LEAVING CONTEMPORARY LEGAL TAXONOMY

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ABSTRACT

In twenty-first century American courts, dysfunctional outcomes invariably follow the formalistic application of the most salient doctrinal distinctions. Attempts by legal taxonomists to delineate the boundaries between contract and tort law are especially ineffectual. Still, courts irregularly determine the obtainable remedies for legally cognizable injuries based on the way these capricious taxonomic boundaries are drawn. Doctrinal distinctions that demonstrably operate poorly unfairly persist.

Tellingly, contemporary challenges arising out of a flawed system of classification typified by the tort and contract taxa are not the result of ineluctable progress in the legal system of the United States. To the contrary, these classifications are rooted in competing crosscurrents of legal theory debated both in the United States and England during a period roughly measured from the mid-nineteenth until the early twentieth century (generally, the *fin de siècle*).

Owing to a burst of intellectual vigor and systemic reform during the fin de siècle, an end might have been achieved to the then-nascent but now familiar taxonomy of legal claims. Instead, since this period, purported doctrinal distinctions between tort and contract theory have become ever more firmly embedded in the American judicial psyche and legal practice.

This Article exposes the role that legal taxonomy plays in contemporary legal scholarship and practice, and then accounts for and laments the product of fateful choices during the fin de siècle—a period of both great progress and regression in the development of the legal system in the United States. A neoteric, rights-based juridical model is then presented as a better alternative to parsing claims and restricting relief based on the fuzzy legal taxa that are prevalent today.

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I. INTRODUCTION

In twenty-first century American courts, dysfunctional outcomes invariably follow the formalistic application of the most salient doctrinal distinctions. Attempts by legal taxonomists to delineate the boundaries between contract and tort law are especially ineffectual. Deciding whether a claim "sounds" in contract or tort would be farcical if not for the injustice thereby wrought. Courts irregularly determine the obtainable remedies for legally cognizable injuries based on the way these capricious taxonomic boundaries are drawn. Doctrinal distinctions that demonstrably operate poorly unfairly persist.

Tellingly, contemporary challenges arising out of the flawed system of classification typified by the tort and contract taxa are not the result of ineluctable progress in the legal system of the United States. To the contrary, these classifications are rooted in competing crosscurrents of legal theory debated both in the United States and England during a period roughly measured from the mid-nineteenth until the early twentieth century (generally, the *fin de siècle*).

A burst of intellectual vigor and systemic reform during the fin de siècle put at risk and nearly stifled the then-nascent but now familiar taxonomy of legal claims. Instead, since this period, purported doctrinal distinctions typified by the tort and contract taxa have become ever more firmly embedded in the American judicial psyche and legal practice.

Contemporary legal taxonomists uncannily devote considerable energy to the classification of claims according to fuzzy doctrinal lines that are often illogical. Their ongoing efforts to fine-tune and thereby ration-

alize inherently unreliable taxa are rewarded *only* when an injured party is denied relief based on invented and often arbitrary taxonomic distinctions. The pursuit of legal taxonomy, as it is presently conceived, is thus revealed as an inherently insufferable enterprise.

Legal taxonomists cannot justify the imprecise classification of legal claims by claiming that precise classification of legal claims is impossible. The fault lies not in the stars. Worse still, contemporary legal taxonomists tend also to blame jurists and attorneys for misapplying or failing to understand the incongruous and indefensible classifications they have devised. Responsibility for the inconsistent classification of like claims instead falls squarely on the proponents of legal taxa that cannot be consistently applied by highly trained professionals. If equal treatment under the law is the essence of what is just, then for the contemporary legal taxonomist apparently there must be injustice everywhere to preserve an existing but defective classification of legal claims. No system based on this unbefitting premise can (or will) long endure.

This Article exposes the dysfunctional role that contemporary legal taxonomy plays in legal scholarship and practice today, and then accounts for and laments this product of fateful choices during the fin de siècle—a period of both great progress and regression in the development of the legal system in the United States. This account delivers a fresh perspective on current legal taxonomy and uncovers an understanding of primary rights and plenary forms of relief proposed during the fin de siècle as an alternative to abjure it. The neoteric, rights-based juridical model presented herein is a better alternative to parsing claims and restricting relief based on the fuzzy contemporary legal taxa and a viable means to relegate contemporary legal taxonomy to the dustbin of legal history in which it belongs.

II. CONTEMPORARY LEGAL TAXONOMY FAILS TO RELIABLY CLASSIFY TORT AND CONTRACT CLAIMS

As Dean William Prosser noted in 1953, the now-venerated foci of the civil law canon known as tort and contract were derived from precisely the same medieval English writs.[1] Indeed, the contemporary doctrinal categories of contract and tort are the product of a relatively recent advent and did not take root in American courts until the latter half of the nineteenth century.[2] Encrusted now like barnacles, supposed distinctions

1. *See* WILLIAM LLOYD PROSSER, *The Borderland of Torts and Contract*, *in* SELECTED TOPICS ON THE LAW OF TORTS 380, 381 (1953); Thomas C. Galligan, Jr., *Contortions Along the Boundary Between Contracts and Torts*, 69 TUL. L. REV. 457, 461 (1994) ("Although opposing philosophies underlie torts and contracts, the two bodies of law exist side-by-side the world over . . . . Dean Prosser pointed out in 1954 that the historical relations between common law contract and tort were not antagonistic and that contract law actually grew from the same writs that lawyers used for what we now think of as tort claims.").

2. GRANT GILMORE, THE DEATH OF CONTRACT 161 (Ronald K. L. Collins ed., 2d ed. 1995) ("Until the late nineteenth century, the dividing line between 'contract' and 'tort' had never been

between tort and contract law render almost entirely unrecognizable the structure of a system better suited to vindicate the violation of primary rights (a topic to which this Article will turn in Part III). Scraping these barnacles away reveals a theory of rights and remedies far superior to the contemporary miasma of indistinct and ambiguous limitations on remedies based on hide-bound doctrinal classifications.

Before turning to a rights-based alternative to contemporary legal taxonomy, whimsical and wishful thinking on the part of some that all is well on the border between the law of torts and contracts first must be dispelled. Some courts and scholars are in denial about the erosion of this boundary and will hold fast to the fiction that contract law governs exclusively, or at least should govern exclusively, the range of available remedies arising out of breach of purely consensual obligations.[3] Below, several examples demonstrate contrariwise that unalloyed doctrinal distinctions between tort and contract theory are a chimera.

A. A Categorical Muddle: The Failure to Reliably Classify Claims Arising from the Negligent Performance of Contractual Duties

The negligent performance of a contractual duty presents a particularly thorny problem of doctrinal classification. A perceived need for such classification arises more often than not when remedies or defenses

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sharply drawn . . . ."); Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1246 (2001) ("[T]he recognition of contract as a fundamental department of substantive law by 1870 did not entail the acceptance of tort as well."); David Marcus, *The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform*, 44 GA. L. REV. 433, 475 (2010) ("The familiar doctrinal categories of contract and tort did not exist before the latter half of the nineteenth century."); Mark P. Gergen, *Negligent Misrepresentation as Contract* 16 (Berkeley Program in Law and Economics, Working Paper Series, 2011), *available at* http://escholarship.org/uc/item/1vc0j5x5 ("Contract is not written about as a generic category of obligation by common lawyers until the late 18th and early 19th century. As late as 1800, if a lawyer bungled your case, a carrier damaged your goods, or a farrier bungled in shoeing your horse, and you sought legal redress in an English or American court, you would not bring an action for negligence, professional malpractice, or breach of contract. Instead you would bring an action either for assumpsit or for trespass on the case.").

3. Some scholars believe that contract law reigns supreme within clearly defined boundaries. *See, e.g.*, William Powers, Jr., *Border Wars*, 72 TEX. L. REV. 1209, 1224–26 (1994) ("In fact, [the] Balkanized structure [of tort, property and contract law] reveals that the paradigms of the different bodies of law are not really coequal. The negligence paradigm takes a back seat. . . . [C]ontract law embodies the ideology of autonomy and consent and assigns decision-making power to markets. Sometimes, however, the predicates for the application of contract law are not present, for example, when disputes arise between noncontracting strangers or when a party to a contract is mentally incompetent. Thus, we do not need to refer either to another body of law—such as tort law—or to some extradoctrinal normative system in order to keep contract law from devouring the entire legal world. Contract law, along with its accompanying prime directive of agreement and consent, sets its own limits. Tort law waits in the background to step in and resolve the disputes that occur when no contractual relationship is present. In other words, tort law fills in when, due to contract law's own rules about its applicability, we do not have the option of using contract law."); Dennis Patterson, *Good Faith in Tort and Contract Law: A Comment*, 72 TEX. L. REV. 1291, 1291 (1994) ("Ever since it emerged as a distinct body of law, contract law has consistently been under the threat of reabsorption into tort law. However, despite the persistence of this theme in academic literature, one sees in the actual work of courts little serious threat to the autonomy of contract. In short, even given the distinct overlap and occasional congruence, a merger of tort law and contract law appears most unlikely.").

that are typically allowed only in an action by one who has been "wronged" are sought in an action for breach of contract.

A breach of contract, it is oft said, constitutes no legal wrong.[4] Rather, a contract adjusts the volitional relation of autonomous parties, requiring them to "consider" one another only insofar as they have agreed. As thus conceived, scholars and courts that adhere to rigid doctrinal distinctions between tort and contract agree that breach of a contractual obligation gives rise to a claim only by a party to the contract that created it, and only for those consequential losses that were contemplated by the parties to the agreement at the time of its formation.[5] Thus, a promisor may breach a contract "efficiently" and without moral opprobrium or legal penalty.[6]

Are these legal aphorisms even putatively sound? If a doctor botches a surgery without justification, should it matter whether a contract with the patient required the doctor to exercise ordinary care? Should the nature and scope of the liability of a painter contracted to paint a home turn on whether the painter drips paint on a surface not within an agreed scope of work? Answering these questions sheds light on two principal approaches taken by courts struggling to stay within the strictures that contemporary doctrinal distinctions between tort and contract law impose.

Courts have understood a case involving a doctor's botched surgery to afford an opportunity to distinguish tort from contract theory based on the *nature* of the conduct at issue. The location of the painter's drip has been understood to afford the opportunity to distinguish tort from contract theory based on the *consequence* of the conduct at issue. Each of these approaches is considered below in turn. Each approach is unmanageable and thus leads inexorably to a dilution of sought-after, clear doctrinal divisions between tort and contract law.

4. *See, e.g.*, E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1147 (1970) ("Our system, then, is not directed at *compulsion* of *promisors* to *prevent* breach; rather, it is aimed at *relief* to *promisees* to *redress* breach. . . . [This] adds to the celebrated freedom to make contracts, a considerable freedom to break them as well.").

5. *See, e.g.*, Robinson Helicopter Co. v. Dana Corp., 102 P.3d 268, 275 (Cal. 2004) ("A breach of contract remedy assumes that the parties to a contract can negotiate the risk of loss occasioned by a breach. '[W]hen two parties make a contract, they agree upon the rules and regulations which will govern their relationship; the risks inherent in the agreement and the likelihood of its breach. The parties to the contract in essence create a mini-universe for themselves, in which each voluntarily chooses his contracting partner, each trusts the other's willingness to keep his word and honor his commitments, and in which they define their respective obligations, rewards and risks. Under such a scenario, it is appropriate to enforce only such obligations as each party voluntarily assumed, and to give him only such benefits as he expected to receive; this is the function of contract law.'" (alteration in original) (quoting Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 869 P.2d 454, 461 (Cal. 1994)) (internal quotation marks omitted).

6. *See id.*; Farnsworth, *supra* note 4, at 1147.

1. Distinguishing a Tort from a Pure Breach of Contract Based on the Nature of the Actor's Conduct

Attempts since the fin de siècle to classify claims against a physician for avoidable injury to a patient demonstrate an impressive shift in significant doctrinal distinctions. During the nineteenth century, American courts usually found that a duty to perform with ordinary professional skill and care arose out of a contract to provide medical services.[7] An "implied in fact" promise to perform medical services competently was understood not only as an implied in fact term of a physician's contract with a patient but also as an independently enforceable obligation without regard to a general common law duty of care independent of the contract.[8]

The nascent tort of "medical malpractice" was analytically keyed to this implied promise by a physician to act competently and skillfully. By the outset of the twentieth century, courts nearly uniformly recognized the implied promise by a physician to perform with "reasonable care" to be indistinguishable from the duty to act with care imposed by operation of law in negligence actions.[9] Pure contract theory could then be understood in these cases as too incompatible with the nature or *gravamen* of an action for medical malpractice to allow the hallmarks of contract law to prevail. Thus, as time passed and experience with this category of cases grew, courts became increasingly reluctant to permit in an action against a careless physician any resort to the statute of limitations on contract claims[10] and progressively more precautious about attempts to assert the contractual right to disclaim tort liability in such cases.[11]

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7. *See, e.g.*, Whittaker v. Collins, 25 N.W. 632, 633 (Minn. 1885) ("[I]t seems to us clear that this is an action on the contract. The gist and *gravamen* is the breach of its terms, which, whether express or implied, were that these physicians and surgeons would treat the plaintiff with ordinary professional skill and care. It would have been impossible for plaintiff to state his cause of action without alleging the contract, for the liability of the defendant arose solely out of it, and not out of some general common-law duty independent of contract.").

8. *Id.*

9. *See, e.g.*, Miller v. Toles, 150 N.W. 118, 120 (Mich. 1914) ("[T]he implied contract between the surgeon and patient is . . . to use that degree of diligence and skill which is ordinarily possessed by the average of the members of the profession in similar localities, giving due consideration to the state of the art at the time. . . . [On] testimony of an expert character tending to show malpractice, [the jury] should be permitted to draw inferences of negligent conduct on the part of defendant.").

10. *See, e.g.*, Frankel v. Wolper, 169 N.Y.S. 15, 16–17 (N.Y. App. Div. 1918) ("The question is whether this action against a physician is for breach of contract or malpractice. If for the latter, it is barred by a statute of limitations, whether it arose from lack of requisite skill or negligent exercise of it. The question is not whether the plaintiff could declare on a contract to cure her, and for the breach of it recover damages for failure to make the cure. . . . [H]ere the damages alleged are unsuited to an action on contract, and help to characterize the complaint as one for malpractice and negligence. It is useless to discuss the authorities, as the decision [that the tort statute of limitations applies] is placed upon the ground that the complaint does not declare on contract.").

11. *See, e.g.*, Meiman v. Rehab. Ctr., Inc., 444 S.W.2d 78, 79–80 (Ky. Ct. App. 1969) (finding that an exculpatory contract executed between the patient and health care providers was no defense because it was contrary to public policy).

By the mid-twentieth century, courts forthrightly declared tort theory *de rigueur* in cases of medical malpractice. As definitively stated by the once oft-cited opinion in *Kozan v. Comstock*[12]: "On principle . . . we consider a [medical] malpractice action as tortious in nature whether the duty grows out of a contractual relation or has no origin in contract."[13]

At present, a cause of action against a physician for careless performance typically sounds *solely* in tort, and any implied promise to act with care is considered to be mainly immaterial.[14] Although the physician–patient relationship is nearly invariably consensual (and accompanied by a myriad of adhesive contractual terms),[15] most contemporary American courts will hold a physician to a duty and standard of care that arises by operation of law (rather than by reason of express or implied contractual assent).[16]

Because a duty of due care imposed by operation of law is considered to supplant any similar contractual duty, a physician generally may not avoid liability to a patient in tort for careless performance.[17] Thus, with respect to consensual relations between a physician and patient, contemporary legal taxonomy fails to recognize the principal signet impressed on the contract taxa: judicial deference to the private ordering of obligations that are voluntarily assumed.[18]

The doctrinal distinctions applicable to breach of a physician's contract have not been universally applied to service contracts generally, however. The *nature* of the contracted services is sometimes claimed to

12. 270 F.2d 839 (5th Cir. 1959).

13. *Id.* at 845.

14. Contemporary American courts often reject outright the theory that breach of an implied promise to act with care undergirds the liability of a physician for malpractice. *See, e.g.*, Woolley v. Henderson, 418 A.2d 1123, 1135 (Me. 1980) ("In addition to the inadequacy of implied contract as a comprehensive liability base in malpractice actions, we discern additional reasons for eschewing any reliance upon a theory that a physician has breached an implied contractual duty of due care. First, the reasonableness of a physician's conduct can be adequately determined under familiar tort principles without the necessity of importing into malpractice actions commercial concepts with traditionally distinct rules as to theory, proof, damages, limitation periods and venue. Second, and related to the foregoing, recognizing the continued vitality of implied contract as an independent cause of action would be fundamentally inconsistent with the modern view that malpractice actions should be predicated on a single basis of liability—deviation from the professional standard of care—with the application of common evidentiary and procedural rules." (citations omitted)).

15. Some scholars still believe the patient–physician relationship to be principally contractual and eerily suggest that a physician should gain therefrom even more than mere monetary remuneration. *See, e.g.*, John Portmann, *Physician–Patient Relationship: Like Marriage, Without the Romance*, 173 W.J. MED. 279, 280 (2000) ("No matter what else it aims to be, the patient–physician relationship is a contract involving the exchange of money and services. . . . [Four] assumptions underlie the physician–patient contract: both the physician and the patient have unique responsibilities; the physician–patient relationship is consensual, not obligatory; both the physician and the patient must be willing to negotiate; and physician and patient each must gain something in their encounters. Nothing in this list contradicts a contractual description of marriage, which similarly stands on an exchange of money and services.").

16. *See, e.g.*, *Woolley*, 418 A.2d at 1134; *Kozan*, 270 F.2d at 845.

17. *See, e.g.*, Meiman v. Rehab. Ctr., Inc., 444 S.W.2d 78, 80 (Ky. Ct. App. 1969).

18. *See, e.g.*, Robinson Helicopter Co. v. Dana Corp., 102 P.3d 268, 275 (Cal. 2004).

be a reference point by which courts can ascertain whether an action arising out of careless performance of a contract sounds in tort, contract, or both. A common statement on this point is as follows:

> There is in truth sometimes a thin distinction drawn between whether an action is grounded in tort or a contract. Generally, the test of distinction seems to be that if the claim is based on a breach of specific terms of the contract without any reference to the legal duties implied by law upon the relationship created thereby, the action is in contract; whereas, if there is a contract for services which places the parties in such relation to each other that in an attempt to perform the promised service, a duty imposed by law as a result of the contractual relationship is breached, then the gravamen of the action is the breach of the legal duty rather than a breach of the contract, and so is a tort.[19]

This widely accepted formulation is the juridical equivalent of answering the question "under what circumstances does a careless breach of a service contract sound in tort?" with the answer "when a court states that the services entail a duty enforceable in tort." The rule stated above is pure tautology. It fails as a reliable basis to distinguish negligent breaches of contract that give rise to a cause of action in tort from those that do not because courts do not *discover* duties imposed by law in contractual relations but rather *declare* them.[20]

By claiming that a tort action arises out of the misperformance of duties "imposed by law," a court presupposes discretion (within the bounds of precedent) to pick and choose those relations that qualify for the imposition of a legal duty to perform carefully enforceable in tort.[21] By implicitly stating that a court decides whether certain consensual relationships implicate duties that are "imposed by law," a court presupposes the power to transform any breach of contract that gives rise to a cause of action that sounds exclusively in contract into a breach that gives rise to a cause of action that sounds exclusively or concurrently in tort.[22]

There is no principled basis to distinguish contractual relationships that entail a duty to perform with care and skill enforceable in tort from

19. Billings Clinic v. Peat Marwick Main & Co., 797 P.2d 899, 908 (Mont. 1990).

20. This point was generally conceded by the court in *Annett Holdings, Inc. v. Kum & Go, L.C.*, 801 N.W.2d 499, 506 n.3 (Iowa 2011) ("In our view, it does not advance the analysis to assert that [the defendant] owed an 'independent duty' . . . to use ordinary care. This rephrases the question, but does not answer it. We have said 'the existence of a duty is a policy decision, based on the relevant circumstances, that the law should protect a particular person from a particular type of harm.' . . . Whether [or not] the issue is framed in terms of . . . the scope of an actor's duty, we still need to make the underlying determination whether tort law affords a potential remedy." (quoting Van Essen v. McCormick Enters. Co., 599 N.W.2d 716, 719 (Iowa 1999))).

