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## Contingency, Immanence, and Inevitability in the Law of Accidents

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# Contingency, Immanence, and Inevitability in the Law of Accidents\*

John Fabian Witt

## Abstract

For well over a century now, the law of accidents has offered one of the great testing grounds for theories of legal history. This article draws out three competing theories of history, and in particular of legal history, embedded in narratives of accident law's development. The first is immanence; the second is contingency; the third is inevitability. The immanence idea is that there is a deep inner logic to the development of the common law of torts. Contingency narratives, by contrast, tell the story of accident law's development as being accidental: untethered to any deep logic or transhistorical coherence. Finally, inevitability narratives contend that tort and accident law are driven inexorably in one direction or another, not by forces that are immanent or instinct in tort doctrine, but by institutions and economic imperatives that impose strong constraints on the development of the law. The article elaborates further on these three themes, highlights their significance, and shows some of the ways they have animated (consciously or otherwise) important work in the literatures of law and history. Along the way, the article notes the deep tensions between immanence narratives and contingency narratives.

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\*Professor of Law and History, Columbia University. Many thanks to Michael Grunfeld and Margaret Symuleski for research assistance in the preparation of this article. Thanks also to Tom Grey, Sam Issacharoff, Greg Keating, Cathy Sharkey, and especially to the gracious and learned John Goldberg for stimulating reactions to earlier versions of this article. The Columbia faculty lunch series run by the magnificent Ariela Dubler provided helpful feedback in the final stages of preparing the piece for publication.

## INTRODUCTION

For well over a century now, the law of accidents has offered one of the great testing grounds for theories of legal history. A remarkable number of the leading figures in the history of American law have spent time here. Willard Hurst developed an entire legal history curriculum out of personal injury cases. Lawrence Friedman developed his sociological theory of law from his reading of employers' liability cases. Robert Gordon tried out the key ideas for his field-shaping articles in an essay on the history of tort doctrine. Morton Horwitz made the crystallization of the negligence principle a key moment in his critique of early nineteenth-century American law, and then made theories of tort causation central to his study of orthodox legal thought later in the same century.<sup>1</sup>

Among scholars who specialize in the law of torts, leaders of the field for the past century and a half have worked seriously in the same historical materials. These are scholars who typically do not consider themselves historians, but who have been borne ceaselessly into the past of the law nonetheless. Here the (radically underinclusive) list of distinguished scholars includes Kenneth Abraham, James Barr Ames, Richard Epstein, George Fletcher, Tom Grey, Wex Malone, Richard Posner, George Priest, Robert Rabin, Gary Schwartz, Jeremiah Smith, John Henry Wigmore, and -- of course -- the unclassifiable Oliver Wendell Holmes, Jr.

My lists are as notable for the many, many names they omit as for the names they include, but that's precisely my point. The history of torts has been generating deep and engaged attention from the very best lawyers and historians for a very, very long time.

In the past decade a deluge of new work has washed against the formidable foundations of the field. Perhaps the most important feature of this new wave of scholarship has been its diversity of outlook and approach. Once upon a time -- and it was not too long ago -- histories of the law of accidents dwelled on a relatively narrow body of ancient common law cases from the English yearbooks, or on a set of greying opinions from the nineteenth-century case reports. The most recent generation of histories of accident law now approaches the topic from a far wider array of perspectives and on the basis of a dramatically more eclectic set of materials.

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<sup>1</sup> J. WILLARD HURST & LLOYD K. GARRISON, *THE LEGAL PROCESS* (1956); Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 60 (1967); Robert W. Gordon, *Tort Law in America: An Intellectual History*, 94 HARV. L. REV. 903 (1981) (reviewing G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* (1980)); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992). This list barely glances on the surface of the deep pool of historical talent that has worked in the accident law area. For more, see below.

Recent work in the field includes the efforts of business historians and lawyers to trace the interactions of the history of the firm with risk, accidents, and the law.<sup>2</sup> Political scientists have used accident law to illustrate the power of starting points and timing in public policy formation; others in the discipline have begun to see the law of torts (and in particular the law of personal injury) as a paradigm case for a distinctive set of patterns in American governance.<sup>3</sup> Historians of gender and race are uncovering the ways in which these categories influenced the law of tort damages and the application of the reasonableness test in negligence cases.<sup>4</sup> Social historians have performed heroic labors in the dusty docket of the trial courts, and sometimes even in the claims files of industrial firms.<sup>5</sup> Critical historians have used the law of accidents to illustrate reconfigurations in social power and authority.<sup>6</sup> Students of insurance have illuminated the historical

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<sup>2</sup> MARK ALDRICH, *SAFETY FIRST: TECHNOLOGY, LABOR, AND BUSINESS IN THE BUILDING OF AMERICAN WORK SAFETY* (1998); R. W. KOSTAL, *LAW AND ENGLISH RAILWAY CAPITALISM, 1825-1875* (1997); Sally H. Clarke, *Unmanageable Risks: MacPherson v. Buick and the Emergence of a Mass Consumer Market*, 23 *LAW & HIST. REV.* 1 (2005); DAVID ROSNER & GERALD MARKOWITZ, *DEADLY DUST: SILICOSIS AND THE POLITICS OF OCCUPATIONAL DISEASE IN TWENTIETH-CENTURY AMERICA* (2001); DAVID ROSNER & GERALD MARKOWITZ, *DECEIT AND DENIAL: THE DEADLY POLITICS OF INDUSTRIAL POLLUTION* (2002); John Fabian Witt, *Speedy Fred Taylor and the Ironies of Enterprise Liability*, 103 *COLUM. L. REV.* 1 (2003).

<sup>3</sup> THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* (2002); ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001); SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE AMERICAN SEPARATION OF POWERS SYSTEM* (typescript, Columbia University, 2004); Robert C. Lieberman, *Private Power and American Bureaucracy: The EEOC and Civil Rights Enforcement*, 6-7 (Apr. 2003) (unpublished manuscript); Christopher Howard, *Workers' Compensation, Federalism, and the Heavy Hand of History*, 16 *STUDIES IN AMERICAN POLITICAL DEVELOPMENT* 28-47 (2002).

<sup>4</sup> BARBARA WELKE, *RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION* (2001); John Fabian Witt, *From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family*, 25 *LAW & SOCIAL INQUIRY* 717 (2000); Jennifer Wriggins, *Torts, Race, and the Value of Injury, 1900-1949*, 49 *HOWARD L.J.* 99 (2005); see also Martha Chamallas & Linda Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 *MICH. L. REV.* 814 (1990).

<sup>5</sup> Lawrence M. Friedman, *Civil Wrongs*, 1987 *AM. B. FOUND RES. J.* 351, 361; Lawrence M. Friedman & Thomas D. Russell, *More Civil Wrongs: Personal Injury Litigation, 1901-10*, 34 *AM. J. LEGAL HIST.* 295, 299 (1990); Thomas D. Russell, *Blood on the Tracks: Turn-of-the-Century Streetcar Injuries, Claims, and Litigation in Alameda County, California*, *Rohrschach Lecture at Rice University* 4 (Oct. 29, 1998); Thomas D. Russell, *Death on the Tracks: Solace and Recompense in Turn-of-the Century Streetcar Deaths*, *Presentation to the Law and Society Association Annual Meeting* 10 (May 28, 1999); David Buffum & Robert Whaples, *Fear and Lathing in the Michigan Furniture Industry*, 33 *ECONOMIC INQUIRY* 234 (1995); Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Litigation: An Institutional Account of American Tort Law*, 57 *VAND. L. REV.* 1571 (2004).

<sup>6</sup> CHRISTOPHER TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY REPUBLIC* (1993); see also Jonathan Simon, *For the Government of Its Servants: Law and Disciplinary Power in the*

interactions between accident law and the insurance industry.<sup>7</sup> Historians of politics have traced the consequences of elective judiciaries on the adoption of one or another set of tort rules.<sup>8</sup> Empiricists (and especially empirical economists) have done yeoman's work making sense of the micro-economic consequences of competing accident law systems for things such as wages and accident rates.<sup>9</sup> Intellectual historians are reevaluating the changing role of ideas about the will and the mind in the philosophical bases of nineteenth-century tort.<sup>10</sup> I should add that first-rate old-fashioned doctrinal histories continue to be published as well, substantially illuminating the salient features of the common law landscape.<sup>11</sup>

The new histories of accident law are so diverse they defy generalization. It is dauntingly difficult to say much more about them as a group than that they are remarkably eclectic. There are high-tech regressions, sophisticated cultural analyses, and impressive institutional histories. All around, there is an intimidating amount of erudition. The observer tries to make sense of it as a whole at his peril.

Nonetheless, into the breach I go. With all the appropriate caveats in place about the eclecticism of the work in the field and its resistance to easy classifications, I want to take this opportunity to identify some themes that run through the literature on the history of accident law, primarily American accident law. I will be interested here in the literature as it has developed since the early years of the field known as tort law, in the mid- and late-nineteenth century. But the themes I aim to pick out are ones that have become sharper thanks to recent work in the field.

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*Workplace, 1870-1906*, 13 STUDIES IN LAW, POLITICS, AND SOCIETY 116 (1993); Jonathan Simon, *Driving Governmentality: Automobile Accidents, Insurance, and the Challenge to Social Order in the Inter-War Years, 1919-1941*, 4 CONN. INS. L.J. 521 (1997-1998); KAREN ORREN, *BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES* (1992).

<sup>7</sup> KENNETH S. ABRAHAM, *THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11* (forthcoming); see also Tom Baker, *Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law*, in GERHARD WAGNER ED., *LIABILITY IN TORT AND LIABILITY INSURANCE* (2005).

<sup>8</sup> Jed Shugerman, Note, *The Floodgates of Strict Liability*, 110 YALE L.J. 333 (2000).

<sup>9</sup> PRICE V. FISHBACK & SHAWN EVERETT KANTOR, *A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKMEN'S COMPENSATION* (2000)

<sup>10</sup> SUSANNA BLUMENTHAL, *LAW AND THE MODERN MIND: THE PROBLEM OF CONSCIOUSNESS IN AMERICAN LEGAL CULTURE, 1800-1930* (Ph.D. diss., 2001); Susanna Blumenthal, "Mind of the Moral Agent": *Scottish Common Sense and the Problem of Responsibility in Nineteenth-Century American Law*, LAW & HISTORY REVIEW (forthcoming, 2007); see also George Fletcher, *The Fault of Not Knowing*, 3 THEORETICAL INQUIRIES IN THE LAW 265 (2002)

<sup>11</sup> E.G., A. W. B. SIMPSON, *LEADING CASES IN THE COMMON LAW* (1996); Michael Ashley Stein, *Priestley v. Fowler and the Emerging Tort of Negligence*, 44 B.C. L. REV. 689 (2002); MICHAEL ASHLEY STEIN, *VICTORIAN TORT LIABILITY FOR WORKPLACE INJURIES: THE JUDGES V. THE WOUNDED SOLDIERS OF INDUSTRY* (forthcoming 2007).

The three interconnected themes I have in mind relate to the theories of history, in particular the theories of *legal* history, embedded in narratives of accident law's development. The first is immanence; the second is contingency; and the third (and last) is inevitability. What I would like to suggest is that histories of accident law have typically adopted one of these three narrative styles to make sense of the development of accident law.

The immanence idea is that there is a deep inner logic to the development of the common law of torts. The second style is contingency. If there is a Hegelian quality to the immanence thesis (more on that later), then contingency is the antithesis to immanence's thesis. Contingency narratives tell the story of accident law's development as being, well, accidental: untethered to any deep logic or transhistorical coherence. Finally, inevitability narratives contend that tort and accident law are driven inexorably in one direction or another, not by forces that are immanent or instinct in tort doctrine, but by institutions and economic imperatives that impose strong constraints on the development of the law. Like the immanence thesis, inevitability narratives locate a historical logic in the development of accident law. Unlike the immanence thesis, however, inevitability narratives find this logic not by reference to principles instinct in doctrine, but rather by reference to paths of historical development that are shaped by starting points and institutions.

I have pursued at least two of these themes in my own previous work, as is evident from the titles of my past writing. Witness, on one hand, the clumsy double entendre of *The Accidental Republic*, a title that is designed to suggest both the contingency of American accident law and its significance in the development of modern American social policy. Witness, on the other hand, the apparently different notion of my article "The Inevitability of Aggregate Settlement." What I want to do here is elaborate further on all three of the themes, highlight their significance, and show some of the ways they have animated (consciously or otherwise) important work in the literatures of law and history. Along the way, I will have some things to say about the tensions between immanence narratives and contingency narratives. These are tensions that seem to me to have grown more acute in recent years. In the process, if I am lucky, I will rescue myself from the inconsistency of occupying what seem to be two competing positions at once.

