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Alexandra D. Lahav

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CRIME AND TORT: REFLECTIONS ON LEGAL CATEGORIES

Alexandra D. Lahav*

INTRODUCTION

Tort law has always been accused of being somewhat incoherent or at least an untidy and fragmented legal category.¹ Is it a residual category for things that are neither truly private ordering (contract) nor truly public wrongs (crime)?² Is it simply an instrumental body of law, which can be easily replaced by proper regulation? Or, by contrast, could torts be a coherent body of law that has its own internal logic?³ How torts are categorized has implications for what wrongs scholars and judges think are and are not redressable. For example, categorizing a particular wrong as a “crime” exclusively in the province of government action (and not every level of government), rather than a “tort” which can be a private action, has real-world consequences for who can bring a suit and whether a suit will be brought at all.⁴ As Thomas Grey pointed out “categorical schemes have a power that is greatest when it is least noticed. They channel the attention of those

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1. Kenneth S. Abraham & G. Edward White, *Conceptualizing Tort Law: The Continuous (and Continuing) Struggle*, 80 MD. L. REV. 293, 295 (2021) (observing that “tort law is not the coherent field it is sometimes thought to be. In fact, the untidy, fragmented organizational structure of tort law is the legacy of a lost history that not only helps to explain tort law’s puzzling organization, but also to reveal the underlying disordered character of tort law itself. It is difficult to order something that is essentially disordered.”).

2. See Gregory C. Keating, *Form and Substance in the “Private Law” of Torts*, 14 J. TORT L. 45, 84 (2021) (stating that “[t]he origin of our tort law help to explain why the contemporary revival of the idea that tort is “private law” goes too far. “Private law,” as Ripstein and Weinrib articulate it, is insufficiently attentive to the way in which the modern law of torts is entangled with bodies of law that the theorists of “private law” count as public—with statutory and administrative risk regulation and with administrative compensation schemes.”).

3. See generally JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* 2 (2020).

4. Compare Thomas W. Merrill, *Is Public Nuisance A Tort?*, 4 J. TORT L. 1, 5 (2011) (arguing that public nuisance is not a tort but a crime), with Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 YALE L. J. 702, 710 (2023) (arguing that public nuisance is a tort).

who use them, structuring experience into the focal and the peripheral.”⁵

This Essay investigates how a particular category of torts—suits for injuries caused by dangerous products—has been seen alternatively as based in contact or criminal law—in addition to, or sometimes instead of, an independent doctrine sounding in tort that arises from a duty not to harm others. This category problem has plagued courts even though, since the 1850s, courts have held that manufacturers had a duty enforceable by private suit not to sell harmful products. The Essay tells the story of regulation of one very dangerous product, milk, in the late nineteenth century as a window into the meaning of how conduct is categorized—the significance of putting torts at the periphery rather than the center. The meanings of legal categories map on to conceptions about how society should be governed that continue to be at the heart of many doctrinal and policy debates today. These include: how much should private ordering govern? To what extent should harm lie where it falls, especially when it comes to untested or untried products, and in what cases should manufacturers be held responsible for harm? What kind of fault is in play in the sale and distribution of harmful products and is this something to be policed by purely public entities or by the individuals harmed or both? Should there be an intent requirement, or is a showing of causation sufficient? What institutions—criminal, public health, or civil justice—are best situated to provide redress in cases where people are harmed?

The Essay proceeds in four parts. Part I introduces the problem of poisoned milk in the period between 1850 and 1910. Milk was killing babies in part because it was adulterated with the chemicals formaldehyde or boric acid to stave off spoilage. Part II describes how the law addressed this problem, mostly by criminalizing the adulteration of milk. Part III describes the callous attitude of some public health officials regarding adulteration of milk, and how this relates to the bigger argument about whether regulation of injurious products should be left to market forces. Part IV introduces a modern analogue to the milk crisis of the late nineteenth century—contaminated infant formula—and reconsiders the categories of tort, crime, and market forces in our own times.

5. Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 49–50 (1983).

I. UNFORTUNATELY THE MILK⁶

The period between 1850 and 1910 was one of extraordinary changes in American life, creating new problems for law to solve and new laws to solve those problems. There was, of course, the civil war. In 1840, 10% of the population lived in communities with over 2,500 residents.⁷ By 1870, 26% of the population lived in urban communities with more than 2,500 residents.⁸ By 1910, the number of Americans living in urban centers had grown exponentially. Fifty cities had more than 100,000 residents and 46% of the population in lived in urban communities with more than 2,500 residents.⁹ About 10% of the total U.S. population lived in New York, Philadelphia, and Chicago in 1910; each of these cities had over a million residents by that year.¹⁰

Many of the people living in these cities were foreign-born. Between 1840 and 1914 twenty-four million people immigrated to the United States.¹¹ Between 1840 and 1860, these migrants were mostly from Europe, escaping the potato blight, including 1.5 million Irish Catholics.¹² Immigrants also arrived from China after 1850, although in somewhat smaller numbers, reaching around 130,000 by the passage of the Chinese Exclusion Act of 1882.¹³ Later in the nineteenth century, immigrants arrived from the Balkans, Greece, Italy, Russia.¹⁴ These immigrants settled mostly in cities. Fifty-three percent of the urban population was foreign born in 1890.¹⁵

The people in these urban areas needed food, and it came from out of town. It came on railcars, sometimes canned and preserved, other times from closer by in canisters. Hundreds of thousands of miles of railroad tracks were built, crisscrossing the nation in the second half of the nineteenth century. In 1860 there were about 30,000 miles of railroad track in the United States; by 1910 that number had risen a ten-

6. This is a play on Neil Gaiman's book *FORTUNATELY THE MILK* (2013) in which a father goes out to buy milk and is embroiled in a series of wild adventures. Milk is all that this discussion has in common with that book.

7. JONATHAN HUGHES & LOUIS P. CAIN, *AMERICAN ECONOMIC HISTORY* 354 (8th ed. 2011).

8. *Id.* at 261, 354.

9. *Id.*

10. *Id.* at 354.

11. *Id.* at 323.

