

# CARDOZO LAW

BENJAMIN N. CARDOZO SCHOOL OF LAW • YESHIVA UNIVERSITY

**To: Torts Section F**  
**From: Professor Redwood**  
**Re: First class meetings and readings**  
**Date: August 11, 2025**

Our first Torts class meeting will be on **Thursday, August 21<sup>st</sup>** in **Room 423**.

For the first assignment, read the Syllabus to be sent to you by email.

**Torts**  
Fall 2025  
Cardozo School of Law

Prof. Britta Redwood  
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Office: Room 943

Office Hours: Tuesdays 3:30 – 5:30 & Thursdays 3:30-5:00

Make an appointment via Calendly: <https://calendly.com/b-redwood/>

**Course Description and Objectives:**

Tort law is concerned with the obligations of individuals and enterprises for injuries and losses that they cause to others when no breach of contract or promise is involved. Tort law is *private* law (as opposed to *public* law), meaning that the government is not a party—as in, for example, criminal law or administrative regulation. Because tort law helps to identify the kind of conduct that will result in liability, it can exert an influence on the behavior of those who may be liable. It also concerns itself with the compensation of parties who suffer injury or loss that is wrongfully caused. Tort law is influenced by and reflective of the social and cultural contexts in which it operates. Indeed, social and cultural ideas about duty, responsibility, and the relative nature of harms influence the decisions of lawyers, judges, and juries.

By the end of this course, you should understand (1) the role of duty, breach, causation, and damages in tort liability; (2) how tort law governs various kinds of wrongful conduct, such as negligence, intentional torts, products liability, and nuisance; (3) how tort law may entrench or ignore existing social inequalities; (4) how the common law develops over time and responds to economic and social change; and (5) how tort lawyers deal with factual uncertainty while strategizing to help their clients. You should also understand the theories and policy rationales that provide the foundations for the various rules you will learn this semester, and you should be able to engage with them critically, and to question what values they serve and why. Finally, like all law school classes, this is also a course about lawyering. You should emerge from it better equipped to read and analyze judicial opinions, distinguish precedents, and make effective legal arguments with an eye toward reaching a specific outcome for your client.

**Methodology:**

You are responsible for your legal education. You must come to class ready to contribute and to engage deeply with the materials and one another through close reading, mutual learning, and care. This means having read and truly endeavored to understand the assigned cases and notes, including looking up any words or concepts with which you are unfamiliar.

During each class, I will call on a handful of students at random. I do this for two reasons—to ensure that everyone has a meaningful opportunity to contribute to class discussion and to encourage accountability for the material. You may always volunteer to participate. If I call on you and you are not prepared, you may pass, but you will be on call in the future. Subsequent failure to be prepared or willing to engage will negatively affect the participation component of your final grade. Robust and genuine participation is also expected in your sessions with your teaching assistants.

Some of your learning will happen through the completion of written exercises and a simulation. These exercises are meant to invite you to take responsibility for your learning and to practice synthesizing concepts and engaging in lawyerly strategic thinking right from the start. You may feel uncertain as to how to approach these exercises, especially at the beginning of the semester. I encourage you to push past these feelings of uncertainty and make your best effort. Active learning entails some friction, but the payoff is in your own comprehension and confidence.

### **Support:**

1) Mentoring and connecting with students is one of the most rewarding aspects of my professional life. You should feel welcome to come to office hours to discuss the course, or indeed any aspect of transitioning to the legal profession. I hold office hours on Tuesday and Thursday afternoons. “Office hours” means I will be at my desk and available for you to drop in and ask me questions. I ask that you sign up via Calendly so that I have a sense of who is coming and what you would like to discuss, but you are welcome to stay beyond your appointment time. If you require privacy, you can indicate that in Calendly as well. You should not feel like you are intruding. Office hours time is *your* time.

2) If you cannot make it to office hours, then you should also feel free to make an appointment with me for another mutually convenient time. Please be in contact via e-mail to do so.

