continue to be its elevation in comprehensiveness, its shedding of error, and its ongoing self-instruction guiding, it to what is denominated sometimes as a “right fit” in its time and culture. This ageless improvement of tort law over time would be predicted by Socrates, in his constant references to the imperative of man’s path of enhancing the life of the individual and the polity through education, even if simply experiential, self-knowledge, and the inevitable influence of these attributes to the task of political or judicial development of tort law.

To Immanuel Kant, only a norm respecting personal physical integrity and non-wasteful behaviors would be suited to a rule that if applied to all mankind would bring evenhanded good. Tort law’s supple receptivity to change in response to ever-perfectible societal norms is fully harmonious with the norm Kant identified as “acting from duty,” as distinct from “acting according to duty.” The concept of acting from duty is captured in the example of the merchant conducting an honest business because of his “purely moral interest in obeying the [duty] of objectively correct behavior[,]” irrespective of what the state may or may not ordain.138 It is noteworthy that philosophers reaching back to the Greeks proposed similarly that an individual achieved “good” when leading a life in harmony with nature, and that “virtue” was demonstrated by a man’s “will” that was “in agreement with nature.”139 Indeed, Bertrand Russell noted the striking comparisons between the philosophical structures of Kant and those of the Stoics.140

If it is true that the development of efficient norms and laws for the treat- ment of civil wrongs characterizes human development to this date, does this alone demonstrate that employment of such methods will continue, through trial and error, into the future? Of course, such a historical showing, available in this article only in selected sketches, does not so prove, in the same way that coincidence does not demonstrate causation. The evidence here falls far short of a philosophical proof that admits of no contrary conclusion. Yet, there exists a strong basis for a prediction that tort law’s development along these lines will, in fact, continue.


139 Bertrand Russell, *A HISTORY OF WESTERN PHILOSOPHY* 254 (1945), referencing, among others, Seneca and Democritus.

140 *Id.* at 268.
Historians attending to broader topics have reached agreement that the path of history is one of steady improvement. The so-called “law of progress,” affecting all disciplines from biology to history, is discussed by the influential R. G. Collingswood, who proposes further that progress in history means simply that man builds his knowledge on the incidents of his history and that of others. Man does not and will not know that he participates in this progress, nor is any assumption of this progress predicated on the identification of man as a “child of nature,” thus binding the prediction of societal progress to the laws of evolution. Importantly, progress does not necessarily mean improvement, as the former can be gauged objectively, whereas the latter is in the eye of the beholder. Concerning progress qua progress, as distinct from progress as improvement, the law of historical progress has been foundational to the development of man’s economic life. Success historical development is achieved when man’s construction of societal change is made actual as fully as possible, by knowledge of the past in such measure as will permit him to avoid its errors. It does not necessarily involve replacement of the bad with the good. As often it will be the replacement of the good with the better. This much is true irrespective of whether history is regarded as a transcendental concept, an empirical pursuit, or a mixture of both. And if a seemingly uncontradicted string of proofs of this progress is shown to be applicable to man’s economic development, it would be incongruous to fail to recognize the rightful place of economic efficiency in society’s development of rules governing the economic stability of individuals, including tort rules.

Applying these concepts to tort-type law, we can see that principles of economic efficiency have always been part and parcel of civil remediation of wrongful harm. And yet the strong philosophical and theistic ties to early tort rules retarded a sensible and explicit recognition of the equivalent and largely harmonious efficiency rationales for such rules. In the past, as now, the legal approaches to tort-type remedies is maturing rather than matured. To use only one example, for their philosophical advances in a philosophy of corrective justice and in ethics, the slave-holding Greek culture did not recognize that

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142 Id.

143 Id. at 325, giving the example of a primitive group’s development of a more efficient way to catch fish, resulting in the availability of not one, but instead five fish a day. Although this might be considered progress, those in the community content with the availability of one fish per day might not call it an improvement.

144 Id. at 331.
inequality is inefficient, but, then, neither did other nations for another millennium.

Even so, it can be predicted with confidence that principles of economic efficiency, waste avoidance, repulsion of unjust enrichment, and deterrence will continue to affect tort theory, policy and law. That to date economic analysis plays only an episodic and subordinate role in decisional law should not vitiate this prediction. Moreover, the presence of proto-efficiency arguments, however crude and polemic, in state and federal tort reform initiatives, should presage that more matured efficiency interpretations will hold increasing sway in the proliferation of statutes governing injury law.

The entirety of history’s philosophical development has been devoted to the identification and description of a scientific model of human and societal behavior. In injury law today, principles of economic efficiency and correlative deterrence represent the only applied scientific model. It would be anomalous to suppose that injury law, by reason of its ancient articulation in moral terms, ought be immune from scientific deconstruction and reanalysis in the scientific terms of economic efficiency, and it verges on impossibility to propose that it will fail to find greater and greater employment in tort theory, adjudication, and statutory adoption.