21. *Id.*

22. *Billings Clinic*, 797 P.2d at 909 ("A scissors more sharp than we command is required to pare away the contract implications from the tort claim here. The claims exist mutually in contract and in tort.").

those that do not. Courts often concede this point by stating categorically that accompanying *every* contract is a common law duty to perform with care and skill, and that a failure to do so is a tort as well as a breach of contract.[23] Despite this axiom, however, even with respect to contracts that call for specialized or so-called professional services, not all courts and scholars can agree that breach of a common law duty to perform with care and skill is always a tort. The axiom is disregarded with regularity in practice, giving lie to the law and further undermining the taxonomic classification of essentially similar claims.[24]

Thus, when it comes to the liability of accountants for avoidable errors in the course and scope of contractually undertaken services, varying results in the Unites States are, as the expression goes, all over the map.[25] Many, perhaps most, states presently adhere to the view that tort is the exclusive theory of recovery against an accountant for misfeasance.[26]

Yet, some jurisdictions suggest that a contract theory might still be viable in such cases, even in the absence of a promise to obtain a specific

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23. *E.g.*, N. Am. Chem. Co. v. Superior Court, 69 Cal. Rptr. 2d 466, 470–71 (Ct. App. 1997) ("[F]or over fifty years California has . . . recognized the fundamental principle that '[a]ccompanying every contract is a common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of the contract.' The rule which imposes this duty is of universal application as to all persons who by contract undertake professional or other business engagements requiring the exercise of care, skill and knowledge; the obligation is implied by law and need not be stated in the agreement.' . . . A contract to perform services gives rise to a duty of care which requires that such services be performed in a competent and reasonable manner. A negligent failure to do so may be both a breach of contract and a tort. In such a hybrid circumstance, the plaintiff is entitled to pursue both legal theories until an occasion for an election of remedies arises." (citations omitted) (quoting Roscoe Moss Co. v. Jenkins, 130 P.2d 477, 481 (Cal. Dist. Ct. App. 1942))); *see also* Ins. Co. of N. Am. v. Cease Elec. Inc., 688 N.W.2d 462, 470 (Wis. 2004) ("[C]ontract law is not better suited than tort law for dealing with negligently provided services. Tort law provides an incentive generally to guard against negligent conduct in the provision of services. If tort law is avoided, the ability to deter certain activity is impaired because contract remedies and warranties may be easily disclaimed. Tort principles address more than merely a private interest between two commercial companies; they also address society's interest in minimizing harm by deterring negligent conduct.").

24. *See, e.g.*, Robinson Helicopter Co. v. Dana Corp., 102 P.3d 268, 280 (Cal. 2004) (Werdegar, J., dissenting) ("[The] taxonomy of contract cases where tort liability may be found is descriptive, not prescriptive. It offers no specific rationale for the characteristics shared by past cases allowing tort recovery, nor does it purport to say that all cases that fall within one or another category will necessarily give rise to tort liability. It thus does not advance the analysis.").

25. *See, e.g.*, Howard M. Garfield & Thomas Weathers, *A Survey of Accountant Malpractice: Breach of Contract or Tort?*, *in* ACCOUNTANTS' LIABILITY 1995, at 275 (PLI Litig. & Admin. Practice Course Handbook Series No. H-526, 1995) ("States divide on whether a claim by a client against its auditor for malpractice sounds in contract as well as in tort.").

26. *See, e.g.*, Swartz v. KPMG, LLC, 401 F. Supp. 2d 1146, 1154 (W.D. Wash. 2004) ("[T]he breach of contract allegations amount to nothing more than the re-framing of a negligence or malpractice claim against the accounting firm."). *But see* Garfield & Weathers, *supra* note 25, at 275–76 ("According to one commentator, '[t]he rule in a majority of states is that a plaintiff cannot sue a professional for breach of contract on the professional's failure to render services with due professional care.' This may or may not be an accurate statement. Apparently, an almost equal number of states divide on whether a plaintiff can or cannot base a malpractice cause of action against an accountant on breach of contract." (alteration in original) (citation omitted) (quoting Samuel J. Winer et al., *Accountant's Liability for Audits of Savings & Loan Associations*, C646 ALI-ABA 157, 167 (1991))).

result.[27] In these jurisdictions, courts may find that a claim against an accountant for careless performance sounds concurrently in tort and contract.[28] Other jurisdictions might still cling to the old implied in fact promise to exercise care to justify finding that an action against an accountant for malpractice sounds in contract.[29] Regrettably, under the present system, the wrong choice of legal theory may result in dire consequences.[30]

Paradoxical examples of courts attempting to distinguish tort from contract claims arising out of the careless performance of contractually undertaken obligations abound. Examining these attempts with respect to claims against doctors and accountants only begins to survey the field. For example, cases deciding whether attorney malpractice sounds in tort or contract are often equally incoherent.[31]

A case in point is *Jackson State Bank v. King*.[32] In 1993, the Wyoming Supreme Court held:

> Even though legal malpractice may be attributable to negligence on the part of the attorney, still the right to recompense is based upon the breach of the contract with the client. It follows that, because this re-

27. *See, e.g.*, Blumberg v. Touche Ross & Co., 514 So. 2d 922, 927 (Ala. 1987) ("[W]e are certain that New York would allow a contract action against an accountant for the accountant's failure to exercise due care."); Allied Int'l Bancorp, Inc. v. Peat, Marwick, Mitchell & Co., 530 N.Y.S.2d 964, 965 (Sup. Ct. 1988) (finding contract action against accountant for failure to exercise due care in performance of contract permissible so long as client seeks recovery for pecuniary harm). Some commentators believe that the trend in the United States is to recognize both tort and contract liability arising out of accountant malpractice. *See* Garfield & Weathers, *supra* note 25, at 289 ("[As certain] cases illustrate, disparity exists between the states as to whether a plaintiff can bring an accountant malpractice action in contract as well as tort. Several jurisdictions hold that a plaintiff can state a claim under either or both theories, but offer little reasoning supporting such a rule. Nonetheless, the trend, as evidenced by New York, may be toward permitting claims for both negligence and/or breach of contract against an accountant who fails to adhere to the standard of professional care. . . . [I]f the trend is true and a plaintiff can sue under one or both theories, a plaintiff should take care to appreciate the differences between the theories, particularly any applicable statute of limitations.").

28. *See, e.g.*, Billings Clinic v. Peat Marwick Main & Co., 797 P.2d 899, 909 (Mont. 1990) ("We cannot therefore agree with Peat Marwick that the Clinic had only a single form of claim against the Peat Marwick defendants. . . . The claims exist mutually in contract and in tort.").

29. *See, e.g.*, *In re* Am. Reserve Corp., 70 B.R. 729, 736 (Bankr. N.D. Ill. 1987) ("Under Illinois law . . . a professional may impliedly contract to render services in a manner consistent with the skill and care of those in the profession. Actions in contract may be based on this implied obligation; in such actions, liability is predicated on the failure to perform an agreed undertaking rather than upon negligence." (citations omitted)).

30. *See, e.g.*, Garfield & Weathers, *supra* note 25, at 274 (describing several distinctions between "an action . . . based in contract and an action based in tort law" including "(1) a longer statute of limitations may apply to contract actions; (2) the defense of contributory or comparative negligence may be unavailable in a contract action; (3) a nonclient plaintiff may claim that it was an intended third-party beneficiary of a contract . . . ; (4) expert witness testimony may be unnecessary to prove a breach of contract; (5) different jury instructions might apply; (6) in a contract action the plaintiff may have to be the party with whom the [defendant] had the contract; and (7) the contract measure of damages might differ from the tort measure of damages").

31. *See* Note, *Attorney Malpractice*, 63 COLUM. L. REV. 1292, 1292 (1963) ("American courts have exhibited disagreement and inconsistency regarding the theory underlying actions for [legal] malpractice."); *id.* at 1292 n.4 (listing cases exhibiting such inconsistencies).

32. 844 P.2d 1093 (Wyo. 1993).

> lationship is contractual in nature[, it] is to be treated according to the law of contracts . . . .[33]

Then, nine years later in *Long-Russell v. Hampe*,[34] the same court found that a legal malpractice action sounded in negligence (but refused to affirm an award of damages for emotional distress because such recovery is ambiguously reserved for other subcategories of tort claims).[35]

Summarily stated, results in this area of the law remain intolerably inconsistent despite decades of judicial tinkering. The law imposes a duty to perform all contractual duties with care, but not all negligently performed contractual duties give rise to an action in tort. Even those that do don't necessarily give rise to every otherwise available tort remedy. In addition, as demonstrated immediately below, there is yet another criterion that often plays a determinative role in the attempt to distinguish tort from contract theory in cases arising out of the misperformance of agreed services.

2. Distinguishing a Tort from a Breach of Contract Based on the Consequence of an Actor's Conduct

May a homebuyer recover in tort from a contractor who built her home a money judgment representing the cost to repair construction defects attributable to the builder's negligent deviations from the applicable building codes or industry standards? In a case that highlights perfectly the incongruous state of American law on this subject at the beginning of the twenty-first century, the California Supreme Court answered, "No."[36]

In *Aas v. Superior Court*, the California Supreme Court surveyed the prevailing law in other jurisdictions and forthrightly acknowledged that many of those jurisdictions had answered the question differently, though any hope for uniformity would have been misplaced.[37] In South Carolina, a builder stood liable in tort for the diminished value of a house caused by negligent deviations from applicable building codes or indus-

33. *Id.* at 1096; *see also id.* at 1094–95 (noting that Wyoming's comparative negligence statute did not bar plaintiff's recovery in a legal malpractice action based on claims for breach of contract, even though the jury apportioned fault to plaintiff, because a legal malpractice action is based on an implied warranty that the work performed by an attorney for his client will be performed in a skillful and professional manner).

34. 39 P.3d 1015 (Wyo. 2002).

35. *See id.* at 1019–20 ("Our analysis is complicated by the hybrid nature of claims for legal malpractice. To state a claim for legal malpractice, one must show that the 'defendant acted negligently *or* in breach of contract.' We have recognized that the two theories will frequently be interchangeable in legal malpractice cases. However, . . . [i]f we were to affirm the award of damages for emotional distress in this case, we would be sanctioning a similar award whenever a lawyer breached his or her contract with a client by negligently performing the promised legal services. This we are not willing to do." (citations omitted)).

36. Aas v. Superior Court, 12 P.3d 1125, 1130–33 (Cal. 2000), *superseded by statute*, 2003 Cal. Stat. 722, *as recognized in* Rosen v. State Farm Gen. Ins. Co., 70 P.3d 351, 356–57 (Cal. 2003).

37. *Aas*, 12 P.3d at 1130–33, 1131 n.7.

try standards.[38] In Maryland, a homeowner could recover in a negligence action the reasonable cost of correcting only construction defects that presented "a clear danger of death or personal injury."[39] The Supreme Court of Indiana permitted a tort action arising out of negligent construction to avoid a risk of physical harm.[40] In North Carolina, a homeowner could state a cause of action for negligence against the builder of her home by alleging that she was "forced to undergo extensive demolition and repair work to correct . . . defective, dangerous and unsafe conditions caused by the defendant's negligence."[41] The Nevada Supreme Court, after first indicating that a homeowner could recover in tort for the negligent framing of her home,[42] then held on appeal after remand *in the same case* that no tort liability arose from negligent construction that resulted in damage to only the home and its components.[43]

In light of these irregular decisions and those from other jurisdictions, the California Supreme Court in *Aas* rightly noted that whether a cause of action arising out of a contractor's negligence sounds in tort, contract, or both is "not [a] simple [question], because it arises from the nebulous and troublesome margin between tort and contract law."[44] That was, to say the least, an understatement.

The court in *Aas* chose a familiar criterion to determine whether the contractor's negligence gave rise to a cause of action in tort. The *Aas*

38. *See* Kennedy v. Columbia Lumber & Mfg. Co., 384 S.E.2d 730, 738 (S.C. 1989).

39. *See* Council of Co-Owners Atlantis Condo., Inc. v. Whiting-Turner Contracting Co., 517 A.2d 336, 345 n.5 (Md. 1986); *see also id.* at 345 ("We conclude that the determination of whether a duty will be imposed in this type of case should depend upon the risk generated by the negligent conduct, rather than upon the fortuitous circumstance of the nature of the resultant damage. Where the risk is of death or personal injury the action will lie for recovery of the reasonable cost of correcting the dangerous condition.").

40. *See* Barnes v. Mac Brown & Co., 342 N.E.2d 619, 620–21 (Ind. 1976). *But see* Fisher v. Simon, 112 N.W.2d 705, 708–10 (Wis. 1961) ("[A]ccompanying every contract is a common law duty to perform it with care and skill, and a failure to do so is a tort as well as a breach of contract. . . . [W]e can perceive of no public policy which would be promoted by relieving a builder-vendor from liability for damages caused by defective construction due to his failure to exercise ordinary care. As between the vendee and the builder-vendor, we deem it more equitable that the loss resulting from negligent construction, in a case of a latent defect, should be borne by the latter rather than the former.").

41. Oates v. Jag, Inc., 333 S.E.2d 222, 224 (N.C. 1985).

42. Calloway v. City of Reno, 939 P.2d 1020, 1025 (Nev. 1997), *superseded by statute*, 2003 Nev. Stat. 362, *as recognized in* Olson v. Richard, 89 P.3d 31, 33 (Nev. 2004) ("Subcontractors could clearly foresee that homeowners would live in the homes they framed. The Subcontractors could also foresee that if they negligently performed their framing work, structural damage and water intrusion could develop and force each homeowner to pay repair costs. Further, the costs of repairing the framing defects and water damage are reasonably calculable by a person in the trade. Therefore, we conclude that the Subcontractors need not be protected by the shield of the economic loss rule."). The court in *Olson v. Richard*, recognized that Nev. Rev. Stat. 40.600–40.770 supersedes *Calloway*. *Olson*, 89 P.3d 31, 33 (Nev. 2004).

43. *See Calloway*, 993 P.2d 1259, 1269–70 (Nev. 2000) (holding negligence claims against subcontractors alleging that defective framing caused water intrusion and structural decay without merit because the allegations involved pure economic loss).

44. *See* Aas v. Superior Court, 12 P.3d 1125, 1130 (Cal. 2000).

majority essentially asked: "What harm has the negligence caused?"[45] Though the contractor may have had a common law duty to perform the contract to build the home with care and skill, the negligent failure to do so, according to a majority of the California Supreme Court, was not actionable in tort until and unless a particular type of harm resulted from the breach.[46]

The *Aas* court carefully traced the history of recovery in tort for negligently performed services to reach this conclusion.[47] After observing that "this [question of taxonomy] implicates [many considerations of social policy]," the court denied recovery in tort because it could not "justify[] . . . the imposition of liability for construction defects that have not caused harm of the sort traditionally compensable in tort . . . ."[48] The "sort" of harm to which the court referred was "physical harm."[49]

To be sure, reasoning backward from the "sort" of harm claimed has often been used as a proxy for a better means to distinguish tort from contract claims. Some courts sometimes have required a showing of some modicum of some kind of physical harm to maintain a cause of action in tort. For example, early in the twentieth century, the illustrious jurist Benjamin Cardozo disavowed the doctrine of contractual privity and found tort liability to the ultimate user of a negligently manufactured chattel that caused bodily injury.[50] Judge Cardozo made clear that a duty

45. Dissenting in *Aas*, Justice Mosk reframed the majority's question and then answered it himself as follows: "[T]he majority's rhetorical question [is] 'What harm?' I would say, the harm that will arise when homeowners, believing, as humans are wont to do, that injury only befalls others, fail to repair hazardous conditions." *Id.* at 1156 (Mosk, C.J., concurring in part and dissenting in part).

46. *Id.* at 1135 (majority opinion).

47. *Id*. at 1131–34.

48. *Id.* at 1142.

49. Use of the term of art "physical harm" can be ambiguous. For example, the authors of the *Restatement (Third) of Torts: Products Liability* refer to "harm to persons or property, commonly referred to as personal injury and property damage." RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 cmt. d (1998). Ambiguity in use of these terms arises, *inter alia*, because "personal injury" can be physical, emotional, or some other sort of harm. For ease of reference, the term "physical harm" will be used herein to connote a measurable physical change in the condition of a human being or property, recognizing that physiological changes can be manifested by psychological conditions and vice versa.

50. *Compare* MacPherson v. Buick Motor Co., 111 N.E. 1050, 1051 (N.Y. 1916) (holding that a manufacturer is subject to tort liability without regard to privity whenever "the nature of a [manufactured] thing is such that it is reasonably certain to place life and limb in peril when negligently made"), *with* Winterbottom v. Wright, (1842) 152 Eng. Rep. 402 (Ex.) (holding that a postman seriously injured when a mail coach collapsed was unable to state a claim against the mail coach repairer in tort, because the repairer's contract was with the postman's employer). Courts and scholars often appear at the ready to spin *Winterbottom* to point to some idiosyncratic contention about the holding in the case. Two aspects of contract law compelled the result: first, the postman was not a party to the contract with the repairer (i.e., not in privity); and second, the court did not find that the contractual relationship between the repairer and the postman's employer implicated a duty to the postman that would be "imposed by law" (i.e., a tort duty). The court in *Winterbottom* stated: "There is also a class of cases in which the law permits a contract to be turned into a tort; but [only if] there has been some public duty undertaken, or public nuisance committed." *Id*. Rather than solely an "assault upon the citadel of privity" (to which then-New York Court of Appeals Judge

arose by operation of law to avoid negligently created risks of bodily injury.[51] His path-breaking decision was a major step along the way to unifying the tort and contract law canon; liability did not depend on contractual niceties. However, by focusing (at times inferentially) on the manifested result that the risk of bodily injury produced as the pronounced rationale to avoid the privity rules in contract, the great Cardozo perhaps inadvertently helped to nurture the seeds of an artificial distinction upon which the *Aas* court seized nearly a century later.

The *Aas* court found that the mere presence of defects in a home as a result of negligent construction would not qualify as the type of physical harm "traditionally" required to support a cause of action in tort.[52] In a very Cardozian vein, the *Aas* court speculated that the conduct of the builder *might* give rise to tort liability because someone might scratch a finger or bruise a toe owing to the negligent construction. But, according to the court in *Aas*, no tort liability would lie to compensate for the costs to ameliorate a negligently created *risk* of not yet realized bodily injury or property damage:

> For . . . negligent services that have caused neither property damage nor personal injury, . . . tort remedies have been uncertain. . . . [D]eviations from standards of quality that have not resulted in property damage or personal injury. . . are primarily the domain of contract and warranty law . . . rather than of negligence. In actions for negligence, a manufacturer's liability is limited to damages for physical injuries; no recovery is allowed for economic loss alone. . . . This general principle, the so-called economic loss rule, is the primary obstacle to plaintiffs' claim.[53]

Cardozo referred in *Ultramares Corp. v. Touche*, 174 N.E. 441, 445 (N.Y. 1931)), the second aspect of the *Winterbottom* rationale correspondingly was assaulted by Judge Cardozo in *MacPherson*.

