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THE VICISSITUDES OF TORT: A RESPONSE TO PROFESSORS RABIN, SEBOK & ZIPURSKY

Catherine M. Sharkey*

INTRODUCTION

Professors Robert Rabin, Anthony Sebok, and Benjamin Zipursky explore predictability and tort doctrine from three different vantage points. Professor Rabin takes a historical approach, presenting two dichotomies—liability rules versus standards and make-whole versus categorical approaches to damages—as lenses through which to explore the precarious role of predictability in the evolution of tort doctrine.¹ Professor Sebok showcases champerty, a much maligned form of third-party litigation financing, and argues that it should be characterized as a form of a socially valuable quasi-insurance risk-distribution mechanism as opposed to a shunned form of gambling.² And, finally, Professor Zipursky offers a critique of the Fourth Circuit Court of Appeals' and the U.S. Supreme Court's reasoning in *Snyder v. Phelps*—a case in which the picketing of anti-gay religious protesters at the funeral of a military soldier was protected by the First Amendment and thus insulated from tort liability for invasion of privacy or intentional infliction of emotional distress—as a misguided “jurisprudential critique” of the unpredictable, open-textured nature of liability standards of privacy and emotional distress torts.³

Three themes pervade these rich articles. First, I explore the use of unpredictability as a code word for an assault on tort doctrine in response to an out-of-control tort system. In Professor Rabin's historical account of the evolution of tort from a predominantly rules-based tort system through an explosion of standards-based, open-textured tort liability to a resting equipoise of standards hemmed in by rules at the outer boundaries, rules are linked with limited tort liability and

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1. See generally Robert L. Rabin, *The Pervasive Role of Uncertainty in Tort Law: Rights and Remedies*, 60 DEPAUL L. REV. 431 (2011).

2. See generally Anthony J. Sebok, *Betting on Tort Suits After the Event: From Champerty to Insurance*, 60 DEPAUL L. REV. 453 (2011).

3. See generally Benjamin C. Zipursky, *Snyder v. Phelps, Outrageousness, and the Open Texture of Tort Law*, 60 DEPAUL L. REV. 473 (2011).

standards are tied to expansive tort liability. Yet this correspondence—while perhaps unassailable as an overarching descriptive trend—is by no means inherent in the nature of rules. Rules, in other words, can operate in both directions, not only as a one-way downward ratchet on tort liability, but also in a pro-liability direction. Rabin focuses on the canonical “no duty” rules of the nineteenth century and the contemporary rules-based limitations on open-textured liability in the twentieth century. But largely missing from this historical account is the story of rules promoting tort liability, such as strict liability, vicarious liability, negligence per se, and the like.

Second, I probe the link between unpredictability and insurance. Here, when confronting unpredictability, those future elements or contingencies susceptible to measurement (risks) must be separated from those elements defying measurement (uncertainty)—or, to use Mark Geistfeld’s preferred term, ambiguity.⁴ Risks are insurable, whereas ambiguity is not (at least not until it can be tamed by predictions and measurement). But our social institutions of insurance are not guided by economics alone. Thus, Professor Sebok’s efforts to distinguish champerty from illegal gambling and to analogize it to a form of insurance will inevitably fall short of establishing social acceptance or embrace of the practice.

Third, I highlight the role of the U.S. Supreme Court and its incursions into the state law domain of tort in the name of predictability. Punitive damages have been a target over the past fifteen years, with the Court struggling under the rubric of substantive and procedural due process to rein in unwieldy awards. With *Exxon Shipping v. Baker*, the Court singled out unpredictability as the root problem of punitive damages and imposed a rule-like outer bound (a ratio of 1:1 punitive to compensatory damages).⁵ Professor Rabin is doubtful that the U.S. Supreme Court will achieve great strides in this endeavor to quell unpredictability. Professor Zipursky has considerable angst about the Court’s making inroads into privacy and emotional distress torts. Both of these cases raise the possibility that the U.S. Supreme Court is engaging in a direct challenge to settled tort doctrine. Such incursions are in keeping with the Court’s longer-term project of procedural reform of the civil litigation system in the name of unpredictability, but are novel in their ambition to launch frontal attacks.

4. Mark A. Geistfeld, *Legal Ambiguity, Liability Insurance, and Tort Reform*, 60 DEPAUL L. REV. 539, 539 (2011).

5. *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).

II. “NO DUTY” RULES AND PRO-LIABILITY RULES IN PURSUIT OF PREDICTABILITY

In contemporary debate, “unpredictability” has become a code word for an assault on tort doctrine in response to a tort system spinning out of control. Predictability, however, need not be so ideological. Predictability is a core rule-of-law precept, embodying the fairness principle of treating like cases alike. In the age-old, rules-versus-standards debate, predictability sides squarely with rules.⁶ But tort rules, and their associated predictability, can work in a liability-enhancing direction as well. In other words, there is no inherent link between a rules-based orientation and the constriction of tort liability.

Professor Rabin, nonetheless, frames his historical discussion of uncertainty with the perceived concerns of opening the “floodgates” of liability and “crushing liability.” Staving off these twin evils could be accomplished, first and foremost, by a reduction in tort liability and damages. Of course, clamping down on torts is one way to increase certainty, but the increased predictability would seem to be a mere byproduct of the main thrust to stymie tort liability. The main historical examples used throughout Professor Rabin’s article fit the general characterization of rules designed or deployed with the aim of keeping tort liability within diminished bounds: the contributory negligence rule, the tripartite division of entrants onto property, assumption of risk, and the economic loss rule.⁷ In comparing rules to standards, then, Professor Rabin overwhelmingly compares “no duty” rules with more discretionary (and pro-liability) standards. Professor Rabin is by no means blind to this—he writes: “As late as mid-twentieth century, tort standards of reasonable conduct—and the concomitant uncertainty inherent in case-by-case jury assessment of responsibility—were sharply circumscribed by a constellation of proscriptive rules (no-duty rules, by and large).”⁸ But the historical association between

6. See, e.g., Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 265 (1974) (concluding that because rules restrict courts (the secondary audience) they also make outcomes more predictable to regulated parties (the primary audience), which, in turn, encourages settlement of legal disputes); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (“Predictability . . . is a needful characteristic of any law worthy of the name. There are times when even a bad rule is better than no rule at all.”); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 62 (1992) (“[R]ules afford certainty and predictability to private actors, enabling them to order their affairs productively. Standards produce uncertainty, thereby chilling socially productive behavior.”).

