

ALL-AMERICAN TORT LAW

A recent book by Joseph A. (Jay) Ranney, the Adrian P. Schoone Fellow at Marquette Law School, occasions reflections by a leading national scholar on tort law's past—and its possible future.



Cristina Carmody Tilley is professor of law at the University of Iowa. This is an edited form of keynote remarks at a conference this past fall supported by Marquette University Law School's Adrian P. Schoone Fund and held in the Law School's Lubar Center. An article version will appear in next fall's issue of the *Marquette Law Review*.

by **Cristina Carmody Tilley**

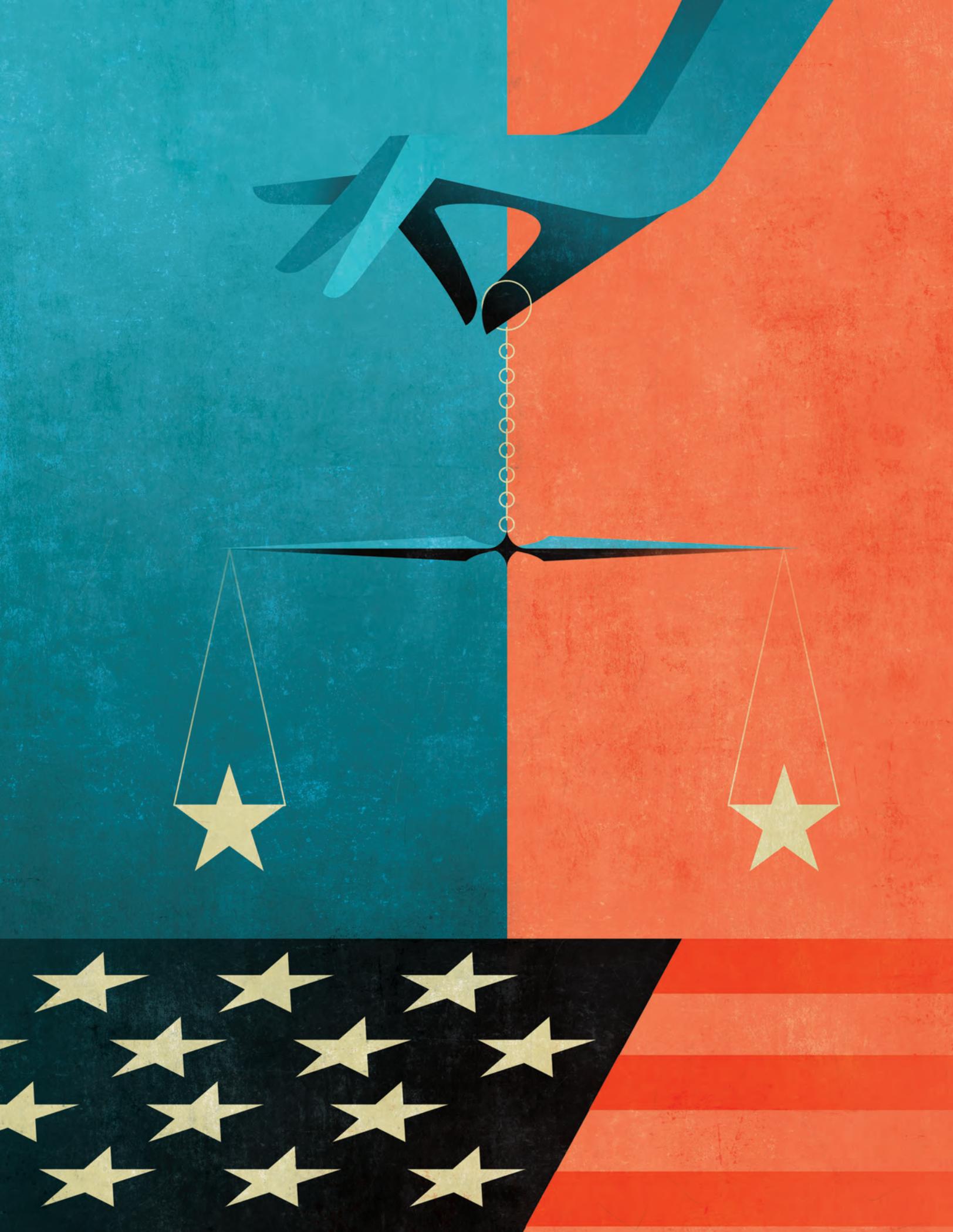
I will start this morning by describing Jay Ranney's accomplishment in *The Burdens of All: A Social History of American Tort Law*. Jay's remarkable book braids together three distinct scholarly traditions in illuminating the past and future of personal injury law. He gives us an intellectual history of both moods and markets in the United States, a doctrinal study of tort rules over two centuries, and an empirical compilation of tort cases over that time in five representative states. Only a master could weave these strands into the readable whole we celebrate today. But as all practicing lawyers know, the reward for good work is more work. So after I persuade you of the enormity of Jay's success, I'll explain why I am now looking for a sequel.

