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CONVERGENCE AND CONTRAST IN TORT SCHOLARSHIP: AN ESSAY IN HONOR OF ROBERT RABIN

John C.P. Goldberg* & Benjamin C. Zipursky**

INTRODUCTION

We are pleased to join in honoring Bob Rabin, our friend and fellow torts scholar. Bob has played a singularly important role in the field. Speaking very broadly, the most influential members of the generation of tort scholars that began writing in the 1960s and 1970s have pursued three genres of scholarship. Some have offered systematic visions of the field that attempt to organize its many facets within an overarching framework.¹ Others have issued broad-brush indictments of tort as an inadequate means to the ends it might serve.² Still others have intensively focused on particular areas or problems; for example, the history of tort law,³ products liability,⁴ mass torts,⁵ or insurance.⁶

Among our most prominent Torts professors, Bob Rabin stands out not only for his knowledgeability, perceptiveness, and integrity, but also for the kind of scholar that he is. He is not a specialist, a global

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². See, e.g., STEPHEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW 127–200 (1989) (advocating for insurance and regulatory alternatives to the tort system).
³. See, e.g., MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 (1977) (arguing that nineteenth-century American tort law was crafted by judges eager to limit the liability of industry).
⁵. See, e.g., PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS (1986) (chronicling the Agent Orange litigation as illustrative of the promise and pitfalls of mass tort litigation).
skeptic, or a grand theorist. So it is that this modest member of the Stanford Law faculty has had such an enormous impact. Simply by doing what he does, Bob, perhaps more than anyone in the upper echelons of the legal academy, has kept torts alive as an area of law and policy. That he has been able to play this role—at once moderate and enriching, grounded and sophisticated, forward looking and historically informed—is the secret behind the great success of his co-authored casebook (now in its ninth edition),\(^7\) as well as his writings on tobacco litigation,\(^8\) enterprise liability,\(^9\) enabling torts,\(^10\) and the September 11th Victim Compensation Fund (the 9/11 Fund).\(^11\) Members of his generation, and of succeeding generations, have found in his work a model for serious, well-informed, thoughtful scholarship about real-world tort law. Indeed, it is in part because of his example—we were taught torts from Franklin and Rabin—that we saw scholarly value in assembling a casebook. As beneficiaries of Bob's wisdom, we are grateful to acknowledge our many intellectual debts to him.

Although the opportunity to engage Bob's corpus is most welcome, it also poses a problem for us—three problems, actually. As noted, his writings are consistently topical, careful, and reasonable. They primarily aim to identify trends in how American law responds to accidents, as well as broader trends in how Americans think about compensation and responsibility for injuries. Moreover, when it comes to assessing particular judicial decisions, we usually find ourselves agreeing with him as to their proper outcomes and often agreeing on the reasons for those outcomes. And so for us, on this particular occasion, it might seem that the only thing left for us to do is to register our agreement.

The second problem is the opposite of the first. A political scientist by training, Bob approaches tort law through the lens of Legal Realism and in particular the Law and Society movement. Although he pays close attention to case law, he attributes, at best, modest signifi-

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cance to the "formal" language of the law. In his view, judicial decisions in tort cases have more in common with the policy decisions of an administrative agency than the moral judgments that guide everyday interpersonal interaction. Finally, he is wont to emphasize the "messiness" of tort law and believes that there is little reason to hope that the concept of a tort, or our system of tort law, can be captured in a single, unified account.

In contrast, we come to tort law with training in analytic philosophy, and we were introduced to law at a time when there was anxiety in the academy about the risks of pushing Legal Realism too far. Accordingly, our writings give greater attention to the legal concepts that Realists dismiss as mere labels. We also see tort law as bearing a close connection to everyday morality and hence tend to interpret judicial decisions in tort cases as reflecting ordinary moral judgments. Finally, as students of Ronald Dworkin, we hold out greater hope for the possibility of a theoretical synthesis that connects law to morality through judicial decisions. This orientation is useful to lawyers and judges, and it has led us to develop an interpretive, practically oriented—but also theoretical—account of tort as a law of civil recourse.

Though abstract, the differences we have just described have sometimes seemed to amount to an intellectual chasm. Indeed, just at those moments when we think it is blindingly obvious that courts mean what they say—about duty in negligence, for example—Bob is equally certain that we are packing too much substance into a mere word, that we are inappropriately importing into tort law moral niceties, and that we are missing the policy considerations that really do the work in judicial decision making. On occasions such as these, it seems that Bob and we are doomed to talk past each other.

The third problem—and the one posed most immediately for us—is created by the conjunction of the first two: What shall our theme be in commenting upon the work of Bob Rabin when we cannot even decide whether our predominant theme is convergence or contrast? If there were deep agreement between Bob and us, we could identify and explore a rare area of disagreement. If we disagreed on almost everything, we could identify and explore a rare point of overlap. But given that we find ourselves fundamentally in agreement and disagreement, a kind of paralysis sets in. In addition to the practical problem of knowing what to do, there is the puzzle of explaining how convergence and contrast could simultaneously characterize the relationship between our approaches.

Our solution is procedural. We aim in what follows first to adopt an approach typical of Bob's scholarship (selecting and elaborating on
important and characteristic themes within tort law) before switching to an approach typical of our own work (undertaking a detailed commentary on a particular judicial decision). Thus, Part II identifies three broad themes that figure centrally in Rabin's writings,\(^\text{12}\) while Part III reviews a case that has earned a fair bit of attention within the Rabin corpus—*Seffert v. Los Angeles Transit Lines*\(^\text{13}\)—and harnesses it to flesh out the Rabinite approach, in part by using our own approach as a foil.\(^\text{14}\) By taking some from each approach, we hope to illustrate the reasons for the frequent convergence of our views, the grounds for our sometimes contrasting inclinations, and the sources of this somewhat paradoxical combination.

**II. Rabin on Torts**

In Rabin's view, tort law attends to the fact that, when members of a polity suffer harms, the polity faces the social or political problem of how to respond. Specifically, it must determine when losses associated with an injury traceable to human activity will, by order of the courts, be "compensated"—shifted from the victim who initially bears the loss to another. In the industrial and post-industrial world, these injuries are much more commonly caused accidentally rather than intentionally. Thus, for all practical purposes, tort law—in Rabin's view—is a compensation scheme for accidentally caused injuries. As such, it operates alongside alternative schemes that range from workers' compensation systems to narrowly targeted funds such as the 9/11 Fund. Much of modern regulatory law is also, in a sense, injury law, though regulatory law is not typically concerned with compensation. Instead, it aims to prevent injuries and perhaps to hold accountable irresponsible actors who cause them. In sum, according to Rabin, tort law is one of several ways by or through which governments address the policy problem of injury-producing accidents. It does so by allowing injury victims, on some occasions, to obtain court orders shifting some or all of their injury-related costs.

From within this general orientation to the subject, Rabin has explored a dauntingly broad and diverse array of topics. Yet, despite the breadth of this corpus, certain methods and themes consistently make an appearance. A Rabin article almost always frames a particular legal development or issue against broader historical developments in injury law and sets these against still-broader sociological trends. At

\(^{12}\) See infra notes 15–63 and accompanying text.

\(^{13}\) 364 P.2d 337 (Cal. 1961).

\(^{14}\) See infra notes 64–114 and accompanying text.
the same time, Rabin is keen to capture certain fundamental conflicts within these developments. The large-scale historical and sociological trends he identifies are always instances in which one cluster of ideas is ascendant over, but does not completely defeat, a contrastive cluster of ideas. In the remainder of this Part we describe three trends that have been of particular interest to Rabin, as well as the forces he deems to be cutting against them.

A. Individualized Versus Bureaucratic Compensation

If tort law is but one compensation scheme among several, what distinguishes it from others? Although the contrast was perhaps clearer 150 years ago, the answer, according to Rabin, is found in part in tort’s commitment to individualized treatment of accidents and compensation.\(^\text{15}\) This commitment is reflected most directly in tort’s notion of “make-whole” compensation and tort law’s grant of broad discretion to fact finders in setting a victorious plaintiff’s damage award. Implicit in each is the notion that every pre- and post-tort situation is unique.\(^\text{16}\) Traditional tort law aims to take these differences into account, which is why damage awards can vary enormously even among a class of similarly situated claimants—for example, adult pedestrians run down by careless drivers.

The same individualized orientation characterizes tort law’s treatment of defendants and its treatment of the connection between the defendant and the plaintiff. A tort suit calls for a careful examination of the defendant’s conduct to determine if, for example, the defendant acted reasonably under the circumstances. It also insists on proof that this defendant's misconduct had something to do with this plaintiff having suffered an injury.\(^\text{17}\) Hence, the difficulties posed by tortfeasor-identification cases like *Summers v. Tice*\(^\text{18}\) and *Sindell v.*


\(^{18}\) 199 P.2d 1 (Cal. 1948).
Abbott Laboratories, in which it is clear that someone has tortiously injured the plaintiff, but unclear who.