## I. THE IMMANENCE TRADITION

The oldest tradition in the history of Anglo-American accident law is to write narratives of immanence. Blackstone may be the progenitor of this approach. Blackstone was the common law's first great systematizer. In his *Commentaries* he worked excruciatingly hard (and not always successfully) to trim the unruly brambles of the common law into the kind of carefully ordered rationality that

characterized the civil law and natural law traditions. As John Goldberg has recently observed, Blackstone sought to do just this for the smattering of common law actions that he grouped under the rubric of “*torts* or wrongs.”<sup>12</sup> In common law actions such as trespass, trover, and case, replevin, nuisance, and waste, Blackstone purported to find the traces of a Lockean social compact. Here was evidence that the individual in society had retained the right to private redress, converted from a right of self-help in the state of nature to the kind of private wrong that the King was “officially bound to redress in the ordinary forms of law.”<sup>13</sup>

To the modern ear, Blackstone’s approach is at once foreign and familiar. The motley assemblage of ancient writs can leave the reader feeling a little like Jeremy Bentham, who dismissed as ridiculous the entire Blackstonian enterprise of finding reason hidden deep within the common law’s historical nooks and crannies. At times, one can’t help but sympathize with the great twentieth-century political scientist Edward Corwin, who described Blackstone as Anglo-American law’s paradigm case of “legalistic and judicial obscurantism.”<sup>14</sup> In another sense, however, Blackstone’s project is readily recognizable in modern common law terms. The idea of making reasoned sense of the historically accumulated materials of the common law, after all, has become a kind of professional convention in Anglo-American law. This is the kind of work that sophisticated lawyers and judges do every day when they argue cases and cite authorities for legal propositions. They mix historical description of the decided cases and with normative prescription about what the cases should be understood to stand for. Ronald Dworkin, of course is the leading articulator of this deeply ingrained way of talking about the law. It is the project of making the law the best it can be, whatever “best” might mean. In this sense, Blackstone is a founding figure in the common law method of finding a deep logic implicit in the historical materials. In Blackstone’s version of the common law logic of immanence, the history of the common law bore the traces of reason and nature. As in the “majestic ruins of Rome or Athens,” a deep rationality dwelled in the historical material of the common law.<sup>15</sup>

More than a century after Blackstone, the first generation of American academic lawyers adapted Blackstone’s immanence narrative to a sweeping, world historical-evolutionary perspective on the common law. James Barr Ames’s well-known article *Law and Morals* described a deep evolutionary

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<sup>12</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 117 (1779) (1765-1769) (emphasis in original).

<sup>13</sup> *Id.* at 115-16.

<sup>14</sup> EDWARD S. CORWIN, THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 85 (1986).

<sup>15</sup> 2 BLACKSTONE, *supra* note 12, at 44.

movement in the law from a primitive “formal and unmoral” stage toward a condition of ever greater rationality and morality. Where primitive law imposed sanctions without regard to the blameworthiness of the act in question, Ames contended that modern law sought to take account of the “ethical quality of the defendant’s act,” which was “the measure of his liability.”<sup>16</sup> To be sure, the law’s evolution from amoral to moral had “not yet achieved its perfect work” during Ames’s lifetime. But it was obvious to Ames that for “the last six hundred years” the “spirit of reform” had been “bringing our system of law more and more into harmony with moral principles.”<sup>17</sup> John Henry Wigmore’s early work viewed responsibility for tortious acts in much the same light. Indeed, Wigmore contended that the jurist could “trace back in a continuous development . . . without a break, for at least two thousand years” the evolution of the idea of tortious liability. From a primitive and unrefined law of liability that made no distinctions among injuries by design, by negligence, or by accident, the law had passed through stages to achieve what Wigmore called a “rational basis.”<sup>18</sup>

Much of Holmes’s writing – especially his early writing – fits within the immanence tradition as well. Generalizing about Holmes at all is always a risky endeavor. Holmes himself was sometimes a theory skeptic; liability in tort, he wrote in *The Common Law*, “did not begin with a theory,” and “it has never worked one out.”<sup>19</sup> Moreover, Holmes famously contended that legal propositions were the concrete embodiment of the “felt necessities of the time” and of the “prevalent moral and political theories” of an era, not the product of transhistorical principles that were then immanent in its rules.<sup>20</sup> Yet for all this, much of Holmes’s early work on tort law adopts an implicit immanence narrative. The central project of the tort sections of *The Common Law* is to identify an unarticulated legal standard in tort running through the history of the field. Indeed, Holmes purported to be able to find a hidden logic in the foundations and development of the common law. What he found was not Ames’s trend from amoral rules to moral standards, but rather something quite different: the progressive rise of an objective standard of fault by which to measure the conduct of men. Properly understood, Holmes contended, the common law had “never known” any other rule. The external standard of fault had been implicit in the common law since time immemorial, on Holmes’s account. To be sure, sometimes it was more or less obscure; the course of the law was not always straight and “its direction not always visible.”<sup>21</sup> But in the true history of the

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<sup>16</sup> James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 100 (1908).

<sup>17</sup> *Id.* at 113.

<sup>18</sup> Wigmore, *Responsibility for Tortious Acts*, 7 HARV. L. REV. 42.

<sup>19</sup> OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 77 (Boston: Little, Brown, 1881).

<sup>20</sup> *Id.* at 1.

<sup>21</sup> *Id.* at 78.

common law one could discern what the law of torts is and “what it tends to become,” to use Holmes’s formulation from the opening passage of *The Common Law*.<sup>22</sup>

One detects more than a little Hegel in all of this. It is perhaps most easily seen in Ames’s account of the “the spirit of reform,” or in Wigmore’s account of what he called “the German idea” of tortious responsibility. Reason in law, Ames argued, worked itself out over historical time, reaching ever closer to the end of law, which was a perfect harmony between law and morals. Morality, Ames seemed to say, was instinct in the law, and in time what was implicit would become explicit. The common law, as Lord Mansfield had famously put it a century and a half earlier, “works itself pure,” drawing its rules progressively over time “from the fountain of justice.”<sup>23</sup> This was essentially Hegel’s view of reason and freedom in world history. The study of history, he wrote, is “the image and enactment of reason”<sup>24</sup>; it is “the exhibition of Spirit in the process of working out the knowledge of that which it is potentially.”<sup>25</sup> Critically for Hegel, the ultimate elaboration of Spirit was immanent in all of history, from the beginnings of recorded time to the present. “As the germ bears in itself the whole nature of the tree, and the taste and form of its fruits, so do the first traces of Spirit virtually contain the whole of that history.”<sup>26</sup> Historical time is simply the working out of what was already implicit at its beginning. Hegelian history is thus a deeply internal discipline. For Hegel, as Frederick Beiser has put it in a recent essay on Hegel’s historicism, the end of history was internal to and always instinct in history itself.<sup>27</sup>

Hegel’s internal approach to identifying reason in time matches quite nicely with the (albeit more modest) traditional self-conception of the law professoriate. What law professors do is identify hidden logics in masses of undigested and messy historical authority. (At least, that is what they used to do, or perhaps best of all, what they were once *supposed* to do.) The law professor’s work is to identify the general patterns and the salient facts, to jettison the accidental and irrelevant. Ames’s idealized law professor, for example, made “systematic and comprehensive study” of the accumulated legal materials in order to distinguish the emanations of the law’s deep reason from the historical artifacts of law’s primitive origins.<sup>28</sup> Likewise, for Hegel, the “aim of philosophical inquiry [was]

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<sup>22</sup> *Id.* at 1.

<sup>23</sup> *Omychund v. Barker*, 1 Atk. 17, 23 (1744).

<sup>24</sup> Quoted in NIALL FERGUSON, *VIRTUAL HISTORY* 29 (1997).

<sup>25</sup> GEORG W. F. HEGEL, *PHILOSOPHY OF HISTORY* 17-18 (J. Sibree trans., 1991).

<sup>26</sup> *Id.* at 18

<sup>27</sup> Frederick C. Beiser, *Hegel’s Historicism*, in FREDERICK C. BEISER ED., *THE CAMBRIDGE COMPANION TO HEGEL*, 270, 289 (1993).

<sup>28</sup> Ames, *supra* note 16, at 113.

to eliminate the contingent.” “In history,” he wrote, the philosopher “must look for a general design.”<sup>29</sup>

Holmes famously dismissed Hegel along with Kant and other German theorists as overly preoccupied with intricate logic and ideals (what he sneeringly called “Hegelian dreams”).<sup>30</sup> Nonetheless, the traces of Hegel are readily apparent whenever Holmes reaches for the profound.<sup>31</sup> In particular, Holmes betrays both Hegel’s sense that history has a teleological endpoint and that the materials of that end are instinct in history. The law, Holmes wrote in one of his not-infrequent mystical moments, was connected to the universe; in it one could “catch an echo of the infinite,” glimpse “its unfathomable process,” and grasp “a hint of the universal law.”<sup>32</sup> The history of the law, in Holmes’s view, was no less than the history of “the moral life” of the race.<sup>33</sup> Indeed, immanent in the law was “every painful step and every world-shaking contest by which mankind has worked and fought its way from savage isolation to organic social life.”<sup>34</sup> This was a struggle to which an “eternal procession” of jurists had contributed, marching through history in countless rows “stretching away against the unattainable sky, the black spearheads of the army that has been passing in unbroken line already for over a thousand years.”<sup>35</sup>

If Holmes’s historical logic bore traces of a Hegelian progression through time, Holmes was decidedly more materialistic than Hegel in his conception of history. In this sense, Holmes’s work stands at the intersection of the Hegelian immanence narratives by Ames and Wigmore, on one hand, and the Marxist or materialist immanence narratives that became prominent in the field in the middle of the twentieth century. On the Marxian view, history “does not end by being resolved into ‘self-consciousness’ as ‘spirit of the spirit.’” Instead, “at each stage there is found a material result: a sum of productive forces” that prescribes for each generation “its conditions of life and gives it a definite development.”<sup>36</sup> It followed for Marx that ideas about the law in any given epoch were determined by the dominant class of the period; its interests were implicit in the law.<sup>37</sup> The

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<sup>29</sup> Niall Ferguson, *Introduction*, in NIALL FERGUSON, *VIRTUAL HISTORY: ALTERNATIVES AND COUNTERFACTUALS* 1, 29 (1997).

<sup>30</sup> Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 473 (1897)

<sup>31</sup> For another dismissal of Hegel by Holmes, see 14 AM. L. REV. 233, 234 (1880), identified by MARK D. HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS, 1870-1882*, at 155 (1963) as a note by Holmes; see also “conscious humbug” quoted in Thomas A. Reed, *Holmes and the Paths of the Law*, 37 AM. J. LEGAL HIST 273, 277 (1993).

<sup>32</sup> Holmes, *supra* note 30, at 478

<sup>33</sup> Holmes, *The Law*, in JULIUS J. MARKE, *THE HOLMES READER* 62 (1964).

<sup>34</sup> *Id.* at 62-63.just

<sup>35</sup> Holmes, *Learning and Science*, in MARKE, *THE HOLMES READER*, *supra* note 33, at 72-73.

<sup>36</sup> Karl Marx, *The German Ideology*, reprinted in ROBERT C. TUCKER, *THE MARX-ENGELS READER* 146, 164-65 (2nd ed. 1978)

<sup>37</sup> *Id.* at 172.

“illusions of the jurists” were therefore just that: epiphenomenal artifacts of the underlying forces of production, capital funds, and material life processes.<sup>38</sup> Material conflict and the historical progression of stages of production – the foundations of history -- were (for Marx) always immanent in the legal superstructure. Economics animated the workings of the law and explained its characteristic features.

Materialist theories were more or less the tacit conventional wisdom in the field by the middle of the twentieth century. We can get a sense for this from a casual assertion in 1938 by Fleming James, soon to become one of the leading torts scholars of his generation, and hardly a Marxist radical. “Economic and political factors and philosophies,” James observed, were “the inarticulate major premises underlying legal decision.”<sup>39</sup> For the next half-century, variations on this claim underwrote most of the best work in the history of accident law. Charles O. Gregory’s well-known article *Trespass to Negligence to Absolute Liability*, for example, took as its mission to get at “just what the law of torts is chiefly concerned with.” The answer, Gregory concluded, was material “social context” and the needs of industry. When “struggling industry was trying hard to get on its feet,” Lemuel Shaw helped it along with the liability-limiting negligence standard. Since then, society had “undergone radical changes,” and tort law had changed apace. Roger Traynor’s strict liability approach, for example, matched the new context of mid-century America.<sup>40</sup>

By the 1970s, the central debate about the history of tort was not so much between idealist (Hegelian) and materialist (Marxist) accounts of the forces immanent in tort law, but rather about which of two competing materialist accounts best captured the way social structures were embodied in law. Lawrence Friedman and Jack Ladinsky’s 1967 description of the evolution of the law of work accidents provided the best example of what we might call the consensus or functionalist version of the materialist account.<sup>41</sup> Friedman and Ladinsky described a three-stage process. As in Gregory’s version of the same story, judges like Lemuel Shaw established the negligence standard and the fellow servant rule at a time when the Americans “placed an extremely high value on economic growth.” As the economic context of the fellow servant rule shifted, the rule itself slowly disintegrated in a welter of exceptions and counter exceptions. Ultimately, the rule was abolished altogether and a workmen’s

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<sup>38</sup> *Id* at 175; see also *Letter from Engels to Franz Mehring*, in TUCKER, THE MARX-ENGELS READER, *supra* note 36, at 765-66.

<sup>39</sup> Fleming James, Jr., *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704, 704 (1938).

<sup>40</sup> Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 360 (1951).

<sup>41</sup> Friedman & Ladinsky, *supra* note 1, 50-83; see also J. WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956)

compensation scheme put in its place. Friedman and Ladinsky were at pains to make clear that the rules themselves were the product of an ongoing power struggle between “the clashing interests of labor and management.”<sup>42</sup> “Social change, moving more or less in one definite direction,” they wrote, had “produced noticeable regularities” in the development of the law.<sup>43</sup> Legal outcomes were not, for example, a result of the influence of great men; they were the end product of socially-determined “pattern[s] of demand.” In their account, however, socially-driven legal change was not usually the result of any one interest or class winning out over others. Legal rules were the product of compromises. Those compromises, in turn, were unstable in the face of social change, which was forever re-initiating the process of destabilization and reformation.

