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Richard Abel

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# CIVIL RIGHTS AND WRONGS

*Richard Abel\**

Civil rights and tort law are natural allies. Both offer legal responses for harms to (often vulnerable) individuals committed by (generally powerful) collectivities. Yet the two domains differ dramatically in many respects, including substantive and procedural law, remedies, lawyers, and public image. Only by deepening our understanding of these differences can we mobilize the complementary strengths of these two legal weapons in the struggle against injustice.

Economics constructs torts, whose dominant moral philosophy is utilitarian. Tortfeasors are negligent because care costs money. (Negligent tortfeasors are generally indifferent to the identity of their victims.) In a market economy, competition compels entrepreneurs to be as unsafe as they can get away with being. And Learned Hand's famous formula<sup>1</sup> reassures them that courts will *not* find them negligent when the harm they inflict costs less than the safety precautions that would have been necessary to prevent it. Torts are takings from victims of their physical and psychic well-being, earning power, savings, relationships, even life itself. The legal system creates an incentive to injure those whom society endows with less human capital (earning capacity, recourse to quality health care, even capacity to enjoy life), who are also (partly for similar reasons) less likely to respond by suing.<sup>2</sup> (The poor also have less bargaining power to demand workplace safety and less purchasing power to buy it in consumer products, or even to protect themselves

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\* Connell Professor of Law, University of California Los Angeles.

1. U.S. v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).

2. Because we lack a metric for general damages, these are often proportioned to specials, amplifying the biased incentive. In New York City, 23/100,000 of those in households earning less than \$25,000/year die of unintentional injuries, compared with 10/100,000 of those in households earning more than \$50,000. *New York City Health Disparities*, N.Y. TIMES, July 16, 2004, at B3.

against the weapons of the rich—as when they have the misfortune to collide with SUVs.) These market failures can be corrected only by politics, i.e. legislation. Most tort defendants are private entities; indeed, sovereign immunity is a significant obstacle to suing the state. Because the rights that tort law seeks to vindicate are private and individual, victims are generally free to sell them *ex ante* (by agreements not to sue) and *ex post* (through settlements, which can even include purchase of the victim's right to speak about the claim).

Politics constructs civil rights, whose dominant moral philosophy is deontological. (The Bush Administration's efforts to justify torture on utilitarian grounds provoked widespread outrage.) Wrongdoers seek to oppress and subordinate, not to maximize profit (although the two can be related); they therefore care about the identity of their victims. Ironically, the targets are often the more rather than the less privileged, those who challenge power politically (social movement leaders), symbolically (cultural rebels), or sexually (by violating taboos against miscegenation or same-sex relationships). The political system creates a perpetual incentive to subordinate. Because inequality breeds resistance, it must constantly be reconstructed, reenacted, reinforced. This is a zero-sum game: people can enhance their own power and status only by disempowering and humiliating others. Those who violate civil rights appeal to members of their own group, both through electoral politics and the institutions of civil society. They are not driven primarily by material incentives; indeed, neoclassical economics insists that discrimination is impossible because it is inefficient, i.e., the invisible hand ineluctably corrects political failure. (Would this were so.) Most civil rights defendants are public entities; indeed, the state action doctrine is a significant obstacle to suing private actors for constitutional violations. Because civil rights are public and collective, they cannot be abridged by contract (e.g., contracts for slavery, or compounding a felony).

The gatekeeper to law for the tort victim is the private practitioner, usually working alone or in small firms. The plaintiffs' personal injury bar is large, geographically dispersed (at least in cities and suburbs, though not rural areas),<sup>3</sup> and generally culturally