Finally, in Rabin's view, the individualized focus of the common law of tort has, until recently, gone hand in hand with a stark, all-or-nothing approach to the question of compensation, an approach epitomized by the doctrines of contributory negligence and superseding cause. Older common law, he suggests, had a tendency to frame the compensation question in terms of three exclusive alternatives: (1) a particular person other than the plaintiff was responsible for the plaintiff's injury (resulting in full compensation paid by the responsible person); (2) the plaintiff was responsible for her own injury (resulting in no compensation); or (3) nobody was responsible (also resulting in no compensation). Thus, if one of two wrongdoers was deemed responsible for injuring the plaintiff, then the other was not; this was the upshot of the doctrine of superseding cause. If the plaintiff was responsible for her own injury, then the defendant was not; this was the upshot of the doctrine of contributory negligence.

Standing in contrast to the common law's individualized approach are bureaucratic compensation schemes, epitomized by the workers' compensation systems adopted at the beginning of the twentieth century. In these schemes, damages are scheduled rather than keyed to the individual victim's circumstances, and the inquiry into the origins of the injury lacks the niceties of the comparable tort inquiry. There is no worry about whether the defendant was at fault, and these schemes have a more relaxed attitude toward causation and tortfeasor identification. What matters is not who did what to whom, but simply whether an employee suffered an on-the-job injury. If so, scheduled compensation ought to be forthcoming.

In Rabin's view, one of the major "stories" of modern tort law has been the rise of bureaucratized approaches, both within tort doctrine and outside of it. The all-or-nothing aspect of tort doctrine, he notes, has given way to comparative fault regimes and a greater openness on the part of courts to deem multiple actors responsible for a single injury. The legislative adoption of damage caps has also introduced an element of uniformity to many tort awards. Although the adoption of workers' compensation schemes did not spell the demise of tort

21. See id. at 61-63.
22. See id. at 71-72.
law, a number of bureaucratic schemes have been adopted, including no-fault insurance and industry-specific funds such as the federal Vaccine Act.

And yet the trend toward bureaucratization is only a partial one. For many accident victims, tort law remains their only potential source of compensation, and sometimes tort principles work their way back into schemes that are otherwise bureaucratic. The 9/11 Fund, for example, merged tort-like, individualized determinations of economic loss with a bureaucratized, uniform payment for nonpecuniary losses.

**B. The Fault Principle and Enterprise Liability**

In one of his earliest and most important writings on tort, Rabin offered a critique of a historical claim common to the otherwise disparate views of Morton Horwitz and Richard Posner. Horwitz and Posner both claimed that the second half of the nineteenth century witnessed the rise to dominance of the tort of negligence and, with it, the realization in practice of “the fault principle”—the principle that each person is prima facie liable for carelessness causing foreseeable injury to another. Against both, Rabin argued that the real story line for this period was the continued vitality of large pockets of no liability. Nineteenth-century law, he pointed out, was filled with no-liability rules that reflected common law judges’ greater familiarity and comfort with concepts drawn from property and contract law. Unable or unwilling to think about human interactions outside of these conceptual boxes, judges of this era routinely applied contract principles to personal injury cases and hence set contract-based limits on recovery, as evidenced most notably by the privity rule for claims against product manufacturers and by the vitality of the quasi-contractual tort defense of implied assumption of risk. Likewise, these judges harnessed categories drawn from property law to set the terms on which persons injured by hazardous conditions on land could recover. This explains the traditional rule that landowners owe no

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29. See id. at 945.
32. Id. at 933.
duty to maintain safe premises to trespassers and only limited duties to licensees. More generally, the judges of this era tended to think about human interactions in terms of personal, rather than social or public, obligations. In turn, they were reluctant to recognize liability between strangers and quite willing to accord relationship-based exemptions to liability through doctrines such as charitable and spousal immunities.

Armed with this picture of nineteenth-century tort law, Rabin recast the recognition of the fault principle as a twentieth-century phenomenon. That century, after all, was the one in which many of the aforementioned limits on liability were rejected or revised. And it was also the period in which courts, led by Cardozo in *MacPherson*, reconceptualized negligence liability as grounded in acts generating risk of injury, rather than personal relationships. Indeed, according to Rabin, the development of the fault principle was still happening at the end of the century. For it was only then, he argued, that courts started to look behind the immediate risks of injury generated by primary actors, such as those who drive while intoxicated, to the contributions of background actors in generating those same risks, like the restaurants, bars, and social hosts that serve alcohol to drunk drivers. As courts did so, they pushed the fault principle toward a purer form by recognizing "enabling torts"—liability for conduct that is careless only in that it increases the odds that other actors will wrongfully injure others.

Like his efforts to chart the emergence of bureaucratic compensation systems, Rabin’s efforts to chart the realization of the fault principle also reflect his resistance to excessive intellectual tidiness. The fault principle’s working itself pure may have been the dominant doctrinal trend within twentieth-century tort law, but it was tempered by two countervailing trends.

First, Rabin grants that even modern courts have refused to carry the fault principle to its logical limits. In particular, they have been selective about imposing liability for carelessness in the form of nonfeasance—unreasonable failures to rescue, protect, or assist, as opposed to careless conduct that risks and causes injury. Even within

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33. *Id.*
34. *Id.* at 953.
35. *Id.* at 959–61.
36. See *id.* at 936–38.
the realm of misfeasance, they have maintained some categorical limits on the fault principle. For example, they have allowed a relatively narrow band of claims alleging emotional distress or pure economic loss. Rabin does not regard these continuing pockets of no-liability as evidence of the resilience of nineteenth-century formalism or of continuing judicial concern for status relations. Rather, he attributes them to modern judges’ self-conscious acceptance of a set of fairness-based constraints on liability, including a concern not to impose too heavily on freedom of action or property rights—which helps explain remaining limits on liability for unreasonable failures to act—and a concern not to permit disproportionate punishment—which helps explain the persistence of limits on liability for emotional distress and pure economic loss.

Second, at about the same time courts were eliminating exceptions to the fault principle, some began recognizing an entirely distinct conception of liability. Enterprise liability is not concerned with locating an actor who is an appropriate bearer of an injury victim’s loss by virtue of having carelessly injured that victim. Rather, it is strict, being predicated on the idea that certain ongoing enterprises, even when operating carefully, generate recurring risks of injury and therefore can fairly be asked to pay the costs associated with the realization of those risks. Although not based on notions of wrongdoing, enterprise liability is nonetheless expressive of a normative principle, as opposed to being a purely instrumental means of achieving a policy goal, such as deterrence or loss spreading. The notion, in part, is captured by the idea behind the consumer rights movement that emerged in the 1960s and 1970s: Consumers are entitled to expect a large, powerful enterprise to take responsibility for the risks characteristic of that enterprise, whether it takes the form of physical dangers posed by products or the risk of illness associated with exposure to industrial chemicals. Enterprise liability provides a vehicle through which the

40. See Robert L. Rabin, Rowland v. Christian: *Hallmark of an Expansionary Era*, in *Torts Stories* 73, 93 (Robert L. Rabin & Stephen D. Sugarman eds., 2003) (speculating that some courts have resisted the application of the pure fault principle to premises liability cases to avoid asking too much of property owners by way of efforts to maintain their properties).
42. See Rabin, *Tort Law in Transition*, supra note 38, at 12-14 (discussing the emergence of products liability as a form of enterprise liability); id. at 28-29 (linking applications of enterprise liability thinking to increased awareness of systemic risk).
43. Id. at 32 (describing enterprise liability as embodying “a distributional norm of assigning costs to appropriate activities”).
44. See id. at 22-24.
injurious side effects of certain large-scale activities are fairly spread among the participants in, and beneficiaries of, the enterprise. And although tort judgments grounded on enterprise liability principles do not turn on proof of fault, they will sometimes serve as occasions to identify irresponsible enterprise behavior, whether in the form of tobacco companies attempting to mislead the public as to the risks of smoking or the asbestos industry failing to disclose or act on its knowledge of the toxicity of airborne asbestos.

According to Rabin, the most notable doctrinal recognition of the principle of enterprise liability is to be found in the early forms of strict products liability recognized by courts and the Restatement (Second) of Torts in the mid-twentieth century. Outside of tort doctrine as well as in academic discourse, the rivalry between enterprise liability and the fault principle has played out as a contest between tort law and some of its more bureaucratic alternatives. (Here it is helpful to recall that Rabin was an Associate Reporter for the study commissioned by the American Law Institute (ALI) that was eventually published as the Reporters’ Study on Enterprise Liability. Just as bureaucratisation has rivaled, but not overwhelmed, tort law’s individualized approach, so too have enterprise liability notions pushed back at the margins against the fault principle.

C. Formalism Versus Realism

Like most scholars who write on torts, Rabin has generally focused on appellate court decisions, particularly the decisions of state courts of last resort and the U.S. Supreme Court. More particularly still, he has focused on courts that bring to their decisions a certain understanding of their role. It is no accident that the Franklin and Rabin casebook was initially constructed around decisions rendered by the California Supreme Court and New York Court of Appeals. As Franklin and Rabin recognized, these courts embraced a self-consciously Realist mindset in the post-World War II period and accordingly had set for themselves the task of critically reexamining inherited common law rules. The first step of their self-appointed task was to recognize traditional legal concepts and doctrines for what they “really” are: encapsulations of policy decisions rendered by predecessor judges. Next, the task was to reassess these policy decisions to

45. Id. at 12–14.
46. Rabin, The Fault Principle, supra note 26, at 961 n.120 (noting intense academic debate regarding the relative merits of fault-based and strict liability).
47. See 1 ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY (Reporters’ Study 1991).
determine whether they remained sound in light of then-current circumstances and values.