12. *Id.* at 324, 326.

13. Richard P. Cole & Gabriel J. Chin, *Emerging from the Margins of Historical Consciousness: Chinese Immigrants and the History of American Law*, 17 *LAW & HIST. REV.* 325, 326 (1999) ("The population of Chinese immigrants in American grew steadily from 1850 to 1880. By 1880 their number had grown to about 105,000 persons. The population of Chinese may have reached as many as 135,000 persons on the eve of the passage of the first federal law specifically excluding Chinese immigrants in 1882.").

14. HUGHES & CAIN, *supra* note 7, at 326.

15. *Id.* at 329.

fold, to a little over 350,000.¹⁶ These tracks brought goods into growing urban areas. One of the main food products transported into cities that caused consternation for public health officials and parents was milk.

Milk was a drink that was touted as the “fountain of life,”¹⁷ prescribed by doctors to children, and widely considered a food for invalids and infants. In cities like New York, as early as 1842 milk was known to come from urban cows, fed on distillery waste and full of bacteria. It was colloquially called swill milk. The dairymen sold it as though it was from the bucolic pastures of Westchester, outside the city, and labeled it “Pure Country Milk” when in fact it often came from Brooklyn.¹⁸ To make the milk go farther, the dairymen skimmed off the fat and added unsanitary water. To make it less blue, they added Plaster of Paris and the yellowish dye annatto. It looked creamy, but sometimes it contained puss from the infected cows. At least, so reported the journalist Frank Leslie. One morning in 1858 he picked up his milk pail and found inside it “a disgusting dose of milk and pus,” barely milk at all.¹⁹

As the century progressed, to prevent spoilage as the milk traveled, especially when it might have to sit in the hot sun for hours or longer, dairy men added chemicals, including boric acid and formaldehyde. These came under the trade names of Formalin and Preservaline. “Milk and cream kept thoroughly sweet and fresh for a week,” promised the Preservaline Manufacturing Company in an 1892 advertisement aimed at dairymen. “Healthful, tasteless, simple to use, and cheap.”²⁰ It also killed children.²¹

There was no way of knowing which of the thousands of children who died each summer were killed by rotten food, poisonous chemicals, diphtheria, or myriad other diseases. Even today, it would be hard to figure out the answer to these questions.²² Newspapers re-

16. *Id.* at 285.

17. ROBERT M. HARTLEY, AN HISTORICAL, SCIENTIFIC, AND PRACTICAL ESSAY ON MILK, AS AN ARTICLE OF HUMAN SUSTENANCE; WITH A CONSIDERATION OF THE EFFECTS CONSEQUENT UPON THE PRESENT UNNATURAL METHODS OF PRODUCING IT FOR THE SUPPLY OF LARGE CITIES 239 (1842) (referring to the swill milk manufacturers as “poisoning the fountain of life at its source.”).

18. *Id.* at 320–21.

19. *How We Poison Our Children*, N.Y. TIMES, May 13, 1858, at 8.

20. Advertisement, DAILY PICAYUNE, Mar. 22, 1892, at 6.

21. TIMOTHY D. LYTTON, OUTBREAK: FOODBORNE ILLNESS AND THE STRUGGLE FOR FOOD SAFETY 24–49 (2019); RICHARD A. MECKEL, SAVE THE BABIES: AMERICAN PUBLIC HEALTH REFORM AND THE PREVENTION OF INFANT MORTALITY, 1850–1929 11 (1990).

22. For example, there is an ongoing dispute among economists as to whether public health efforts during this period contributed to the decline of infant mortality. *See generally* D. Mark

ported 1,000 deaths in Chicago attributed to adulterated milk in August of 1900.²³ Yet more were reported in Indianapolis, Indiana that same month.²⁴ “How many children have died in during the past two years from using ‘embalmed’ milk is not and cannot be known from the records in the board of health office,” wrote an Omaha newspaper, “but that a number of the deaths reported to be from convulsions, cholera infantum and other diseases of small children were directly due to the use of formaldehyde is believed by those who have investigated the matter.”²⁵

Experimentation with chemicals to preserve milk and prevent food poisoning started early. In the 1830s a Parisian chemist named Jean-Pierre D’Arcet experimented with chemical additives, adding “one grain of super-carbonated soda”—what we know today as sodium carbonate or washing soda—to the swill milk he served his family. One of his children, who was particularly sickly, recovered his health. The chemically treated milk did not make the child as sick as the swill milk, D’Arcet claimed.²⁶ But too much sodium carbonate is poisonous, causing ulcers and damaging the gastrointestinal tract. “It is time the world had learned,” wrote Robert Hartley, a temperance advocate who discovered the dangers of swill milk in the 1840s, “that medicine cannot be safely used as daily food or drink, without leading to disease.”²⁷ The chemical solution recreated the same problems it was intended to solve.

Increasingly over the course of the nineteenth century, public health officials and doctors’ groups recognized the danger and sounded alarms.²⁸ Still the chemical companies argued for the salutary nature of their products, which killed the deadly bacteria present in so much of the milk. And many believed them. In the end, the problem of proof ended up being a problem of belief, intuition, and individual experience.

Illustrative of the general attitude of chemists during this period is an article by Dr. Bruno Terne, a chemist who worked on fertilizers. In 1892 Terne wrote an article in *Scientific American* on Perservaline,

Anderson et al., *Reexamining the Contribution of Public Health Efforts to the Decline in Urban Mortality*, 14 AM. ECON. J.: APPLIED ECON. 126 (2022).

23. *Deaths Traced to Formaldehyde: Indianapolis Cases Interest Omaha Health Board in Milk Tests*, OMAHA WORLD-HERALD, Aug. 15, 1900, at 6 (reporting on deaths in Chicago and Indianapolis).