51. *See MacPherson*, 111 N.E. at 1051 ("We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought not be. We have put its source in the law.").

52. The terribly convoluted and illogical analysis that is required to determine whether negligent construction has caused "property damage" is exemplified by this passage:

> In a single paragraph and without significant analysis, the majority . . . substantially erodes the demarcation between contract and tort law in California. Plaintiffs allege they bought a product (a mass-produced home) that included defective components (the windows), which malfunctioned, *damaging the product* [the home] *as a whole* but otherwise causing no personal injury or *property damage*. . . . As such, [this] is a purely commercial dispute involving failure to deliver bargained-for value (monetary harm) and dependent for its resolution on the terms of the parties' agreement.

Jimenez v. Superior Court, 58 P.3d 450, 459–60 (Cal. 2002) (Brown, J., concurring in part and dissenting in part) (emphasis added) (citations omitted); *see also* Calloway v. City of Reno, 999 P.2d 1259, 1273, 1275 (Nev. 2000) (Maupin, J., concurring in part and dissenting in part) (suggesting, in dictum, that a tort claim could have been maintained against negligent framing subcontractors had the water intrusion caused by their negligence ruined, instead of the structure, a non-fixed carpet within it, i.e., personal property not part of the "single integrated entity" at issue (the home) that the subcontractor framed).

53. *Aas*, 12 P.3d at 1130–31 (citations omitted); *see also infra* note 104.

The "economic loss rule" to which the court referred is a product of the struggle to distinguish tort from contract law. By focusing on the *consequence* of carelessly performed services, the economic loss rule purportedly "defines the boundary between the overlapping theories of tort law and contract law . . . particularly in . . . negligence cases."[54] As one court recently stated, "The purpose of the rule is to strike an equitable balance between countervailing public policies[] that exist in tort and contracts law."[55] The rule is thought by its proponents to honor the volitional ordering of essentially private obligations that arise by consent by barring the recovery of purely economic loss in tort.[56] Contemporary legal taxonomists thus claim that if a breach of contract gives rise to economic harm absent *manifested* physical injury, then the "pure" economic nature of the injury is a reliable means to distinguish a contract claim from one in tort.

Once again, however, inherent in these platitudes are unadorned fallacies. First, the economic loss rule is not always invoked to honor the ordering of private, voluntarily assumed obligations. Instead, the rule is used frequently as a substitute for a difficult "proximate cause" analysis to determine the scope of liability in cases involving garden-variety negligence that causes far-reaching economic harm (arising out of the performance of contractual duties or otherwise).[57] In this context, the "rule" is an arbitrary pretext for principle that is grounded in a desire for ease of judicial administration.

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54. Dean v. Barrett Homes, Inc., 968 A.2d 192, 202 (N.J. Super. Ct. Ch. Div. 2009) (citations omitted) (internal quotation marks omitted).

55. Travelers Indem. Co. v. Dammann & Co., 594 F.3d 238, 244 (3d Cir. 2010) (alteration in original) (internal quotation marks omitted).

56. *See, e.g.*, Jay M. Feinman, *The Economic Loss Rule and Private Ordering*, 48 ARIZ. L. REV. 813, 814 (2006) ("[C]ases [implicating the rule] originate[] . . . in a contract entered into by the defendant and its contracting partner. The defendant and its partner have allocated the risks and benefits of performance in their contract, and the court upsets that allocation when it imposes liability on the defendant. Imposing such liability outside the contract is unfair to the defendant, who has ordered its affairs on the expectations created in the contract, and undermines the process of contracting. Although there are other justifications for the rule, the argument about private ordering is primary. . . . The logic of private ordering is, of course, the logic of contract law: individuals are the best judges of their own interests; individuals maximize those interests through contracts; the expectation and reliance interests created by contracts deserve protection; promoting private contracting produces a social benefit; contract law provides the framework through which the individual and social benefits are realized in practice. In economic loss cases, private ordering is advanced when courts recognize contract law as the primary structure for regulating relationships. Applying tort law, on the other hand, could upset the parties' private ordering. As a result, recovery is allowed only within the bounds of contract law . . . ."); *see also id.* at 817 n.23 ("Other elements of the rationale for the economic loss rule include avoiding indeterminate liability, the difficulty in measuring fault, causation, and damages, the adequacy of other remedies in providing deterrence, and preserving the defendant's assets for the most deserving victims." (citing RESTATEMENT (THIRD) OF TORTS: ECON. TORTS & RELATED WRONGS § 8 cmt. b (Preliminary Draft No. 2, 2006))).

57. *See, e.g.*, Dan B. Dobbs, *An Introduction to Non-Statutory Economic Loss Claims*, 48 ARIZ. L. REV. 713, 715 (2006) (arguing that the "stranger economic loss rule" is justified in a complex society where "[s]tand-alone economic loss often spreads without limit").

The latter observation was essentially conceded by the Fifth Circuit in *Louisiana ex rel. Guste v. M/V Testbank*.[58] The injured parties argued that "[t]he [economic loss rule] is arbitrary, unfair, and illogical, as it denies recovery for foreseeable injury caused by negligent acts."[59]

In response, the court demurred:

> Those who would delete the requirement of physical damage have no rule or principle to substitute. Their approach fails to recognize limits upon the adjudicating ability of courts. We do not mean just the ability to supply a judgment; prerequisite to this adjudicatory function are preexisting rules, whether the creature of courts or legislatures. Courts can decide cases without preexisting normative guidance but the result becomes less judicial and more the product of a managerial, legislative or negotiated function.
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> . . . .
>
> . . . Plaintiffs point to seemingly perverse results, where claims the rule allows and those it disallows are juxtaposed . . . . The answer is that when lines are drawn sufficiently sharp in their definitional edges to be reasonable and predictable, such differing results are the inevitable result—indeed, decisions are the desired product.[60]

Conceptions of judicial efficiency may be thought by some to compel limiting the scope of the liability of actors who cause widespread harm in a crowded, industrialized society to damages for physical harm (and *consequential* economic loss). But in attempts to apply the distinctions required by the economic loss rule as between contracting parties, the utter incoherencies of the rule are disturbingly apparent.

For whatever the merits of the economic loss rule when used to foreclose liability in tort to third parties not physically injured as a result of a negligent breach of a contract with another, the rule intolerably fails to reliably identify whether a negligent breach of contract should be adjudicated according to the principles of tort or contract law in a dispute between the parties to the agreement. The economic loss rule is patently incongruous when considered in the latter context. As the court explained in *Moransais v. Heathman*[61]:

> [T]he economic loss rule may have some genuine, but limited, value in our damages law, [but was never] intended to bar well-established common law causes of action, such as those for neglect in providing

58. 752 F.2d 1019, 1030 (5th Cir. 1985).
59. *Id.* at 1028.
60. *Id.* at 1028–29.
61. 744 So. 2d 973 (Fla. 1999).

> professional services. . . . The rule, in any case, should not be invoked to bar well-established causes of actions in tort . . . .[62]

The *Moransais* court correctly alluded to an entire body of tort law that pertains precisely to recovery for purely economic loss arising out of negligently performed contractual duties.[63] Any attempt to wall recovery of negligently caused "pure economic loss" arising out of contractual services within the bounds of contract law necessarily fails. Attempts by courts to do so inevitably lead to even more inconsistencies and consequent incoherency in the application of the economic loss rule.

For example, not much more than a decade ago, the Supreme Judicial Court of Massachusetts was called upon to decide whether the economic loss rule precludes viewing attorney malpractice as a tort.[64] An attorney's client argued that legal malpractice that causes purely economic harm gives rise to an action sounding solely in contract in order to avoid the attorney's defense based on the client's alleged comparative negligence.[65] Remarkably, in 1998, the court labeled the question "unanswered" by precedent.[66]

In response to this classification gambit, the Supreme Judicial Court of Massachusetts first noted that it had never applied "the economic loss rule to claims of negligence by a fiduciary, such as a lawyer."[67] The court

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62. *Id.* at 983 (footnote omitted). In *Moransais*, the Florida Supreme Court acknowledged that "our pronouncements on the [economic loss] rule have not always been clear and, accordingly, have been the subject of legitimate criticism and commentary." *Id*. at 980. The court found that, as a consequence, courts in Florida had "[u]nfortunately" extended the economic loss doctrine "beyond its principled origins and . . . appli[ed] the rule . . . well beyond our original intent." *Id.* In order to avoid precluding traditional and well-established actions in tort, the *Moransais* court limited future application of the economic loss rule generally to the product liability context or to situations where the policy considerations are substantially identical to those underlying its "product liability-type analysis." *Id*. at 983; *see also In re* Hannaford Bros. Co. Customer Data Sec. Breach Litig., 613 F. Supp. 2d 108, 126–27 (D. Me. 2009) (holding that customers had stated a claim in tort for alleged negligence in handling electronic payment data because economic loss rule was restricted to product liability cases).

63. *See Moransais*, 744 So. 2d at 984 ("[W]e again emphasize that by recognizing that the economic loss rule may have some genuine, but limited, value in our damages law, we never intended to bar well-established common law causes of action.").

64. *See* Clark v. Rowe, 701 N.E.2d 624, 626 (Mass. 1998).

65. *Id.*

66. *Id.*

67. *Id.* Professor Dan B. Dobbs agrees that lawyers and other fiduciaries should be liable in tort for negligent performance, and he would foreclose contractual disclaimers in such cases as follows:

> [B]ases for subjecting lawyers and perhaps some other professionals to negligence liability do indeed exist. When you retain someone for the express purpose of being on your side, he cannot rightly contract to be your adversary instead or to be on your side but free to be negligent. This suggests that contract limits on lawyer liability for negligence would be inappropriate. That is not the whole story, because lawyers can limit the scope of their representation by contract, but it is enough to justify holding lawyers and fiduciaries liable in negligence and foreclosing any broad self-exculpatory contract.
>
> That line of reasoning does not apply to all services, so you can say that while professionals may not readily limit their liability to clients by contract, other service providers might well be allowed to do so. Yet, for non-professional service providers it would be more in line with contractual autonomy to ask what the parties actually provided, ex-

could not leave the matter at that, however. To be sure, the Massachusetts courts had imputed a duty "enforceable in law" to carefully perform services that are likely to cause only economic harm in instances involving a service by one who owes a fiduciary duty. Yet, a breach of professional standards by an attorney does not always give rise to a fully realized remedy in tort for breach of fiduciary duty,[68] and attorney malpractice does not always entail a breach of fiduciary duty.[69]

Thus, the Supreme Judicial Court of Massachusetts could not elide the question presented by the attorney's client. The client asked the court to decide whether the economic loss rule applies in cases arising out of legal services likely from the outset to cause only economic harm if negligently performed. The court rejected the client's claimed immunity

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pressly or impliedly, rather than to determine by a rule of law that none of them can be liable for negligence.

Dobbs, *supra* note 57, at 727–28. Unfortunately, the means suggested by Professor Dobbs to distinguish tort from contract liability is too vague to be of much practical benefit. Deciding what service providers are "on your side" is a rather nebulous standard. For example, auditors are usually required to take no side other than the truth, yet, their misfeasance is considered a tort, sometimes even as to third parties. Moreover, reference to "lawyers and perhaps some other professionals" is intelligible to only a self-referential elite. The authors of the *Restatement (Second) of Torts* correctly considered nearly all trades in parity with "professionals" when stating the applicable standard of care in tort. *See* RESTATEMENT (SECOND) OF TORTS § 299A, (1965) ("Skill . . . is something more than the mere minimum competence required of any person who does an act . . . . It is that special form of competence which is not part of the ordinary equipment of the reasonable man, but which is the result of acquired learning, and aptitude developed by special training and experience. All professions, and most trades, are necessarily skilled, and the word is used to refer to the special competence which they require."). Wisely, the *Restatement (Third) of Torts: Physical & Emotional Harm* thus provides that "[i]f an actor has skills or knowledge that exceed those possessed by most others, these skills or knowledge are circumstances to be taken into account in determining whether the actor has behaved as a reasonably careful person." RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 12 (2010). As the American Law Institute authors explain, "This Section can be easily applied to cases involving the liability of professionals," but it is not limited thereto. *Id*. § 12, cmt. a (citing RESTATEMENT (SECOND) OF TORTS § 299A). Defining negligent services as tortious based on the identity of an actor as a "professional" at long last should be rejected outright; it is, at best, problematic and vague, and, at worst, an inappropriate throwback to outdated notions of *noblesse oblige*.

68. *See, e.g.*, Medina v. Bryk, No. FBT-CV-5008762-S, 2007 WL 4754990, at *2 (Conn. Super. Ct. Dec. 28, 2007) ("Although the Connecticut Supreme Court has never expressly limited the application of claims of breach of fiduciary duty to those involving fraud, self-dealing or conflict of interest, all of the cases decided by the court have involved such egregious deviations from proper and ethical conduct. Superior Courts which have considered the issue have further limited the *type of conflict of interest* which will give rise to a claim for breach of a fiduciary duty to those involving *self-dealing*. No cause of action [in tort for emotional distress] has been recognized, when the claims involve a breach of the Rules of Professional Conduct, in the absence of self-dealing or actions placing the interest of the attorney above those of the client." (emphasis added) (citation omitted)).

69. *See, e.g.*, Kilpatrick v. Wiley, Rein & Fielding, 909 P.2d 1283, 1289–90 (Utah Ct. App. 1996) ("While legal malpractice actions based on breach of contract are conceptually distinct, legal malpractice actions based on negligence and breach of fiduciary duty are more difficult to differentiate. . . . [A]n attorney's fiduciary duty is two-fold: undivided loyalty and confidentiality. An attorney's failure to provide undivided loyalty to a client does not necessarily mean that an attorney has performed legal services negligently. . . . Legal malpractice based on negligence concerns violations of a standard of care; whereas, legal malpractice based on breach of fiduciary duty concerns violations of a standard of conduct. Breach of fiduciary duty, therefore, provides a basis for legal malpractice separate and apart from professional negligence." (citations omitted)).

from tort defenses in such a case and approved a standard broad enough to nearly destroy the economic loss rule in like circumstances:

> [A] defendant owes a duty of care to take reasonable measures to avoid the risk of causing economic damages, aside from physical injury, to particular plaintiffs or plaintiffs comprising an identifiable class [who] defendant knows or has reason to know are likely to suffer such damages from its conduct. A defendant failing to adhere to this duty of care may be found liable [in tort] for such economic damages proximately caused by its breach of duty.[70]

Defining tort liability for economic loss in terms that measure the scope of the risk created by a defendant's conduct is a fulsome capitulation to logic that displaces the economic loss rule as a means to distinguish a breach of contract from a tort. The negligent breach of almost any contract to perform services (such as construction services) will foreseeably cause economic loss.[71] The standard recognized by the Supreme Judicial Court of Massachusetts might adequately resolve a "scope of liability" problem in some cases by reference to a foreseeable class of injured parties, but that standard does not reliably distinguish negligently performed services that give rise to a cause of action in tort for economic harm from those that do not.

Against this backdrop, in 2004, the American Law Institute (ALI)[72] set out to "restate" tort law governing economic losses in the *Restatement (Third) of Torts: Economic Torts and Related Wrongs*.[73] The second draft of this proposed Restatement adopted a rule not entirely unlike the standard accepted by the Supreme Judicial Court of Massachusetts in *Clark v. Rowe*.[74] That rule provided that an actor owes a duty of care to another to avoid negligently inflicted economic harm when the actor "appears to invite the other to rely on the actor to render a service . . . ."[75] In the view of some, this formulation adequately "'mediate[d] between

70. Clark v. Rowe, 701 N.E.2d 624, 626–29 (Mass. 1998) (quoting People Express Airlines, Inc. v. Consol. Rail Corp., 495 A.2d 107, 116 (N.J. 1985)); *see also People Express Airlines*, 495 A.2d at 118 ("[E]conomic losses are recoverable as damages when they are the natural and probable consequence of a defendant's negligence in the sense that they are . . . demonstrably within the risk created by defendant's negligence.").

71. *See, e.g.*, Landwehr v. Citizens Trust Co., 329 N.W.2d 411, 413–14 (Wis. 1983) ("[Plaintiff] contends 'that there [should] be liability in tort whenever . . . misperformance involves a foreseeable, unreasonable risk of harm to the interests of the plaintiff.' We agree with the courts below that this theory, which focuses on foreseeability . . . would destroy the distinction between tort and contract, since some kind of foreseeable injury or damage is present in virtually all contractual breaches." (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS 617–18 (4th ed. 1971)).

72. "The American Law Institute is the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law." THE AM. LAW INST., http://www.ali.org/index.cfm?fuseaction=about.overview (last visited Nov. 10, 2012).

73. *Past and Present ALI Projects*, THE AM. LAW INST., (Apr. 2010), http://www.ali.org/doc/past_present_ALIprojects.pdf.

74. Feinman, *supra* note 56, at 818–19.

75. RESTATEMENT (THIRD) OF TORTS: ECON. TORTS & RELATED WRONGS § 9(2) (Preliminary Draft No. 2, 2006) *quoted in* Feinman, *supra* note 56, at 819.

the rules of tort liability for physical harm and the rules of contract liability," owing to the required relation to another and numerous proposed exceptions to the primary rule.[76] Unfortunately, those exceptions prescribed taxonomic distinctions nearly impossible to apply in practice.[77]

Professor Mark F. Gergen was the reporter for this project. By December 2007, he stepped down. The second draft failed to garner sufficient support. As Professor Gergen explained in his letter of resignation:

> I presented Council Draft No. 2 covering much of the field of economic negligence. There was strong disagreement voiced at the meeting about the direction taken in the draft. The draft states the law of economic negligence (and in particular negligent misrepresentation) in terms that emphasize its relation to contract law and that distinguish the law of economic negligence from accident law involving physical harm. The criticism was that the law of economic negligence should be situated within a general tort of negligence . . . .[78]

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76. *See* Feinman, *supra* note 56, at 819. In 2006, Professor Feinman argued that the breadth suggested by the primary rule was tempered by several exceptions deferential to contractual relations in that

> [i]n a number of circumstances, the general principle of section 9(2) is explicitly subordinated to private ordering. First, the principle does not apply if an actor "effectively disclaims liability." Second, when the invitation to rely comes in the course of performing a contract governed by an integrated document, the parol evidence rule trumps what might otherwise be a duty of care. Third, there is no duty of care when "the actor's obligation to the plaintiff is resolved by another body of law," which includes contract law. "Resolved by" apparently does not mean "provides a remedy for," but rather "addresses the issue," which would result in no liability in many cases. Fourth, "a tort action usually is unnecessary" when "the plaintiff could obtain redress for the harm by contract from the actor or an intermediate party."

Id. (quoting RESTATEMENT (THIRD) OF TORTS: ECON. TORTS & RELATED WRONGS § 9(3)(c) (Preliminary Draft No. 2, 2006)); *see also* Mark P. Gergen, *The Ambit of Negligence Liability for Pure Economic Loss*, 48 ARIZ. L. REV. 749, 764–65 (2006) (discussing Jane Stapleton's view that tort liability can be precluded when contract law regulates an actor's unreasonable conduct or is available to prevent or redress the alleged harm).