Emblematic is the string of California Supreme Court decisions rejecting or modifying "no-duty" limitations on negligence liability, including Biakanja v. Irving, Rowland v. Christian, Dillon v. Legg, Gibson v. Gibson, Coulter v. Superior Court, Tarasoff v. Regents of the University of California, J'Aire Corp. v. Gregory, Palma v. United States Industrial Fasteners, Inc., and Randi M. v. Murow Joint Unified School District. These decisions earned Rabin's attention both for their substance and for their methodology. Substantively, each allowed for liability on terms that contributed to the further realization of the fault principle. Methodologically, each followed Biakanja's lead in framing the duty issue as an occasion for judges to adjust the contours of negligence liability by balancing competing policy considerations in light of contemporary circumstances and mores. That each allowed for liability attested to the fact that the California Supreme Court had not only freed itself from the conceptual blinders that had caused its predecessors to privilege contract and property over tort, but also had come to realize that past judicial decisions were themselves mere exercises in policymaking that should be revisited and modified to reflect new conditions. In short, this was a court that had learned the lessons of Legal Realism.

Although the decisions rendered by courts with a Realist self-understanding have tended to go hand in hand with the removal of existing limitations on the fault principle, they have not always done

49. 320 P.2d 16 (Cal. 1958) (eliminating the privity limitation on duty in a negligence claim against a notary public).
50. 443 P.2d 561 (Cal. 1968) (eliminating status-based duty restrictions in negligence claims against land possessors), superseded in part by statute, CAL. CIV. CODE § 846 (West 2007).
51. 441 P.2d 912 (Cal. 1968) (allowing claims by certain bystanders who suffer emotional distress as a result of having observed the defendant carelessly causing physical harm to a third party).
52. 479 P.2d 648 (Cal. 1971) (abolishing intrafamilial tort immunity).
53. 577 P.2d 669 (Cal. 1978) (permitting negligence-based liability against social hosts who serve alcohol when an inebriated guest causes an automobile accident), superseded by statute, CAL. CIV. CODE § 1714.
54. 551 P.2d 334 (Cal. 1976) (recognizing that psychiatrists and psychologists owe a duty of care to identifiable persons endangered by potentially violent patients).
55. 598 P.2d 60 (Cal. 1979) (relaxing restrictions on negligence-based liability for pure economic harm).
56. 681 P.2d 893 (Cal. 1984) (allowing for liability to be imposed on vehicle owners who carelessly allow their vehicles to be stolen in situations in which the thief wrongfully injures a third party while operating the vehicle).
57. 929 P.2d 582 (Cal. 1997) (recognizing an obligation on the part of a school to take steps to alert a potential future employer of the possible threat to students posed by a former employee of the school).
so or have not done so as thoroughly as they might have. And here again Rabin recognizes something of a counter-trend pushing against a dominant tendency (here, the tendency toward embracing Realism). For example, Dillon eliminated the supposedly “artificial” zone-of-danger requirement, allowing claims by certain bystanders who suffer emotional distress as a result of having observed the defendant carelessly causing physical harm to a third party. Yet at the same time it suggested that recovery would ordinarily be limited to those who contemporaneously observe the careless injuring of a close relative, thereby excluding claims by many other bystanders. The court purported to explain this limit on the traditional doctrinal ground that recovery should be had only by foreseeable victims. Rabin, however, rejects this purported explanation as unpersuasive. By placing more weight on the abstract concept of foreseeability that it can bear, Dillon demonstrates that even a Realist court can lapse into a kind of formalism. In Rabin’s view, the real reasoning behind Dillon is that emotional distress claims, like economic loss claims, pose a ripple-effect problem. To recognize bystander claims is to be prepared to impose liability for injurious effects extending well past the effects on the immediate victim of the wrong. Ripple-effect liability thus threatens tortfeasors with disproportionate punishment, an outcome that runs afool of the norm of proportionate punishment that, according to Rabin, American judges overwhelmingly endorse.

III. **Seffert v. Los Angeles Transit Lines: A Case Study**

In this Part, we aim to shed further light on the Rabin approach to torts through a discussion of **Seffert v. Los Angeles Transit Lines**, a 1961 California Supreme Court decision that has long been featured in **Tort Law and Alternatives** and that has engaged Rabin’s scholarly attention elsewhere.

In Seffert, the plaintiff suffered severe, permanent damage to her foot after being caught in the door of a city bus and dragged down the

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59. Id. at 920.
60. Id. at 920–21.
62. See id.
63. Id.
64. 364 P.2d 337 (Cal. 1961).
65. See, e.g., Franklin, Rabin & Green, supra note 7, at 711; Rabin, Pain and Suffering, supra note 16, at 362, 375–77. In its original incarnation, Franklin’s casebook commenced with Seffert. Marc A. Franklin, Injuries and Remedies: Cases and Materials on Tort Law and Alternatives 2 (1971).
street. She sued the transit company for negligence and prevailed. The jury awarded her approximately $188,000, with about $54,000 providing compensation for medical expenses and lost earnings and the other $134,000 providing compensation for her pain and suffering. On appeal, the defendant argued for a new trial on two principal grounds. First, it argued that the trial court had erroneously instructed jurors to draw a rebuttable inference of driver carelessness from the fact that a bus passenger had been injured by the operation of the bus. Second, it argued that the jury’s award was so excessive as to reflect passion and prejudice against the defendant.

The California Supreme Court affirmed. All seven justices agreed that the trial judge’s instruction was appropriate. Prior court decisions had authorized “an inference of negligence based on res ipsa loquitur . . . in cases where a passenger on a common carrier is injured as the result of the operation of the vehicle.” By contrast, with respect to damages, a bare majority voted to uphold the award. Applying the traditional and deferential “shocks the conscience” standard of review, the majority concluded that the plaintiff’s evidence provided a rational basis for the jury’s award. After the accident, Seffert endured nine procedures, several of which were extraordinarily grueling. She spent a total of eight months in hospitals and rehabilitation centers. Her foot was permanently deformed and harbored a persistent open ulcer that, were it to become infected, might require the amputation of part of her leg. Although she was able to resume her job as a file clerk, Seffert had difficulty standing and sitting, frequently had to lie down, could only walk for short distances, and suffered ongoing humiliation and embarrassment because of the injury.

A. Convergence

Seffert would be a substantially less noteworthy decision if not accompanied by a provocative dissenting opinion penned by Justice Roger Traynor. Traynor was not only the most prominent state court

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67. Id. at 340.
68. See id. at 342.
69. Id. at 344.
70. See id. at 340; id. at 344 (Traynor, J., dissenting) (agreeing with the majority on the issue of liability).
72. See Seffert, 364 P.2d at 342–44.
73. Id. at 341.
74. Id.
75. Id. at 341–42.
judge of the mid-twentieth century, he was also a founding father of strict products liability and a judge generally associated with a liberal, pro-plaintiff disposition in tort cases. Yet in Seffert he was prepared to adopt a novel and aggressive approach to appellate review of tort damages.

Traynor's dissent expresses deep skepticism about the propriety of pain-and-suffering damages. The category's existence, he suggested, is a vestige of premodern law's concern for "punishing wrongdoers and assuaging the feelings of those who had been wronged." Its claim to a legitimate place in tort practice has correspondingly weakened "as emphasis shifts in a mechanized society from ad hoc punishment to orderly distribution of losses through insurance and the price of goods or of transportation." Although Seffert had obviously suffered grave injuries, she still had a normal life expectancy, and she returned to her job without a reduction in salary. She had also been fully compensated for lost wages and out-of-pocket costs, and thus, she had already received the kind of "orderly distribution" of benefits one would expect to receive through a first-party insurance policy or a workers' compensation scheme.

Traynor further insisted that the category of pain-and-suffering damages asks judges and jurors to square the circle by monetizing something that cannot be monetized. To instruct jurors to award damages that fairly compensate a tort plaintiff for pain and suffering is akin to instructing them to set a fair price for unicorns. The incoherence of the assignment in turn invites lawyerly sophistry. Indeed, Seffert's trial lawyer had, according to Traynor, cleverly exploited the incommensurability of money and pain by offering a meretricious per diem "formula" that misled the jury into thinking that they were rationally assigning a value to the plaintiff's psychic injuries.

These strong criticisms notwithstanding, Traynor conceded that certain instrumental and institutional reasons counseled against the court taking the radical step of eliminating pain-and-suffering damages out-

76. Id. at 345 (Traynor, J., dissenting).
77. Id.
78. Seffert, 364 P.2d at 344.
79. Id. (noting that "[i]t would hardly be possible ever to compensate a person fully for pain and suffering" and that the translation of "pain and anguish into dollars can, at best, be only an arbitrary allowance" (quoting CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 318–19 (1935))).
80. Seffert's attorney argued to the jury that it should award plaintiff $100 per day for her pain and suffering for the 660 days between the accident and the trial ($66,000) and $2,000 per year for the remainder of her expected life ($68,000). Id. at 344. The jury's award tracked these numbers exactly. Id. at 346–47.
Still, he believed that the court was well within its authority to call for more aggressive judicial scrutiny of jury awards. In particular, he called for a ban on quantification efforts of the sort undertaken by Seffert’s lawyer and for a rule under which any pain-and-suffering award that exceeds the plaintiff’s pecuniary award would be presumptively invalid.