24. *Id.*

25. *Id.*

26. HARTLEY, *supra* note 17, at 181–82.

27. *Id.*

28. LYTTON, *OUTBREAK*, *supra* note 21, at 24–49.

one of the culprits of the milk crisis that was sweeping American cities in the 1890s.²⁹ He began his article with the chemical makeup of the product and its expense. On this matter, his language was strong. “Without any doubt this product, on account of the large quantity of borax in its composition, will act as a good preservative”³⁰ He wrote, “but it is unquestionably a fraud upon the public, so far as the selling price is concerned”³¹ He was reluctant to state that the chemical was harmful in food but felt quite comfortable criticizing the manufacturer for selling under its brand name two relatively cheap ingredients (borax and salt) at an inflated price. Only at the end of the review did he consider safety: “We have no positive knowledge of the action of large quantities of borax upon the human organism, when taken internally,” he equivocated, “though there can hardly be any doubt that, if taken even in small doses continuously for a considerable time, its effect must be hurtful.”³² But he didn’t *prove* the harm, and nobody else did either. This absence of evidence would later become a problem, when skeptical judges were asked to convict milk sellers who doctored their products with chemicals in violation of the criminal laws.

II. THE CRIME OF ADULTERATION

There were many reactions to deadly milk. One of the main tools was criminal statutes. During the period frequently associated with laissez-faire economics there was significant local regulation of products like milk. Even in the same term that the U.S. Supreme Court struck down legislation limiting baker’s hours, ushering in the *Lochner* era, it upheld a New York milk regulation.³³ As the Supreme Court majority wrote in 1934 in a case upholding price regulations for milk, “[s]ave the conduct of railroads, no business has been so thoroughly regimented and regulated by the State of New York as the milk industry.”³⁴ After making this statement, the Court then listed myriad regulations to make milk safer that had been passed since the

29. Dr. Bruno Terne, “*Preservaline*,” *A New Preservative for Meat*, 33 SCIENTIFIC AM. SUPPLEMENT, No. 840, Feb. 6, 1892.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Lochner v. New York*, 198 U.S. 45 (1905) (striking down legislation limiting baker’s working hours); *Lieberman v. Van de Carr*, 199 U.S. 552 (1905) (upholding conviction for selling milk without a license and by extension the accompanying law regulating milk). For a discussion of the importance of milk to constitutional law, see Mathilde Cohen, *Of Milk and the Constitution*, 40 Harv. J.L. & Gender 115 (2017).

34. *Nebbia v. New York*, 291 U.S. 502, 521 (1934); Hurst, *infra* note 44, at 93–94.

1860s. These regulations demonstrated that the idea that local governments could legislate to promote the general welfare was unexceptionable.³⁵ *Salus populi suprema lex esto.*

One of the choices legislatures had to make was how to regulate chemicals in the milk, if at all. There were challenges at the legislation stage, where lobbyists for chemical companies tried to limit the regulation of their products, and challenges at the prosecution stage, where judges were unconvinced of the danger. Two stories illustrate these difficulties.

A. *A Fistfight at the Legislature*

On Wednesday, April 12, 1899, Henry T. Latshaw, candidate for the state legislature and President of the Standard Savings & Loan Company of Kansas City, Missouri, walked into the meeting of the legislative Committee on Criminal Jurisprudence and attacked T. B. Bruckner.³⁶ The men had to be pulled apart by the legislators who were debating that afternoon.

Why would a respected public figure like Latshaw hit another man unprovoked? And in such a public setting? The reason was that poisoned milk had killed his child. Just a month before, in March of 1899, the health officer of Kansas City, Missouri announced a crack-down on milk adulterated with formaldehyde. “As it is a deadly poison when used in sufficient quantities,” the local newspaper reported, “the health board of the state has taken steps to prevent its use before some milk dealer, by putting too much of the stuff into one of his cans, manages to poison a big section of the community.”³⁷

We don’t know if it was a boy or a girl who died, but we can infer that Latshaw’s child was probably under five, the age range with the highest mortality rate during that period. It seems likely she died that March, around the time that the health commissioner made his announcement that the milk was tainted, and that the wound was still fresh that April. Many children died, and many parents, like Henry Latshaw, grieved. A Philadelphia newspaper summed up the feelings of many activists and parents just a few years later: “Embalmed milk tends to make embalmed babies; let us have no more of it.”³⁸

35. See generally WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH CENTURY AMERICA* (1996).

36. Latshaw was president of the Standard Building & Loan Co. of Kansas City, Missouri. Advertisement, *KAN. CITY TIMES*, Jan. 2, 1890, at 5. He was also a lawyer. *Scruggs Patrimony Suit*, *KAN. CITY TIMES*, June 26, 1894, at 3 (describing Latshaw as lawyer for the plaintiff).

37. *DULUTH SUNDAY NEWS TRIBUNE*, Mar. 12, 1899, at 6.

38. *PHILA. INQUIRER*, July 27, 1903, at 8.

Just as Latshaw walked into the building, Bruckner was speaking to the committee against proposed legislation criminalizing adulterants in milk. His company sold boric acid to local dairymen. These chemicals aren't dangerous, he explained to the legislators, and they are needed to keep the milk fresh when it must travel long distances. Latshaw must have heard him from outside the committee room as he passed by and his reaction to this speech was quick as it was violent. He rushed into the room and started telling the committee how "embalmed" milk was dangerous to children. His anger bubbled over, and he attacked Bruckner, attempting to punch the lobbyist until bystanders broke up the fight.³⁹

That spring day in 1899, on the cusp of the new century, the legislators in Missouri were deciding two things when they were interrupted by that fight. First, whether the milk should be regulated at all and second, whether it was the jurisdiction of the Committee on Criminal Jurisprudence or the Committee on Public Health. No legislation was passed that year.

Latshaw had another avenue for redress. He could have sued the dairyman who sold him the milk in tort. Latshaw was a successful plaintiff's lawyer, as it happens, in addition to his other business and political ventures.⁴⁰ Wrongful death was a statutorily recognized cause of action, having been codified in Missouri in 1855.⁴¹ He could have sued for negligence or fraud. Although the life of a child was probably not worth very much in 1899,⁴² it would have been a way for Latshaw to pursue some form of justice. Then again, in 1898, a Tennessee Supreme Court case described a verdict of \$3,000 for the death of a child by accidental poisoning.⁴³ We do not know for sure, but the likelihood is that Latshaw did not sue.

