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# RIGHTS-TALK AND TORTS-TALK: A COMMENTARY ON THE ROAD NOT TAKEN IN THE INTELLECTUAL HISTORY OF TORT LAW

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PROFESSOR DAVID LEEBRON'S carefully researched and elegantly written exploration of the intellectual history of the tort law of privacy<sup>1</sup> encourages us to look beyond the often mundane front line issues of loss allocation and risk reduction in considering the shape of contemporary tort law. Professor Leebron's contribution to this Symposium on The Right To Privacy One Hundred Years Later not only describes the origins and the reactions to the Warren and Brandeis article,<sup>2</sup> but it also offers significant insights into the nature and the function of tort law in the late nineteenth century as well as in modern society.

While Professor Leebron's ideas stimulate thought on a number of different themes, this commentary is directed to the effort to place the Warren and Brandeis view of privacy on a road that was not taken in the intellectual development of tort law. I undertake this effort with some trepidation, and with the following caveat: I am not an intellectual historian, and furthermore, unlike some of the other things that I am not, I do not even play this role in the classroom. Thus, this commentary may resemble an outsider's view of this bit of intellectual history, but at the same time it is the view of a tort law insider.

Professor Leebron undertakes to ground the privacy protection Warren and Brandeis's article advocated in a meaningful notion of rights. This effort is especially interesting when it is combined with the corollary proposition that the intellectual

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1. Leebron, *The Right to Privacy's Place in the Intellectual History of Tort Law*, 41 CASE W. RES. L. REV. 769 (1991).

2. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

development of tort law has proceeded along a different line. Professor Leebron describes this development of tort law in a variety of ways: as focussing on a characterization of defendants' conduct, as a matter of interest protection for plaintiffs, and as a combination of compensation and deterrence functions. This commentary pursues two related lines of inquiry. First, should rights and the "stuff" of tort law be conceptualized as two distinct categories? Is there a meaningful distinction between rights discourse and some alternative discourse characterizing the law of torts? In other words, is there an important difference between "rights-talk" and "torts-talk?" Second, assuming such a difference is justified, what is its significance?

The logically antecedent of these two questions is the descriptive inquiry into the distinction between the rights-based philosophical roots of privacy in the Warren and Brandeis article and the something-other-than-rights roots from which contemporary American tort law developed. While there is no definitive answer to the question of whether Warren and Brandeis's view of privacy has a focus on rights that has subsequently been abandoned in the development and the operation of tort law, this question requires an investigation of two bodies of material. Professor Leebron provides us with strong evidence of the rights focus of the Warren and Brandeis approach and of its reception. However, we must also carefully question whether the rights focus has been lost in the intervening century since the publication of the Warren and Brandeis article. In answering this question, one might begin by examining the materials of modern tort law to quantify the extent of reliance on the language of rights. This involves more than a simple computer word search for the inclusion of the word "rights." Instead, the task requires a more sophisticated appreciation of whether today's tort law rests on the same sort of philosophical foundations that would be found in a rights-based body of law. One ought to determine whether contemporary tort law issues are decided with a view toward the nature of a person and the demands that flow from that nature, in a way that would show the influence of a deontological rights structure. Similarly, one might find that a consequentialist basis for tort decision making indicates that teleological rights language could be applied to the results of that decision-making process.

In addition to judicial opinions and formal scholarly writing, one should also investigate the professional communications of tort lawyers among themselves, particularly in forums such as the

meetings and the publications of plaintiff and defense trial lawyer organizations. Another important part of this inquiry would focus on the appellate briefs filed in both routine and landmark tort cases. These briefs constitute the subculture of the reported opinions we most frequently use in our attempt to construct a vision of the actual content of contemporary tort law.

My impression is that today this material contains a good deal of talk of the demands of justice and of the fairness of particular results, and that such talk has probably been a consistent feature of that body of material for a long time. In the major developments of the last few decades, the arguments for and against liability notions are routinely grounded in rights-talk. For example, justifications and rationales built on notions of justice and fairness have been the foundation for the blossoming of strict tort liability in product injury cases,<sup>3</sup> and similar contentions are apparent in the increasingly successful movement to restrict or reverse that trend.

