PROSSER ON TORTS (4TH ED. 1971) p. 14-16

3. "SOCIAL ENGINEERING"

Perhaps more than any other branch of the law, the law of torts is a battleground of social theory. Its primary purpose, of course, is to make a fair adjustment of the conflicting claims of the litigating parties. But the twentieth century has brought an increasing realization of the fact that the interests of society in general may be involved in disputes in which the parties are private litigants.[14] The notion of "public policy" involved in private cases is not by any means new to tort law,[15] and doubtless has been with us ever since the troops of the sovereign first intervened in a brawl to keep the peace; but it is only in recent decades that it has played a predominant part. Society has some concern even with the single dispute involved in a particular case; but far more important than this is the system of precedent on which the entire common law is based, under which a rule once laid down is to be followed until the courts find good reason to depart from it, so that others now living and even those yet unborn may be affected by a decision made today. There is good reason, therefore, to make a conscious effort to direct the law along lines which will achieve a desirable social result, both for the present and for the future.

Individuals have many interests for which they claim protection from the law, and which the law will recognize as worthy of protection. Various interesting attempts have been made [16] to classify these interests into categories, which of course have no virtue in themselves, and only serve to suggest the wide extent to which the law is concerned with human welfare. Men wish to be secure in their persons against harm and interference, not only as to their physical integrity, but as to their freedom to move about and their peace of mind. They want food and clothing, homes and land and goods, money, automobiles and entertainment, and they want to be secure and free from disturbance in the right to have these things, or to acquire them if they can. They want freedom to work and deal with others, and protection against interference with their private lives, their family relations, and their honor and reputation. They are concerned with freedom of thought and action, with opportunities for economic gain, and with pleasant and advantageous relations with their fellow men. The catalogue of their interests might be as long as the list of legitimate human desires; and not the least of them is the desire to do what they please, without restraint and without undue consideration for the interests and claims of others.

In any society, it is inevitable that these interests shall come into confict. When they do, the primitive man determines who shall prevail with sword and club and tomahawk; and there is recent melancholy evidence that the law of the jungle is not yet departed from the affairs of nations. But in a civilized community, it is the law which is called upon to act as arbiter. The administration of the law becomes a process of weighing the interests for which the plaintiff demands protection against the defendant's claim to untrammeled freedom in the furtherance of his own desires, together with the importance of those desires themselves. When the interest of the public is thrown into the scale and allowed to swing the balance for or against the plaintiff, the result is a form of "social engineering" [17] that deliberately seeks to use the law as an instrument to promote that "greatest happiness of the greatest number," [18] which by common consent is the object of society. This process of "balancing the interests" is by no means peculiar to the law of torts, but it has been carried to its greatest lengths and has received its most general conscious recognition in this field.

The process is not a simple one, and the problems which arise are complex, and seldom easy of solution. It is usually far easier to describe what has been done than to give a clear reason for it, and harder still to predict what the future may hold. It is a simple matter to say that the interests of individuals are to be balanced against one another in the light of those of the general public, but far more difficult to say where the public interest may lie. Most of the writers who have pointed out the process have stopped short of telling us how it is to be done. It is easy to say that the law will require of every man reasonable conduct [19] not unduly harmful to his neighbors; but what is reasonable, and what is undue harm? In determining the limits of the protection to be afforded by the law, the courts have been pulled and hauled by many conflicting considerations,[20] some of them ill defined and seldom expressed at all, no one of which can be said always to control. Often they have had chiefly in mind the justice of the individual case, which may not coincide with the social interest in the long run.[21] If we are to have general rules, and the law is to have no favorites, occasional injustice is inevitable to someone who does not fit into the rule; and the constant struggle is to make the rule sufficiently flexible to allow for the particular circumstances, and yet so rigid that lawyers may predict what the decision may be, and men may guide their conduct by that prediction. It is only by a slow, halting, confused, and often painful progress that any agreement is reached as to the best general rule. Ultimately the law must coincide with public opinion, and cannot stand against it; but when that opinion is in a state of division and flux, it is not surprising that the courts' decisions reflect the battle which is raging about them.

Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (1997)

Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws

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ANTONIN SCALIA

THE FOLLOWING essay attempts to explain the current neglected state of the science of construing legal texts, and offers a few suggestions for improvement. It is addressed not just to lawyers but to all thoughtful Americans who share our national obsession with the law.

THE COMMON LAW

The first year of law school makes an enormous impact upon the mind. Many students remark upon the phenomenon. They experience a sort of intellectual rebirth, the acquisition of a whole new mode of perceiving and thinking. Thereafter, even if they do not yet know much law, they do—as the expression goes—"think like a lawyer."

The overwhelming majority of the courses taught in that first year, and surely the ones that have the most profound effect, teach the substance, and the methodology, of the common law—torts, for example; contracts; property; criminal law.

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American lawyers cut their teeth upon the common law. To understand what an effect that must have, you must appreciate that the common law is not really common law, except insofar as judges can be regarded as common. That is to say, it is not "customary law," or a reflection of the people's practices, but is rather law developed by the judges. Perhaps in the very infancy of Anglo-Saxon law it could have been thought that the courts were mere expositors of generally accepted social practices; and certainly, even in the full maturity of the common law, a well-established commercial or social practice could form the basis for a court's decision. But from an early time—as early as the Year Books, which record English judicial decisions from the end of the thirteenth century to the beginning of the sixteenth—any equivalence between custom and common law had ceased to exist, except in the sense that the doctrine of *stare decisis* rendered prior judicial decisions "custom." The issues coming before the courts involved, more and more, refined questions to which customary practice provided no answer.

Oliver Wendell Holmes's influential book *The Common Law*[1]—which is still suggested reading for entering law students—talks a little bit about Germanic and early English custom. But mostly it talks about individual court decisions, and about the judges, famous and obscure, who wrote them: Chief Justice Choke, Doderidge, J., Lord Holt, Redfield, C.J., Rolle, C.J., Hankford, J., Baron Parke, Lord Ellenborough, Peryam, C.B., Brett, J., Cockburn, C.J., Popham, C.J., Hyde, C.J., and on and on and on. Holmes's book is a paean to reason, and to the men who brought that faculty to bear in order to *create* Anglo-American law.

This is the image of the law—the common law—to which an aspiring American lawyer is first exposed, even if he has not read Holmes over the previous summer as he was supposed to. He learns the law, not by reading statutes that promulgate it or treatises that summarize it, but rather by studying the judicial opinions that invented it. This is the famous case-law method,

[1] Oliver Wendell Holmes, Jr., *The Common Law* (1881).

pioneered by Harvard Law School in the last century, and brought to movies and TV by the redoubtable Professor Kingsfield of *Love Story* and *The Paper Chase*. The student is directed to read a series of cases, set forth in a text called a "casebook," designed to show how the law developed. In the field of contracts, for example, he reads, and discusses in class, the famous old case of *Hadley* v. *Baxendale*,[2] decided a century and a half ago by the English Court of Exchequer: A mill in Gloucester ground to a halt (so to speak) because of a cracked crankshaft. To get a new one made, it was necessary to send the old one, as a model, to the manufacturer of the mill's steam engine, in Greenwich. The miller sent one of his workers to a carrier's office to see how long the delivery would take; the worker told the carrier's clerk that the mill was stopped, and that the shaft must be sent immediately. The clerk replied that if the shaft was received by noon, it would be delivered the next day. The miller presented the shaft to the carrier before noon the next day and paid the fee have it transported; but because of the carrier's neglect it was delivered several days late, with the result that several additional days passed before the mill got back into service. The miller sought, as damages for breach of the shipping contract, his lost profits for those days, which were of course many times what the carrier had received as the shipping charge. The carrier said that he was not liable for such remote consequences.

Now this was a fairly subtle and refined point of law. As was the case with most legal points that became the subject of litigation, it could not really be said that there existed a general practice that the court could impose as common, customary law. The court decided, essentially, that the carrier was right, laying down the very important rule, that in a suit for breach of contract not *all* damages suffered because of the breach can be recovered, but only those that "could have been fairly and reasonably contemplated by both the parties when they made [the] contract." The opinion contains some policy reasons for that result, citation of a few earlier opinions by English courts, and

[2] 9 Ex. 341, 156 Eng. Rep. 145 (1854).

citation of not a single snippet of statutory law—though counsel arguing the case did bring to the court's attention the disposition set forth in the French Civil Code. For there *was* no relevant English statutory law; contract law was almost entirely the creation and domain of English judges.

