COPYRIGHT © 2023 VIRGINIA LAW REVIEW ASSOCIATION

ESSAY

DYNAMIC TORT LAW: REVIEW OF KENNETH S. ABRAHAM & G. EDWARD WHITE, *TORT LAW AND THE CONSTRUCTION OF CHANGE: STUDIES IN THE INEVITABILITY OF HISTORY*

*Catherine M. Sharkey**

Rarely does a book—let alone one on torts—come along with true staying power. *Tort Law and the Construction of Change* is such a book. It stopped me in my tracks when I first read it, and it has been a book to which I have returned again and again while teaching torts and probing new research projects. With *Tort Law and the Construction of Change*, Professors Kenneth Abraham and G. Edward White, who have inspired generations of torts students and scholars,[1] have truly energized and inspired this nearly twenty-year veteran in the field.

Abraham and White explore the past, present, and future of tort law through a historical, theoretical, and pragmatic lens seeking to excavate and explicate how doctrines evolve. Their central thesis is that "[c]ontinuity arises in part out of linking current decisions, even if they are innovative and constitute an expansion of liability, to the principles expressed or implied in prior precedents,"[2] and that "external pressure for change in established common law doctrines is almost always filtered through received doctrinal frameworks."[3] I pay tribute to their book in

* Segal Family Professor of Regulatory Law and Policy, New York University School of Law. Robert McCarthy (NYU Law 2024) provided excellent research assistance.

[1] As UVA Law Dean Risa Goluboff remarked at the UVA Law book panel Festschrift for Professors Abraham and White:

> [They] have been anchors of this faculty for a long time, maybe longer than you realize. They have been on this faculty for a combined total of nearly 90 years, both of them spending most of their professional lives here . . . . Over the past 10 years or so, they have both taught torts to generations of UVA Law students among other things.

Transcript of UVA Law Book Panel at 2 (Sept. 22, 2022) (on file with the *Virginia Law Review*) [hereinafter Transcript].

[2] Kenneth S. Abraham & G. Edward White, Tort Law and the Construction of Change: Studies in the Inevitability of History 206 (2022).

[3] Id. at 213.

COPYRIGHT © 2023 VIRGINIA LAW REVIEW ASSOCIATION

this Essay, with equal parts praise (Part I), quibbling (Part II), and prodding for roads not taken (Part III).[4]

I. "CLOAKING"

Abraham and White coin the term "cloaking" to describe "a legal convention about how to construct, explain, and justify change" in tort law.[5] Simply put, "the availability of precedent facilitates cloaking the actual basis for decision in the language of precedent."[6]

With their "cloaking" metaphor, Abraham and White have given a name to a somewhat elusive—though highly significant—phenomenon that is key to understanding the development of tort doctrine. Illustrations abound in their book, and (once appreciated) are ubiquitous in the torts canon. They unearth fresh insights on the process by which courts recognized new dignitary torts, such as the intentional infliction of emotional distress ("IIED"). And they tell a tale of cunning and daring on the part of William Prosser (and his influential treatise), simultaneously encouraging and providing cover for courts by grouping the newly emergent tort of IIED alongside well-established tort chestnuts of battery, assault, and false imprisonment under the umbrella of "Words and Acts Causing Mental Disturbance."[7] Thus prodded, common law courts were on familiar ground, and able to couch fairly dramatic expansions of tort liability in precedential language familiar to antiquity.

Inspired by their framework, I offer a new example: a pair of cases that address the potential expansion of the tort doctrine of conversion into new terrain: biotechnology (*Moore v. Regents of the University of California*)[8] and internet domain names (*Kremen v. Cohen*).[9] Conversion is an age-old

[4] Here, I build upon remarks I made at the UVA Law book panel. See Transcript, supra note 1, at 13 ("I have three points I want to make. The first is going to be some praise. There's a lot that's praiseworthy in the book. The second is going to be a quibble, and the third is going to be a thought about the future.").

[5] Abraham & White, supra note 2, at 212–13.

[6] Id. at 206.

[7] Id. at 104–05.

[8] 793 P.2d 479, 493 (Cal. 1990).

[9] 337 F.3d 1024, 1035–36 (9th Cir. 2003). I am reminded here of Professors Rabin's and Sugarman's *Torts Stories*, which highlighted ten canonical torts cases in which various scholars probed behind-the-scenes or insider accounts of these influential cases. Torts Stories (Robert L. Rabin & Stephen D. Sugarman eds., 2003). After publishing the book, Rabin and Sugarman set up a Westlaw TWEN website (sadly no longer accessible) and invited other scholars to add to their collection of cases. If memory serves, the *Torts Stories* progeny project began as a seminar Sugarman taught at Berkeley Law, where he inspired students to take up

COPYRIGHT © 2023 VIRGINIA LAW REVIEW ASSOCIATION

property tort that is an amalgam of an intentional tort and strict liability, by which I mean that it combines aspects of intent ("an intentional exercise of dominion or control over a chattel"[10]) with strict liability (liability that attaches without fault, notwithstanding a "mistaken belief that [a defendant] has possession of the chattel or the right to possession, or . . . is privileged to act"[11]). Historical cases are rife with antiquated examples such as the conversion of wine barrels, unsuspectingly sold by a building owner who assumed they were "junk or rubbish,"[12] or controversies between the "loser or the finder of a horse."[13] But the modern age presents new (dare I say more urgent) controversies stemming from "the recent explosive growth in the commercialization of biotechnology"[14] and intangible property on the internet.

Enter *Moore* and *Kremen*. In *Moore*, the California Supreme Court refuses to recognize conversion liability against doctors and researchers at the UCLA Medical Center who developed a patient's cancer cells (surreptitiously) taken from his spleen into a cell line that they subsequently commercialized.[15] In *Kremen*, the U.S. Court of Appeals for the Ninth Circuit (applying California law) extends conversion liability to a domain registrar that unwittingly gave away a domain name (sex.com) with potentially lucrative opportunities for exploitation, already registered to another user.[16] *Moore* and *Kremen* are a striking pedagogical pair of modern conversion cases that lend themselves to compare and contrast the significant policy considerations courts take into account when deciding whether to extend a strict liability tort: incentive effects, fairness, and institutional competence.

With regard to incentive effects, in *Moore*, the California Supreme Court invokes the law and economics concept of the "activity level" effect of strict liability—namely, the recognition that imposing strict liability

the challenge of identifying (and writing about) significant cases to add to the canon. I could imagine a "Cloaks and Torts" seminar/website to similar effect, with even greater potential for attracting attention. (Inspiration for this idea arrived at a propitious moment in summer 2022, while I visited the cloak- and top hat-filled home of Maurice LeBlanc, creator of the Gentleman Thief Detective Arsène Lupin—inspiration for the *Lupin* Netflix series. See Transcript, supra note 1, at 13.)

[10] Restatement (Second) of Torts § 222A (Am. L. Inst. 1965).

[11] Id. § 223 cmt. b.

[12] Poggi v. Scott, 139 P. 815, 815–16 (Cal. 1914).

[13] *Moore*, 793 P.2d at 488.

[14] Id. at 507 (Mosk, J., dissenting).

[15] Id. at 480–82, 487–88, 493 (majority opinion).

[16] Kremen v. Cohen, 337 F.3d 1024, 1026–28, 1035–36 (9th Cir. 2003).