If Friedman advanced a consensus or functionalist version of the materialist immanence narrative, Morton Horwitz’s 1977 *Transformation of American Law* advanced a more controversial alternative. Hewing more closely to Marx’s connection between (economic) base and (legal) superstructure, Horwitz described the law of accidents and the negligence standard as central elements in capitalism’s early-nineteenth-century transformation of the law to serve commercial interests. Horwitz’s study purported to show how jurists promoted the interests of merchants and entrepreneurs, helping them win an ever greater share of the society’s wealth through the elaboration of an ostensibly neutral set of legal doctrines. In the false neutrality of the law, Horwitz brought to life Marx’s juristic illusions, mobilized for the benefit of the new ruling class of the early nineteenth century. His story of the modern negligence standard was thus one in which “the law of negligence became a leading means by which the dynamic and growing forces in American society were able to challenge and eventually overwhelm the weak and relatively powerless segments of the American economy.”<sup>44</sup> Of the fellow servant rule articulated by Shaw in *Farwell v. Boston & Worcester R.R.*, Horwitz’s conclusion was equally severe: “the law had come simply to ratify those forms of inequality that the market system produced.”<sup>45</sup>

To be sure, Horwitz allowed (in theory, at least) that law was autonomous from material contexts -- “at least in the short run” and to the extent that ideas themselves were autonomous. But this grudging and qualified concession sounded much like the later Engels, who contended that ideas would track ever more parallel to the line of economic development “the longer the period considered.” Horwitz’s concession, in other words, hardly disowned the notion

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<sup>42</sup> Friedman & Ladinsky, *supra* note 1, at 72.

<sup>43</sup> *Id.* at 81-82.

<sup>44</sup> HORWITZ, TRANSFORMATION I, *supra* note 1, at 99.

<sup>45</sup> *Id.* at 210.

that the common law of torts was the congealed output of underlying class conflicts.<sup>46</sup>

Yet another sort of materialist immanence narrative emerged from more conservative economic schools at around the same time. Richard Posner's classic 1972 article, *The Theory of Negligence*, claimed to deduce the inner economic logic of the law from a sample of hundreds of appellate cases decided during the heyday of the negligence standard in the late nineteenth century. On Posner's reading, the negligence standard served as an implicit cost-benefit test that aimed to induce efficient behavior.<sup>47</sup> Along with his University of Chicago colleague William Landes, Posner also offered a reason to expect that the law of accidents would develop consistently with the efficient cost-benefit standard. Landes and Posner claimed that virtually all people are both prospective defendants and prospective plaintiffs in tort. In other areas of the law, Landes and Posner observed, interest groups often distorted the law for their own partial interests. In tort law, however, interest groups who faced roughly the same chance of being plaintiffs and defendants had good incentives to create the most efficient rules possible so as to maximize their future welfare. Tort law, in other words, was a kind of pure public good. Social welfare maximization could therefore be expected to be its aim.<sup>48</sup> A few years later, another of Posner's colleagues, Richard Epstein, wrote an essay that shared Posner's sense of the economic basis of tort law in history. Epstein disagreed with Posner about which approach to accident law best achieved economic efficiency; in his view, the negligence standard accompanied by the damages rule of full compensation was highly undesirable. But like Posner, Epstein saw an efficiency at work deep in the logic of the law of accidents. Workers' compensation statutes, Epstein contended, enacted the efficient bargains that employees and employers had sought to enter into as private contracts, only to find courts reluctant to hold injured employees to their side of the bargain. The compensation statutes were the statutory manifestations of the Pareto optimal logic of the market, a logic that had been stymied by the courts.<sup>49</sup>

The allure of the efficient common law has waned in recent years. David Rosenberg's creative (but flawed) reinterpretation of Holmes's theory of tort law contended that the particular approach to accident law that Rosenberg believes most efficient – strict liability constrained by a foreseeability limit – was present

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<sup>46</sup> TUCKER, MARX-ENGELS READER, *supra* note 36, at 768.

<sup>47</sup> Richard Posner, *The Theory of Negligence*, 1 J. LEGAL STUDIES 29-96 (1972).

<sup>48</sup> WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987).

<sup>49</sup> Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775 (1982).

in its germinal form in Holmes's *The Common Law*.<sup>50</sup> Rosenberg's historical account, I think it is fair to say, has found relatively little traction. Another approach to the immanent efficiency of the law has lost whatever traction it may once have had. For a short time in the 1970s, it seemed to many that the common law might tend ineluctably toward efficiency in accident law and indeed in a wide array of fields.<sup>51</sup> Efficiency, it seemed, might not merely be instinct in the law of torts, but more generally in the genetic processes by which common law rules were formulated in an array of fields. Like Rosenberg's theory of the history of torts, however, the idea of the common law's immanent efficiency now seems mostly defunct. Its central proponents have long since retreated from their claims. By the mid-1980s, George Priest, who once suggested that the common law embodied a set of principles that tended ever closer to efficiency, was describing the twentieth-century law of torts as having veered off in an economically foolish, even disastrous direction.<sup>52</sup>

With the demise of economic immanence narratives, the field has been retaken by a new wave of moralists. A hundred years after Ames and Wigmore described the law as tending to evolve inexorably from amoral standards to moral principles, the law reviews are once again filled with the morality of tort law. The central idea of the new moralist literature is that a particular form of justice is the normative basis of liability in tort. Mostly this means corrective justice, though some of the literature now purports to offer a different basis for tort in what is styled civil redress. For our purposes, these two variations on the justice theme are effectively the same, and in what follows I'll often refer to both of them under the rubric of corrective justice.<sup>53</sup>

What it means to say that one or another idea of corrective justice is the basis of torts depends, of course, on what the meaning of the word *is* is. In the corrective justice literature – as in lawyers' literature more generally – the word “is” imports both a normative and a descriptive dimension. The basis of tort liability *is* corrective justice (the theory goes) because the practice of tort law, its structure, and (significantly) its history is best accounted for by reference to the principles of corrective justice. At the same time, the basis of tort liability *is* corrective justice because Aristotle's notion of corrective (as opposed to

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<sup>50</sup> DAVID ROSENBERG, *THE HIDDEN HOLMES: HIS THEORY OF TORTS IN HISTORY* (1995).

<sup>51</sup> Paul Rubin, *Why Is the Common Law Efficient?*, 6 J. Legal Studs. 51 (1977); George Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. Legal Studs. 65 (1977).

<sup>52</sup> Criticism includes Priest, *Selective Effects in Litigation*, 9 J. Legal Studs 399 (1980); Gillian K. Hadfield, *Bias In the Evolution of Legal Rules*, 80 Geo. L.J. 584 (1992). Priest's economic critique of the modern law of torts is George L. Priest, *The Invention of Enterprise Liability*, 14 J. Legal Studs. 461 (1985).

<sup>53</sup> For the distinction, see Benjamin Zipursky, *Civil Recourse, Not Corrective Justice*, 91 Geo. L.J. 695 (2003); for a rejoinder, see Jules L. Coleman, *Political Morality and Tort Law*, paper presented at the Conference on Law and Morality, William & Mary School of Law.

distributive) justice provides a compelling account of what justice requires between a wrongful injurer and the victim of that wrongful injury. The first account is descriptive; it purports to account for the way that tort law operates now and the way that tort law has operated in the past. The second account is prescriptive; it purports to account for how tort law ought to operate, regardless whether it does so now or has done so in the past.

The claim of virtually all the writers who adopt a corrective justice or civil redress perspective is that as a descriptive matter Anglo-American tort law instantiates the prescriptive principles of corrective justice.<sup>54</sup> In Ernest Weinrib's formulation, "corrective justice is the structure of justification implicit in the practice" of tort law. The immanent logic of torts, in other words, is corrective justice. Jules Coleman puts it this way: "when we see the inferential practices of tort law in the light of the principle of corrective justice, they hang together in a way that makes the best sense of those practices."<sup>55</sup> Corrective justice, Coleman repeats, "expresses the principle that holds together and makes sense of the central concepts of tort law." At the same time, tort law realizes corrective justice "in concrete institutional forms."<sup>56</sup> The mission of the corrective justice jurist, in turn, is to bring out the hidden logic of tort law and develop its implications for the structure and operation of the law. Weinrib, echoing Mansfield's eighteenth-century logic of common law immanence, puts it this way: corrective justice "provides the immanent critical standpoint informing the law's efforts to work itself pure."<sup>57</sup>

To be sure, most of the corrective justice literature is not historical per se. When Coleman writes that "the principle of corrective justice is embodied in tort law," he is not making a claim based on what he or anyone would usually call historical research; when Stephen Perry or Arthur Ripstein or Jeremy Waldron or Ernest Weinrib or Benjamin Zipursky articulate similar views of the basis of tort law, they do not typically purport to be doing history in any meaningful sense. And yet there is something historical in the sensibility of the corrective justice literature. Like the structure of tort law they describe, their work is inevitably backward looking. The conceptual elaboration of the practice of tort law and the principles instinct in it is based (as it must be) on the structure of tort law as it has existed in the past.

Of late, corrective justice theories of tort law have moved into history in a more sustained fashion. In particular, John Goldberg and Benjamin Zipursky

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<sup>54</sup> Interestingly, not all corrective justice theorists also hold the view that corrective justice is necessarily an appealing moral theory. See, e.g., JULES COLEMAN, *THE PRACTICE OF PRINCIPLE* 4-5 & notes, 10-11 & notes (2003).

<sup>55</sup> *Id.* at 55.

<sup>56</sup> *Id.* at 62.

<sup>57</sup> Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 356 (2002).

have overtly turned to history in articulating what they call the “redress-based conception of tort law.” In an article titled *The Moral of MacPherson*, Goldberg and Zipursky turned to the early twentieth-century history of tort doctrine to accomplish two interrelated ends. First, they sought to establish as a historical matter that the moral theory of duty and redress better explains the structure and practice of tort law than its primary competitor, the principle of economic efficiency. Second, they contended that twentieth-century American legal academics (and sometimes American judges) lost track of the moral idea in torts, and in particular lost track of the idea that tort actions lie only where a defendant owes the plaintiff a duty of care.<sup>58</sup> In a subsequent article, Goldberg sketched a history of tort that aimed to describe tort’s civil remedies as constitutionally-enshrined rights. This claim went considerably beyond what Goldberg and Zipursky had advanced in *The Moral of MacPherson*, though its roots were evident in the earlier piece. Not only was tort law’s redress principle immanent in common law tort cases such as *MacPherson v. Buick*, Goldberg’s position was now that civil redress was immanent in the constitutional law of the United States; the availability of some kind of satisfactory private remedy was therefore constitutionally required. By extending the search for corrective justice principles, Goldberg found them residing deep within British constitutionalism, inside Anglo-American political theory, and ultimately in American constitutional law as well.<sup>59</sup>

Most recently, Goldberg has contended that historically speaking, tort awards (properly understood) provided damages according to a measure of satisfaction or adequate redress, not according to the currently-prevailing logic of full compensation. Adopting what he calls an “internal” approach “operating entirely at the level of lawyerly usage and doctrine,” Goldberg’s project here is to discern the inner logic of the practice of tort damages. His intuition is that the practice of full-compensatory tort damages in the modern era has departed from the logic that underlies tort law more generally.<sup>60</sup>

I will return to the moral theory of tort law in history in further detail after setting out the countertradition of contingency narratives. For now, however, it is worth noting several interesting features of the turn to history in the moral theory of torts. First, Goldberg and Zipursky are considerably more historical in their approach than other scholars who advance the moral view of torts. They provide

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<sup>58</sup> Goldberg & Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733 (1998); see also John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513 (2003); Gregory Keating & Dilan A. Esper, *Abusing “Duty”*, 79 U.S.C. L. REV. 265 (2006).

<sup>59</sup> John C. P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005).

<sup>60</sup> John C. P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 462 (2006).

a much more detailed look at the history and development of tort doctrine, for example, than Coleman or Weinrib does. Turning squarely to history has required that the moral theorist of tort grapple with more than the barest schematic account of the abstract structure of tort law. Goldberg's and Zipursky's move to history has also effectively described the intellectual history by which the moral theory of tort has become an embattled approach in the juridical literature. Goldberg's and Zipursky's projects thus involve seeking to restore an embattled moral practice in tort, and this is at least in part why their projects are historical, though historical in a particular way. As historical projects, the accounts of tort offered by Goldberg and Zipursky are dedicated in significant part to the same goal as Coleman and Weinrib: identifying the normative concepts that best capture the law of torts as it has developed in time. It is, as Goldberg writes quite explicitly, a deeply internalist practice in the sense that it is concerned to elaborate the existing logic of torts.<sup>61</sup>

Second, Goldberg and Zipursky adopt a more ambitious version of the moral theory of tort law than many of their colleagues in the corrective justice literature. In their view, the moral theory of tort law is not only compelling as a conceptual description of torts (Coleman's starting position), it is also compelling as a normative account of how the law ought to deal with tortious interference by one person with the rights of another. Goldberg's and Zipursky's co-authored article had hints of this, but Goldberg's subsequent work has made clear his ambitions for the redress-based theory of tort. Weinrib observed that the closely related corrective justice theory of tort provided an immanent normative framework from which to critique tort doctrine. Goldberg and Zipursky have taken Weinrib's point and run with it.