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3. Compare JEROME CARLIN, *LAWYERS ON THEIR OWN* 71–91(1962) and CARROLL SERON, *THE BUSINESS OF PRACTICING LAW: THE WORK LIVES OF*

accessible (in terms of the class, race, and language of lawyers and their employees, partly because minority lawyers excluded from other career alternatives often gravitate to personal injury practice).<sup>4</sup> At the same time, restrictions on solicitation in person,<sup>5</sup> by telephone, and even through the mails<sup>6</sup> impede lawyer efforts to inform victims of their rights.<sup>7</sup> Lawyers willing to risk discipline by collaborating with or employing ambulance chasers charge a vice tax to clients, which increases cost, restricts providers, and lowers quality.<sup>8</sup> Unauthorized practice of law rules prevent laypersons from advising or representing victims; and intermediaries (lay or lawyer) cannot be paid for referrals in most states.<sup>9</sup> (In England, by contrast, claims agents can solicit cases, negotiate settlements, and sell cases to lawyers for litigation.)<sup>10</sup> General practitioners charge fees for forwarding cases to litigation specialists (although these are supposed to be proportioned to the work invested); because of unauthorized practice restrictions, such fees include a monopoly rent for referrals that could be performed more efficiently by laypeople.<sup>11</sup> The contingent fee gives lawyers an incentive to seek such work; but

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SOLO AND SMALL-FIRM ATTORNEYS (1996), with David Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 LAW & SOC'Y REV. 551 (1987); and DONALD LANDON, COUNTRY LAWYERS: THE IMPACT OF CONTEXT ON PROFESSIONAL PRACTICE 23-30 (1990).

4. JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 111-16 (rev. ed., 1994).

5. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 467 (1978).

6. *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 635 (1993).

7. Kenneth Reichstein, *Ambulance Chasing: A Case Study of Deviation and Control Within the Legal Profession*, 13 SOC. PROBS. 3, 9 (1965) (concluding without ambulance-chasing lawyers, injured parties would not necessarily be provided with legal representation against insurance companies).

8. See HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968). See also Reichstein, *supra* note 7, at 12 (finding that solicitation also leads to "fraud and client exploitation").

9. See, e.g., Legal Business Solicitation Act, 705 ILL. COMP. STAT. ANN. 210/1-3 (West 1993) ("It shall be unlawful for any person not an attorney at law to solicit . . . any demand or claim for personal injuries. . .").

10. RICHARD L. ABEL, ENGLISH LAWYERS BETWEEN MARKET AND STATE 230-32 (2003).

11. See CARLIN, *supra* note 3, at 83-86 ("Cowboys" file prematurely, seeking publicity in order to hawk the case for the highest price—to a litigation specialist or the defendant).

it also skews their case preferences toward certain liability, high damages, and visibility (both for ego gratification and to attract other work).<sup>12</sup> Contingent fees create a perverse incentive to settle quickly and low (maximizing lawyer return on time invested at the expense of client recovery) and to accept less on high-value claims in order to obtain more on low-value claims (from the same defendant or insurer).<sup>13</sup> Because a claim is only as good as the defendant's solvency, tort law diverts attention from more to less culpable defendants through the (often strained) doctrines of duty and proximate cause. Although most personal injury lawyers occupy the bottom of the professional hierarchy in terms of income and status,<sup>14</sup> a few are obscenely rich—notably the tobacco litigation billionaires—wealth that is acquired at the expense of full compensation for their clients. Some successful lawyers seek to transform wealth into status by creating exclusive clubs, such as the Inner Circle of Advocates—a “million dollar club,” the American Board of Trial Advocates, the International Academy of Trial Lawyers, and the Richard Grand Society. Of course, these practices just intensify public detestation.

Unlike tort lawyers, civil rights attorneys are not largely motivated by monetary incentives.<sup>15</sup> Because there are many fewer private civil rights lawyers, they are geographically less accessible. (They may be culturally more accessible if categories previously excluded from the legal profession enter it imbued with a passion for justice.) Civil rights lawyers may solicit as long as they do not charge clients fees;<sup>16</sup> but they have weaker material incentives to do

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12. Lisa Girion, *Justice Denied?*, L.A. TIMES, Aug. 1, 2004, at C1 (lawyers unwilling to take medical malpractice cases because of damage caps).

13. See Matthew Scully, *Contingency Fees: Another Name for Champerty*, WALL ST. J., Nov. 10, 1997, at A23 (“Look at some of the fastest-growing legal practices . . . [such as torts] . . . and you will find . . . the highest damage awards and the highest lawyer profiles.”).