77. *See* Feinman, *supra* note 56, at 819 (noting that an exception from the primary rule provided that "there is no duty of care when the actor's obligation to the plaintiff is *resolved* by another body of law" (emphasis added)). Stating that tort law applies when contract law does not "resolve[]" the matter is not a workable standard because it provides no normative guidance whatsoever. If a contract "addresses the issue" in dispute by "effectively disclaim[ing] liability" in tort or provides "redress" so limited that the outcome will be "no liability in many cases," then yet another standard will be necessary to test the validity of such provisions to preserve tort liability in a wide range of cases. *Contra id.*; Gergen, *supra* note 76, at 768, 771 (recognizing that in certain cases absent tort liability alternative means may be inadequate to "deter unreasonable conduct, or to prevent or redress the [alleged] harm," allowing that in such instances a court might "weigh[] the need for tort liability against concerns about its efficacy," and accepting that "the particular balance struck [might vary based] on institutional and social considerations, legal culture, judicial philosophy, and judicial temperament").

78. Bruce Feldthusen, *What the United States Taught the Commonwealth About Pure Economic Loss: Time To Repay the Favor*, 38 PEPP. L. REV. 309, 319–20 (2011); *see also* Gergen, *supra* note 2, at 4–5 (explaining his resignation, Professor Gergen stated: "[My] taxonomic claim [regarding negligent misrepresentation] goes to the heart of a disagreement between me and some other participants in the American Law Institute project on Economic Torts that led to my resignation as Reporter for the project. They think the law of negligent misrepresentation (or negligent misstatement, as it is known elsewhere in the common law world) is best understood as part of negligence law. [I don't.] Taxonomy matters.").

The so recent inability of a group of scholars so prominent as these to agree on a question of the taxonomy of legal claims so basic tells us a great deal about the inability of contemporary legal taxonomy to serve the interests of those who are so considerably affected by its inadequacies.

Despite the "strong disagreement" to which Professor Gergen referred in his letter of resignation, the circulated draft garnered some expectable support notably from stalwarts of economic loss theory. For example, Professor Bruce Feldthusen, who has focused his research and writing on the economic loss rule for more than thirty-five years, described the debate in the following terms:

> Professor Gergen resigned over a fundamental disagreement as to whether the distinction between economic loss and physical damage was justified, and whether the close relationship between economic loss cases and contract law, in which Professor Gergen believed, actually existed. Having attended some of the American Law Institute meetings, I can tell you that those who saw economic negligence as a wrinkle on the general law of physical damage negligence law believed equally that it is productive to group all negligence cases together and to resolve them with reference to high level principles rather than relatively clear rules that apply in *easily identified* categories of cases. Of course I believe this is a totally misguided approach.[79]

Professor Feldthusen's conclusion about the misguided nature of unifying themes in the common law may be a triumph of academic aspirations over real world experience. His observation that pure economic loss and its relation to contract law is "easily identified" is demonstrably belied by the cases.

For however sincere some scholars (and courts) may be in implicit assurances to the contrary, views about "pure economic harm" that prominent and respected contemporary legal theorists like Professors Gergen and Feldthusen propound would wreak havoc in the common law if ever fully implemented.[80] Attempts to codify rules to reliably distinguish contract from tort claims based on whether a claim is for solely economic loss cannot and will not succeed. The cases are just too incongruent to "easily" distinguish those circumstances in which courts will

79. Feldthusen, *supra* note 78, at 320 (emphasis added).

80. As stated by the dissent in *Aas*: "[T]hose courts [that] have addressed [the economic loss rule] from . . . a commonsense perspective . . . have reached conclusions very different from that adopted by the majority in the present case. . . . [T]he majority today embraces a ruling that offends both established common law and basic common sense." Aas v. Superior Court, 12 P.3d 1125, 1143 (Cal. 2000) (George, C.J., concurring in part and dissenting in part); *see also* Moransais v. Heathman, 744 So. 2d 973, 983 (Fla. 1999) ("If the [economic loss] doctrine were genuinely applied to bar all tort claims for economic losses without accompanying personal injury or property damage, the rule would wreak havoc on the common law of torts." (citing Paul J. Schwiep, *The Economic Loss Rule Outbreak: The Monster That Ate Commercial Torts*, 69 FLA. B.J. 34, 34 (1995)).

permit recovery in tort based on a breach of contract that causes only economic harm from those in which courts will not, as the court in *Aas* so cogently demonstrated.[81]

In practice, fluctuating classifications result in fluctuating remedies. For example, one can recover in tort for emotional distress arising out of the negligence of a notary that causes "pure economic loss"[82] but not for emotional distress that arises out of a veterinarian's negligence that causes physical harm (e.g., the death of a cat or dog).[83] The latter result may be the same even if the veterinarian intentionally causes the death of one's beloved pet, and yet, punitive damages might be awarded.[84]

In sum, one cannot help but be amazed by the volume of conflicting and contradictory precedent governing the matter of distinguishing tort from contact theory in cases involving the rendering of services. Some courts are so completely befuddled by the illogical distinctions swirling around them that they cannot keep the supposed taxa distinct and in the final analysis misapply the putative taxonomic rules of recovery without any legitimate basis for deviation owing seemingly to pure confusion.[85]

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81. *Aas*, 12 P.3d at 1143. *Compare* City Express, Inc. v. Express Partners, 959 P.2d 836, 840 (Haw. 1998) (holding that recovery of pure economic loss for professional negligence of architect is precluded), *with* Robinson Redevelopment Co. v. Anderson, 547 N.Y.S.2d 458, 460 (App. Div. 1989) (holding that recovery of pure economic loss for professional negligence of architect is not precluded). *See* Peter Benson, *The Problem with Pure Economic Loss*, 60 S.C. L. REV. 823, 824–825 (2009) ("[B]oth defenders and critics of the traditional bar against recovery [in tort for pure economic loss] share the assumption that it cannot be justified on the basis of ordinary principles of negligence. They take as given that these principles would allow recovery in the very circumstances where courts have consistently denied it. The rationale must lie elsewhere. Thus pure economic loss claims are to be governed by a special rule—the 'economic loss rule.' On this view, economic loss represents a distinct topic within tort law that apparently raises its own special policy considerations and concerns.").

82. *See, e.g.*, Webb v. Pioneer Bank & Trust Co., 530 So. 2d 115, 118–119 (La. Ct. App. 1988) (holding negligent notary liable for emotional distress damages); McComber v. Wells, 85 Cal. Rptr. 2d 376, 379 (Ct. App. 1999) (holding negligent notary liable for emotional distress damages).

83. *See* Tracy Bateman Farrell, *Animals*, 4 AM. JUR. § 116 (2d ed. 2012) ("Most jurisdictions deny recovery of damages for emotional distress arising from injury or death of animals caused by ordinary negligence on the ground that animals are, at common law, and sometimes by statute, deemed personal property."); McMahon v. Craig, 97 Cal. Rptr. 3d 555, 563 (Ct. App. 2009) (holding that a contract between veterinarian and owner to treat Tootsie [the dog] did not demonstrate that defendants undertook a duty to protect owner's mental and emotional tranquility (citing Selden v. Dinner, 21 Cal. Rptr. 2d 153, 158–59 (Ct. App. 1993) (holding that a duty to protect patient's emotional health does not arise by virtue of physician–patient relationship))); *see also* Erlich v. Menezes, 981 P.2d 978, 982 (Cal. 1999) ("The[] uncertain boundaries and the apparent breadth of the recovery available for tort actions create pressure to obliterate the distinction between contracts and torts—an expansion of tort law at the expense of contract principles which Grant Gilmore aptly dubbed 'con*torts*.' In this case we consider whether a negligent breach of a contract will support an award of damages for emotional distress . . . . [I]s the mere negligent breach of a contract sufficient? The answer is no.").

84. *See, e.g.*, Scheele v. Dustin, 998 A.2d 697, 701 (Vt. 2010) (surveying authority from several jurisdictions, court adopts nearly universal rule and denies plaintiffs' recovery for emotional damages for the intentional killing of their pet dog but postulates that punitive damages may be "available to a party who has suffered from an intentional . . . tort").

85. *See, e.g.*, Boone v. C. Arthur Weaver Co., 365 S.E.2d 764, 766 (Va. 1988) (reasoning that because there would have been no duty to a client in the absence of a contract, the court applied the contract statute of limitations to a tort action based on professional negligence).

The types of harm that "traditionally" have been compensable in tort are not carved in immutable stone tablets. The failure to have derived coherent taxa to reliably describe legally cognizable claims and available remedies arising out of a conceded harm not only deprives litigants of remedies based on steady principles but also speaks volumes about the likely success of building on the shaky foundation of archaic doctrinal distinctions.[86] A legal structure able to provide a more coherent and predictable forum for adjudicating rights and remedies is sorely required.

B. The Restatement (Third) of Torts: Products Liability*; A Useful but Piecemeal Measure to Abjure Contemporary Legal Taxonomy*

If regulating the boundary between tort and contract theory is challenging in the area of service contracts, doing so has proved even more maddening in the area of liability arising out of the defective manufacture of consumer goods. The legal theory of liability applicable to claims by a consumer injured by a defectively made chattel is a matter of impressive juridical vagueness and striking sidestepping by courts and legislatures. Perhaps no aspect of the legal canon in contemporary America demonstrates better the futility of parsing claims based on faulty taxonomic distinctions.

To get a sense of the conflicting precedents governing "product liability," consider the frustration evident in this passage, penned by a judge trying to make sense of the nonsensical patchwork of state law in the United States prevailing at the outset of the twenty-first century:

> In [New York], a products liability plaintiff may sue in negligence, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, breach of express warranty, strict liability in tort, as well as intentional or negligent misrepresentation. In [Connecticut, Kansas, Oregon, or Washington], that same plaintiff would have only a single cause of action under the state products liability act. Somewhere else, such as Indiana, that identical plaintiff could sue in negligence or strict liability but not warranty, while a few miles away in Michigan, he or she could only sue in negligence or warranty.[87]

These confused and contradictory precedents are directly attributable to the uncertain but relentless morphing in fits and starts of tort and contract theory. As the legatees of Prosser's famous torts casebook state:

86. *See Current Projects, Restatement Third, Torts: Liability for Economic Harm*, AM. LAW INST., http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=15 (last visited Nov. 10, 2012) ("[The] project [which resumed in 2010] will focus on torts that involve economic loss, or pecuniary harm not resulting from physical harm or physical contact to a person or property. The project will update coverage of economic torts in Restatement Second, Torts and address some topics not covered in prior Restatements.").

87. Drooger v. Carlisle Tire & Wheel Co., No. 1:05-CV-73, 2006 WL 1008719, at *7 (W.D. Mich. Apr. 18, 2006) (alterations in original) (quoting Fisher v. Bristol-Myers Squibb Co., 181 F.R.D. 365, 369 (N.D. Ill. 1998) (internal quotation marks omitted).

"[An] action by the buyer of goods against the seller for breach of warranty is a hybrid, 'born of the illicit intercourse of tort and contract,' and partaking the characteristics of both."[88] They further note:

> Originally the action was in tort, in an action of trespass on the case for breach of an assumed duty, and the wrong was conceived to be a form of misrepresentation, in the nature of deceit, and not at all clearly distinguished from it. . . . In the latter part of the seventeenth century, decisions . . . established the fact that the tort action would lie for an affirmation of fact (''express warranty''), even one made without knowledge of its falsity and without negligence. . . .
>
> In [1778], it was first held that assumpsit would lie for breach of an express warranty as a part of the contract of sale. After that decision, and over a period of more than a century, warranties gradually came to be regarded as express or implied terms of the contract of sale, and the action on the contract became the usual remedy for any breach.[89]

Since the end of the nineteenth century, tort theory gradually has come to play an important role again with respect to liability for defectively made chattels.[90] But, as noted above, old theories do not die, and they do not even fade away. Instead, a party injured by a defective product in most jurisdictions today must choose from an awkward, confusing, and sometimes conflicting array of "causes of action" to plead her case. The consequence of this accumulation of legal theories is not of simply or solely academic interest: the wrong choice of theory by a litigant or the court may result in no recovery at all for injuries caused by a defectively manufactured chattel.

In 1998, the authors of the *Restatement (Third) of Torts: Products Liability* discernibly moved toward recognizing a true uniform canon governing liability arising out of defectively manufactured chattels.[91] The black-letter rule of product liability proposed by this Restatement prescribes liability based on a "functional" analysis that abandons doctrinal

88. VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE, AND SCHWARTZ'S TORTS 748 (12th ed. 2010).

89. *Id.* at 748–49.

90. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 cmt. a (1998) ("In the late 1800s, courts in many states began imposing negligence and strict warranty liability on commercial sellers of defective goods. In the early 1960s, American courts began to recognize that a commercial seller of any product having a manufacturing defect should be liable in tort for harm caused by the defect regardless of the plaintiff's ability to maintain a traditional negligence or warranty action. . . . Strict liability in tort for defectively manufactured products merges the concept of implied warranty, in which negligence is not required, with the tort concept of negligence, in which contractual privity is not required.")

91. *See id.* § 1 ("One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.").

distinctions between tort and contract law in favor of liability based on categories of product defect. As the ALI explains:

> [P]roducts liability is a discrete area of tort law which borrows from both negligence and warranty. It is not fully congruent with classical tort or contract law. Rather than perpetuating confusion spawned by existing doctrinal categories, [this Restatement] define[s] the liability for each form of defect in terms directly addressing the various kinds of defects. As long as these functional criteria are met, courts may utilize the terminology of negligence, strict liability, or the implied warranty of merchantability, or simply define liability in the terms set forth in the black letter.[92]

This praiseworthy effort to locate the source of liability for defectively made products in the operative facts, while leaving to the courts the prerogative to classify a claim however they please, is consonant with other efforts by the ALI to begin the process of abandoning the artificial and unworkable doctrinal categories that haunt the legal canon in the United States.[93] However, laudable as may be the efforts by the ALI authors to simplify substantive claims arising out of the defective manufacture of chattels, the liability regime they recommend regrettably continues to distinguish "pure economic loss" from "physical harm" and consigns claims of "economic loss traditionally excluded from the realm of tort law" to the law of contracts (here, the Uniform Commercial Code)—thereby perpetuating the very confusion caused by the existing doctrinal categories of claims that the authors sought to avoid at the outset.[94]

The authors of the *Restatement (Third) of Torts: Products Liability* specify three categories of economic loss that cannot be recovered under the unified theory of product liability. The first category is consequential economic loss (unaccompanied by physical harm) owing to the failure of a product to perform;[95] the second is loss owing to the need to replace a

92. *Id.* § 1 cmt. a.

93. For example, the ALI has taken a major step toward supplanting archaic doctrinal distinctions with respect to the apportionment of liability. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 1, cmt. b (2000) ("This Restatement applies to all claims to recover compensation for death, personal injury, or physical damage to tangible property, including intentional torts, negligence, strict liability, nuisance, breach of warranty, misrepresentation, or any other theory of liability.").

94. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 cmt. d. (1998) ("The rule stated in this Section applies only to harm to persons or property, commonly referred to as personal injury and property damage. For rules governing economic loss, see § 21."); *id.* § 21 cmt. a. ("This Section limits the kinds of harm for which recovery is available under this Restatement. Two major constraints on tort recovery give content to this Section. First, products liability law lies at the boundary between tort and contract. Some categories of loss, including those often referred to as 'pure economic loss,' are more appropriately assigned to contract law and the remedies set forth in Articles 2 and 2A of the Uniform Commercial Code. . . . Second, some forms of economic loss have traditionally been excluded from the realm of tort law even when the plaintiff has no contractual remedy for a claim.").

95. *Id.* § 21 cmt. d. ("Such a defect may also result in consequential loss to the buyer. For example, a machine that becomes inoperative may cause the assembly line in which it is being used

product that poses a risk of physical harm that has not yet occurred;[96] and the third is economic loss caused by physical harm that affects only the product.[97]

Despite vigorous defense by some courts[98] and scholars,[99] these rules cannot be applied with any regularity. To the contrary, these are precisely the sort of taxonomic guidelines that compel pointless efforts to classify claims by the nature of the remedies sought.

For example, advocates of the economic loss rule argue that rejecting a claim in tort for the costs to repair a structure that suffers from "an internal construction defect" is necessary to respect contractual allocations of loss in the commercial context.[100] Yet, as the authors of the *Re-*

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to break down and may lead to a wide range of consequential economic losses to the business that owns the machine. These losses are not recoverable in tort under the rules of this Restatement.").

96. *Id.* ("A somewhat more difficult question is presented when the defect in the product renders it unreasonably dangerous, but the product does not cause harm to persons or property. . . . A plausible argument can be made that products that are dangerous, rather than merely ineffectual, should be governed by the rules governing products liability law. However, a majority of courts have concluded that the remedies provided under the Uniform Commercial Code—repair and replacement costs and, in appropriate circumstances, consequential economic loss—are sufficient. Thus, the rules of this Restatement do not apply in such situations.").

97. *Id.* § 21 cmt. e ("A defective product that causes harm to property other than the defective product itself is governed by the rules of this Restatement. What constitutes harm to other property rather than harm to the product itself may be difficult to determine. A product that nondangerously fails to function due to a product defect has clearly caused harm only to itself. A product that fails to function and causes harm to surrounding property has clearly caused harm to other property. However, when a component part of a machine or a system destroys the rest of the machine or system, the characterization process becomes more difficult. When the product or system is deemed to be an integrated whole, courts treat such damage as harm to the product itself. When so characterized, the damage is excluded from the coverage of this Restatement. A contrary holding would require a finding of property damage in virtually every case in which a product harms itself and would prevent contractual rules from serving their legitimate function in governing commercial transactions.").

98. The California Supreme Court explained the operation of the economic loss rule in the context of product liability as follows:

> Economic loss consists of "damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits—without any claim of personal injury or damages to *other property*." Simply stated, the economic loss rule provides: "[W]here a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only economic losses. This doctrine hinges on a distinction drawn between transactions involving the sale of goods for commercial purposes where economic expectations are protected by commercial and contract law, and those involving the sale of defective products to individual consumers who are injured in a manner which has traditionally been remedied by resort to the law of torts." . . . Quite simply, the economic loss rule "prevent[s] the law of contract and the law of tort from dissolving one into the other."

Robinson Helicopter Co. v. Dana Corp., 102 P.3d 268, 272–73 (Cal. 2004) (alteration in original) (emphasis added) (citations omitted) (quoting Jimenez v. Superior Court, 58 P.3d 450, 456 (Cal. 2004), Neibarger v. Universal Cooperatives, Inc., 486 N.W.2d 612, 615 (Mich. 1992), and Rich Products Corp. v. Kemutec, Inc., 66 F. Supp. 2d 937, 969 (E.D. Wis.1999), respectively).

99. Feldthusen, *supra* note 78, at 319 ("Indeed, the U.S. product liability cases are among the most impressive of all judicial decisions in explaining the distinctions between economic loss and physical damage.").