I must interject at this point that even according to the new rule—that only reasonably foreseeable damages are recoverable—the miller rather than the carrier *should* have won the case. The court's opinion simply overlooks the fact that the carrier was *informed* that the mill was stopped; it must have been quite clear to the carrier's clerk that restarting the mill was the reason for the haste, and that profits would be lost while the mill was idle. But if you think it is terribly important that the case came out wrong, you miss the point of the common law. In the grand scheme of things, whether the right party won is really secondary. Famous old cases are famous, you see, not because they came out right, but because the rule of law they announced was the intelligent one. Common-law courts performed two functions: One was to apply the law to the facts. All adjudicators—French judges, arbitrators, even baseball umpires and football referees—do that. But the second function, and the more important one, was to *make* the law.

If you were sitting in on Professor Kingsfield's class when *Hadley* v. *Baxendale* was the assigned reading, you would find that the class discussion would not end with the mere description and dissection of the opinion. Various "hypotheticals" would be proposed by the crusty (yet, under it all, goodhearted) old professor, testing the validity and the sufficiency of the "foreseeability" rule. What if, for example, you are a blacksmith, and a young knight rides up on a horse that has thrown a shoe. He tells you he is returning to his ancestral estate, Blackacre, which he must reach that very evening to claim his inheritance, or else it will go to his wicked, no-good cousin, the sheriff of Nottingham. You contract to put on a new shoe, for the going rate of three farthings. The shoe is defective, or is badly shod, the horse goes lame, and the knight reaches Blackacre too late.

Are you really liable for the full amount of his inheritance? Is it reasonable to impose that degree of liability for three farthings? Would not the parties have set a different price if liability of that amount had been contemplated? Ought there not to be, in other words, some limiting principle to damages beyond mere foreseeability? Indeed, might not that principle—call it presumed assumption of risk—explain why *Hadley* v. *Baxendale* reached the right result after all, though not for the precise reason it assigned?

What intellectual fun all of this is! It explains why first-year law school is so exhilarating: because it consists of playing common-law judge, which in turn consists of playing king—devising, out of the brilliance of one's own mind, those laws that ought to govern mankind. How exciting! And no wonder so many law students, having drunk at this intoxicating well, aspire for the rest of their lives to be judges!

Besides the ability to think about, and devise, the "best" leg-' rule, there is another skill imparted in the first year of la school that is essential to the making of a good common-la judge. It is the technique of what is called "distinguishin cases. That is a necessary skill, because an absolute prerequisite to common-law lawmaking is the doctrine of *stare decisis*—that is, the principle that a decision made in one case will be followed in the next. Quite obviously, without such a principle common-law courts would not be making any "law"; they would just be resolving the particular dispute before them. It is the requirement that future courts adhere to the principle underlying a judicial decision which causes that decision to be a legal rule. (There is no such requirement in the civil-law system, where it is the text of the law rather than any prior judicial interpretation of that text which is authoritative. Prior judicial opinions are consulted for their persuasive effect, much as academic commentary would be; but they are not *binding*.)

Within such a precedent-bound common-law system, it is critical for the lawyer, or the judge, to establish whether the case at hand falls within a principle that has already been decided.

Hence the technique—or the art, or the game—of "distinguishing" earlier cases. It is an art or a game, rather than a science, because what constitutes the "holding" of an earlier case is not well defined and can be adjusted to suit the occasion. At its broadest, the holding of a case can be said to be the analytical principle that produced the judgment—in *Hadley* v. *Baxendale*, for example, the principle that damages for breach of contract must be foreseeable. In the narrowest sense, however (and courts will squint narrowly when they wish to avoid an earlier decision), the holding of a case cannot go beyond the facts that were before the court. Assume, for example, that a painter contracts with me to paint my house green and paints it instead a god-awful puce. And assume that not I, but my *neighbor*, sues the painter for this breach of contract. The court would dismiss the suit on the ground that (in legal terminology) there was no "privity of contract": the contract was between the painter and *me*, not between the painter and my neighbor.[3] Assume, however, a later case in which a company contracts with me to repair my home computer; it does a bad job, and as a consequence my wife loses valuable files she has stored in the computer. *She* sues the computer company. Now the broad rationale of the earlier case (no suit will lie where there is no privity of contract) would dictate dismissal of this complaint as well. But a good common-law lawyer would argue, and some good common-law judges have held, that that rationale does not extend to this *new* fact situation, in which the breach of a contract relating to something used in the home harms a family member, though not the one who made the contract.[4] The earlier case, in other words, is "distinguishable."

It should be apparent that by reason of the doctrine of *stare decisis*, as limited by the principle I have just described, the common law grew in a peculiar fashion—rather like a Scrabble board. No rule of decision previously announced could be *erased*, but qualifications could be *added* to it. The first case lays

[3] *See, e.g.*, Monahan v. Town of Methuen, 558 N.E. 2d 951, 957 (Mass. 1990).

[4] *See, e.g.*, Grodstein v. McGivern, 154 A. 794 (Pa. 1931).

on the board: "No liability for breach of contractual duty without privity"; the next player adds "unless injured party is member of household." And the game continues.

As I have described, this system of making law by judicial opinion, and making law by distinguishing earlier cases, is what every American law student, every newborn American lawyer, first sees when he opens his eyes. And the impression remains for life. His image of the great judge—the Holmes, the Cardozo—is the man (or woman) who has the intelligence to discern the best rule of law for the case at hand and then the skill to perform the broken-field running through earlier cases that leaves him free to impose that rule: distinguishing one prior case on the left, straight-arming another one on the right, high-stepping away from another precedent about to tackle him from the rear, until (bravo!) he reaches the goal—good law. That image of the great judge remains with the former law student when he himself becomes a judge, and thus the common-law tradition is passed on.

DEMOCRATIC LEGISLATION

All of this would be an unqualified good, were it not for a trend in government that has developed in recent centuries, called democracy. In most countries, judges are no longer agents of the king, for there are no kings. In England, I suppose they can be regarded as in a sense agents of the legislature, since the Supreme Court of England is theoretically the House of Lords. That was once the system in the American colonies as well; the legislature of Massachusetts is still honorifically called the General Court of Massachusetts. But the highest body of Massachusetts judges is called the Supreme Judicial Court, because at about the time of the founding of our federal republic this country embraced the governmental principle of separation of powers.[5] That doctrine is praised, as the cornerstone of the

[5] *See* Plaut v. Spendthrift Farms, Inc., 115 S. Ct. 1447, 1453–56 (1995).

proposed federal Constitution, in *The Federalist* No. 47. Consider the compatibility of what Madison says in that number with the ancient system of lawmaking by judges. Madison quotes Montesquieu (approvingly) as follows: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul, for *the judge* would then be *the legislator*."[6] I do not suggest that Madison was saying that common-law lawmaking violated the separation of powers. He wrote in an era when the prevailing image of the common law was that of a preexisting body of rules, uniform throughout the nation (rather than different from state to state), that judges merely "discovered" rather than created. It is only in this century, with the rise of legal realism, that we came to acknowledge that judges in fact "make" the common law, and that each state has its own.

I do suggest, however, that once we have taken this realistic view of what common-law courts do, the uncomfortable relationship of common-law lawmaking to democracy (if not to the technical doctrine of the separation of powers) becomes apparent. Indeed, that was evident to many even before legal realism carried the day. It was one of the principal motivations behind the law-codification movement of the nineteenth century, associated most prominently with the name of David Dudley Field, but espoused by many other avid reformers as well. Consider what one of them, Robert Rantoul, had to say in a Fourth-of-July address in Scituate, Massachusetts, in 1836:

> Judge-made law is ex post facto law, and therefore unjust. An act is not forbidden by the statute law, but it becomes void by judicial construction. The legislature could not effect this, for the Constitution forbids it. The judiciary shall not usurp legislative power, says the Bill of Rights: yet it not only usurps, but runs riot beyond the confines of legislative power.

[6] *The Federalist* No. 47, at 326 (James Madison) (Jacob E. Cooke ed., 1961) (emphasis in original). The reference is to Montesquieu, 1 *The Spirit of the Laws* 152 (Thomas Nugent trans., Hafner Pub. Co., N.Y. 1949).