There are at least two reasons why such language may not unequivocally indicate that contemporary tort law is rights-based. Perhaps judges, lawyers, and scholars are simply paying lip service to ideas having only the most peripheral relationship to the underlying policy concerns of today's tort law. If what is said is merely a screen for what is being done, this screen must be pierced to reach an informed and accurate understanding of tort law.<sup>4</sup> If this is true, however, one wonders why this type of dismissive approach should not be applied as well to those who seemed to engage in rights-talk a century ago.

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3. This is particularly evident in the writing of Roger Traynor during his years on the Supreme Court of California, beginning with *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944), where Justice Traynor stated:

Even if there is no negligence, . . . public policy demands that responsibility be fixed whenever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market . . . . Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury . . . may be overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects . . . . If such products . . . find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer . . . .

*Id.* at 461-62, 150 P.2d at 440-41 (Traynor, J., concurring).

4. The variations on this view range from the law and economics movement's search for efficiency explanations and norms for tort law to the critical legal studies movement's tendency to characterize law as involving a more conspiratorial effort.

A second response to my suggestion that one would probably find the concept of rights playing a significant role in modern tort law is that the rights-talk Professor Leebron identifies and quotes from the late nineteenth and early twentieth century writings differs *in kind* from the language of modern tort law. Without getting into a full-fledged development of the concept of rights,<sup>5</sup> I would simply suggest that there is the possibility that the rights-talk in the scholarly literature that Professor Leebron identifies and the justice and fairness language of modern tort law are sufficiently similar that they could illustrate different *conceptions* of rights, rather than fundamentally different *concepts* of rights.

In the technical sense of legal concepts, of course, it could be highly questionable to characterize the negligence theory of liability dominating contemporary tort law as something other than rights-based. Many scholars would agree that the central element of negligence liability is neither damage to the plaintiff nor the wrongful conduct of the defendant viewed in isolation.<sup>6</sup> Instead, negligence liability in American tort law since the first third of this century has for the most part been seen as a matter of duty.<sup>7</sup> Having accorded the concept of duty the central position in the analytical framework of negligence law, one could then acknowledge that the Hohfeldian correlative of a duty is a right.<sup>8</sup> Thus, the negligence claim of modern tort law could easily be rephrased in terms suggesting that rights, as correlatives of duties, remain at the heart of contemporary tort law.<sup>9</sup>

This somewhat skeptical note about the distinction between

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5. The most interesting recent addition to the literature on rights is J. THOMSON, *THE REALM OF RIGHTS* (1990).

6. For a recent debate concerning whether risky conduct alone should be a sufficient basis for liability, see Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 *UCLA L. REV.* 439 (1990), and Simons, *Corrective Justice and Liability for Risk-Creation: A Comment*, 38 *UCLA L. REV.* 113 (1990). Jules Coleman and Ernest Weinrib are perhaps the scholars whose work involves the most sustained exploration of this debate.

7. Leon Green was the leading proponent of the centrality of duty issues in tort law. See L. GREEN, *THE LITIGATION PROCESS IN TORT LAW* 153-247 (2d ed. 1977). See generally W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER & KEETON ON THE LAW OF TORTS* 356-59 (5th ed. 1984).

8. W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 36-38 (1919).

9. See, e.g., Coval & Smith, *Rights, Goals, and Hard Cases*, 1 *LAW & PHIL.* 451, 451 (1982) ("The function of the law of torts is the enforcement of rights through awards of compensation for damages suffered as the result of another person's breach of the duty which is the correlative of the right. . . . [T]ort law deals exclusively with rights and duties.").

the philosophical base from which Warren and Brandeis proceeded and the philosophical grounding of modern tort law ought not to detract from the extent to which Professor Leebron has identified a distinction that does exist and that does matter. The difference between rights-talk and tort-talk is important in the ways suggested in the second half of this commentary.

#### CHARACTERISTIC MODES OF DISCOURSE: RIGHTS AND TORTS

Rights-talk and torts-talk are types of discourse that proceed by and large at different levels of abstraction. Thus, the distinction worth pursuing is between rights-talk as a predominantly *conceptual* discourse and torts-talk as a discourse that is more sensitive to and more fully enriched by *context*.

