

## TORTS: A LAW AND POLITICAL ECONOMY COUNTERSYLLABUS

This syllabus is, in conjunction with [the framing post on the Law & Political Economy Blog](#), a starting point for understanding the law and political economy approach to torts. The initial readings introduce both the law and economics perspective and the competing law and political economy perspective on tort. Subsequent portions of the syllabus use existing literature to apply the law and political economy perspective to concepts featured in tort classes, such as injury, proximate cause, and negligence. Given the newness of the law and political economy perspective, this syllabus is a work-in-progress: email any suggested readings to Conor Dwyer Reynolds at [conor.reynolds@yale.edu](mailto:conor.reynolds@yale.edu).

### I. The Law and Economics Perspective on Tort

“Sense and Nonsense of the Economic Analysis of Tort Law” by Dina Waked, available on SOCIAL SCIENCE RESEARCH NETWORK ([last updated 2017](#)).

*Law and economics perspectives on tort are often written in a dense, seemingly mathematical language. Waked clears through this thicket with a concise critical history of the law and economics perspective in tort, connecting and differentiating the ideas embedded in key texts such as Oliver Wendell Holmes’ The Common Law, Ronald Coase’s The Problem of Social Cost, and Calabresi’s The Cost of Accidents. The contemporary version of this perspective is the simple teaching that what should “drive” the tort system is minimizing the social costs of life. Thus, tort rules can and should be crafted to maximize “efficiency,” while “distributional questions” should be left to “tax and transfer programs.” Waked notes that this perspective is “hailed” because “it appears to an objective scientific methodology that claims to be apolitical, coherent, and free of value judgement.” But, as Waked demonstrates in a brief section critiquing the perspective, appearances can be deceiving.*

“Too Good to Be True: The Positive Economic Theory of Law” by Jack Balkin in THE COLUMBIA LAW REVIEW, Vol. 87 ([1987](#)).

*If Waked provides a taste of critiques of the law and economics perspective on torts, Balkin is here to sate your appetite with a hearty takedown of a law and economics classic, The Economic Structure of Tort Law by William Landes and Richard Posner. Landes and Posner believe that tort’s purpose – in both this world and an ideal one – is to maximize wealth. Balkin shows their argument to be “intimately related to and dependent upon modern American conservative ideology,” despite its purported objectivity. Balkin does not construct a clear alternative vision of tort law, but instead embraces the likely truth: that tort law has a “diversity [of] purposes and principles” which are often “conflicting.”*

“The Efficiency Norm” by Brooke D. Coleman in THE BOSTON COLLEGE LAW REVIEW, Vol. 56 (2015).

*Coleman’s project is to deconstruct and reconstruct the idea of “efficiency” as it is applied the context of civil (that is, tort) litigation. Coleman begins by tracing that idea from its origins in the law and economics perspective, which ignores the fact that “measur[ing] ‘costs’ and ‘benefits’ necessarily turns on [a political] judgment.” Coleman then describes how the economist’s vision of efficiency was embraced by the anti-plaintiff movement, which distorted the idea by translating the idea of “welfare-maximizing” as “cheapest way of doing things.” This mistranslation focuses narrowly on monetizable court costs, allowing the economically powerful to form the public adjudication (and those who seek justice through it) as threats to economic efficiency. Coleman argues for “reclaiming” efficiency by demanding that those who use it account for all costs – including those that stem from dismantling a democratic tort system that allows the disempowered to hold the powerful accountable for harms.*

## II. The Law and Political Economy Perspective on Tort

“Politics” and “The Political Economy of Compensation Schemes” in KEY IDEAS IN TORT LAW by Peter Cane (2017).

*Cane argues that behind the law and economics perspective (and any perspective on tort law) is “political argument,” that is, a vision of how tort law should “distribut[e] the costs and benefits of social life.” Cane attempts to demonstrate that such political assumptions are the foundations on which the conceptual building blocks of the law and economics perspective – such as its views on tort’s role in regulating behavior, compensating injury, and promoting responsibility – are built. On Cane’s view, each of the tort reforms promoted by law and economics scholars (from public insurance schemes to the abandonment of strict liability) is best thought of as furthering competing “political econom[ies]” because they “each have distinctive rules about entitlement to, and assessment of, [costs and benefits].”*

“Toward A New History of American Accident Law: Classical Tort Law and the Cooperative Firstparty Insurance Movement” by John Fabian Witt in THE HARVARD LAW REVIEW, Vol. 114 (2001).

