[1] Law and Economics

[a] Concepts & Methods

"The Law and Economics movement has established a strong beachhead in law and legal education because it provides a powerful tool for assessing the costs and benefits of a given legal rule or case outcome." BAILEY KULIN & JEFFREY W. STEMPHEL, FOUNDATION OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER 29 (1994). Tort law is largely about reducing the cost of accidents in the most efficient manner possible. "Standard textbooks in economics define the field as the study of resource allocation in the presence of scarcity. Laws affect resource allocation and help to determine what, how, and for whom." DONALD WITTMAN, ECONOMIC FOUNDATIONS OF LAW AND ORGANIZATION 2 (2006).

Tort law determines who bears the burden of an injury and what forms of injury are compensable. TORT LAW IN AMERICAN HISTORY xi (Kermit L. Hall ed. 1987) (stating that the critical question of tort law is, "who would pay for the damages and on what basis — what legal standard — would their responsibility be based"). The twenty-first century tort lawyer needs to be able to make policy-based arguments considering competing perspectives. If you are making an argument before a judge with a law and economics perspective, you may need to consider concepts you studied in your economics class such as Pareto Optimality or Kaldor-Hicks Efficiency. Pareto efficiency is an allocative decision that makes at least one individual better without making any other individual worse off. In contrast, the Kaldor-Hicks compensation principle would define an outcome as efficient if those made better off would compensate those made worse by a given allocative decision. Many economically based models have unrealistic assumptions such as "the parties have perfect information" and "there are no transaction costs." Another criticism is that efficiency leaves considerations of consumer protection, fairness, and distributive justice unaddressed or unduly minimized.

Economics provides an analytical framework to approach many tort law issues. "Tort reformers" use law and economics arguments such as specific cost-containment and efficiency to argue for caps on damages. For an analysis of the role these arguments play in contemporary tort reform battles, see Frank McClellan, Medical Malpractice Law, Morality and the Cultural Wars, A Critical Assessment of the Tort Reform Movement, 27 J. LEGAL MED. 33, 42 (2006).
Law and economics, an interdisciplinary field, applies economic theory to examine the formation as well as impact of tort law and tort damages. Public choice, neoclassical, and game theory are, in turn, competing approaches within law and economics. However, the two most important forms for the study of tort law are positive (descriptive or “what is”) economics or normative (prescriptive or “what should be”) economics. Positivistic economics employs the vocabulary of the scientific method. A judge employing a positive economics perspective will ask what rule of tort law will induce the industry to undertake efficient precautions. Positive economics describes how legal rules influence behavior whereas normative economics prescribes changes that will increase the efficiency of legal rules or institutions. See William M. Landes & Richard Posner, The Economic Structure of Tort Law (1987); see generally Mitchell A. Polinsky, An Introduction to Law and Economics (3d ed. 2003); see also Mitchell A. Polinsky and Steven Shavell (eds.), Handbook of Law and Economics (2006) (discussing basic economic principles and applying the economic principles to legal problems).

“For law-and-economics scholars, deterrence is the primary rationale for torts, easily outstripping corrective justice and compensation.” Michelle M. Mello & Troyen Brennan, Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform, 80 Tex. L. Rev. 1595, 1603 (1995). Guido Calabresi’s The Cost of Accidents: A Legal and Economic Analysis (1970) applied economic analysis to explain the functioning of specific and general deterrence to tort remedies. It is “axiomatic that the principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents.” Id. at 26. Specific deterrence assesses a price to a particular wrongful act whereas general deterrence fulfills the larger function of vindicating the broader societal interest by making wrongful acts more expensive and less attractive to potential wrongdoers. Id. at 26–27. “The idea of punishment or retribution is that it is just for the defendant to suffer for his misconduct. The idea of deterrence is quite different. It is that a sufficient sum should be exacted from the defendant to make repetition of the misconduct unlikely.” Dan B. Dobbs, The Law of Torts § 381, p. 1063 (2000). Personal injury verdicts send the deterrent signal “tort does not pay.” Rookes v. Barnard, [1964] L.R. 28 at 66 (H.L.).