39. *Quarreled over the Milk Bill. Two Kansas City Men Nearly Come to Blows in the Argument*, KAN. CITY STAR, Apr. 13, 1899, at 4.

40. See *supra* note 36 (article describing Latshaw's representation of the plaintiff in a high-profile patrimony litigation).

41. DAVID WAGNER, *THE STATUTES OF THE STATE OF MISSOURI* (1872); Stacey Ann Lannert, *Dueling Decisions: The Wrongful Death Clock Clangs Twice on the Same Day*, 81 MO. L. REV. 583, 591 (2016).

42. See generally VIVIANA ZELIZER, *PRICING THE PRICELESS CHILD* (1994).

43. *Wise v. Morgan*, 48 S.W. 971, 971 (Tenn. 1898) ("Defendant in error recovered a verdict and judgment in the circuit court of Hamilton county against Harry Wise & Co. for the sum of \$3,000 damages for the negligent killing of his daughter, Ella Morgan, a child about three years old."). In that case, however, the Supreme Court of Tennessee reversed the judgment on the grounds that it would be absurd for the applicable statute to be read to require that every product compounded in a pharmacy and containing a poisonous ingredient be labeled a poison. *Id.* at 974.

Latshaw probably did not file a suit for cultural reasons; one might call it a limitation of his legal imagination. What we know of the historical record indicates that tort suits arising out of dangerous products were not very common during the nineteenth century.⁴⁴ There was talk in treatises and scholarship about increases in tort cases during this period, which have been documented by historians, but most of these seem to have been workplace or street accidents.⁴⁵ There are, however, a number of influential opinions at the highest courts in the old reports dealing with defective products, and these indicate that there must have been some litigation around the issue.⁴⁶

As the decision facing the Missouri legislature indicates, the law's approach to dealing with milk adulterated with formaldehyde or boric acid, which is a dangerous and even fatal product, was either local public health regulations or criminal fines. Constant newspaper coverage, especially lamenting the dangers of milk, is evidence that risky products were very much on the minds of newly urbanized Americans whose children were dying and who had no choice but to buy their milk from the dairyman, who adulterated it with water, dyes, Plaster of Paris, and various chemicals before sale.

44. Lawrence M. Friedman, *Civil Wrongs: Personal Injury Law in the Late 19th Century*, 12 AM. BAR FOUND. RSCH. J. 351, 355 (1987); Lawrence M. Friedman & Thomas D. Russell, *More Civil Wrongs: Personal Injury Litigation 1901-1910*, 34 AM. J. LEGAL HIST. 295, 302-03 (1990); James Willard Hurst, *Initiative and Response, in LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY: FIVE LECTURES DELIVERED AT THE UNIVERSITY OF MICHIGAN NOVEMBER 9, 10, 11, 12, AND 13, 1959* 95 (1960) ("In theory the consumer of impure or adulterated milk might have remedies for breach of contract or warranty of quality, or in tort for fraud or for damage caused by the seller's negligence; in practice the interest of private litigants proved insufficient to provide a pattern of regulation out of suits in contract or tort.")

45. G. EDWARD WHITE, *LAW IN AMERICAN HISTORY, VOLUME II: FROM RECONSTRUCTION THROUGH THE 1920s* 243 (2016); Eli Shelby Hammond, *Personal Injury Litigation*, 6 YALE L. J. 328, 332 (1897). The cases complained of do not seem to have involved products. *See also* RANDOLPH E. BERGSTROM, *COURTING DANGER: INJURY AND LAW IN NEW YORK CITY, 1870-1910* (1992); ROBERT A SILVERMAN, *LAW AND URBAN GROWTH: CIVIL LITIGATION IN THE BOSTON TRIAL COURTS, 1880-1900* 105 (1981); Friedman, *supra* note 44. Margo Schlanger, *Injured Women Before Common Law Courts, 1860-1930*, 21 HARV. WOMEN'S L.J. 79, 86 (1998) (describing rail and carriage accident cases).

46. *See, e.g.*, *Moon v. N. Pac. R.R. Co.*, 48 N.W. 679, 681 (Minn. 1891) (railcar manufacturer liable to brakeman for defective brakes); *Empire Laundry Mach. Co. v. Brady*, 60 Ill. App. 379, 383 (Ill. App. Ct. 1895), *aff'd*, 45 N.E. 486 (Ill. 1896) (automated wringer machine); *Huset v. J. I. Case Threshing Mach. Co.*, 120 F. 865, 872 (8th Cir. 1903) (thresher); *Leas v. Cont'l Fruit Express*, 99 S.W. 859, 861 (Tex. Civ. App. 1907) (defective handhold on railcar brake); *Davidson v. Montgomery Ward & Co.*, 171 Ill. App. 355, 365-67 (Ill. App. Ct. 1912) (defective handsaw); *Lewis v. Terry*, 43 P. 398, 398-99 (Cal. 1896) (murphy bed); *Thomas v. Winchester*, 6 N.Y. 397, 397 (1852) (mislabelled medicine); *Fisher v. Golladay*, 38 Mo. App. 531, 536 (Mo. Ct. App. 1889) (failure to label poison); *Blood Balm Co. v. Cooper*, 10 S.E. 118, 119 (Ga. 1889) (injurious medicine).

Newspaper articles lamenting the death of a child usually called for criminal penalties and made no mention of a civil suit. As early as the 1850s, Frank Leslie's *Illustrated Newspaper* in New York, angry about bacteria-laden milk sold in that city, agitated for stricter criminal laws:

For the midnight assassin we have the rope and the gallows; for the robber the penitentiary; but for those who murder our children by the thousands we have neither reprobation nor punishment. . . . It has become a byword among the great rogues of the country that conviction is impossible where the culprit has wealth, and the existence of so high a misdemeanor in our midst as the vending of that liquid poison, swill milk, is another damning fact in support of the prevailing belief of the nullity of our laws, or the criminal inertness of our governmental authorities for protecting the rights of our citizens.⁴⁷

In 1906 Congress passed a long-awaited Pure Food and Drug Act, the first legislation to federally regulate adulterants in food.⁴⁸ Legislation like it had been under discussion for decades.⁴⁹ The Act provided for a fine of not more than \$500 or not less than one year's imprisonment, with an increased penalty for repeat offenses, and for manufacturers of adulterated and misbranded food. It gave the Department of Agriculture the power to promulgate regulations about adulteration and to inspect facilities. Although it was the first step towards a national regulatory regime, the Act also was very limited. The Pure Food Act did not require testing of substances prior to their use, unlike the Biologics Control Act of 1902, which mandated annual licensing of vaccine producers before they could distribute vaccines.⁵⁰ It was underfunded, and inspections were extraordinarily limited.⁵¹ And the penalties were not onerous—\$500 in 1906 is approximately \$15,000 in today's dollars. Still, it was more than most local ordinances fined the milkmen.