Let's begin with Jay's central thesis: American tort is a body of law that has waxed and waned in response to American social and economic trends. The book begins in the 19th century, identifying tort's corrective-justice posture and pro-defendant tilt, and moves to the twentieth century, where tort turns toward a distributive-justice posture with a pro-plaintiff tilt. These shifts in theory and outcome, the book shows, have complemented and facilitated an American cultural turnaround, from a climate of thoroughgoing rugged individualism to an ethos of collective well-being. Jay bolsters this broad claim about tort's reorientation with a multistate, multidecade survey of case law, showing that American tort law today typically operates in

a quasi-regulatory fashion to distribute risks for the benefit of all—even while it clings in certain pockets to the expectation that individuals shoulder responsibility for their own fates.

ERAS OF BURDENS: A SOCIAL HISTORY

Drilling down to specifics, Jay tells us that American tort law has moved through five eras. Each of these involves a response to social and economic dynamics, and each either accelerates progress or reins it in—all according to the felt necessities of any given time (as it always is with the common law). The following capsule history is rather an injustice to Jay's detailed, nuanced account, but it will serve our ends today.



1810–1870: Rugged American Man

The period 1810–1870 might be called the era of Rugged American Man, and it was matched by a tort law of individualized rights. Nineteenth-century Americans were able to turn away from their forebears' highly insular way of life; they ventured out of their local communities into new cities and states, where stranger-to-stranger accidents spiked as a byproduct of nationalizing travel and commerce. Tort responded, supplying or refining the concept of negligence to describe and condemn the interpersonal disregard that produced these inadvertent injuries.

Of course, the suggestion that self-sufficient Americans were obligated to look out for their neighbors' well-being encountered resistance in a culture that "celebrated individual self-reliance," as Jay puts it. Consequently, even as judges recognized negligence as a tort vessel to convey claims of stranger-inflicted injury, they made sure to limit its reach. In particular, the doctrine of contributory negligence relieved defendants of responsibility for careless injuries when the plaintiff bore even slight blame for his own predicament—a rule that, among other

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things, tended to shield employers from liability for worker accidents.

Notably, the physical-injury claims in the first part of the 19th century reflected an old way of life, where personal injuries arose from one-on-one hostility and claims for compensation were made via pleading assault and battery. But by the end of the century, the classic personal injury claim arose from a railroad or workplace injury. This brings us to a period that Jay might describe as "Industrial American Man."

1870–1910: Industrial American Man

During the decades from 1870 to 1910, individual self-sufficiency was dislodged from its foundational position in tort. The commercialization and technologization of daily life meant that Americans were under near-constant threat of stranger-to-stranger injury. Simply stated, the possibility of serious accidents loomed everywhere—in corporate factories featuring assembly-line technology and new power sources such as electricity, on national rail networks, and on urban electrified streetcars.

Again, Jay shows how tort dockets reflected this reality. In his book's taxonomy, *property claims* during the period declined from a high of 55 percent of cases to a low of about 10 percent, while *railroad accidents* climbed from 5 percent to a high of 35 percent in 1900. *Workplace accidents*, accounting for just 5 percent of tort cases in 1860, peaked at 43 percent in 1910.

Leading jurists and scholars of the day, worried about the toll that consumer and employee accidents were taking on the polity, began to question the rule that plaintiffs could recover only when entirely free from fault. Was it fair, these leaders asked (in Jay's words), to saddle slightly careless individuals with the cost of injury, when accidents might "be an unavoidable byproduct of industrialization and economic growth"? These doubts, he shows, led judges to start rationing or restricting the doctrine of contributory negligence as a defense to liability.