14. HEINZ & LAUMANN, *supra* note 4, at 100, 107.

15. Neil K. Komesar & Burton A. Weisbrod, *The Public Interest Law Firm: A Behavioral Analysis*, in PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 80, 85 (Burton A. Weisbrod et al. eds., 1978).

16. *In re Primus*, 436 U.S. 412, 425 (1978). The Legal Services Corporation, however, has its own restrictions under § 504(a)(18) of the 1996 Legal Services Corporation Appropriations Act. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504, 110 Stat. 1321, 1321-56 (1996).

so. There are no restrictions on uncompensated referrals, whether from other lawyers or laypeople or organizations (but there is no market for referrals).<sup>17</sup> They are paid not at the expense of their clients but by government, philanthropy, or defendants. But fee-shifting statutes, foundation funding (and tax exempt status), and government employment all skew the cases they take.<sup>18</sup> Monetary incentives are subordinated to those of cause lawyering: vindicating principle, gaining recognition.<sup>19</sup> Public interest lawyers are notoriously possessive about their cases and causes.<sup>20</sup> No one gets rich doing civil rights law, but a few receive well-deserved recognition, from their peers, the profession, even the wider society (Clarence Darrow, Charles Hamilton Houston, and Thurgood Marshall).<sup>21</sup> Government agencies (state attorneys general, city attorneys, prosecutors, the EEOC, and state and city anti-discrimination bodies) are constrained and shaped by inadequate resources, bureaucracy, and career incentives. These bodies focus on collective prevention rather than individual remediation.<sup>22</sup>

The “dark figure” of unasserted legitimate claims<sup>23</sup> differs in the two domains. Empirical studies repeatedly confirm (contrary to the myths propagated by tort “reformers”) that only a small proportion of

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17. See *NAACP v. Button*, 371 U.S. 415, 428 (1963) (finding such restrictions violative of the First Amendment).

18. See Komesar & Weisbrod, *supra* note 15, at 88.

19. *LAWYERING ON THE LEFT: CAUSES, POLITICS, AND PROFESSIONAL RESPONSIBILITY* (Austin Sarat & Stuart Scheingold eds., 1997); *CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA* 13 (Austin Sarat & Stuart Scheingold eds., 2001); Komesar & Weisbrod, *supra* note 15, at 80, 85.

20. *MARTHA DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT 1960–73* (1993).

21. See, e.g., The Honorable Ruth Bader Ginsburg, *Lecture: Frank M. Coffin Lecture on Law and Public Service: In Pursuit of Public Good: Lawyers of Care*, in 53 *ME. L. REV.* 301, 304 (2000) (lauding lawyers who have dedicated themselves to the public good, including Charles Hamilton Houston and Thurgood Marshall.)

22. See, e.g., *Washington v. Davis*, 426 U.S. 229, 239 (1976) (finding systemic exclusion of a particular group necessary in order to merit a Due Process Clause claim).

23. See, e.g., William L.F. Felstiner, Richard Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 *LAW & SOC'Y REV.* 631 (1980–81); Lynn Mather & Barbara Yngvesson, *Language, Audience, and the Transformation of Disputes*, 15 *LAW & SOC'Y REV.* 775 (1980–81).

eligible tort victims recover damages (about 10 percent).<sup>24</sup> It seems likely that claims vary directly with income and wealth, which render such claims more valuable to both victims and their contingent fee lawyers (although some of these claims may be brought by subrogated loss insurers).<sup>25</sup> The likelihood of claims being brought and won directly influences the incentive for safety.<sup>26</sup> Accordingly, entrepreneurs endanger those who are least costly to injure. Legal “need” studies show an even lower rate of civil rights claiming, but we know less about the population of eligible claimants.<sup>27</sup> These high and different levels of selectivity also introduce biases in terms of class, race, gender, and immigration status.<sup>28</sup> Thus, the reasons for and hence the size and demographics of the dark figure differ in the two domains.