7. I have long thought of the economic loss rule as the new manifestation of the now-defunct privity boundary, designed to forge the dividing line between contracts and torts. Perhaps Lord Abinger is vindicated here. See Rabin, *supra* note 1, at 431.

8. *Id.* at 435.

no-duty rules and the urge for predictability may nonetheless have skewed our contemporary perspective on the inherent link between the two.

The key point is that rules, in pursuit of certainty and predictability, could take us (at least theoretically) in two polar opposite directions in tort. At one end point lies no-duty rules; at the opposite resides no-fault rules of strict liability (or absolute liability).⁹

This latter pro-liability pole is (largely) curiously absent from Professor Rabin's account.¹⁰ There are, however, some glimpses. In a footnote reference, Professor Rabin mentions that Judge Cardozo "re-sort[ed] to primary negligence as a matter of law as a device for narrowing the scope of jury (read 'unpredictable') decision-making."¹¹ Negligence per se stands out as a stark example of a tort rule that operates in a distinctly pro-liability direction.¹² Defendant's violation of a legislative standard or regulation results in an automatic finding

9. See Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713, 719 (1965) (advocating a transition to "a system of nonfault enterprise liability" that "assesses the costs of accidents to activities according to their involvement in accidents"); see also Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 520 n.55 (1961) (explaining how the current negligence system "certainly results in less frequent liability damages than would a nonfault arrangement, [but] a nonfault system might result in considerably smaller damage awards"); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 510–11 (1985) (tracing the justifications for enterprise liability to the judicial opinions of Justice Traynor and the academic writings of Harper, James, and Prosser, which all "recommended absolute liability for manufacturers to encourage prevention of defects and to distribute risks broadly through the price of the product"). But see Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973) (critiquing predominance of negligence liability and developing a new approach to causation as the basis for a system of strict liability); Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974) (discussing invalid defenses—including private necessity, third-party compulsion, best efforts, and mistaken belief—and valid defenses, such as causal defenses, assumption of risk, and plaintiff's trespass, that should limit liability under a strict liability regime). Epstein's approach clearly rejects the notion that strict liability is necessarily pro-liability, given these structural limitations.

10. In previous work, Professor Rabin has argued that the ascension of enterprise liability had more to do with the evolution of thinking "about the social function of the tort system," as opposed to (as argued by Professor Priest and others) the transition from negligence to strict liability. See Robert L. Rabin, *Some Thoughts on the Ideology of Enterprise Liability*, 55 MD. L. REV. 1190, 1193–94, 1198 (1996). He points to *Rylands v. Fletcher* and the blasting cases as evidence that strict liability evolved contemporaneously with negligence liability. See *id.* at 1194–95. For my purposes here, I am interested not in the historical roots of enterprise liability, but simply in the (uncontroversial) point that both strict liability and enterprise liability represent a "rule-like" approach to liability, as compared with negligence-based liability. It is this aspect that is not fully recognized in Professor Rabin's present exploration of rules versus standards in tort law.

11. Rabin, *supra* note 1, at 433 n.13.

12. See Fleming James, Jr., *Statutory Standards and Negligence in Accident Cases*, 11 LA. L. REV. 95, 107 (1950) ("[T]he negligence per se rule sometimes tends to expand liability in desira-

of breach of a duty of care; plaintiff is relieved of the burden of proving this element in his or her particular case (as necessitated by the standard of reasonable care). The rules-versus-standards debate plays out in this context, but the pro-liability rules-based approach has predominated over time.¹³

Professor Rabin's article provides additional hints—albeit subtle—of the bidirectional possibilities of rules-based approaches. Professor Rabin takes up the issue in “an often-overlooked corner of the world of accident law”: the independent contractor defense to a vicarious liability claim in the hospital setting.¹⁴ In *Roessler v. Novak*, a Florida appellate court reversed a summary judgment ruling in favor of the defendant hospital and instead endorsed Florida's three-element test of whether an independent contractor (in this case, a radiologist who allegedly misinterpreted a scan) had “apparent authority,” thus subjecting the hospital to vicarious liability.¹⁵ Chief Justice Altenbernd concurred separately to voice his concern that the movement away from clear rules to a standards-based, case-by-case approach (the “apparent authority” test) to determine a hospital's vicarious liability for independent contractors has been an abject failure:

Patients, hospitals, doctors, nurses, other licensed professionals, risk managers for governmental agencies, and insurance companies all need to have predictable general rules establishing the parameters of vicarious liability in this situation. Utilizing case-specific decisions

ble ways (along lines charted out by the legislature in ways which they as practical lawmakers have found feasible).”).

13. In *Martin v. Herzog*, Judge Cardozo gave the canonical expression of negligence per se as conclusively establishing negligence: “We think the unexcused omission of statutory signals is more than some evidence of negligence. It *is* negligence itself.” 126 N.E. 814, 815 (N.Y. 1920). Robert Blomquist describes the evolution of the doctrine of negligence per se in the lead-up to *Martin v. Herzog*:

[N]ineteenth century American judges started to utilize negligence per se parlance as a shorthand way of describing certain types of conduct as negligent as a matter of law. This approach was closely related to so-called rule of law assessments made by judges in an “attempt to create specific rules of conduct that they . . . declare to be the rule the reasonable person will always follow.”