> Judge-made law is special legislation. The judge is human, and feels the bias which the coloring of the particular case gives. If he wishes to decide the next case differently, he has only to distinguish, and thereby make a new law. The legislature must act on general views, and prescribe at once for a whole class of cases.[7]

This is just by way of getting warmed up. Rantoul continues, after observing that the common law "has been called the perfection of human reason":

> The Common Law is the perfection of human reason,—just as alcohol is the perfection of sugar. The subtle spirit of the Common Law is reason double distilled, till what was wholesome and nutritive becomes rank poison. Reason is sweet and pleasant to the unsophisticated intellect; but this sublimated perversion of reason bewilders, and perplexes, and plunges its victims into mazes of error.
>
> The judge makes law, by extorting from precedents something which they do not contain. He extends his precedents, which were themselves the extension of others, till, by this accommodating principle, a whole system of law is built up without the authority or interference of the legislator.[8]

The nineteenth-century codification movement espoused by Rantoul and Field was generally opposed by the bar, and hence did not achieve substantial success, except in one field: civil procedure, the law governing the trial of civil cases.[9] (I have always found it curious, by the way, that the only field in which lawyers and judges were willing to abandon judicial lawmaking

[7] Robert Rantoul, Oration at Scituate (July 4, 1836), *in* Kermit L. Hall et al., *American Legal History* 317, 317–18 (1991).

[8] *Id.* at 318.

[9] The country's first major code of civil procedure, known as the Field Code (after David Dudley Field, who played a major role in its enactment), was passed in New York in 1848. By the end of the nineteenth century, similar codes had been adopted in many states. *See* Lawrence M. Friedman, *A History of American Law* 340–47 (1973).

was a field important to nobody except litigants, lawyers, and judges. Civil procedure used to be the *only* statutory course taught in first-year law school.) Today, generally speaking, the old private-law fields—contracts, torts, property, trusts and estates, family law—remain firmly within the control of state common-law courts.[10] Indeed, it is probably true that in these fields judicial lawmaking can be more freewheeling than ever, since the doctrine of *stare decisis* has appreciably eroded. Prior decisions that even the cleverest mind cannot distinguish can nowadays simply be overruled.

My point in all of this is not that the common law should be scraped away as a barnacle on the hull of democracy. I am content to leave the common law, and the process of developing the common law, where it is. It has proven to be a good method of developing the law in many fields—and perhaps the very best method. An argument can be made that development of the bulk of private law by judges (a natural aristocracy, as Madison accurately portrayed them)[11] is a desirable limitation upon popular democracy. Or as the point was more delicately put in the late nineteenth century by James C. Carter of New York, one of the ardent opponents of Field's codification projects, "the question is, shall this growth, development and improvement of the law remain under the guidance of men selected by the people on account of their special qualifications for the work" (i.e., judges) or "be transferred to a numerous legislative body, dis-

[10] The principal exception to this statement consists of so-called Uniform Laws, statutes enacted in virtually identical form by all or a large majority of state legislatures, in an effort to achieve nationwide uniformity with respect to certain aspects of some common-law fields. *See, e.g.*, Uniform Commercial Code, 1 U.L.A. 5 (1989); Uniform Marriage and Divorce Act 9A U.L.A. 156 (1987); Uniform Consumer Credit Code, 7A U.L.A. 17 (1985).

[11] "The [members of the judiciary department], by the mode of their appointment, as well as by the nature and permanency of it, are too far removed from the people to share much in their prepossessions." *The Federalist* No. 49, at 341 (Jacob E. Cooke ed., 1961).

qualified by the nature of their duties for the discharge of this supreme function?"[12]

But though I have no quarrel with the common law and its process, I do question whether the *attitude* of the common-law judge—the mind-set that asks, "What is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?"—is appropriate for most of the work that I do, and much of the work that state judges do. We live in an age of legislation, and most new law is statutory law. As one legal historian has put it, in modern times "the main business of government, and therefore of law, [is] legislative and executive. . . . Even private law, so-called, [has been] turning statutory. The lion's share of the norms and rules that actually govern[] the country [come] out of Congress and the legislatures. . . . The rules of the countless administrative agencies [are] themselves an important, even crucial, source of law."[13] This is particularly true in the federal courts, where, with a qualification so small it does not bear mentioning, there is no such thing as common law. Every issue of law resolved by a federal judge involves interpretation of text—the text of a regulation, or of a statute, or of the Constitution. Let me put the Constitution to one side for the time being, since many believe that that document is in effect a charter for judges to develop an evolving common law of freedom of speech, of privacy rights, and the like. I think that is wrong—indeed, as I shall discuss below, I think it frustrates the whole purpose of a written constitution. But we need not pause to debate that point now, since a very small proportion of judges' work is constitutional interpretation in any event. (Even in the Supreme Court, I would estimate that well less than a fifth of the issues we confront are constitutional issues—and probably less than a twentieth if you exclude criminal-law cases.) By far the greatest part of what I

[12] James C. Carter, *The Proposed Codification of Our Common Law* 87 (New York: Evening Post Printing Office 1884).

[13] Friedman, *supra* note 9, at 590.

and all federal judges do is to interpret the meaning of federal statutes and federal agency regulations. Thus the subject of statutory interpretation deserves study and attention in its own right, as the principal business of judges and (hence) lawyers. It will not do to treat the enterprise as simply an inconvenient modern add-on to the judge's primary role of common-law lawmaker. Indeed, attacking the enterprise with the Mr. Fix-it mentality of the common-law judge is a sure recipe for incompetence and usurpation.

But the Great Divide with regard to constitutional interpretation is not that between Framers' intent and objective meaning, but rather that between *original* meaning (whether derived from Framers' intent or not) and *current* meaning. The ascendant school of constitutional interpretation affirms the existence of what is called The Living Constitution, a body of law that (unlike normal statutes) grows and changes from age to age, in order to meet the needs of a changing society. And it is the judges who determine those needs and "find" that changing law. Seems familiar, doesn't it? Yes, it is the common law returned, but infinitely more powerful than what the old common law ever pretended to be, for now it trumps even the statutes of democratic legislatures. Recall the words I quoted earlier from the Fourth-of-July speech of the avid codifier Robert Rantoul:

"The judge makes law, by extorting from precedents something which they do not contain. He extends his precedents, which were themselves the extension of others, till, by this accommodating principle, a whole system of law is built up without the authority or interference of the legislator."[48] Substitute the word "people" for "legislator," and it is a perfect description of what modern American courts have done with the Constitution.

If you go into a constitutional law class, or study a constitutional law casebook, or read a brief filed in a constitutional law case, you will rarely find the discussion addressed to the text of the constitutional provision that is at issue, or to the question of what was the originally understood or even the originally intended meaning of that text. The starting point of the analysis will be Supreme Court cases, and the new issue will presumptively be decided according to the logic that those cases expressed, with no regard for how far that logic, thus extended, has distanced us from the original text and understanding. Worse still, however, it is known and understood that if that logic fails to produce what in the view of the current Supreme Court is the *desirable* result for the case at hand, then, like good common-law judges, the Court will distinguish its precedents, or narrow them, or if all else fails overrule them, in order that the Constitution might mean what it *ought* to mean. Should there be—to take one of the less controversial examples—a constitutional right to die? If so, there is.[49] Should there be a constitutional right to reclaim a biological child put out for adoption by the other parent? Again, if so, there is.[50] If it is good, it is so. Never mind the text that we are supposedly construing; we will smuggle these new rights in, if all else fails, under the Due Process Clause (which, as I have described, is textually incapable of containing them). Moreover, what the Constitution meant

[48] Rantoul, *supra* note 7, at 318.

[49] *See* Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 279 (1990).

[50] *See In re* Kirchner, 649 N.E.2d 324, 333 (Ill.), *cert. denied*, 115 S. Ct. 2599 (1995).

yesterday it does not necessarily mean today. As our opinions say in the context of our Eighth Amendment jurisprudence (the Cruel and Unusual Punishments Clause), its meaning changes to reflect "the evolving standards of decency that mark the progress of a maturing society."[51]

This is preeminently a common-law way of making law, and not the way of construing a democratically adopted text. I mentioned earlier a famous English treatise on statutory construction called *Dwarris on Statutes*. The fourth of Dwarris's Maxims was as follows: "An act of Parliament cannot alter by reason of time; but the common law may, since *cessante ratione cessat lex*."[52] This remains (however much it may sometimes be evaded) the formally enunciated rule for statutory construction: statutes do not change. Proposals for "dynamic statutory construction," such as those of Judge Calabresi and Professor Eskridge, are concededly avant-garde. The Constitution, however, even though a democratically adopted text, we formally treat like the common law. What, it is fair to ask, is the justification for doing so?

One would suppose that the rule that a text does not change would apply a fortiori to a constitution. If courts felt too much bound by the democratic process to tinker with statutes, when their tinkering could be adjusted by the legislature, how much more should they feel bound not to tinker with a constitution, when their tinkering is virtually irreparable. It certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away. A society that adopts a bill of rights is skeptical that "evolving standards of decency" always "mark progress," and that societies always "mature," as opposed to

[51] Rhodes v. Chapman, 452 U.S. 337, 346 (1981), quoting from Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

[52] Fortunatus Dwarris, *A General Treatise on Statutes, with American Notes and Additions by Platt Potter* 122 (Albany, N.Y. 1871).

rot. Neither the text of such a document nor the intent of its framers (whichever you choose) can possibly lead to the conclusion that its only effect is to take the power of changing rights away from the legislature and give it to the courts.