These two legal domains appear to have different dynamics of growth. Tort law tends to grow through judicial innovation. Noteworthy examples include the right to privacy, negligent infliction of emotional distress, loss of consortium, and strict liability. But legislatures can and do reverse such expansion, driven by powerful special interests (doctors, insurers, manufacturers, cities, etc.).<sup>29</sup> Because state supreme courts have struck down numerous

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24. DONALD HARRIS ET AL., COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY (1984); Alfred Conard, *The Economic Treatment of Automobile Injuries*, 63 MICH. L. REV. 279 (1964); WILLIAM SCHWARTZ & NEIL KOMESAR, DOCTORS, DAMAGES AND DETERRENCE: AN ECONOMIC VIEW OF MEDICAL MALPRACTICE (Rand 2340-NIH/RC 1978); PATRICIA DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY (1985); Engel, *supra* note 3; Thomas Moriarty, *A Nation of Willing Victims: Urban Danger and Urban Insult*, PSYCHOL. TODAY, Apr. 1975, at 43; INTERAGENCY TASK FORCE ON PRODUCT LIABILITY—FINAL REPORT (1978); DEBORAH HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES (1991).

25. BARBARA CURRAN, THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY (1977).

26. *Special Issue on Toxic Torts and Environmental Justice*, 26(2) LAW & POL’Y (2004); Jim Yardley, *Rivers Run Black, and Chinese Die of Cancer*, N.Y. TIMES, Sept. 12, 2004, at A1.

27. Leon Mayhew, *Institutions of Representation: Civil Justice and the Public*, 9 LAW & SOC’Y REV. 401 (1975); CURRAN, *supra* note 25.

28. M.P. Baumgartner, *Social Control in Suburbia*, in 2 TOWARD A GENERAL THEORY OF SOCIAL CONTROL 79 (Donald Black ed., 1984); HAZEL GENN, MEETING LEGAL NEEDS? AN EVALUATION OF A SCHEME FOR PERSONAL INJURY VICTIMS (1982).

29. Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The*

tort “reform” statutes on state constitutional grounds, these interests increasingly seek to influence the election of state supreme court judges through massive campaign contributions.<sup>30</sup>

Civil rights law, by contrast, grows primarily through legislation, as illustrated by the Civil War amendments and the Civil Rights Act of 1964 after *Brown v. Board of Education*.<sup>31</sup> “Massive resistance” by state and even federal judges can be an obstacle, as in the post-*Brown* South. Consequently, civil rights enforcement is limited by the (local) political consensus. Nonetheless, federal (and as Republican appointments make the federal judiciary more conservative, increasingly state) constitutional provisions remain a potential source of expansion. But referenda and constitutional amendments can curtail civil rights.<sup>32</sup> State courts make most tort law; federal courts have the final word in interpreting the U.S. Constitution and federal statutes.

Unlike civil rights law, which is primarily enforced by government agencies, most tort cases are tried before juries. Laypeople may misunderstand the law.<sup>33</sup> Because it is so difficult and risky to buy a jury, it rarely occurs (although those who can afford jury research may use voir dire to bias the panel). Insofar as civil rights are enforced initially by administrative agencies (which screen complaints), the political priorities of majority groups (which are hostile to minorities), bureaucratic overload, and simple

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*Case of Torts*, 49 DEPAUL L. REV. 533 (1999).

30. See Adam Liptak, *Judicial Races in Several States Become Partisan Battlegrounds*, N.Y. TIMES, Oct. 24, 2004, § 1 at 1; Justice at Stake Campaign, at <http://www.justiceatstake.org>; Robert S. Peck, *Tort Reform's Threat to an Independent Judiciary*, 33 RUTGERS L.J. 835 (2002); KYLE CHEEK & ANTHONY CHAMPAGNE, JUDICIAL POLITICS IN TEXAS: PARTISANSHIP, MONEY, AND POLITICS IN STATE COURTS (forthcoming).

31. 347 U.S. 483 (1954). See U.S. CONST. Amend. XIII; U.S. CONST. Amend. XIV; U.S. CONST. Amend. XV; Civil Rights Act of 1964, 42 U.S.C.A. § 2000 (1964).

32. For example, California Proposition 187 was aimed against immigrants and California Proposition 209 ended public sector affirmative action. Additionally, many states have recently proposed and enacted laws and constitutional amendments against gay marriage.