3) Each of you will be assigned to a TA group; your assigned TA will be available to answer questions and will administer quizzes and host related review sessions throughout the semester. Your TAs will also lead you through a simulation exercise, which you will work through with a group of other students. More information about this will be shared in the first two weeks of class.

4) You can post questions on the Canvas Discussion Board. I will monitor that Board and post answers regularly. You are also welcome to piggyback on other students’ questions or even help with answering them. I will correct any errors and make clarifications as necessary.

5) Over the course of the semester, you will be required to complete three quizzes. They are designed to check your comprehension of the material in a way that approximates aspects of the final exam. You are encouraged to prepare for the quizzes as you would an exam. You will evaluate your own performance against a rubric. Although the quizzes are themselves

ungraded, your participation in the process of taking and evaluating your performance on each quiz has the potential to impact your participation grade.

### **Attendance:**

The ABA mandates regular attendance in all law school classes, and Cardozo's attendance policy requires students to attend at least 80% of classes. The rules of the New York Court of Appeals and Cardozo policy stipulate that only in-person attendance counts. To effectuate both of these policies, I will take attendance each day with a sign-in sheet.

Failure to attend the requisite 80% of our classes *in person* will result in your not being permitted to take the final exam and, accordingly, not receiving credit for the course.

Life events and professional obligations may require you to miss class from time to time. I do not distinguish between excused and unexcused absences. If you need to miss class, please let me know in advance if you are able. You do not need to provide a reason for your absence. However, missing more than six classes may negatively impact your participation grade. If, however, there are serious matters requiring your absence from law school for more than a few days, contact the Office of Student Services, which will notify all of your professors.

Each class will be recorded via Zoom and the recording will be uploaded automatically to our Canvas page. If you do miss class, I urge you to stay current with what you missed by doing the reading and watching the recording. In those cases, I have no objection to you observing the class live by Zoom if you are able. It is a great way to keep up with your learning, but just remember that doing so will not count as attendance.

### **Grades:**

Your grade will be based primarily on your performance on the final exam. Like other first-year exams, this exam will be closed-book. It will be based on essay questions and likely some objective multiple-choice questions like those on the Bar Exam.

A portion of your grade will be impacted by your demonstrated willingness to engage in the learning process. This means that your in-class participation and your contributions during sessions with your TAs, especially on the simulation exercise, will have an impact on your grade. Preparedness, thoughtful class contributions, and robust participation in the simulation exercise may raise your grade by one step (*e.g.*, from B+ to A-).

You will also complete some short assignments throughout the semester to check comprehension of the concepts we cover. The quizzes listed on the syllabus are an example of such an assignment. Your performance on these assignments will be ungraded, but failure to complete them or seriously engage with them will adversely affect your grade. Similarly, as discussed above, absences below the level that disqualify you from taking the exam but that are nonetheless substantial may adversely affect my assessment of your classroom participation.

## **Classroom Etiquette:**

Students in this class must engage deeply with the materials, and one another, through close reading, mutual learning, and care. Close reading often requires slow reading. It also entails being attentive (reading thoroughly) and reflective (synthesizing information as you read, and seeking out clarification when necessary).

Engaging in conversation openly and respectfully, while taking into account your prior close reading, are the bases of mutual learning. Reciprocity involves being open to mutual learning from me and your peers, and being respectful, compassionate, kind, and generous. Keep in mind the ways in which your own experiences and allegiances impact the way in which you receive the material, and the fact that your peers' viewpoints are likewise impacted by their experiences and allegiances.

Hand-writing notes has been shown to have a [positive impact on memory and learning](#), as compared to using a laptop. However, everyone learns and processes information differently, and you are welcome to use a laptop to take notes in class. Do what works best for you. Regardless of how you take notes, however, resist the urge to transcribe the class. Effective note-taking requires close listening, understanding, and synthesizing. This often putting things in your own words.