Robert F. Blomquist, *The Trouble with Negligence Per Se*, 61 S.C. L. REV. 221, 275 (2009) (second alteration in original) (quoting DAN B. DOBBS, *THE LAW OF TORTS* § 132, at 309 (2000)). Judge Cardozo's rule-based approach has predominated. See, e.g., James, *supra* note 12, at 106 (describing the “majority” of American courts that follow the rule-based approach); Paul Sherman, *Use of Federal Statutes in State Negligence Per Se Actions*, 13 WHITTIER L. REV. 831, 880 (1992) (describing the majority approach to negligence per se whereby “[t]he standard of care applied in negligence actions . . . is the standard adopted by the statute, and it borders on absolute or strict liability”).

14. Rabin, *supra* note 1, at 441.

15. *Roessler v. Novak*, 858 So. 2d 1158 (Fla. Dist. Ct. App. 2003), discussed in Rabin, *supra* note 1, at 441–42.

by individually selected juries . . . is inefficient, unpredictable and, perhaps most important, a source of avoidable litigation.¹⁶

Professor Rabin borrows Chief Justice Altenbernd's words here to illustrate the "ineradicable tension between rules and standards."¹⁷

For my purposes, what is equally significant is that the Chief Justice's predilection for rules does not operate as a one-way ratchet towards lesser tort liability. He does not presume that movement away from a case-by-case standards approach would be tantamount to deciding that hospitals should be immune from the liability of independent contractors. Rather, the Chief Justice would opt for a clear rule in the interest of predictability, regardless of whether the chips fall in a pro- or anti-liability direction: "Our society can undoubtedly function well and provide insurance coverage to protect the risks of malpractice if there is *either* broad liability upon the hospital for these services as nondelegable duties *or* if liability is restricted to the independent contractor."¹⁸ Unlike a single-minded focus on either the "floodgates" of liability or "crushing" damages under the guise of pursuit of predictability, the evil here is the uncertainty itself associated with standards-based decision making.

Moreover, this particular example invoked by Professor Rabin raises an even more significant (yet unremarked upon) issue: What of the dominance and acceptance of the rule of vicarious liability, which—unlike the other examples discussed by Professor Rabin—works indisputably in a pro-liability direction?

The historical evolution of this controversial species of strict liability complicates Professor Rabin's account of the rules-versus-standards debate over time.¹⁹ Indeed, "[t]he way in which the modern conception [of vicarious liability] has grown is, in fact, very comparable to the method by which special liabilities are attached to innkeepers, to those who have wild animals, to those who start a fire, to those

16. *Roessler*, 858 So. 2d at 1163 (Altenbernd, C.J., concurring), *quoted in* Rabin, *supra* note 1, at 441–42.

17. Rabin, *supra* note 1, at 441.

18. *Roessler*, 858 So. 2d at 1163 (Altenbernd, C.J., concurring) (emphasis added), *quoted in* Rabin, *supra* note 1, at 441–42.

19. Here, I do not purport to resolve the controversy surrounding the historical origins of this doctrine. *See, e.g.*, Fleming James, Jr., *Vicarious Liability*, 28 TUL. L. REV. 161, 164 (1954) ("Historians are not agreed on the origins of the modern doctrine of vicarious liability in Anglo-American law."); Harold J. Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105, 105–06 (1916) ("In no branch of legal thought are the principles in such sad confusion."). *Compare, e.g.*, Oliver Wendell Holmes, Jr., *Agency*, 4 HARV. L. REV. 345, 364 (1891) (tracing the doctrine to the Roman, master–slave relationship and *paterfamilias*), *with, e.g.*, John H. Wigmore, *Responsibility for Tortious Acts: Its History—II*, 7 HARV. L. REV. 383, 383 (1894) (locating the origins of the doctrine in the Germanic idea "that the master was to be held liable absolutely for harm done by his slaves or servants").

who engage as public carriers.”²⁰ Writing in the mid-twentieth century, Fleming James explicitly tied the liability-expanding doctrine of vicarious liability to that of enterprise liability:

In the rest of the accident field there has been a typical common law development which is gradually imposing a similar liability on enterprises for the risks they inject into our society. . . . And by fictions and procedural devices it has subordinated fault to the need for compensation supported by enterprise liability. Vicarious liability is one of the cornerstones of this newer structure. . . . As to the master it is a form of strict liability based on the same philosophy as workmen’s compensation and involving similar assurances that claims will be paid and widely distributed.²¹

By the end of the twentieth century, Gary Schwartz noted a trend among academics and practitioners to justify vicarious liability on a “deep pockets” rationale—a perspective that has led to the adoption of multiple pro-liability doctrines and rules, such as joint-and-several liability and strict liability for product manufacturers.²² Whereas “many of those [pro-]liability rules . . . have themselves been subjected to legislative review and revision,” vicarious liability stands out, according to Schwartz, in that “no attention has been paid to [it]” during this period of tort reform.²³

20. Laski, *supra* note 19, at 113 (footnotes omitted).

21. James, *supra* note 19, at 172 (footnotes omitted).

22. Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1744–45 (1995). The “deep pockets” rationale can be linked to the insolvency theory of vicarious liability. See Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231 (1983) (noting potential employee insolvency as one of two reasons—the other being transaction costs in principal–agent negotiations—that vicarious liability should result in more economically efficient allocation of liability); see also Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563 (1988) (applying the same economic analysis to justify “scope of employment” limitations to vicarious liability but arguing that courts often fail to evaluate appropriate factors in “scope of employment” analysis).

23. Schwartz, *supra* note 22, at 1744. Schwartz thus concludes that “[a]s a practical matter employer vicarious liability is not only untouchable, it is essentially invisible.” *Id.* at 1745.