Judge Guido Calabresi, formerly Yale Law School’s Dean and currently a judge on the U.S. Court of Appeals for the Second Circuit, has been a prominent figure in law and economics. He broke new ground with Some Thoughts on Risk Distribution and the Law of Torts, 70 Yale L. J. 499 (1961), by applying economic principles to tort law. Law and economics has become the most influential paradigm of torts scholarship. Judge Calabresi would later expand on his 1961 article’s economic approach to torts in The Cost of Accidents: A Legal and Economic Analysis (1970), developing a framework for analyzing market deterrence on achieving accident law’s primary function of reducing the cost of accidents. Calabresi argued that accident law can best be viewed as a social problem to be cured in the most efficient and optimum way. Id. at 26. Calabresi argues that primary accident losses may be reduced where primary accident costs exceed prevention costs. Id. Furthermore, loss-spreading arrangements reduce secondary losses. Id. at 39–40. Calabresi and Hirsch is propose a search for the cheapest cost-avoider as the sine qua non of strict products liability.
Guido Calabresi & Jon T. Hirschoff, Toward a Test for Strict Liability in Torts, 81 Yale L. J. 1055, 1060 (1972). For example, the manufacturer is usually in the best position to avoid losses in the research laboratory as opposed to the consumer marketplace. Law and economic scholars often view judge-made common law as an attempt to "bring about (economically) efficient results." Richard S. Markovitz, On the Economic Inefficiencies of Liberal-Corrective-Justice-Securing Law of Torts, 2006 U. Ill. L. Rev. 525, 538. Law and economics scholars who determine efficiency on the grounds of wealth maximization have influenced American tort teachers who now focus upon efficiencies, transaction costs, redistributive motives, and indeterminacies.

The more liberal law and economics scholars go far beyond wealth maximization and economic efficiency in their analysis. Judge Calabresi incorporates his economic analysis in his judicial decision-making. See Circolo v. City of New York, 216 F.3d 236, 242 (2d Cir. 2000) (Calabresi, J., concurring). Tort law's capacity to efficiently punish and deter conduct through socially compensatory damages is another economics-based observation central to Calabresi's theory of punitive damages. He reasoned that in many cases, "compensatory damages are...an inaccurate measure of the true harm caused by an activity." Ciralo, 216 F.3d at 244. Judge Calabresi contends that punitive damages in tort law play multiple roles including the enforcement of social norms through private attorney's general, deterrence. Guido Calabresi, The Complexity of Torts — The Case of PunitiveDamages, in Exploring Tort Law 333, 337 (M. Stuart Madden ed. 2005). Judge Calabresi takes issues with law and economics proponents who reduce complex tort rights and remedies to economic efficiency. Id. at 334.

Economists quickly embraced Ronald Coase's theorem that the choice of a specific legal rule did not affect allocative efficiency. Ronald Coase, The Problem of Social Cost, 3 J.L. & Econ. 1 (1960). In order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on. These operations are often extremely costly, sufficiently so to prevent many transactions that would be carried out in a world in which the pricing system worked without costs. Id. at 7.


[2] Corrective Justice

[a] Concepts & Methods

Corrective justice views the goal of tort law to be providing victims with the legal weapons necessary to right wrongs. Of course, tort remedies will seldom be able to restore the plaintiff to the pre-injury situation in the literal sense. While the circumstances that led to the harm might also support a criminal charge, a claim for breach of contract, or other complaint, the torts case focuses
on rights and liabilities that arise although no one promised to pay for the damages and without regard to whether the government could prosecute the actor for a crime.

Corrective justice theory is based on the simple and elegant idea that an injurer who wrongfully injures another must make the injured party whole. This idea of justice presupposes the Aristotelian idea of normative equilibrium. One party wrongfully injuring another disturbs this equilibrium. Corrective justice restores it. Benjamin C. Zipursky, Civil Recourse, Not Corrective Justice, 91 Geo. L.J. 695, 695 (2003).