Third, Goldberg extends the historical roots of corrective justice's immanent principles back far beyond the advent of tort law as a crystallized common law field. Social historians of tort law such as Lawrence Friedman have long made a starting point of their histories of tort law the claim that tort law (understood as a unified conceptual body of law) only appeared in the 1850s.<sup>62</sup> Goldberg, however, seeks to challenge this timing story by describing the redress theory of tort law as deeply entrenched in the history of the common law. It may well be, he concedes, that the middle of the nineteenth century witnessed the advent of a particular novel theory of tort law, the welfarist or utilitarian theory. But that

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<sup>61</sup> *But see* Coleman, *supra* note 54, at 53, 54-63 (connecting corrective justice to wider ideals of freedom and equality); Goldberg, *Constitutional Status*, *supra* note 59, at 541-44 (connecting the theory of civil recourse to Lockean social contract theory); Benjamin C. Zipursky, *Philosophy of Private Law*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW* 623, 637-40 (Jules Coleman & Scott Shapiro eds., 2002) (connecting private law redress to Lockean social contract theory).

<sup>62</sup> FRIEDMAN, *A HISTORY OF AMERICAN LAW* (3<sup>rd</sup> ed., 2005).

novel theory was only a misguided departure from the better theory to be found in the earlier cases.<sup>63</sup> It is worth noting that Goldberg may be on increasingly tenuous ground here, whether or not the law of private redress for wrongs is properly conceived as reaching back many centuries. If the basis of his prescriptive case for torts is his description of torts practice, then torts practice cannot depart for too long from the approach he endorses before his prescriptive argument loses its footing. The more tort law frolics and detours from the principles that are ostensibly inherent in it, the more one wonders whether immanence narratives can make sense of accident law's development at all.

## II. THE COUNTERTRADITION OF CONTINGENCY

Alongside the long tradition of immanence stories in the Anglo-American law of torts, there is also a counter narrative tradition. The countertradition is committed to the contingency of the historical development of the law of accidents. It rejects the notion that the law of accidents is made up of practices in which either coherent immanent principles or deep underlying material forces are working themselves pure over time. Accident law, in the countertradition, is as messy, fragmented and time-bound as the collisions and accidents and human interactions out of which it arises. It is the ever-changing product of politics and human actions working themselves out in historical time.

What does it mean to say that something is contingent? This is actually quite a sticky and complicated question, one that quickly becomes mired in a philosophical quicksand of historical determinism and chance. The root is the Latin *contingere*, "to happen," which captures the basic idea. Historical contingencies are things that just happen. They are things about which it's difficult to say much more than that they happened. The realm of the contingent is a world of chance and probabilities, a world in which outcomes are not subject to natural or historical laws. There is no underlying logic, no indwelling principle in contingent phenomena. In this sense it is a realm of radical freedom: the future is not ineluctably determined by the past because the future just happens in irreducibly probabilistic ways. But it can also be a world of terrifying randomness, a world with few solid spots on which to rest easily.

The best science on this question suggests that something like this is the world we find ourselves in. Contingency actually exists in the basic order of the universe. That at least is the conclusion of quantum physics, which sees the

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<sup>63</sup> See Goldberg, *supra* note 60, at 467; see also Goldberg, *The Constitutional Status of Tort Law*, 115 YALE L.J. 524 (2005).

behavior of sub-atomic particles as irreducibly probabilistic. If quantum particles are not subject to natural-historical law, who is to say that human history is?<sup>64</sup>

All this science and metaphysics is a little more than a historians' training has equipped me to deal with. The historian's role in making sense of the question of contingency in human affairs is to sketch out more and less plausible counternarratives: stories of how phenomena such as accident law might have been very different. It is the project of sketching the branching paths that the law might have taken as human beings moved it into the future.

There are few more appropriate places to turn in the study of contingency than to the history of accidents and to the legal institutions that we have tried to build out of the ruins of their aftermath. In our everyday speech, after all, we typically treat accidents as unforeseen contingencies. Not surprisingly, they have long been a source of trouble for those who would see in history the working-out of either transhistorical principles or underlying social forces. Some have simply denied that there are any accidents at all. Hume contended that "what the vulgar call chance is nothing but a secret and conceal'd cause."<sup>65</sup> The belief in chance, Hume wrote, was a result not of the actual existence of chance in the world, but the result of "our ignorance of the real cause" of the event in question.<sup>66</sup> According to Montesquieu, "*les accidents*" were "controlled by general causes"; even "if the chance of one battle" seemed to have "brought a state to ruin," there was inevitably a more general cause that explained the state's demise.<sup>67</sup> For those who hold this view, historical contingencies are merely those features of history that have not yet been explained. Jonathan Edwards, the great eighteenth-century American theologian and theorist of free will, put it this way: "Any thing is said to be contingent or to come to pass by Chance or Accident . . . when its Connection with its Causes or Antecedents . . . is not discerned."<sup>68</sup> Two and a half centuries later, Chief Judge Benjamin Cardozo of the New York Court of Appeals agreed: "in the strictest sense," he wrote in a well-known insurance law opinion, "there is no such thing as an accident."<sup>69</sup>

Other proponents of underlying laws of historical development acknowledge that the problem of accidents in history requires them to qualify their strongest

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<sup>64</sup> The classic lay treatment is STEPHEN HAWKING, *A BRIEF HISTORY OF TIME*, 54-64 (10<sup>th</sup> Anniversary ed., 1998).

<sup>65</sup> DAVID HUME, *A TREATISE OF HUMAN NATURE* 97 (1999) (Part III, section 12).

<sup>66</sup> DAVID HUME, *AN INQUIRY CONCERNING HUMAN UNDERSTANDING* 69 (1995) (1748).

<sup>67</sup> MONTESQUIEU, *CONSIDERATIONS ON THE CAUSES OF THE GREATNESS OF THE ROMANS AND THEIR DECLINE* 169 (David Lowenthal ed., 1965) (1748). The French is from the original; see *CONSIDÉRATIONS SUR LES CAUSES DE LA GRANDEUR DES ROMAINS ET DE LEUR DÉCADENCE* 103 (1954).

<sup>68</sup> JONATHAN EDWARDS, *FREEDOM OF THE WILL* (Paul Ramsey ed., 1957) (1754) (I. iii. 20).

<sup>69</sup> JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 21 (2004).

and least guarded claims. Marx, for example, conceded that “accidentals” could alternately accelerate and retard the general trends of history.<sup>70</sup> Marx’s collaborator, Friedrich Engels, sought to explain accidents away as the short-run noise in the otherwise predictable long-term evolution of the law. (“Amid the endless host of accidents,” he contended, the “economic movement finally asserts itself.”<sup>71</sup>) In a similar vein a century earlier, Blackstone identified “various accidents” as the reason why nature and reason manifested themselves differently in the laws of the states of Europe.<sup>72</sup> Marx, Engels, and Blackstone each sought to adjust their theories of general patterns in history so as to accommodate messy facts that couldn’t easily be fit within the confines of their models. Along just these lines, the great English historian E. H. Carr even developed an entire theory of historical causation based on the distinction between “rational” causation and “accidental” causation. Accidents became the occasional, unsystematic, and ultimately irrelevant deviations from the general course of reason, history, and time.<sup>73</sup>

Yet accidents do not have to be features of history to be explained away as irrelevant detail. Other historians, especially in recent years, have embraced the idea of accident as a metaphor for how history happens. For this group, accidents illustrate and embody a deep contingency in history. Mid-twentieth-century French historian Marc Bloch described accidents in his classic book on the theory of history as the stuff of which history was made. Rejecting Carr’s distinction between the “rational” and “accidental” causes of any particular human phenomenon, Bloch found deep causal significance in even seemingly trivial causal factors. For Bloch, the distinction between the trivial and the significant in causal accounts was socially constructed and contingent on the particular context in which the causal inquiry took place.<sup>74</sup> More recently, John Lewis Gaddis and Niall Ferguson have built on Bloch’s beginning to suggest that accident and chaos are how history develops.<sup>75</sup> As Gaddis notes, the most sophisticated students of risk believe that accidents are inevitably built into even the most sophisticated and rationally engineered systems. It hardly seems likely that history should be any different.<sup>76</sup>

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<sup>70</sup> See FERGUSON, *supra* note 29, at 39.

<sup>71</sup> Engels to Joseph Bloch (September 21-22, 1890), in TUCKER, *supra* note 36, at 760; see also Engels to H. Starkenburg (Jan. 25, 1894), in TUCKER, *supra* note 36, at 767, 768.

<sup>72</sup> 3 BLACKSTONE, *supra* note 12, at 87.

<sup>73</sup> EDWARD HALLETT CARR, WHAT IS HISTORY? 136-43 (1961).

<sup>74</sup> MARC BLOCH, THE HISTORIAN’S CRAFT (Peter Putnam trans., 1953) ; also H. L. A. HART & TONY HONORE, CAUSATION IN THE LAW (1959).

<sup>75</sup> JOHN LEWIS GADDIS, THE LANDSCAPE OF HISTORY: HOW HISTORIANS MAP THE PAST (2002); Niall Ferguson, *Introduction*, in FERGUSON, *supra* note 29.

<sup>76</sup> CHARLES PERROW, NORMAL ACCIDENTS: LIVING WITH HIGH-RISK TECHNOLOGIES (1999).

My own version of accident as metaphor and illustration – coming in the long line of such historical metaphors stretching from Carr to Bloch to Gaddis -- is *The Accidental Republic*. My hope was to use the double meaning of the term “accidental” as more than a kind of cheap linguistic parlor trick. The law of accidents is one of the central forums in which human beings have sought to grapple with the risk and reality of unforeseen catastrophe and unexpected loss. In creating a law of torts, lawyers – and perhaps especially common lawyers – have sought to contain risk within the confines of reasoned principles. Tort, in other words, has been a site where the messiness of human existence – its injuries, its insults, its accidents – meets the human project of imposing reason on contingency. Common law tort jurists, in other words, seek to draw immanent principles out of the very teeth of contingency.<sup>77</sup>

From the beginning of torts as a field there have been many who doubted that this conceptual project could succeed. Much has been made of the fact that the first English-language treatise on the law of torts – *The Law of Torts or Private Wrongs* by Francis Hilliard -- was not published until 1859.<sup>78</sup> Perhaps more attention should be paid to the great difficulties that torts treatise writers experienced over the subsequent decades making sense of the field and organizing the messy and overflowing detritus of human interaction within its ambit. Hilliard’s treatise set off a flood of similar publications. Hilliard himself published no fewer than three new editions of his treatise by 1874. Others followed quickly in his train.<sup>79</sup> Thomas M. Cooley, one of the most distinguished of the treatise authors, felt compelled to justify the publication of still another torts treatise in 1879. As he explained, vast increases in injuries and injury-related disputes required an almost constant updating and reorganization of the field.<sup>80</sup>

And yet for all the energy put into torts books, identifying a conceptually coherent ordering of the emerging field proved remarkably difficult. Eleven years after Hilliard’s first treatise, Holmes still thought that “torts is not a proper subject

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<sup>77</sup> JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC*, *supra* note 69.

<sup>78</sup> FRANCIS HILLIARD, *THE LAW OF TORTS OR PRIVATE WRONGS* (Little, Brown, 1859). Subsequent editions, all published by Little, Brown, came out in 1861, 1866, and 1874.

<sup>79</sup>See, e.g., JAMES BARR AMES, *SELECT CASES ON TORTS* (Cambridge, 1874); MELVILLE M. BIGELOW, *ELEMENTS OF THE LAW OF TORTS FOR THE USE OF STUDENTS* (Boston, Little, Brown & Co. 1878); GEORGE BLISS, JR., *THE LAW OF LIFE INSURANCE WITH CHAPTERS UPON ACCIDENT AND GUARANTEE INSURANCE* (New York, Baker, Voorhis & Co. 1872); FREDERICK H. COOKE, *THE LAW OF LIFE INSURANCE INCLUDING ACCIDENT INSURANCE AND INSURANCE BY MUTUAL BENEFIT SOCIETIES* (New York, Baker, Voorhis & Co. 1891); WILLIAM B. HALE, *HANDBOOK ON THE LAW OF TORTS* (St. Paul, West Publ'g Co. 1896); THOMAS G. SHEARMAN & AMASA A. REDFIELD, *A TREATISE ON THE LAW OF NEGLIGENCE* (New York, Baker, Voorhis & Co. 1869).

<sup>80</sup>THOMAS M. COOLEY, *A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT I* (Chicago, Callaghan & Co., 1879).

for a law book.” Holmes was hardly alone in this. Irish lawyer James Henry Monahan observed wryly that “no one supposes that the heterogeneous topics grouped together in our law books under the heading ‘torts’ have any generic connection.”<sup>81</sup> Edward Jenks, whose *Digest of English Civil Law* began to appear in 1905, wrote that

[T]here is no English Law of Tort; there is merely an English Law of Torts, i.e., a list of acts and omissions, which, in certain conditions, are actionable. Any attempt to generalize further, however interesting from a speculative standpoint, would be profoundly unsafe as a practical guide.<sup>82</sup>

Sir William Markby put it most baldly when he asserted as to the field of torts: “I believe the classification to be a false one.”<sup>83</sup> By 1917, even defenders of tort law’s basic principles, men like Jeremiah Smith of Harvard Law School, were calling the category “torts” an incoherent hodge-podge and calling for a reorganization of the law of torts into several new categories.<sup>84</sup>

Closer to our own time, contingency narratives in the law of accidents owe much to the doctrinal history work of Robert Rabin and Gary Schwartz. In the late 1970s and early 1980s, at a time when economically-influenced scholars were arguing about the historical pedigree of strict liability and negligence, when materialist historians like Horwitz were claiming to find a pro-industrial transformation of American accident law, and when philosophers of tort like Coleman and George Fletcher were beginning to develop their alternative accounts of the principles underlying torts practice, Rabin and Schwartz each wrote pieces that called into question whether these social forces and moral principles could be said to be indwelling in tort law. Schwartz wrote eclectic and undoctinaire histories of nineteenth-century tort doctrine that left one feeling pretty certain that it would be hard to find any kind of underlying logic in the unruly mass of nineteenth-century cases; nineteenth-century courts didn’t seem to have developed much of a theory for their decisions. Horwitz’s and Posner’s competing economic theories of tort were Schwartz’s primary targets, but his findings were no more congenial to those who sought to locate immanent justice principles in the law of torts.<sup>85</sup> Rabin’s essay shared Schwartz’s undoctinaire

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<sup>81</sup> JAMES HENRY MONAHAN, *THE METHOD OF LAW: AN ESSAY ON THE STATEMENT AND ARRANGEMENT OF THE LEGAL STANDARD OF CONDUCT* 106 (MacMillan & Co., 1878).