Professor Rabin seeks to qualify my claim that vicarious liability is pro-liability:

[V]icarious liability rests on the foundation of primary tort liability of a responsible agent—whether that responsibility is premised on failure to adhere to a rule or a standard. Thus vicarious liability operates in a pro-liability direction in the secondary sense of imputing liability to assure a solvent defendant.

Rabin, *supra* note 1, at 442 n.56. While there is no gainsaying Professor Rabin’s description of the doctrine of vicarious liability operating as secondary tort liability, his description of the doctrine still may understate its force. The doctrine’s historical link to the development of enterprise liability and the extent to which the insolvency rationale is linked to the broader “deep pockets” rationale, suggest that the domain of vicarious liability might be quite capacious. In the end, Professor Rabin raises an intriguing empirical issue and a possible explanation for the “invisibility” of the doctrine as noted by Schwartz—namely that the impact on tort liability is mini-

Predictability as a code word for an assault on the tort system applies equally, if not more strongly, to damages as to liability. As Professor Rabin notes, state legislatures have enthusiastically embraced caps and other limits on damages. Damage caps certainly result in more predictability,²⁴ but, as in the case of no-duty rules, uncertainty and unpredictability concerns take second seat to reducing “crushing liability” and outlier damage awards. But—once again—at least in theory, rule-like boundaries on jury (and less often, judge) awarded damages do not have to operate in a unidirectional manner. Take, for example, Blumstein and his coauthors’ proposal for damage schedules. Under their proposed reform, juries would have to justify awards at *both* the high and low ends of damage ranges: “An unexplained outlier should constitute a prima facie case for either remittitur or additur by the trial judge or an appellate holding of inadequacy or excessiveness of the judgment.”²⁵

Justice Traynor provides a final illustrative example that the desire for rule-like constraints on damages need not operate in tandem with a disdain for expansive liability regimes. As Professor Rabin describes, Justice Traynor, in his dissenting opinion in *Seffert v. Los Angeles Transit Lines*,²⁶ advocated an unusual position in support of limits on noneconomic pain-and-suffering damages. “[Pain and suffering damages] become increasingly anomalous as emphasis shifts in a mechanized society from ad hoc punishment to orderly distribution of losses through insurance and the prices of goods or of transportation.”²⁷ This “quest for predictable assessment of risk,”²⁸ however, is a far cry from the tort reformer’s complaint of crushing liability. It is linked, instead, to an enterprise liability system, with insurance functioning as a loss-spreading mechanism.

mal (at least as compared with the pro-liability rules that have been the subject of the tort reform lobby’s efforts).

Professor Rabin offers a “second qualification . . . that liability-enhancing ‘rules’ of strict liability for defective products and abnormally dangerous activities are in practice far less clearly categorized as ‘rules.’” *Id.* While I accept this assessment, I merely intend to emphasize that tort law is textured with several pro-liability rules and doctrines that reveal that the impulse toward predictability need not be considered inevitably linked with the agenda of limiting tort liability.

24. For this reason, caps on damages find prominent place on the lobbying agenda of insurance companies. Geistfeld, *supra* note 4, at 565.

25. James F. Blumstein et al., *Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury*, 8 *YALE J. ON REG.* 171, 179 (1991) (footnotes omitted).

26. *Seffert v. L.A. Transit Lines*, 364 P.2d 337 (Cal. 1961).

27. *Id.* at 345 (Traynor, J., dissenting).

28. Rabin, *supra* note 1, at 444.

III. INSURABLE RISKS AND LIMITS ON THE QUEST FOR PREDICTABILITY

The “quest for predictable assessment of risk”—inherent in insurance—is not tantamount to an assault on tort doctrine. The last thing an insurance company should clamor for is the end of tort liability, for the insurance business would dry up alongside. Insurers want predictability, not diminished liability.²⁹

What is key to insurance as an economic matter is to distinguish risk from uncertainty or (the preferred economic term) ambiguity. Risks denote future events that occur with measurable probability. People can thereby make arrangements to protect themselves against such measurable uncertainty. By contrast, uncertainty or ambiguity applies when the likelihood of future events is indefinite or incalculable. Uncertainty or ambiguity, then—not tort liability—is the formidable foe of insurance companies. Note the close correspondence here with the insight from Part II: Insurance companies tend to favor rules-based approaches, which themselves are associated with predictability, not diminishment of tort liability. Recall Chief Justice Altonbernd’s lament over the standards-based approach to determining “apparent authority” as an exception to the independent contractor defense to vicarious liability. Not only did the Chief Justice remain indifferent as to whether the alternative rules-based approach would be liability-enhancing or diminishing, but his consistent focus on eradicating the evil of unpredictability was linked to insurance practice: “Our society can undoubtedly function well and provide insurance coverage to protect the risks of malpractice [only if we do something about] . . . [t]he uncertainty of the current system.”³⁰

29. In this vein, Kip Viscusi has urged insurers to end their fixation on numerical caps on particular components of damages. See W. Kip Viscusi, *Tort Reform and Insurance Markets*, 7 RISK MGMT. & INS. REV. 9 (2004). Viscusi notes that “the character of the reforms that have been proposed to date often are not ideal. Past proposals have been designed strictly with respect to the narrow objective of reducing insurance costs, which is not necessarily equivalent to fostering sound insurance market performance.” *Id.* at 10. To illustrate this point, he also points out that “if such [liability reform] policies were taken to the extreme by abolishing tort liability altogether . . . [l]osses would be reduced, but there would be no market for insurance.” *Id.* at 17. Mark Geistfeld has similarly pointed out that while insurers have at times joined with manufacturers in supporting some tort reform proposals, such support has always been limited. See Mark Geistfeld, *The Political Economy of Neocontractual Proposals for Products Liability Reform*, 72 TEX. L. REV. 803, 839–42 (1993). Insurers are likely to favor “reforms that reduce the uncertainty surrounding the potential for exceptionally large awards.” *Id.* at 840. However, they are unlikely to support reforms that limit the liability of manufacturers because such reforms would also limit the market for liability insurance. *Id.* at 841.