However, laptops (and cell phones, for that matter) can be distracting. You are expressly prohibited from recording our class sessions, surfing the internet, checking email, sending instant messages, using any chat capabilities, playing games, checking scores, and anything else that is not taking notes. These activities are enormously distracting to you and everyone around you.

## **Materials:**

*Required casebook:* VETRI ET ALL, TORT LAW AND PRACTICE (7th ed. 2025).

*Additional Text:* BARRY WERTH, DAMAGES (2008).

## Course Plan, Schedule, and Assignments:

Below are the topics I intend to cover this semester. I have endeavored to provide a thorough overview of the entire semester, but **this syllabus the readings will change as we move through the material. All changes will be reflected in the “dynamic syllabus” posted as a Google Document.** I will flag significant changes or updates as I make them.

Unless otherwise indicated (*i.e.*, by reference to materials posted on Canvas or hyperlinked), all assignments are listed by their page numbers in the Vetri text book.

Date & Class Number	Assigned Readings
Class 1: August 21 (Thu.)	Syllabus Overview and Class Expectations Purposes and Theories of Tort Law (on Canvas)
Class 2: August 22 (Fri.)	<b>I. INTRODUCTION</b> A. <u>Overview of the Tort System</u> (pp. 3-38) B. <u>Overview of the Tort Litigation Process</u> (pp. 39-55)
Class 3: August 26 (Tue.)	<b>II. NEGLIGENCE: BREACH OF DUTY</b> A. <u>Overview of Negligence and its Elements</u> (pp. 58-74) <i>Rudolph v. Arizona B.A.S.S. Federation</i>  B. <u>Reasonable Care &amp; the Reasonable Person</u> (pp. 75-83) <i>Vaughn v. Menlove</i> <i>Reed v. Tacoma</i> <i>Holmes, The Common Law</i> <i>Edwards v. Johnson</i>
Class 4: August 28 (Thu.)	<u>Reasonable Person</u> (cont'd, pp. 83-98) <i>Foster v. Strutz</i> <i>Bashi v. Wodarz</i> <i>Robinson v. Lindsay</i>
Class 5: August 29 (Fri.)	<b>Superior Skill Problem</b> , pg. 98-99
Class 6: September 02 (Tue.)	C. <u>Developing the Reasonable Care Standard</u> 1. Balancing Risk vs. Untaken Precautions (pp. 99-113) <i>United States v. Carroll Towing</i> <i>Grady, Untaken Precautions</i> <i>McCarty v. Pheasant Run, Inc.</i> <a href="#"><u>Researchers Examine Race Factor in Car Crashes Involving Pedestrians</u></a> <b>Missing Rearview Mirror Problem</b> <b>The Dangerous Bus Stop Problem</b>

<b>Class 7:</b> September 04 (Thu.)	2. Role of Custom (pp. 113-124) <i>Hagerman Construction v. Copeland</i> <i>Trimarco v. Klein</i> <i>The T.J. Hooper</i> <b><i>The Careless Driver Problem</i></b>
<b>Class 8:</b> September 05 (Fri.)	<b>CLASS CANCELLED</b>
<b>Class 9:</b> September 09 (Tue.)	D. <u>Alternatives to the Reasonable Care Standard</u> 1. Judicial Standards (pp. 124-29) <i>Baltimore v. Ohio R.R. Co. v. Goodman</i> <i>Pokora v. Wabash Railway Co.</i>  2. Safety Statutes and Regulations as Standards (pp. 129-51) <i>Ferrell v. Baxter</i> <i>Wright v. Brown</i> <i>Bauman v. Crawford</i>
<b>Class 10:</b> September 11 (Thu.)	Safety Statutes and Regulations as Standards, <i>continued</i> <b><i>The Headlights Problem</i></b> <b><i>Childproof Cap Problem</i></b> <b><i>Keys in Ignition Problem</i></b>
<b>Class 11:</b> September 12 (Fri.)	E. <u>Proof of Negligence</u> (pp. 151-55) 1. Circumstantial Proof <i>Clark v. Kmart</i>
<b>Class 12:</b> September 16 (Tue.)	2. Res Ipsa Loquitur (155 – 171) <i>Byrne v. Boadle</i> <i>Eaton v. Eaton</i> <i>Ybarra v. Spangard</i> <b><i>The Falling Steer Problem</i></b> <b><i>The Rolling Car Problem</i></b>
<b>Class 13:</b> September 18 (Thu.)	<u>The Standard of Care in Medical Malpractice</u> (pp. 171-93) 1. Negligent Medical Performance <i>Smith v. Finch</i>  2. Informed Consent <i>Phillips v. Hull</i> <b><i>Medical Malpractice Problem</i></b>  3. Legal Malpractice and the Liability of Other Professionals <i>Smith v. Lewis</i>
<b>Class 14:</b> September 19 (Fri.)	<b><i>Electroshock Therapy Problem, pg. 196</i></b>
<b>Quiz 1</b>	