33. We know little empirically about the effect of jury instructions or judicial directions to ignore inadmissible evidence. *But see* NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS DAMAGE AWARDS (1995).



indifference can frustrate implementation. For instance, prosecutors are notoriously protective of police, on whom they rely for cases and testimony, and hence reluctant to prosecute misconduct vigorously.<sup>34</sup> Reagan and Bush appointees to the U.S. Civil Rights Commission have restricted civil rights investigations. Similarly, their appointees to the EPA and NLRB have been anti-environmental and anti-labor.<sup>35</sup>

The vast majority of tort claims are based on negligence (and most of the rest on strict liability).<sup>36</sup> Indeed, contemporary American tort law transforms intentional injuries by criminals (who tend to be anonymous and indigent) into negligent injuries by identifiable, solvent entities that might have prevented crimes (prisons, mental hospitals, landlords, retailers, gun manufacturers and sellers).<sup>37</sup> In doing so, it reconceptualizes a civil rights violation as a tort. (By contrast, tribal societies transform what we consider “acts of God” or “inevitable accident” into intentional torts through beliefs in witchcraft and sorcery, which attribute agency to anger and jealousy.)<sup>38</sup> Although torts scholars continue to debate the relative merits and the definition of those two kinds of mens rea, even negligence generally is not that difficult to prove.<sup>39</sup> At the same time, the lower mens rea of most torts entails less moral blame. By contrast, the intent required for most civil rights violations is a major stumbling block to finding culpability, but such a finding carries

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34. See, e.g., Marshall Miller, *Police Brutality*, 17 YALE L. & POL'Y REV. 149, 153 (1998).

35. The Commission blocked publication before the November 2004 election of its report “Redefining Rights in America—The Civil Rights Record of the George W. Bush Administration, 2001–2004.” Michael Janofsky, *Study of Bush and Civil Rights Draws Fire*, N.Y. TIMES, Oct. 13, 2004, at A22.

36. See, e.g., KENNETH A. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 53 (1997).

37. Henry Weinstein, *Slain Postman's Mother Can Sue Weapon Makers*, L.A. TIMES, May 29, 2004, at B1; Fox Butterfield, *Sniper Victims in Settlement With Gun Maker and Dealer*, N.Y. TIMES, Sept. 10, 2004, at A13.

38. E.E. EVANS-PRITCHARD, WITCHCRAFT, ORACLES AND MAGIC AMONG THE AZANDE (1937); M. MARWICK, SORCERY IN ITS SOCIAL SETTING: A STUDY OF THE NORTHERN RHODESIA CEWA! (1965); WITCHCRAFT AND SORCERY IN EAST AFRICA (John Middleton & Edward Henry Winter eds., 1963).

39. But see Joseph H. King, Jr., *A Goals-Oriented Approach to Strict Tort Liability for Abnormally Dangerous Activities*, 48 BAYLOR L. REV. 341, 355 (1996).

greater opprobrium.

While tort is concerned with both actions and consequences, civil rights law is primarily concerned with actions. This has important implications. Tort is torn between its often divergent goals of compensating for consequences and deterring and passing moral judgment on conduct.<sup>40</sup> It addresses both past and future, victim and offender. Is it morally acceptable to impose liability (for purposes of compensation and deterrence) when the defendant's conduct seems innocent (strict liability)? Or to leave unreasonable risk creation uncorrected where it does not result in harm? Is it appropriate to impose damages to deter even when the victim cannot be compensated (loss of enjoyment for a comatose victim)?<sup>41</sup> The imperative of compensation for catastrophic harms may persuade judges and juries to stretch (some would say distort) moral concepts of duty and causation and to demand inefficient levels of care. These tensions contribute to criticism of and distrust for tort. (Doctrines of duty and proximate cause attempt to mediate the tensions, but in an ad hoc and unprincipled fashion.)<sup>42</sup> Because civil rights claims do not seek to compensate the victim, they can focus on deterrence and moral judgment, which are more often congruent.