30. *Roessler v. Novak*, 858 So. 2d 1158, 1163 (Fla. Dist. Ct. App. 2003) (Altonbernd, C.J., concurring).

But it is worth remembering that insurance is a social institution. It therefore does not follow that simply because risks can be insured as an economic matter that society will embrace insurance for those risks.

Consider the fact that liability insurance is a twentieth-century innovation. Moreover, throughout most of the nineteenth century, there was vehement opposition to the concept of providing insurance against a person's negligent actions. As Willard Phillips wrote in his 1823 *Treatise on the Law of Insurance*, insurance against losses voluntarily incurred "seems to be so obviously opposed to the general interest of a community, that it could hardly be enforced by any legal tribunal."³¹ Indeed, prior to the industrial revolution, insurance was not available for tort liability because it was thought to create moral hazard by encouraging negligent behavior.³² It was not until "the dawn of the twentieth century [that] the courts were rejecting the concern that liability insurance would so undermine safety incentives that this new form of insurance was against public policy."³³

More recently, controversy has surrounded the issue of the insurability of punitive damages. While a majority of states in fact do permit insurance for punitive damages, several—including New York—have a resolute public policy prohibition on such insurance.³⁴

This backdrop is critical for evaluating Professor Sebok's argument regarding champerty, a form of third-party litigation investment. Professor Sebok sets out to refute the argument that champerty is a form of gambling—one of several reasons courts have used to denigrate or outlaw the practice.³⁵ Instead, he posits that insurance is a closer

31. WILLARD PHILLIPS, *TREATISE ON THE LAW OF INSURANCE* 158 (1823).

32. As Kenneth Abraham explains, during this period, "the tension between insurance seen as a social good and insurance . . . as an encouragement of morally suspect behavior was manifested." KENNETH S. ABRAHAM, *THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11*, at 21 (2008). It makes sense that industrialization preceded the growth of insurance. The need for insurance is much less in an agrarian society, where most injuries occurred on the farm and most potential defendants were family members. Moreover, prior to the introduction of railroad systems, transportation injuries were relatively infrequent. *See id.* at 20. Professor Rabin briefly discusses the advent of liability insurance during the period when "tort matured . . . as an economic buttress for re-shaping the influence of tort." Rabin, *supra* note 1, at 438 n.35.

33. Kenneth S. Abraham, *Liability Insurance and Accident Prevention: The Evolution of an Idea*, 64 MD. L. REV. 573, 584 (2005).

34. Catherine M. Sharkey, *Revisiting the Noninsurable Costs of Accidents*, 64 MD. L. REV. 409, 427 n.92, app. at 458–59 (listing states prohibiting insurance for punitive damages).

35. It is interesting to note a parallel here—namely, in the pre-industrialization period in the United States, when the legal status of insurance was murky, it was tolerated but viewed as being "like gambling." ABRAHAM, *supra* note 32, at 20; *see also* Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 257 (1996) (finding evidence from images, advertisements, and popular references to insurance from the late 1800s that "the [insurance is gambling] objec-

analogy. Professor Sebok's analysis raises an intriguing question regarding what precisely separates insurance from gambling. It may well be, as Professor Sebok suggests, that the difference lies in the primary purpose—that of insurance being to neutralize an already existing chance. This suggests that an insurance bet is a type of hedge, which most forms of gambling are not. But, the converse does not hold, in that all hedges are not forms of insurance. The collective method of insurance is a key attribute. Insurance combines, averages, and distributes risks and losses, such that it is neither a zero-sum game nor simply a mechanism for shifting risk and loss.³⁶ Insurance may also fulfill a “risk management” role; inspections, for example, which are often part-and-parcel of an insurance agreement may serve a risk-reduction (in addition to risk-spreading) function. Consider, for example, terrorism insurance, which (to some) may seem to be the form of insurance most closely approximating gambling. Here, “[i]nsurers play key but often hidden roles in establishing preventive security and loss prevention infrastructures, whether based on environmental design, electronic surveillance technologies, or private security operatives.”³⁷

But in the final analysis, even were Professor Sebok able to cloak the practice of champerty with the nomenclature of insurance, he still would not have established the social viability of the practice. Perhaps the most striking take-away from Professor Sebok's article is a reminder of the limits on the pursuit of predictability. Insurance is not simply the given end in what Professor Rabin describes as a “quest for predictable assessment of risk.”³⁸ Should champerty be allowed as a form of insurance for plaintiffs, as Professor Sebok's analysis suggests? If so, it is not because we (or courts) are persuaded that it is not a form of gambling. Nor does its social acceptability hinge on whether it is termed insurance, as the historical debate over liability insurance and more recent debates over insurance for punitive dam-

tion resonated in the moral climate of this time”); Roy Kreitner, *Speculations of Contract, or How Contract Law Stopped Worrying and Learned to Love Risk*, 100 COLUM. L. REV. 1096, 1099–1100 (2000) (“Early insurance schemes were relatively straightforward forms of gambling, with people insuring against the death of public figures with whom they had no personal relationship.”).

36. In his trenchant analysis of the history of insurance, Kenneth Abraham points out that late nineteenth-century and early twentieth-century cases viewed liability insurance as a form of risk-transfer, similar to risk indemnification. See ABRAHAM, *supra* note 32, at 32. It was not until the debates surrounding workers' compensation transpired that courts began to consider the risk-spreading role. See *id.*

37. Richard V. Ericson & Aaron Doyle, *Catastrophic Risk, Insurance and Terrorism*, 33 ECON. & SOC'Y 135, 139 (2004).

38. Rabin, *supra* note 1, at 444.

ages illustrate. The historical and more contemporary insurance debates focus on whether societal interests in deterrence and retribution are well served by allowing such insurance (in addition to other more pragmatic factors such as the demand and supply of such services). In similar fashion, the debate surrounding champerty should cut to the core. In closing, Professor Sebok gestures in this direction, with his statement that “as a functional matter, the [champerty] contract serves a socially useful function.” But this should be the launching point of the analysis, not the conclusory end.