Even before the Pure Food and Drug Act was passed, local ordinances criminalizing adulterants in food were widespread. Criminalization was the primary way legislators addressed dangerous products, including food. Part of this may have been a personnel issue. There was no bureaucratic apparatus in most cities, and the burden of enforcement naturally fell on the people who were already doing it: prosecutors. Weak criminal enforcement was a chronic problem

47. *The Swill Milk Trade of New York and Brooklyn*, FRANK LESLIE'S ILLUSTRATED NEWSPAPER, May 8, 1858, at 359.

48. Pure Food and Drug Act of 1906, Pub. L. No. 59-384, 34 Stat. 768.

49. See generally JAMES HARVEY YOUNG, *PURE FOOD: SECURING THE FEDERAL FOOD AND DRUGS ACT OF 1906* (1989).

50. *Id.* at 148-49.

51. *Id.*

throughout the nineteenth century according to historians.⁵² At least, it was complained of.⁵³ Still, as William Novak's work has shown, municipal ordinances were enforced.⁵⁴

In part because of the limitations of scientific knowledge, local prosecutors faced uphill battles when trying to enforce criminal penalties against adulteration. And even if they succeeded, the penalties were small. Consider a trial that took place in August of 1900, a little over a year after Latshaw hit Bruckner.

B. *The Judge Gets Food Poisoning*

An Omaha milkman named J.C. Root was caught adulterating the milk he sold to local dairies with formaldehyde. A criminal statute had been passed in Nebraska, making adulteration of milk a misdemeanor subject to a fine.⁵⁵ Root pleaded guilty to adding the embalming fluid to keep the milk sweet, but in the court proceedings, he denied that it was harmful.⁵⁶

"I admit that I am guilty of putting a 'preserver' composition in the milk that I sell to the Waterloo Creamery Company and others," Root explained, "but I don't think that it is unwholesome. This may be adulteration, but it does no harm to either the milk or the people drinking it. One thing is certain, and that is I don't water it."⁵⁷

The prosecutor, having obtained this guilty plea, demanded a sentence. But Police Judge Gordon, who was assigned the case, refused. "While this man pleads guilty to adulterating the milk that he sells," the Judge opined, "he says that the embalming compound is not injurious to the health. Before I can pass upon this point, I must have proof that it is unwholesome."⁵⁸

The prosecutor was shocked. There is "no reason why he should not be punished the same as any other person who has violated a city ordinance." He complained. "If I can't get a sentence on a plea of

52. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 344 (2005).

53. See *The Swill Milk Trade of New York and Brooklyn*, *supra* note 47 (lamenting lack of criminal enforcement).

54. See LYTTON, *OUTBREAK*, *supra* note 21, at 27–31 (describing public health regulation of milk); NOVAK, *THE PEOPLE'S WELFARE*, *supra* note 35, at 193 (describing role of public health type regulation).

55. *Thinks it No Harm to Embalm Milk Judge Gordon Refuses to Punish J C Root Who Pleads Guilty to Having Adulterated Milk*, *OMAHA WORLD-HERALD*, Aug. 4, 1900, at 2.

56. *Id.*

57. *Id.*

58. *Id.*

guilty, I don't see what use there is in going through the farce of a trial."⁵⁹

"I take the ground that I don't know that this embalming composition is unwholesome." The judge responded, "If it's not unwholesome, then I take it does not adulterate the milk."⁶⁰

How could the impasse be resolved? By an experiment. The judge announced that he would drink the milk to find out for himself. He headed over to the local chop house where he regularly had his lunch, followed by reporters.⁶¹ On his way there he was heard to say:

I'll just try some of that 'embalmed' milk. If it kills me, then it will be apparent to the world that my decision was wrong, but I will be where the finger of criticism will not be pointed at me. If I live and am not sickened, then it will be conclusive evidence to me, at least, that 'embalmed milk' is good for man.⁶²

At the restaurant, he hoisted himself onto a high stool, tucked a napkin under his chin, and ordered a bowl of half and half and a glass of milk. It tasted delicious, the judge told the man seated next to him, probably for the benefit of the reporter taking notes: "This is fine milk. Tastes like that we got when I was a boy."

"Then," the newspaper reported, "he went out prepared to either die or live in the interest of law and the justification of his ruling."⁶³

Days later, Judge Gordon was still so sick he could not go to work. The diagnosis? Deranged stomach. The journalists speculated: Was his illness due to the milk or from eating an excess of green corn?⁶⁴

The aptly named Police Judge Learn, who replaced Judge Gordon in the case of J.C. Root, the embalmed milk seller, did not want to find out. When the journalists asked him if he would taste the milk, he declared that he had been "weaned a number of years ago."⁶⁵ He fined Root \$25, which would be about \$750 in today's dollars. "Providing a large enough fine is imposed I think that we can make it an object for milk dealers to stop doctoring their milk," he said.⁶⁶

59. *Id.*

60. *Id.*

61. *Tries the "Embalmed" Milk. Judge Gordon Says He Knows Whereof He Speaks When He Declares Doctored Beverage Not Injurious*, OMAHA WORLD-HERALD, Aug. 5, 1900, at 14.

62. *Id.*

63. *Id.*

64. *Judge Gordon on the Sick List. Sufferers from Deranged Stomach—is "Embalmed" Milk the Cause?*, OMAHA WORLD-HERALD, Aug. 15, 1900, at 6.