COPYRIGHT © 2023 VIRGINIA LAW REVIEW ASSOCIATION

will not only affect the level of care taken by an actor, but also how frequently an actor engages in a particular activity.[17] The court is reluctant to impose strict liability, which it fears would unduly dampen socially useful medical research by "threaten[ing] with disabling civil liability innocent parties who are engaged in socially useful activities, such as researchers who have no reason to believe that their use of a particular cell sample is, or may be, against a donor's wishes."[18] Indeed, the *Moore* court circles back to the notion that "[t]o impose such a duty . . . would affect medical research of importance to all of society," and its concomitant fear of dulling the incentives for medical innovation.[19]

The "activity level" effects of strict liability were likewise front and center in *Kremen*, though of course not because judicial minds were directed towards influencing the development of "online porn empire[s]."[20] The district court took a wider view of the activity—as domain name registration—and worried that the "threat of litigation threatens to stifle the registration system by requiring further regulations by [the domain registrar] and potential increases in fees."[21] The court of appeals agreed with the characterization of the relevant activity, but, in its opinion, the fact that the imposition of strict liability would rein it in with "further regulations"[22] and even the "prospect of higher fees" furthered the public interest.[23] After all, the court opined, "A bank could lower its ATM fees if it didn't have to pay security guards, but we doubt most depositors would think that was a good idea."[24]

On the question of fairness, the *Moore* court worried that imposing strict liability via recognizing the conversion tort would "utterly sacrifice

[17] 793 P.2d at 493–96. For example, if a driver of an automobile were subject to strict liability for causing accidents, the driver would not only be induced to drive with reasonable care but also to modulate how often she drives—given that, per strict liability, she will be liable for the costs of accidents that arise even when she has exercised all reasonable care. Thus, in anticipation of this, the only way to reduce the costs of accidents further would be to drive less often (given that some accidents will take place even absent any negligence on the part of the driver). For general discussion of the "activity level" effect, see Richard Allen Epstein & Catherine M. Sharkey, Cases and Materials on Torts 176 (12th ed. 2020); Steven Shavell, Strict Liability Versus Negligence, 9 J. Legal Stud. 1, 2–3 (1980).

[18] *Moore*, 793 P.2d at 493.

[19] Id. at 487.

[20] *Kremen*, 337 F.3d at 1027.

[21] Kremen v. Cohen, 99 F. Supp. 2d 1168, 1174 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 337 F.3d 1024 (9th Cir. 2003).

[22] *Kremen*, 337 F.3d at 1035 (quoting *Kremen*, 99 F. Supp. 2d at 1174).

[23] Id.

[24] Id. at 1035–36.

COPYRIGHT © 2023 VIRGINIA LAW REVIEW ASSOCIATION

the . . . goal of protecting innocent parties" by "impos[ing] liability on all those into whose hands the cells come."[25] Thus, fairness was a second reason, along with adverse "activity level" effects, that weighed against expansion of the traditional conversion tort. The *Kremen* appellate court likewise thought fairness and "activity level" effects aligned, but in the opposite direction—namely, to recognize conversion.[26] The court reasoned that "there is nothing unfair about holding a company responsible for giving away someone else's property even if it was not at fault."[27]

Both courts also addressed the policy question of institutional choice. The *Moore* court was persuaded that "[i]f the scientific users of human cells are to be held liable for failing to investigate the consensual pedigree of their raw materials, we believe the Legislature should make that decision."[28] The district court in *Kremen* agreed that there were "methods better suited to regulate the vagaries of domain names" and left it "to the legislature to fashion an appropriate statutory scheme."[29] But the appellate court was equally adamant that "the common law does not stand idle while people give away the property of others."[30] In the case before it, the court explained: "The legislature, of course, is always free (within constitutional bounds) to refashion the system that courts come up with. But that doesn't mean we should throw up our hands and let private relations degenerate into a free-for-all in the meantime."[31] Thus, deference to the legislature dealt the final strike against conversion in *Moore*, whereas the *Kremen* court saw no impediment to common law tort as first mover in new terrain.

---

[25] Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 494 (Cal. 1990).

[26] *Kremen*, 337 F.3d at 1035.

[27] Id. The court elaborated:

> Negligent or not, it was Network Solutions that gave away Kremen's property. Kremen never did anything. It would not be unfair to hold Network Solutions responsible and force *it* to try to recoup its losses by chasing down Cohen. This, at any rate, is the logic of the common law, and we do not lightly discard it.

Id. Here the court invokes the classic libertarian or autonomy-based corrective justice version of "fairness" to justify strict liability—namely, "as between two innocents, put liability on the one who acts." See, e.g., Epstein & Sharkey, supra note 17, at 133.

[28] *Moore*, 793 P.2d at 496.

[29] Kremen v. Cohen, 99 F. Supp. 2d 1168, 1174 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 337 F.3d 1024 (9th Cir. 2003).

[30] *Kremen*, 337 F.3d at 1036.

[31] Id.

COPYRIGHT © 2023 VIRGINIA LAW REVIEW ASSOCIATION

And now we come to cloaking. The *Moore* court foreshadows its ultimate conclusion with its observation that "[n]o court . . . has ever in a reported decision imposed conversion liability for the use of human cells in medical research."[32] And though the court concedes that "that fact does not end our inquiry," it nonetheless "raises a flag of caution."[33] Having raised this red flag of absence of precedent, the policy-laden basis for the court's decision follows as almost pre-ordained.

The contrasting *Kremen* decision presents an interesting twist. Camouflaging its expansion of the antiquated conversion tort into the modern realm of the internet to apply to intangible domain names, the *Kremen* appellate court insists "[w]e have *not* 'creat[ed] new tort duties,'"[34] but instead "[w]e have only applied settled principles of conversion law to what the parties and the district court all agree is a species of property."[35] Ironically, in support, the *Kremen* court cites and quotes approvingly from *Moore*![36] In so doing, the court dresses its brave (even unprecedented) foray in the "cloak" of precedent-supported legitimacy, even while citing a decision that described conversion as "a tort theory originally used to determine whether the loser or the finder of a horse had the better title."[37]

With the stroke of their collective pen, Abraham and White serve up a pithy metaphor (cloaking) that presents a compelling way to assess how courts construct, explain, and justify changes or expansions of the common law of torts.

II. "CONSTITUTIONALIZATION" BY THE U.S. SUPREME COURT

As promised by their title, *Tort Law and the Construction of Change*, Abraham and White posit how tort doctrines evolve: "[E]xternal developments influence the courts to make doctrinal changes," and "the changes they construct seek to maintain continuity between the past and the future."[38] While they offer extensive support for this harmonious framework, I would suggest that "the interaction of external

[32] *Moore*, 793 P.2d at 487.
[33] Id.
[34] *Kremen*, 337 F.3d at 1035 (emphasis added) (quoting *Moore*, 793 P.2d at 495).
[35] Id.
[36] Id. (citing *Moore*, 793 P.2d at 495).
[37] *Moore*, 793 P.2d at 487–88.
[38] Abraham & White, supra note 2, at 215.

COPYRIGHT © 2023 VIRGINIA LAW REVIEW ASSOCIATION

developments and internal doctrinal structure"[39] is far less harmonious when the "external" source is the U.S. Supreme Court.

Abraham's and White's otherwise-compelling thesis somewhat understates the Supreme Court's assault on the common law of torts and attack on the jury that has occurred, under cover of the more neutral-sounding "constitutionalization" of certain areas of common law torts, including defamation, privacy torts, and the tort of intentional infliction of emotional distress ("IIED").