1910–1920: The Progressive "Pivot" Period

This skepticism reached a high point during the 20th century's second decade, which Jay describes as a crucial "pivot" point in tort law. During the Progressive decade of 1911–1920, the baseline of individualism in American culture and economic life gave way to a robust collectivism. Progressive activists joined together in a belief that "democracy and economic security were interdependent" and that state intervention on behalf of economically and physically frail individuals might be a linchpin of collective economic stability—and thus of democracy. These new ideas rippled immediately through tort law.

During this period, Crystal Eastman, a lawyer and journalist, gathered data suggesting that industrial injuries were often "the result of bad luck, not employer [fault] or worker fault." She and any number of other individuals argued that as long as financial support for injured workers was conditioned on proof of employer wrongdoing, too many Americans were bound to lives of poverty and dependence. Driven by these studies, legislatures in New York, Wisconsin, Minnesota, and then 15 additional states began to study workers' compensation schemes between 1909 and 1911. And, again, the dockets reflect this story. From 1910 to 1920, Jay explains, the percentage of state high court tort dockets comprising workplace accidents fell from 45 percent to 25 percent.

Just as factories and factory accidents had changed the composition of state court tort dockets, so, too, did cars and the proliferation of car accidents. Automobile-accident litigation was essentially a non-presence in state courts in 1910 but occupied 20 percent of the docket in 1920. The growing market for cars also led to a profoundly broadened approach to the concept of duty in negligence law. While most American states had long followed England's 1842 *Winterbottom v. Wright* rule, imposing on manufacturers a duty of care only to those with whom they

were in privity, that rule began to erode during the Progressive period.

Finally, in the well-known 1916 *MacPherson v. Buick Motor Co.* case, the New York high court abolished the privity rule altogether. The result was to permit plaintiffs injured by defective goods considered inherently or imminently dangerous to pursue remote actors up the chain of commerce. Like workers' compensation, a legislative innovation, the judicial erasure of privity allowed the state to spread the costs associated with technological risk-taking throughout the national economy, rather than letting it fall on unlucky injured individuals.

1920–1970: An Effort to Rebalance the Scales

Continuing forward, in the midcentury period, the decades 1920–1970, Jay shows how tort leaders rapidly embraced the idea of an American national collective and an interest in developing quasi-regulatory tort rules to guarantee cost-justified precautions by manufacturers and professionals without burdening socially useful innovation. Slowly in the 1930s, and at a rapid clip in the 1960s and into the 1970s, states began to drop draconian contributory-negligence rules, which had undercompensated careless plaintiffs and insulated careless defendants.

In their place arose comparative-negligence rules that treated injuries—and the behavior producing them—as the product of reciprocal risk. This change had the power to induce additional caution by—and collective cost-spreading to—potential defendants. It also created a more durable legal safety net beneath consumers, which encouraged them to participate fully in a nationally networked economy. Tort also adapted to make the contours of that safety net more predictable for repeat-player defendants by fortifying summary disposition of cases via the announcement of legal rules to guide potential defendants' primary conduct or behavior.

Alongside the decline of contributory negligence, Jay traces the ascent of strict liability for products. This upstart body of law was helped along by the California Supreme Court decisions in *Escola v. Coca-Cola Bottling Co.* (1944) and *Greenman v. Yuba Power Products, Inc.* (1963) and by William Prosser's appointment as Reporter of the Second Restatement of Torts. Some 19 states adopted strict product liability in the 1960s, and another 25 did so in the 1970s.



The doctrine of strict liability, forcing distributors along the American supply chain to assume greater responsibility for their products, regardless of fault, intensified a tort ethos treating the American marketplace as a networked collective bearing shared responsibility—and reaping shared profits—from a consumer class increasingly beholden to commercial suppliers.

1970–2010: Individualism Redux?

Finally, Jay brings his study full circle by documenting the resurgence of an individualist ethic in American culture from 1970 to 2010. This resurgence was fortified by a “tort reform” movement in the late 20th and early 21st centuries. Together, social and political activists placed a new emphasis on individual responsibility, which made its way into tort doctrine. The most notable *legislative* movement in the modern tort era has been the adoption of damage caps limiting the potential monetary recoveries of successful plaintiffs. And alongside that legislative initiative,

the private American Law Institute, in its Restatement project, was facilitating doctrinal change—for example, by shifting the design-defect test in product liability from an ostensibly plaintiff-friendly consumer-expectation test toward a risk-utility test that made recovery more elusive.