IV. THE U.S. SUPREME COURT WEIGHS IN ON PREDICTABILITY

State-law torts are not supposed to fall within the province of the U.S. Supreme Court. And yet, increasingly, the Court has made inroads in areas long thought to be the purview of the states. Professor Rabin and Professor Zipursky offer views of potential federal incursions into two different state law tort domains: punitive damages and emotional distress and privacy torts. Each encapsulates the U.S. Supreme Court’s zest for predictability and demonstrates where the Court’s enthusiasm might ultimately lead. The stakes are high. As Professor Zipursky succinctly puts it, should the Court offer up “what is in essence a jurisprudential critique,” such an approach would stymie the development of the common law of torts.³⁹

A. Punitive Damages

Concern about predictability drove the U.S. Supreme Court’s most recent punitive damages decision. In *Exxon Shipping v. Baker*,⁴⁰ after decades of interventions justified by procedural or substantive due process, at long last the Court gave its definitive diagnosis of what ails punitive damages: “The real problem, it seems, is the stark *unpredictability* of punitive awards.”⁴¹ The Court’s commitment is to the rule-of-law conception of predictability and fairness: treating like cases alike, such that “even Justice Holmes’s ‘bad man’ can look ahead with some ability to know what the stakes are in choosing one course of action or another.”⁴²

Though (as discussed above in Part II), predictability is often a code word for disillusionment with “crushing liability,” the Court insisted that “[a] survey of the literature reveals that discretion to award puni-

39. Zipursky, *supra* note 3, at 475.

40. *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).

41. *Id.* at 499 (emphasis added).

42. *Id.* at 502.

tive damages has *not* mass-produced runaway awards.”⁴³ Instead, the Court found “an overall restraint” on the part of juries.⁴⁴ But perhaps the Court protests too much. Deep skepticism of the role of the jury and its capacity to transform its expression of moral outrage into dollar values pervades most criticisms of punitive damages.

The Court’s fixation on unpredictability, moreover, can be linked to a broader trend in its jurisprudence of circumscribing the role of the civil jury in the name of certainty, predictability, and efficiency. The Court cannot alter tort doctrine directly, for example, by transforming standards into fixed rules. But, it can—and does—pursue predictability via shifts in the allocation of decision-making power.⁴⁵

In 2003, Professor Arthur Miller wrote the definitive piece on the Court’s civil litigation reform project designed to rein in the vagaries of jury decision making: *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*⁴⁶ Since then, the Court has proceeded further down this road, most recently with the restrictive pleading standards imposed in *Twombly* and *Iqbal*.⁴⁷ With each successive step in this project, the Court has pushed its regulation earlier in the pre-trial phase—a point emphasized by Richard Nagareda—and Arthur Miller has warned that the resulting early termination of cases deprive claimants of their right to resolution by a jury trial.⁴⁸

In *Exxon Shipping*, given that the Court was sitting as a common law court of last resort (under admiralty jurisdiction), the Court was

43. *Id.* at 497 (emphasis added).

44. *Id.* at 498–99.

45. Professor Rabin mentions in passing two additional examples of shifts in power from juries to judges. One (which I have already discussed in the text above) is Judge Cardozo’s deployment of negligence per se. The second example is that of courts’ blurring the distinction between no duty and no negligence as a matter of law with the resulting obfuscation, according to Professor Rabin, that courts (as opposed to juries) determine what constitutes reasonable care.

46. Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003).

47. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

48. For a discussion of these two cases as a departure from the model of litigation established by the Federal Rules of Civil Procedure, see Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010). For a discussion of the cases as being part of the Court’s ongoing civil litigation reform effort but as representing a new emphasis on cost imposition rather than variance—and as not so far removed from the “ethos” of the Rules—see Richard A. Nagareda, *1938 All over Again? Pre-Trial as Trial in Complex Litigation*, 60 DEPAUL L. REV. 647 (2011). Nagareda notes, however, that the decisions position courts as regulators while simultaneously depriving them of the information necessary to deploy regulation. *Id.* at 28–29.

freer than ever before (when it has always been hemmed in by the constraints of substantive or procedural due process) to unleash its criticism of punitive damages as a policy matter.⁴⁹ Given this unique window into the Court's policy view—and in light of its previous civil litigation reform efforts—it is fitting to consider how far the Court's zeal to control unpredictability in the civil justice system might be taken. When contemplating the need for a quantitative limit on punitive damages, the Court doubted the capacity of instructions to guide the jury decision-making process with enough precision: "Instructions can go just so far in promoting systemic consistency when awards are not tied to specifically proven items of damage (the cost of medical treatment, say)."⁵⁰ The Court's concerns about the indeterminate and unmoored nature of the jury's determination of punitive damages would seem to apply full stop to the jury's determination of noneconomic, pain-and-suffering damages. Moreover, noneconomic damages are comprised of "soft" components like mental anguish and pain and suffering—i.e., not "specifically proven items" like medical costs and lost wages.⁵¹

In the face of such dire predictions, Professor Rabin offers sobriety. To begin, Professor Rabin voices a firm conviction that, in the realm of fixing compensatory damages, "the judiciary has been singleminded in resisting the allure of imposing structure on case-by-case decision making."⁵² Professor Rabin proclaims the "impregnable fortress of make-whole, case-by-case decision making" safe from judicial intermeddling.⁵³ He adds an "afterword" on punitive damages, but maintains that the impact of the U.S. Supreme Court's verve for intervention will be inherently limited. As an initial matter, Professor Rabin reminds us that *Exxon Shipping* was decided under admiralty jurisdiction (not as a constitutional matter), "which is an open invita-

49. See Catherine M. Sharkey, *The Exxon Valdez Litigation Marathon: A Window on Punitive Damages*, 7 U. ST. THOMAS L.J. 25, 31–34 (2009).

50. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 504 (2008).

51. *Id.*

52. Here, I quibble with the resoluteness of the claim. For the practice of remittitur is alive and well. See, e.g., David Baldus, John C. MacQueen & George Woodworth, *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109, 1119 (1995) (stating that state courts "routinely apply additur/remittitur review" and federal courts "frequently" employ remittitur); Suja A. Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731, 732 (2003) (noting "widespread use" of remittitur in federal courts). While concededly not as structured as a set damages schedule, such practices nonetheless have a similar effect in terms of constraining individual damages determinations in light of aggregate practices.

53. Rabin, *supra* note 1, at 452.

tion [to lower courts] to limit its reach.”⁵⁴ Given that lower courts are not bound to follow *Exxon Shipping* as precedent, Professor Rabin submits that the case’s broader influence will stand or fall on its persuasive power—which Professor Rabin (with generous citation to an article of mine, *The Exxon Valdez Litigation Marathon: A Window on Punitive Damages*) points out is weak. Notwithstanding our agreement here, I am not as sanguine as Professor Rabin that lower courts will resist the tide of the U.S. Supreme Court’s advances. The evidence to date is mixed. Several lower courts have relegated *Exxon Shipping* to the annals of admiralty.⁵⁵ But other courts have internalized the Court’s impulse to rein in punitive awards and have cited *Exxon Shipping* in a wider array of cases.⁵⁶ It will also come as no surprise to Professor Rabin that the lower courts do not always share the academic’s view of the lack of persuasiveness of the U.S. Supreme Court. Indeed, at least the early returns seem to suggest that state courts are less persuaded than federal courts, setting up an interesting federalism dynamic.⁵⁷

B. Emotional Distress and Privacy Torts

Continuing the theme of the U.S. Supreme Court’s making inroads into traditional domains of state tort law, Professor Benjamin Zipursky’s article, *Snyder v. Phelps, Outrageousness, and the Open Texture of Tort Law*, explores the potential for the Court to wield the First

54. *Id.*

55. See Sharkey, *supra* note 49, at 32 n.32 (citing an array of “federal and state courts [which] have signaled a desire to limit the Court’s 1:1 ratio to the realm of federal admiralty and have refused to impose a 1:1 ratio as a matter of constitutional due process”). Moreover, “[s]tate courts have been slightly more emphatic in their rejection of attempts to extend the reach of *Exxon Shipping* beyond federal maritime.” *Id.*

56. See *id.* at 33 n.33 (citing cases in which other “[l]ower courts have taken the cue from the U.S. Supreme Court and have begun to cite *Exxon Shipping*, along with *Gore*, *Campbell*, and *Williams* in their constitutional due process excessiveness review—even while acknowledging that, by its terms, *Exxon Shipping* is limited to federal admiralty”); see also *Jurinko v. Med. Protective Co.*, 305 F. App’x 13, 27 n.15 (3d Cir. 2008) (describing that the Court used *Exxon* to signal to lower courts that 1:1 ratio “may well be” the constitutional limit on punitive damages (quoting *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 515 n.28 (2008)); Sharkey, *supra* note 49, at 34 & nn. 37–40 (discussing cases in which lower courts “have gravitated . . . [toward] *Exxon Shipping*’s 1:1 ratio full stop in constitutional due process review of punitive damages” in anticipation that the Court will reach such a holding in its next punitive damages case).

57. I have argued that the Court’s single-minded focus on unpredictability almost inexorably drives it to embrace and reinforce an exclusively retributive rationale for punitive damages (by equating punitive damages and criminal sentencing). See Catherine M. Sharkey, *Federal IncurSIONS and State Defiance: Punitive Damages in the Wake of Philip Morris v. Williams*, 46 WILLAMETTE L. REV. 449 (2010). By elevating a single punitive damages goal—that of retributive punishment—the Court sets the stage for a clash with state courts and legislatures who might be inspired to define their legitimate state interests in punitive damages differently. *Id.*

Amendment to chip away at the common law torts of intrusion upon seclusion and intentional infliction of emotional distress (IIED). Professor Zipursky strikes out against the First Amendment enthusiasts (Professor Eugene Volokh most prominently among them) who have raised “what is in essence a jurisprudential critique: that the vagueness of the tort of . . . IIED creates so much uncertainty and pliability that it should be struck down.”⁵⁸ Professor Zipursky believes such critiques fundamentally misunderstand the nature of the open texture of tort law. In a postscript on the Supreme Court’s decision in *Snyder*, he offers a plea that the Court not go further down the road of defining a hard-edged constitutional boundary to the duties and obligations of tort law.

Professor Zipursky concedes that the U.S. Supreme Court has a valid role to play in terms of policing state tort law end runs around constitutional principles.⁵⁹ In this vein, he sees a role for the Court’s skepticism of “a slap-dash pasting of facts about politically odd, unconventional, and provocative speech onto a newfangled, random torts framework.”⁶⁰ But, Professor Zipursky is at pains to convince that the IIED tort, by contrast, fits within the body of principles and concepts with some integrity within the common law.