<sup>82</sup> EDWARD JENKS, *A DIGEST OF ENGLISH CIVIL LAW*, bk 2, part 3 (cont’d), p. xiv (1910).

<sup>83</sup> WILLIAM MARKBY, *ELEMENTS OF LAW* § 713 (Clarendon Press, 3d ed. 1885).

<sup>84</sup> Jeremiah Smith, *Tort and Absolute Liability: Suggested Changes in Classification*, 30 *HARV. L. REV.* 241 (1917).

<sup>85</sup> Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 *YALE L.J.* 1717 (1981); Gary T. Schwartz, *The Character of Early American*

approach. But Rabin's conclusions were considerably more startling. Looking carefully at early nineteenth-century cases, Rabin concluded that the dominant position in the common of torts through the nineteenth century was one of no liability at all. Rabin traced the astonishing array of status-based limited-duty rules that minimized tort liability in virtually every sphere of social life, ranging from the family to the workplace to the state, from real property to medical care to consumer products. One of the signal features of Rabin's analysis was that it offered the beginnings of an explanation for one of the nagging issues in the history of tort law: why were there so few cases before the nineteenth century? Anywhere one happened to be injured, it seemed, a limited-duty rule would be sure to minimize the prospects of a tort recovery.<sup>86</sup>

The combined effect of Rabin and Schwartz's essays was to knock the legs out from under both the materialist and the idealist immanence narratives. If Schwartz was right, then neither the left-wing materialist account of tort (Horwitz) nor its right-wing cousin (Posner) accurately described the cases. If Rabin was right, then it seemed strange to identify long-standing corrective justice principles in tort doctrine; the law had established powerful no- and limited-duty rules that took away with one hand whatever corrective justice rights it had seemed to create with the other.

Among intellectual historians, a number of scholars have kept alive the conceptual critique of the field by adopting an essentially Kuhnian view. In this approach, the basic paradigm of the law of torts oscillates from one paradigm to another over time. Writing not long after Jeremiah Smith's critique of the doctrinal category as incoherent, Nathan Isaacs described the development of tort as flopping back and forth between moral and amoral approaches to the fault principle. "The history of tort law," he wrote, "lapses from the moral fault basis and returns to it." Rather than a single movement in any one direction," Isaacs observed ongoing "alternation between periods" of liability according to external standards of liability and periods in which "morals are reinfused into the law."<sup>87</sup> Several decades later, E. F. Roberts elegantly described the law of torts moving through time in infinitely iterating oscillations between order and disorder, clarity and muddiness, as the prevailing ethos of one generation transformed the tort principles it had inherited from the one before it. The normal science of one

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*Tort Law*, 376 *UCLA L. REV.* 641 (1989). It's worth noting that Schwartz's historical scholarship on developments in the mid-twentieth century focused on the durability and persistence of the negligence principle in tort. These twentieth-century studies were quite congenial to negligence-oriented immanence narratives. See Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 *GA. L. REV.* 963 (1981); Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 *GA. L. REV.* 601 (1992).

<sup>86</sup> Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 *GA. L. REV.* 925 (1981).

<sup>87</sup> Nathan Isaacs, *Fault and Liability*, 31 *HARV. L. REV.* 954, 966 (1917-1918).

generation (to put it in more closely Kuhnian terms) gave rise to an increasing number of anomalies and ambiguities as it clashed with the ethos of the next.<sup>88</sup> G. Edward White's elegant intellectual history of American tort law evinced the same Kuhnian attitude, tracing the paradigm shifts in tort as one intellectual fashion replaced another.<sup>89</sup> Arthur McEvoy and Herbert Hovenkamp did much the same in interesting studies of the law of tort causation, though Hovenkamp in particular was less certain than White that changing intellectual fashions made their way all the way down from juridical theory to decided cases.<sup>90</sup>

So far I have been focusing on the critics of what White's intellectual history of tort law called "the conceptualizers": mid- and late-nineteenth-century jurists who sought to organize the law of torts around one or more coherent ideas. Convinced that a set of principles was immanent in the developing case law, the conceptualizers did their best to organize and arrange the cases and the doctrines so as to develop the principles immanent in them. The first generation of contingency narratives, by contrast, viewed tort as too disparate and messy to embody any indwelling principle or theory. For the critics, the law of accidents was moving at far too fast and furious a pace to hew nicely to a set of guiding ideas drawn from the case law itself. The United States, as I have written elsewhere, underwent a world-historical accident crisis in precisely the years in which tort law developed as an independent legal field. It would have been a remarkable feat of common law engineering if the law had been able to keep up.

There have also been critics of the materialist strand of immanence narratives. Fleming James tended to side with the conventional materialist wisdom, but even he grasped that the social premises of tort law left degrees of freedom for legal doctrine. "The fact that these premises are inarticulate of itself has some effect in directing the course of the trend," he wrote, "and leaves no little room for rationalization and explanation to give it shape – sometimes to distort it."<sup>91</sup> George Priest's influential essay on the origins of enterprise liability offered an even more critical view of the economic determinism thesis; on Priest's account, foolish ideas had hijacked the law of torts toward economically disastrous ends.<sup>92</sup>

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<sup>88</sup> E. F. Roberts, *Negligence: Blackstone to Shaw to ? An Intellectual Escapade in a Tory Vein*, 50 CORNELL L. Q. 191 (1964).

<sup>89</sup> G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* (1980).

<sup>90</sup> Herbert Hovenkamp, *Pragmatic Realism and Proximate Cause in America*, 3 JOURNAL OF LEGAL HISTORY 3 (1982); Arthur F. McEvoy, *The Triangle Shirtwaist Fire of 1911: Social Change, Industrial Accidents, and the Evolution of Common-Sense Causality*, 20 LAW & SOCIAL INQUIRY 621 (1995).

<sup>91</sup> Fleming James, Jr., *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704, 704 (1938).

<sup>92</sup> George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUDS. 461 (1985); see also George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987).

The still-new literature on the public choice dilemmas presented by legislation in the area of personal injuries and tort law has only further emphasized the time-bound and interest-group-contingent character of tort law. Rather than Posner and Landes's vision of tort law as an efficient public good, more recent scholars such as Paul Rubin and Neil Komesar describe the democratic creation of tort law as a highly contentious process in which powerful interest groups often get their way at the expense of the disorganized and diffuse. The new public choice scholars disagree strongly about which side has the unfair advantage in the legislative process (plaintiffs' lawyers or defendants' interests), but they share the view that legislation in the area can be expected not to embody overarching efficiency principles but to be contingent on the ever-shifting power balance among the relevant interest groups.<sup>93</sup>

The high point of the late twentieth-century critique of materialist histories of accident law was a pair of articles written by Robert W. Gordon. In a few spare and elegant moves, Gordon swiftly undid the bonds that ostensibly tied accident law closely to society's material base. A whole host of approaches to accident law, Gordon noted, had been employed by states engaged in successful industrialization projects. The United States may have industrialized under a negligence regime, but Germany shifted toward strict liability even in the midst of its first generation of industrialization. England and the United States had similar timetables in the development of tort doctrine, notwithstanding that English industrialization happened a good deal earlier than industrialization in the United States. Material demands simply did not translate in any kind of determinate fashion into particular approaches to the law of accidents. The needs of society or the interests of one or more classes could not explain developments in the law of accidents, and by the same token the law could be said to embody underlying social needs or class interests only in a highly attenuated fashion.<sup>94</sup>

Much of the best work in the contingency literature has been destructive, focused on the take-down of various immanence narratives. But of late there has been a renaissance of what we might call positive or constructive contingency accounts. The historian Barbara Welke, for example, has written a fascinating book describing in abundant detail the ways in which the liberalization of tort liability in the late nineteenth and early twentieth centuries turned on cases involving female passengers' railroad injuries. In particular, Welke contends that we can identify in railroad injury cases at the turn of the turn of the twentieth century a shift in prevailing ideas of liberty from freedom and autonomy to bodily

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<sup>93</sup> Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEGAL STUDS. 807 (1994); NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

<sup>94</sup> Robert W. Gordon, *Tort Law in America*, 94 HARV. L. REV. 903 (1981); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

integrity. The former were values that American culture gendered as male, but the latter theory of liberty was one that was gendered female and drew support from the hundreds and thousands of startling injuries to women on the new railroad system. In Welke's account, the law of torts developed in a complex set of interactions between Victorian gender roles, common law doctrine, and industrial machinery.<sup>95</sup>

Thomas Grey's *Accidental Torts* is an especially significant contribution to the positive contingency literature. Grey starts with the claim that torts is a remarkably recent field in the law. His questions are why the field developed and what other ways of categorizing and classifying the law might have developed in its place. Grey's counterfactual history identified an alternative category of the "general rights of persons," a category that would have treated the actions we now call tort actions as remedial actions enforcing "primary rights," which would have formed the core of the substantive law.<sup>96</sup> The field of tort law ultimately swallowed up the "general rights of persons" category, substituting set of remedies for the substantive rights as the central conceptual apparatus of the law of private wrongs. As Grey puts it, "things need not have turned out this way." A very different ordering scheme for the law we now call torts was instinct in the body of common law materials at the birth of the field.

My contingency account of the law of accidents started with the commonplace observation that the law of torts is just one of many ways that we regulate risks and compensate injuries. As we look across legal systems, tort, regulation, and social insurance serve a number of overlapping functions and often substitute for one another in doing so. It follows that the story of American accident law is not just the story of doctrinal contingency internal to the common law (the story Grey tells so well), but also the story of interactions among a wide array of very different approaches to dealing with the problem of accidents. Labor and consumer markets, risk regulation, social insurance, first-party insurance, mutual assistance associations, welfare capitalism, and the common law of torts represent just the most prominent devices with which Americans experimented in establishing the United States's mixed system of accident law. The mix that characterizes our accident law, I argued, is largely the outcome of debates and conflicts around the turn of the twentieth century, debates and conflicts that have shaped our accident law to this day.

At this higher level of generality, the particular structure of American accident law looks ever more contingent on the unpredictable messy resolution of contests among a wide array of constituencies, interest groups, and ideologies, all situated in a dense thicket of political and legal institutions. This is an approach, in other

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<sup>95</sup> BARBARA YOUNG WELKE, *RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865-1920* (2001).

<sup>96</sup> Thomas C. Grey, *Accidental Torts*, 54 *VAND. L. REV.* 1225, 1252-56 (2001).

words, that emphasizes the contingency of our accident law systems. It is also an approach that is skeptical of the idea that one can locate immanent principles of justice, corrective or otherwise. Common law jurists of the nineteenth century, as both Grey and I (among others) have argued, had a difficult enough time locating principles around which the field could be organized. Once we see that the common law was just one of a number of contingent alternatives for dealing with accidents at all, the full scope of the contingency in the development of accident law becomes clear. Accident law in the United States might have taken on many different characters, and that it took on the character it did is the result of messy interactions between myriad institutions and constituencies in real historical time.

A word is in order here about the limits of the contingency story in both Grey's account and in mine. Properly understood, these are not histories of accident law that list one damn doctrine or institution after another. These are not stories of inexplicably random or chance development. There are patterns and constraints in both of our accounts. Grey identifies at least two constraints on the development of what became tort law in the mid- and late-nineteenth century. The first is history. Doctrinal development does not happen on a blank slate; it happens against the backdrop of historically developed legal materials. The common law is self-avowedly path dependent, and radical departures without any grounding in the received materials of the law are highly unlikely. The second constraint is one of function. Grey describes the negligence regime as "particularly well-suited" to the problem of accidents and personal injury in industrial era. At the very least, we can say that the social needs and the law's economic functions place outer bounds on the kinds of approaches that the law can develop. Sometimes, as in the case of the Soviet Union, dysfunctional legal regimes can survive for a very long time. But the relationship of the function of the law to its form is powerful, if not determinative. Grey does not mention a further constraint, but it is also clearly at work in history: justice. Approaches to accident law that offend widely held ideas of justice are about as unlikely to stick as approaches that are functionally disastrous. (Of course, prevailing ideas of justice themselves change over time in Kuhnian paradigm shifts.)