FLEXIBILITY AND LIBERALITY OF THE LIVING CONSTITUTION

The argument most frequently made in favor of The Living Constitution is a pragmatic one: Such an evolutionary appoach is necessary in order to provide the "flexibility" that a changing society requires; the Constitution would have snapped if it had not been permitted to bend and grow. This might be a persuasive argument if most of the "growing" that the proponents of this approach have brought upon us in the past, and are determined to bring upon us in the future, were the *elimination* of restrictions upon democratic government. But just the opposite is true. Historically, and particularly in the past thirty-five years, the "evolving" Constitution has imposed a vast array of new constraints—new inflexibilities—upon administrative, judicial, and legislative action. To mention only a few things that formerly could be done or not done, as the society desired, but now cannot be done:

- admitting in a state criminal trial evidence of guilt that was obtained by an unlawful search;[53]
- permitting invocation of God at public-school graduations;[54]
- electing one of the two houses of a state legislature the way the United States Senate is elected, i.e., on a basis that does not give all voters numerically equal representation;[55]
- terminating welfare payments as soon as evidence of fraud is

[53] *See* Mapp v. Ohio, 367 U.S. 643 (1961).

[54] *See* Lee v. Weisman, 505 U.S. 577 (1992).

[55] *See* Reynolds v. Sims, 377 U.S. 533 (1964).

received, subject to restoration after hearing if the evidence is satisfactorily refuted;[56]

- imposing property requirements as a condition of voting;[57]
- prohibiting anonymous campaign literature;[58]
- prohibiting pornography.[59]

And the future agenda of constitutional evolutionists is mostly more of the same—the creation of *new* restrictions upon democratic government, rather than the elimination of old ones. *Less* flexibility in government, not *more*. As things now stand, the state and federal governments may either apply capital punishment or abolish it, permit suicide or forbid it—all as the changing times and the changing sentiments of society may demand. But when capital punishment is held to violate the Eighth Amendment, and suicide is held to be protected by the Fourteenth Amendment, all flexibility with regard to those matters will be gone. No, the reality of the matter is that, generally speaking, devotees of The Living Constitution do not seek to facilitate social change but to prevent it.

There are, I must admit, a few exceptions to that—a few instances in which, historically, greater flexibility has been the result of the process. But those exceptions serve only to refute another argument of the proponents of an evolving Constitution, that evolution will always be in the direction of greater personal liberty. (They consider that a great advantage, for reasons that I do not entirely understand. All government represents a balance between individual freedom and social order, and it is not true that every alteration of that balance in the direction of greater individual freedom is necessarily good.) But in any case,

[56] *See* Goldberg v. Kelly, 397 U.S. 254 (1970).

[57] *See* Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969).

[58] *See* McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511 (1995).

[59] Under current doctrine, pornography may be banned only if it is "obscene," *see* Miller v. California, 413 U.S. 15 (1973), a judicially crafted term of art that does not embrace material that excites "normal, healthy sexual desires," Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498 (1985).

the record of history refutes the proposition that the evolving Constitution will invariably enlarge individual rights. The most obvious refutation is the modern Court's limitation of the constitutional protections afforded to property. The provision prohibiting impairment of the obligation of contracts, for example, has been gutted.[60] I am sure that We the People agree with that development; we value property rights less than the Founders did. So also, we value the right to bear arms less than did the Founders (who thought the right of self-defense to be absolutely fundamental), and there will be few tears shed if and when the Second Amendment is held to guarantee nothing more than the state National Guard. But this just shows that the Founders were right when they feared that some (in their view misguided) future generation might wish to abandon liberties that they considered essential, and so sought to protect those liberties in a Bill of Rights. We may *like* the abridgment of property rights and *like* the elimination of the right to bear arms; but let us not pretend that these are not *reductions* of *rights*.

Or if property rights are too cold to arouse enthusiasm, and the right to bear arms too dangerous, let me give another example: Several terms ago a case came before the Supreme Court involving a prosecution for sexual abuse of a young child. The trial court found that the child would be too frightened to testify in the presence of the (presumed) abuser, and so, pursuant to state law, she was permitted to testify with only the prosecutor and defense counsel present, with the defendant, the judge, and the jury watching over closed-circuit television. A reasonable enough procedure, and it was held to be constitutional by my Court.[61] I dissented, because the Sixth Amendment provides that "[i]n *all* criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him" (emphasis added). There is no doubt what confrontation meant—or indeed means today. It means face-to-face, not watching from

[60] *See* Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

[61] *See* Maryland v. Craig, 497 U.S. 836 (1990).

another room. And there is no doubt what one of the major purposes of that provision was: to induce *precisely* that pressure upon the witness which the little girl found it difficult to endure. It is difficult to accuse someone to his face, particularly when you are lying. Now no extrinsic factors have changed since that provision was adopted in 1791. Sexual abuse existed then, as it does now; little children were more easily upset than adults, then as now; a means of placing the defendant out of sight of the witness existed then as now (a screen could easily have been erected that would enable the defendant to see the witness, but not the witness the defendant). But the Sixth Amendment nonetheless gave *all* criminal defendants the right to *confront* the witnesses against them, because that was thought to be an important protection. The only significant things that *have* changed, I think, are the society's sensitivity to so-called psychic trauma (which is what we are told the child witness in such a situation suffers) and the society's assessment of where the proper balance ought to be struck between the two extremes of a procedure that assures convicting 100 percent of all child abusers, and a procedure that assures acquitting 100 percent of those falsely accused of child abuse. I have no doubt that the society is, as a whole, happy and pleased with what my Court decided. But we should not pretend that the decision did not *eliminate* a liberty that previously existed.

LACK OF A GUIDING PRINCIPLE FOR EVOLUTION

My pointing out that the American people may be satisfied with a reduction of their liberties should not be taken as a suggestion that the proponents of The Living Constitution *follow* the desires of the American people in determining how the Constitution should evolve. They follow nothing so precise; indeed, as a group they follow nothing at all. Perhaps the most glaring defect of Living Constitutionalism, next to its incompatibility with the whole antievolutionary purpose of a constitution, is that

there is no agreement, and no chance of agreement, upon what is to be the guiding principle of the evolution. *Panta rei* is not a sufficiently informative principle of constitutional interpretation. What is it that the judge must consult to determine when, and in what direction, evolution has occurred? Is it the will of the majority, discerned from newspapers, radio talk shows, public opinion polls, and chats at the country club? Is it the philosophy of Hume, or of John Rawls, or of John Stuart Mill, or of Aristotle? As soon as the discussion goes beyond the issue of whether the Constitution is static, the evolutionists divide into as many camps as there are individual views of the good, the true, and the beautiful. I think that is inevitably so, which means that evolutionism is simply not a practicable constitutional philosophy.

I do not suggest, mind you, that originalists always agree upon their answer. There is plenty of room for disagreement as to what original meaning was, and even more as to how that original meaning applies to the situation before the court. But the originalist at least knows what he is looking for: the original meaning of the text. Often—indeed, I dare say usually—that is easy to discern and simple to apply. Sometimes (though not very often) there will be disagreement regarding the original meaning; and sometimes there will be disagreement as to how that original meaning applies to new and unforeseen phenomena. How, for example, does the First Amendment guarantee of "the freedom of speech" apply to new technologies that did not exist when the guarantee was created—to sound trucks, or to government-licensed over-the-air television? In such new fields the Court must follow the trajectory of the First Amendment, so to speak, to determine what it requires—and assuredly that enterprise is not entirely cut-and-dried but requires the exercise of judgment.

But the difficulties and uncertainties of determining original meaning and applying it to modern circumstances are negligible compared with the difficulties and uncertainties of the philosophy which says that the Constitution *changes*; that the very act which it once prohibited it now permits, and which it once permitted it now forbids; and that the key to that change is unknown and unknowable. The originalist, if he does not have all the answers, has many of them. The Confrontation Clause, for example, requires confrontation. For the evolutionist, on the other hand, every question is an open question, every day a new day. No fewer than three of the Justices with whom I have served have maintained that the death penalty is unconstitutional,[62] *even though its use is explicitly contemplated in the Constitution*. The Due Process Clause of the Fifth and Fourteenth Amendments says that no person shall be deprived of life without due process of law; and the Grand Jury Clause of the Fifth Amendment says that no person shall be held to answer for a capital crime without grand jury indictment. No matter. Under The Living Constitution the death penalty may have *become* unconstitutional. And it is up to each Justice to decide for himself (under no standard I can discern) when that occurs.