65. *Learn Declines the Milk*, OMAHA WORLD-HERALD, Aug. 15, 1900, at 8.

66. *Milk Men Pay Their Fines. Acting Judge Learn Taxes Them \$15 to \$25 and Costs for Formaldehyding*, OMAHA WORLD-HERALD, Aug. 16, 1900, at 3.

After the sentencing, the prosecutor told reporters to expect more: “We have started in on this and prosecutions will be kept up until every dealer is forced to sell pure milk.”⁶⁷

Why did Judge Gordon resist imposing a fine on Root, when the fine, after all, was relatively minor? One speculation is that Root was a respected businessman in Gordon’s eyes, and he was loath to doubt Root’s claims that the products he used were not dangerous to human health. Another is that Judge Gordon was an optimist about technological and chemical innovations, presuming they were safe and beneficial. It is impossible for us to know today.

One of the traditional hallmarks of criminal law is that most crimes require some form of intent. But the new crimes of milk adulteration were different; they required only a showing that the dairyman had added something to the milk, be it water, borax, or formaldehyde. And the punishment was not a jail term but a fine. The task of enforcing the laws fell to the prosecutors. Sometimes the prosecutions succeeded, but J.C. Root’s story illustrates that there were at least some instances when the judges were reticent. We also know the fines were small and could easily be just a cost of doing business. By the time the milkmen were caught, they had sold the milk, and in the event that a fine was levied, the profit margin on watered-down milk doctored with chemicals was enough to keep them in business.

III. BUYER BEWARE?

Local public health departments shared jurisdiction with prosecutors over dangerous food adulterants such as formaldehyde. It seems likely that prosecutors learned of adulteration from public health officials, who were able to test food or to send it out for testing to see if it in fact contained the poisons alleged. For example, in 1885, the Health Commissioner of Brooklyn, New York announced that he had had pickles tested and learned that they were made using a copper sulfate solution, an additive that made the pickles a vivid green. At high doses, copper sulfate is toxic. So it was to an eight-year-old girl, Mary Martin, who ate part of a pickle and died. Testing revealed enough copper in the pickle to “kill a man.”⁶⁸ Reporting on her death, the *New York Times* called on the Health Commissioner to track down the manufacturer, and for prosecutors to prosecute.⁶⁹ No civil suit was reported.

67. *Id.*

68. *Poison In Pickles*, N.Y. TIMES, July 3, 1885, at 4.

69. *Id.*

Despite these calls for criminal prosecution from the newspapers, health officials were sometimes surprisingly lackadaisical when it came to prevention, preferring to rely on market forces. The idea was that if the consumer had been warned, that would be sufficient to address any problems caused by dangerous products. This is a market-based conception of private ordering, which sounds in contract, rather than a duty-based conception, sounding in tort.

In May 1899, one month after Latshaw's assault on Bruckner, Dr. Spaulding, the health commissioner of the city of Omaha, Nebraska became concerned about rising reports of formaldehyde in milk. He had samples of milk tested and found most of it was contaminated. Dr. Spaulding made a public announcement that was reported in the local papers: the milk being sold in the city was "unwholesome and indigestible."⁷⁰ But he was not terribly sympathetic to the parents whose children might be at risk, stating that because they had been warned "mothers whose babies are made ill by using the embalmed milk will have only themselves to blame."⁷¹

Dr. Spaulding favored private ordering as the solution to the problem of chemicals in milk. He hoped "that with the active assistance of the majority of the householders of the city it will be able to compel the milk dealers to quit their embalming or else quit the business."⁷² This buyer-beware mentality conveniently blamed mothers rather than milkmen. But it also expected consumers to be the main actors in the regulation of dangerous products like milk, rather than the law.

It did not have to be this way. A city ordinance authorized the meat inspector not only to inspect dairy sellers, but to discard their wares (specifically, to throw them into the Omaha river) and to seek a fine of between \$10 and \$100, or thirty days imprisonment.⁷³ The milk dealers could have been punished or prosecuted, and while the penalties were low, still there were penalties. But Dr. Spaulding preferred a different, market-based approach.

Today, this type of situation is the kind that might lead to tort liability if a child were poisoned by formaldehyde. But there were no reported lawsuits in the newspapers, nor are there lawsuits involving milk in the reported decisions, both in Nebraska and everywhere else.

70. *Embalmed Milk in Omaha. Large Proportion of Lacteal Fluid Brought to City is Chemically Treated*, OMAHA WORLD-HERALD, May 28, 1899, at 15.

71. *Id.*

72. *It is Worse and More of it. Samples of Chemically Treated Milk and Cream Pouring into Health Office*, OMAHA WORLD-HERALD, May 30, 1899, at 8.

73. OMAHA, NEB., REV. ORDINANCES ch. 41, §§ 5 (milk inspection); 7 (power to condemn); 10 (penalty) (1890), <https://hdl.handle.net/2027/nnc1.cu56596936?urlappend=%3Bseq=358%3Bownerid=27021597768571797-364>.

This is despite the reports of thousands of deaths from the stuff. Suits in tort, a safety valve with respect to other products, such as meat,⁷⁴ were not used by the injured to hold milk dealers accountable in tort for their poisonous milk.

This was not a case of true *laissez-faire*. The product was regulated and there were penalties for adulterating milk, although perhaps enforcement was too lax and the likelihood of being held to account too uncertain to deter adulteration sufficiently. The buyer-beware mentality was not legally mandated.⁷⁵ In some judicial opinions, however, it was important to the court that the seller have had some sense of the risk of injury. Merely injuring was not enough, there had to be a warning to the producer of the good that it might be defective before a court would find liability. Contrast two cases, from 1897 and 1888, that demonstrate these two approaches.