<b>Class 15:</b> September 25 (Thu.)	<b>III. DUTY</b> A. <u>General Duty of Reasonable Care</u> (pp. 200-215) <i>MacPherson v. Buick Motor Co.</i> <i>A.W. v. Lancaster County Sch. Dist.</i> <b><i>Texting While Driving Problem</i></b>
<b>Class 16:</b> September 26 (Fri.)	B. <u>Limited Duty Rules</u> (pp. 216 – 238) 1. Owners & Occupiers of Land <span style="float: right;"><i>American</i></span> <i>Industries Life Ins. v. Ruvalcaba</i> <i>Rowland v. Christian</i> <b><i>Ice Caves Mountain Problem</i></b>
<b>Class 17:</b> September 30 (Tue.)	<u>2. Limited Duties to Act Affirmatively</u> (cont'd)  a. To Assist or Rescue (pp. 239 - 253) <i>Yania v. Bigan</i> <i>Farwell v. Keaton</i>  b. To Protect from Third Persons (pp. 253 - 268) <i>Tarasoff v. Regents of the Univ. of CA</i> <i>Estates of Morgan v. Fairchild Family Counseling</i>

*Yom Kippur, Sukkot*

<b>Class 18:</b> October 09 (Thu.)	<u>Limited Duties to Act Affirmatively</u> (cont'd) c. To Protect Against Criminal Conduct (pp. 269 - 279) <i>Delta Tau Delta v. Johnson</i> Alec MacGillis, <a href="#"><i>The True Cost of Dollar Stores</i></a> <i>Note on Duty of Gun Manufacturers</i>  The Daily (podcast), <a href="#"><i>Can Gunmakers Be Held Liable for Mass Shootings?</i></a> <i>Note on Duty of Alcohol Providers</i> <i>Note on Negligent Entrustment</i>
<b>Class 19:</b> October 10 (Fri.)	<u>Limited Duties to Act Affirmatively</u> (cont'd) d. Public Duty Doctrine (pp. 280 – 288) <i>Cuffy v. City of New York</i>
<b>Class 20:</b> October 13 (Mon.)	C. Limited Duties Regarding Types of Harm 1. Emotional Distress Injuries (pp. 292 - 318) <i>Mitchell v. Rochester Ry. Co.</i> <i>Clohessy v. Bachelor</i> <i>Burgess v. Superior Court</i> <i>Huggins v. Longs Drugs Stores</i>
<b>Quiz 2</b>	
<b>Class 21:</b> October 16 (Thurs.)	<b>IV. CAUSATION</b> <u>The Conceptual Basis of Causation</u> A. <u>But-for Causation</u> (pp. 368 - 370, notes 1-2, 4-7) <i>Sowles v. Moore</i> <i>New York C.R.R. v. Grimstad</i>  B. <u>Substantial Factor Test</u> (pp. 371 - 378) <i>Corey v. Havener</i>