With Traynor’s dissent in view, it is easy to see why Seffert is of interest to Rabin and equally easy to appreciate the value in Rabin’s approach to torts. Each of the three themes we discuss above are put into play by, and illuminate, Seffert. The majority and dissenting opinions quite overtly contrast individualized and bureaucratic approach to compensation. According to the majority, each plaintiff stands on his own. Uniformity in compensation across cases is simply not an aspiration of the tort system, and hence, there is little reason for appellate courts to review juries’ judgments to try to achieve it. For Traynor, this way of thinking was outmoded. By 1961 the proper way to conceive of a damage award in a negligence suit—or at least many kinds of negligence suits—was as a payment of standardized benefits under what is in effect a legally imposed insurance policy.

Traynor also explicitly linked his insurance-driven conception of damages to the emergence of enterprise liability principles. The majority was content to treat the litigation at face value—a suit predicated on the idea that the defendant had wrongfully injured the plaintiff—such that the plaintiff was entitled to redress for the wrong done. For Traynor, however, Seffert was emblematic of the ways in which modern negligence litigation had left behind tort’s moralistic past. Seffert’s injuries were the by-product of a humdrum activity—the operation of a fleet of city buses—that affects thousands of people daily and that predictably generates a certain number of serious injuries. The degree to which this particular bus driver on this particular occasion really was at fault is beside the point, if only because in the end the driver’s employer, users of city buses, and perhaps city and state taxpayers would foot the bill. A major transportation operation is just the sort of enterprise that should be required by law to spread losses it predictably causes by providing compensation for injuries characteristic of that activity. But, again, if the rationale for compensation is an insurance rationale, then payments to victims should be in

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81. Practically, he noted, they can serve to offset a victorious plaintiff’s legal fees. Institutionally, they are a sufficiently well-entrenched feature of tort practice to require legislative rather than judicial abolition. Id. at 345.
82. See id. at 346–47.
accordance with insurance principles—scheduled and without provision for pain and suffering.

Finally, while the majority opinion in Seffert is not necessarily formalist, it is content to follow traditional doctrine. Traynor, the prototype Realist judge, is eager to get past legal categories and concepts to the genuine crux of the matter. “Negligence” is unhelpful. It connotes wrongdoing, yet legal negligence is a broad concept that covers conduct that might be treated as acceptable or tolerable in ordinary life—for example, a bus driver inattentively or impatiently closing the bus’s doors a moment earlier than he should. The doctrine of res ipsa loquitur, by generating an inference of fault from the happening of a certain kind of accident, only further attenuates the connection between legal negligence and ordinary notions of fault. The issue is not the moral—legal issue of substandard behavior. It is the policy issue of who ought to pay for which losses. The whole trick, according to Traynor, is to get past legal concepts to the underlying policy considerations so that the law can be rendered rational and realistic.

Rabin’s approach to torts not only helps to capture the ways in which a seemingly straightforward case like Seffert reveals deep issues in tort law and theory, it also provides grounds for questioning certain aspects of it. For example, Rabin is not persuaded by, and is indeed critical of, Traynor’s argument for the incommensurability of money and misery. Characteristically, the criticism is historical and descriptive, as opposed to conceptual or philosophical. By canvassing the circumstances in which tort compensates for intangible injury—ranging from the hoary action for assault to the modern tort of outrage—he makes a strong case for the proposition that compensation for intangible injuries is central to, rather than an isolated feature of, our tort law. It does not follow for Rabin that Traynor was wrong to express the concerns he expressed. Rather, it is that Traynor’s incommensurability argument does not help us think about these problems—it is no less conceptual, in a pejorative sense, than the sort of conceptual analysis Traynor elsewhere criticizes. The issue is not metaphysics, but fairness and practicality. Should the law for this class of accidents continue to afford compensation on the individualized terms that historically have gone hand in hand with negligence law’s wrongs-based approach, or should it move toward enterprise liability with respect to either the standard of liability, the measure of damages, or both?

There is enormous value for tort practitioners, teachers, students and scholars in framing the issues raised by Seffert as Rabin does.

Consider, for example, his emphasis on the dichotomy between individualized and bureaucratized compensation schemes. As Seffert vividly demonstrates, judges applying state common law must understand that tort law has long granted jurors nearly unfettered discretion with respect to setting damages, just as it does with respect to jury findings on issues such as intent, consent, fault, and actual causation. In the United States, tort law's individualized approach to accidents is deeply intertwined with its reliance on juries. Jury discretion is not a mere annoyance that judges need to manage, it is part of the design of the institution. At the same time, it is equally valuable for judges to be aware of the potential shortcomings of this system, including the room it gives lawyers for deploying questionable tactics and the possibility of awards out of line with any plausible conception of compensation. Striking a balance between these competing considerations is central to the task of American judges in tort cases.

Lawyers, too, must understand the tension between individualization and bureaucratization. Plaintiffs' lawyers, for example, must be prepared to take advantage of the degree to which the system invites them to emphasize the particulars of the client's experience and situation. Yet they must also be aware that many judges will have sympathy for the types of concerns raised by Traynor and in the end will bridle at certain compensatory awards, especially those involving large non-economic damages. Legislatures and policymakers also need to understand that an award of tort damages functions—institutionally and conceptually—quite differently than does compensation of the sort typically provided by a government benefits program. Hence, large compensatory awards in tort cases are not necessarily instances of "Robin Hood" redistribution, nor signs of the system malfunctioning.

Rabin's approach also reminds us that lawmakers, lawyers, scholars, and students must have a realistic understanding of the law in action in order to properly assess and improve it. To understand the practical impact of decisions like Seffert requires learning more about how juries think, how they respond to various lawyerly tactics, and how their thinking is influenced by instructions. Part of what the defendant sought in Seffert—and part of what Justice Traynor wished to grant—was a ruling that trial judges ought to keep a tighter rein on plaintiffs' lawyers in their communications with juries. One cannot really make a reliable judgment about the advisability of this sort of effort until one knows more about how juries respond to lawyerly rhetoric, as well as judicial efforts to guide their deliberations.
Likewise, until one gains an accurate understanding of what it really means in practice to limit pain-and-suffering damages, one cannot form confident judgments as to whether Seffert herself, as well as other claimants who would be affected by new restrictions on jury awards, would be appropriately compensated, as Traynor supposed, or undercompensated. Consider again Seffert’s $188,000 award—a figure that translates to about $1,423,000 today. Under a standard contingent fee arrangement, a present-day Seffert would retain two-thirds of her award: approximately $949,000. Compensation for lost wages and out-of-pocket expenses would account for $409,000 of that sum, entailing a final recovery of $540,000 as compensation for enduring multiple painful operations, extensive rehabilitation, permanent disfigurement, and decades of anxiety, depression, and limited mobility. To play a card from her lawyer’s deck, our present-day Seffert would, on this accounting, recover about $15,000 per year in compensation for pain and suffering over the expected remainder of her life.

More relevantly, perhaps, suits like Seffert’s are today almost certain not to go to trial, much less through the appellate process. Instead, they will settle for some fraction of what the plaintiff would in principle recover in the optimally successful case litigated through to judgment. A decision by the Supreme Court of California that trial and appellate judges can cut back substantial pain-and-suffering verdicts would have the effect of scaling down the settlement values of such cases. And the standard 33% contingent fee would still apply. Although one would have to do a good deal of empirical work to be confident about these matters, it is entirely possible that even verdicts like that in Seffert, if left intact under the traditional rule of deferential appellate review, would tend to generate settlements of meritorious cases on terms that provide plaintiffs with a take-home amount that compensates them only for their pecuniary damages or that leaves them with pennies on the dollar with respect to their pain and suffering. Again, one must have a realistic picture of tort compensation before one can make intelligent judgments about how to evaluate and reform the system.

Rabin’s unpretentious approach to torts scholarship theorizes in a way that brings to the fore practical considerations of the sort just raised. To see in contemporary accident law a deep tension between individualized versus bureaucratic compensation or a tension between fault-based and loss-spreading conceptions of liability is to flag ques-

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tions about the operation and reform of tort law that are at once very deep and very much on the ground. Precisely because Rabin’s scholarship does not cram tort law into a reductive theoretical framework, but instead aims to spot within contemporary legal developments certain tendencies and tensions, his work invites thoughtful consideration of practical problems in a way that leaves open their proper resolution. These are highly commendable aspirations for torts scholarship, ones that we very much share.

B. Contrast

We have invoked Seffert to gain some feel for the richness and value of Rabin’s torts scholarship. In this section, we turn things around and use the same case to try to raise, respectfully, certain questions about his approach.