In the last analysis, however, it probably does not matter what principle, among the innumerable possibilities, the evolutionist proposes to determine in what direction The Living Constitution will grow. Whatever he might propose, at the end of the day an evolving constitution will evolve the way the majority wishes. The people will be willing to leave interpretation of the Constitution to lawyers and law courts so long as the people believe that it is (like the interpretation of a statute) essentially lawyers' work—requiring a close examination of text, history of the text, traditional understanding of the text, judicial precedent, and so forth. But if the people come to believe that the Constitution is *not* a text like other texts; that it means, not what it says or what it was understood to mean, but what it *should* mean, in light of the "evolving standards of decency that mark the progress of a maturing society"—well, then, they will look

[62] *See* Gregg v. Georgia, 428 U.S. 153, 227 (1976) (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting); Callins v. Collins, 114 S. Ct. 1127, 1128 (1994) (Blackmun, J., dissenting from denial of certiorari).

for qualifications other than impartiality, judgment, and lawyerly acumen in those whom they select to interpret it. More specifically, they will look for judges who agree with *them* as to what the evolving standards have evolved to; who agree with *them* as to what the Constitution *ought* to be.

It seems to me that that is where we are heading, or perhaps even where we have arrived. Seventy-five years ago, we believed firmly enough in a rock-solid, unchanging Constitution that we felt it necessary to adopt the Nineteenth Amendment to give women the vote. The battle was not fought in the courts, and few thought that it could be, despite the constitutional guarantee of Equal Protection of the Laws; that provision did not, when it was adopted, and hence did not in 1920, guarantee equal access to the ballot but permitted distinctions on the basis not only of age but of property and of sex. Who can doubt that if the issue had been deferred until today, the Constitution would be (formally) unamended, and the courts would be the chosen instrumentality of change? The American people have been converted to belief in The Living Constitution, a "morphing" document that means, from age to age, what it ought to mean. And with that conversion has inevitably come the new phenomenon of selecting and confirming federal judges, at all levels, on the basis of their views regarding a whole series of proposals for constitutional evolution. If the courts are free to write the Constitution anew, they will, by God, write it the way the majority wants; the appointment and confirmation process will see to that. This, of course, is the end of the Bill of Rights, whose meaning will be committed to the very body it was meant to protect against: the majority. By trying to make the Constitution do everything that needs doing from age to age, we shall have caused it to do nothing at all.

SECOND RESTATEMENT OF TORTS

§ 766. Intentional Interference with Performance of Contract by Third Person

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Green, Pedrick, Rahl, Thode, Hawkins, Smith & Treece, Cases on the Law of Torts (2nd ed. 1977)

TRADE RELATIONS

Introductory Note

It is a basic assumption of Anglo-American society that a person has a *right* to engage in any trade or business not forbidden by formal law. Freedom of enterprise is an economic liberty which is deeply imbedded in the concepts of civil rights of a democratic society. Most people live by their enterprise, and reasonable protection of their means of material livelihood may be as important as protection of the physical integrity of their person and property.

The purpose of this chapter is to explore the question of what kind of protection the law affords to the right to carry on trade, and against what kinds of harms and risks it will be protected. The person and property of the trader are given full protection under orthodox theories and processes; no special analysis is needed as to these interests, for the trader is in the same position as any other person in these respects. More difficulty arises with respect to those interests of the trader which comprise his relations with others—with suppliers, customers, and others with whom he deals. These relations are as essential to him in his enterprise as are his person and his property. Indeed, they are what enable his personal talents and his property to yield economic satisfaction.

The trader's relations have frequently been loosely called "property," but this is a confusing term in this context. "Property" normally signifies tangible things having physical existence, such as land or chattels, or at least being capable of being symbolized by a physical thing such as money, shares of stock and negotiable instruments. But a trader's relations with others exist not in any independent physical embodiment, but rather in the intangible bonds of reputation, good will, custom, respect, credit and other relationships between people.

A simple illustration will suffice. Assume an industrial plant, well managed and with all the business it can handle. A depression strikes. Within a few months the plant shuts down. Owners, managers, workers, raw materials and the physical plant itself still exist. But the life is gone out of the enterprise. It is gone because the industry's relations are gone—relations primarily with customers, but also relations between owners, managers, workers, suppliers, creditors and others. The withering of these relations jeopardizes the value of the plant's property and the welfare of the personnel. The idle plant will deteriorate; owners' interests will fade in value; employees will drift away; goodwill will vanish. Only if its relations can be reestablished will the enterprise regain its value and live again.

The "good will" of a trader is an example of an extremely valuable trade relation. The best product or service in the world will be valueless as a business asset unless customers or patrons are willing to deal with the trader who seeks to sell it. This willingness to deal is the beginning of goodwill; established dealing and continued expectation of satisfactory quality or service build goodwill to a vital status. "Good will" is fragile; it is hard to come by and easy to destroy; being an intangible, its value is hard to measure, its diminution hard to perceive and its restoration extraordinarily difficult to accomplish. Encumbering its protection with abstruse doctrines of property law simply increases the difficulties. Trade relations require the protection of law developed out of the trader's environment and equipped with the flexibility and scope necessary to deal with the fast-moving and every-changing circumstances of the market-place.

Many of the harms to which trade relations are subject are easily classified. The concepts of physical violence, appropriation, defamation and abuse of governmental power accommodate the bulk of the injuries. But there are frequent situations which are not readily assimilated into traditional tort doctrines. No attempt will be made in this note to identify these areas; they can be clearly seen only upon examination of the cases.

Special complexities in the protection of trade relations arise because of the economic values of our society associated with the idea of "competition." The courts will not tolerate much intentional or negligent destruction of physical property. But not only may the law tolerate substantial interference with trade relations under some circumstances but it may give such interference positive encouragement when it takes a socially desirable form of competition. Competition is rivalry between traders for patronage or for supplies. The competitor seeks to displace his rival's favor with the customer, i. e., to divert trade and profits, to overcome goodwill, indeed to appropriate economic values enjoyed by the rival. These are among the "risks" to be assumed by the competitor; only the monopolist is free from them.

Competition is encouraged by government policy, by generally accepted economic theory, by the mores of business and most importantly by the customers who stand to benefit by the lower prices, better quality and better service which competition may bring. Consequently, where a trader's relations have been impaired by a competitor, the plaintiff's desire for protection of his trade values must be balanced with the desirability of encouraging the rivalry of the defendant. Too much protection of the trader may hurt the vitality of the competitive process. On the other hand, too little protection, or tolerance of immoral, predatory or violent types of rivalry may hurt competition by discouraging honest, peaceful men from engaging in business. No simple formula will work here. the court must call upon the best economic judgment and social wisdom which it can muster to achieve the delicate balance required.

In competition cases the courts are thus put to the necessity of drawing the line between methods of rivalry which will be permitted and methods of competition which will be held beyond the pale; in other words, the courts must seek to establish the plane of competition, and the ground rules subject to which the battle of the marketplace may be conducted. Much of this task has been taken over by federal administrative agencies, and to a lesser extent by state and local agencies. Large areas nevertheless exist where the common law court is the final arbiter.

Analysis of trade relations cases should at least begin with identification of the kind of interest which is hurt, and the type of harm to which it has been subjected. Also, it is usually possible to identify the interest being pursued by the defendant, whether competitive or non-competitive, malicious or prompted by desirable motives. Many decided cases seem not to have advanced even this far in analysis, much less in the language employed. But if the problems can be made to stand out clearly, normally the judicial process, especially that of equity, has ample capacity for judgment and remedial apparatus at hand to get an acceptable result.

For amplification, see Green, Basic Concepts, Persons, Property, Relations, 24 American Bar Association Journal 64 (1938), The Litigation Process In Tort Law 413 (1965); Green, Protection of Trade Relations in Tort Law, 47 Va. Law Rev. 559 (1961), The Litigation Process in Tort Law 425 (1965); Green, Trade Relations, 30 Ill.L.Rev. 1 (1935); Handler, Unfair Competition, 21 Iowa L.Rev. 175 (1936); Chafee, Unfair Competition, 53 Harv.L.Rev. 1289 (1940); Brown, Advertising and the Public Interest: Legal Protection of Trade Symbols, 57 Yale L.J. 1165 (1948); and Developments—Competitive Torts, 77 Harv.L.Rev. 888 (1964).

Treatises include R. Callman, The Law of Unfair Competition, Trademarks and Monopolies (3d ed. 1967) (5 vols.), and J. T. McCarthy, Trademarks and Unfair Competition (1973) (2 vols.).

Singer, The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld, 1982 Wisc. L. Rev. 975.