100. *Id.* at 314–16 ("[I]n . . . the product liability field . . . pure economic loss . . . refers to a claim to recover the cost of repairing or replacing a product or structure that suffers from an internal manufacturing or construction defect. . . . [T]he . . . rule [denying recovery in this circumstance] is based on respect for contractual allocations of risk primarily in commercial law.").

statement (Third) of Torts: Products Liability acknowledge, there is a glaring exception to the economic loss rule in product liability cases involving the incorporation of asbestos-containing materials in buildings.[101]

In such cases, the only arguable loss is the depreciated value of a building owing to the risk of future harmful release of asbestos fibers. Recovery in tort for the costs of remediation in such cases ostensibly should be precluded by that aspect of the economic loss rule expressed by the Restatement that purportedly governs cases involving the need to replace a product that poses a risk of physical harm that has not yet occurred. And yet, such recovery is usually allowed. Courts have held that the mere incorporation of asbestos-containing materials constitutes "physical harm" to a building, even if the asbestos is not "friable"—even if it is stable *in situ* and poses no immediate risk of physical harm to the building or its users.[102]

The troubling nature of this "asbestos exception" from the economic loss rule is illustrated dramatically by comparing the outcome in the asbestos cases with the outcome in other cases involving the risk of bodily injury arising out of negligently made products. Courts are less solicitous of claims by a person who might die instantly as a result of the anticipated failure of a presently functioning but allegedly defective heart valve[103] or who might be seriously injured when the risk of collapse or fire created by the negligent manufacture of a home is finally realized.[104] Anomalous and unfair distinctions like these—all in the name of an untrustworthy and completely unnecessary doctrinal purity—abound.

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101. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 21 cmt. e (acknowledging the exception).

102. *See, e.g.*, Richard C. Ausness, *Tort Liability for Asbestos Removal Costs*, 73 OR. L. REV. 505, 530 (1994) ("Because property owners seek reimbursement for abatement expenses (economic harm) rather than compensation for structural damage to their buildings (physical damage), one would expect courts to consider only contract remedies, at least in jurisdictions that adhere to the 'physical injury' rule of tort law. In fact, most courts have done just the opposite, freely allowing property owners to sue in tort by adopting a 'liberal' definition of physical injury.").

103. *See* Khan v. Shiley Inc., 266 Cal. Rptr. 106, 110 (Ct. App. 1990) (holding that despite plaintiff's claim that her implanted heart valve was defective because the valve was allegedly unreasonably prone to fracture and end her life instantly upon failure, plaintiff could state no tort claim until the implanted heart valve actually malfunctioned, leaving plaintiff only the possibility of posthumous vindication).

104. *See* Aas v. Superior Court, 12 P.3d 1125, 1140 (Cal. 2000) ("[W]hether the economic loss rule applies depends on whether property damage has occurred rather than on the possible gravity of damages that have not yet occurred."). In his dissenting opinion, the Chief Justice of the California Supreme Court stated:

> Other courts faced with the question we address today have asked: Why should a homeowner have to wait for a personal tragedy to occur in order to recover damages to repair known serious building code safety defects caused by negligent construction? . . . [T]hose courts [that] have addressed the matter from such a commonsense perspective . . . have reached conclusions very different from that adopted by the majority in the present case.

Id. at 1143 (George, C.J., concurring in part and dissenting in part).

III. THE *FIN DE SIÈCLE* AND NEAR ELIMINATION OF THE DOCTRINAL DISTINCTIONS UPON WHICH CONTEMPORARY LEGAL TAXONOMY RELIES

As demonstrated by the preceding discussion, dysfunctional outcomes invariably follow the formalistic application of the most salient contemporary doctrinal distinctions. Attempts to delineate the boundaries between contract and tort law are especially ineffectual. The true question in such cases is the choice of available remedies for a legally cognizable breach of obligation and not one of drawing capricious taxonomic lines in the sand to dictate relief therefor.[105]

Tellingly, challenges arising out of the contemporary taxonomy of legal claims are rooted in competing crosscurrents of legal theory debated both in the United States and England during period from the mid-nineteenth until the early twentieth century (generally, the fin de siècle). During this period, three salutary developments nearly put an end to then-nascent efforts to institute the doctrinal classification of legal claims known today.

First, a movement to unify the courts of law and equity succeeded.[106] Second, newly propounded "codes of civil procedure" sought to divorce completely the art of pleading from the substance and merit of underlying claims.[107] Third, and perhaps most importantly, legal scholars offered an elegant theory of primary rights that would have put into practice in earnest an iteration of the old Roman maxim *ubi jus, ibi remedium*.[108] Each of these developments will be considered below in turn.

A. The Merger of the Courts of Law and Equity

During the fin de siècle, a merger of the courts of law and equity in the United States put at risk a nascent form of the legal taxonomy known today. Prior to this merger, the branched court system that predominated in England was adopted by its colonies in North America and carried on after they formed the United States.[109] Apprehending the impetus for the

105. The dissent in *Aas* properly framed the fundamental question the majority elided: "What remedy is there [arising out of a negligently constructed home] when there is no privity, and hence there are no contract rights, or when there is privity, but disclaimers or technical notice rules preclude enforcement of contract rights . . . ?" *Id.* at 1153.

106. *See, e.g.*, City of Morgantown v. Royal Ins. Co., 337 U.S. 254, 257 (1949) ("The coalescing of law and equity procedure was completed [in the federal courts] in 1938 . . . ."); Marcus, *supra* note 2, at 476–77 (noting that, beginning in 1848, the New York state legislature adopted David Dudley Field's code of civil procedure that abolished the formal distinction between law and equity).

107. *See infra* Part III.B.

108. Where there is a right, there must be a remedy.

109. Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 783–84 (2004) ("At the time of the American Founding, the question whether a plaintiff had a cause of action was generally inseparable from the question whether the forms of proceeding at law and in equity afforded the plaintiff a remedy for an asserted grievance. . . . Most of the states that ratified the Constitution adopted in some measure the common law of England. Thus, to discern what the

merger of the courts of law and equity in the United States uncovers the risks that merger posed to the contemporary classification of legal claims and requires a brief overview of the reasons the bifurcated English judicial system arose.

Although the history of legal taxonomy stretches back at least to Ancient Rome,[110] efforts to classify legal claims into forms of action known as writs reached an apogee in the medieval English courts of law. In these courts, rigid and inflexible rules of pleading and procedure precluded relief for conceded wrongs based on a hidebound taxonomy of claims. Immediately preceding the American Revolution, any plea "at law" was subject to such strict scrutiny that the inability to fit a claim or defense within the tightly prescribed writs (developed over at least five centuries) resulted in no relief at all.[111] In other words, taxonomy was not relevant: it was determinative.

In the English courts of law from the late eighteenth until the early nineteenth century, "a plaintiff had a cause of action . . . only if judicial relief was available through a particular form of proceeding. Each form of proceeding carried with it unique procedural incidents, a particular form of relief, and specific forms of judgment and execution."[112] Thus, although the English courts at this time sometimes paid deference to the Latin maxim *ubi jus, ibi remedium*, that deference was entirely illusory:

> It is true that Bracton wrote in the thirteenth century that "[t]here may be as many forms of actions as there are causes of action," suggesting, as F.W. Maitland puts it, that "[t]here ought to be a remedy for

term cause of action denoted in American law during the late eighteenth and early nineteenth centuries, it is useful to begin with what it denoted in English law during that time period.").

110. *See, e.g.*, Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1234 (2001) ("The structure originally established for Roman law by the Institutes of Gaius and Justinian, and thereafter generally followed by the writers in the civilian tradition, was roughly as follows. Public law (including criminal law) was distinguished from private law, and later came to be largely ignored by the post-medieval civilians, for whom Roman law essentially meant Roman private law. Private law was then divided into three basic categories: the law of persons (status), the law of things, and the law of actions (remedies and procedure). The widest category, the law of things, was further divided into bodies of law governing property, successions, and obligations. Obligations, finally, were subdivided into those arising out of promise or agreement (ex contractu), and out of wrongs or torts (ex delicto).").

111. *See, e.g.*, Eric A. White, Note, *Examining Presidential Power Through the Rubric of Equity*, 108 MICH. L. REV. 113, 118–19 (2009) ("By [the seventeenth century], the common law courts had been around a great while, and over the years common law procedure had become increasingly rigid. . . . Indeed, in some cases litigants could not even manipulate the pleas to get into common law courts. For such actions as disputes over ordinary contracts, negligence, and nuisance, there was for a long time simply no common law remedy at all."); Marcus, *supra* note 2, at 473 ("[D]etractors criticized [the writ system] as a 'fossilized formalism.' Common law pleading required that the contours of the forms of action, not practical considerations or concerns of justice, dictate the boundaries and progress of suits. A nineteenth-century plaintiff, for example, could not obtain relief unless his claims fit one of what amounted to a fourteenth-century writ. If the plaintiff chose a writ that did not precisely match the facts at issue, his case would be dismissed, no matter how meritorious." (quoting CHARLES M. HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND 51–52 (1897)).

112. Bellia, *supra* note 109, at 784.

> every wrong; if some new wrong be perpetrated then a new writ may be invented to meet it." The subsequent recitation of this phrase through the centuries left some with the misimpression that at common law in the late eighteenth and early nineteenth century (and at all times since the Middle Ages) judicial inquiry proceeded by first discerning the existence of a right and then crafting an appropriate remedy for its violation—that, in other words, if . . . a plaintiff could identify a right that had been invaded, the existence of a cause of action necessarily followed. This was not, however, the mode of judicial proceeding that generally prevailed in the courts of England around the time of the American Founding. . . . *Ubi jus, ibi remedium* was not a black letter legal doctrine; it was merely a platitude.[113]

All was not lost, however, for a litigant whose claims could not fit within the tightly prescribed writs in the English courts of law. A means to escape from that rigid form of legal taxonomy evolved. Starting as early as the medieval period, an entirely separate tribunal arose to ameliorate the straightjacketed system of cognizable claims at law. In spite of the writ system, or perhaps because of it, two court systems developed, in parallel and sometimes in competition, as many as a thousand years ago.[114] Refuge from prevailing rules of practice in the King's courts of law could be found in the "courts of equity."

The Chancery, a separate court of equity apart from the courts of law, offered a means to meet the widely acknowledged need to provide relief in many cases not viable in a system that otherwise failed to afford it.[115] To address the taxonomic rigidity of the writ system, a "Chancellor" in the court of equity was afforded great power and flexibility.[116] The

113. *Id.*

114. *See, e.g.*, White, *supra* note 111, at 113 ("[I]n the eleventh century . . . the judicial system in England was fragmented between an informal court of equity, known as Chancery, and two courts at common law, known as King's Bench and the Court of Common Pleas."); Zechariah Chafee, Jr., *Foreword* to SELECTED ESSAYS ON EQUITY, at iv (Edward D. Re ed., 1955) ("How absurd for us to go on until the year 2000 obliging judges and lawyers to climb over a barrier which was put up by historical accident in 14th century England and built higher by the eagerness of three extinct courts to keep as much business as possible in their own hands . . . .").

115. *See, e.g.*, Newton v. Aitken, 633 N.E.2d 213, 216 (Ill. App. Ct. 1994) ("An equitable remedy is not available where there is an adequate remedy at law."); White, *supra* note 111 ("The principle virtue of equity was the flexible escape route it provided. As one seventeenth-century chancellor put it, equity was necessary because 'men's actions are so diverse and infinite that it is impossible to make a general law which may aptly meet with every particular and not fail in some circumstances.' . . . [T]he Court of Chancery . . . had the power to issue new writs and hear actions 'on the case.' . . . '[T]he chancellor was free from . . . rigid procedures . . . . His court was a court of conscience, in which defendants could be coerced into doing whatever conscience required in the full circumstances of the case.'" (quoting J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 106 (4th ed. 2002))).

116. *See, e.g.*, Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."); David A. Smith, *The Error of Young Cyrus: The Bill of Conformity and Jacobean Kingship, 1603–1624*, 28 LAW & HIST. REV. 307, 309 (2010) ("[L]egal historians have frequently commented on the 'triumph' of equity in the seventeenth century as necessary to remedy the deficiencies in the common law. The equitable courts of Chancery and Requests departed from the strict course of the common law in order to

Chancellor's decisions were guided by subjective notions about "right and wrong"[117] but not entirely subjective. Chancellors in the English courts of equity were guided not only by their views about morality and "Divine Law" but also by the maxims of Roman law and the decisions of Roman jurists.[118]

The composition of the common law courts of England as just described was "received" by the American Judiciary at the founding of the United States.[119] To be sure, courts in the newly formed United States did not and could not in most instances fully adopt the English legal system. The process of transference was inevitably imperfect, and some elements of the English system were simply lost in translation.[120] Yet, perhaps just

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remedy injustice by exercising a more discretionary jurisprudence."); Sarah M. R. Cravens, *Judging Discretion: Contexts for Understanding the Role of Judgment*, 64 U. MIAMI L. REV. 947, 949 (2010) ("It has long been taken for granted that in order to achieve justice in particular cases, the law must provide consistency, and equity must allow judges the flexibility to do justice in the cases to which the general rule does not seem to apply for one reason or another."); Marcus, *supra* note 2, at 474 ("The development of equity as an escape valve from the rigidities of the common law underscores the latter's formalism. The language of equity (the chancellor would act as the 'Court of Conscience,' with morality and common sense deciding claims), and the practice of equity (in Stephen Subrin's words, 'flexible, discretionary, and individualized')—distinguished it from the formal common law system." (quoting Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 920 (1987))).

117. *See, e.g.*, 1 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 467 (A.L. Goodhart & H.G. Hanbury eds., 7th ed. 1956) ("In early days there were no fixed principles upon which the Chancellors exercised their equitable jurisdiction. The rule applied depended very much upon the ideas as to right and wrong possessed by each Chancellor.").

118. Despite initial reliance on morality and "Divine Law," the early Chancellors were guided also by the maxims of Roman law and influenced by the decisions of Roman jurists. *See, e.g.*, 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 55, at 71 (Spencer W. Symons ed., 5th ed. 1941) ("There can be no doubt that [Chancellors] took their conception of equity from the general description of it given by the Roman jurists, *understood and interpreted, however, according to their own theory of morality as a Divine law*, and also borrowed many of the particular rules by which this equity was applied from the Roman law."); *see also* Hon. H. Brent McKnight, *How Shall We Then Reason? The Historical Setting of Equity*, 45 MERCER L. REV. 919, 923 (1994) ("There was a time when the chancellor, as the only judge in equity, had the power to override ordinary law to achieve 'equity and good conscience' as determined by a more superior set of moral principles than those governing the ordinary courts. Equity was closely identified with the prerogatives and personal conscience of the King. The chancellor's broad discretion was supposed to be guided by natural law as expounded by Christian philosophers and divine law expressed in the Ten Commandments and Roman Catholic moral doctrines.").

119. *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 137 (1996) (finding that virtually all of the constitutions of the newly United States of America contained explicit provisions providing for "reception" (or incorporation by reference) of the English common law, except to the extent inconsistent with unique local circumstances); *see also* Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791, 805 (1951) ("[A] review of the cases shows that no matter what the wording of the reception statute or constitutional provision of the particular state, the rule developed, which was sooner or later to be repeated in practically every American jurisdiction, that only those principles of the common law were received which were applicable to the local situation."); Richard C. Dale, *The Adoption of the Common Law by the American Colonies*, 30 AM. L. REG. 553, 554 (1882).

120. *See, e.g.*, Sclamberg v. Sclamberg, 41 N.E.2d 801, 802–03 (Ind. 1942) ("It is true that the fundamental principles (of the law of equity) are the same as those which were developed through the past centuries by the English chancery; but the application of these principles, and the particular rules which have been deduced from them, have been shaped and determined by the modern American national life, and have received the impress of the American national character." (quoting 1

as inevitably, a juridical model that fit the English mold prevailed in the courts of England's colonies in North America both before and after those colonies formed the United States.[121]

Thus, although separate courts of equity as known in England were not established in the United States, from the outset of the American judicial system it was understood that a jurist could and would exercise legal and equitable "jurisdiction" on two fictional "sides" of the court.[122] This notional structure permitted an American jurist, within the confines of precedent, to simply don a different hat to afford a remedy in cases thought to demand relief unavailable according to the strict system of writs inherited from the English common law.[123]

Underscoring the power to forego formalism by so transparent an artifice as a fictional move to another "side" of the court (while remaining seated on the same bench), beginning in the mid-nineteenth century any formal distinction between the jurisdiction of the courts of law and equity in the United States was expressly abolished.[124] This "merger"

JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE, AS ADAPTED IN THE UNITED STATES OF AMERICA xiv (4th ed. 1914)) (internal quotation marks omitted)).

121. *See, e.g.*, John T. Crossal, *The Erie Doctrine in Equity*, 60 LA. L. REV. 173, 210 (1999) ("Th[e] basic model of separate courts traveled across the Atlantic Ocean to England's North American colonies. Although thirteen of these colonies threw off the yoke of English sovereignty, they did not discard all English ways. When the framers of the Constitution began to design a system of national courts, they naturally used the English model. . . . When they divided the federal courts along the same lines as the English system, the framers undoubtedly envisioned that each of the national courts would function in the same basic way as the English counterpart."); *see also* Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 449–50 (2003) ("[T]he early American courts were modeling the English method of complementary systems of law and equity. Even prior to the American Revolution, 'courts of chancery had existed in some shape or other in every one of the thirteen colonies.' Pursuant to Article III, Section 2 of the United States Constitution, the jurisdiction of the federal courts could extend to certain cases in Law and Equity. Although Congress did not create a separate court of equity in the Judiciary Act of 1789, it contemplated that the federal court system would administer law and equity on different sides of the court and by different procedures." (quoting Solon Dyke Wilson, *Courts of Chancery in the American Colonies*, *in* 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 779 (Comm. Ass'n Am. L. Sch. ed. 1907))).

122. *See, e.g.*, Main, *supra* note 121, at 450 ("Congress did not create a separate court of equity in the Judiciary Act of 1789, [however] it contemplated that the federal court system would administer law and equity on different 'sides' of the court and by different procedures."). *But see* City of Morgantown v. Royal Ins. Co., 337 U.S. 254, 257–58 (1949). Admonishing the lower courts, the United States Supreme Court stated:

> This is not a situation where a 'chancellor' . . . can be said to be enjoining a 'judge' who has cognizance of a pending action at law. This is rather a case of a judge making a ruling as to the manner in which he will try one issue in a civil action pending before himself. The fiction of a court with two sides . . . is not applicable where there is no other proceeding in existence . . . .").

Id. at 257–58.

123. *City of Morgantown*, 337 U.S. at 256–58.

124. *See, e.g.*, Marcus, *supra* note 2, at 476 (explaining that in 1848, the New York State Legislature adopted David Dudley Field's code of civil procedure that abolished the formal distinction between the courts of law and equity); Robert G. Bone, *Mapping the Boundaries of the Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 78–79 (1989) ("After Roscoe Pound's famous 1906 address to the American Bar Association critical of late nineteenth century procedure, the Association took up the reform challenge with renewed vigor and pressed for the merger of law and equity in the federal system and for a uniform

cemented the notion that the same judge in the same case on the same facts could afford relief not cognizable at law. Critics warned that this merger in theory would empower jurists to simply disregard established taxa to afford any relief thought to be just.[125] These critics' fears proved ultimately to be without much merit, however. The merger of the courts of law and equity did not break down American legal formalism beyond the point of recognition in the courts of the United States, as the foregoing discussion of contemporary legal taxonomy demonstrates.