Aristotle's distinction between voluntary and involuntary harm anticipates modern concepts of negligence. M. Stuart Madden, Tort Law Through Time and Culture: Themes of Economic Efficiency, in EXPLORING TORT LAW 11, 32–33. (M. Stuart Madden ed. 2005). Corrective justice is central to the jurisprudence underlying negligence. See Ernest Weinreb, Corrective Justice in a Nutshell, 52 U. TORONTO L.J. 349, 349 (2002). “For the defendant to be held liable, it is not enough that the defendant's negligent act resulted in harm to the plaintiff. The harm has to be to an interest that has the status of a right, and the defendant's action has to be wrongful with respect to that right.” Id. at 352. Corrective justice posits a correlative relationship between the doer and sufferer of harm. The reason that the plaintiff is entitled to win a torts lawsuit is the same as the reason why the defendant should lose it. Id. Vindicating the moral basis of society through a just verdict is important, not increasing overall societal wealth through promoting economic efficiency.


[a] Concepts & Methods

A growing body of scholarship confirms that race matters when it comes to tort rights and remedies. Critical race theorists argue that the legal system cannot ignore the racial dynamics underlying many cases. Theorists ask practitioners and scholars to acknowledge that, even though national ideals aspire to equality, not all Americans receive equal treatment and opportunities. Furthermore, treating those situated differently in merely an equal manner can produce systematic injustice.

Intersectionality, an analytical tool used by some critical race theorists and others concerned about equality, examines the ways that race, ethnic, economic, and educational factors interact to create and perpetuate oppression and postulates that that more than one axis of oppression may be operating in a given situation. See STEPHANIE M. WILDMAN WITH CONTRIBUTIONS BY MARGALYNNE ARMSTRONG, ADRIENNE D. DAVIS & TRINA GRILLO, PRIVILEGE

The late Jerome Culp, a Black law professor, always introduced himself to his students as the “son of a poor coal miner.” Jerome McCristal Culp, Jr., Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy, 77 Va. L. Rev. 539, 539 (1991). Culp tells of his visit when in college to a white suburb where an elderly white woman “turn(ed) her back and assumed a ‘pseudo-fetal posture’” as Culp and his companion approached. Id. at 552. “She saw us not as the well-dressed black college students that we were, but as mythic black revolutionaries.” Id. Culp asks his class if it would have been as assault if he leaned over and whispered, “Boo.” Id. at 553. He adds that he thought about doing so, but did not. Id. Some students are angry to learn that Culp considered that path. Id. Culp “posed the hypothetical to alter the assumptions that we make about the relationships between people and the tradeoffs imposed by the law.” The story illustrates “how race influences the construction of law and legal doctrine” and that other rules limit Culp and require his self-censorship. Id.

Tort law remedies against the perpetrators of hate crimes illustrate how the civil justice system can serve to supplement the criminal law. Morris Dees, Director of the Southern Poverty Law Center, and others have utilized civil lawsuits as a weapon against organizations that championed racial violence. In 1988, racist thugs in Portland, Oregon beat an Ethiopian man to death with their fists, a baseball bat, and steel-toed boots. The victim, an Avis shuttle bus driver, was inadvertently dropped off in front of his home just as a White Pride gathering was breaking up. Michael L. Rustad, Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers, and Consumers, 48 Rutgers L. Rev. 673, 687 (1996). “A skinhead named Kenneth Mieske came up behind [the victim] with a baseball bat,” striking him repeatedly so violently that his skull was split wide open. James Willwerth Portland, Making War on WAR: An Alabama Civil Rights Advocate Invokes Liability Doctrine in a Bid to Drive a California Racist-Haired Monger Out of Business, TIME, October 22, 1990, at 60. Morris Dees represented the victim’s family and won a $12,475,000 verdict against Tom and John Metzger, the organizers and leaders of the White Aryan Resistance (WAR). WAR was assessed a multi-million dollar punitive damage award because it sent violent racists into the city for the explicit purpose of fomenting racial strife.” Plaintiff Verdict for $12,475,000, NORTHWEST PERSONAL INJURY LITIGATION REPORTS (Dec. 1990) at 1.