V. Damnum Absque Injuria

A. The Problem of Damnum Absque Injuria

The classical theory of self-regarding acts represented an effort to both describe and legitimate the legal rules in force, and in so doing it minimized and obscured the existence of rules that allowed some people to inflict harm on others without the victims having legal recourse of any kind. In the classical analytical schemes, the category of *damnum absque injuria* was partially excluded, sometimes ignored and always obscured by the jurists. Further, *damnum absque injuria* was always somewhat anomalous to the classical schemes. After all, the very concept of damage for which the legal system provided no remedy seemed to contradict the theory that other-regarding harmful acts were presumptively invalid. As an anomaly, it did not threaten the reigning meta-theory as long as it was perceived to be a minor or infrequent occurrence in the legal system. But once the self-regarding theory was firmly established, attention turned, as it naturally does in intellectual history, to the anomaly.[120] From approximately 1880 to 1920, *damnum absque injuria* emerged as the central issue of theoretical concern for critical analytical jurists; its effect was to shatter the self-regarding theory and to expose a series of conceptualist errors.

This happened in three steps. First, empirical observation of the legal system led to the recognition of the extent of the factual existence of *damnum absque injuria* in the legal rules in force, which the classical jurists had severely underestimated. Second, analytical jurists began to see policy arguments for the existence of *damnum absque injuria* on such a wide scale. Finally, they appro-

120. *See* T. Kuhn, The Structure of Scientific Revolutions 52-65 (1970).

priated those policy arguments and incorporated *damnum absque injuria* into the analytical schemes, no longer as an anomaly, but as a fundamental component of the new paradigm.

The theoretical incorporation of *damnum absque injuria* revolved around three major areas of inquiry. They were: (1) the emergence of the concept of legally protected interests; (2) focus on economic competition as an alternative model to the self-regarding acts theory; and (3) the problem of uncorroborated liberties generally. The end result of the theoretical incorporation of *damnum absque injuria* was Hohfeld's category of "no-right." To the extent others have the legal liberty to act or not to act, the damage they inflict on us violates "no [legal] rights" of ours, and we have no claim on the legal system to protect us from such harms or to provide us with remedies. I will now trace the history of that theoretical incorporation.

B. Factual Recognition of Damnum Absque Injuria

In 1879 Edward Weeks published a remarkable book entitled *The Doctrine of Damnum Absque Injuria Considered in its Relation to the Law of Torts*. He sought to illustrate "those cases of loss and damage for which the law provides *no* remedy."[121] Weeks argued that "[e]very invasion of a legal right, such as the right of property, or the rights incidental to the possession of property or the right of personal security, constitutes a tort. . . . To constitute a tort, two things must concur—actual or legal damage to the plaintiff, and a wrongful act committed by the defendant."[122] Weeks defined *damnum* or damage as "the loss caused by one person to another, or to his property, either with the design of injuring him, or with negligence and carelessness, or by inevitable accident."[123] *Injuria* on the other hand is a "wrongful act or tort, that relates to the defendant."[124] *Damnum absque injuria* therefore is damage without legal wrong. "The wrong or injury [*damnum*], however great, is not one in the eye of the law—not recognized as such by the law."[125]

Beginning around the time of Weeks's treatise, critical analytical jurists became preoccupied with the existence of *damnum ab-*

121. E. WEEKS, THE DOCTRINE OF DAMNUM ABSQUE INJURIA CONSIDERED IN RELATION TO THE LAW OF TORTS vii (1879). *See also id.* at 2 n.1.

122. *Id.* at 2.

123. *Id.* at 7.

124. *Id.*

125. *Id.* at 8. Weeks also identified *injuria sine damno*. One may breach a legal duty, but if there is no damage to another, there can be no compensation or liability. *Id.* at viii, 3, 9.

sque injuria in the legal system. To simplify the task of exposition, I will rely primarily on examples given by Edward Weeks and Oliver Wendell Holmes. I will present the examples of *damnum absque injuria* in categories that will be useful in understanding the process by which *damnum absque injuria* was incorporated into the later analytical schemes of rights and liberties. The three basic categories of *damnum absque injuria* are: (1) absence of legal protection for some interests; (2) general limits to the legal protection of all interests; and (3) varying extent of protection for different interests.

1. ABSENCE OF LEGAL PROTECTION FOR SOME INTERESTS

Weeks recognized that certain interests are not granted any legal protection whatsoever. For example, Weeks noted that in some jurisdictions of the United States there is no easement for light and air. "So, it is held that a person may legally erect a building on his own land, immediately adjoining the land of another, and put out windows overlooking the latter's, and although he use them for twenty years, he will have no redress."[126] The interest in unobstructed light and air is not granted legal protection. Thus, the harm to these interests is *damnum absque injuria*.

Another example is the interest in emotional security. The law generally provides no redress for mental distress caused by another:

> In another case one church member brought an action against a brother member for disturbing him during religious services in church by making loud noises in singing, reading, and talking. "In the first place," said the court, "the injury alleged is not the ground of an action. He (the plaintiff) claims no right in the building, or any pew in it, which has been invaded. There is no damage to his property, health, reputation, or person. He is disturbed in listening to a sermon by noises. Could an action be brought by every person whose mind or feelings were disturbed in listening to a discourse or any other mental exercise (and it must be the same, whether in a church or elsewhere) by the noises, voluntary or involuntary, of others, the field of litigation would be extended beyond endurance. The injury, moreover, is not of a temporal nature; it is altogether of a spiritual character, for which no action at law lies."[127]

Oliver Wendell Holmes also addressed the problem of *damnum absque injuria* in his essay *Privilege, Malice, and Intent*

126. *Id.* at 60.
127. *Id.* at 59-60 (footnote omitted).

in 1894.[128] In certain cases, Holmes wrote, the "defendant is privileged knowingly to inflict the damage complained of."[129] No legally protected interest has been recognized in esthetic enjoyment. A person "has a right to build a house upon his land in such a position as to spoil the view from a far more valuable house hard by."[130]

The recognition that certain interests of consequence to individuals are devoid of legal protection is not, by itself, enough to cast doubt on the self-regarding theory. Most major interests are granted some level of legal protection. Yet it is an important step on the road to recognizing that there might, in some instances, be good reasons to leave citizens vulnerable to harm.

2. GENERAL LIMITS TO LEGAL PROTECTION OF INTERESTS

Weeks's introductory chapter contains a list of generalized limits that are applicable to many, if not all, legally protected interests. Recovery is denied in cases of contributory negligence,[131] "trifling injuries,"[132] and injuries committed through necessity.[133] Consent is also generally a valid defense: "That to which a person assents is not usually esteemed in law an injury."[134] Finally, injury may be legally justified on grounds of public policy:

> That regard be had for the public welfare is the highest law. *Salus populi suprema lex*. There is an implied assent on the part of every member of society, that his own individual welfare shall in cases of necessity yield to that of the community, and that his property, liberty, and even his life shall, under given circumstances, be jeopardized or sacrificed for the public good.[135]

This is similar to the utilitarian arguments advanced by Bentham and Mill for sometimes allowing harms to be inflicted. The difference in Weeks, however, is that Weeks noticed that these limits to legal protection pervaded the legal system. Granting legal protection to an interest did not necessarily mean that one would obtain legal redress if the interest were invaded. This realization led them to consider the *extent* to which an interest would be protected by the law.

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128. Holmes, *supra* note 10.
129. *Id.* at 3.
130. *Id.*
131. E. WEEKS, *supra* note 121, at 14-15.
132. *Id.* at 15.
133. *Id.* at 17.
134. *Id.* at 22.
135. *Id.* at 17-18.

3. VARYING EXTENT OF LEGAL PROTECTION OF INTERESTS

The organization used by Weeks follows that of a treatise on torts. Each chapter contains sections on related legally protected interests and the ways in which those interests can be invaded without resulting liability. He discussed every major tort recognized by the legal system at the time, including: injuries to the person, false imprisonment, nuisance, slander and libel, malicious prosecution, injuries to personal and real property, negligence, deceit, fraud and misrepresentation. The structure of his presentation conveys the message that there are limits to the legal protection for virtually every legally protected interest, and that the extent to which each interest is protected varies according to the interest involved and the manner of the invasion. Weeks did not advance a general principle to describe the limits of legal protection. Rather, he presented a detailed collection of examples from actual cases in which judges denied recovery for invasions of interests.