Abraham and White address the constitutionalization of defamation, beginning with *New York Times v. Sullivan*:[40]

> [T]his episode began with the pressure created by the civil rights movement for protection against liability for defamation for those criticizing government. The Supreme Court decisions extending the protections of the First Amendment then had to be harmonized with previous precedents in the common law of defamation. Although the common law of torts was openly modified, this was done so within the structure of that common law—for example, by characterizing the new limitations on liability as a constitutional privilege designed to create breathing space, analogous to prior, non-constitutional privileges creating breathing space.[41]

Abraham and White are right to draw attention today (nearly sixty years later) to the charged civil rights atmosphere that surrounded the case, though they missed an opportunity to highlight the real fear that the actions of southern juries and state courts could potentially bankrupt a respected national institution such as the *New York Times* with costly defamation litigation.[42]

Moreover, Abraham and White understate the extent to which *New York Times v. Sullivan* represented a significant break with the continuity of centuries-old common law defamation, ushering in a new

[39] Id.

[40] 376 U.S. 254, 256 (1964).

[41] Abraham & White, supra note 2, at 216.

[42] The *New York Times* tried to remove the case to federal district court but was blocked by the joinder of in-state defendants that defeated complete diversity. See David A. Anderson, Wechsler's Triumph, 66 Ala. L. Rev. 229, 249 n.135 (2014). Those removal issues have loomed even larger in recent years, and are the source of major legislation in the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d)(2). See 14AA Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3705.1 (4th ed.), Westlaw (database updated July 12, 2022).

COPYRIGHT © 2023 VIRGINIA LAW REVIEW ASSOCIATION

constitutional jurisprudence for all defamation cases brought by public officials against media defendants. The qualified privilege to attack public officials (later extended to include public figures) on matters of fact, defeasible only on a showing of constitutional "actual malice,"[43] ran against the then-dominant common law line.[44] Choosing to override the common law, the Court evinced disdain for its weakness.[45] The aggressiveness of the Court's decision is even more apparent when one

[43] *Sullivan*, 376 U.S. at 279–80 (articulating "actual malice" standard as "with knowledge that it was false or with reckless disregard of whether it was false or not"); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, J., concurring in the result) (extending constitutional "actual malice" requirement to "public figures").

[44] Subsequently, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court took yet another step in distancing the constitutional from the common law by imposing requirements for private figure plaintiffs suing defendants for publishing statements on matters of public concern. The *Gertz* Court held that states may not impose liability without fault, id. at 347, and that states may not permit recovery of presumed damages unless the plaintiff satisfies the "actual malice" standard. Id. at 349.

The Court took a further step in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), when it held that "the common-law presumption that defamatory speech is false cannot stand" when a private figure plaintiff sues on a matter of public concern. Id. at 777; id. at 776 ("In *Gertz*, as in *New York Times*, the common-law rule was superseded by a constitutional rule. We believe that the common law's rule on falsity—that the defendant must bear the burden of proving truth—must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.").

At one level the decision makes sense, for if defamation depends upon misrepresentations to third parties, then falsity is an essential part of the prima facie case, and it is one that the plaintiff should typically be able to get good evidence about, given her superior access to the facts.

What is questionable is whether the rest of the *Gertz* apparatus, especially the requirement that a private figure plaintiff suing on a matter of public importance prove negligence, should also be left in place. The need to insulate media defendants from strict liability rules is reduced if the burden of proof on truth is placed on the plaintiffs. The dual burden of proving both fault and falsity on plaintiffs could strip too many private plaintiff / public concern cases of their legal protection. The paucity of defamation suits suggests that this double burden, along with all the other procedural maneuvers, has made a difference. See Berisha v. Lawson, 141 S. Ct. 2424, 2428 (2021) (Gorsuch, J., dissenting from denial of certiorari) ("Statistics show that the number of trials involving defamation, privacy, and related claims based on media publications has declined dramatically over the past few decades: In the 1980s there were on average 27 per year; in 2017 there were 3." (citing David A. Logan, Rescuing Our Democracy by Rethinking *New York Times Co. v. Sullivan*, 81 Ohio St. L.J. 759, 808–10 (2020) (surveying data from Media Law Resource Center))).

[45] *Sullivan*, 376 U.S. at 268–71. It is a fair question to ask whether Justice Brennan, who recognized the need for some balance between the common law of defamation and the freedoms of speech and press protected by the First Amendment, ever discredits the position that he so eloquently repudiates. By the same token, one can note that the decision can be attacked from the other side, as protracted litigation against the press led to renewed calls for an absolute privilege, at least within some confined scope, usually that of political speech.

COPYRIGHT © 2023 VIRGINIA LAW REVIEW ASSOCIATION

considers how the lower court opinion could have been overturned on much narrower grounds.[46]

Abraham and White do not address the extent to which the Court's actual malice standard overshot the mark,[47] a standard that some scholars have found to be especially ill-suited to the Internet Age.[48] Indeed, there has been an ever-louder call to reconsider *New York Times v. Sullivan*, which, decided in 1964, "might as well be a century ago, or maybe a millennium, in light of the massive technological advances that followed it."[49] Given the speed and breadth with which information (including false and/or defamatory statements) is disseminated on the internet and the line between truth and falsity increasingly blurred with ever-more-sophisticated deep-fake videos and the like, the demanding actual malice standard and its generous protection does seem to warrant a new look.[50]

[46] See, e.g., Richard A. Epstein, Was *New York Times v. Sullivan* Wrong?, 53 U. Chi. L. Rev. 782, 792–95 (1986). Epstein's view is that the Alabama court was wrong on the "of and concerning" issue, and that setting this point correct could have ended the constitutionalization of the case. Id. at 792. Epstein also points out that the Court could have granted summary judgment, honoring a common law principle that defamation should not apply to large (or amorphous) groups, such as an entire police department. Id. at 793. In a similar vein, it seems that the plaintiff acted precipitately in rebuffing the *New York Times*'s effort to find out his objection to the story. *Sullivan*, 376 U.S. at 261.

[47] For a long while defamation suits against the press lay dormant. See supra note 44. The ability to make life miserable for plaintiffs, and to republish the libel while defending the case ushered in a retreat. In modern-day defamation cases, a determined press won most of these high-visibility lawsuits, often by mounting a scorched earth defense on any and all issues to win a war of attrition.

[48] Cass R. Sunstein, Liars: Falsehoods and Free Speech in an Age of Deception 101 (2021); Jeffrey Standen, Republication Liability on the Web, 105 Marq. L. Rev. 669, 671 (2022).

[49] Cass R. Sunstein, Falsehoods and the First Amendment, 33 Harv. J.L. & Tech. 387, 413 (2020). Supreme Court Justices Thomas and Gorsuch have likewise stated that the modern news media landscape played a role in their call for a reconsideration of the *New York Times v. Sullivan* case. See *Berisha*, 141 S. Ct. at 2425 (Thomas, J., dissenting from denial of certiorari) ("The proliferation of falsehoods is, and always has been, a serious matter. Instead of continuing to insulate those who perpetrate lies from traditional remedies like libel suits, we should give them only the protection the First Amendment requires."); id. at 2428 (Gorsuch, J., dissenting from denial of certiorari) ("What started in 1964 with a decision to tolerate the occasional falsehood to ensure robust reporting by a comparative handful of print and broadcast outlets has evolved into an ironclad subsidy for the publication of falsehoods by means and on a scale previously unimaginable.").