The Public Broadcasting Service documentary, Forgotten Fires, depicts the Klan as aiding and abetting a series of arson fires through inflammatory rhetoric, which falsely claimed that black churches were teaching their members how to be welfare cheats. Forgotten Fires, Gripping ITVS Documentary About Black Church Burnings, PR NEWSWIRE (April 26, 1999) at 1. In one of the church fire cases, a South Carolina jury ordered the Klan to pay $37.8 million for conspiring to burn down the Macedonia Baptist Church. The assets of the Klan and some of its leaders were seized and used, in part, to help rebuild the black church. Brad Knickerbocker, Latest Tactic Against Hate Groups: Bankruptcy, CHRISTIAN SCIENCE MONITOR (Aug. 25, 2000) at 1. Criminal law can effectively target the direct perpetrator of violent racist acts but the
organization that promotes racial hatred and encourages violent acts against minorities generally runs little risk of government prosecution.

Tort victims and their lawyers play the role of "private attorneys general" by financing civil lawsuits that uncover and publicize patterns of systematic wrongdoing. Punitive damages are the classic remedy for the private attorney general because the claimant receives a bounty beyond the amount necessary for compensation as a reward for serving the public interest. The private attorney general plays a vital societal role when government enforcement agencies lack the will, expertise, or financial resources to police new social dangers.

Tort law has long been a means of social control against oppressors. In the cases discussed above, the individual racists committing crimes were dealt with on the criminal side of law, but tort damages struck at the organizational roots of evil. Although tort law can be a weapon that can be mobilized to protect racial and cultural minorities, tort law has often fallen short of fulfilling this promise. The modern torts scholar and litigator need to consider the realities of race, class, and gender on tort recovery. Caps on non-economic damages, for example, will typically have a disparate impact on elderly black women who will find it difficult to find representation because they have low imputed earnings. See Frank M. McClellan, The Dark Side of Tort Reform: Searching for Racial Justice, 48 RUTGERS L. REV. 761 (1996).

Few torts classrooms tackle the intersection of gender, class, and race in teaching the topic of intentional torts. Professor Camille Nelson employs traditional intentional tort doctrines such as assault, battery, and negligence-based concepts such as the infliction of nervous shock to construct tort remedies for the mental and physical harms caused by racial abuse. She reconceptualizes the victim of racial hatred as a "thin-skulled" or "egg-shell" claimant. The English case, Dulieu v. White & Sons, [1901] 2 K.B. 669, first articulated the eggshell plaintiff doctrine. In Dulieu, the court observed:

If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury or no injury at all, if he had not had an unusually thin skull or an unusually weak heart.

Dulieu 2 K.B. at 679. The traditional "eggshell plaintiff" rule requires the defendant to take the plaintiff as he finds him.

In racial abuse cases, the hateful defendants must compensate the plaintiff for harm an ordinary person would not have suffered. The victims of racial hatred are especially vulnerable claimants because of the long history of racial violence in this country. Camille A. Nelson, Considering Tortious Racism, 9 DePaul J. HEALTH CARE L. 905, 907–09 (2005). Professor Nelson connects the "racial dots" in traditional tort law, extending the eggshell doctrine to the victims of racism. She reconceptualizes the "leveler of a racial abuse and the orchestrator of racial conduct" as an intentional tortfeasor because they "intentionally inflict harm based upon race — this is usually calculated and premeditated behavior." Id. at 933. She contends that tort remedies for cross burnings and other racial abuse may be predicated upon the special vulnerability of [intended] victims. Id. at 918–919.
C. SIX PERSPECTIVES AND A WELL-KNOWN TORT STORY