	<p><i>Doull v. Foster</i></p> <p>C. <u>Proof of Causation</u> (pp. 378 - 386)  <i>Ingersoll v. Liberty Bank of Buffalo</i>  <i>Note on Proving Causation</i></p>
<b>Class 22:</b> October 17 (Fri.)	<p><u>Special Rules of Causation-in-Fact</u></p> <p>A. <u>Loss of a Chance Recovery</u> (pp. 404 - 414)  <i>Matsuyama v. Birnbaum</i></p>
<b>Class 23:</b> October 21 (Tue.)	<p>Special Rules of Causation-in-Fact (cont'd)</p> <p>B. Proving Who Caused the Harm: Burden-Shifting Rules (pp. 415 - 425)</p> <p>1. Alternative Liability  <i>Summers v. Tice</i></p> <p>2. Market Share Liability  <i>Hymowitz v. Eli Lilly &amp; Co.</i></p> <p>Rules Related to Causation-in-Fact (pp. 433 - 440)</p> <p>A. Multiple Causes and Apportionment  <i>Fugere v. Pierce</i> (joint and several liability)</p>
<b>Class 24:</b> October 23 (Thu.)	<p>V. <b>SCOPE OF LIABILITY (PROXIMATE CAUSE)</b></p> <p>A. <u>Direct Consequences v. Foresight Test</u> (pp. 453 - 457)</p> <p>B. <u>Unforeseeable Plaintiffs and Consequences</u> (pp. 458 - 475)  <i>Palsgraf v. Long Island R.R.</i>  <i>Juisti v. Hyatt Hotel</i>  <b>Peripatetic Rat Problem</b></p>
<b>Class 25:</b> October 24 (Fri.)	<p>C. <u>Intervening Forces</u> (pp. 476 - 482)</p> <p>1. Criminal Conduct of Third Party  <i>McClenahan v. Cooley</i>  <i>Price v. Blaine Kern Artista</i></p>
<b>Class 26:</b> October 28 (Tue.)	<p><u>Exceptions to Foresight Rule</u> (pp. 494 - 507)</p> <p>A. Medical Malpractice Complications Rule  <i>Ass'n for Retarded Citizens v. Fletcher</i></p> <p>B. Eggshell Plaintiffs  <i>Pace v. Ohio Dept of Transp.</i></p> <p>C. The Rescuer Rule  <i>Sears v. Morrison</i>  <b>Cat in the Hat Disaster</b></p>
<b>Quiz 3</b>	
<b>Class 27:</b> October 30 (Thu.)	<p><b>VI. Damages</b></p> <p>Personal Injury, Pain and Suffering, and Emotional Distress (pp. 519 - 538)  <i>Calva-Cerqueira v. United States</i></p>