Professor Leebron's terminology can be used to flesh out these categories of discourse. One of Professor Leebron's distinctions is between the *rights* lying at the heart of the natural-justice-based approach he finds in Warren and Brandeis's article and the *interests* that seem to be the major preoccupation of modern tort law. This distinction between rights and interests might be recharacterized as embodying the functional part of a distinction between a conceptual discourse on rights and a contextual discourse on interests.

The further normative implication that could then be drawn from this conceptual/contextual discourse distinction<sup>10</sup> is that tort law, which focuses on the interests at stake in resolving disputes, makes significant gains from the contextual sophistication of its inquiries. Similarly, the conceptual blindness to the world as it is and to the particular features of the dispute underlying a legal claim may distort and diminish the effectiveness of the legal doctrines that are developed.<sup>11</sup>

Is this distinction between a conceptual discourse about rights and a contextual discourse about interests useful? An affirmative

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10. I do not understand Professor Leebron's article necessarily to include this normative claim about the superiority of a rights-based theory of tort law. The superiority of the contextual discourse of tort law is instead a claim that I would make in response to the question raised earlier about why the distinction between rights-talk and tort-talk matters.

11. Interestingly, the two most conceptual of contemporary scholars of tort law, Richard Posner and Richard Epstein, each visited the topic of invasion of privacy at earlier stages of their careers. See R. POSNER, *THE ECONOMICS OF JUSTICE* 231-347 (1981); Epstein, *A Taste for Privacy? Evolution and the Emergence of a Naturalistic Ethic*, 9 J. LEGAL STUD. 665 (1980); Posner, *Privacy, Secrecy and Reputation*, 28 BUFFALO L. REV. 1 (1979).

answer draws on two different lines of inquiry. The first focuses on the work of tort *law*, which is the resolution of disputes, while the second concentrates on the task of tort *scholarship*, particularly the impressive kind of intellectual history scholarship Professor Leebron contributed to this symposium.

The tort law significance of a difference between a conceptual discourse and a contextual discourse can be fairly simply stated in the following way. Characterizing a dispute as a conflict of rights virtually begs for an either/or solution. On the other hand, when a dispute involves competing interests, there tends to be more room for accommodation and an expectation that an accommodation is an acceptable outcome.

This is admittedly something of an oversimplification. A full taxonomy of rights would include abstract and concrete rights, as well as absolute and qualified rights. Depending on the configuration of rights involved in a particular conflict, one might locate the dispute closer to, or even on the other side of, the line separating these categories. Nevertheless, the basic thesis of this distinction conveys a useful idea. Professor Leebron lends support to this in his identification and brief discussion of the differences in the remedies typically available for an interference with or a denial of one's rights (typically injunctions and other forms of equitable relief), and the remedy that plays the dominant role in tort litigation (an award of damages).

This difference in remedies can be incorporated into the terms of the distinction between rights and interests in a way that supports the suggested difference in disposition bias (either/or versus accommodation resolutions of disputes) associated with the difference between conceptual and contextual discourse. When examined in this light, the significance of the damages remedy generally available in tort law for an interference with a protected interest is that it allows a quantification, and even more precisely, a *monetarization*, of the harm that has been done and of the interest that has been invaded. The legal remedy, money damages, provides a *medium for accommodation* of the interests at stake. The remedy literally provides a *currency of compromise* of the competing interests.

Considering the other side of the rights/interests distinction, there is either a reluctance to engage in that sort of monetarization of rights or at least a stronger sense of the incongruity of the

quantification enterprise when it is applied to rights.<sup>12</sup> This point is nicely illustrated in the decisions of a group of free speech cases in which Vietnam war protesters in the 1970s challenged such matters as denials of access to military installations.<sup>13</sup> One of the legal issues these cases shared was whether the free speech claims asserted by the war protesters satisfied the amount in controversy jurisdictional requirement of the general federal question jurisdiction statute then in effect.<sup>14</sup> In the cases presenting that jurisdictional issue, the courts were forced initially to decide whether the rights, if any, of the war protesters to conduct their demonstrations or to distribute their literature inside the gates of military bases were worth more than the ten thousand dollar jurisdictional requirement. Suppose a court found a right existed, but that the controversy over that right did not satisfy the amount in controversy requirement. Or suppose that the jurisdictional amount was satisfied but no equitable relief was granted. The right asserted in those cases would have been substantially less meaningful if it were quantified at a low monetary value or if the plaintiffs had simply been awarded damages for its violation. The point of litigation about open access is to *get* access, whether to a courtroom, to official records, or as in those cases, to particular pieces of government property. Therefore, the most effective remedy is one enjoining future denials of access.