Still, the merger of the courts of law and equity was an augury that portended a troubled future for the type of taxonomy epitomized by the writ system. The merger of the courts of law and equity in the United States during the fin de siècle afforded an opportunity to forswear the formalistic taxonomy typified by the English writ system. Unfortunately, this merger proved to be a necessary but ultimately insufficient condition for abjuring legal taxonomy as it is known today.

B. The Newly Adopted Codes of Civil Procedure

A second major development during the fin de siècle signaled a movement to do away with the then-dominant form of legal taxonomy. Complementing the merger of the courts of law and equity, a movement to reform the injustice of the old English writ system included a growing understanding that civil procedure could and should be conceived and regulated separately from the merits of a legal claim. In England and in the United States, a distinction between "procedure" and "substance" gained widespread acceptance during the fin de siècle. The English legal scholar Jeremy Bentham keenly described a distinction between civil

set of federal rules governing all civil actions. The ensuing struggle culminated in the Rules Enabling Act of 1934 and the Federal Rules of Civil Procedure, which became effective in 1938.").

125. This understanding of the merger was not without critics, especially insofar as it did not dispel the long-standing presumption that a single jurist may exercise legal and equitable "jurisdiction" on two fictional "sides" of an American court. Even before the federal courts of the United States were created, critics in England and in its North American colonies warned that a "merger" of legal and equitable jurisdiction in the same judge would foster this dogma. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 128 n.4 (1995) (Thomas, J., concurring) ("The Federal Farmer [a commentator writing at the time of the formation of the American judicial system] particularly feared the combination of equity and law in the same federal courts: 'It is a very dangerous thing to vest in the same judge power to decide on the law, and also general powers in equity; for if the law restrain him, he is only to step into his shoes of equity, and give what judgment his reason or opinion may dictate; we have no precedents in this country, as yet, to regulate the divisions in equity as in Great Britain; equity, therefore, in the supreme court for many years will be mere discretion.'"); William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1043 n.267 (2001) ("The identity of the Federal Farmer is contested."); *see also* W.S. Holdsworth, *Blackstone's Treatment of Equity*, 3 HARV. L. REV. 1, 21 (1929) ("Should there be a judge who, enlightened by genius, stimulated by zeal to the honest work of reformation, sick of the caprice, the delays, the prejudices, the ignorance, the malice, the fickleness, the suspicious ingratitude of popular assemblies, should seek with his sole hand to expunge the effusions of traditionary imbecility, and write down in their room the dictates of pure and native justice, let him but reflect that partial amendment is bought at the expense of universal certainty; that partial good thus purchased is universal evil; and that amendment from the Judgment seat is confusion." (quoting JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES 214 (Everett ed. 1928)) (internal quotation marks omitted)).

procedure and the substance of a legal claim in support of the reforms that would ultimately replace the writ system:

> Bentham . . . provided much of the ideological fuel for the procedural reforms that were sweeping away the writ system in the latter years of the century. The same analysis that supported the abolition of the forms of action also portrayed as incoherent and indefensible the Roman/civil categories of "personal actions" and "obligations," subdivided into parallel categories of contract and tort.
>
> Bentham . . . insisted that law should be analyzed on the basis of a firm distinction between substantive law and procedure. This new conceptual distinction helped Bentham and [others] make the case that English law remained intellectually and practically incoherent because substantive legal rights and duties were learned and classified for practice under the jumbled array of procedural forms that had grown up over the centuries to enforce them. This had it backwards, Bentham insisted; procedure should be designed functionally to serve as the handmaiden of substance.[126]

In practical terms, Bentham's insights about the distinction between the procedural aspects and the substantive merits of a claim for relief found some parallel in newly propounded Codes of Procedure in America. In 1848, for example, the New York State Legislature adopted David Dudley Field's code of procedure.[127] The "Field Code" was considered a major advance. The Field Code was

> premised on the idea that a single procedural form, the "civil action," could regulate the adjudication of all civil disputes, without altering either the pre-existing legal rights and duties of the parties or the relief triggered by their violation. . . . Th[e] substantive law was the substratum [that would be] left unchanged by the purely procedural reforms, which affected only the machinations of lawyers and judges inside the system. The reforms were only intended to make the machinery of justice run with less delay and expense.
>
> The reformers . . . believed that the simplified procedure would create pressure for systematic reclassification of the law, which would make it easier to teach and learn and more accessible to the

126. *See* Grey, *supra* note 2, at 1239–40.

127. *See, e.g.*, Marcus, *supra* note 2, at 476 ("The epoch of code pleading, the first major domestic system of American procedure, began when the New York State Legislature adopted David Dudley Field's code in 1848. Field listed the 'grotesque forms of action' and their primacy over substantive justice, as well as the confusing and occasionally unjust separation between law and equity, as motives for reform. The Field Code's 'crowning achievement' in [Charles] Clark's mind was its replacement of the multifarious and confusing forms of action with a single form of action, the 'civil action.'" (quoting CHARLES E. CLARK, CASES ON PLEADING AND PROCEDURE 18–19 (1940))); Grey, *supra* note 2, at 1231 ("Starting with New York's Field Code in 1848, legislatures throughout the common-law world abolished the old writs and their offshoots in favor of the unitary 'civil action,' under which plaintiffs were simply to plead facts that established grounds for the relief sought.").

> public. But a new arrangement of the law would not change its substance, except insofar as a better taxonomy exposed inconsistencies and anomalies to the kind of scrutiny that might lead . . . to substantive reform.[128]

By 1938, Charles Clark's newly minted Federal Rules of Civil Procedure eschewed even the term "cause of action" with the hope to clearly separate procedural questions from the substantive merits of a claim in every possible way.[129] The reformers of the fin de siècle anticipated that the gap-filling tendencies of the common law would lead to a new and better taxonomy of legal claims.[130]

This second major development set the stage for the abolition of legal taxonomy as it is known today. In newly enacted codes of procedure, the reformers of the fin de siècle set out to create the conditions that would permit a more rational classification of legal claims to take hold. It was the hope of the reformers that leaving this classification to the vagaries of legal scholarship and practice would inspire a "better taxonomy" that would "expose[] inconsistencies and anomalies to the kind of scrutiny that might lead . . . to substantive reform."[131] Lamentably, these hopes were misguided and the faith of the fin de siècle reformers was misplaced.

C. "Primary Rights" Theory and a Fateful Consensus to Abjure It

Certain scholars during the fin de siècle, notably John Norton Pomeroy, capitalized on some of the same assumptions that propelled the merger of law and equity, and reform of the rules of civil procedure, to conceive a better means to ascertain and classify legally cognizable claims. Pomeroy saw the opening that the substance–procedure fissure created, and worked into that fissure his vision of substantive legal claims based on "primary rights."[132] An iteration of Pomeroy's theory of primary rights was described in *Crowley v. Katleman*[133] as follows:

> [P]rimary right theory . . . provides that a cause of action is comprised of a primary right of the plaintiff . . . . The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action. . . .

128. *See* Grey, *supra* note 2, at 1240–41.

129. *See, e.g.*, Marcus, *supra* note 2, at 439–40. Charles Clark was "the primary and most important author of the Federal Rules" adopted in 1938. *Id.* at 496 ("Clark recommended that the term cause of action, 'worst of all in its capacity for mischief,' appear nowhere in the Federal Rules." (quoting Memorandum from Charles Clark to the Advisory Committee (Jan. 23, 1936) (on file with Yale University Library))).

130. *See supra* note 126.

131. Grey, *supra* note 2, at 1241.

132. *See, e.g.*, Marcus, *supra* note 2, at 481–82 (describing the approach advocated by John Norton Pomeroy).

133. 881 P.2d 1083 (1994).

> As far as its content is concerned, the primary right is simply the plaintiff's right to be free from the particular injury suffered. . . . It must therefore be distinguished from the *legal theory* on which liability for that injury is premised: "Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief." The primary right must also be distinguished from the remedy sought: "The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other."[134]

Thus, just as the courts of law and equity were merging in the late nineteenth century, a true synthesis of the best attributes of those systems was persuasively propounded. In truly unified courts, infringement of a legally cognizable primary right would give rise to a palette of possible remedies: secondary, plenary, and tailored to "naturally fit" the violation.[135]

Pomeroy's theory of primary rights did not depend upon scholarly musings or judicial whim and caprice. Instead, Pomeroy's primary rights theory built upon the firm foundation of precedent established over time within the strictures of the courts of law and equity as inherited from England and developed in America. Identification of primary rights was as elegant as it was expansive; a logical culmination of the reform of the writ system of magnificent proportions. As Professor Robert G. Bone explains:

> Pomeroy believed that it was possible to reduce law . . . to a system of internally consistent and complete general principles. The general principles were not directly knowable through reason. . . . [T]hose principles emerged gradually through a process of judicial deliberation that combined reliance on precedent with the application of the "natural justice" ideal to the facts of particular cases. Natural justice was the fountainhead of legal principle, for it served as a bridge between law and the society's moral sense. In the early stages of equity, judges had applied the natural justice norm to decide individual cases, thereby building a body of precedent from which principles could be extracted. Those judges had gradually perfected those principles

134. *Id.* at 1090 (quoting Slater v. Blackwood, 15 Cal.3d 791, 795 (1975); Wulfjen v. Dolton, 24 Cal.2d 891, 895–96 (1944)).

135. *See, e.g.*, Christopher Columbus Langdell, *A Brief Survey of Equity Jurisdiction*, 1 HARV. L. REV. 111, 111 (1887) ("It is because rights exist and because they are sometimes violated that remedies are necessary. The object of all remedies is the protection of rights. . . . An action may protect a right in three ways, namely, by preventing the violation of it, by compelling a specific reparation of it when it has been violated, and by compelling a compensation in money for a violation of it."); *see also* Bone, *supra* note 124, at 13 ("The ideal remedy was the one that best fit the right in the sense of most perfectly restoring the right to its preinfringement state. A person was entitled to a legal remedy only if she suffered an infringement of a legal right, and conversely, whenever a legal right was infringed the rightholder was entitled to a legal remedy adequate to restore the right.").

> by testing that precedent against the developing natural justice ideal in particular cases.[136]

This well-reasoned construct prefers the grand process of the common law to its grand theorists. Pomeroy's view of primary rights was based on extant and discernible legal principles. Conceptually, Pomeroy's theories fit perfectly both with his times and the zeitgeist of the American enterprise. Not surprisingly, Pomeroy's primary rights "were roughly the standard natural rights of liberal theory: personal security, subdivided into rights to life, body and limb, and reputation; the right to personal liberty; the right to acquire and enjoy private property; and finally, the right of religious belief and worship."[137] These values were embodied in the foundational documents of the United States.[138] Indeed, it is entirely possible to view certain rights that today are considered "constitutional" as simply codified variants of independently established primary rights.[139] Apart from and in addition to constitutional bases, these values have stood the test of time despite well-founded concerns about proliferation.[140] Subject to these and other concerns, a legal system based on the recognition of primary rights promotes respect for the law and a common-sense approach to justice.[141]

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136. Bone, *supra* note 124, at 41–42.

137. Grey, *supra* note 2, at 1254.

138. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights . . . ."); *see also* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."). Indeed, the government of the United States was founded in no small measure on the rights-based approach typified by the work of John Locke. *See, e.g.*, THE UNIVERSITY OF NORTHERN COLORADO INSTITUTE OF PROFESSIONAL ETHICS, CENTER FOR ETHICAL DELIBERATION, http://mcb.unco.edu/ced/perspectives/rights.cfm (last visited Nov. 10, 2012) ("Since his thought has had such an influence on American political life, a study of the ethics of John Locke (and rights-based perspectives in general) is needed. . . . [T]he US is based on a system of individual rights . . . .").

139. *See, e.g.*, Andrew C. Spiropoulos, *Rights Done Right: A Critique of Libertarian Originalism*, 78 UMKC L. REV. 661, 696 (2010) ("I contend, then, that the Ninth Amendment, in particular, requires judges to apply a presumption in favor of the protection of natural rights as they are embodied in common law rights, meaning natural rights limited legitimately under the natural law principles incorporated in the traditional common law. . . . I agree . . . that, under the principles of our constitutional regime, the common law serves as the background or presumptive source of legal rules and thus is the foundation of the people's rights and responsibilities.").

140. There are some who decry a potentially problematic explosion of discourse about "rights." *See, e.g.*, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 919–21 (2010) (Roberts, C.J., concurring) (postulating a nonhuman right of free speech); Peter Westen, *The Rueful Rhetoric of Rights*, 33 UCLA L. REV. 977, 978 (1986) ("[T]he persuasiveness of rights discourse is to a significant extent semantic. That is to say, the language of rights tends to persuade not by illuminating the matters at issue, but by concealing them through linguistic sleight of hand. The rhetoric of rights derives its force from a deep-seated ambiguity in the ordinary meaning of the word 'rights'—an ambiguity that causes disputing parties to assume away the very issues they purport to be addressing. . . . [W]e find ourselves facing a proliferation of 'rights'—such as . . . animal rights—rather than a proliferation of 'liberties,' 'freedoms,' or 'entitlements.'"); STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/legal-rights/#1 (last visited Nov. 20, 2012) (surveying various approaches to determining legal rights).

141. *See, e.g.*, Alan Calnan, *The Instrumental Justice of Private Law*, 78 UMKC L. REV. 559, 591–92 (2010) ("Rights work better than rules for two reasons. First, rights are what people want out

Unfortunately, Pomeroy's primary rights theory gained less than enduring and widespread acceptance, with long-lasting consequences.[142] The "reformers" of the legal system in the United States, beginning in the late nineteenth century and early twentieth century, with varying intensity rejected a rights-based approach.[143] Ironically, leading scholars of the day who figured prominently in the "reform" movement during the fin de siècle hastened (unwittingly it seems) the advance of unworkable theoretical distinctions between tort and contract law that have morphed into the incoherent taxa we know today.

For example, Charles Clark, the principal author of the highly influential Federal Rules of Civil Procedure and a leader of the reform movement during the fin de siècle,[144] was unhesitatingly critical of a legal system based on the vindication of infringements upon primary

of private law. As a general rule, people will obey specific laws only if they believe the larger legal system is just; and they will consider the system just only if it protects individual rights. . . . Second, and concomitantly, rights work better because they come equipped with informal policing mechanisms. It is difficult enough to get people to do things they do not want or are not inclined to do. It is more difficult still if, as is true of rules, the state is the only overseer. The state simply cannot be everywhere it needs to be, and its authority as 'outside' rule enforcer only goes so far. Thus, it must rely on people to control other people. This is what rights do best. By inspiring a belief in and a commitment to the law, rights get ordinary citizens to enforce the rules from the inside out.").

142. *See* Theodore W. Ruger, *Health Law's Coherence Anxiety*, 96 GEO. L.J. 625, 633–34 (2008) ("We know now, of course, that Pomeroy's classification lost the intellectual debate over a century ago. Today's legal canon, reflected in the mandatory first-year courses and in the shape and division of legal scholarship generally, is organized primarily around differences in forms of law rather than upon legal protections for primary substantive interests. The adoption of a classification scheme hinging on legal form, rather than some version of a primary rights approach, carried with it dramatic implications for the development of American legal scholarship. These implications vary in severity for different fields of law, as certain disciplines would have thrived under either approach. . . . For other fields, however, the choice of a typology based on legal form rather than primary rights had dramatic ramifications, which still resonate more than a century later.").

143. *See, e.g.*, Bone, *supra* note 124, at 79–82 ("Early twentieth century reformers . . . rejected the late nineteenth century natural-rights-based theory . . . . The reformers adopted a pragmatic view instead. They envisioned substantive law in terms of an ideal fit with the facts of social life, not with the abstract structure of rights, and they relied on professional expertise and community experience to achieve the law-society fit. . . . In 1913, [Wesley Newcomb] Hohfeld published his seminal article challenging the late nineteenth century conception of 'legal right,' an article that triggered a major jurisprudential debate about the idea of right and the proper classification of legal relations. While participants disagreed about the implications of Hohfeld's analysis, most agreed with Hohfeld's central propositions—that there was no universally ideal system of legal rights; that legal rights were the result of socially contingent policy choices, and that legal relations could not all be derived from or reduced to the concept of 'right.'"); *see also* Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 978 (1982) ("Hohfeld's article [was] a landmark in the history of legal thought.").

144. *See* Bone, *supra* note 124, at 80 ("Charles Clark and Roscoe Pound [are noteworthy] because of their prominence in the reform movement. Clark and Pound shaped the movement's public rhetoric and its constructive agenda. Both men were avid publicists for reform; both wrote a great deal on the subject, and both participated actively in concrete reform efforts. Furthermore, the legal community saw Clark and Pound as the intellectual leaders of procedural reform, and other reform advocates frequently referred to their work to support criticism of existing practice and proposals for change. Clark's and Pound's jurisprudential views thus provide a window onto the beliefs that shaped the reform program.").

rights. He rejected the taxonomy that primary rights theory supposedly required, on primarily practical grounds.[145]

Ironically, however, by rejecting a more fulsome classification of legal claims based on primary rights established in the common law, Clark encouraged a form of taxonomy far worse. Clark's fears about fostering useless taxonomic debates owing to use of the term "cause of action" have been manifested a thousand-fold, albeit perhaps not in the way he envisioned. The threat has come not from a system proposed during the fin de siècle based on discernible and enforceable primary rights but from attempts by courts and scholars to describe the substantive law of actions after the writ system fell by reference to the same old regime that gave rise to the writ system in the first place.

Contrary to the belief of "reformers [like Clark] that . . . simplified procedure would create pressure for [a] systematic reclassification of the law [that] would make it easier to teach and learn and more accessible to the public,"[146] legal scholars during the fin de siècle sought and found comfort in the old scholarship with which they were already familiar. Roman law distinguished obligations arising out of promise or agreement (*ex contractu*) from obligations arising out of wrongs (*ex delicto*).[147] When confronted with the challenge the reformers laid down, instead of preferring Pomeroy's vision of a reformed system founded on primary rights discernible in the common law, legal theorists in particular reverted to views that had been prevalent since Roman times:

> Sophisticated English and American legal writers had long promoted the study of Roman and civil law on the ground that it sup-

145. *See, e.g.*, Marcus, *supra* note 2, at 439–40. Federal Rules of Civil Procedure architect Charles Clark's critique of primary rights theory can be described as follows:

> Clark recommended that the term cause of action, "worst of all in its capacity for mischief," appear nowhere in the Federal Rules. By 1938, he had soured on the term entirely, after struggling with his own stab at defining it. . . . [He claimed the very idea of a "cause of action"] had misled generations of lawyers to waste time in conceptual disputes over primary rights and the like at the expense of efficient trial work—an end procedural rules could actually serve.

Id. at 496.

> Clark's approach to the cause of action neatly illustrates realism in pleading. His deconstruction of the primary rights approach is a textbook illustration of a realist attack on conceptualistic doctrine. [Clark contended that] the concept of a primary right 'seem[ed] to be precise, and yet upon application in practice [failed to] carry any exact meaning . . . .' To say that a plaintiff had a primary right simply begged the question of what the primary right consisted of and, more importantly, why.

Id. at 488 (alteration in original) (quoting Charles E. Clark, *The Cause of Action*, 82 U. PA. L. REV. 354, 386 (1934)); *see also* Bellia, *supra* note 109, at 796 ("Charles Clark believed that Pomeroy's 'primary right' theory was vague and unworkable.").