Delving into the core meaning of IIED, Professor Zipursky invokes the standards-versus-rules debate (which features so prominently in Professor Rabin’s article). In *Snyder*, the Supreme Court expressed concern with the required element of “outrageousness,” which the Court characterized as a “highly malleable standard [that] . . . ‘allows a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression.’”⁶¹ But, Professor Zipursky counters, there is inherent value in an open-textured standard such as “outrageousness.” As Professor Zipursky elaborates, both the offensiveness at the heart of a privacy claim and the outrageousness at the heart of an emotional distress claim are “morally charged” concepts given over to a jury to decide.⁶²

58. Zipursky, *supra* note 3, at 475.

59. Though not mentioned by Professor Zipursky, the greater “end run” threat of IIED may be to statutorily prescribed damage limitations. See, e.g., Catherine M. Sharkey, *Dissecting Damages: An Empirical Exploration of Sexual Harassment Awards*, 3 J. EMPIRICAL LEGAL STUD. 1, 39 (2006) (studying the effect of inclusion of state tort claims on the application of Title VII damage limitations in sexual harassment cases and noting that “[a]fter controlling for myriad independent variables . . . the inclusion of a state tort law claim is associated with, on average, a \$137,176 increase in total damages and a \$136,021 increase in outrage damages”).

60. Zipursky, *supra* note 3, at 477.

61. *Snyder v. Phelps*, No. 09-751, slip. op. at 16 (Mar. 2, 2011) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988)).

62. Zipursky, *supra* note 3, at 475.

Professor Zipursky's celebration of the open-textured standard calling forth the jury's fresh moral judgments is reminiscent of Professor Seana Shiffrin's argument highlighting the value of standards in calling for moral deliberation among the populace.⁶³ Professor Shiffrin argues that moral and democratic deliberative purposes are served by these features of standards that are not necessarily served by precise rules. In a nutshell, open-ended standards encourage greater levels of moral deliberation. We must ask ourselves whether we are treating one another fairly or not, whether we are taking due care, et cetera, rather than rotely applying a rule.

Professor Rabin's analysis of historical tort trends provides some additional insight on Professor Zipursky's subject matter. Professor Rabin describes a kind of equilibrium reached, with open-textured liability standards reined in, on the margins, by various no-duty rules. In the abstract, the IIED tort may embody similar compromise forces in a different guise. It is a fairly modern tort, recognized officially in *The Restatement (Second) of Torts* only in 1948.⁶⁴ Its subjective, open-textured standard for liability is combined with sharp restrictions, as Professor Zipursky himself recognizes.⁶⁵ Indeed, the early proponents of IIED advocated strict limitations on the tort, particularly on the signature injury, defined as severe emotional distress, and the "outrageousness" requirement.⁶⁶ Given the internal policing of the tort,⁶⁷ the

63. See Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214 (2010).

64. See Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 43 (1982). Prior to the official recognition of IIED, plaintiffs (with some notable exceptions) could recover for emotional distress only as a form of "parasitic" damages—that is, if they could "peg" their mental damage claim to another independent tort, "no matter how technical it might be." William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 880 (1938).

65. Professor Zipursky discusses the built-in limitations that are part of the IIED tort and the rigorous self-policing by courts throughout his article. See Zipursky, *supra* note 3, at 476–77, 498, 500–01, 504–05.

66. See RESTATEMENT (SECOND) OF TORTS § 46 (1965); see also Prosser, *supra* note 64, at 879 ("What we are dealing with, in other words, is outrageous conduct, of a kind especially calculated to cause serious mental and emotional disturbance. It is the character of such conduct itself which provides the necessary assurance that genuine harm has been done, and that it is so important as to be entitled to redress.").

67. See, e.g., Frank J. Cavico, *The Tort of Intentional Infliction of Emotional Distress in the Private Employment Sector*, 21 HOFSTRA LAB. & EMP. L.J. 109, 112 (2003) ("[M]ost states set a very high legal and factual standard for the common law tort of intentional infliction of emotional distress."); see also Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths"*, 34 WM. & MARY L. REV. 579, 589 (1993) ("Courts adjudicating intentional infliction cases generally have followed the *Restatement* formulation . . . both in tone and in letter."). But see Givelber, *supra* note 64, at 43 ("The [IIED] tort . . . has become an instrument for judicial tinkering. . . . The very

need for external limitations imposed by the U.S. Supreme Court may be correspondingly limited.⁶⁸

V. CONCLUSION

Common law torts were once kept in their place by the predominance of contract and property law principles. With the relaxation of contract and property-based restraints, in the form of no-duty rules, and the revolutionary expansion of open-textured liability standards, renewed efforts were directed at restraining the twin evils of “flood-gates liability” and “crushing liability.” Professor Rabin suggests that a point of stasis may have been reached—an equipoise characterized by the predominance of liability standards, reined in by no-duty rules and a reluctance to give birth to new torts. Professor Sebok’s exploration of courts’ resistance to champerty provides a vivid illustration of the doctrinal limits on the quest for predictability, while at the same time serving as a reminder of the creative possibilities of insurance expanding into new realms. The U.S. Supreme Court has emerged as the newest player on the scene, ramping up its efforts to restrain the vicissitudes of common law tort in the name of predictability. The efficacy of its efforts, as described by Professors Rabin and Zipursky, is, at present, a story without an ending.

indeterminacy of the tort has . . . free[d] courts of the necessity of rationalizing results in terms of rules of universal applicability.”); Hayden, *supra*, at 593 (“[T]he tort of intentional infliction of emotional distress opens the door to uniquely freewheeling and unfettered condemnation of antisocial conduct. Its breadth and vagueness, both as to the kind of conduct that is actionable and to the amount and kind of damages that may be recovered, have never been limited significantly, as many courts and commentators have recognized.” (footnotes omitted)).

68. In *Snyder*, Justice Samuel Alito agreed, see *Snyder v. Phelps*, No. 09-751, slip. op. at 2 (Mar. 2, 2011) (Alito, J., dissenting) (describing IIED as a “very narrow tort”), but the overwhelming majority of the Court concluded otherwise.