Plausible contingency stories articulate counterfactual possibilities and alternative paths that operate within the constraints of history, function, and justice. This is why my *The Accidental Republic* spent as much time as it does limning, for example, the economics of insurance markets. Cooperative first-party insurance was a widespread response among industrial workers to the problem of industrial accidents. But if we are to understand the course by which cooperative insurance societies developed and eventually unraveled, the peculiar insurance market constraints under which they worked are critically important. So too classical tort doctrine: both the strict liability and negligence principles offer plausible strategies for economically functional and morally just approach to

liability determinations. (Economists and philosophers still argue today about which approach best advances efficient outcomes and corrective justice.) But doctrinal strategies that gum up the works of social life or offend moral sensibilities are unlikely to get much traction. Function, history, and justice, rarely determine legal outcomes, but they shape some outcomes and effectively preclude others. Legal regimes that are functionally disastrous, historically ungrounded, or morally outrageous are considerably less plausible candidates for the future of the law than those that meet these constraints.

The point of my account of accident law's contingency (and Grey's as well) is that the bounds placed on the development of the law by function, history, and morality are really quite loose. There are any number of rules, institutions, doctrines, and organizing principles that can meet the spare (if insistent) demands of history, economy, and justice. But the field is not completely open. The development of accident law is a story of what I have in another context called bounded contingency: many possibilities within the boundaries of outer limits.<sup>97</sup>

Yet even when we acknowledge these important constraints on contingency, the implications of contingency narratives remain substantial. It is the contingency of accident law, as Coleman and Grey have recently reminded us, that underlies what Grey calls the instability of the field and the readiness of tort scholars to imagine and even call for the abolition of the field altogether. These latter-day Jeremiah Smiths have included some of the leading lights in the field, people such as P. S. Atiyah and Stephen Sugarman. As Coleman observes, no one calls as readily for the abolition of the criminal law or for the abolition of contracts. Indeed, the law of torts seems to have been peculiarly susceptible to wholesale critique, from 1870 when Holmes first doubted its coherence right up to the present.<sup>98</sup>

So why, then, have immanence narratives recently become so much more prominent in the literature? At least three interrelated factors seem to be at work. For starters, there is no doubt that principles of corrective justice are an essential part of Western traditions of justice and law. These go back at least to Aristotle, and they resonate powerfully in the social contract tradition of seventeenth-century thinkers such as Locke. Second, in the law schools, the idea of corrective justice fits most easily into the torts curriculum. Torts has become the foundation course in private wrongs in the American system of legal education, and it should therefore not be surprising to see the significance of tort attributed to the

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<sup>97</sup> JOHN FABIAN WITT, *PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW* (2007).

<sup>98</sup> Jules Coleman, *The Costs of the Costs of Accidents*, 64 MD. L. REV. 337 (2005); P. S. Atiyah, *Personal Injuries in the Twenty-First Century: Thinking the Unthinkable*, in PETER BIRKS ed., *WRONGS AND REMEDIES IN THE TWENTY-FIRST CENTURY* (1996); STEPHEN D. SUGARMAN, *DOING AWAY WITH TORT LAW* (1989).

corrective justice tradition. Third, in law schools talking like lawyers is what we do (or try to do, anyway), and immanence narratives reproduce the ways of arguing about the law that we find in conventional lawyer speech. Immanence narratives share law-talk's heady mix of descriptive and prescriptive. The curricular structure of the modern law school – along with the robust financing of law schools and legal scholarship in law schools – has created institutional reasons to invest the field of torts with integrity and coherence.

Yet the latest round of immanence narratives may have gone a step or two too far. We need not doubt that corrective justice presents an important set of ideas about justice. We need not even doubt that the law of torts has in significant part been shaped by corrective justice ideas. But the number of factors that have gone into the development of tort law is dizzying, and corrective justice ideas have just as often as not been subordinated to considerations of an almost infinite variety of other kinds. Ironically, this is perhaps more true in the common law system than in other legal systems, even though it is the common law system (in its American variation, at any rate) that has the most robust system of tort law.<sup>99</sup>

Let me focus in particular on two claims in the immanence literature that become more contingent and complex on sustained examination. Both of these claims are advanced by Goldberg, who has pursued the historical angle in the corrective justice literature more aggressively than anyone else of late. The first is Goldberg's claim that the long history of tort law justifies identifying a constitutionally-protected baseline of private rights of action in tort, a baseline that places Fourteenth Amendment limits on the scope of what tort reform may accomplish in the state legislatures and in the Congress. The second is Goldberg's suggestion that the historical measure of tort damages was one of satisfaction or adequate redress rather than compensation. These two claims are closely related for Goldberg. Private satisfaction of wrongs (not full compensation for wrongful injuries) is the constitutional baseline he seeks to defend. Moreover, both are integral to his attempt to create what he describes as an "internal" historical description of tort law, "operating entirely at the level of lawyerly usage and doctrine" and redescribing tort law not as a regulatory system but as a body of law in which corrective justice principles have been immanent for centuries.<sup>100</sup>

As for the first claim, it would be quite startling if corrective justice's principles were immanent in the common law's extension of royal authority in late medieval and early modern England. Every first year student knows (or ought to know) that the common law developed not as a system of law or justice in the first instance, but as a mechanism for extending the power of the English

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<sup>99</sup> U.S. TORT COSTS: 2004 UPDATE, TRENDS AND FINDINGS ON THE COST OF THE U.S. TORT SYSTEM (2004).

<sup>100</sup> Goldberg, *Two Conceptions*, *supra* note 60, at 435.

crown.<sup>101</sup> The common law forms of action emerged, in Theodore Plucknett's phrase, as "administrative commands" from the sovereign designed to keep the peace.<sup>102</sup> This is the reason phrases such as "by force and arms" ("*vi et armis*") and in "breach of the peace" ("*contra pacem*") run through early torts pleadings.<sup>103</sup> The King was not so much interested in remedying private wrongs as he was in establishing a monopoly on the legitimate use of force. We can tell this in significant part because other private wrongs were remediable in the welter of local manorial and borough courts that underlay the common law system.<sup>104</sup> Not surprisingly, the leading historians of the common law describe its early history as one chiefly concerned with the expansion of royal power and with the growth of the crown's administrative authority.<sup>105</sup>

This mismatch between the justice talk of the corrective justice literature and the expedient political origins of the common law helps to explain why Blackstone has served the immanence narratives so well. When Goldberg writes that the common law established "a full menu of remedies" for private wrongs, he is relying on Blackstone's similar description of the common law.<sup>106</sup> But Blackstone was engaged in virtually the same project Goldberg is! That is to say, Blackstone, too, was the author of an immanence narrative. At the end of the long early modern period, in which the helter-skelter development of common law forms of action grew in an ever more chaotic tangle, Blackstone sought to knit together the common law into a coherent cloth. It was famously Blackstone's project to make a reasoned and coherent whole out of the historically accumulated common law forms of action. Perhaps he sought to hold off Parliamentary revisions to the common law, as David Lieberman has persuasively argued.<sup>107</sup> Perhaps he sought to put the common law on the same plane as the civil law, which had long claimed to resonate in natural law principles and reason.<sup>108</sup> Perhaps he sought merely to introduce to the common law literature the civil law

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<sup>101</sup> J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 14 (4th ed., 2002) ("The Crown's first object was to develop the scope of breach of the king's peace in order to preserve public order."); THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 11-13 103, 353-54 (1956).

<sup>102</sup> PLUCKNETT, *supra* note 101, at 355.

<sup>103</sup> See especially BAKER, *supra* note 101, at 60-61.

<sup>104</sup> Julius Goebel, *King's Law and Local Custom in Seventeenth-Century New England*, 31 COLUM. L. REV. 416 (1931); BAKER, *supra* note 101, at 22-27, 61 ("The limit of writs of trespass to wrongs *vi et armis* and *contra pacem* did not reflect any narrow understanding of the nature of trespass; it was merely a fetter on the jurisdiction of the central courts.").

<sup>105</sup> See especially BAKER, *supra* note 101, at 14-17.

<sup>106</sup> Goldberg, *The Constitutional Status of Tort Law*, *supra* note 63, at 534.

<sup>107</sup> DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY ENGLAND (1989).

<sup>108</sup> S. F. C. Milsom, *The Nature of Blackstone's Achievement*, 1 OXFORD J. OF LEGAL STUDIES 1 (1981).

literary genre of “institutes,” a style of legal literature designed to reveal a coherent national legal architecture.<sup>109</sup> But regardless why Blackstone was engaged in the project of finding a hidden logic internal to the common law, it should be clear that his mix of prescription and description does not provide us with a ready evidentiary basis for characterizing the common law as a coherent body of law animated by underlying principles. Blackstone’s goal was to do just that. But whether he succeeded in this descriptive project has long been doubted.<sup>110</sup>

On closer examination, beneath the strong descriptions of Blackstone’s *Commentaries*, the common law offered scant few remedies for private injury. When we consider the daunting array of status categories as to which the common law implied no duty of care (or only a limited duty of care), Robert Rabin’s account of the common law as a regime of no liability seems substantially closer to the mark.<sup>111</sup> Blackstone and Goldberg, of course, have a ready rejoinder: not all injuries are legally cognizable wrongs. Rabin’s no-duty categories, they might say, are categories the law treated as not being wrongs at all. It would follow that the common law did provide remedies for wrongs, even if it defined the class of wrongs substantially more narrowly than we do today. But this is not really a satisfactory response. If the proposition is limited in this fashion to legally cognizable wrongs, it risks becoming an arid and circular formalism. In this form, the all-wrongs-have-a-remedy idea pretends to establish little more than that the common law remedied those wrongs that the common law remedied.

Even this arid and circular formulation may not offer a good account of the common law. Procedural and evidentiary obstacles to recovery made it exceedingly difficult for the victims of legally cognizable wrongs to vindicate their rights. Consider the well-known procedural dilemma of the victim in a running-down case on a highway. He had to choose between an action in trespass and an action in trespass on the case. If he sues in trespass, he risks being nonsuited if it turns out that the carriage owner’s servant was driving the carriage; respondeat superior claims were claims of indirect injury that could only be remedied in case. If he sues in case, he risks being nonsuited if it turns out that the master himself was driving the carriage; claims for direct injury could only be remedied in trespass.<sup>112</sup> Consider also the evidentiary difficulties a trespass or case plaintiff would face even if he was fortunate enough to choose the right writ.

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<sup>109</sup> John Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547 (1993).

<sup>110</sup> See especially JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES: A CRITICISM OF WILLIAM BLACKSTONE’S COMMENTARIES ON THE LAWS OF ENGLAND (Charles Warren Everett trans.) (1928).

<sup>111</sup> Rabin, *supra* note 86.

<sup>112</sup> See RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 97-98 (8<sup>th</sup> ed., 2004).

Until the middle of the nineteenth century, parties themselves were incompetent to testify. So were witnesses with an interest in the case. John Langbein has suggested that the witness incompetency rules of the common law effectively precluded the emergence of a law of torts for personal injury. (Who other than the parties, after all, were in a position to say much about what had happened?)<sup>113</sup> Even after the abolition of the witness incompetency rules, I have pointed out, the emerging law of hearsay and the now-abandoned doctrine of the *res gestae* made it extremely difficult throughout the nineteenth century and into the twentieth to offer into evidence the statements of a corporate defendant's employees in a personal injury case.<sup>114</sup>

One could compile a long list of such procedural obstacles to common law tort actions.<sup>115</sup> To be sure, these are procedural and evidentiary obstacles to righting wrongs, not substantive obstacles, whatever that means. (It's worth noting that whether the law of torts is best thought of as a substantive or a remedial field is subject to considerable debate.<sup>116</sup>) The immanence narrative might be able to rescue itself by purporting only to describe a substantive law of torts.<sup>117</sup> But it does so at the cost of retreating ever further into an arid formalism, here one that rests almost entirely on the socially constructed boundaries between legal-doctrinal fields. It may be that we can identify parts of the common law that loosely embody the principles of corrective justice, and it may also be that we can cordon those parts off from the rest so as to identify a field of the law conceptually committed (more or less) to corrective justice principles. But absent consideration of the numerous additional legal rules and practices that impinge on the field, one cannot know whether this hermetically sealed body of corrective justice embodying legal practices is a good thing or a bad thing. (Coleman's work has stated this forthrightly for years.) Corrective justice might, for example, be the superstructural ideological apparatus that disguises the underlying class interests of the law. Or corrective justice might be a norm in tort law because it is

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<sup>113</sup> John H. Langbein, *Historical Foundations of the Law of Evidence: A View From the Ryder Sources*, 96 Colum. L. Rev. 1168 (1996); see also George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575. (1997); John Fabian Witt, *Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine*, 77 TEX. L. REV. 825 (1998).

<sup>114</sup> WITT, *THE ACCIDENTAL REPUBLIC*, *supra* note 69, at 57-59.

<sup>115</sup> See, e.g., EDWARD PURCELL, *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY LITIGATION IN INDUSTRIAL AMERICA, 1870-1958* (1992).

<sup>116</sup> Compare Grey, *Accidental Torts* (torts as remedial) *supra* note 96, with Coleman, *The Costs of the Costs of Accidents* (torts as the connective tissue between first order and second order) *supra* note 98, with Zipursky, *Civil Recourse, Not Corrective Justice* (torts as about rights and wrongs) *supra* note 53.

<sup>117</sup> See, e.g., Goldberg's contention that the law's failure to allow meaningful remedies in cases of judgment proof wrongdoers is no obstacle to the civil redress theory of torts. Goldberg, *The Constitutional Status of Tort Law*, *supra* note 63.

functionally suited to advance social welfare.<sup>118</sup> On the corrective justice account of tort law, however, we have no way of grappling with such questions. To make matters still worse, if we go back far enough, it is not readily apparent that the substantive / procedural move is available to corrective justice theorists in the common law system. Henry Sumner Maine's famous dictum on this score was that in the history of the common law, substance was "secreted in the interstices of procedure." The substantive rights protected by tort law (what Thomas Grey's alternative schema would have called "the general rights of persons") emerged out of the procedures of the writ system. If common law procedures obstructed the righting of wrongs, then it would hardly seem that the substance / procedure distinction can do much work to rescue the immanence narrative.