1. Individualization Reconsidered

Seffert explicitly invites the reader to contemplate the sense in which tort damages can be said to make the plaintiff whole and compensate for injuries. Traynor seems to have adopted the view that making whole, on a certain understanding, is the touchstone for compensatory damages in tort cases, or at least tort cases arising out of accidents. A successful claimant such as Seffert, he supposed, is entitled to be made whole. But this is just to say that she is entitled to reimbursement for past pecuniary losses, anticipated pecuniary losses, and repair or replacement of her damaged or destroyed tangible goods (including physical integrity). Money damages paid in recognition of her having been victimized, disfigured, and traumatized cannot and do not contribute to making her whole; they do not reimburse, repair, or replace. Rabin, as we have seen, partly disagrees with Traynor; he rejects the idea that being modern about tort law entails a narrow or literal rendition of the principle of making whole, under which only tangible and monetizable harms are compensated. There historically has been room, and today there is still room, for a broader notion.

For our part, we agree and disagree with different aspects of Rabin’s and Traynor’s views. We think Traynor is right to emphasize the degree to which pain-and-suffering damages do not really fit the idea of reimbursing an expense incurred or the idea of restoring or repairing something that has been broken, taken, or destroyed, and in that sense, do not fit comfortably with the idea of making whole. At the same time, we reject his claim that these aspects of pain-and-suffering damages provide grounds for excluding them from a tort plaintiff’s
award or for viewing them with a jaundiced eye. Here, we share Ra-
bin's view that it is perfectly plausible to think of pain-and-suffering
damages as providing the tort victim with meaningful compensation,
albeit not compensation in the sense of reimbursement. Rather, it is
compensation in a broader sense—money damages in recognition of
how the victim was mistreated and the consequences for her of the
mistreatment, including the experience of the ordeal and its
aftermath.

And yet in the end, Rabin, in our view, does not go far enough in
responding to Traynor. He is essentially content to observe that tort
law has long compensated intangible injuries and that its willingness
to do so has distinguished tort from other ways in which injury victims
get compensated. Helpful though it is, Rabin's observation that com-
pensation schemes can be placed on a spectrum from individualized to
standardized is incomplete, or understated, and appears to have built
into it certain implicit theoretical commitments. In particular—
although we are concededly reading into Rabin's work assumptions
that he does not expressly state—it appears to manifest a view that
tort law can be treated as on par with other departments of law that
deal with accidental injuries by getting money into the hands of per-
sons who have suffered such injuries or by incentivizing safer activity.
Compensatory damages, on this understanding, are seen as a rela-
tively generous form of injury compensation that happens to be avail-
able to certain classes of claimants through a particular branch of
accident law that has been labeled "tort law." But tort is just one
division of accident law, with strengths and weaknesses that need to
be weighed against alternative systems along metrics of efficacy, effi-
ciency, fairness, and the like. Whether we should continue to have a
form of law that pays out on these terms is an open question on which
Rabin does not take a stand. He is content to note that we have had
this particular system for a long time and that it is intelligible for us to
have done so, but that there may be good reasons for questioning and
changing it. The questions that Special Master Kenneth Feinberg
wrestled with in trying to determine the extent to which payments

85. Franklin's and Rabin's casebook—titled Tort Law and Alternatives—is expressly ad-
dressed to the topic of how the legal system deals with accidental injuries and is written in such a
way that students appreciate that tort law is but one part (albeit the oldest part) of accident law
more broadly conceived. The Prologue to the Introduction expressly puts forward this view. See
FRANKLIN, RABIN & GREEN, supra note 7, at 1 ("This book is concerned with the array of
injuries that are by-products of a complex society, and with how the legal system responds to the
diverse problems raised by such injuries. . . . For several centuries tort law was the one outlet
through which the legal system did provide such redress. Other sources of compensation have
grown dramatically. . . .").
from the 9/11 Fund should be uniform or individualized epitomize what, for Rabin, is the kind of issue that goes to the core of an evaluation of different rules for tort damages.86

We think it is critical not to infer too much from the fact that tort law frequently or even typically involves payments to accident victims that emerge from judgments backed by the coercive power of the state—or from settlements reached in the shadow of such judgments. It is a mistake to infer from tort litigation’s standard outcome that tort is an accident-victim compensation system. Indeed, this is a highly contentious and counterintuitive depiction of tort law and tort damages. Neither lawyers nor nonlawyers tend to talk or think about the tort system as an accident-victim compensation system, as if it were an alternative to a government benefits program. Nor is it right to say that an inquiry into whether pain-and-suffering damages should be available starts from the neutral premise that tort law can just as readily adopt scheduled or individualized damages, depending on how the relevant policy considerations play out. Before accepting Rabin’s implicit characterization of tort compensation one needs to consider whether there is a way of drawing a more meaningful link between the idea of making whole and tort damages without falling into Traynor’s error of treating making whole—in his narrow sense—as the be-all and end-all of tort compensation, such that there is no place for pain-and-suffering damages.

Elsewhere, we have outlined such an account.87 In a nutshell, we maintain that the guiding conception for the proper measure of compensatory damages in tort is irreducibly normative, as is reflected by the longstanding rule that a prevailing tort plaintiff is entitled to what courts quite unapologetically call "just," "fair," or "reasonable" compensation.88 To be sure, courts have long held that fair compensation includes reimbursement, repair, and replacement associated with harm done. But these aspects of compensatory damages are available because they jibe with the overriding normative principle of fair compensation, not because reimbursement, repair, and replacement define what fair compensation means. The entitlement to fair compensation can include not only make-whole damages (in Traynor’s narrow sense), but also payment of damages responsive to the nature

86. Rabin, Past as Prelude, supra note 20, at 63–65 (observing that the 9/11 Fund raised but did not settle basic questions about how properly to compensate for personal injuries).
88. See Rabin, Pain and Suffering, supra note 16, at 374 (observing that standard instructions given to juries with respect to calculating compensatory damages only “recite a general exhortation to act reasonably”).
of the wrong committed against the plaintiff and the consequences of that wrong. The point here is not just Rabin's point that tort damages, when contrasted with other forms of payments that are sometimes made in light of injurious accidents, are more tailored to the individual circumstances of the victim. The point is that they are awarded in accordance with a normative ideal of what counts as an adequate remedy for the victim of a wrong.

If compensatory damages in tort are guided by the master principle of fair compensation, where does the idea of making whole fit into the picture? In certain special cases—for example, unintentional conversions or inadvertent damage to fungible property—make-whole compensation might be exactly what fairness requires. In other cases, the plaintiff's entitlement to be made whole is part of, but does not exhaust, the idea of fair compensation. Given a conception of tort damages as fair compensation, it is entirely apt that some plaintiffs recover damages beyond those necessary to replace the plaintiff's lost property or restore the plaintiff's rights. A reasonable award for a tort victim such as Seffert—one who is put through a horrible ordeal and is left disfigured, partially disabled, depressed, and anxious—includes money that compensates for these aspects of her victimization. This payment does not give back to Seffert something that she has lost. It gives something to her in recognition of all that she has been through and will go through, something to which she is entitled as a matter of fairness.

More generally, to direct a fact finder to think about what it will take to make the plaintiff whole is to invite her to adopt a victim-oriented focus on the question of damages and to push aside other considerations that might plausibly be thought to bear on an award of tort damages. In particular, it pushes against any tendency to assess the fairness and reasonableness of a tort award in terms of punishment or general deterrence. In determining compensatory damages, the fact finder is not to ask what punishment the defendant deserves or what award would induce others not to behave the way the defendant did. The make-whole idea emphasizes instead that a tort remedy is fair and reasonable insofar as it reflects what the defendant has done to the victim and what the victim has suffered at the hands of the defendant.

To sum up, Rabin's emphasis on the individualized nature of tort damages is at one level quite right and quite helpful. It is indeed an important distinguishing feature of compensatory tort damages as contrasted to, say, standardized benefit payments. And yet it is a mistake to treat individualization as the sum and substance of the differ-
ence—it misses a crucial part of the story. To treat compensatory tort damages as individualized compensation is to denature tort law by treating it as just another compensation system. Tort law is a law of wrongs and recourse. It empowers wrongfully injured persons to use the courts to hold their injurers accountable to them. A person who can prove she was wrongfully injured by another (under the definitions of “wrongs” recognized in the law) is empowered by the state to exact a remedy from the injurer. Overwhelmingly, the law empowers the injured to hold their injurers accountable by forcing their injurers to compensate them fairly for the injuries inflicted. (Much less frequently, those who are injured are additionally entitled to invite the fact finder to allow them to be punitive toward those who have wronged them.) Understanding the meaning of compensation in tort law requires one to grasp how this practice works and the sense in which it is part and parcel of a system for achieving civil justice between the wrongfully injured and their injurers. One needs to grasp the basic idea of a system in which a powerful but neutral actor—the state—has the power to force an injurer to make a payment to an individual he has injured in response to a demand by the injured person for such payment. The scope and limits of damage awards in cases where liability has been established is a normative question, within our system, about the content of this practice.

As we noted at the very outset of this Article, it is not clear that these deep and abstract differences between Rabin and us entail different conclusions about particular cases. There is often more than one road to the same destination. Thus, for example, Rabin’s conception of compensatory damages as quasi-benefits and our notion of compensatory damages as redress may not entail a different assessment of the result in Seffert. Indeed, our guess is that we all view Seffert as rightly decided, notwithstanding Traynor’s impressive dissent. And again, we share with Rabin the idea that there is nothing problematic, as a matter or principle, about the idea of tort damages that compensate for intangible injury, even granted that they are not restorative in any meaningful sense. Given this convergence, one may fairly wonder—we think Rabin himself probably does wonder—whether there is real significance to the contrasts we have offered here between his view and ours. What is at stake?