Perhaps the single most important difference between the two regimes is their remedies. The *only* tort remedy is damages, which strongly motivate both victims and lawyers to sue. (Injunctions are limited to nuisance, really a property claim.) Remedies are individual (even in class actions damages have to be individually calculated, one reason courts increasingly disfavor tort class actions).<sup>43</sup> Juries determine damages, introducing systematic errors (although judges order remittitur and legislatures impose caps).<sup>44</sup> Privilege enhances tort damages; deprivation depresses it. (The opposite tends to be true in civil rights actions, where the most

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40. See, e.g., *DeLoach v. Alfred*, 960 P.2d 628, 632 (Ariz. 1998).

41. *McDougald v. Garber*, 73 N.Y.2d 246 (1989). California business interests successfully backed Proposition 64 on the November 2004 ballot, which amended the Unfair Business Competition Law, passed in 1933, to require a showing of damage.

42. E.g., Richard L. Abel, *Judges Write the Darndest Things: Judicial Mystification of Limitations on Tort Liability*, 80 TEX. L. REV. 1547 (2002).

43. E.g., *Amchen Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

44. Michael Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147 (1992).

vulnerable victims evoke the greatest sympathy.) Unless punitive damages are available, imposed, and sustained on appeal (a tiny fraction of cases),<sup>45</sup> tortfeasors can continue to engage in wrongful conduct as long as they are prepared to pay its costs.<sup>46</sup> (The nineteenth-century Knights of Labor wanted workers to control workplace risk rather than let employers pay trivial amounts of blood money for the right to injure employees; even today some victims are more interested in protecting others from suffering what the victims did than in being compensated.)<sup>47</sup> The U.S. Supreme Court's recent decisions requiring that punitive damages be proportional to compensatory damages subordinate civil rights goals to torts.<sup>48</sup>

Payment perversely expropriates victims' injuries.<sup>49</sup> It commodifies experience: tort damages equate pain and suffering, loss of enjoyment, and impaired relationships with money.<sup>50</sup> For example, the New York workers compensation schedule gives those who lose a big toe 38 weeks wages.<sup>51</sup> Whatever lacks economic value to the living usually goes uncompensated.<sup>52</sup> Damages replace pity with envy and resentment towards those who win the torts lottery. That is one reason why victims of intentional torts are often ambivalent about accepting payment, which might appear to absolve

45. *Id.*; MARK PETERSON ET AL., PUNITIVE DAMAGES: EMPIRICAL FINDINGS (N-2342-ICJ 1985).

46. OLIVER WENDELL HOLMES, *THE PATH OF THE LAW* (1992) (illustrating Holmes's "bad man" theory of law).

47. Jonathan Garlock, *The Knights of Labor Courts: A Case Study of Popular Justice*, in 1 *THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE* 17-34 (Richard L. Abel ed., 1982); Mike Anton, *Shooting Victim Is Outbid for Costa Mesa Gun Maker*, L.A. TIMES, Aug. 13, 2004, at B5; Fox Butterfield, *Teenager Fails In Bid to Buy Gun Maker*, N.Y. TIMES, Aug. 13, 2004, at A12.

48. *E.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 403 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

49. Leslie Eaton, *Grant From 9/11 Victim Fund Is Bittersweet for a Survivor*, N.Y. TIMES, June 4, 2004, at A26; *cf.* Nils Christie, *Conflicts as Property*, 17 BRIT. J. OF CRIMINOLOGY 1 (1977).

50. *See e.g.*, HAW. REV. STAT. ANN. § 633-8.5(a) (Michie 1993).

51. N.Y. WORKERS' COMPENSATION LAW § 15 (McKinney 2004).

52. For example, tort law generally does not compensate for: (1) lost years for the deceased—or even the comatose, which could still be a civil rights violation; and (2) anything other than labor value in workers compensation (e.g., senses of taste and smell, sexual function, reproductive capacity, relationships).