	A. Wrongful Death (pp. 569 - 578) <i>Krouse v. Graham</i>
<b>Class 28:</b> October 31 (Fri.)	<b>Damages Problem</b>
<b>Class 29:</b> November 04 (Tue.)	B. Racial, Gender, Cohabitation, and Class Fairness (pp. 538 - 559) <i>Tarpeh-Doe v. United States</i> <i>9/11 Victim Compensation Fund Fairness in Awards</i> <i>McMillan v. City of New York</i> <i>Reilly v. United States</i>
<b>Class 30:</b> November 06 (Thu.)	<ul style="list-style-type: none"> <li>• Freakonomics, <a href="#">Who Decides How Much a Life Is Worth?</a> (ep. 344)</li> <li>• Nora Freeman Engstrom &amp; Robert L. Rabin, <a href="#">California Bars the Calculation of Torts Damages Based on Race, Gender, and Ethnicity</a></li> <li>• <i>Note on Cohabitation and the Law</i> (pp. 564 - 566)</li> </ul>
<b>Class 31:</b> November 07 (Fri.)	<b>In-Class Exercise</b>
<b>Class 32:</b> November 11 (Tue.)	<b>VII. Defenses and Immunities</b> A. Contributory Negligence and Comparative Fault (pp. 579 - 596) B. Assumption of Risk (pp. 597 - 618) <ol style="list-style-type: none"> <li>1. Express <i>Bowen v. Cochran</i></li> <li>2. Implied <i>Murray v. Ramada Inns</i></li> <li>3. Primary Assumption of Risk – Limited Duty <i>Cheong v. Antablin</i></li> </ol> <b>The Flopper Problem</b>
<b>Class 33:</b> November 13 (Thu.)	C. Immunities Governmental Immunity (pp. 647 - 648)  Congressional Research Service, <a href="#">The Federal Torts Claim Act (FTCA): A Legal Overview</a> , pp. 1 - 8 and 18 - 26  Nathaniel Sobel, <a href="#">What is qualified immunity, and what does it have to do with police reform?</a>
<b>Class 34:</b> November 14 (Fri.)	<i>Strategic Litigation and Tort Law: Public Nuisance</i> <ul style="list-style-type: none"> <li>• <i>Randle v. City of Tulsa</i> (on Canvas)</li> <li>• International Court of Justice, Advisory Opinion on Climate Change (excerpts on Canvas)</li> </ul>
<b>Class 35:</b> November 18 (Tue.)	<b>VIII. Abnormally Dangerous Activities</b> Strict Liability (pp. 809 - 824) <i>Klein v. Pyrodine</i>

	<p>IX. Products Liability</p> <p>A. Development of Strict Products Liability (pp. 827 – 842)  <i>Escola v. Coca Cola Bottling Co.</i>  <i>Greenman v. Yuba</i>  Restatement (2d) on Products Liability 402A  Restatement (3d) on Products Liability</p>
<p><b>Class 36:</b> November 20 (Thu.)</p>	<p>C. Design Defects</p> <p>1. Ordinary Consumer Expectations Test (pp. 851 – 860)  <i>Leichtamer v. American Motors</i>  <i>Campbell v. General Motors</i></p> <p>2. Risk Utility Test (861 - 874)  <i>Valk Manufacturing v. Rangaswamy</i>  <i>Vautour v. Body Masters Sports Industries</i></p> <p>D. Warning &amp; Product Information Defects (pp. 887 – 899)  <i>Norwak v. Faberge</i>  <i>Ramirez v. Plough</i></p>
<p><b>Class 37:</b> November 21 (Fri.)</p>	<p>D. Defenses (pp. 920 – 925)  <i>Whitehead v. Toyota Motor Corp.</i>  <b><i>Household Cleaner Injury Problem, pg. 927</i></b></p>
<p><b>Class 38:</b> November 25 (Tue.)</p>	<p>X. Intentional Torts</p> <p>A. Assault, Battery, IIED, Meaning of Intent (pp. 657 – 684)  <i>White v. Muniz</i>  <i>Doe v. Johnson</i>  <i>Hall v. McBryde</i>  <i>Vetter v. Morgan</i>  <b><i>Short Problems on Battery &amp; Assault</i></b></p> <p>B. IIED in Discrimination Cases (pp. 689 – 712)</p>
<p><b>Class 39:</b> December 02 (Tue.)</p>	<p>C. Defenses (pp. 734 – 755)</p> <p>1. Consent</p> <p>2. Self-Defense and Defense of Others</p>

### *Purposes and Theories of Tort Law*

**Purposes.** In one sense, merely describing the purposes of tort law is challenging; the field is politicized and animated by sharp philosophical disputes over how to define its scope and purposes. However, the following are noncontroversial starting points: Tort law exists to “(a) to give compensation, indemnity or restitution for harms; (b) to determine rights; (c) to punish wrongdoers and deter wrongful conduct; and (d) to vindicate parties and deter retaliation or violent and unlawful self-help.” Restatement (Second) of Torts § 901 (1979)