The second claim in recent immanence narratives is that the historical law of tort damages embodied the law's commitment not to full compensation but to the redress of private wrongs. Goldberg makes this argument in significant part to support his first claim about the constitutional baseline of tort law. The idea is to disengage tort damages from the utilitarian model in which tort damages are equal to the harm inflicted in order to create incentives for efficient behavior. (If prospective tort defendants have to pay for the cost of the tortious damages they cause, they can be expected to take precautions up to the cost of the expected harm, and no more.) If Goldberg can succeed in disentangling tort damages from the utilitarian calculus, he suggests, he will better be able to defend torts as a justice-oriented (rather than an efficiency-oriented) practice.<sup>119</sup> And in at least one respect, Goldberg's damages contention is certainly right. It is highly unlikely that the measure of damages at common law had much to do with a formally utilitarian calculation about optimal damages or cost-internalization. The modern idea of cost internalization is a quite new development, traceable back to the turn of the twentieth century.<sup>120</sup>

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<sup>118</sup> Cf. Cass Sunstein, *Moral Heuristics*, 28 BEHAVIORAL AND BRAIN SCIENCES 531 (2005).

<sup>119</sup> Goldberg, *Two Conceptions*, *supra* note 60; see also Zipursky, *Civil Recourse, Not Corrective Justice*, *supra* note 53, at 710-13. It is worth noting that it is not clear that decoupling damages from compensation will distinguish Goldberg's civil redress approach from its utilitarian competitors. A whole host of utilitarian theorists have also begun to develop the idea that damages ought to be decoupled from compensation. See, e.g., Albert Choi & Chris William Sanchirico, *Should Plaintiffs Win What Defendants Lose? Litigation Stakes, Litigation Effort, and The Benefits Of Decoupling*, 33 J. LEGAL STUDS. 323-354 (2004); Robert Cooter & Ariel Parat, *Anti-Insurance*; Michael A. Heller & James Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997 (1999); A. Mitchell Polinsky & Yeon-Koo Che, *Decoupling Liability: Optimal Incentives for Care and Litigation* 22 RAND JOURNAL OF ECONOMICS 562-570 (1991); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347 (2003).

<sup>120</sup> DAVID MOSS, *SOCIALIZING SOCIAL SECURITY* (1995); see also WITT, *ACCIDENTAL REPUBLIC*, *supra* note 69.

This does not mean, however, that there was necessarily an alternative model of redress damages indwelling in the common law. It is substantially more likely that the broad authority of the common law jury allowed damages questions to go undertheorized for centuries. This juror discretion (which persisted well into the nineteenth century) may account for the early ambiguities in the idea of damages that Goldberg usefully illustrates.<sup>121</sup> The greater difficulty measuring economic losses in the era before the rise of wage labor surely also played a role in the ambiguity of personal injury damages in the eighteenth-century common law. This latter factor may explain why Goldberg thinks that the model of satisfaction and redress was more pronounced in personal injury cases than in property damage cases. Calculating personal injury losses in the pre-wage-labor era was simply far more difficult than calculating the value of harm to property, and so the common law left the former to the broad discretion of the jury.<sup>122</sup>

To note the interesting ambiguity of early tort damages measures and the late arrival of formal utilitarian theories of damages may be the best that one can say about the Goldberg thesis. If there are ambiguous descriptions of tort damages in Blackstone's *Commentaries* suggesting a measure of damages such as satisfaction or adequate redress, there are just as many relatively unambiguous passages that would support a full compensation model of damages.<sup>123</sup> Moreover, the unusual contract / tort distinction that Goldberg articulates is almost certainly unsound. On Goldberg's account, contract damages were full compensation damages, but tort damages were no more than adequate redress.<sup>124</sup> This would be very odd given that contract law in the common law tradition emerged out of tort law as a special variation of the writ of trespass.<sup>125</sup> Indeed, tort and contract in the common law typically work in exactly the opposite direction from the one that Goldberg suggests. Relational cases – that is, cases between parties with relationships with one another, such as contract cases – offer a variety of legal and extra-legal remedies to aggrieved parties. Stranger cases, by contrast, typically

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<sup>121</sup> WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830* (1975).

<sup>122</sup> Goldberg, *Two Conceptions*, *supra* note 60, at 443.

<sup>123</sup> 3 BLACKSTONE, *supra* note 12, at 120, 126, 377, 398-99. Goldberg's account also has difficulty explaining what Blackstone meant by "treble damages." Treble "what" if not compensatory damages? (3 BLACKSTONE 121) Note that three times the satisfaction damages is not an available move for Goldberg because he has suggested that measures of damages that included exemplary or other obviously super-compensatory damages are evidence for the idea that damages were not tightly linked to full compensation. If super-compensatory damages were designed to achieve adequate redress, then treble damages remedies can hardly have been achieved by multiplying already-adequate (by hypothesis) damages by three.

<sup>124</sup> Goldberg, *Two Conceptions*, *supra* note 60, at 443-44.

<sup>125</sup> A. W. B. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 199-247* (1975); BAKER, *INTRODUCTION TO ENGLISH LEGAL HISTORY*, *supra* note 101, 329-39.

offer only legal mechanisms of redress. It is not surprising, then, that the modern common law of tort damages usually authorizes tort victims to recover greater damages (full compensation) than the contract law measures of damages (expectancy damages) would allow. Given the availability of non-legal remedies and contractual protections for contracting parties (liquidated damages, refusals to do further business, etc.), the opposite approach would be odd, to say the least. In this instance, at least, we can rest assured that the common law was not as arbitrary and capricious as it sometimes seems. The early nineteenth-century cases that Goldberg cites for the supposed move from adequate redress to full compensation are better understood as articulating the tort / contract distinction I have suggested rather than transition Goldberg purports to describe.<sup>126</sup>

These criticisms of the immanence thesis suggest just some of the ways in which contingency narratives disrupt more traditional ways of thinking about the historical development of accident law. The law of accidents, in the contingency view, is more likely to arise out of institutional imperatives such as the jury trial, or the historical roots of the forms of action, or the vagaries of procedure and the law of evidence.

There is at least one way that the immanence theorists can deal with the force of the critique from contingency. We can call this the limiting strategy, and we've already seen one example of it in what I described as the formalism of immanence narratives' response to the abundant procedural and evidentiary obstacles to common law tort recovery. Jules Coleman's work is the best example of this limiting strategy. Coleman is extremely careful to clarify that his conceptual account of the principles underlying tort law says nothing about whether its moral appeal would be worth the costs it would undoubtedly entail. Indeed, Coleman further avows that the conceptual account of corrective justice in tort says little about the moral appeal of corrective justice principles at all. Elsewhere, Coleman has acknowledged that the corrective justice understanding of tort law entails no particular view of what counts as a wrong, about where duties exist and where they do not, or about when those duties have been

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<sup>126</sup> Goldberg's cases are *Purviance v. Angus*, 1 Dall. 180 (Pa. Ct. Err. & App. 1786) (principal – agent case for negligence by the agent that led to damages to the principal), *Russell v. Palmer*, 95 Eng. Rep. 837 (K.B. 1767) (client – lawyer case for legal malpractice), and *Bussy v. Donaldson*, 4 Dall. 206 (Pa. 1800) (stranger case involving collision between two vessels). The three cases can be explained most parsimoniously by the idea that where the suit is based in a contractual relation between the parties, damages were sometimes less than fully compensatory, and that when the case was between strangers, damages were fully compensatory. This seems to have been Chief Justice Shippen's notion, at any rate, though Goldberg's opposite view finds direct support in the dissenting opinion of Justice Smith in the *Bussy* case, 4 Dall. at 208 (Smith, J., concurring in part).

breached.<sup>127</sup> And in order to escape the circularity problem in corrective justice (tort law is about corrective justice because tort law is about corrective justice), Coleman describes tort law and corrective justice as just one contingent mechanism for achieving fairness, a goal that other legal systems have sought to achieve (more or less effectively, Coleman doesn't say) through mechanisms such as social insurance and regulation.<sup>128</sup> Immanence narratives can try to hermetically seal off the law of torts in order to invest it with conceptual integrity. The price of the limiting strategy is clear, however: reduced significance in the world. It leaves the immanence arguments pristine and coherent. But one wonders whether the pristine game is worth the candle.<sup>129</sup>

### III. THE PROSPECT (AND LIMITS) OF INEVITABILITY

In one sense, the contest between immanence narratives and contingency narratives is the continuation of a debate that Fleming James identified fifty years ago. James observed that one school of tort law theory sought to identify a “unifying principle” to give integrity and cohesion to the law of torts (the immanence school), while another insisted on “the fragmented nature of the subject” (the contingency school).<sup>130</sup> These two approaches persist today, but they do not exhaust the narrative styles in the history of accident law.

The recent literature in accident law history includes a third narrative style, one that we might call the inevitability narrative. The prehistory of this style is a distinguished one. Beginning in the early and mid-nineteenth century, European scientists such as Pierre Simon Laplace developed new statistical ways of understanding natural and social phenomena. Astronomical orbits, births, marriages, deaths, dead letters in the post office, and accidents: all of these phenomena seemed to move from year to year in regular and predictable aggregate patterns. It followed that statistical laws of social life seemed to underlie human existence. Accidents, “just when they may seem to be due to pure chance,” as one French study reported, turned out to be governed by “a mysterious law. English historian Henry Thomas Buckle’s two-volume *History of Civilization in England*, first published in the 1850s, adopted this approach, purporting to identify deep laws of history in the development of English

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<sup>127</sup>Jules Coleman, *Theories of Tort Law*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Winter 2003 Edition), Edward N. Zalta (ed.), <http://plato.stanford.edu/archives/win2003/entries/tort-theories/>.

<sup>128</sup> COLEMAN, PRACTICE OF PRINCIPLE, *supra* note 54, at 59 (“The case of New Zealand can serve to illustrate that the range of duties that fall under corrective justice is a contingent matter, and that such duties can vary across different legal systems.”).

<sup>129</sup> For similar ruminations, see Robert L. Rabin, *Law for Law’s Sake*, 105 YALE L.J. 2261 (1996).

<sup>130</sup> Fleming James, Jr., *Tort Law in Midstream*, 8 BUFF L REV 315, 316 (1959).

civilization. “Events apparently the most irregular and capricious,” Buckle wrote, “have been explained and have been shown to be in accordance with certain fixed and universal laws”<sup>131</sup>

These early generations of statistical determinanists were closely aligned with the materialist approach to history. The regularities revealed by statistical inquiry seemed to confirm the existence of hidden laws of history such as those proposed by Marx. (This was why historian E. H. Carr distinguished between accidental and rational causes.) Statistical determinism also undercut the notion that individual agency had much effect on accidents or accident rates. Together, materialist skepticism about the ideas that were said to animate tort law and statistical resignation to hidden laws of historical development help to explain the widespread support for social insurance approaches among tort scholars in the middle of the twentieth century. Injury and need were inevitable in mass society, went the reasoning, and so the law should develop in ways that spread the risk of these injuries and minimized the deprivations they would otherwise cause. The logic of social insurance seemed extremely powerful, so much so that it seemed to many mid-twentieth-century torts scholars that not only were the injuries and the needs inevitable, so too was the progressive substitution of social insurance systems for tort law. Workmen’s compensation seemed almost certain to be only the first of what would be many socialized replacements of the common law.

More recently, the confidence of mid-century scholars that individual agency had been overwhelmed by the inexorable force of institutions has waned. Moral hazards and the persistence of agency at the level of the individual have returned to the forefront of theorizing about tort law.<sup>132</sup> Contingency and accident have returned to the forefront of social theory. Inevitability, in other words, no longer seems quite so inevitable.

The inevitability narrative persists, however, in new and hopefully more nuanced forms. In particular, it has been updated by a number of scholars looking not at the microstructure of tort disputes, or at the discourse of particular leading tort decisions, but at the wholesale operation of regimes of accident law as their subject. Scholars in at least two different scholarly traditions have contributed to this literature.

In political science, the most prominent work is by Robert Kagan, though in his wake a number of younger scholars have made significant contributions of their own. The central idea in the literature begun by Kagan is that American governmental institutions have created conditions under which tort law (and litigation more generally) plays a distinctively significant regulatory function. In Kagan’s view, the United States has sought to pour the new wine of modern regulatory functions and modern rights notions into the old bottles of courts,

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<sup>131</sup> Quoted in FERGUSON, *supra* note 29, at 33.