146. Grey, *supra* note 2, at 1241.

147. *Id.* at 1234. Notably, the legal tradition expressed by the highly influential legal scholar Sir William Blackstone (July 10, 1723–February 14, 1780) might have served as a potential beacon to guide a different course because certain of Blackstone's views were more consistent with Pomeroy's vision than with Roman law: "Blackstone's formulation of the modern 'absolute rights of individuals,' the natural rights to life, liberty, property, and personal security . . . had no parallel in Roman law." *Id.* at 1248.

> plied a more logical and elegant arrangement than the common-law writ system. So when in the mid-nineteenth century the abolition of the forms of action required a new arrangement based on substantive law categories, it was natural to look to the civil law—where an impressive body of literature defined and elaborated the distinctions between property and obligations and then between contract and tort.
>
> During the final period of transition from the writ system to the new simplified civil procedure, from about 1850 on, English and American legal writers came to agree that contracts would be one fundamental branch of the new substantive private law, and their treatment of the subject was much influenced by civilian scholarship. Since the civilian tradition paired tort with contract as the two fundamental subdivisions of the law of obligations, recognition of contract as one basic category naturally suggested that tort should be another.[148]

An epic and infamous flip-flop by a prominent legal theorist exemplifies the lost opportunity to strangle in its infancy the reinstitution of this archaic but now-familiar taxonomy of civil law claims. As Professor Thomas Grey notes, a scholar as notable as Oliver Wendell Holmes wrote as late as 1871 that "[t]orts is not a proper subject for a law book"[149] because "[v]iewed from the perspective of the classification of primary rights or duties, the category of tort [is] . . . entirely incoherent."[150] Yet, only two years later Holmes capitulated and wrote an essay titled "The Theory of Torts" in which "he formulated a structural account of tort law very close to the one we use today."[151] When the time came to fulfill the hopes of the reformers, and to help others to see the way forward more clearly, Holmes (and others) blinked. Just as the time was at hand to finally envision a better means to more coherently classify legally cognizable claims, the great Holmes and his contemporaries succumbed to the *ancien régime*.[152]

The observations of Roscoe Pound, another prominent beacon of the fin de siècle, cast more light on the lamentable reasons underlying the failure to jettison the most untoward aspects of a nascent form of the fundamentally flawed legal taxonomy known today—just when it seemed the stars were so perfectly aligned to do so. Pound saw the merits

148. *Id.* at 1235–36.

149. Oliver Wendell Holmes, Book Review, 5 AM. L. REV. 340, 341 (1871) (reviewing C.G. ADDISON, THE LAW OF TORTS (1870)).

150. Grey, *supra* note 2, at 1244.

151. *Id.* at 1232; *see also id.* at 1252 ("Holmes . . . conclude[d] that, whatever the abstract merits of the analytical critique of tort, any practical taxonomy of Anglo-American substantive law had to include it as a primary category.").

152. Grey, *supra* note 2, at 1282 ("In the law, theories, however brilliant, do not thrive unless they also serve significant interests. John Norton Pomeroy had ideas about the organization of the law that, simply regarded as ideas, may have been as good as Holmes'—yet no one remembers them. Holmes' theory of torts turned out to have practical strengths that he never claimed for it, and that he may never have realized it possessed.").

of primary rights theory, but he found it to be merely the fourth of five stages in the evolution of legal thought.[153] The fifth stage, Pound reasoned, was attainable and at hand in the early twentieth century.

In this fifth stage of legal development, at least in the essential respects that Pound described, Pound believed that legally enforceable rights would be fashioned from "interests" that arise out of a socially connected society.[154] Perhaps some threads of the "sociological" law that Pound projected can be teased out of contemporary decisions.[155] But today there are also signs of a distinct strain of scholarly advocacy that harkens back to the second rung on Pound's ladder of legal development.[156]

Regrettably, if there is a force of progress that impels the development of better functioning legal systems, there is no rule that such progress is linear. Even though there is ample historical support for the conclusion that the elimination of outdated doctrinal classifications is preferable to a system of ever-increasing hair-splitting with respect to the forms of action, today instead there are signs of a distinct strain of scholarly advocacy in which echoes can be heard of the justifications for the rigid writs that gave rise to the courts of equity in the first place. Some contemporary legal scholars apply their talents still in the futile effort to properly discern the "taxonomy" of particular claims, laden by the burdens imposed by the current system of doctrinal classification.[157]

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153. *See* Roscoe Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 HARV. L. REV. 195, 220 (1914); *see also* Bone, *supra* note 124, at 90–91 ("[According to Pound,] the fourth stage [of legal development is] 'the maturity of law.' . . . American law entered this fourth stage during the last quarter of the nineteenth century, and its most important contribution was the idea of right . . . . Late nineteenth century jurists . . . celebrated Pound's fourth stage as the fulfillment of law's teleological end, as the perfection of a rational legal system embodying general principles structured around an ideal system of primary rights.").

154. *See* Bone, *supra* note 124, at 91–92 ("Pound believed that mature law was deeply flawed. . . . Pound thought that the law of his time was entering a fifth stage, the 'socialization of law,' spurred on by recognition of the interconnected and interdependent web of social [lives]. . . . 'Interest' for Pound had nothing to do with relationships among or arrangements of legal rights. The idea of 'interest' was logically and normatively prior to legal right. Interests were a matter of social fact, and legal rights were created in order to promote social interests.").

155. In one sense, decisions like *Citizens United* may evoke Pound's fifth stage of legal development. As Justice Stevens explained, "The Framers . . . took it as a given that corporations could be comprehensively regulated in the service of the public welfare. Unlike our colleagues [in the majority], they had little trouble distinguishing corporations from human beings . . . ." Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 949–50 (2010) (Stevens, J., concurring in part and dissenting in part). But the majority's decision in *Citizens United* instead characterized a corporation's right of free speech in a manner that may serve as an iteration of the thesis that "[i]nterests [are] a matter of social fact, and legal rights [are] created in order to promote [those] social interests." Bone, *supra* note 124, at 92.

156. In the second of five stages of legal development postulated by Pound, scholars and courts struggle to fit claims within defined classifications. Bone, *supra* note 124, at 90 ("In the second stage, that of 'strict law,' . . . the desired level of certainty and security could only be achieved by the formal application of rigid rules. The common law writ system was the quintessential example of this rigidity.").

157. *See, e.g.*, Gergen, *supra* note 2, at 5 ("They [certain of my colleagues] think the law of negligent misrepresentation . . . is best understood as part of negligence law. [I don't.] *Taxonomy*

The work of contemporary legal taxonomists thus not only impedes the path to progress in the development of the legal system in the United States but also harkens back to an earlier era that was demonstrably in need of fundamental reforms. Among the imperfect alternatives, the legal taxonomy of today is the more regressive and perhaps the least attractive choice. A contemporary legal taxonomist must "learn to live with" the "fuzzy" and "sloppy" boundaries he purports to describe.[158] To be sure, this may be a slight demand in some respects, as the taxonomist may suffer only intellectual discomfiture as a result of the inability to draw reliable doctrinal distinctions. But the contemporary legal taxonomist must also indulge the near certainty that the result of indistinct designs will be distinct harm unrecompensed in the real world. For someone, some legal remedies will be made unavailable owing to the vaguely drawn doctrinal classifications with which the contemporary legal taxonomist has "learned to live."[159] Any such legal regime is in design and effect defective.

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matters." (emphasis added)). Adherence to "core" legal taxa resembles in some respects what some have called "[c]lassical legal science" based on "antebellum understandings of the natural sciences." Marcus, *supra* note 2, at 444.

> From judicial opinions, the raw data or fossil record of the law, a legal scholar would inductively uncover general principles, then classify them in a taxonomy akin to the ordering of species. The resulting classificatory schemes had practical utility. After fitting a case into the right category, the judge would derive appropriate rules from the fundamental principles using a rigidly deductive logical method; these rules would become the major premise, and the case's facts the minor premise, in a syllogism that would generate results.
>
> Classical legal science was conceptualistic. It rested on the premise that fundamental principles or concepts of law existed independently of any particular case in an autonomous legal order.

Id. at 444–45.

158. Gergen, *supra* note 2, at 38 ("A workable taxonomy of law requires either we live with some sloppiness in the theory we use to define a field or we live with some sloppiness in the specification of the periphery of the field. We can have a tight theory to define a field and a fuzzily defined periphery or we can have a fuzzy theory to define a field. The success of classical theories of contract and the modern theory of negligence suggest tight theories are going to win out over fuzzy theories in defining the core of a field in any event. This is to be expected. Most teaching and theorizing about a field focuses on the core. A tight theory will always beat out a fuzzy theory in explaining the core. If I am right about this, then we need to learn to live with some sloppiness in specifying the periphery.").

159. To his credit, in a recent article that addresses the proper taxonomy of a claim for negligent misrepresentation, Professor Gergen recognizes (in another context) that the practical consequences of a strict taxonomy of claims based on economic loss might be "unjust":

> Liability is not imposed for nakedly—some would say offensively—prudential and policy reasons despite the dictates of ordinary morality. In particular, a claim is denied even though the result seems unjust in a specific case because of the need for a bright-line rule and concerns for the cost and risk of error in processing similar claims in future cases.

Gergen, *supra* note 2, at 49 (citing the "stranger" economic loss rule). Elsewhere, and in yet another context, Professor Gergen allows that in certain cases "a situation-specific cause of action or liability rule [is necessary] to protect especially vulnerable claimants from what is in retrospect clearly unreasonable conduct." *Id.* at 6. The latter formulation may ameliorate the former, but it is not sufficient, as it depends too much on ad hoc determinations by courts and attorneys, about the majority of whom Professor Gergen opines: "We may realistically expect *nonspecialist* judges and lawyers to be familiar with the *core* principles of a few major fields of the law. More than this is unrealistic." *Id.* at 38 (emphasis added). Further, given that disagreement by Professor Gergen's colleagues about the proper taxonomy of certain long-seasoned tort claims (typified by claims for negligent misrepresen-

Although the battle to abjure legal taxonomy as we now know it was lost during the fin de siècle, over time the sort of legal taxonomy in vogue today surely will lose the war for survival in right-thinking common law courts. Studied indifference to the maxim *ubi jus, ibi remedium* will not prevail in the long term if the essential common law character of the American juridical system survives.[160] For in the development of the law in the United States, the clamor for a rights-based approach has begun again.

IV. LEAVING CONTEMPORARY LEGAL TAXONOMY

Echoes of primary legal rights theory are heard in certain interstices of current legal practice. For example, California relies on a variant of this theory to determine the issue of res judicata in a civil law suit.[161] The thinking of some early twentieth-century scholars about interests and enforceable primary rights was also evidenced in the organization of the *Restatement (Second) of Torts*, at least insofar as the categories of torts were grouped with reference to invasions of interests of "[a] person [in self], [in] land, or [in] chattels."[162] These echoes are hardly more than whispers in the grand scheme of American jurisprudence, however. Con-

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tation) compelled his resignation as an ALI reporter, hope for anything more than the permanent confusion inherent in contemporary legal taxonomy would not well-founded. After all, were it not so, it would be hard to imagine so great a loss to the ALI of so fine a reporter over so basic a question about contemporary legal taxonomy. That this regrettable loss occurred (and was perceived to be necessary) speaks volumes about the disadvantages of contemporary legal taxonomy.

160. Although real harm is done by reason of attempts to adopt the theoretical classification of claims propounded by legal theorists of the contemporary legal taxonomist stripe, there is some reason to admire their works of pure abstraction. As was once said of criticism leveled at Joseph Beale's work and theories:

> [Beale's] approach would ultimately be judged not for its theoretical niceties but for its real-world results. . . . Metaphysical observations about the nature of law do not resolve concrete problems, and . . . theoretical purity [is] purchased at the price of ignoring practical issues. This preference for theory over praxis [is] an easy target for criticism[,] . . . as an arbitrary metaphysics, based on "jejune notions of an omnipresence." . . . But it is more a vessel of reflection, and less a bark of dogma, than such appraisals indicate. The internal structure is really rather elegant, its concepts interacting with a smoothness and complexity suspiciously reminiscent of celestial spheres, phlogiston, luminiferous ether, and other refined illusions.

Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2457–58 (1999) (quoting Nicholas deBelleville Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J. 1087, 1096 (1956)).

161. *See, e.g.*, Crowley v. Katleman, 881 P.2d 1083, 1090 (1994) ("The primary right theory has a fairly narrow field of application. It is invoked most often when a plaintiff attempts to divide a primary right and enforce it in two suits."). For a critique of the California system, see Walter W. Heiser, *California's Confusing Collateral Estoppel (Issue Preclusion) Doctrine*, 35 SAN DIEGO L. REV. 509, 521–22 (1998) ("[T]he California Supreme Court has continued to employ the primary rights theory as the basis of California's res judicata doctrine. In current res judicata determinations, the court typically defines the scope of a primary right by reference to the 'harm suffered,' by the litigant, as opposed to the particular theory of recovery asserted or remedy sought. . . . By focusing on the 'harm suffered' by the plaintiff, the primary rights theory provides an ambiguous and unpredictable test for determining whether a defendant's conduct creates one or more causes of action. This abstract approach to claim preclusion requires further judicial interpretation of what categories of harms are 'primary' harms. Unfortunately, the California Supreme Court has not developed clear guidelines for the classification of harms for the purpose of primary rights distinctions.").

162. *See* RESTATEMENT (SECOND) OF TORTS § 519 (1977).

temporary legal taxonomy, by and large, remains based on the now familiar classifications that replaced the old writs.[163]

Despite this state of affairs and the marginalization of Pomeroy's primary rights theory during the fin de siècle, a variant of rights-based analysis has emerged in contemporary scholarship. Professor Randy Barnett observed three decades ago a renewed interest in a form of "normative legal philosophy" that might displace legal realism and positivism.[164] Different in the main from Pomeroy's vision, a normative legal philosopher nevertheless similarly asks not what the "law is" but rather what the "law ought to be." Normative legal philosophers, as just described, joined a "new coalition [that] agree[d] that . . . refining legal doctrine through traditional forms of legal analysis grounded on the identification of moral principles is a defensible and worthwhile activity."[165]

Professor Richard S. Markovits's work reflects views of this sort. Professor Markovits focuses on moral rights in a schema of idealized integrity that he denominates a "rights-based society."[166] He recognizes the instantiation of "moral" rights in part in the common law of torts, but he also finds that this method is not a sufficiently reliable means to ascertain rights rooted in moral precepts.[167] Professor Markovits would instead

163. *See* John C.P. Goldberg & Benjamin C. Zipursky, *Torts As Wrongs*, 88 TEX. L. REV. 917, 953 (2010) ("[O]ur legal tradition[] [treats] Torts as among a handful of fundamental legal categories such as Contracts, Property, and Criminal Law.").

164. *See* Randy E. Barnett, *Contract Scholarship and the Reemergence of Legal Philosophy*, 97 HARV. L. REV. 1223, 1224, 1233 (1984) (tracing the recent development of "normative legal philosophy which . . . has been displacing the schools of legal positivism and realism that once dominated legal thinking" and undermining the "amoralism and pragmatism of both the efficiency approach of law and economics and the views of the legal realists."). Legal positivism eschews normative and moralistic considerations in favor of a more "empirical" approach. *See, e.g.*, David Lyons, *Founders and Foundations of Legal Positivism*, 82 MICH. L. REV. 722, 722 (1984) ("The tradition of legal theorizing that we call 'positivism' embraces two principal, related ideas: first, law is a species of empirical fact; second, law must be distinguished from morality—in particular, we must not confuse the law that we actually have with the law as we would like it to be.").

165. *Id.* at 1224–25. Professor Barnett goes so far as to say that "[a]lthough legal positivism still exerts a powerful hold over many legal academics and students, the growing strength of the new normative philosophy may indicate that the positivist separation of law from morals is currently on the wane." *Id.* at 1227.

166. Richard S. Markovits, *Liberalism and Tort Law: On the Content of the Corrective-Justice-Securing Tort Law of a Liberal, Rights-Based Society*, U. ILL. L. REV. 243, 245 (2006) ("(1) [R]ights-based societies are morally and constitutionally obligated both (A) to protect the primary moral rights of their members and participants and (B) to give them an appropriate opportunity to secure redress from wrongdoers who have violated their primary rights—i.e., to secure their secondary, corrective-justice rights—and (2) various actual countries—e.g., the United States (and such other countries as Germany)—are liberal, rights-based societies of moral integrity.").

167. *Id.* at 256 ("[A] type of tort-law study that has a normative component tries to infer the normative underpinnings of the primary tort rights of a society's members and participants that are legally enforceable from some mixture of the arguments judges have made in their tort-case opinions and the conclusions they have reached in such cases. Although such analyses can make a valuable contribution, I believe that their value is reduced by three 'facts': (1) the fact that the moral rights and obligations of the members of any society should be inferred from the society's members' moral-rights discourse, conclusions, perceptions, and conduct outside as well as inside legal fora; (2) the 'fact' that, since Lochner, American judges have hesitated to articulate much less discuss the moral foundations of their decisions even when their decisions were based on moral argument; and (3) the

permit and perhaps compel judges to expressly base their decisions on rights recognized as a matter of moral integrity.[168] (In this, one hears the echoes of an eleventh-century Chancellor's views.) Professor Markovits looks as well to extra-judicial fora to ascertain "moral" rights, although the means by which he proposes the content of moral rights may be so derived remain, in some respects, oblique.[169]

It can be cogently contended that even a well-conceived and rich conception of tort law is an imperfect means to instantiate moral principles and effect corrective justice. And one cannot reasonably disagree that "taking justice seriously may require going beyond doctrinal analysis. When a doctrine runs into trouble or when conflicts between doctrines arise, [one] may need to look to more fundamental notions of justice."[170] Yet, the advocates of contemporary legal taxonomy can be expected to oppose the duplication of moral values in a system of legal classification nearly devoid in any formal sense of such considerations.

For instance, as Professors Goldberg and Zipursky rightly note, one who trespasses believing land to be one's own has engaged in no moral wrong but is nevertheless liable in tort. One who exercises one's best judgment but is honestly mistaken about the objectively unreasonable nature of a risk is at "fault" in tort, despite the fact that few would say that actor has behaved "immorally."[171] Goldberg and Zipursky correctly observe (to an end different from mine) that imposing the condition of moral wrong upon tort law as it is presently conceived therefore has been resisted:

> For sound doctrinal reasons, tort theorists have been disinclined to cast torts as moral wrongs. For a different set of jurisprudential reasons, they have instead treated torts as legal wrongs. Yet in doing so, they have felt compelled to concede that this choice necessarily

'fact' that the concrete moral rights of a rights-based society's members and participants are legal rights, regardless of whether such legal rights have been recognized in courts of law.").

168. *Id.* at 250 ("[C]ommon-law courts can make the tort-related moral rights of their society's members and participants legally enforceable without promulgating new legislation—indeed, are obligated to do so (i.e., to enable their society's members and participants to secure corrective justice).").

169. *Id.* Professor Markovits would allow "government officials" to "promulgate goal-oriented tort legislation if, but only if, 'the People' have explicitly authorized them to do so and the legislation in question does not on balance disserve the rights-related interests of the relevant society's members and participants." *Id.* Professor Markovits would forbid delegation by the legislature of this power to the courts: "[U]nless the People have explicitly authorized the legislature to redelegate their tort-law-making power to judges or administrative-agency officials, the legislature may not authorize such officials to promulgate new legislation—inter alia, may not authorize courts to create new law (as opposed to announcing preexisting law that had not previously been articulated)." *Id.*

170. *See* Barnett, *supra* note 164, at 1236.