Another illustration of the incongruity of setting a monetary value on rights involves examining challenges to the death penalty. One can easily envision a profound disagreement about whether the death penalty violates the eighth amendment protection against cruel and unusual punishment. Suppose courts decided that the constitutional right *was* violated by the infliction of capital punishment. It would be odd if the court then decided that the appropriate remedy was an award of damages reflecting the loss

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12. See generally Comment, *The Jurisdictional Amount in Controversy in Suits to Enforce Federal Rights*, 54 TEX. L. REV. 545, 546 (1976) (discussing the difficulty in assessing the amount in controversy in actions to enforce rights).

13. See, e.g., *Greer v. Spock*, 424 U.S. 828 (1976).

14. See, e.g., *CCCO-Western Region v. Fellows*, 359 F. Supp. 644 (N.D. Cal. 1972); *Cartright v. Resor*, 325 F. Supp. 797, 809 (E.D.N.Y.), *rev'd*, 447 F.2d 245 (2d Cir. 1971), *cert. denied sub nom. Cartright v. Froehlke*, 405 U.S. 965 (1972).

The general federal question statute had contained an amount in controversy requirement from its inception in 1875. The requirement was eliminated in 1976 for actions against the federal government, its agencies, and its officers and employees who were acting in their official capacity, and it was removed entirely in 1980. See 1 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 0.62 [2.-2] (2d ed. 1990).

of income and support for the survivors of the prisoners who continued to be executed after the decision. Anything short of an enforceable prohibition against future executions would be considered ludicrous. Yet it is decidedly *not* the process of calculating and awarding monetary damages for the effects of death that would be odd about the situation. Tort law does exactly that many times every day, in resolving claims that are brought under wrongful death statutes.

The inappropriateness of the contentions offered in the course of this kind of inquiry about the monetary value of rights highlights an important point about the either/or nature of rights protection. A conceptual conflict invites discourse on a higher level of abstraction. The monetarization of the rights at issue in these illustrative cases is more than a little incongruous. In identifying the difference in remedies for invasions of rights and interferences with interests, Professor Leebron has given us an important insight that is useful in drawing the distinction between rights-talk and torts-talk.

Torts-talk tends to be more sensitive to context than is rights-talk. Resolving tort claims tends to proceed from the premise that conflicting interests may be accommodated so that no interest is totally rejected. The remedial innovation in the tort law of private nuisance illustrates the extent to which this premise actually drives the process of common law development.<sup>15</sup>

Rights-talk tends to be less sensitive to context than is torts-talk. Rights adjudication tends to proceed from the premise that rights are placed in jeopardy unless they are protected regardless of the context in which they arise. This premise may need to be narrowed in some situations. However, it does have some support in the current legal treatment of first amendment rights relating to the speech torts, especially as these rights are presented in defamation and invasion of privacy claims.

When speakers' first amendment rights are balanced against state interests in compensating victims of speech torts, the first amendment right almost always prevails.<sup>16</sup> In part, this occurs be-

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15. See, e.g., *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 108 Ariz. 178, 494 P.2d 700 (1972); *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

16. I realize that this is not the conventional wisdom on this issue. However, in the last quarter-century there has been an increasingly narrow range within which traditional tort doctrines in defamation and invasion of privacy claims have operated. Even in cases where media interests have not obtained the complete protection they have sought, the first

cause these cases almost uniformly balance the wrong items. The balancing process used now weighs the rights of the defendant causing harm against something other than the rights or interests of the plaintiff suffering harm to his reputation or privacy. Thus, a speech tort victim arrives at the balancing process carrying not the weight of his or her *own* rights or interests but rather whatever weight the state has chosen to attach to those interests.