<sup>132</sup> See Tom Baker, *The Genealogy of Moral Hazard*, 75 TEX. L. REV. 237 (1996).

litigation, and the law. The result, Kagan contends, is a dysfunctional model of governance by adversarial litigation. For our purposes, the advisability of adversarial litigation is less significant than the account of how we came to have it. According to Kagan, the key to understanding the development of adversarial legalism is the way in which American political institutions (separation of powers, bicameralism and presentment, federalism, and powerful courts) inexorably weakened legislative and regulatory solutions to modern social problems, favoring private litigation in the courts instead.<sup>133</sup>

Scholars working in the tradition begun by Kagan have not necessarily agreed that the outcome of the interplay of institutions and ideas is as dysfunctional as Kagan suggests. But they, too, contend that American legal institutions are structured in such a way as to make regulation by legislation difficult and regulation by tort-style litigation exceptionally important. Kagan's student, Thomas Burke, points to what he calls a "constitutional theory of litigious policy making" as the roots of the American style of governance. Developing the same observations in concrete policy areas, political scientists Sean Farhang and Robert Lieberman have noted the distinctive role of litigation in American civil rights law. Christopher Howard, in turn, describes the path dependency and the "heavy hand of history" in the historical trajectory of workers' compensation programs in the United States. In all of these political science accounts, the emphasis is on the powerful shaping effects of institutions. Once in place, institutions such as the courts and the jury and the constitutional structure of U.S. governance have directed the course of American accident law, cutting off some paths of development and favoring others.<sup>134</sup>

Drawing in part on this political science literature, recent accounts of the development of American tort law by legal scholars have adopted a similar institutional approach. Samuel Issacharoff and I have written about what we called the "inevitability of aggregation." Our claim was that wherever tortious accidents resolve themselves into repetitive fact clusters, repeat players eventually arise on both sides of the tort claims arising out of these accidents and reduce the claims process to a set of stereotyped rules of thumb and standardized measures of damage.<sup>135</sup> Since then, I have built on the observations in that article to

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<sup>133</sup> Kagan, *Adversarial Legalism*, *supra* note 3; see also W. Kip Viscusi ed., *REGULATION THROUGH LITIGATION* (2002).

<sup>134</sup> THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* (2002); Sean FARHANG, *supra* note 3; Robert C. Lieberman, *Private Power and American Bureaucracy: The EEOC and Civil Rights Enforcement*, presented at the American Political Development Colloquium, University of Virginia (March 18, 2005); Christopher Howard, *Workmen's Compensation, Federalism, and the Heavy Hand of History*, 16 *STUDIES IN AMERICAN POLITICAL DEVELOPMENT* 28-47 (2002).

<sup>135</sup> Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Litigation*, 57 *Vand. L. Rev.* 1571 (2004).

describe the ways in which the American plaintiffs' bar developed in the middle of the twentieth century. The story I tell in a long chapter in *Patriots and Cosmopolitans* is about the institutional context for the making of the Association of Trial Lawyers of America. ATLA, as it was known until its recent name-change to the American Association for Justice, arose ostensibly as a defender of a common law regime of courts, juries, and individualized determinations of liability and right. Very quickly, however, ATLA's members became leading and critical players in the construction of the vast and sprawling system of private claims administration that Issacharoff and I had identified in our earlier article.<sup>136</sup>

Other lawyers have been writing in what we may loosely call the inevitability style as well. Howard Erichson describes informal aggregation in the decentralized system of American tort law as virtually irrepressible, appearing and reappearing regardless what courts, bar associations, and ethics mandarins do to try to forbid it.<sup>137</sup> Richard Nagareda's forthcoming account of the shift from tort to administration in late-twentieth-century mass torts depicts a legal system driven ineluctably toward one or more forms of private and quasi-private administration.<sup>138</sup> Kenneth Abraham's forthcoming book provides still another twist on the inevitability narrative. In Abraham's account, tort liability developed across the twentieth century in conjunction with liability insurance in a kind of dialectic ratchet effect. The plaintiffs' bar sought to develop new doctrines of liability that would extend liability to entities with insurance. Entities fearful of expanded liability purchased ever more liability insurance, which emboldened the plaintiffs' bar further and licensed judges to extend liability to entities and persons that were now insured and therefore would not be ruined by liability. The ever-upward and outward cycles of liability worked as if by a logic of their own, in close conjunction with the self-interest of key constituencies such as the plaintiffs' lawyers, insurers, and corporate defendants.<sup>139</sup>

The great promise of inevitability narratives is their capacity to make sense of tort law in the broader context of the distinctive paths of American regulation. They also help to broaden the scope of what counts as tort law. For too long, histories of torts have focused on litigated cases and the courts. Given the dominance of settlement – often without even a court filing – it seems that even the trial courts may be too high up the dispute pyramid to make much sense of the operation of tort law. The turn to insurance company practice and the institutions

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<sup>136</sup> John Fabian Witt, *The King and the Dean: Melvin Belli, Roscoe Pound, and the Common Law Nation*, in *PATRIOTS AND COSMOPOLITANS*, *supra* note 97.

<sup>137</sup> Howard M. Erichson, *Informal Aggregation*, 50 *DUKE L.J.* 381 (2000)

<sup>138</sup> RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* (2007).

<sup>139</sup> KENNETH S. ABRAHAM, *supra* note 7.

of the repeat-play plaintiffs' bar allows the historian of accident law to include these critically important players in the story.<sup>140</sup>

Significantly, the central mechanisms of the inevitability account are the models of rational actors and principal-agent relationships. In a world in which litigation is expensive and legal claims are freely alienable in private settlements, the inevitability narratives suggest, we should expect to see markets develop for the wholesale private disposition of claims. There is money to be made in the minimization of litigation costs, and entrepreneurial representatives of both plaintiffs and defendants can be expected to try to take advantage of the opportunity. The result in many areas of American tort law has been standardization and stereotyped settlements, established in the aggregate by claims agents who develop ongoing repeat-play relationships with one another.

It is important to clarify, however, the limits of the inevitability story. The claim is emphatically not that market pressures require any one accident law system. The inevitability claim, properly formulated, is that where industrial and post-industrial societies generate injuries with repetitive fact clusters; where adjudicatory resources are relatively scarce; and where mature claims are freely alienable in settlement markets, we will see the informal aggregate resolution of claims in the private settlement process. We might just as well describe this inevitability as a contingency, for it is contingent on the three conditions specified here: repetitive fact clusters, overtaxed adjudicatory resources, and freely marketable mature claims. Alternative legal arrangements – such as ready and inexpensive adjudication, for example, or a rule making claims inalienable,<sup>141</sup> or an abolition of the bar's monopoly on claims brokering<sup>142</sup> -- would generate very different responses by the great mass of claimants and defendants. There are, in short, many markets that one might imagine for the handling of these sorts of tort claims, and the possible variations are virtually endless.<sup>143</sup> The logic and the limits of market-based inevitability narratives present in a sense the flip side of the constraints on contingency narratives. Markets powerfully influence the development of the law and the institutions that animate it. They can set loose bounds on the development of the otherwise contingent history of accident law.

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<sup>140</sup> See also Edward A. Purcell, Jr., *The Action Was Outside the Courts: Consumer Injuries and the Uses of Contract in the United States, 1897–1941*, in Willibald Steinmetz ed., *PRIVATE LAW AND SOCIAL INEQUALITY IN THE INDUSTRIAL AGE* 505, 512 (2000).

<sup>141</sup> Owen M. Fiss, *Against Settlement*, 93 *YALE L.J.* 1073 (1984)

<sup>142</sup> HERBERT M. KRITZER, *THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION* (1990)

<sup>143</sup> See, for example, the English claims settlement market, which is organized very differently than its American analogue, largely because of the loser-pays rule in civil suits, the absence of contingency fees, and the widespread use of union-subsidized legal assistance. On the English context, see Herbert M. Kritzer, *A Comparative Perspective on Settlement and Bargaining in Personal Injury Cases*, 14 *LAW & SOCIAL INQUIRY* 167, 168 n.6 (1989).

They also set off predictable and powerful trends in the aggregate behavior of people in massive, decentralized systems such as the tort system.

Consider my description of the development of the ATLA plaintiffs' bar. In my account, the delegation of substantial regulatory capacity to the tort system and to the private bar in areas such as automobile safety was not at all inevitable in the U.S. Powerful constituencies at various times in the twentieth century strongly favored the adoption of social insurance and workers' compensation-like alternatives. That the problem of automobile accidents would be left largely in the domain of the common law was a contingent outcome, not an inevitable one. But once the auto accident problem was left to the common law without limits on the free alienation of claims in settlements and with overworked adjudicatory officials, more and less formal claims aggregation in the private claims marketplace was inevitable. In the U.S., plaintiffs' lawyers' fee practices (fortuitously, for my purposes, called *contingent* fees) facilitated the process by creating incentives for claimants' agents to settle and by creating financial rewards for those who specialized in representing personal injury claims. Contingent legal arrangements set off ineluctable market processes. Depending on the level of generality at which the description of those processes is pitched, the observer could call them either inevitable or contingent.

#### CONCLUSION

Properly understood, what I have styled here as inevitability narratives are relatively easily reconcilable with contingency narratives. The tension between these two approaches to the history of the law of accidents is more apparent than real, at least defined the way I have defined them here. This is a considerable relief to me, having written in both styles. Once one sees that the inevitability stories are about the statistically predictable consequences that flow from highly contingent features of our accident law system, the tension between these two narrative styles abates. The aspects of accident law that I (and others) have called inevitable are contingent on particular sets of arrangements. When those arrangements are in place, we can expect to see accident law develop along certain paths. But because such arrangements themselves are not inevitable, these paths are both contingent and inevitable at once – contingent in the sense that they rest on some other, contingent set of arrangements, and inevitable in the sense that once those arrangements are in place, certain effects follow ineluctably.

Inevitability narratives are also reconcilable with many of the corrective justice accounts of tort law. Much of the inevitability narrative as it has developed in recent years is about the ways in which private market institutions develop in the shadow of accident law. Jules Coleman observed some time ago that the theory of corrective justice in torts need not be troubled by the mere fact that people can go into the social and economic sphere to discharge or trade the

obligations that arise out of tort law. The same point might be said to hold for the relationship between the principles immanent in the law of torts and the social practices that have evolved from those principles. By holding substantive law separate from the procedures that instantiate it, the corrective justice theorist is able to sustain the immanence of corrective justice in tort law even as the lawyer-client and settlement practices that predominate in the field move inexorably toward structures that are at odds with many of the features of the corrective justice tradition.<sup>144</sup>

Immanence narratives and contingency narratives, however, seem unavoidably at odds with one another. The best one can do to reconcile the two narratives is to suggest that they differ merely in the kind of interpretive analysis in which they engage. In this reading, immanence narratives engage in a timeless mode of conceptual analysis in which interpretation of the contingent development and historical roots of tort law's structure are irrelevant. Immanence narratives, in other words, are synchronic where contingency narratives are diachronic. The aim of synchronic immanence narratives is to articulate a conceptually coherent account of the structure of the law, without regard to the developmental paths by which the law arrived at the structure in question. Indeed, it is precisely the point of this kind of immanence narrative to disregard the historical and the contingent in favor of the generalizable. Just as E. H. Carr sought to disregard what he called accidental causes in favor of what he styled as rational causes, the immanence theorist seeks to set aside the happenstance of history in favor of a theory of reason and principle that can stand above the helter-skelter forces of time.

It is not at all clear, however, that this distinction between synchronic conceptual analysis and diachronic historical interpretation ultimately provides a satisfying way of reconciling the two narrative styles. Those who theorize tort law's basis in corrective justice purport to root their accounts in the practice of tort law as tort law actually exists, which is the same thing as to say: as it has existed in the past. In so doing, of course, the corrective justice theorist may exclude those features of torts practice that do not embody corrective justice principles as the mere flotsam and jetsam of history, to be disregarded in interpreting the deep and ostensibly more significant features of tort law. The corrective justice theorist may restrict her account to those features of the law of accidents that embody corrective justice principles. But this brings us back to the same circularity we have seen before. Tort law embodies corrective justice, in this conception, because tort law has been defined to exclude those features of the law that do not embody corrective justice. Immanence narratives of tort law, we might say, lack a good theory of the boundaries of the field.

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<sup>144</sup> To this extent, the claims in my article with Issacharoff on the implications of the aggregate resolution of tort claims for the corrective justice literature are probably overstated.

Even if the synchronic versus diachronic distinction could permit immanence and contingency narratives to coexist more easily, it could not resolve the conflict between the two narrative styles that has emerged in the recent historical turn of the immanence narrative. The Goldberg claim (advanced to a lesser extent by Zipursky as well) that the historical development of tort law embodies the principles of civil redress, is deeply in tension with the spirit of the contingency narratives. Contingency narratives insist on the probabilistic, unforeseen, pell-mell development of accident law in the United States. They describe accident law as always subject to the push and pull of interest groups, the constraints of political and legal institutions, and the messy, haphazard, entropic forces of time. They do not necessarily single out accident law as especially contingent. The kind of bounded contingency I have described here may well run through the law more generally. But it would be especially surprising if contingency were not a signal feature in an area of the law that arises out of accidents, which are after all the very paradigm of contingency in human events.

The difficulty ultimately seems to be that contingency thinking is deeply at odds with the professional style of the lawyer. Since Blackstone and indeed since long before Blackstone, the aim of common law reasoning has been a kind of alchemy, in which the common lawyer seeks to turn the historical bric-a-brac of tort practice into gold. Golden principles immanent in the law offer the common lawyer a set of arguments from authority – arguments that rest not on contested political propositions, but on the kind of higher abstraction principles that immanence narratives purport to provide. Contingency, by contrast, leaves the lawyer with fewer sources of the authority that at once constrains and empowers the law. Contingency, in other words, leaves the jurist terrifyingly free and substantially disempowered, for in contingent accounts she is in an undetermined world without the authority of a determinate history. The common law jurist's immanence narrative is thus a kind of flight from freedom, a flight driven by institutional and professional imperatives that demand arguments from authority drawn from historically accumulated legal materials. In the social imperatives of the immanence narratives, grounded firmly in human time, we don't so much connect with Holmes's infinite universe as catch an echo of the history and a glimpse of the contingency of the immanence narratives themselves.