the wrongdoer of guilt.<sup>53</sup>

If wealthy defendants can buy their way out of tort liability, poor (or devious) defendants can simply default. Corporations declare strategic bankruptcy (asbestos, Dalkon shield, Bhopal, etc.).<sup>54</sup> Poorer victims may be more likely to confront judgment-proof defendants: criminals, thinly capitalized fly-by-night employers, manufacturers of Saturday-night specials, unlicensed medical practitioners. Court congestion allows defendants to stall and drive down the price of a settlement.<sup>55</sup> Differences in need for wage replacement and medical care and in coverage by loss insurance may intensify class, race, and gender bias in willingness to accept a low offer.<sup>56</sup> Some defendants seek to propagate a reputation for intransigence: self-insurers like the Magic Kingdom and UCLA; AAA automobile insurance. Settlement (especially if the defendant buys the plaintiff's silence) also frustrates both the victim's desire for public moral vindication and recovery by other mass tort victims. Nevertheless, execution of tort remedies is usually relatively straightforward and quick once judgment is final. There is, however, little reason to believe that damage payments have the desired effect

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53. For example, relatives of those killed in the bombing of the Pan Am plane that crashed at Lockerbie objected to payments by Libya and the reintegration of Muammar Quaddafi into the international community. Some Holocaust victims and their relatives have similar attitudes towards German reparations.

54. Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1 (1996).

55. ALFRED CONARD ET AL., AUTOMOBILE ACCIDENT COSTS AND PAYMENTS: STUDIES IN THE ECONOMICS OF INJURY REPARATION (1964); HAZEL GENN, HARD BARGAINING: OUT OF COURT SETTLEMENT IN PERSONAL INJURY ACTIONS (1987); J. HAMMITT, AUTOMOBILE ACCIDENT COMPENSATION: PAYMENTS BY AUTO INSURERS (1985); J. KAKALIK ET AL., COSTS AND COMPENSATION PAID IN AVIATION ACCIDENT LITIGATION (1988); H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT (2d ed. 1980); Patricia Danzon & Lee Lillard, *Settlement Out of Court: The Disposition of Medical Malpractice Claims*, 12 J. LEGAL STUD. 345 (1983); Marc Franklin et al., *Accidents, Money and the Law: A Study of the Economics of Personal Injury Litigation*, 61 COLUM. L. REV. 1 (1961); Michael Rosenberg & Maurice Sovern, *Delay and the Dynamics of Personal Injury Litigation*, 59 COLUM. L. REV. 1115 (1959); E. KING & J. SMITH, ECONOMIC LOSS AND COMPENSATION IN AVIATION ACCIDENTS (1989).

56. GENN, *supra* note 55; ROSS, *supra* note 55; Hazel Genn, *Who Claims Compensation: Factors Associated with Claiming and Obtaining Damages*, in HARRIS ET AL., *supra* note 24.

of making the tortfeasors safer in the future, much less “optimally” safe (especially in the vast majority of cases where damages are paid by a collectivity rather than the culpable actor). There is even greater reason to be skeptical about the general deterrent effect of tort damages, especially given that most cases are settled, many settlements are sealed, and few of the rare judgments are publicized to potential tortfeasors.<sup>57</sup>

Civil rights actions may award damages, but they also can produce injunctions, special masters, receiverships, and criminal penalties. Unfortunately, damages leave to tortfeasors the decisions of whether and how to change. Judges craft civil rights remedies, which can make recidivism prohibitively expensive. But precisely because of their draconian nature, courts are very reluctant to issue such orders or compel compliance (the most notorious example is the Supreme Court’s “all deliberate speed” qualification in *Brown II*).<sup>58</sup> The civil rights equivalents of tort settlements are consent decrees and plea bargains, in which victims (and government lawyers) relinquish full enforcement of rights in return for greater certainty of success at lower cost. Outcomes tend to be well publicized (which is true of only the largest or most innovative tort judgments or those involving celebrity parties). Remedies are collective rather than individual and strongly normative. They increase public condemnation of wrongdoers rather than eliminating it (demonizing racists like Bull Connor, Orville Faubus, George Wallace) and proclaim, even intensify, sympathy for victims. Violator poverty does not preclude punishment; indeed, it exacerbates the impact of fines.

Unlike civil rights remedies, tort damages are a regressive tax. Some of the costs are paid by consumers (like a sales tax). The tobacco settlements are a perfect example: the hundreds of billions of dollars of damages will be paid by those whom the cigarette manufacturers succeeded in addicting to nicotine—disproportionately poor people of color, increasingly women.<sup>59</sup>

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57. But see Gary Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377 (1994).