In 1897, the Supreme Court of Illinois held that a butcher owed his customers food that was safe. The court explained that the butcher was in a better position than the customer to know whether the meat was safe to eat. “[It] is much safer to hold the vendor liable than it would be to compel the purchaser to assume the risk,”⁷⁶ recognizing liability not only in situations where the customer could not inspect the product, as in the case of canned goods, but with respect to any meat that was defective. The court based its views on an argument that would become popular in the late twentieth century: that the best cost avoider should bear the risk of loss.⁷⁷ The butcher and the canner are in a better position than the customer to take precautions to prevent losses due to food poisoning, the court held, and therefore they should bear the cost of injury to incentivize them to take greater care.⁷⁸

Contrast that outcome with an earlier case, reported in the newspapers, in which no liability was found. In 1888, a woman named Theodora Kayler of New York sued the large provision firm of Thurber & Co. She claimed that a can of tomatoes she had bought was poisoned

74. *Wiedeman v. Keller*, 49 N.E. 210, 211 (Ill. 1897) (butcher liable for sale of meat that caused food poisoning); *Craft v. Parker, Webb & Co.*, 55 N.W. 812, 813 (Mich. 1893) (holding that seller of meat is liable for injuries caused by food poisoning); *Bishop v. Weber*, 1 N.E. 154, 154 (Mass. 1885) (same).

75. For example, there were successful lawsuits for food poisoning. *See, e.g., Bishop*, 1 N.E. at 154.

76. *Wiedeman*, 49 N.E. at 211.

77. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 175 (1970) (describing the best cost avoider as “that reduction or alteration in activities which gives us the optimal primary cost avoidance.”) (emphasis omitted).

78. *Weideman*, 49 N.E. at 211.

by “muriate of zinc” or zinc chloride, used to solder the top of the can.⁷⁹ She sought \$50,000 in damages, a substantial sum in those days.⁸⁰ The jury found for the defendant. According to the news item, there were no other reports of incidents of injury from the zinc in the tomato cans, and thus there would have been no way for Thurber & Co., or Shade & Johnson, the Maryland firm that canned the tomatoes, to know of the alleged risk.⁸¹

In the cases actually decided and for which we have opinions, most courts did not think like Dr. Spaulding that the buyer ought to be aware. They did not leave it to the consumer alone to influence manufacturers to sell safer products. Rather, the judges considered who was in the best position to know of the defect and put the responsibility on that person. If the manufacturer could not have known of the danger, as with Ms. Kayler’s case, then it was not to be held responsible unless it could be shown it was otherwise careless.⁸² But if the manufacturer was either careless, or worse, knew of the problem, it would be held liable.

Still, Spaulding’s idea that, having been warned, consumers were responsible for their own decision, resonates with broader ideas about the role of the marketplace versus the role of tort law with respect to injurious products today. Contract law facilitates private ordering, privileging parties’ expectations from one another and providing causes of action for disappointed expectations. It aims to mimic the marketplace.⁸³ Tort law, by contrast, delineates the duties people owe

79. Henry A. Riley, *Medico-Legal Cases*, 54 MED. & SURGICAL REP. 454, 454 (1886).

80. To get a sense of the amount, \$50,000 in 1913 (the earliest available date from the Bureau of Labor Statistics) is approximately \$1,514,326.53 in 2022 dollars. See *CPI Inflation Calculator*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/data/inflation_calculator.htm (last visited Oct. 13, 2022).

81. Riley, *Medico-Legal Cases*, *supra* note 79.

82. See, e.g., *Thomas v. Winchester*, 6 N.Y. 397, 402 (1852). In that case, the defendant druggist was likely not aware that they accidentally labeled the poison “belladonna” as the harmless medicine “extract of dandelion.” *Id.* at 405. They were nevertheless held liable because they had a responsibility to be careful in labeling—mislabeling was per se evidence of carelessness. *Id.* at 408–09.

83. *Denny v. Ford Motor Co.*, 662 N.E.2d 730, 736 (N.Y. 1995) (explaining the differences between defect in breach of implied warranty claims versus defect in products liability claims as follows: “The former class of actions originates in contract law, which directs its attention to the purchaser’s disappointed expectations; the latter originates in tort law, which traditionally has concerned itself with social policy and risk allocation by means other than those dictated by the marketplace.”). This distinction is not historically accurate. As Roy Kreitner has demonstrated, contracts started out as a fault regime and only developed as a strict liability regime—one that privileged parties’ agreements above status—later in the nineteenth century. Roy Kreitner, *Fault at the Contract-Tort Interface*, 107 MICH. L. REV. 1533, 1536 (2009). For a more modern discussion suggesting that product liability in tort should be jettisoned in favor of the market, see A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV.

to one another, in this case, the duties of manufacturers of dangerous products like formaldehyde-based preservatives, or as was more often the case, milk sellers owe to milk buyers.⁸⁴ As the New York Court of Appeals described the role of tort over one hundred years later, products liability is concerned with “social policy and risk allocation by means *other than those dictated by the marketplace.*”⁸⁵

IV. MODERN ECHOES OF A MILK CRISIS

Today a new crisis threatens babies: contaminated formula.⁸⁶ The Food and Drug Administration (FDA) filed an enforcement action against Abbott Laboratories to shut down their formula manufacturing plant in Michigan in May 2022.⁸⁷ The accusation was that the plant was contaminated with bacteria, and this in turn contaminated the formula. According to the Commissioner of the FDA, the conditions at the plant were “egregiously unsanitary.”⁸⁸ There was “a leaking roof, water pooling on the floor, and cracks in production equipment that allowed bacteria to get in and persist.”⁸⁹ The company and the government entered into a consent decree requiring Abbott to make safety changes.⁹⁰

In the meantime, four babies became extremely ill, and two died after consuming the formula, although some news reports say as many as three infants have died.⁹¹ The company claimed the deaths were not caused by bacterial contamination at the plant. As with the milk crisis of the nineteenth century, when infants might have died from milk poisoning or from water-borne disease, it was possible that the

1437, 1443 (2010). *But see* John C.P. Goldberg & Benjamin C. Zipursky, *The Easy Case for Products Liability Law: A Response to Professors Polinsky and Shavell*, 123 HARV. L. REV. 1919, 1945 (2010) (arguing in favor of products liability in tort).