[50] On the other hand, wide access to social media also means that affected individuals have more resources available to respond online. But are self-help remedies sufficient to compensate harm caused by the defamatory statements? Or (as I am inclined to believe) is something akin to Sunstein's proposed "notice and takedown" right worth exploring? Sunstein, supra note 49, at 413.

COPYRIGHT © 2023 VIRGINIA LAW REVIEW ASSOCIATION

But another argument for its reconsideration is that it was—even in 1964—an unnecessary assault on the common law of libel. The question I wish Abraham and White had tried to answer is: Was the constitutionalization of defamation law necessary, or might the common law have continued to evolve to strike the right balance between protecting reputational interests and First Amendment free speech interests?[51] After all, many regulations have a "chilling effect"[52] on speech (for example, perjury and securities law), but are nonetheless necessary to deter significant potential harm. What societies need is an optimal level of "chill," not its absence.

Likewise missing from their account is an appreciation of the Court's increasing hostility towards the jury, an oft-overlooked feature of the *New York Times v. Sullivan* opinion, where some members of the Court worried about "more such huge [jury] verdicts lurking just around the corner."[53] This concern rises to the fore in *Gertz v. Robert Welch, Inc.*, where the Court opines:

> We also find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation. In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views.[54]

Such hostility to the jury, moreover, bubbles to the surface in more recent tort cases, such as the IIED case of *Snyder v. Phelps*,[55] where members of the Westboro Baptist Church picketed near the funeral

[51] Although the fault standard in common law might not adequately protect free speech interests, countries like the United Kingdom have carved out additional privileges in the common law of libel in light of strong free speech interests. In the U.K. Defamation Act of 2013, Parliament carved out an affirmative defense to defamation where the defendant can show "a statement on a matter of public interest" and "the defendant reasonably believed that publishing the statement complained of was in the public interest." Defamation Act 2013, c. 26, § 4 (Eng. & Wales).

[52] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 300–01 (1964) (Goldberg, J., concurring in the result).

[53] Id. at 294–95 (Black, J., concurring).

[54] 418 U.S. 323, 350 (1974).

[55] 562 U.S. 443, 447–50 (2011).

COPYRIGHT © 2023 VIRGINIA LAW REVIEW ASSOCIATION

service of the plaintiff's son, a fallen Marine.[56] Under Maryland state law, the jury had found the picketers' conduct "outrageous."[57] The U.S. Supreme Court held that the picketers had addressed a matter of public concern and were thus entitled to First Amendment protection.[58] And, in justifying its holding, the Court dismissed the "outrageousness" standard of IIED as a "highly malleable standard with 'an inherent subjectiveness,'" namely, at the mercy of a jury's unpredictable "tastes or views."[59]

Such discord between the Supreme Court and the common law of torts (and, in turn, the jury) is likewise on full display in the realms of federal preemption of state tort law and punitive damages. The Supreme Court has fashioned a peculiar jurisprudence of federal preemption of state tort law claims involving prescription medical devices and pharmaceutical drugs. In *Riegel v. Medtronic, Inc.*,[60] the first case of its kind finding express preemption of state tort claims against a medical device manufacturer, the Court ventured well beyond interpreting express congressional language in the relevant statute to opine on what was, in its view, the comparative superiority of the FDA's clear-headed determination that a medical device is safe, relative to the emotion-marred assessment of a jury who sees only the injured plaintiff before it.[61] In

[56] The jury is a curious omission from a book preoccupied with the evolution of tort doctrine. Juries are a signature feature of tort trials and the evolution of various tort doctrines seems inextricably linked to the jury as decision-maker. IIED is but one prominent example.

At the UVA book event, my fellow panelist Michael Green also commented on "the role of the jury in influencing the shape of tort law." And Abraham, magnanimous as ever, conceded the point in his rejoinder:

> It's true, we don't talk a lot about juries in this book, but make no mistake about it . . . American tort law, the common law of torts is all about the relationship between judges and juries. It's only a slight exaggeration to say it's about nothing other than the relationship between judges and juries. We wouldn't need as much tort law or all the rules that we have if it weren't for the fact that we have juries in civil cases. Much of the law of torts could be left unset or at least ungoverned by rule. So there's the whole world that you could write about, and you have to pick some of it when you write, and it's true we didn't say much about juries.

Transcript, supra note 1, at 18.

[57] *Snyder*, 562 U.S. at 450–51, 458–59.

[58] Id. at 454, 458 ("[E]ven if a few of the signs—such as 'You're Going to Hell' and 'God Hates You'—were viewed as containing messages related to [the private-figure plaintiff] specifically, that would not change the fact that the overall thrust and dominant theme of [the church group's] demonstration spoke to broader public issues.").

[59] Id. at 458 (quoting Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 55 (1988)).

[60] 552 U.S. 312, 320–21, 330 (2008).

[61] Id. at 324–26. As I have elaborated elsewhere:

COPYRIGHT © 2023 VIRGINIA LAW REVIEW ASSOCIATION

Wyeth v. Levine,[62] albeit in dissent, several Justices again barely hid their contempt for the jury in asking, "[W]ho—the FDA or a jury in Vermont—has the authority and responsibility for determining the 'adequacy' of [the drug manufacturer's] warnings[?]"[63] In case after case, the "Justices' hostility toward the common law of torts trumps even their caustic criticism of the ever-inflating administrative state."[64] Or, so I have argued.[65]

The Court's relatively recent foray into the centuries-old remedial realm of punitive damages provides another salient example. Given the Court's now seeming ubiquitous presence in punitive damages disputes, it is worth recalling that it is only in the last two decades that the Court has established itself as an interloper in the domain of state common law.[66] From the inception of their "constitutionalization" of punitive damages, the Justices have intervened in state courts to police outlier

> Justice Scalia's majority opinion . . . cast[s] aspersions on the *jury's* competence to engage in cost-benefit analysis, relative to that of the FDA. And in a passage distinctly out of place in an opinion whose outcome is ostensibly determined exclusively by statutory text, Justice Scalia, "speculat[ing] upon congressional motives," finds a "suggest[ion] that the solicitude for those injured by FDA-approved devices . . . was overcome in Congress's estimation by solicitude for those who would suffer without new medical devices if juries were allowed to apply the tort law of 50 states to all innovations."

Catherine M. Sharkey, What *Riegel* Portends for FDA Preemption of State Law Products Liability Claims, 103 Nw. U. L. Rev. 437, 440 (2009) (emphasis added) (quoting *Riegel*, 552 U.S. at 326).

[62] 555 U.S. 555, 558–59 (2009).

[63] Id. at 605 (Alito, J., dissenting).

[64] Catherine M. Sharkey, The Administrative State and the Common Law: Regulatory Substitutes or Complements?, 65 Emory L.J. 1705, 1733 (2016).

[65] Id. This article—which presents myriad examples of the Justices' hostility towards the common law of torts—is what I would point to in response to White's rejoinder:

> "I don't think the current majorities on the Court care a whole lot about tort law one way or another. I think they feel they have bigger fish to fry. If they're going to get on the First Amendment hobbyhorse, they're going to stake out a bolder path than just product warnings."

Transcript, supra note 1, at 20.

[66] The Court's (in)famous trilogy of punitive damages cases begins in 1996 with *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 585–86 (1996) (overturning a jury-awarded punitive damages judgment, for the first time, on constitutional excessiveness grounds); followed by *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 429 (2003) (overturning jury punitive damages award of $145 million as "neither reasonable nor proportionate to the wrong committed"); and *Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007) (vacating a jury's $79.5 million punitive damages award with admonishment that "a jury may not . . . use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties").