Here is one way to think about the stakes. On Rabin’s view, a legislature would be perfectly reasonable to follow Traynor’s lead and eliminate pain-and-suffering damages in the name of a more routinized system, particularly if doing so promised to save on the transaction costs associated with litigation. There is long experience with
routinized compensation schemes for workplace accidents, and it might be reasonable to extend this model of compensation to public-transportation accidents. Even if we were to endorse this line of reasoning, we would not share the view that the enactment of the new system would involve simply swapping one compensation scheme for another. The rule of fair compensation is part of a body of law that is designed to enable victims of wrongs to obtain redress from wrongdoers. They are two parts of an integrated whole. To replace fair compensation with scheduled benefits, therefore, is to go a long way toward replacing a scheme of victim redress with a compensation system. The difference between the two ways of characterizing a decision to adopt scheduled benefits—ours (swapping out a scheme of victim redress for a compensation system) and Rabin’s (adopting one of two alternative compensation schemes)—is substantive, not semantic. Choosing between torts and a compensation system is akin to choosing whether to treat certain behavior as criminal and deserving of punishment, or as evidence of a psychiatric condition warranting therapeutic treatment. To move from criminal punishment to therapy is to characterize the underlying conduct on fundamentally different terms. Something similar is at work in shifting from a view of conduct as wrongful and compensation as a form of recourse to a view that is agnostic as to the nature of the conduct and that goes along with a system of standardized benefits. In tort, compensation is redress. In insurance and benefit schemes, compensation is akin to localized disaster relief. There is certainly room for legislative choice between tort and compensation systems, but the choice is between qualitatively different schemes, rather than simple substitutes.

2. Beyond the Fault Principle and Enterprise Liability

Both in his casebook’s presentation of Seffert and in his discussion of that decision in a contribution to a prior Clifford Symposium, Rabin focuses on the issue of damages. He does not discuss the grounds on which the defendant was held liable. As noted above, the trial judge in Seffert, applying the doctrine of res ipsa loquitur, instructed jurors that they should infer driver carelessness from the fact that the plaintiff was a bus passenger who had been injured by the operation of the bus. In turn, the jurors were told that the defendant could rebut this inference by introducing evidence of driver care. The jury

89. Id. at 375–77.
found for the plaintiff, obviously, and the California Supreme Court upheld the instruction and the verdict on appeal.91

At one level, there is nothing objectionable or even remarkable about Rabin's decision to forego a discussion of the grounds of liability in Seffert. This aspect of the court's decision seems ho-hum: it simply followed its own precedents on res ipsa and did so unanimously. And there is another set of reasons—reasons almost opposite to the ones just mentioned—to downplay the significance of res ipsa for the resolution of Seffert. For it is not at all clear that a case like Seffert warrants the application of res ipsa. Even if it did, one might legitimately be skeptical of the doctrine itself.

To appreciate the force of these reasons for putting aside Seffert's liability holding, it is worth pondering why Traynor took this particular occasion to express grave doubts about pain-and-suffering damages and to suggest that Seffert's suit, even though nominally involving a negligence claim, ought to be handled in accordance with enterprise liability principles. After all, Traynor participated in scores of negligence decisions rendered by the California Supreme Court during a period of aggressive doctrinal reform. And yet he did not seem to make a habit of urging the court to move away from a negligence conception of liability in favor of an enterprise liability approach. For example, in Rowland v. Christian,92 there is not a word from Traynor in support of the idea that slip-and-fall liability ought to turn on enterprise liability principles. So why did he treat the accident in Seffert as an occasion to implement those principles?

One answer is the size of the damage award, in particular the greater than 2:1 ratio of pain-and-suffering damages to pecuniary damages. Another is the fact that the defendant is a large enterprise rather than a natural person. But it also matters, we suspect, that Seffert was a res ipsa loquitur case. Seventeen years earlier, in the now-famous Escola case, Traynor chastised his brethren for relying on res ipsa to mask in the language of fault what was in reality an imposition of enterprise liability for injuries caused by defective products.93 For Traynor, it seems, Seffert was Escola all over again. Res ipsa was operating in this context as a legal fiction—a circuitous way for judges to pay homage to negligence doctrine while imposing liability on other grounds. We expect that Rabin is sympathetic to the notion that res

91. Id.
ipsa is often a means by which negligence doctrine confers on juries leeway to impose strict liability under the guise of a fault standard.

Once again, we find ourselves in partial agreement and partial disagreement with Traynor and Rabin. To us *Seffert* seems like a poor candidate for the application of res ipsa. That doctrine is most naturally at home in cases in which a passive victim is injured by an object or by conditions that for the relevant time period were exclusively under the defendant's control. At the same time, we are probably more open than Traynor or Rabin to the idea that the doctrine of res ipsa constitutes (or can constitute) a principled variation on negligence liability. Moreover, we think that at the end of the day the instinct of the trial court and the California Supreme Court to show a certain generosity to the plaintiff on the issue of fault can be put in a light that renders it appropriate and principled. Finally, and most importantly for present purposes, we think that in order to grasp this aspect of *Seffert* and by extension tort law generally, students, judges, lawmakers, and scholars must resist aligning their thinking about torts, as Rabin does, along the fault–enterprise liability axis.

Of course Rabin is hardly alone in giving pride of place to some version of the fault–strict liability dichotomy. In this respect, his work is squarely within the dominant tradition in American scholarship, which dates back to Holmes's foundational efforts to define the field. However longstanding and influential, the distinction is more blinding than illuminating. While Rabin and others who insist on the fundamental importance to tort of the fault–strict liability distinction often do so in the name of Realism; being "realistic" about torts requires attention to the complexity of the norms that govern the human interactions that give rise to tort litigation. Normative reality is complex, and therefore being realistic requires attending to complexity.

To understand *Seffert* or any other tort case, one must isolate with relative precision the nature of the wrong for which the plaintiff seeks compensation, and it will often not be sufficient simply to describe the wrong abstractly as an instantiation of a generic notion of negligence. True, *Seffert* involved a negligence suit against a bus company whose driver accidentally harmed his passenger. It did not involve an intentional tort, and in that sense, it more closely resembled a plain vanilla personal injury case. Its unremarkableness is presumably why Traynor was anxious about the large verdict, why Franklin and Rabin chose many years ago to include it in their book, and why Rabin has chosen to revisit it. We confess that the apparent mundaneness of *Seffert* was part of its attraction to us, too. And yet to treat *Seffert* as an utterly conventional application of the fault principle makes need-
lessly mysterious the jury’s decision to award the plaintiff what today would be more than a million dollars in damages.

We are not speculating on the particular jurors’ motivations in the *Seffert* trial, but rather asking the larger question of how a humdrum accident case like this could have generated such a large award. The courts’ invocation of res ipsa, even if not quite right conceptually, provides a clue. Recall that the defendant in *Seffert* is a bus company—a common carrier. Historically, common carriers have been held to owe their passengers a particularly demanding duty of care: not just reasonable care, but a duty of utmost or extraordinary care. Hence, a carrier who accepted a passenger for transport was bound not merely to exercise care in operating the vehicle, but also to take affirmative steps to protect the physical and emotional well-being of passengers. Relatedly, in the nineteenth century, suits by injured passengers against common carriers often generated punitive damage awards, a phenomenon that Anthony Sebok has suggested is consistent with the courts’ emphasis on carriers’ heightened duties. Nineteenth-century and early twentieth-century plaintiffs’ lawyers apparently were consistently able to depict transportation companies as abusing the power they exercised over their dependent passengers by treating them dismissively. And the display of this sort of dismissiveness was at times considered so unacceptable as to warrant punitive damages. Later, common carriers were noted by the California Supreme Court as among those defendants who were categorically barred as a matter of public policy from using form contracts to waive their potential tort liability to passengers.

Although not a punitive damages or waiver case, *Seffert* is recognizable as the progeny of the special brand of negligence law that historically has applied to common carriers. The bus driver not only closed the door on the plaintiff as she was entering the bus, he continued down the street even as part of her body dangled outside the bus. The jury detected in this course of conduct, one might plausibly surmise, a kind of indifference to the plaintiff. And the result was that a

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95. See Rabin, *Enabling Torts*, supra note 10, at 439 (discussing the imposition of liability under Virginia law for a common carrier’s having carelessly discharged a passenger at a location that left her vulnerable to attack).


97. Id.

98. See Tunkl v. Regents of Univ. of Cal., 383 P.2d 441, 444 n.8 (Cal. 1963).
working-class person would lead the rest of her life disfigured, crippled, and in a great deal of misery. So while *Seffert* is indeed an accident case and not an intentional tort case, that observation only goes so far because not all negligence cases are the same. Common carriers are a special kind of defendant when it comes to negligence claims. They have historically been subjected to a higher standard of care, more frequently exposed to punitive damages, and marked by the courts as something more than just another private business.