Just as Jay showed workers' compensation and the wipeout of privity to translate into immediate changes to state court dockets, so also does he show that damage caps and product liability reforms changed tort practice. In 1990, professional-malpractice claims accounted for 35 percent of the state court dockets that Jay examined. The adoption of damage caps and other rules making medical-malpractice lawsuits less attractive brought that number down to 18 percent by 2000. Similarly, product liability claims rose from 5 percent to about 13 percent of all claims between 1970 and 2000, but dropped back to just 7 percent by 2010, after the advent of the risk-utility test.

So, to sum up, Jay has framed the evolution of American society as a perpetual contest between two ideals. In one, society is organized around self-sufficient individuals who push their abilities to the limit, claim as their

own all benefits that may result, and expect their neighbors to shoulder their own burdens. In the other, society is organized around a collective that shares both burdens and benefits. In Jay's history, tort is as dynamic as the society it is serving and shaping. Tort rules bend first to accommodate the enterprising individual, leveraging the entrepreneurship that remakes an economy. They bend next to accommodate the vulnerable collectives of workers and consumers whom the new economy has left behind. And so on, as felt to be needed, decade after decade. The byproduct of tort's short-term agility, he concludes, is America's long-term stability.

WHAT'S MISSING—OR MIGHT BE ADDED

The story Jay tells in *Burdens* is inspiring, and fully persuasive . . . as far as it goes. Which is why, as I mentioned earlier, I wish it went just a bit farther. In order to explain my wish, let's first back up and take a 30,000-foot view of American law and society, in order to think together about tort's rightful place in both.

Public Law and Private Law—and Tort Law?

American *law* has long been depicted as occupying two distinct hemispheres. Public law is the domain in which government engineers the distribution of resources by allocating public funds and services and providing entitlements to act or prohibitions on action. Private law is the domain in which nongovernmental actors move through life alongside each other, accruing and using property, trading goods and services, and seeking a modicum of personal security—all without direct state oversight. American *life* has also been depicted as split in two: public life is carried out in the national economic marketplace and the political public square, while private life is lived close to home, in one's own heart and mind, alongside friends, family, and neighbors.

Jay's thesis is that tort sprang into being in the 19th century on the private law side of this divide, to do individual corrective justice, and gradually migrated by the 20th century to the public law side of this divide, to do collective distributive justice. But accepting Jay's thesis means accepting the neat division of American life and law into public and private. And while American life is many glorious things, neat is not one of them.

Yes, communities in the early republic were insular and culturally homogeneous, lending them a certain self-contained predictability. But over the course of the 19th century, explosions in industry, transportation, and communications, the emancipation of enslaved people, and the flight of American women from the home all combined to destabilize the tidiness of community life. People of all backgrounds began boarding trains, milling about department stores, laboring at factories, and mingling in theaters. Friction began to erupt in these not-fully-public, not-fully-private "middle spaces." Antagonism simmered between fourth-generation Americans and new immigrants from Europe, between wealthy property or factory owners and their day laborers, between men and women, between people of different races. This antagonism manifested in subtle hostility, in the humiliating exploitation of power imbalances, and occasionally in bodily and property injuries.

Unsurprisingly, the two tidy spheres of American law were poorly equipped to deal with the chaos of middle-space life in the 19th and 20th centuries. Federal legislators in the Reconstruction Era tried to adopt public law directives requiring private individuals to share middle-space resources, in hopes that those commands would produce public thriving. But the Supreme Court famously rebuffed those statutory commands as unconstitutional in the *Civil Rights Cases* in 1883. Where did that leave marginalized people like

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the plaintiffs there—Black theatergoers and train passengers degraded by their assignment to balconies and shabby cars? To the private law of tort, the Court answered.

True, private law historically had protected personal dignity and provided post-hostility repair in local communities. But just as the Court was telling marginalized Americans to sue in tort for social humiliation, state supreme courts managing tort dockets replete with plaintiffs maimed by trains, cars, and factory work felt compelled to redistribute wealth in ways that served both the haves and the have-nots of the new American economy. Gilded Age tort judges, confronted with an unprecedented number of claims for bodily injury and death leaving families destitute, concluded that claims of group-level emotional harm were comparatively unimportant. Indeed, state courts eventually articulated explicit rules against compensation for pure emotional harms. The Supreme Court's rejection of public law remedies for identity-based harms and the states' rejection of private law remedies for identity-based harms created a legal diaspora, in which dignitary claims based on race, gender, and class marginality had no legal home at all.