COPYRIGHT © 2023 VIRGINIA LAW REVIEW ASSOCIATION

punitive damages jury awards, reacting to extreme jury verdicts that jar their constitutional sensibilities.[67]

Nor, in this realm, have state courts simply and harmoniously internalized the Court's message seamlessly into the doctrinal evolution of punitive damages, as Abraham's and White's thesis might suggest. First, "[t]o the extent that states have felt *obligated* to fall in step with the Supreme Court's marching orders, it is not a stretch to suggest that the Court's jurisprudence is in the process of creating a generalized federal common law of punitive damages, with far-reaching potential implications."[68] Second—and rather unharmoniously—we see friction and, occasionally, even pushback on the part of state court defenders of the common law.[69] The Oregon Supreme Court in *Williams* provides a bold counter-example of state court defiance of the external force of the U.S. Supreme Court.[70] After the U.S. Supreme Court remanded the case with directions to apply a new constitutional rule forbidding the jury from punishing the defendant for widespread harms to others, "the Oregon Supreme Court instead reaffirmed the original $79.5 million jury punitive damages award."[71] In so doing, the court "guarded its state law turf against further federal incursions,"[72] and "asserted its prerogative to stake out the metes and bounds of its legitimate state interest in the punitive damages review process, even in the face of heavy-handed direction from the U.S. Supreme Court."[73]

[67] One can trace this back even further to *New York Times v. Sullivan* and *Gertz v. Robert Welch, Inc.* For it is sometimes overlooked how the Court—in constitutionalizing defamation for the first time in the centuries-old tort's history—was as much imposing a restraint on large jury verdicts. See supra notes 53–54 and accompanying text. One can also link to the Court's broader project of reining in the vagaries of jury decision-making via procedural reform in civil litigation. See Catherine M. Sharkey, The *Exxon Valdez* Litigation Marathon: A Window on Punitive Damages, 7 U. St. Thomas L.J. 25, 26 (2009) ("[T]he Court's fixation on unpredictability can be linked with a broader trend in the Court's jurisprudence of circumscribing the role of the civil jury in the name of certainty, predictability, and efficiency.").

[68] Samuel Issacharoff & Catherine M. Sharkey, Backdoor Federalization, 53 UCLA L. Rev. 1353, 1425 (2006).

[69] See Catherine M. Sharkey, Federal Incursions and State Defiance: Punitive Damages in the Wake of *Philip Morris v. Williams*, 46 Willamette L. Rev. 449, 449–50 (2010).

[70] Id. at 450.

[71] Id.

[72] Id. The court utilized a procedural maneuver to affirm on "an independent and adequate state [law] ground," obviating the need to take up the constitutional issue. Williams v. Philip Morris, Inc., 176 P.3d 1255, 1260 (Or. 2008).

[73] Sharkey, supra note 69, at 450.

COPYRIGHT © 2023 VIRGINIA LAW REVIEW ASSOCIATION

Abraham and White might temper their thesis that common law courts internalize shocks from "external developments"[74] by folding them into their own doctrinal development to recognize the more fractious relationship of common law courts and one external actor, the U.S. Supreme Court.

III. TORT LAW'S FUTURE

Perhaps the most accurate mark of a great torts book—at least one with staying power—is how it informs the future. Abraham and White adeptly discuss the implications of their thesis regarding change in established common law doctrines for matters that will arise in our "information age."[75]

I offer a few thoughts to sharpen their thesis as it applies to tort law's future. What precisely triggers change in tort law? When it comes to assessing the "birth" of new torts or even the expansion of antiquated torts into new realms—what we may term "new torts in older torts clothing"—two factors predominate: (1) preventing harm or minimizing new societal risks of harm and (2) the role of insurance. Abraham and White (I think) would agree (at least in part).

A. Prevention of Harm

Abraham and White capture the dynamic, evolutionary process of the common law of torts: "[T]ort law is never static because new events and social attitudes toward them generate new perceptions of social wrongs for which some form of relief should be afforded, and tort law becomes a candidate to provide that relief."[76] As to what drives these "new perceptions of social wrongs," Abraham and White suggest that "[a]t various times, widespread perceptions surface that certain kinds of conduct are causing harms to others and that the conduct and resulting harms are socially troublesome enough to amount to 'wrongs.'"[77] Here, they embrace the position that "wrongs" are socially constructed. It would seem only a short step for them to agree further that "the mechanism by which courts' decision to impose liability on new entities derives from the regulatory needs of society, and hence the desire to pin responsibility on

[74] Abraham & White, supra note 2, at 215.
[75] Id. at 181.
[76] Id. at 197.
[77] Id. at 203.

COPYRIGHT © 2023 VIRGINIA LAW REVIEW ASSOCIATION

entities in the best position to have readily avoided harm arising from the imposition of excessive risks."[78]

Abraham and White drop some hints, especially in discussing actual evolving tort doctrines on the ground, that they subscribe to the view that deterrence can provide powerful "external pressure" upon courts to recognize new (or expanded) torts.[79] For example, they recognize that with regard to liability for data breaches: "[I]f the disclosure of private information from hacking becomes common and widespread, and there is no statutory or regulatory regime rigorously deterring negligent failure to provide adequate data security by imposing severe penalties for violations, then eventually some courts will expressly or impliedly recognize this under some circumstances."[80] There, they explicitly recognize the role of tort as quasi-regulatory, stepping in to prevent harms. Deterrence also seems to be at the top of their minds when they suggest that tort liability may "send potential violators a strong message."[81]

Yet they then revert to a more conventional view of tort law as morality play. They point out that "[s]ome kinds of conduct are perceived as more blameworthy than others and therefore have more appeal as targets of tort liability."[82] Returning to the data breach example, when merchants are sued in the aftermath of credit card security breaches, they draw a distinction between harms to banks and other financial institutions who have suffered financial losses due to reimbursements for fraudulent charges or re-issuing cards, and individual consumers whose credit card information has been stolen. They argue that "merchants' failure to protect consumers' data is highly blameworthy, but the principal wrong is to the consumers whose data they failed to protect, not to the issuing

[78] Catherine M. Sharkey, Products Liability in the Digital Age: Online Platforms as "Cheapest Cost Avoiders," 73 Hastings L.J. 1327, 1329 (2022). And:

> To be sure, there are normative dimensions to the determination of what is "cheap" and "costly" that reflect the ever-changing tastes and values in society, and existing torts—themselves derived from pressing regulatory needs in society—dramatically influences the evolution of these normative views insofar as they influence what society deems costly or harmful.

Id. at 1329–30 (citing Guido Calabresi & Spencer Smith, On Tort Law's Dualisms, 135 Harv. L. Rev. F. 184 (2022)).

[79] Abraham & White, supra note 2, at 196.

[80] Id. at 194.

[81] Id. at 185.

[82] Id. at 202.