Professor Leebron's article makes another interesting point in describing the relationship between the rights-based privacy discussion surrounding Warren and Brandeis's article and the subsequent location of a privacy right in the Constitution.<sup>17</sup> That relationship ought to suggest to tort litigants and their lawyers that there is a strategic option available in the invasion of privacy setting that is unavailable in the assertion of defamation claims. If there is a privacy right located in or derived from the Constitution, then there is the potential for a conflict between that right of the privacy invasion victim and the first amendment rights of the invader of privacy. Resolving disputes about privacy invasion could therefore involve a rights conflict in which both parties to the dispute possess rights that are matters of constitutional significance. This view of the conflict is significant when contrasted with defamation, where the due process cases indicate that reputation is not a constitutionally protected matter.<sup>18</sup>

To examine the second type of support for the significance of a concept/context distinction, one must turn from considering adjudication about rights and interests to the kind of scholarly endeavor Professor Leebron contributed to this symposium. Here, the same kind of sensitivity to context necessary for appreciating the discourse on interests in tort law is also useful in considering intellectual history.

In this inquiry, we should remain as interested in what is being done as we are in what is being said. There is considerable

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amendment has often sharply restricted the scope of common law liability for tortious conduct. See generally LeBel, *Reforming the Tort of Defamation: An Accommodation of the Competing Interests Within the Current Constitutional Framework*, 66 NEB. L. REV. 249, 249-50 (1987) (the Supreme Court has "wrenched" defamation from its "moorings and cast [it] adrift in search of a constitutional anchorage"); LeBel, *Emotional Distress, The First Amendment, and "This Kind of Speech": A Heretical Perspective on Hustler Magazine v. Falwell*, 60 U. COLO. L. REV. 315, 317 (1989) (Supreme Court's limitation of intentional infliction of emotional distress recovery is flawed).

17. See Leebron, *supra* note 1, at 802-07.

18. See, e.g., *Paul v. Davis*, 424 U.S. 693 (1976).

talk about justice, fairness, and rights in contemporary tort litigation and scholarship. If the language of a century ago *is* significantly different from the language customarily used today, then it is appropriate to go behind the language of natural law and natural rights and question what the authors were *doing* when they used that language. The questions to ask, then, are what did judges and scholars think they were accomplishing by employing that language, and is that something different from what people filling comparable positions today would consider themselves compelled to accomplish.

One possibility that suggests itself draws on a view of the legal world of a century ago as employing a more formalist concept of adjudication. Formalism places a fairly strong demand on judges, as well as on those who try to influence the work of judges in their advocacy and on those who try to explain the work of judges in their scholarship, to establish first principles. In a formalist decision-making setting, there is more of a demand to establish the major theses from which a deductive reasoning process would produce a particular result. Less formalist decision making can focus more on results and on the selection of appropriate rules and principles from a range of available and potentially competing standards. A difference in the institutional expectations about the nature of decision making and justifications for decisions may help to explain why there might be a difference in the nature of the discourse of the nineteenth century and today.

However, this final hypothesis ought not to be pushed too far. Even in a formalist period, there is a large amount of inductive reasoning and reasoning by analogy in the litigation and in the scholarship. Indeed, the early law and the formative scholarship on tort recovery for invasions of privacy are arguably just as inductive as they are deductive. There seems to be as much reliance on principles derived from legal materials dealing with matters such as property interests and protection of reputation<sup>19</sup> as there is reliance on first principles that are thought to be, or that are sought to be, treated as matters of natural law and justice.

Legal formalism may not sufficiently explain the nature of rights discourse that Professor Leebron argues is representative of the scholarly and judicial writing surrounding the emergence of a

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19. Professor Robert Post's contribution to this symposium provides compelling evidence on this point. See Post, *Rereading Warren and Brandeis: Privacy, Property and Appropriation*, 41 CASE W. RES. L. REV. 647 (1991).

tort claim for an invasion of privacy. However, a careful and critical examination of the context in which overtly conceptual language is used may help enrich our understanding of whether important differences exist, what those differences are, and how those differences might be explained.