In addition to the message that the extent of legal protection varies with the interest involved, Weeks also noted that even within a particular legally protected interest, liability might vary depending on the circumstances and policies involved. In those jurisdictions that recognize an easement for light and air, for example, the interest only extends "to a reasonable distance, so as to give to the tenement entitled to it such an amount of air and light as is reasonably necessary to the comfortable and useful occupation of the tenement for the purposes of habitation or business."[136] The same is true for riparian rights:

> In the case of water running in defined channels upon the surface of the earth, the rule is that riparian proprietors have no absolute right to the water of the streams flowing by them, but merely the usufruct thereof. They may make a proper use of the water, and a party is not liable to a lower proprietor for abstracting water from the stream if no actual damage has been done. What is a reasonable use is to be decided from the facts—considering the size of the stream, and the amount abstracted.[137]

Holmes also noted that "[n]ot only the existence but the degree of the privilege [to inflict harm] will vary with the case."[138] Whether one is liable for the tort of interference with contractual relations depends on the "particular means employed."[139] Depend-

136. *Id.* at 61.
137. *Id.* at 193 (footnote omitted).
138. Holmes, *supra* note 10, at 4.
139. *Id.* at 4.

ing on the circumstances and policies involved, there may be "no privilege," an "absolute" privilege, or a "qualified" privilege.[140]

The recognition of the existence of uncorroborated liberties is closely associated with the recognition that interests are granted varying levels of legal protection. Weeks discussed various *corroborated* liberties in which the legal liberty to inflict damage is accompanied by a duty on the other party not to resist. Such corroborated liberties include: the right to act in self-defense,[141] the right of parents to discipline their children,[142] lawful arrests by a police officer or a private citizen,[143] and the right of self-liberation from false imprisonment.[144] In all these cases, someone is given the legal liberty to inflict harm on another on whom a duty is imposed to submit to the harm.

Weeks also recognized the existence of *uncorroborated* liberties in the legal system. One example is the case of riparian rights to the reasonable use of streams:

> The defendant, for instance, is the owner and occupant of a mill standing on his land above the land of plaintiffs, who are riparian owners on the same stream, and has, in operating his mill and the works contained in it, used the water of the stream by means of a dam erected across it. The dam is of a magnitude adapted to the size of the stream, and the mode of using it is usual and reasonable according to the custom of the country. The defendant is not liable, though the plaintiffs are prevented from deriving benefits they might otherwise enjoy from the stream.[145]

In this case, each party has a legal liberty to use the stream. Neither has a duty not to use it in a way that interferes with the use of the other as long as the use is "reasonable" and therefore within the scope of the legal liberty.

Another example of an uncorroborated liberty is the easement for light and air. One has the liberty to enjoy light and air from one's property, as does one's neighbor. However, neither has a right that places a duty on the other not to interfere with such enjoyment:

> In Vermont, it has been held that long continued use of light for the windows of one's building, standing on or near the line of his land, raises no presumption of a grant from the adjoining owner, and no action lies in favor of the former against the latter for obstructing the light by an erection upon his own premises.[146]

140. *Id.* at 6.
141. E. WEEKS, *supra* note 121, at 37.
142. *Id.* at 38.
143. *Id.* at 54-55.
144. *Id.* at 120.
145. *Id.* at 193-94 (footnote omitted).
146. *Id.* at 61 (footnote omitted).

An easement of light and air is not recognized. Each has the legal liberty to act in ways that interfere with the enjoyment of light and air of the other.

4. ECONOMIC COMPETITION AND NONNEGLIGENT INJURIES

Just as it had been for Weeks and Holmes, the later jurists' awareness of *damnum absque injuria* was intertwined with the recognition of uncorroborated liberties and the recognition that interests are granted varying extents of legal protection. The prime example of *damnum absque injuria* in later analytical discussions is damage inflicted in the course of economic competition. In *First Principles of Law*, published in 1878, Henry Terry dealt extensively with the problem of *damnum absque injuria*:[147]

> If one tradesman sets up his shop so near to the shop of another as to draw away his trade and ruin him by competition, he does him a great damage but no injury, since he is doing no more than what he has a right to do. . . . Damage without injury is called in law *damnum absque injuria*.[148]

Weeks included it in his treatise:

> Interference with another's trade by fair competition is never actionable. The loss in such a case, though a damage, is not considered to be caused by a wrong. It is the exercise of a right, causing no more detriment than is necessarily the result of artificial society and legitimate business enterprises.[149]

In *First Principles of Jurisprudence*, published in 1893, John Salmond, like Terry, raised the issue of *damnum absque injuria*.[150] "It must now be . . . noticed," Salmond writes, "that not every act which is hurtful in fact is recognized and remedied as such by law. . . ."[151] Acts that are injurious to individuals may be lawful for overriding policy reasons. "Hence competition, though hurtful to individuals, is not wrongful."[152] Finally, Holmes noted it in 1894. "For instance, a man has a right to set up a shop in a small village which can support but one of the kind, although he expects and intends to ruin a deserving widow who is established there al-

147. H. TERRY, FIRST PRINCIPLES OF LAW 430 (1878) [hereinafter cited as H. TERRY, FIRST PRINCIPLES].

148. *Id.*

149. E. WEEKS, *supra* note 121, at 16 (footnote omitted).

150. J. SALMOND, FIRST PRINCIPLES OF JURISPRUDENCE (1893) [hereinafter cited as J. SALMOND, FIRST PRINCIPLES].

151. *Id.* at 160-61.

152. *Id.* at 161.

ready."[153]

Liberal political and economic philosophers had always made powerful justificatory arguments for the harms inflicted in the course of economic competition. However, when the early jurists constructed the self-regarding theory to describe and justify the legal rules in force, they asserted that *damnum absque injuria* was a minor part of the legal system. The later jurists recognized that such a theory was incompatible with the existence of *damnum absque injuria* on as large a scale, and in as central a sphere of social life, as the economic realm. The early jurists had also not seen that there could be good reasons to leave liberties uncorroborated by either legal or moral duties on others. The later jurists developed a growing awareness of the policy arguments for both *damnum absque injuria* and uncorroborated liberties. The centrality of economic competition in the liberal legal system and the recognition that the policy arguments that justified it were in conflict with the prevailing meta-theory caused the later analytical jurists to change the theory in a way that incorporated these policy arguments.

Along with the existence of economic competition, the jurists began to recognize that *damnum absque injuria* would result when the requisite mental element was missing. For example, Holmes's 1894 essay discussed the difference between negligence, intent and malice. In some cases, liability attaches if the defendant acted negligently.[154] In other cases, "a man is not liable for a very manifest danger unless he actually intends to do the harm complained of."[155] And in still other cases, there is no liability unless he acted out of malice or a "malevolent motive."[156] What is important is not so much that Holmes noticed the varying levels of duty imposed on individuals, but that he associated those varying duties with *varying levels of vulnerability* of other citizens to harm.

This point is further illustrated by Terry's later discussion of the various levels of protection associated with the various legal duties. Terry explained that there are three kinds of legal duties, which correspond to the modern categories of strict liability, negligence and intent.[157] Depending on the duty imposed on the defend-

153. Holmes, *supra* note 10, at 3.

154. Holmes, *supra* note 10, at 2.

155. *Id.*

156. *Id.*

157. In cases of "peremptory duties," the defendant is liable to the plaintiff if by her actions she has caused the plaintiff harm. In other cases, the defendant is not liable unless she intended to achieve the harmful consequences. And in still other cases, liability attaches only if harm was likely to result from defendant's actions.

ant, the harm may or may not be *damnum absque injuria*:

> For the law never forbids the violation of rights *per se*. The simple fact that A by his conduct has caused a change for the worse in B's bodily condition is not enough to fix a liability upon A. It may be *damnum absque injuria* merely. The violations of rights which are forbidden by law, which amount to actionable wrongs, are those which are caused by acts or omissions which are pointed out and legally described as wrongful by reference to some other circumstance than the mere fact that they are followed by consequences violative of right, for instance the state of mind of the doer, the probability at the time of doing them that they would be followed by such consequences, etc.[158]

Thus, if a negligence standard is employed, a defendant who exercises due care "has done his whole duty and is not responsible for what actually happens. . . ."[159] The harm is *damnum absque injuria*. However, legal redress would be available under the same circumstances if the courts imposed a strict liability standard.

Like Terry, Salmond associated the problem of nonnegligent injuries with the category of *damnum absque injuria*. Like Austin, Salmond assumed that no liability attached in the absence of intent or negligence. Anyone harmed by a person who had acted reasonably would have no legal redress. Such a person is the victim of "inevitable accident." Unlike Austin, Salmond identified "inevitable accident" as an example of *damnum absque injuria*.[160]

To summarize, the critical analytical jurists of the late nine-

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Terry, *Legal Duties and Rights*, 12 YALE L.J. 185, 186-87 (1903) [hereinafter cited as Terry, *Legal Duties*].