COPYRIGHT © 2023 VIRGINIA LAW REVIEW ASSOCIATION

banks."[83] Thus, they claim, in consumer actions, tort liability should be imposed on merchants given that their "failure to exercise reasonable care to protect the data under those circumstances is *highly blameworthy*,"[84] whereas, "[t]here does not seem to be much external pressure to afford the banks a right of recovery in this situation."[85]

"Blameworthy" (like "wrong") may be a suitable stand-in, but courts may be more "motivated to address the negative externalities borne especially by consumers (but also including sophisticated players such as financial institutions) by imposing tort liability on merchants and other breached entities that the courts assume have the ability to minimize risks by adopting greater security measures."[86] Consider the infamous *Home Depot* data breach case:

> To hold that no such duty existed would allow retailers to use outdated security measures and turn a blind eye to the ever-increasing risk of cyber attacks, leaving consumers with no recourse to recover damages even though the retailer was in a superior position to safeguard the public from such a risk.[87]

As for the distinction between consumers and issuing banks, the dividing line may have less to do with blameworthiness and more to do with which parties within the credit card processing ecosystem face externalized risks (not addressed by contract or regulation), such that tort liability is necessary for deterrence. As one court explained:

> [T]he credit card industry involves a complex web of relationships involving numerous players governed by both individual contracts and exhaustive regulations promulgated by [credit] card networks. These relationships may well create non-contractual duties between various participants in the system . . . . In addition, this web of relationships may or may not render . . . negligence claim[s] susceptible to the economic loss doctrine.[88]

[83] Id. at 189.
[84] Id. at 190 (emphasis added).
[85] Id. at 189.
[86] Catherine M. Sharkey, Can Data Breach Claims Survive the Economic Loss Rule?, 66 DePaul L. Rev. 339, 383 (2017).
[87] In re: The Home Depot, Inc., Customer Data Sec. Breach Litig., No. 1:14-md-2583, 2016 WL 2897520, at *4 (N.D. Ga. May 18, 2016).
[88] Banknorth, N.A. v. BJ's Wholesale Club, Inc., 394 F. Supp. 2d 283, 287 (D. Me. 2005).

COPYRIGHT © 2023 VIRGINIA LAW REVIEW ASSOCIATION

Some courts have taken up my suggestion—before diving into doctrinal arguments about the economic loss rule and common law duties—to distinguish what I have termed the "stranger paradigm" from the "contracting parties paradigm"[89]:

> The stranger paradigm fits "when an actor's negligence causes financial losses to a party with whom the actor has no pre-existing relationship." The stranger paradigm seeks to set the "parameters of the duty of reasonable care . . . at physical injuries and property damage" and, traditionally, does not allow recovery for simple economic losses. . . . The contracting parties paradigm approaches the problem differently. Under this paradigm, "the question is whether a duty should be imposed *by* [*tort*] *law* . . . over and above . . . any voluntary allocation of risks and responsibilities already made between the contracting parties."[90]

With these paradigms in mind, the credit card data breach cases can then be reframed in a coherent way that defers to contractual allocation of risk and responsibility but nonetheless allows tort liability to be deployed when needed to ensure the internalization of third-party costs.[91]

A recent decision by the U.S. Court of Appeals for the Seventh Circuit takes up this approach when deciding whether to recognize a "new form of liability" to provide banks an avenue for recovery of financial losses.[92]

---

[89] See, e.g., Cmty. Bank of Trenton v. Schnuck Mkts., Inc., 887 F.3d 803, 813 (7th Cir. 2018) (citing Sharkey, supra note 86, at 344); Bermel v. BlueRadios, Inc., 440 P.3d 1150, 1154 n.5 (Colo. 2019) ("At least one leading tort scholar has sought to clarify doctrinal confusion in this area by distinguishing 'consensual' cases (those involving a contractual or quasi-contractual relationship between the plaintiff victim and the defendant tortfeasor) from 'stranger' cases (those lacking such a contractual or quasi-contractual relationship) and thoughtfully exploring the theoretical justifications for the economic loss rule in these distinct contexts." (citing Catherine M. Sharkey, In Search of the Cheapest Cost Avoider: Another View of the Economic Loss Rule, 85 U. Cin. L. Rev. 1017 (2018)) [hereinafter Sharkey, In Search of the Cheapest Cost Avoider]); Sheen v. Wells Fargo Bank, N.A., 505 P.3d 625, 633, 645 (Cal. 2022) (citing Sharkey, In Search of the Cheapest Cost Avoider, supra, at 1018–19); see also S. Indep. Bank v. Fred's, Inc., No. 2:15-cv-799, 2019 WL 1179396, at *14–16 (M.D. Ala. Mar. 13, 2019) (citing Sharkey, supra note 86, at 342, 349–55); Dittman v. UPMC, 196 A.3d 1036, 1057 (Pa. 2018) (Saylor, C.J., concurring and dissenting) (citing Sharkey, supra note 86, at 348–60).

[90] *Cmty. Bank of Trenton*, 887 F.3d at 814 (quoting Sharkey, supra note 86, at 344–45, 383).

[91] See also *S. Indep. Bank*, 2019 WL 1179396, at *16 (explaining that the Third Restatement of Torts' version of the economic loss rule—which only applies to parties in privity of contract—"serves as a form of 'border control' that keeps tort and contract in their separate lanes" (quoting Sharkey, supra note 86, at 345)).

[92] *Cmty. Bank of Trenton*, 887 F.3d at 808.

COPYRIGHT © 2023 VIRGINIA LAW REVIEW ASSOCIATION

First, the court chooses the "contracting parties paradigm" to guide its analysis of the plaintiff banks' tort claims.[93] (Note that even though the banks have no direct contractual relationship with the merchant, the court appropriately uses the "contracting parties paradigm" because the banks and merchant "all participate in a network of contracts"—a network that "tie[s] together all the participants in the card payment system" and "imposes the duties plaintiffs rely upon and provides contractual remedies for breaches of those duties.")[94] Next, it demonstrates how considerations of deterrence (as opposed to blameworthiness) drive the court's decision (i.e., provide "external pressure") on whether or not to impose tort liability:

> Courts using the contracting parties paradigm first take into account the mechanisms the parties have chosen to allocate the risks they face. Courts then consider whether these mechanisms have sufficiently reduced the externalities visited upon third parties, or whether the breached entities need additional financial incentives to pursue better data security. The ultimate question is whether these arrangements already place costs on "the cheapest cost avoider" or whether additional tort liability is necessary because the existing contracts "externalize significant risk onto hapless third parties."[95]

The Seventh Circuit resisted the plaintiff banks' invitation to recognize a "new form of tort liability"—i.e., "the recognition of new theories of state tort liability through simplistic application of sweeping black-letter tort law principles."[96] But it did so not because harms to banks were less

[93] Id. at 814.

[94] Id. As I have explained:

> What makes the credit card data security breach cases so vexing is that they often straddle the stranger/contracting parties paradigms. They comprise a distinct form of "third party cases"—where the victims and defendants are not themselves in a contractual relationship, but nonetheless, they typically contract with a common entity, and thus are tied together through a complex web of contracts . . . .
>
> Such third-party cases could be slotted into the stranger paradigm—on the theory that the victims (issuer banks or consumers) and defendants (merchants, acquirer banks, or credit card processing entities) are not in direct contractual privity. Alternatively, the cases could be treated as part and parcel of the consensual contracting parties paradigm on account of the web of contracts that link together victims and defendants. Courts have done both, though unpredictably.

Sharkey, supra note 86, at 345–46.

[95] *Cmty. Bank of Trenton*, 887 F.3d at 814 (quoting Sharkey, supra note 86, at 382–83).

[96] Id. at 815.

COPYRIGHT © 2023 VIRGINIA LAW REVIEW ASSOCIATION

blameworthy, but instead on deterrence grounds because "the claimed conduct and losses are subject to these networks of contracts."[97]

This is not to say that a deterrence rationale must be to the exclusion of the concept of blameworthiness. But it suggests, at least, that deterrence is the primary driver of change in tort law.[98] What we might actually be witnessing in twenty-first century torts is a convergence of economic and moral perspectives whereby the party with the greatest control over minimizing a risk is deemed "blameworthy."[99] Thus, to return full circle to data breach, courts are more likely to impose new forms of tort liability upon merchants for the financial losses of consumers, who are far more likely than banks and other financial institutions to fit the bill of "hapless third parties" on whom risks have been externalized. And society may thereby deem the merchants to blame.