Critical race theory offers a great deal of promise to explain the differential injuries experienced by people of color and the often frustrating experiences they have trying to redress their injuries in the civil justice system. Race, as well as social class and gender, matters when it comes to jury selection as well as case selection. Juries undervalue tort claims if people of color are the victims. Insurance companies reduce their settlement offer if a person of color is the tort victim, according to the research and litigator’s experience of Frank McClellan:

People of color usually exercise vigilance to detect and control the impact of racism when they know that white people will participate in decision-making that will affect their lives. Personal experience has demonstrated that race-based assumptions will conspicuously infect decision-making. Tort cases involving “personal” injuries or large money damages present significant risks to clients who are people of color. A substantial risk is that race will trump other considerations affecting the resolution of the dispute in jurisdictions where people of color represent a minority among the judicial decision makers. I believe that we underestimate the extent to which race impacts on the case resolution; most tort cases are resolved through negotiations that occur outside of formal proceedings. In addition, tort principles and rules are value-packed. When we examine the informal process, we must conclude that DuBois’s description of the great American challenge of the twentieth century remains the great American challenge of the twenty-first century. That challenge is reflected in our own tort system as “the problem of the colorline.”


For an in-depth exploration of the ramifications of addressing or ignoring race issues in the development and application of the law, see generally JUAN PEREA, RICHARD DELGADO, ANGELA HARRIS & STEPHANIE WILDMAN, RACE AND RACES: CASES AND MATERIALS FOR A DIVERSE AMERICA 2d ed. (2007).
[4] Critical Feminism

[a] Concepts & Methods

Feminist theory criticizes the misogynistic view of women that characterizes society and advocates the "radical notion" that women are people. Critical feminism makes gender a central focus of inquiry, asking "the woman question." The "woman question" identifies and challenges the omission of women and their needs from the analysis of any societal issue. Critical feminism examines power relationships, making the political visible. The notion that "the personal is political" challenges the public and private dichotomy that characterizes liberal thought.


Social scientists have documented the ways that gender discrimination and sex role socialization track women and men into separate, although overlapping, social and occupational spheres. . .

Many scholars argue that by not taking full account of the manifold differences between males and females, law and the courts are deeply biased against women. . . .

“standard of caring” as an alternative to the “masculine voice of rights and autonomy”.

Contemporary women rely primarily upon tort remedies rather than government regulators to ensure the safety of medical products. Females benefit disproportionately from the liberalization of recovery for reproductive injury in the fields of medical malpractice and products liability. Lucinda Finley found “[r]eproductive or sexual harm caused by drugs and medical devices [have] a disproportionate impact on women because far more drugs and devices have been devised to control women’s fertility or bodily functions associated with sex and childbearing than have been devised for men.” Finley, supra, 64 TENN. L. REV. at 855. Over the past few decades, punitive damages have expanded from punishing intentional torts committed maliciously to controlling reckless product manufacturers and health care providers.

Should it be relevant to a decision maker that only women use the product? For an introduction to feminist legal theory and methodology, see Katharine Bartlett, Cracking Foundations as Feminist Method, 8 AM. U. J. GENDER SOC. POL’Y & L. 31 (1999); Lorena Fries and Veronica Matus, Why Does the Method Matter? 7 AM. U. J. GENDER SOC. POL’Y & L. 291 (1999). For a discussion of gender issues in the specific context of tort law, see Leslie Bender, A Lawyer’s Primer on Feminist Theory and Tort, 38 J. LEGAL EDUC. 3 (1998); Martha Chamallas, Civil Rights in Ordinary Torts Cases: Race, Gender and the Calculation of Economic Loss, 38 LOY. L.A. L. REV. 1435 (2005). Would it be relevant if most of the women using the product were poor and women of color? See DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY (1997). In recent years, some scholars have argued that assessing issues from a feminist perspective must be refined in some contexts to acknowledge differences in the experiences of women as a consequence of race and class. One author observes:

The notion that there is a monolithic “women’s experience” that can be described independent of other facets of experience like race, class, and sexual orientation . . . [may be called] “gender essentialism.” . . . The result of essentialism is to reduce the lives of people who experience multiple forms of oppression to addition problems: “racism + sexism = straight black women’s experience,” or “racism + sexism + homophobia = black lesbian experience.” Thus, in an essentialist world, black women’s experience will always be forcibly fragmented before being subjected to analysis, as those who are “only interested in race” and those who are “only interested in gender” take their separate slices of our lives.