*Witt’s article is characteristic of the law and political economy approach. Putting historical research ahead of close-readings of court opinions or economic analysis, Witt demonstrates that the law of accidents has always “implicate[d] the basic structures of political life.” Witt shows that tort was not fated to be the sole institution to address the carnage that accompanies industrial society, pointing to “very real alternatives” like cooperative insurance schemes that existed at the turn of the century. Such alternatives represented “contrasting conceptions of how best to reorganize [a] nation for a new age,” and “an important path not taken in American*

*political economy” – one that could have led to more cooperative, democratic visions of American life. (These issues are treated more extensively in Witt’s 2004 book THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW).*

“Tort and Neo-liberalism” by Annette Morris in PRIVATE LAW IN THE 21<sup>ST</sup> CENTURY ([Kit Barker et al., eds., 2017](#)).

*It can be easy to think of law and economics as merely academic in nature, with correspondingly low stakes in the real world. Morris’s article is a curative for this thought. In tracing the intellectual underpinnings of the tort reform movement in Britain, Morris describes how tort law can both shape and be shaped by politics and visions of a just economy. Her key insight is that, at least in England, tort has been both (1) driven by competitive, market-based ideologies and (2) serve as a catalyst for a competing, cooperative vision of social ordering.*

### **III. Proximate Cause**

“Responsibility for Human Suffering: Awareness, Participation and the Frontiers of Tort Law” by Timothy D. Lytton in THE CORNELL LAW REVIEW, Vol. 78 ([1993](#)).

*Lytton believes that tort law “not only remedies injustice by imposing damage awards, [but also] articulat[es] and appl[ies] conceptions of responsibility.” The first is the responsibility of “awareness,” where only those who are aware of doing harm are held liable for the consequences of their actions. This kind of responsibility is embraced by “[t]hose with power to act in ways that impose on others, and is seen within traditional, limited vision of proximate cause.” The second is the responsibility of “participation,” which “extends injurer responsibility to circumstances in which a victim’s suffering results from an injurer’s decision to act, no matter how unforeseeable the harm.” This kind of responsibility is embraced by “marginalized groups” who are robbed of “autonomy” by structural forces, and is embraced by products liability and enterprise liability. Lytton calls for a vision of tort law that balances these competing conceptions of responsibility better.*

### **IV. Injury**

“The Meaning of Injury” by Sagit Mor in INJURY AND INJUSTICE: THE CULTURAL POLITICS OF HARM AND REDRESS ([2018](#)).

*Mor’s purpose is to “infus[e]” the “prevailing understanding of injury with . . . a disability [rights] perspective.” Mor wonders if tort’s conception of injury, as “pain, suffering, tragedy, and misfortune,” is the correct one. His article poses two questions: “is it possible to reconstruct a conception of injury that is free of negative stigma and social bias against disabled people,” and “what message is embodied in [tort’s] attempt to prevent injuries?” Mor suggests that the answers to these questions “moves [tort] away from the far end of private law toward the*

*realm of public law and allows for questions of social justice to take a central place.”*

## **V. The Reasonable Person**

“A Lawyer’s Primer on Feminist Theory and Tort” by Leslie Bender, JOURNAL OF LEGAL EDUCATION, Vol. 38 ([1988](#)).

*Bender’s essay is “both a primer that introduces a few of the major components of feminist theory and an example of how feminist theory might be used to examine a particular area of law” – namely, the “reasonable man” in tort. Bender argues that the centrality of reasonableness in tort law reflects an embrace of patriarchal devaluation of women and care. Tort, she argues, “should be on interdependence and help for the injured rather than on ‘reasonableness’ and economic efficiency.”*

## **VI. Insurance**

“Tort, Insurance and Ideology” by Jane Stapleton in THE MODERN LAW REVIEW, Vol. 58 ([1995](#)).

*Those adopting the law and economics perspective often focus on the insurance-like ability of tort to redistribute risk amongst society members; their fear, in the words of Stapleton, is that such risk-spreading “foster[s] a dependency culture and infringes on the autonomy of those who are forced to finance [insurance-like] structures.” Stapleton wants people to “think twice” before buying into the “tort as insurance” framework. Stapleton argues that this framework “masquerades as an apolitical analysis of what we all agree tort is about,” when its analysis is in fact an “ideological one, of removing burdens from [the powerful].”*

## **VII. Intentional Torts**

“Intentional Torts” in Martha Chamallas & Jennifer B. Wriggins, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW ([2010](#)).