Despite—or perhaps because of—their non-status within the law, identity-based indignities endured throughout the 20th century and have arguably intensified in the 21st. Thomas Piketty became an unlikely celebrity in 2013 through his book demonstrating the lack of economic cohesion in a country beset by a wealth overclass and a wealth underclass. Journalists in 2018 won a Pulitzer Prize for exposing the astounding regularity with which female workers striving for merit-based success were treated as members of a category available for sexual gratification in the workplace. And thousands of Americans poured into the streets mid-pandemic to protest the oppressive police treatment of civilians marginalized by virtue of their racial identities, disabilities, or both.

Which brings me back to the wish that Jay had taken a slightly broader approach to his study. He admirably traces tort's role mediating between individual Americans and all Americans, but I am not persuaded that this has ever really been the deep fault line fracturing American community. The truth is that both the American collective and the American individual are aspirational tropes. Jay's study ends in 2010, and the fallacies of both



national cohesion and individual agency have come to the surface in painful ways since then. On highways, in grocery stores, at playgrounds, and through countless other middle spaces, the deep and enduring rift in American life is between classes, genders, and races.

It is true that members of marginalized groups have secured many public law entitlements to move comfortably through middle spaces; constitutional law and federal statutes put those rights on paper late in the twentieth century. But it is equally true that those public law entitlements are often hollowed out by the private cultural hostility and conduct of people sharing these spaces. Members of social groups degraded by private bias they encounter while moving in middle spaces are not seeking neat distributive justice afforded by pure public law any more than they are seeking neat corrective justice sought by pure private law. They

are seeking a third, more diffuse, kind of justice: social justice.

What body of law can afford that kind of justice? On Jay's account, tort has a quicksilver quality that defies the stasis of a public-private law divide. It operates as private when society needs individual justice, and as public when society needs distributional rules. My take on Jay's account is that tort is a hybrid of public and private—a middle kind of law, if you will, and therefore the best law to do middle-space justice. And I would argue that if Jay's account were broadened somewhat, we would find that tort has been doing social justice from the earliest years of American life.

A Sequel, Please?

This is why I am asking Jay for a sequel to his first social history of tort. What exactly do I want from book two? First, I suspect there is more to learn about the American tort story by considering both the first 20 years and the last decade or so of its operation, periods which were squeezed out of *Burdens* for understandable reasons. Second, I suspect there is more to learn by looking at tort's treatment of injuries sitting outside body and property, which are functionally excluded from

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the book's dataset. Finally, the focus on bodily and property injuries from 1810 to 2010 reflects an implicit assumption that tort's conceptual scope is narrow, when evidence on the periphery suggests it may actually be large.

Let's turn first to chronology. By choosing to conduct his study between 1810 and 2010, Jay has inadvertently skipped tort's early origins. But the period from 1789 to 1810 offers useful lessons. In the first two decades of the country, American tort dockets consisted primarily of intentional tort claims, typically between people who belonged to the same closed community. In these cases, local juror neighbors who understood the social context of a given dispute were able to generate resolutions that reflected local expectations about the quantum of dignity to which each litigant was entitled in the circumstances. By forgoing this period, *Burdens* excludes data reflecting tort's seminal role promoting an expectation of interpersonal social dignity.

Turning next to injury: By confining his concept of personal injuries to those involving harm to body or property, Jay paints an incomplete picture of the interests that were originally considered worthy of tort protection. Intentional tort claims for assault, false imprisonment, and slander all vindicated interests in emotional and social well-being. In none was the plaintiff required to show an impact to his limbs or his land.

Limiting one's study of tort's scope to body and property injuries litigated during 1810–2010 leads, unsurprisingly, to an empirical confirmation that tort's scope is limited. To be sure, *Burdens* defines tort as a body of law allocating “the costs of accidents *and* other harms” (my emphasis). But the book is concerned much with accidents and little with “other harms.” For example, the book puts all the cases in the study into one of the following eleven categories: automobile accidents; railroad accidents; accidents causing

injuries to railroad workers; workplace accidents; personal injury on business premises; product liability; professional malpractice; property harm (including business torts and harm to land); debt; personal injury—general; and “other,” including all cases “not classifiable in the above categories.” Unfortunately, this taxonomy flattens the social stakes that are simmering under the surface of many cases treated as data points. Notably, those stakes often involve tensions over the treatment of marginal people in middle spaces.