In the twenty-first century, torts scholars are beginning to understand and take into account the role of gender in tort litigation. Empirical research confirms that women as tort claimants receive smaller economic awards for similar injuries because they earn less than men do and spend fewer years in the workplace. See Thomas Koenig & Michael Rustad, His and Her Tort Reform: Gender Injustice in Disguise, 70 WASH. L. REV. 1, 78–79 (1995).
Tort reform's capping of non-economic damages and punitive damages have a disparate negative impact on women's recovery. Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1263 (2004). Without the prospect of non-economic and punitive damages, many grievously injured women will be unable to convince an attorney to take their case. Consequently, from the perspective of critical feminists and critical race theorists, tort reforms that propose limitations on punitive damages are gender and race injustice in disguise.

A proposed federal tort reform capping non-economic damages at $250,000 imposes a regressive tort tax on judgments recovered by women, children, and the elderly. Professor Finley's study also illustrates the importance of non-economic damages for the elderly, who usually have no imputed earnings and relatively insignificant out-of-pocket expenses. *Id.* at 1283. Torts students who will be representing or defending clients in tort litigation need to consider the impact of societal gender roles.

Think about the different views of work and family roles in the cases in this text. Many cases will involve the hidden injuries of race, class gender, and age. Consider whether a legislature adopting a given tort reform is devaluing an identity category by not considering the social reality of that category. For further reading on critical feminism, see Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J. L. & FEMINISM 41, 65–66 (1989); Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47 (1990).
[5] Pragmatism

[a] Concepts and Methods

Pragmatism is a philosophical tradition based on the idea that every concept should be understood in terms of its practical effects. This idea means that every theory should be seen as relating to some particular practice and, more specifically, as a theory that generates implications for the reform of that practice. For example, as Catharine Wells explains:
A pragmatic theory of bridge building should begin by looking at actual practices of bridge construction. The examination of these practices is both descriptive and normative; it is not aimed simply at enumerating the methods of construction, but at determining which methods produce the “best” bridges. And the question — What is the best bridge? — cannot be answered in the abstract; we cannot give the same answer on the first day as we might give after a thousand years of bridge building. Theory and practice evolve together within a context of human purpose and activity; the practice informs the theory while the theory, in turn, informs the practice. Thus, the hallmark of a pragmatic method is its continual reevaluation of practices in the light of the norms that govern them and of the norms in the light of the practices they generate.


From a pragmatic perspective, one of the difficulties with traditional legal theory is that it makes an absolute distinction between fact and value. ‘Thus, for example, it pits the realist ‘is’ against the formalist ‘ought.’ The pragmatist rejects this division and urges instead that every abstract conception should be understood in relation to its consequences for human activity.” *Id.*

Applying this theory to judicial decision making, Wells contrasts “the notion of impersonal decisionmaking — the kind that a computer might do — and situated decisionmaking — the kind that requires a real human agency . . .” *Id.* at 334. Thus, legal judgments occupy a middle ground.

In concluding that legal decision making is inherently situated, Wells urges judges to attend to their situation, recognizing the impossibility of being an impersonal agent in the decisionmaking process, while striving to be fair minded. “Fairness requires that we consider all points of view and this, in turn, requires that we open our minds and our hearts to the viewpoints of others.” *Id.* at 338.

Jean Love, a well-known torts scholar, sums up the promise of pragmatism as follows: “pragmatism offers both the hope of a constructive way of thinking about society’s problems and the hope of a common language.” Jean C. Love, *Afterword: Symposium on the Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1911, 1925 (1990). She explains:

By “common” language I mean two things. First, I mean “common” in the sense of “ordinary.” Pragmatism encourages us to speak in the language of common ordinary people, rather than in the language of metaphysical philosophers. Second, I mean “common” in the sense of “shared.” Pragmatism helps us to talk across our differences by encouraging us to pay attention to context. In one situation, I may play the role of the oppressed — a woman among men, for example. In another situation, I may play the role of the oppressor — a white woman in a predominantly white society, for example.