*Chamallas and Wriggins argue that tort law and scholarship “tends to reflect and reinforce the social marginalization of women and racial minorities and to place a lower value of their lives, activities, and potential.” In this chapter, the authors criticize the law and economics perspective’s “preoccupation with accidents and a neglect of intentional torts” serves to “devalue” intentional harms widely suffered by women and people of color, such as domestic violence and workplace harassment.*

## VIII. Nuisance

“Nuisance Law and the Industrial Revolution – Some Lessons from Social History” by John P. S. McLaren in THE OXFORD JOURNAL OF LEGAL STUDIES, Vol. 3 (1983).

*McLaren believes that tort law cannot be understood “solely in the context of the [decisions] of the . . . courts,” and that “much more consideration needs to be given to the social context in which that body of law has developed.” McLaren’s project is to provide that context for the development of nuisance law in response to the industrial revolution in England. McLaren finds that nuisance law failed to reduce industrial pollution “not because of doctrinal weakness,” but because of the “‘clout’ exercised by [many] manufacturers” to resist legal change at all levels of government.*

## IX. Negligence

“Historical Perspectives on Negligence” in Joanne Conaghan & Wade Mansell, THE WRONGS OF TORT (1999).

*Conaghan and Mansell’s book argues that tort law is “inherently political,” and “reflects a particular ideological perspective . . . captured by the principle of individual rather than societal responsibility for the misfortunes of others.” Their chapter on the historical roots of negligence recognizes the fact that “a neglect of history depoliticiz[es] the law by robbing it of context,” and further “gives the student a sense of law as static rather than dynamic . . . [undermining] both an understanding of the system and an ability to manipulate it successfully.” Conaghan and Mansell find that “the exercise of power reflecting the interests of capital at the expense of lab[o]r” was behind much of negligence’s evolution in both the American and British experiences.*

## X. Abnormally Dangerous Activity

“The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of *Fletcher v. Rylands* in the Gilded Age” by Jed H. Shugerman in THE YALE LAW JOURNAL, Vol. 110 (2000).

*Shugerman argues that the doctrine of strict liability didn’t come from nowhere, nor was it the inevitable result of “long-term socioeconomic forces” or the whims of “academic and political elites.” While “rapid urbanization,” an “industrial boom” in the late 1800’s, and “the rise of populism” all “se[t] the stage” for the rise of strict liability, these impersonal forces were “insufficient” causes. Instead, the “direct cause” of courts adopting strict liability was a “bottom-up social dynamic” of fear and anger stemming from “a series of bursting rivers and floods” linked to disproportionate social control by industrial elites. Shugerman’s analysis gives *Rylands v. Fletcher* and strict liability the precise “context” that Conaghan and Mansell say reveals that tort is a fluid tool that shapes and is shaped by political economy.*

## XI. Should We Abandon Tort Law?

“Doing Away with Tort Law” by Stephen D. Sugarman in THE CALIFORNIA LAW REVIEW, Vol. 73 (1985).

*“Tort law,” says Sugarman, “is failing – failing to promote better conduct, failing to compensate sensibly at acceptable costs, and failing to do meaningful justice to either plaintiffs or defendants.” Despite this echo of tort’s conservative critics, Sugarman provides an ostensibly progressive view of tort’s superior alternatives: an expanded social security disability system for most on-the-job injuries, “more power[ful]” risk regulators, and a tort system focused solely on intentional torts and abnormally hazardous activity.*

“A Socialist Approach to Risk” by Richard L. Abel in MARYLAND LAW REVIEW, Vol. 41 (1982).

*“Capitalism,” Abel writes, “does not respect the right of each individual to choose his or her own level of risk.” Tort law embraces this disrespect because “the remedy [for being placed at risk] is set by a judge,” and access to that remedy is curtailed by a litigation system that stacks the deck in favor of concentrated power. For Abel, tort is deficient on many grounds, but its most fundamental flaw is its “allow[ing] risk to be allocated solely by the market.” Rather than fixing tort, or adopting a Sugarman-like system of administrative redistribution and regulation, Abel suggest that we abandon it in favor of “producer and consumer cooperatives . . . through which a decentralized socialism might advance autonomous control over and equality of risk.”*

“Muss es Sein? Not Necessarily, Says Tort Law” by Anita Bernstein in LAW & CONTEMPORARY PROBLEMS (2004).

*Bernstein’s article argues that, despite its rootedness in “illiberal traditions,” tort law is a “uniquely progressive” tool for the disempowered in a world of concentrated and entrenched power. Tort, better than any other law, utilizes America’s “liberal . . . discovery regime” and pro-litigant financing rules to give the disempowered a right – regardless of their economic capability or social status – to “disrupt” the structures that oppress them. While one must understand the way political economy structures tort, Bernstein wants one to imagine how tort can change political economy.*