84. Goldberg & Zipursky, *supra* note 83. *See also* Jay M. Feinman, *Implied Warranty, Products Liability, and the Boundary Between Contract and Tort*, 75 WASH. U. L. Q. 469, 471 (1997) (discussing the distinction between contract and tort in breach of implied warranty and products liability claims).

85. *Denny*, 662 N.E.2d at 736 (emphasis added).

86. Amanda Bronstad, *New Lawsuits Latch Onto Infant Formula Recall*, LAW.COM (Mar. 3, 2022), <https://www.law.com/2022/03/03/new-lawsuits-latch-onto-infant-formula-recall/>.

87. Complaint for Permanent Injunction at 1, 4, 20, *United States v. Abbott Lab’ys.*, No. 1:22-cv-00441 (W.D. Mich. 2022).

88. McKenna Oxenden, *Abbott to Restart Production of Similac Baby Formula*, N.Y. TIMES (Aug. 27, 2022), <https://www.nytimes.com/2022/08/27/business/abott-baby-formula-similac.html>.

89. *Id.*

90. *Id.*

91. *Id.* (two deaths); News Desk, *The Death of Another Baby Linked to Abbott Infant Formula Apparently Under Investigation*, FOOD SAFETY NEWS (June 25, 2022), <https://www.foodsafetynews.com/2022/06/the-death-of-another-baby-linked-to-abbott-infant-formula-apparently-under-investigation/> (three deaths).

infants had been exposed to the bacteria from some other source. Multiple civil lawsuits have been filed, and those in federal court were transferred to a new multidistrict litigation in August of 2022: *In re Recalled Abbott Infant Formula Products Liability Litigation*.⁹² Sixteen class actions alleged economic loss for formula purchasers were consolidated, along with two personal injury actions.⁹³ Such civil lawsuits were not imaginable when similar problems plagued the milk supply in the nineteenth century.

The problems we face today in the infant food supply are different in scope but not in kind from those faced by nineteenth century consumers and regulators. Many of the themes remain the same: careless production of important products meant for the weakest among us, denial of responsibility, substantial allegations of fault, as well as reliance on public entities (today the FDA, in the nineteenth century, local health inspectors and prosecutors) to use public law tools to enforce safety standards, and the failure of those agencies to prevent tragic deaths.

But there are also significant differences that teach us about ourselves, particularly in how similar harms were categorized then and now. Whereas in the nineteenth century, the focus was on local criminal regulations to prevent dangerous products from harming the most vulnerable, today national regulation and tort dominate products liability. Regulation at the front end is intended to prevent harm; litigation at the back end is meant to compensate for present losses and deter future misconduct. Crime hardly features in modern discussions about dangerous products, even when misconduct results in innocent deaths, as it did in the formula scandal. Criminal penalties are meted out only in rare instances.⁹⁴

Are Americans better off with more redundant institutions (criminal, regulatory, and tort) to address problems such as contaminated formula? The history told here demonstrates that often one or more institutions fail to protect vulnerable consumers. In the nineteenth century, public health officials such as Dr. Spaulding relied on market forces to limit the risk of adulteration and prosecutors, acting as regulators, were at the mercy of judges. Today, there are concerns that the FDA does not do enough inspections to prevent crises such as the Abbott formula debacle. Despite varied institutions aimed at address-

92. Transfer Order at 1, 3, *In re: Recalled Abbot Infant Formula Products Liability Litigation*, MDL No. 3037 (J.P.M.L. 2022)

93. *Id.*

94. See Adam S. Zimmerman & David M. Jaros, *The Criminal Class Action*, 159 U. PA. L. REV. 1385, 1450 (2011) (describing criminal penalties).

ing these problems and attempting to fill regulatory gaps, modern Americans still face crises that are too similar to those faced by nineteenth century parents. At the same time, the deaths in modern cases of contamination or poisoning are many fewer, thanks to recalls and other national governmental interventions, and we do not know how many crises are averted by the threat of litigation.

Imagine how many children might have been saved if there had been a national ban on using formaldehyde as a preservative in 1890 or if milk and chemical sellers had been subject to tort liability. Tort suits today allow people who are injured to bring civil lawsuits to hold companies accountable, in contrast to the nineteenth century when individuals were at the mercy of the Dr. Spauldings of the world. But today, the injured (and the companies they sue) are equally at the mercy of judges like Judge Gordon, who may or may not believe plaintiff's claims of causation. Criminal penalties for dangerous products are rarely sought. While we have always had at our disposal multiple categories of oversight—regulatory, criminal, and private enforcement—it seems the focus has ordinarily been on only one category of enforcement: criminal law or tort, but not both. In the nineteenth century, that category was criminal regulation. In the twenty-first, it is tort.

CONCLUSION

The history of nineteenth century attempts to stop the adulteration of milk with poisonous preservatives demonstrates that in the United States it has never been the case that people thought that the harm of dangerous products should lie where it falls. Criminal laws, local public health regulations, and local health departments played a much larger role then. National regulations, federal agencies, and tort causes of action play a larger role today. Both judicial opinions and newspaper reports from the nineteenth century demonstrate that there was little sense that it was the responsibility of the harmed individuals to bring wrongdoers to account using the private enforcement mechanism of tort law, at least with respect to poisoned milk. Even though people might have brought suits, they rarely did. Instead, newspapers called on governmental actors to do more and criminal laws to be strengthened.

My reading of modern media accounts of cases like the contaminated infant formula is that such calls for criminal action are very rare today. I have seen none in connection with the many reports on the events that gave rise to that contamination and its aftermath. Instead,

the modern focus is on private enforcement through tort, and public enforcement through federal administrative agencies.

Whether private actors bringing tort actions is the best way to hold companies accountable for dangerous products remains contested, but it is not the only way. In some important ways, tort has taken the place of criminal law as the doctrine through which blame and accountability are meted out. Excavating the history of criminal penalties for injurious products reminds us that there are more possibilities to create overlapping methods of enforcement to prevent injuries from dangerous products, including the use of criminal fines. As the twenty-first century progresses, it is worthwhile to consider experimenting with more overlapping enforcement mechanisms, tort *and* criminal penalties, at least in extreme cases of wrongdoing.