Looking behind the property or bodily label assigned to a given case, to the social dynamics at play, supports a thesis that tort has always been a middle-space law concerned with the doing of social justice. Take, for example, the category of “debt.”

The survey categorizes about 40 pre-1870 cases as claims for “debt,” a category that includes “suits against creditors and sheriffs for improper debt-collection practices.” But digging beyond the book, into the cases themselves, the vast majority of the claims in this category—some 36—were brought by private individuals claiming that a law enforcement officer carrying out judicial orders (to seize an individual or to seize or sell property) did so wrongfully. These wrongs involved alleged lack of due care for civilian interests or apparent officer malice in the execution of judicial orders.

Of course, prior to the adoption in 1871 of 42 U.S.C. § 1983 (as we now denominate the statute), there was no public law mechanism to hold law enforcement officers liable for wrongful behavior depriving a civilian of rights. Moreover, prior to 1961 and *Monroe v. Pape*, that public law mechanism had never been authoritatively applied against law enforcement officers. The only legal mechanism by which civilians could complain of police overreach or abuse during the pre-Reconstruction period, and for decades after, was tort. In other words, most of the cases the

survey treats as attempts to recover wealth could also be viewed as attempts to vindicate a dignitary entitlement to fair treatment by the police.

A variety of other cases the survey categorizes in comparatively bloodless terms such as “personal injury–general” appear additionally to ask the community to weigh in on the dignitary status of individuals within socially marginalized groups, such as enslaved people, women, and the poor. For example, the two earliest North Carolina Supreme Court cases in the study, from 1811 and 1818, involve the status of enslaved people. Each vindicates the plaintiff-slaveholder’s claim, treating persons of African descent as property by virtue of their membership in a group classified as less deserving of full human dignity than other individuals. Yet *Burdens* shows Texas courts, just a few decades later, using tort to the opposite end. When a Black plaintiff sued a white Houstonian for assault and battery, the defendant claimed that he bore no duty to a person not recognized as a member of the Texas polity by virtue of his race. In 1843, the Texas Supreme Court responded that, despite their status as non-citizens, Black residents were entitled to be free from “wanton injuries and aggressions” and could protect that entitlement through tort litigation. So unlike the North Carolina high court, the Texas court used tort to invest members of the marginalized group, African descendants, with a quantum of dignity comparable to that allocated to white Texans.

CAN WISCONSIN POINT FORWARD?

I will conclude by offering a thesis for Jay’s next volume: It is time to revive tort’s original power to do social justice. Tort can do this by forcing communities into conversation about the legitimacy of state resource distributions, by urging community members to acknowledge the private animus that can render those distributions illusory, and by deploying the corrective message that tort verdicts can send to both the injured and the class of private people bent on denying them equal humanity.

This revival can and should apply across *all* of tort. But for present purposes, I will focus on two causes of action that are explicit or implicit modern doctrinal invitations to construct just communities: negligence and intentional infliction of emotional distress. And I will look at the ways that disputes litigated in Wisconsin have illustrated tort’s social justice power.



Why Wisconsin? Aside from being one of the states in Jay’s study, and the venue for this symposium at Marquette Law School, Wisconsin sits at a variety of significant cross-vectors: it is anchored by a major metropolitan city but replete with rural, agricultural counties; it is split virtually down the middle in terms of partisan politics; and its wealth inequality as of 2012 saw the richest 5 percent of households with average incomes 10 times those of the bottom 20 percent of households. Unsurprisingly, in the authoritative Marquette Law School Poll, two-thirds of Wisconsinites report avoiding hot-button issues with friends and family. Yet when called to jury service, these citizens have been able to “come now, and reason together” (*Isaiah* 1:18) in tort cases disputing everything from gun safety to racial and gender humiliation.