*Id.* at 1927.


[a] Concepts and Methods

Social justice theorists start from the proposition that tort law remains contested terrain precisely because it is public policy in disguise. Leon Green, Tort Law, Public Law in Disguise, 38 Tex. L. Rev. 257, 269 (1959–60). Tort law not only alleviates “the plight of the injured” but it also furthers the “the cause of social justice.” Thomas H. Koenig & Michael L. Rustad, In Defense of Tort Law 2 (2001) (quoting John G. Fleming, An Introduction to the Law of Torts 1 (1967)). John C. P. Goldberg coined the term “social justice theory” to refer to the work of theorists who view torts as a means of social control over powerful corporate interests.

Goldberg states:

Social justice theorists conceive of tort law as a device for rectifying imbalances in political power. Specifically, they posit that tort concepts
correct for pathologies of interest-group politics. Moneyed interests, particularly corporations, block or distort legislation and capture regulatory agencies designed to monitor and control them. As a result, these interests are able to pursue the self-interest of their executives and shareholders at the expense of the public by producing dangerous products and hiding critical information about their dangerousness. By arming citizens with the power to sue corporations for misconduct outside of the legislative and regulatory process, tort law serves to correct this imbalance of power. In particular, it permits independent judges and especially juries to hold corporate America and other powerful actors accountable. Thus, negligence actions by gunshot victims and public nuisance actions by cities that bear the cost of treating those victims make up for the absence of effective gun control. Likewise, product liability suits restrain pharmaceutical companies from profiteering on dangerous and ineffective drugs. The social justice conception of torts is most closely associated in practice with Ralph Nader. Scholars who have developed this conception further include Richard Abel, Anita Bernstein, Carl Bogus, Thomas Koenig, and Michael Rustad.


The social justice school, as its name suggests, treats torts as a form of social control. It seeks to control corporate misconduct by generating penalties that send a message of deterrence to corporate America. In tort, the citizen can both vindicate his or her own claim to rights against the powerful and act as a private attorney general policing the conduct of those actors. See THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW (2001). “[S]ocial justice theory emphasizes the pivotal role played by damage awards — particularly punitive damage awards — in restraining self-interested corporate conduct. Only punitive damages, social justice theory supposes, can establish that ‘tort does not pay’ by hitting the rich and powerful in the bank account.” Goldberg, *supra*, at 561. The theory of social justice may be seen in tort litigation where private plaintiffs uncovered “smoking gun” documents that revealed that there was an industry-wide conspiracy of asbestos manufacturers to conceal the deadly consequences of unprotected exposure to asbestos dust that destroyed the health of hundreds of thousands of American workers. Social justice theorists stress the importance of private attorney generals because a private citizen “can both vindicate his or her own claim to rights against the powerful and act as a private attorney general policing the conduct of these actors.” *Id.*

Another insight of the social justice theorists is that torts may be instrumental in bringing about social justice because of the “evolving and open-ended nature of tort causes of action, a quality that permits tort plaintiffs to bring to light, and seek remedies for, new forms of domination and exploitation as they emerge.” *Id.* Johns-Manville Corporation, for example, suppressed publications that would have warned the medical community of the risks of asbestos. *Janssens v. Johns-Manville Co.*, 463 So. 2d 242, 249 (Fla. 1984). The company had a policy of not informing employees that x-rays taken by company doctors revealed clear evidence of asbestosis. *Id.* at 263. Johns-Manville executives claimed that their failure to warn workers was motivated by concern for employees so they “can live and work in peace and the company benefit by their many years of experience.” *Id.* at 250. Private attorneys general litigating their claims, rather than public regulators, brought the asbestos problem to light.