B. The Role of Insurance

Insurance plays a sometimes hidden, yet significant, role in the evolution of tort doctrine. Abraham has perhaps done more than any other scholar to bridge the gap between tort and insurance law as fields of study. His book, *The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11*, presents a compelling argument that the availability of insurance led to the creation of new forms of tort liability

[97] Id. at 816.

[98] Illustrations abound outside the context of data breach / economic loss rule—which is my primary focus here in light of the attention Abraham and White give to the subject. Consider, for example, the New Jersey Supreme Court, which decided to extend a duty of care to inspect home premises and warn prospective buyers and visitors who tour an open house (typically borne by homeowners) to real estate brokers. To justify this expansion of tort liability, the court emphasized:

> [T]he public interest is served by recognizing a duty of care on the part of brokers. . . . [O]ne of the main functions of tort law is to *prevent accidents* rather than simply to provide legal redress to an injured party. One of the central rationales for imposing liability in tort law is to *deter tortious behavior*. The imposition of liability should discourage negligent conduct by fostering reasonable conduct and creating *incentives to minimize risks of harm*.

Hopkins v. Fox & Lazo Realtors, 625 A.2d 1110, 1120 (N.J. 1993) (emphasis added) (citation omitted).

[99] Accord Catherine M. Sharkey, Holding Amazon Liable As a Seller of Defective Goods: A Convergence of Cultural and Economic Perspectives, 115 Nw. U. L. Rev. Online 339, 356 (2020) (suggesting the emergence of "a culturally specific norm incorporating power dynamics is efficiency-as-responsibility" whereby "the party with greatest control over a risk must pay for damages in the event of harm").

COPYRIGHT © 2023 VIRGINIA LAW REVIEW ASSOCIATION

and heavily influenced the expansion of existing tort liability.[100] Surprisingly, however, insurance goes largely un-mentioned in *Tort Law and the Construction of Change*.

To be sure, there are some stray references to the topic (and citations to *The Liability Century*). In their discussion of data breach, Abraham and White point out that "[i]n contrast to economic losses incurred by victims of data breaches, . . . emotional losses from public disclosure of confidential information will be much more difficult for potential victims to insure against."[101] This is at least a tacit recognition that, with regard to economic losses (as opposed to emotional losses), victims themselves may be the "least cost avoiders" given their ability to insure for such losses, for example via business interruption insurance.[102] But that would be much less likely for emotional losses. Abraham and White further suggest that, with regard to liability for such losses, defendants would have an incentive to purchase insurance: "They may find it in their interest to purchase substantial amounts of insurance against such liability, in the same manner that major corporations now purchase hundreds of millions of dollars' worth of insurance against liability for bodily injury and property damage."[103]

[100] Kenneth S. Abraham, The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11, at 2 (2008).

[101] Abraham & White, supra note 2, at 194.

[102] See Sharkey, In Search of the Cheapest Cost Avoider, supra note 89, at 1041 (2018) ("[B]usiness interruption insurance is readily available to the putative victims. . . . [C]ertain particular features of these economic losses likewise tip the balance in favor of the victim as cheapest cost avoider."). To elaborate a bit on this rationale:

> First, business interruption losses are the kind of losses that occur regularly even absent any wrongdoing; putative victims thus develop experience and expertise in terms of managing and reducing them. Second, such losses tend to accumulate over time; as a result, victims tend to operate over a long term horizon in terms of mitigating them. Taken together, the victim can structure its operations—for example, by maintaining spare parts, excess capacity, and alternative operating modes—so as to minimize any compounding of losses. Seen in this light, the economic loss rule provides incentives for potential plaintiffs to exercise optimal care and to self-insure efficiently.

Id. at 1041–42 (footnotes omitted); see also Catherine M. Sharkey, The Remains of the Citadel (Economic Loss Rule in Products Cases), 100 Minn. L. Rev. 1845, 1881 (2016) ("Whereas manufacturers are almost always in a better position to control and insure risks in the manufacturing production process . . . with respect to risks of physical harm and damage to property, the conclusion flips with respect to considerations of economic risks for which the end user often possesses an informational advantage over the seller about potential uses and the consequential risk flowing from those uses.").

[103] Abraham & White, supra note 2, at 195.

COPYRIGHT © 2023 VIRGINIA LAW REVIEW ASSOCIATION

But they miss an opportunity to put these insights to work in furtherance of their thesis regarding doctrinal development and change in tort law. First, to what extent does (or should) the insurability of the loss (with first party insurance by putative victims or third party insurance by defendants) influence judicial decision-making? The role of insurance is especially linked to deterrence or prevention of harm rationales in tort law. To take just one example, a D.C. federal district court included in its opinion that one of the purposes of the economic loss rule in torts is "to encourage the party best situated to assess the risk of economic loss, the commercial purchaser, to assume, allocate, and insure against the risk."[104]

Second, as a more robust third-party liability insurance market emerges in response to a greater threat of tort liability for data breach, to what extent will insurers engage in further risk management, exerting more potent regulatory control?[105] In other words (separate and apart from any loss-spreading role played by insurance), might there be an explicit feedback loop whereby insurance fuels the deterrent impact of tort liability?

Nor is insurance confined to the development of idiosyncratic doctrines such as the economic loss rule. To the contrary, it rears its head as a key factor influencing whether judges recognize or extend affirmative duties. Consider the canonical *Rowland v. Christian* case, in which the California Supreme Court abolished the common law's tripartite classification scheme for determining the scope and content of any duty owed by an owner or occupier of land on the basis of whether the entrant was a trespasser, licensee, or invitee. In its place, the court established a general "reasonableness" inquiry governed by a set of factors, which included both "the policy of preventing future harm" (to bolster the point raised above in Section A) and "the availability, cost, and prevalence of insurance for the risk involved."[106]

[104] Nat'l Tel. Coop. Ass'n v. Exxon Corp., 38 F. Supp. 2d 1, 14 (D.D.C. 1998) (quoting Daanen & Janssen, Inc. v. Cedarapids, Inc., 573 N.W.2d 842, 846 (Wis. 1998)).

[105] This is a question I asked in Sharkey, In Search of the Cheapest Cost Avoider, supra note 89, at 1036 n.97.

[106] Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968). Although stipulated as a general relevant factor in determining the nature of the affirmative duty of the landowner, insurance did not play an outsized role in the outcome of the case before it. The court focused on the fact that "there is no persuasive evidence that applying ordinary principles of negligence law to the land occupier's liability will materially reduce the prevalence of insurance due to increased cost or even substantially increase the cost." Id. at 567–68.