Let’s zoom in to a single case to see how a shared search for norms in a fact-dense, deeply personal context invites conversation, rather than

contention, on the divisive issue of gun ownership. As of 2022, 69 percent of Wisconsinites appeared to favor compulsory licensing for concealed carrying of guns, but the state earned a grade of D+ from the Giffords Law Center in 2023 because it had preserved its gun regulation regime with no changes for the year—data points suggesting a polity deeply split on collective gun policy. Nevertheless, jurors were able in 2015 to reach normative consensus on the reasonableness of commercial firearms practices in *Norberg v. Badger Guns*, a case litigated here in Milwaukee for the plaintiffs by Pat Dunphy, a Marquette lawyer and my terrific fellow panelist at today's conference.

In that case, a salesperson at Badger Outdoors, a gun dealer in West Milwaukee, had stood by while a teen whose age barred him from firearms purchases selected a .40 caliber handgun. The dealer then guided a “straw purchaser,” who was of age, to claim that he was the actual purchaser of the gun, in order to complete the transaction. According to the complaint, this gun and others sold in similar

transactions were used to shoot Milwaukee police officers. Wounded officers sued Badger for negligence in unreasonably ignoring evidence that they were selling guns to be used by individuals deemed ineligible by the state.

After a Milwaukee County Circuit Court judge denied motions to dismiss and motions for summary judgment filed by Badger and its insurers, a local jury concluded that Badger's slipshod sales practices were unreasonable. It went on to award the officers \$5 million in compensatory damages and another \$1 million in punitive damages. This condemnation of gun dealer practice reflects the ability of Wisconsinites to “reason together” toward shared values about the interpersonal care that commercial actors owe local residents. And it does this against a backdrop of splintered opinions on the appropriate role of the state in regulating the rights of residents to carry firearms and a political climate in which elected legislators are deadlocked on public law gun policy.

Now let's zoom out and look at how a more surgical tort cause of action has been used to construct community over time in the state. The tort of intentional infliction of emotional distress (IIED) has long been controversial, in part because detractors claim that its crucial element—defendant “outrageous” behavior—is inherently subjective. Of course, IIED's power to surface and challenge the private use of social capital to deprive private individuals of their distributive entitlements is what makes it a potentially powerful mechanism of social justice via tort, even as it makes the cause of action a lightning rod for criticism.

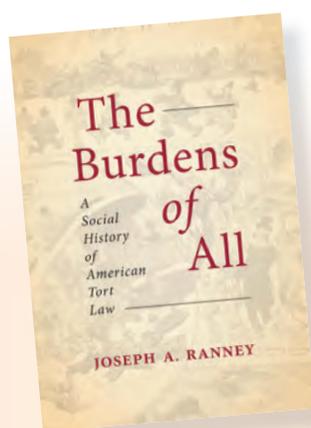
Sure enough, a survey of Wisconsin jury verdicts in IIED cases litigated from 2006 to 2022, most sitting outside the parameters of Jay's study, confirms the ways in which members of marginalized constituencies use tort to seek corrective action when fellow community members

treat them as unworthy of dignity. During that period, 14 cases involving IIED claims went to jury verdict.

Of those cases, 12 appeared to involve plaintiffs from marginalized constituencies, including Black women, Black men, women whose race was unclear, and two children, one disabled. Four of the female plaintiffs were claiming verbal, physical, sexual, or financial abuse by husbands or other domestic partners. The two Black women and one of the Black men were claiming degrading treatment in professional settings. One of the children was claiming sexual abuse by an uncle, while the other (the disabled child) alleged that he had been left strapped in his school bus seat for the entire day after his driver forgot him. In other words, these IIED causes of action are a crucial place where tort has tried to revive its preindustrial role as arbiter of community status relations.

Of course, plaintiffs are not guaranteed clear victories in these cases, nor should they be. What they are guaranteed is a legal forum specifically competent to hear claims of social indignity and to promise a way of convening ongoing community conversations about humanity entitlements in middle-space.

And this is why I am looking to Jay—or someone—to further the remarkable achievement of *Burdens*. He concludes his study in 2010, telling us that tort has largely opted to serve American collective interests. But the decade just behind us has hollowed out the assumption that there is a monolithic American collective that tort can usefully serve. Class, race, and gender destabilization today are causing dignitary injuries that are nothing like the paradigmatic “accidents” of the personal injury docket. If tort is to be a “faithful mirror” of the battles in American society, as Jay eloquently hopes, and if its rules are to be “part of a larger American story” going forward, can the story end where this book leaves it? ■



Professor Tilley's remarks celebrate, and use as a point of departure, a new book by Marquette Law School's Joseph A. Ranney.