Tort theorists have argued over whether the purposes of tort are better understood in terms of (1) the **positive legal rights of the victim** (and *compensation* they may be owed as well); (2) **the rights and duties of members of society** to one another (and thus *fairness* to all individuals); (3) **limits on the rights of those who engage in risky conduct or carelessly cause accidents** (and the *deterrence* tort law imposes on them); and (4) the potential benefits to victim, tortfeasor and members of society if the costs of prevention and remuneration are maintained at optimal levels (which reflects a commitment to efficiency). Indeed, some casebooks and approaches to tort law focus very heavily on the economics of tort law, consistent with the views tort law’s core purposes are *efficiency* and compensation. Others may take a more philosophical approach, grounding rights and duties in different theories of justice, highlighting tort law’s purposes of fairness and deterrence.

These terms and theories could be defined at great length and still seem overly simplified to some and mysterious to others. This text does not purport to be a substitute for an in-depth treatment of jurisprudence (which is the study of theories or philosophies of law). But it will use these terms—**efficiency, compensation, fairness and deterrence**—repeatedly throughout the text, and to ensure that readers understand them, it is helpful to define them in terms of theories of justice with a grounding in tort law.

**Theories.** Tort law is also commonly framed in terms of several theories of justice: **procedural justice** (with an emphasis on fairness, notice and transparency); **distributive justice** (balancing compensation, loss-spreading and efficiency concerns); **retributive justice** (in seeking to punish and deter wrongdoing); and **corrective justice** (in providing compensation to the victims of tortious wrongdoing). There isn’t a perfect overlap between the four sets of terms since, for example, distributive justice balances both compensation and efficiency, but it is still helpful to understand the philosophical underpinnings that attach to the 20th-century development of tort law.

**Procedural justice** focuses on the transparency and fairness of processes by which rights are created and enforced. As such, it is primarily concerned with fairness. Designing a fair and balanced process is not a guarantee of fair outcomes because parties are not equally situated before the law; decisionmakers are not perfectly impartial or incapable of error; and many laws are outdated and lag behind contemporary views of fairness. Nonetheless, our legal system stakes significant importance on making an attempt at procedural fairness.

For example, the idea of “notice” plays an important role in many tort doctrines, which is a nod to procedural justice and reflects the idea that it seems fairer to hold someone responsible when they were “on notice,” if they *knew* or *should have known* that some harm was likely to happen and still took whatever action they took.

**Distributive justice** concerns allocating resources and liabilities fairly based on some pre-set understanding of the right to a “fair share” of both the benefits and burdens. The values driving that distribution may change over time, by jurisdiction, or in connection with political administrations. In our era, the driving concerns behind distributive justice have primarily been economic: who *can* bear the costs of liability and who *should* bear the costs of preventing accidents given the ability of various actors to insure against injury or to internalize the expenses associated with both injury and prevention. Indeed, contemporary tort law has been strongly influenced by late 19th-century philosophers who advanced utilitarian theories of law, as well as 20th-century scholars and judges working in the law-and-economics tradition. Such theorists often seek the “cheapest cost avoider”—the entity best positioned to absorb the costs of preventing harm and compensating for it when preventions fail—so as to maximize efficiency regardless of moral culpability.

*For example, the doctrine of strict liability (liability without fault) has evolved in ways that allow parties to engage in behavior that they know in advance will be risky, such as blasting with dynamite prior to construction. However, merely engaging in the action will cause them to be liable for harms they cause through their actions, which allows them to internalize the costs of precautions and to make their behavior as safe and efficient as possible. Or at least, that’s one theory of how it works.*

**Retributive justice** is more commonly associated with criminal law, which seeks to punish wrongdoers. Tort liability is not typically defined so as to impose suffering or punishment on the wrongdoer. A tortfeasor may be liable in tort even when morally not blameworthy but merely careless. Likewise, an actor may be liable even when behaving carefully but nonetheless causing harm by taking an action to which the law applies strict liability. In rare or egregious cases, however, courts may award punitive damages that do reflect theories of retributive justice, namely, that the wrong was so significant the wrongdoer deserves to suffer.