58. Steven Yeazell & Theodore Eisenberg, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 464 (1980).

59. See The Oral Cancer Foundation, *Demographics of Tobacco Use*, at [http://www.oralcancerfoundation.org/tobacco/demographics\\_tobacco.htm](http://www.oralcancerfoundation.org/tobacco/demographics_tobacco.htm)

Other costs are paid by liability insurance premiums. When we make liability insurance a condition of automobile registration, the vast majority of owners with low to moderate incomes and relatively inexpensive cars pay to protect the privileged few with high incomes and luxury cars.<sup>60</sup> By contrast, much of the cost of both bringing and satisfying civil rights claims against the state is paid out of taxes, which are at least somewhat more progressive.

A long, well-funded, profoundly duplicitous but unfortunately highly effective propaganda campaign by tort defendants has convinced a large proportion of Americans (and perhaps even more abroad) that plaintiffs' lawyers are parasitic, victims undeserving, tort claims frivolous, damages excessive, and liabilities a serious burden on the economy.<sup>61</sup> It argues by anecdote that medical malpractice insurance premiums drive doctors out of practice, lawsuits force playground closures, and products liability costs American workers jobs.<sup>62</sup> (A particular egregious example is a full-page *New York Times* advertisement by The Club for Growth blaming the flu vaccine shortage on trial lawyers—and John Kerry and John Edwards!)<sup>63</sup> ATLA has replied with a number of public interest campaigns, most recently Trial Lawyers Care: free representation before the 9.11 compensation fund.<sup>64</sup> By contrast, each new assertion of a civil rights claim generally stokes public outrage: Rodney King, Abner Louima, the release of those imprisoned for crimes they did not commit (especially death-row inmates), and the entire history of the African American struggle for equality. Of course, civil rights campaigns can also provoke

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(Jan. 23, 2005).

60. See, e.g., Editorial, *Make Insurance Rates The Same for Rich, Poor*, S.F. CHRON., Mar. 8, 2001.

61. WILLIAM HALTOM & MICHAEL MCCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* 37–55 (2004); Nick Anderson & Edwin Chen, *Bush Pushes Stance Against 'Junk Lawsuits'*, L.A. TIMES, Oct. 22, 2004, at A20.

62. PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (1994); PHILIP K. HOWARD, *THE COLLAPSE OF THE COMMON GOOD: HOW AMERICA'S LAWSUIT CULTURE UNDERMINES OUR FREEDOM* (2002).

63. N.Y. TIMES, Oct. 27, 2004, at A7.

64. Robert S. Peck, *The Victim Compensation Fund: Born from a Unique Confluence of Events Not Likely To Be Duplicated*, 53 DEPAUL L. REV. 209, 225 (2003).

backlash: against affirmative action, feminism (blamed for undermining the family), and “special rights” for gays and lesbians. Still, the public is far more likely to express sympathy for the few Thai immigrants enslaved by a Los Angeles garment factory and skepticism toward the mass of workers who claim compensation for routine injuries suffered in the course of employment.

Torts and civil rights are potentially powerful allies.<sup>65</sup> Tort litigation provides a secure economic base of practice. Victims are numerous, geographically dispersed, and transcend race and class (indeed, the disadvantaged probably are over represented). Expansions of duty and proximate cause and the spread of insurance (often compulsory) ensure the availability of a deep pocket defendant. Unlike government agencies (including prosecutors), plaintiffs’ lawyers and juries are invulnerable to political capture. The vast majority of cases are settled. Remedies are readily executed. The contingent fee amply finances claims, even where liability is uncertain and defendants intransigent and wealthy. Civil rights law, by contrast, confers legitimacy. Causes are noble, victims deserving, and violators vile. Therefore, lawyers can be proactive. Remedies are collective and prospective. Collaboration between torts and civil rights lawyers can only enhance the ability of both to be more vigorous, effective advocates for their clients.

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65. Steven Greenhouse, *Woman Sues Costco, Claiming Sex Bias in Promotions*, N.Y. TIMES, Aug. 18, 2004, at C3 (national class action in which the plaintiffs were represented by Bill Lann Lee, among other lawyers).