Understanding the special nature of common-carrier negligence—and with it the special significance of conduct that demonstrates indifference toward precisely the class of persons toward whom carriers are expected to be especially solicitous—in turn sheds light on the damage award in *Seffert*. Although the driver apparently did not act with the sort of wantonness or recklessness that would warrant an award of punitive damages, there is nothing surprising, given the nature of the wrong, about the jurors’ discretionary selection of an amount for pain-and-suffering damages related to their perception of the gravity of the defendant’s mistreatment of the plaintiff. What we see in *Seffert* is a successful effort by the plaintiff’s lawyer to depict the accidental injuring of the plaintiff as a more full-blooded wrong than one finds in other accidental injury cases. And what we also see is the majority of the California Supreme Court recognizing that there is room within the notion of fair compensation for jurors to build in a conception of vindication and equalization of power that goes beyond any notion of compensation that we might utilize in designing a government benefits program. To be sure, as Traynor and Rabin both recognize, there is a price to be paid for maintaining this system. As law professors assessing the debate between the majority and Traynor in *Seffert*, we would therefore want to know how consistent California has been in treating common carriers as a distinct kind of negligence defendant and whether the critiques offered by Traynor and other critics are nonetheless sufficient to warrant a change. But any accounting of the benefits and drawbacks of the rules and institutions that generated the result in *Seffert* must recognize that, by virtue of being a form of redress, compensatory damages have, at least in some settings, dimensions beyond mere reimbursement or replacement.

The point we are pressing—that there is something lost when one views tort in terms of a choice between a fault standard and a strict liability standard—carries well beyond *Seffert* and common-carrier liability. Indeed, a similar point can be made with regard to another case rendered iconic by Franklin and Rabin. The case is *Hammonette v.*
the decision with which their casebook has long commenced. Hammontree is given this special place of prominence in the book on the supposition that it nicely poses the question of whether accident law should be built on a fault standard or strict liability. Suit was brought against an epileptic who had successfully managed his condition, but on this occasion had suffered an unanticipated seizure, lost control of his car, and crashed into the plaintiff's storefront, injuring the plaintiff. The trial court instructed the jury on negligence, leaving for jurors the question of whether, under the circumstances, the defendant's decision to drive was reasonable. In doing so, it rejected the creative effort of the plaintiff's lawyer to analogize injuries arising out of this accident to injuries caused by defective products, which by the time of Hammontree were subject to a rule of strict liability. That decision was affirmed by the intermediate appellate court. Some interesting facets of Hammontree get lost when it is framed as presenting the Holmesian choice of fault versus strict liability. For one thing, Hammontree comes very close to presenting a different type of tort altogether—namely, a trespass. Trespasses to land are their own kind of wrong. They do not fit the mold of ordinary negligence, strict liability, or intentional torts such as battery. Liability turns on an intent to touch the land in question, but not intent to harm and without regard to fault. For this reason, an intentional but entirely innocent touching of another's land is a trespass. Hammontree has the invasive quality of a trespass. It involves, after all, a driver crashing through the wall of the plaintiff's store. As a result, the driver's lack of culpability might not seem to carry the same weight as a reason against liability that it would for other kinds of accidents: the raw trespassory quality of the interaction lends credibility to the plaintiff's argument for liability without fault. But of course the critical intent element, which would render this a true trespass, is missing. The defendant never set out to make contact with the plaintiff's property. And so if the courts were to recognize liability without fault they

100. When Rabin joined the Franklin casebook for its third edition, the two authors agreed on Rabin's suggestion that Hammontree replace Seffert as the first case in the book. MARC A. FRANKLIN & ROBERT L. RABIN, CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES 2 (3d ed. 1983); Email from Robert L. Rabin, A. Calder Mackay Professor, Stanford Law Sch., to authors (Aug. 4, 2011) (on file with authors).
101. Hammontree, 97 Cal. Rptr. at 740.
102. Id. at 741.
103. Id. at 742.
104. See GOLDBERG & ZIPURSKY, supra note 87, at 231–36 (discussing the tort of trespass).
would have to extend trespass-like reasoning beyond its traditional confines, which they decline to do. Appreciating the variety of tortious wrongdoing helps explain why *Hammontree* really is a close call on tort principles, not just an occasion to ask the all-things-considered policy question of whether one ought to prefer fault-based or strict liability. In this respect, it resembles other famous borderline cases, including *Rylands v. Fletcher*¹⁰⁵ and *People Express Airlines, Inc. v. Consolidated Rail Corp.*¹⁰⁶ In these cases too, courts wrestled with the question of what to do with claims that come very close to establishing the commission of recognized torts, but do not quite do so.

3. *Between Formalism and Realism*

As we have already noted, Traynor’s dissent implicitly claims the mantle of Legal Realism. The reality, he suggests, is that a bus passenger has been accidentally injured. And the important question is, will she be left to bear the costs of the injury or will someone else be made to bear (at least some of) those costs? This in turn requires a clear-eyed assessment of what actually counts as a cost of the accident and which of these costs are really compensable. Concepts like res ipsa loquitur and pain and suffering are not helpful in answering these questions—they are distracting.

Of course, the calls for greater realism and less conceptualism were a dime a dozen at the time Traynor wrote his *Seffert* dissent. The pedagogic beauty of *Seffert*, however, is that it offers in the dissent a display of realism that is distinctive and even counterintuitive. In the first place, the dissent is asking for realism about damages, not just liability. This is not the usual diatribe against the malleability of concepts like duty and fault. This is criticism focused on the tangible, bottom-line question of what tort claimants can expect to recover when they prevail on their claims. Second, the dissent invokes realism in aid of a defense-friendly argument for limiting liability. Overwhelmingly in the mid-twentieth century, Legal Realism went hand in hand with expansions of personal injury liability, particular for suits that pitted ordinary workers and consumers against large enterprises. Here, however, Traynor, a member of the Realist–Progressive vanguard, insists that realism about damages entails lesser recoveries for a potentially large universe of tort claimants.

¹⁰⁵. (1868) 3 L.R.E. & I. App. 330 (H.L.); see also Goldberg & Zipursky, supra note 87, at 259–63 (discussing the borderline nature of the claim in *Rylands*).

¹⁰⁶. 495 A.2d 107 (N.J. 1985); see also Goldberg & Zipursky, supra note 87, at 125 (discussing the borderline nature of the claim in *People Express*).
These aspects attest yet again to *Seffert*'s being a brilliant choice for a casebook and a worthy object of scholarly attention. And we assume that even if Rabin is not prepared to endorse Traynor's dissent unequivocally, part of the appeal of the case for him is that it models how to think realistically about tort issues and demonstrates that doing so does not necessarily have a single political valence.

And yet there is something missing in implicitly contrasting Traynor's realism to the majority's formalism or doctrinalism. It is true that the majority opinion in *Seffert* is workmanlike. Its response to the defendant's arguments for a new trial is that the substantive and procedural rules recognized in prior court decisions, properly applied, call for the court to uphold the jury's verdict. And yet it hardly follows that the majority opinion has somehow failed to offer real reasons for its conclusions. The cited rules provide the reasons. This is not to say that all right-thinking persons were or are required to accept the court's analysis. Indeed, as noted, we are somewhat skeptical of the trial court's application of res ipsa loquitur to the facts of the case, although prior California Supreme Court decisions seem to have adopted a rather broad version of that doctrine. It is to say that the court was not merely offering incantations or partaking of magical rituals when it invoked rules and precedents. Instead it was citing reasons for its conclusions.

Here, we suggest, is another dimension of difference between Rabin and ourselves. In our view, judges ought to approach the job of deciding cases as "pragmatic conceptualists." They ought not to presume that legal concepts are empty labels and instead ought to be faithful to those concepts, even as they recognize indeterminacies. We think this because we think there is a connection between law's concepts and its commitment to certain principles. This is not simply the instrumental point that courts presumptively ought to follow precedents in order to promote values such as uniformity and predictability. It is that tort law, like other bodies of law, hangs together in a certain way and that judges are bound, in the first instance at least, to work within it and when they revise it, to do so self-consciously and advisedly rather than to assume that it is an amorphous tangle of rules and policies that is ripe for revision.

Perhaps it will help to return to *Hammontree*. Recall that the plaintiff sued the driver of a car whose unexpected seizure resulted in the car crashing into the plaintiff's store and injuring the plaintiff. The

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plaintiff's lawyer argued that drivers who, because of a medical condition, lose control of their cars and injure others should be treated on the same terms as product manufacturers whose defective products cause injury; namely, they should be subject to a rule of liability without fault. On this approach, this class of drivers would be held liable for the injuries they cause even if it were impossible for them or anyone else to anticipate their sudden loss of control. As noted by the intermediate appellate court, the plaintiff's argument explicitly invoked a Traynorian conception of enterprise liability:

Appellants seek to have this court override the established law of this state which is dispositive of the issue before us as outmoded in today's social and economic structure, particularly in the light of the now recognized principles imposing liability upon the manufacturer, retailer and all distributive and vending elements and activities which bring a product to the consumer to his injury, on the basis of strict liability in tort expressed first in Justice Traynor's concurring opinion in Escola v. Coca Cola Bottling Co. . . . 108

Citing a prior California Supreme Court decision declining to impose strict liability in the context of an automobile collision, the Hammontree court declined the invitation, noting that the plaintiff's argument for strict liability raised policy questions better left for the California legislature.109 Instead, it upheld the trial court's decision to instruct the jury on negligence, and it left standing the jury's defense verdict, which presumably had been rendered based on a judgment of no breach.110

The court's handling of Hammontree strikes us as, generally speaking, the right way to go. For one thing, the lower courts recognized their role within a hierarchical judicial system. For another, they took the framework and concepts of law and applied them straightforwardly but thoughtfully to the case at hand. Accidents such as the incident in Hammontree are governed by negligence law, and negligence law was applied. While the intermediate appellate court appropriately entertained plaintiff's effort to analogize this class of drivers to defective products, it also rightly rejected that effort. It did so primarily on institutional grounds, but there were applicable legal grounds as well. Strict products liability did not come out of nowhere. It emerged out of case law and underlying practices, in particular the law of warranty. As Traynor himself noted in Escola, it is not a huge step from the idea of a manufacturer implicitly warranting that its

108. Hammontree, 97 Cal. Rptr. at 741.
109. Id. at 742 (discussing Maloney v. Rath, 445 P.2d 513 (Cal. 1968)).
110. Id.
products are safe for ordinary use to the idea of strict liability in tort.\textsuperscript{111} Perhaps the main difference between them is the degree to which the manufacturer should be free to disclaim its warranties. There is no comparable set of doctrines or norms at work in the interactions between automobile drivers and those whom they put at risk of physical injury by driving.