158. H. TERRY, SOME LEADING PRINCIPLES OF ANGLO-AMERICAN LAW 331 (1884) [hereinafter cited as H. TERRY, LEADING PRINCIPLES]. "An act *per se*, a mere bodily movement, is never either commanded or forbidden by the law. There is no conceivable bodily movement which a person in some circumstances might not lawfully do or omit." Terry, *Legal Duties*, *supra* note 157, at 186.

Weeks also stated that the harms committed without the requisite element of negligence—lack of due care—were examples of *damnum absque injuria*:

> Use of one's own property.—An owner of land made an excavation therein within a foot or two of a public street, and used no precaution against the danger of passengers falling in. A person passing in the night time went over the line of the street, fell into the excavation, and was injured. It was not disputed that the defendant had the right to excavate the earth for the purpose of making cellar rooms under that portion of the estate where the accident happened. There was no pretense that the defendant was actuated by malice, and the only question was whether he was guilty of such negligence as to expose him to the plaintiff's demand for damages by reason of the injury sustained, on the application of the maxim, *sic utere tuo ut alienum non laedas*. . . . Where neither party is at fault, and an accident takes place, it is equally an instance of *damnum absque injuria*.

E. WEEKS, *supra* note 121, at 13-14.

159. Terry, *Legal Duties*, *supra* note 157, at 187. - 253 -

160. J. SALMOND, FIRST PRINCIPLES, *supra* note 150, at 164.

teenth century recognized the existence of vast spheres of *damnum absque injuria* contained in the legal rules in force. As long as *damnum absque injuria* was seen as a minor element of the legal system, the self-regarding theory was a persuasive way to legitimate the rules. But when the jurists focused on the crucial spheres of economic competition and injuries committed without the requisite element of intent or negligence, they saw that the legal system contained a great amount of *damnum absque injuria* which could not be described or justified by the prevailing theory. It also became clear that there were good policy reasons both for allowing *damnum absque injuria* to exist on such a large scale and for granting varying levels of protection for different interests. The jurists responded to these revelations by attacking the self-regarding theory itself and constructing an analytical system that could describe the legal system as the modern jurists perceived it.

D. Implications for Conceptualism

The factual recognition of *damnum absque injuria* and the need to justify it led to the gradual erosion and the final rejection of the self-regarding theory as a means of justifying the rules in force. It also led the modern jurists to reject various conceptualist errors of the Austinian school.

First, the classical jurists had assumed that invasion of legal right could be deduced from the mere fact of injury. According to the self-regarding theory, citizens were granted freedom of action only to the extent that they did not injure others. If an act caused damage to another, the victim had a prima facie case for legal redress. The modern jurists realized that this was not true. Not every

injurious act is an invasion of the victim's legal rights. The right cannot be deduced from the mere fact of injury.

Second, the classical paradigm had also assumed that when a right was granted by the sovereign, the extent of the protection of the underlying interest would be determined automatically. For example, Austin had argued that invasion of a protected interest only led to liability if the defendant had acted intentionally or negligently. Observation of the legal system demonstrated that the standard varied wildly from malice to intent to negligence to gross negligence to strict liability. It became clear that the extent of the protection was not automatically determined once a right was conferred, but varied tremendously.

Third, the classical jurists had assumed that if a legal liberty was conferred by the sovereign, it was necessarily accompanied by duties on others not to interfere with the exercise of the liberty. It became clear over time that this simply was not true. Terry, Salmond and Hohfeld recognized that the legal system sometimes operated in this way and sometimes did not. It became clear that it was impossible to deduce such duties from liberties.

The very process of recognizing more and more instances of *damnum absque injuria* in the legal system demonstrated that a series of classical conceptualist deductions were logical errors. Conceptualism was a technique used to justify particular legal rules and outcomes. The accumulation of numerous attacks on different conceptualist deductions eventually led to a pervasive skepticism about conceptualism as a technique of legal reasoning. The result was a historical shift from conceptualism to nominalism which culminated in such figures as John Dewey, Roscoe Pound, Morris Cohen and (most emphatically) Felix Cohen.[212]

The shift away from conceptualism is evident in the later analytical jurists. In 1893, Salmond had voiced Holmes's principle that "[s]peaking generally, it may be said that the law peremptorily forbids the harmful interference of one man with another. . . ."[213] However, by the time that he published his torts treatise in 1907, Salmond not only abandoned the self-regarding theory but asserted

212. *See* Dewey, *Logical Method and the Law*, 10 CORNELL L.Q. 17 (1924); Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931); Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909); Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); M. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); M. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); F. Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201 (1931) [hereinafter cited as F. Cohen, *Legal Criticism*]; F. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935) [hereinafter cited as F. Cohen, *Transcendental Nonsense*].

213. J. SALMOND, FIRST PRINCIPLES, *supra* note 150, at 192.

that it was unlikely that any single principle or set of principles could rationalize the legal rules:

> Since, therefore, all harm is not actionable, it is necessary to ascertain whether liability for harm is the general rule, subject to specific exceptions based on definite grounds, or whether, on the contrary, the general rule is one of exemption from liability save in those specific instances in which the law declares that particular kinds of harm are wrongful. In other words: Does the law of torts consist of a fundamental general principle that it is wrongful to cause harm to other persons in the absence of some specific ground of justification or excuse, or does it consist of a number of specific rules prohibiting certain kinds of harmful activity, and leaving all the residue outside the sphere of legal responsibility? It is submitted that the second of these alternatives is that which has been accepted by our law. Just as the criminal law consists of a body of rules establishing specific offences, so the law of torts consists of a body of rules establishing specific injuries. *Neither in the one case nor in the other is there any general principle of liability.*[214]

Several years earlier, in 1903, Terry had put it even more emphatically:

> There is no general rule for determining what legal duties exist, what acts are commanded or forbidden by law. Much labor and ingenuity have been expended in the attempt to find some general criterion of legal right and wrong, some general basis of legal liability. But in vain; there is none. Various acts are commanded or forbidden for various reasons, generally on grounds of expediency; and they are different in different places and periods. In this respect the law presents itself as having a purely arbitrary or positive character, and the duties that exist in any particular system of law must simply be separately learned.[215]

These passages by Terry and Salmond demonstrate the disillusionment that developed about the possibility of discovering general principles that could rationalize the legal system as a whole. The earlier jurists had assumed that a small number of utilitarian arguments would be sufficient to develop principles that could justify the great bulk of the legal rules. Bentham, Austin and Mill were all staunch utilitarians who argued that a simple utilitarian calculus established the theory of self-regarding acts. Social utility would generally be maximized if people were free to do anything that affected only themselves and prohibited from doing anything that harmed others.

It is therefore incorrect to say that the conceptualists relied on

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214. J. SALMOND, TORTS, *supra* note 202, at 8-9 (footnote omitted). *See also id.* at 9 n.7 ("It is difficult to see that English law contains any reasoned and exhaustive list of the grounds for exceptions from liability. The only adequate answer to many claims for damages is the mere *ipse dixit* of the law that no such cause of action is recognized.").

215. Terry, *Legal Duties*, *supra* note 157, at 187-88.

logic alone to justify the legal rules since their logical deductions were based on higher level considerations of utility. The shift away from conceptualism was not really a shift from logic to policy, but a shift from the belief that a small number of utilitarian calculi would be sufficient to rationalize the legal system to the belief that utilitarian considerations had to be used independently to justify particular rules.

Because the self-regarding theory was descriptively flawed, the jurists realized that they would have to use utilitarian arguments to justify particular instances of *damnum absque injuria* that could no longer be explained by the old theory. Policy arguments no longer had as wide a range of application. Each legal rule had to be decided on its own merits, rather than deductively from a generally determined utilitarian calculus. Holmes made this clear:

> But whether, and how far, a privilege shall be allowed is a question of policy. Questions of policy are legislative questions, and judges are shy of reasoning from such grounds. Therefore, decisions for or against the privilege, which really can stand only upon such grounds, often are presented as hollow deductions from empty general propositions like *sic utere tuo ut alienum non laedas*, which teaches nothing but a benevolent yearning, or else are put as if they themselves embodied a postulate of the law and admitted of no further deduction, as when it is said that, although there is temporal damage, there is no wrong; whereas, the very thing to be found out is whether there is a wrong or not, and if not, why not.
>
> When the question of policy is faced it will be seen to be one which cannot be answered by generalities, but must be determined by the particular character of the case, even if everybody agrees what the answer should be. I do not try to mention or to generalize all the facts which have to be taken into account; but plainly the worth of the result, or the gain from allowing the act to be done, has to be compared with the loss which it inflicts. Therefore, the conclusion will vary, and will depend on different reasons according to the nature of the affair.[216]