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TORT WARS

Tort Wars brings together the diverse and usually insufficiently related strands of tort law and treats the moral, economic, and systemic problems running through those strands with a single analysis and a single theory. In that tort law employs theory at all, it is typically theory measured against notions of corrective justice or appeals to utility. Both have severe prescriptive restrictions and limited explanatory power and often stray from any useful description of tort cases in the courts. *Tort Wars* looks at the nature of dispute resolution techniques, criticizes the blasé justice and more esoteric utility theory, and examines the problems of both the legal academy and the veracity vacuum in the courtroom. Further, it explores the conceptual differences between tort and contract, locating contract as a subset of tort. It uses examples drawn from the edges of tort law in an attempt to measure central cases by the marginal ones and to provide a barometer of emerging legal and social change, achieved by imposing an individualized peace.

Joel Levin practices and teaches law in Cleveland, Ohio.

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For Mary Jane
Once, Now, Always,
and Forever

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Preface

This book represents a personal journey, with all the parochial, idiosyncratic, and narrow-minded limitations of such journeys. Having started life focused on an academic career in social science and history, I, like many who saw the waning of professional opportunities in the early 1970s, turned to law. Unlike my more focused colleagues, the tug of the academy continued to beckon, be it at an angle, and I went to Oxford to study philosophy – and proper British analytic philosophy at that. Philosophy degrees having much the same market currency as (and perhaps less caché than) social science degrees a decade earlier, I have spent my life practicing law, mainly, surprisingly enough to me, in a field few choose and hardly anyone with a "decent" degree mentions: tort law. Having handled several thousand tort cases of every kind and having tried close to two hundred while, at the same time, reading just enough in various fields to pass minimal competency to qualify to teach at several law schools that generously overlooked my limitations as a scholarly dilettante, I observed the obvious: academic studies (from economics to history to philosophy to science) present a small and remote voice typically lost in the din and clatter of the law courts.

The most daunting concern in writing this book is illustrated by a story a friend told me about the European history faculty where he taught. A senior and eminent member of that faculty wrote a book globally treating European history and asked for comments of the draft from his fellow historians. They all gave the same basic response. The book was brilliant, in general, but the treatment of their own particular field was just not right. Only ignorance of a field produces a free ride. Such is the problem with any treatment of law (although typically without the brilliance). In fact, as the question of "what is law?" remains so contentious, one could hardly expect that applying the controversial and inexact tools of philosophy, logic, economics, neural science, or common law reasoning – each themselves at least as contentious – would appease anyone. My apology to the reader who is more widespread than that, as I try to illuminate the dark by the candlelight of the obscure. The perspective here is rooted in readings, references, and subject matters whose choices are meanderingly my own, based on perhaps indefensible tastes in seminars, fields,

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books, and, of course, my legal practice, which is often a function of what client walks through the door.

However, that said, despite a seasoned cynicism gained from working within a tort system often teetering on the brink of catastrophe, a system too often populated by indifferent judges, ethically challenged and marginally competent lawyers, avaricious clients, hired-gun experts, dissembling witnesses, and increasing statutory reforms that are at once inscrutable, biased, ignorant, and arbitrary, I have become something of a proponent of tort law, if much less than an enthusiastic fan. Two events have helped to contribute to this conversion. First, having lived in Russia, my exposure to a society that views the legal system only as a last resort was chilling. Those skeptical of the Anglo-American legal system's ability to resolve disputes through a cumbersome, procedurally driven mechanism, with vague delineations of duty and finders of fact amateurish in their sophistication and knowledge, ought to ask what happens when all of this disappears. Blood-feuds, warlordism, mafioso remedies, and self-help all make for a thuggishness that permeates a daily life bereft of resort to law. Second, politics has become more directly involved with tort law – from tort reform to the Contract with America – and the focus has not been on improving a dysfunctional process but on stopping disagreeable results. The politics of reform represent a fundamental move from populism to authority. Juries are restricted, judges kept on tight leashes, remedies limited or assigned according to a schedule oblivious to individual needs. The driving force seems to be this: allowing everyone to have a hand in deciding tort cases is at least rash, probably imprudent, and occasionally dangerous. My own observation is that the mediocrity of the tort participants, like the mediocrity of the voters, yields vastly better results than the decisions of authoritative elites. Thus, parts of this book are not only more celebratory than I would have thought possible, but they are more celebratory than I, at almost any given moment, feel.

In any case, although this book's topic and plot are mine, a number of people have read and criticized drafts of the content, and, given my obstinacy in the face of enlightment, their help is particularly appreciated. Friends who have performed this favor include David Forte, Mark Gamin, Bob Lawry, Bill Leatherberry, Richard Mason, Max Mehlman, Tom Muzilla, Charles Ruiz-Bueno, Mike Ungar, Bob Warren, and Bob Yovovich, with Kathy St. John, Mary Jane Levin, Apu Paul, and Chris Vlasich providing long-suffering and invaluable service by closely reading and criticizing the entire manuscript. I appreciate the kindness of the American Bar Association, and its *TTIPS* journal, for giving me permission to use Chapters 3 and 4, modified and supplemented, for this book; and the gracious support of John Berger and Cambridge University Press in publishing this book. Finally, Mark Gamin encouraged me to begin this book, and my wife, Mary Jane, encouraged me to finish it. I owe them special thanks.

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