And although Realists are fond of treating formal or conceptual analysis as the opposite of pragmatic policy analysis, \textit{Hammontree} suggests that this opposition is overblown. The court applied negligence law.\textsuperscript{112} But negligence law is a nuanced system for determining responsibility. In this instance, it called for a fact-intensive normative judgment made by a jury as to whether the driver, given the circumstances, exercised the degree of prudence that a person of ordinary prudence would have exercised. As a policy matter, it seems to us quite sensible to balance the interest of would-be drivers in driving and the interest of the public in not being injured through a norm of reasonable prudence that allows only those who can expect to meet the norm to drive without serious risk of liability. By contrast, the alternative proposed by the plaintiff might—through the threat of strict liability and its effects on the price and availability of liability insurance—render driving entirely unavailable to a class of persons, many or most of whom can be expected to drive safely. At a minimum, we see no reason to think that judges will do better, in cases like \textit{Hammontree}, to tackle head-on the policy question of whether to adopt a fault-based or strict liability regime for accidents caused by drivers with certain medical conditions. Realism of this sort certainly does not guarantee intelligent policymaking, and it is far from clear that it even promotes it. Most likely, it entails judges making ill-informed guesses about the consequences for society of adopting one liability rule or another.

\section*{C. Revisiting the Puzzle}

If the \textit{Seffert} discussion is to serve as an illustration of how we disagree with Rabin, we must add something to it. As it stands, section B of this Part merely sets forth a kind of analysis that is more typical of our work and suggests ways in which it points to an approach to torts that is different from Rabin's. By his lights, tort-theoretic work like ours tends to be too conceptualistic and too driven by a

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\textsuperscript{111} See Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 442–43 (Cal. 1944) (Traynor, J., concurring).
\textsuperscript{112} Hammontree, 97 Cal. Rptr. at 741–42 (approving the use of negligence instructions and affirming the lower court's refusal to give strict liability instructions).
\end{flushleft}
desire for explanations of principle and notions of right. But this does not make for a disagreement, only a difference of style and perspective. If Rabin is simply disinclined to engage in this kind of discussion but is open to others doing so, then there is really no tension at all.

We suspect that, to the extent that there is genuine disagreement, it is not so much about any single proposition of law, substantive tort theory, or even methodology. It is a disagreement that arises in application, where it might take the form of a disagreement about law and theory and methodology. The question is really when, if ever, a more conceptualistic approach such as ours provides value. While not dogmatically so, Bob is strongly inclined to be skeptical of whether a principles-based examination of tort cases or tort doctrine can shed much light. As for us, we have used both approaches in teaching, in our casebook, and in our engagement with practical issues of tort law. In our own scholarship, however, we have frequently—in fact, most commonly—utilized the more conceptualistic approach.

*Seffert* is a useful case, we believe, for representing both why Rabin might be so strongly disinclined to go down our path and why we insist upon doing so. We are ready to concede at the outset that the California Supreme Court Justices were not philosophizing about the meaning of “make whole” and were not theorizing about the special duties of common carriers. Nor do we suppose that they should have been. We think the case is a rather simple one and that it was correctly decided. Justice Traynor’s objections must be understood fundamentally from a policymaker’s perspective and must be evaluated with the recognition that tort law is not just a compensation system like other administrative systems, but has its own norms that are in important respects much more individualized. As judge, lawyer, or first-year torts professor, to turn *Seffert* into an abstract investigation of the meaning of the concept of making whole would be to display a tin ear for some of the practicalities that inevitably factor in thinking about torts. To the extent that Rabin would insist on realism rather than formalism, it is driven by a sort of prudence: it is a wake-up call designed to ward off the temptations of grand tort theory that sometimes creates tin-eared torts professors.

We think Rabin’s warning has been salutary; frankly, it has had a major impact on our own work. However, we also think that the risk of theoretical overindulgence is not the only one that faces legal academia. There is an opposing risk, one that Ronald Dworkin appears to have perceived in the thought of his mentors, Learned Hand and H.L.A. Hart. It is the risk that one might become so committed to a kind of down-to-earth level-headedness and so suspicious of the
moralizing and posturing of others that one ends up, in effect, yielding matters of principle that one never imagined were really up for grabs. Of course, it is far from clear that the grand theoretical frameworks of academics or immersion in the abstract structure of doctrine are antidotes to this problem, and we hope that we have never suggested otherwise. Dworkin’s answer to his mentors is that thick moral principles are entrenched in the law itself and that a full understanding of certain aspects of law is not possible without recognition that these principles are actually part of the law. Judges and academics must not come to believe that a body of law—like the Bill of Rights—is like an actor who plays whatever role the judges of the time provide for it. Even if, in Yeats’s words, it is hard to “know the dancer from the dance,” there is not just a dance, there is a dancer; there is not simply a set of functional roles of the law and things that happen with it, there is the law itself.

We have chosen Seffert to serve as the center of this Article as a means of challenging ourselves, for such a modest case seems better suited to be an emblem of Rabin’s warning to keep one’s feet on the ground than of Dworkin’s warning to hang onto principle. But perhaps that is not so. For the principle at the heart of Seffert is that a person who proves that she was wronged by another under the law is entitled to have a jury of her peers determine what is fair and reasonable compensation for the wrongful injury done to her, so long as the determination is not infected by passion or prejudice. In California, and across the country, that very principle is slipping away.

Fourteen years after Seffert was decided, California’s legislature famously weighed in on non-economic damages in tort cases that are not so different from Seffert. Medical malpractice cases now have a cap on non-economic damages of $250,000.114 Adjusting for inflation, if that cap had been in place and applied to Seffert, her pain-and-suffering award would have been reduced from $134,000 to $34,000 and her total verdict would have been $88,000 rather than $188,000. After attorneys’ fees, she would have recovered $59,000—or $5,000 more than the amount of her bills. Essentially, she would have received $5,000 for having been mangled and left crippled by a careless bus driver.

The larger point is that our legal system has to a remarkable extent abandoned the seemingly uncontroversial holding of Seffert. The political and economic reasons that this occurred are legion and merit

114. CAL. CIV. CODE § 3333.2(b) (West 2007).
close examination. It has, to a great extent, occurred legislatively; cer-
tainly, it is interest groups and politicians and practicing lawyers be-
hind this change, and not legal academics. And yet we do think there
is something to be learned from Seffert’s fate about tort theory.

Part of the reason for the abandonment of the jury as an institution
that is entitled to make damages decisions is that our system no longer
takes very seriously what tort damages aim at doing and, more funda-
mentally, what the provision in our law for a right of action in tort
aims at doing—supplying a victim with a right of redress against one
who wrongfully injures her. The idea that tort law recognizes a right
of redress strikes many as corny, troubling, or vacuous. But if courts,
lawyers, and legislators think it is shallow to say that tort law empow-
ners victims of wrongs to redress those wrongs, they will tend to think
they must justify it through a mélange of instrumental reasons. Hav-
ing been reconceptualized as a Rube Goldberg device for deterrence
and compensation, tort law is ripe for the attack of social engineers
who claim to have found better ways to do what it does. Of course,
tort law does serve deterrence and compensatory goals, and argu-
ments of efficiency and practicality are worth hearing and evaluating.
To an astute observer like Rabin, it is obvious that such concerns do
not exhaust what there is to say. Our worry is that matters of princi-
ple that seem obvious to thoughtful commentators and participants do
not remain obvious forever; it is a worthwhile enterprise to nourish
the ideas within our system so that basic principles do not come to be
misunderstood or treated as disposable platitudes.

IV. Conclusion

Bob Rabin’s writings have addressed virtually every important issue
in tort law over the past forty years. From products liability to defa-
mation, from workers’ compensation to the 9/11 Fund, from law and
economics to corrective justice theory, Bob’s has been a voice of rea-
sonableness and realism, in the best sense. While we have taken this
occasion to raise some questions about aspects of his approach, we
trust that the reader will not mistake our having done so for a lack of
appreciation or admiration. We are grateful to be among the many
who have benefited from the bright, guiding light that, for more than
forty years now, Bob has shed on the law of torts.