The court's pointing to "no persuasive evidence" raises an interesting issue as to the kind of record evidence on the availability of insurance that might be introduced by parties. See, e.g.,

COPYRIGHT © 2023 VIRGINIA LAW REVIEW ASSOCIATION

Courts and scholars cited *Rowland* to support the proposition that the insurability of the landowner's risk of liability warranted the collapse of the tripartite classification system (in whole or in part).[107] More generally, whether insurance typically covers the risk at issue (even if there is no record evidence before the court) emerges as a key explanatory factor in courts' willingness to impose or extend tort liability. Courts are more willing to impose such tort duties in areas traditionally covered by insurance—such as landlord affirmative duties for injuries to tenants,[108] employer liability for negligence of employees,[109] the scope of liability for physician negligence,[110] or even (more speculatively) universities' liability for failing to protect their students from foreseeable violence of

Formet v. Lloyd Termite Control Co., 110 Cal. Rptr. 3d 551, 604 (Ct. App. 2010) ("[A]lthough it is probable insurance would be available, there is no obligation for us to consider evidence of the pest control liability insurance industry because there is no record upon which to base such a determination. Other courts facing an absence of evidence regarding liability insurance have concluded '[w]e cannot, therefore, evaluate this factor one way or the other.'" (quoting Laabs v. S. Cal. Edison Co., 97 Cal. Rptr. 3d 241, 256 (Ct. App. 2009))).

[107] See Smith v. Arbaugh's Rest., Inc., 469 F.2d 97, 107–08 (D.C. Cir. 1972) (Leventhal, J., concurring) (suggesting that the common law classifications be abolished as to persons on business premises but not as to persons on the premises of private homeowners based on the different implications for insurability of the respective risks). But see Schofield v. Merrill, 435 N.E.2d 339, 345 (Mass. 1982) ("The ready availability of insurance and a sympathetic plaintiff should not allow us to undermine the fundamentals of negligence law. Thus we reject the suggestion of some authorities that the insurability of the landowner's risk of liability warrants abolishing the trespasser classification."). For academic inspiration on the loss-spreading role of insurance, see generally Fleming James, Jr., Tort Liability of Occupiers of Land: Duties Owed to Trespassers, 63 Yale L.J. 144, 151–52 (1953) (suggesting that small homeowners can protect themselves against liability stemming from the duty of care to trespassers through insurance).

[108] See, e.g., Wylie v. Gresch, 236 Cal. Rptr. 552, 567 (Ct. App. 1987) ("Insurance is readily available to landlords for property that they have leased which can include injuries to the tenants for which the landlord is liable.").

[109] Soldano v. O'Daniels, 190 Cal. Rptr. 310, 316 (Ct. App. 1983) ("We have no information on the question of the availability, cost, and prevalence of insurance for the risk, but note that the liability which is sought to be imposed here is that of employee negligence, which is covered by many insurance policies.").

[110] Welke v. Kuzilla, 365 N.W.2d 205, 213–14 (Mich. Ct. App. 1985) (Bronson, J., dissenting) ("An important consideration in the willingness of courts to impose malpractice liability on doctors is the ability of the defendants to pass on to the general public through malpractice insurance . . . . It would be anomalous to impose liability on a doctor for injuries arising out of his treatment of a patient, and to require the doctor to insure against this risk of liability separately and distinctly from the risk imposed under traditional malpractice actions.").

COPYRIGHT © 2023 VIRGINIA LAW REVIEW ASSOCIATION

other students.[111] And they are correspondingly more reticent to do so where the availability of insurance is questionable, such as in newly emergent contexts like spiritual counseling by clergy that causes injury,[112] or where they deem it unlikely (even if they are mistaken), such as for parents or romantic partners' failure to warn third parties about threats from children or intimate partners, respectively.[113]

Insurance is thus (at least sometimes) front and center in the judicial mind when considering whether to extend existing or create new affirmative duties in tort, and it is an issue that would have been interesting to see in Abraham's and White's book.[114] And so now for the

[111] Regents of the Univ. of Cal. v. Superior Ct., 413 P.3d 656, 674 (Cal. 2018) ("While not addressing this issue specifically, UCLA has offered no reason to doubt colleges' ability to obtain coverage for the negligence liability under consideration.").

[112] Nally v. Grace Cmty. Church of the Valley, 763 P.2d 948, 960 (Cal. 1988) (noting that although "a new type of 'clergyman malpractice' insurance has been offered to religious organizations to protect against potential liability for spiritual counseling that causes injury," "[t]he value of such insurance, however, is unknown and difficult to determine because few cases have been filed against the clergy"); Lee v. Corregedore, 925 P.2d 324, 338 (Haw. 1996) (refusing to impose a tort duty on counselors to prevent the suicides of noncustodial clients, noting "we are not familiar with the value and availability of insurance for counselors' liability arising out of a duty to prevent the suicides of noncustodial clients, because few such cases have been filed against counselors").

[113] See, e.g., Koepke v. Loo, 23 Cal. Rptr. 2d 34, 39 (Ct. App. 1993) (considering, in deciding whether to recognize a duty to alert another of a threat of attack, that "[i]nsurance coverage for this sort of risk is certainly unusual; this is not the sort of risk ordinarily contemplated by either the insured or the insurer"); Smith v. Freund, 121 Cal. Rptr. 3d 427, 434 (Ct. App. 2011) ("Plaintiffs do not assert that parental liability insurance is prevalent."). I have it on good authority (namely Abraham!) that most homeowners policies would cover these situations, subject to the fairly new "sexual molestation" exclusion that is in some but not all policies.

To be sure, the non-availability of insurance is not a trump; thus, courts have imposed duties upon entities for uninsured risks, especially when other factors—such as prevention of harm!—weigh in favor. See, e.g., Hoff v. Vacaville Unified Sch. Dist., 68 Cal. Rptr. 2d 920, 926 (Ct. App. 1997) (imposing liability on a school for failing to supervise one of its students who injured a nonstudent off campus) ("The general unavailability of commercial insurance is the only reason to use the status of the victim as the gatekeeper for imposing liability [against a school] for negligent supervision where, as here, the on-campus behavior requiring supervision could just as easily harm a student as a nonstudent. This is not enough, in our opinion, to deny protection."). The California Supreme Court did, however, reverse this decision. It held that "school personnel who neither know nor reasonably should know that a particular student has a tendency to drive recklessly owe no duty to off-campus nonstudents." Hoff v. Vacaville Unified Sch. Dist., 968 P.2d 522, 529 (Cal. 1998).

[114] Its absence is especially concerning when Abraham and White boldly suggest the future of tort lies in liability for "Intentional and Negligent Sexualized Misconduct." Abraham & White, supra note 2, at 184–85. What about the ubiquitous intentional act exclusion included in insurance policies, and the longstanding relegation of domestic violence torts to the

COPYRIGHT © 2023 VIRGINIA LAW REVIEW ASSOCIATION

prodding: the next project should take up the centrality of insurance for the doctrinal evolution of tort law.[115]

CONCLUSION

As our world will change in ways and along dimensions that we may not even be able to predict, tort law and doctrine will have to expand and adapt right along with it, if it is to be of any utility going forward. With *Tort Law and the Construction of Change*, Abraham and White have presented a compelling explanation for tort law's evolution to date, one that shows how tort law has responded to external societal influences while staying faithful to existing doctrinal frameworks of the past. They have done so in a thought-provoking way that invites us to re-examine canonical cases, the relationship of U.S. Supreme Court jurisprudence to the common law of torts, and the roles of deterrence and insurance in shaping new tort duties, through the lens of that explanation. Their book is a necessary resource to an understanding of tort law as it exists now, and will likewise be an instrumental guide to the tort law of the future.

periphery of tort law as a result? See, e.g., Martha Chamallas & Jennifer B. Wriggins, The Measure of Injury: Race, Gender, and Tort Law 71–74 (2010).

[115] Full disclosure—Abraham has brought me on board to do just that. Stay tuned for Kenneth S. Abraham & Catherine M. Sharkey, The Glaring Gap in Tort Theory (forthcoming 2023).