**Corrective justice** frames tort law as a form of moral or ethical obligation, structured in terms of first- and second-order duties. First-order duties specify particular behaviors (such as driving reasonably or refraining from trespass). Second-order duties arise if an actor breaches their first-order duties. Accordingly, second-order duties are duties to repair or make the injured party “whole,” thus *correcting* the tortfeasor’s wrongs and compensating for the losses their breach of first-order duties caused. Corrective justice is oriented around the duties owed by the defendant to those they injure because its central logic is the “making whole” of the plaintiff. For example, most plaintiffs sue to recover compensatory damages so that they will be “repaid” for the costs they incurred in connection with the defendant’s wrongdoing.

One problem with this theory arises when injuries are irreparable; under such circumstances, tort law may still allow a victim to recover, thus broadening the right of recovery to the suffering caused by the injury even when the harm is irreparable, that is, something that cannot be “corrected.” It is also worth noting that the very idea of “wholeness,” when applied to the body, hints at an ableist understanding of selfhood. Wholeness, of course, is not simply a literal reference to body parts; it applies to compensation for pain and suffering and medical bills and many other ways in which catastrophic injury can derail and burden one’s regular way of life. Hence it is a good idea to keep the literal and figurative uses of “wholeness” conceptually distinct.

A related theory of tort law is that of **civil recourse theory**: when a person suffers a particular kind of harm, they have a right to bring a civil action against the one who harmed them and seek recovery. Yet unlike corrective justice, the duty to repair does not justify civil recourse theory. Rather, the individual whose right has been invaded merely has a right of recourse, that is a right to have their legal claim evaluated. The distinction may seem purely academic, but it can have important implications for how we conceive of the nature and scope of the plaintiff’s possible rights and remedies. Proponents of both of these

approaches commonly treat tort law as containing moral obligations (that is, they case it in **deontological terms**). Tort law expresses these moral values through rules and outcomes, and efficiency concerns may be subordinated accordingly rather than prioritized the way they are in the economic account of torts.

Scholars in the field have produced elegant refinements of each of the theories briefly sketched above; whole books could be and have been dedicated to each, in fact. There are also deep disagreements about the justifications of tort law that are much elaborated elsewhere. The debate between the two dominant views of (1) “corrective justice or civil recourse” and (2) “the efficiency or utility-maximizing account” is so longstanding, in fact, it “shown signs of being tired [...] midway through its sixth decade at the very least[,]” and has prompted “increasingly prominent effort of scholars across generations to move beyond it, either by declaring a truce or by asserting a third model for the field altogether.” Nathaniel Donahue & John Fabian Witt, *Tort As Private Administration*, 105 Cornell L. Rev. 1093, 1094–95 (2020).

A recent synthesis of tort theories has argued that “morality and efficiency are not mutually exclusive theories of tort”; instead, “tort law operates as a vehicle through which communities perpetually reexamine and communicate their values, encouraging individuals to coordinate private relationships without undue state involvement. In short, the goal of tort law is to construct community.” Cristina Carmody Tilley, *Tort Law Inside Out*, 126 Yale L.J. 1320, 1324 (2017). The approach in this book most resembles this last view, of tort law as a means of constructing communities, a force that is legal and social and psychological, and one which can be studied through law but also through economics, sociology, anthropology, and various theories of identity.

To learn the basic contours and doctrines of tort law you need not reconcile deeper conflicting theories, of course, but it is helpful to gain at least an introduction to the theories that are underpinning the way tort law was created, has developed and continues to evolve. When the materials refer to these first four purposes of tort law—**efficiency, compensation, fairness** and **deterrence**—you will now have at least a preliminary sense of their origins and interconnections.