171. Goldberg & Zipursky, *supra* note 163, at 951 (citing Vaughan v. Menlove (1837) 3 BING. N.C. 467, 132 E.R. 490 (C.P.)) (noting that individual judgment and good faith are generally irrelevant to the applicable negligence standard).

> drains the normative aspect of the idea of a wrong from torts, leaving only an empty conceptual shell.[172]

Instead of concluding that the doctrinal category known as "torts" therefore should be abjured, however, Goldberg and Zipursky embrace the doctrinal classification by recasting torts as private wrongs according to a "civil-recourse theory" of tort liability.[173] They state:

> What stands next to Contracts, Property, and Criminal Law is . . . . the law of private wrongs. By recognizing torts as wrongs, civil-recourse theory permits legal scholars to make sense of and develop further a vast body of concepts and principles central to a general understanding of American law.[174]

Goldberg and Zipursky argue that the classification of claims based on conduct that is "wrong," in the sense they understand the word, makes sense of the tort taxa.[175] The taxonomic division of obligations to which the old *ex contractu* and *ex delicto* distinction belongs thus emerges as an extremely durable version of the old Roman model that can and will resist the influence of contemporary appeals for the primacy of moral principles in the pursuit of coherence in the application of tort law. Moral values may cohere with tort law in some instances, but it may be simply too difficult to recast a "tort"-based doctrinal classification as a pure replication of moral obligations.[176] A rights-based approach based on moral precepts thus fails to shake the contemporary legal taxonomists' hold on a fundamental classification of legal claims based on "tortious" conduct.

If it is difficult to cast the law of torts solely in terms of moral values, it is nearly impossible to find "enforceable moral rights" to be at the root of cognizable claims for breach of contract, at least insofar as that

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172. *Id.* at 930. The authors describe the "Moral–Legal Dilemma" associated with characterizing torts as "wrongs" as follows: "[The dilemma is that] one cannot characterize torts as moral wrongs without losing the ability to account for large swaths of doctrine, yet one cannot characterize torts as legal wrongs without rendering the concept of 'wrong' vacuous (a legal wrong being anything the law defines as a legal wrong)." *Id.* at 947–48.

173. *Id.* at 953, 985–86 (describing a "wrongs-and-recourse" model of tort law).

174. *Id.* at 985–86.

175. *Id.* at 950–51 ("[T]here is no obstacle to seeing tort law as a domain of duty-imposing legal directives. And then it is straightforward to understand torts—the violations of these directives—as legal wrongs.").

176. *See* John C.P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 FORDHAM L. REV. 1563, 1585–86 (2006) ("[H.L.A.] Hart analyzed obligations as a genus of social and normative forms (for lack of a better term), and he took moral obligations and legal obligations each to be different species of that genus. . . . [O]ur own aim, within tort, has been to avail ourselves of a roughly Hartian framework for thinking about the nature of duties in tort law. . . . [Although] legal obligations are, in many respects, the same sort of creature as moral obligations . . . because law comes with consequences that morality does not (most obviously state-enforced sanctions), and because there are, at times, demands on law that it take a certain form that renders it efficacious, capable of being internalized, and amenable to application by judges, there will be times at which it is appropriate for legislatures and judges and jurors to decline to elevate certain moral norms to legal norms. Similarly, there are sometimes reasons that favor recognition of legal norms that do not have counterparts in morality.")

taxa has been traditionally and is presently understood.[177] Very recently, however, bold legal philosophers like Professor Andrew Gold have argued that because "private law—the law of torts, contracts, and property—is at an interpretive impasse . . . [there should be] a new way to understand private law . . . as a means for individuals to exercise their moral enforcement rights."[178] For Professor Gold, even a breach of contract may create in the promissee a "moral enforcement right," to wit:

> According to [some] account[s], contract law diverges from morality in light of the contractual overlap with promising. . . . A contract is often portrayed as a promissory relationship. And contract law doctrines, at least purportedly, are premised on the idea that people should feel free to breach their agreements as long as they pay damages. Promissory morality, in contrast, frowns upon a breach of promise even if damages are paid, and even if the breach is efficient. Consequently, contract law appears to disregard the moral duty that a promisor owes to a promisee. . . .
>
> [I] offer[] . . . a different way to understand contract law. . . . [C]ontract law, like other fields within private law, is best understood in terms of moral enforcement rights. Contract law is not about the contractual promisor's moral duties to the promisee, and so we should not be looking for contract law doctrines to parallel a promisor's moral duties. Once we consider moral enforcement rights, the meaning of contractual remedies changes. . . . [I]f we focus on a promisee's moral enforcement rights, contract law may actually represent a convergence between legal doctrine and moral principles.[179]

Here again, a legal philosopher may focus on the rights of the individual based on moral values; in Professor Gold's view of contract law, the promissee's. But again, this proposed conceptual model will run straight into the contemporary legal taxonomists' hold on the view that

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177. *See, e.g.*, Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) ("Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so called primary rights and duties are invested with a mystic significance beyond what can be assigned and explained. The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference. But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can."). In any event, Holmes resisted the recognition of primary rights theory in the common law. *See* Ann Woolhandler & Michael G. Collins, *Federal Question Jurisdiction and Justice Holmes*, 84 NOTRE DAME L. REV. 2151, 2189 (2009) ("Holmes' view[s] may have been the product of his jurisprudential attempts to dispense with the concept of 'primary rights.'").

178. Andrew S. Gold, *A Moral Rights Theory of Private Law*, 52 WM. & MARY L. REV. 1873, 1910 (2011) ("Instead of thinking that a wronged party possesses a right to 'act against another' when there has been a violation of her legal rights, we may recognize that the right of redress applies in cases where the wronged party has suffered a violation of a strong moral right. In those cases where the victim of a wrong would normally have a moral enforcement right, the state is obligated to provide an alternative means for the victim to bring about that enforcement.").

179. *Id.* at 1922–23.

the contract taxa is at bottom based on the notion that an ordinary breach of promise is not "wrongful." These taxonomists can dodge any claim to an "immoral" breach of contract (or conversely, in Gold's view, a breach that creates a reciprocal "moral enforcement right" in the promissee) by simply conceding that sometimes a breach of contract is a tort. This bit of legerdemain is all too facile and sweeps the question of morality back into the hopper. By reference to a baseline analysis of a tort as a legally cognizable private wrong, a contemporary legal taxonomist can avoid the legal philosopher's appeal to find "moral enforcement rights" in contractual relations.

Thus, Professor E. Allen Farnsworth blithely stated in his famous treatise on contract law that the justification for reliance-based recovery (such as in cases involving promissory estoppel) is essentially extra contractual and tort-based. As Farnsworth explained:

> The possibility of an answer founded on principles of tort law is inescapable, particularly if recovery is limited to the reliance measure. One person has caused harm to another by making a promise that he should reasonably have expected would cause harm, and he is therefore held liable for the harm caused.[180]

Professor Barnett amplified Farnsworth's resort to a "wrong"-based characterization of promissory estoppel theory as follows:

> [A]lthough . . . court[s] [speak] of promissory estoppel, [their] decision[s] may fit better into that field of liability for blameworthy conduct that we know as tort, instead of the field of liability based on obligations voluntarily assumed that we call contract.[181]

Contemporary legal taxonomists thusly redraw doctrinal lines to account for situations that appear to demand recognition of the "wrongs" that may arise in the course of a contractual relationship. For the contemporary legal taxonomist, if recovery is based on "reliance" (i.e., the right of the person "harmed") rather than the "consent" of the person held liable (as in cases of promissory estoppel or fraud), then for the contemporary legal taxonomist the matter can be simply conceptually reclassified as a tort. There is then, putatively, no threat to the overall view that contract law both governs and defers to the private ordering of legal obligations based on volition and consent (including consent to a predictable damages remedy in the event of an "efficient breach"). In the face of

180. E. ALLAN FARNSWORTH, CONTRACTS 97–98 (1982), *quoted in* Barnett, *supra* note 164, at 1241.

181. Barnett, *supra* note 164, at 1241 (first alteration in original) (quoting E. ALLAN FARNSWORTH, CONTRACT SCHOLARSHIP AND THE REEMERGENCE OF LEGAL PHILOSOPHY 192 (1982)) (internal quotation marks omitted). Professor Randy Barnett, reviewing Professor Farnsworth's treatise, explains that in such cases "the tort-contract distinction is inadequate to account for, much less resolve, the apparent tension between freedom of contract and reliance-based liability." *Id.* at 1241.

a "bad faith" breach of contract, the contemporary legal taxonomist, if so inclined, can blithely find a tort arising out of breach of an implied promise in every contract to "fairly deal" with another.[182] In the case of a contract that limits liability, the contemporary legal taxonomist, if so inclined, can unashamedly find a violation of an implied in fact right enforceable in tort that is therefore incapable of volitional alienation (despite actual waiver) owing to "public policy" or some other ad hoc, vaguely stated premise.[183]

Left to their own devices, moralists thus can and will never overcome the fetid legacy of the Romans' *ex contractu* distinction so deeply embedded in contemporary legal theory and praxis. When a moralist runs into the resistance of contemporary legal taxonomists, the taxonomists will win the debate by stretching and reshaping the porous boundaries that supposedly separate the "core" contours of the contemporary legal taxa. This reality in practical terms may be insurmountable.

Yet, there is powerful reformative strength in asking what "rights" are legally cognizable based principally on what is "just" in a "moral" sense.[184] Although perhaps unable to avoid the squishy and unseemly squirming and trickstering of contemporary legal taxonomists, laudably, moralists directly challenge the more hollow aspects of contemporary legal taxonomy. Their appeal does not depend upon the answer to sterile questions about into which taxa a legal claim should fall. A moralist identifies a primary moral right that has been infringed and the theory that justifies the state compelling some form of redress for its infringement. These are the eternal questions of law, grounded in a fierce sense of justice. Ironically, however, these principal strengths in the propositions of legal moralists are also fatal flaws.

Aside from whether any resort to morality as the principal justification for the enforcement of legally cognizable rights is likely to succeed in the present American legal climate, a question remains whether such resort should succeed. Are any but the most basic moral precepts sufficiently recognizable to effectively guide this or any other complex and functioning legal system? I think not. Discerning inalterable "primary moral rights" or "moral enforcements rights" has inarguably eluded resolution from time immemorial. Were systemic guidance ceded solely to the legal moralists, the legal system in the United States would falter and never achieve what the reformers during the fin de siècle sought to cre-

182. *See* Crisci v. Sec. Ins. Co., 426 P.2d 173, 177 (Cal. 1967).

183. Meiman v. Rehab. Ctr., Inc., 444 S.W.2d 78, 79–80 (Ky. Ct. App. 1969).

184. *See, e.g.*, Helge Dedek, *From Norms to Facts: The Realization of Rights in Common and Civil Private Law*, 56 MCGILL L.J. 77, 104 (2010) ("Private law rights are not ends in themselves; of what use, after all, are rights without remedies, substantive entitlements without any means of realization, if people do not comply with them? Does it not make sense to keep an eye on the possible enforcement of a right while discussing its substantive merits?").

ate: a "systematic reclassification of the law, which would make it easier to teach and learn and more accessible to the public."[185]

Because resting legally cognizable rights on moral obligation entrusts the ability to obtain remedies in court to the sometimes vague and often difficult-to-understand standards propounded by contemporary legal moralists, the theory of primary rights advocated by scholars like Pomeroy is a superior means to move to a rights-based legal system—at least insofar as legally cognizable primary rights are not postulated, but derived, through the common law experience. For Pomeroy, primary rights are discernible in "principles [that] emerge[] gradually through a process of judicial deliberation that combine[s] reliance on precedent with . . . gradually perfected [expansion tested] against the developing natural justice ideal in particular cases."[186] This process does not involve the keyboarded postulations of legal moralists. The primary rights so derived have been forged in the crucible of reality and polished by the work of legal theorists and practitioners over centuries.

Despite any of their respective shortcomings, normative legal philosophers, moralists, and like-minded legal theorists who believe a rights-based analysis of legal claims to be superior to the present system of legal taxonomy can and should be allied. In the search for a means to abandon contemporary legal taxonomy to focus more on legally cognizable primary rights, Professor Randy Barnett perhaps pointed the way to a workable synthesis:

> What is needed—and, I suggest, possible—is a theory of justice that explains when legal force, whether it is exercised in the realm of contract or of tort, is morally justified. Such a theory must articulate the rights people have and the ways in which these rights may be consensually or nonconsensually alienated. The fact that this is precisely the mission upon which the new moral and legal philosophers have embarked highlights the importance of legal philosophy and the direct role it can play in developing legal doctrines. The treatise writer is . . . . in need of the philosopher's theory of justice, without which a completely coherent doctrinal analysis will remain elusive.[187]

185. *See* Grey, *supra* note 2, at 1241.

186. *See* Bone, *supra* note 124, at 41–42.

187. Barnett, *supra* note 164, at 1245. Professor Barnett fits a rights-based view of contract law neatly within a normative legal philosopher's frame: "[C]ommitments should be enforceable as contracts when the parties effectuate the unilateral or bilateral transfer of alienable rights to resources in the world by manifesting their consent to a legally binding transfer." *Id.* at 1242.

> Indeed, the moral justification for consent-based enforceability can be provided only by underlying notions of rights. The two-step analysis under a consent theory—that is, the bifurcated inquiry into rights and consent—shows the proper relationship between contract theory and a more fundamental theory of justice based on rights. The analysis can thus explain the source of many of the extracontractual considerations that courts currently incorporate into contract law under the loose heading of "public policy" but that are completely unaccounted for by either a bargain or a reliance theory of contractual obligation.

Professor Barnett got this just about right: the quest to develop legal doctrine in the service of what is "just" is perpetual.[188] Fortunately, in the roots of the contemporary legal system, there is already a venue in which legal claims and remedies have been tested against theories of justice and morality. That venue is not the writings and debates of contemporary normative legal philosophers and moralists (though, these writings and debates are of great value and influence nevertheless). It is still, as it has been for centuries, the role of equitable jurisdiction in the common law courts to break down the barbarism of formalism in the law and to give true meaning to concerns about justice.[189]

By refashioning rules of law and thereby allowing remedies once thought unavailable, the courts of equity have traditionally hastened the development of a legal system unhampered by archaic doctrinal boundaries, while fostering a sense of controlling moral principles and fundamental justice. This is, perhaps, a form of the doctrinal coherence of which Professor Barnett speaks.[190] A "unification principle" has already been at work in the United States (and other countries as well) under the guise of an "equitable jurisdiction" in the merged courts of law and equity. These courts can focus competently less on ancient notions about forms of action (and the relief thereby prescribed) and more on the recognition of certain primary rights and remedies that Pomeroy championed.[191]

Id. at 1244–45.

188. *See* Calnan, *supra* note 141, at 559. Comparing the views of "instrumentalists," who argue that private law is merely a means to achieving any number of political or social ends, with "deontologists," who contend that the law seeks only the moral end of justice and cannot be used for anything else, Professor Calnan offers a composite theory called "instrumental justice" that acknowledges the inherent instrumental nature of private law but establishes justice as its central, organizing ideal. Professor Calnan summarizes:

> So framed, instrumental justice's primary function is to create rights that serve as tools for marking and mapping important interests, and for defending and vindicating those interests when they are threatened or impaired. Rights, in turn, both imbue the law with the moral credibility necessary to perform secondary social functions, and prevent it from pursuing these functions at the expense of its core principles.

Id.

189. *See, e.g.*, Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53, 67–68 (1993) ("Our substantive law is derived from common law, from equity, and from statute. [Frederick W.] Maitland [in 1 Equity 1 (2d ed. 1936)] correctly observed . . . that it is impossible to generalize about the things that came from equity. . . . He also noted that the most basic rights and legal concepts came from common law. When equity imposed personal duties . . . it presupposed legal rights of property and contract. Equity without common law, Maitland said, would have been 'a castle in the air.' He was right. But the other half of his comparison was equally right: Common law without equity would have been a functioning system, but in many applications it would have been 'barbarous, unjust, absurd.' It is hardly surprising that we have not abandoned equity and reverted to barbarism. To the contrary, substantive equity is now fully integrated into our substantive law, with or without continued consciousness of its equitable origins.").

190. Barnett, *supra* note 164, at 1245 (referring to "coherent doctrinal analysis").

191. POMEROY, *supra* note 118. Pomeroy noted that jurisdiction in equity provides "those doctrines and rules, primary and remedial rights and remedies, which the common law, by reason of its fixed methods and remedial system, [is] either unable or inadequate in the regular course of its development, to establish, enforce, and confer, and which it therefore [has] either tacitly omitted or openly rejected." *Id.* at 89; *see also* Woolhandler & Collins, *supra* note 177, at 2156 ("In the latter

Since the early twentieth century, the constant and inexorable obscuring of the porous boundaries thought by some to keep tort and contract law distinct has been advanced by the abandonment of judge-made doctrinal restraints.[192] Unified courts can and do blend and transform doctrinal principles once thought inviolate, making possible the dissolution of formalistic distinctions between "tort" and "contract" law.

As stated by Kevin M. Teeven:

> After the abolition of the forms of action and the complete fusion of law and equity in American jurisdictions during the second half of the nineteenth century, the way was open to consider the possibility of . . . a third branch of private law independent of contracts and torts. . . . As it became irrelevant whether a remedy was obtainable under a particular form, courts began to pry open the old common counts to determine their foundation and meaning. In the process, courts recognized the existence of a third category of the common law grounded upon neither tortious conduct nor bargain . . . .[193]

A proper synthesis of legal and equitable principles avoids the "barbarism" of formalistic adherence to doctrinal distinctions, yet tethers courts' discretion to juridical traditions and precedent.[194] Abandonment of doctrinal distinctions in the exercise of equitable jurisdiction does not toss away the past. Instead, liberation from the doctrinal shackles of the past allows a court to draw from the law of contract and torts (and all the other old taxa) to properly discern legally cognizable rights[195] and to

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half of the nineteenth century, John Norton Pomeroy, in his treatises Remedies and Remedial Rights and Equity Jurisprudence . . . address[ed] whether equity merely provided additional remedial rights for the same primary rights as those vindicated at common law or instead vindicated additional primary rights.").

192. *See, e.g.*, Vincent A. Wellman, *Assessing the Economic Loss Doctrine in Michigan: Making Sense out of the Development of Law*, 54 WAYNE L. REV. 791, 861 (2008) ("[I]f one goes back far enough, it should be clear that both tort law and contract law (and any sense of the boundary that divides them) are the result of judicial decision-making with little or no guidance or—even attention—given by the legislative branch. . . . [T]he ongoing development of torts and contracts [is] a development that has been judge-made since its inception.").

193. Kevin M. Teeven, *The Advent of Recovery on Market Transactions in the Absence of a Bargain*, 39 AM. BUS. L.J. 289, 339 (2002).

194. The courts of equitable jurisdiction have been traditionally guided by a form of precedent known as the "equitable maxims." *See, e.g.*, Regions Bank v. Wingard Props., Inc., 715 S.E.2d 348, 352 (S.C. Ct. App. 2011) ("Equitable maxims are not binding legal precedent but represent notions and concepts of equity in various situations."); *see also* RUSSELL L. WEAVER ET AL., PRINCIPLES OF REMEDIES LAW 8 (2007) ("[Equity courts] . . . began to develop 'rules' or 'maxims' governing equitable relief. Although these 'maxims' were generalizations of experience based on the results of prior cases, they eventually developed into a loose set of 'rules' designed to bring some coherency to the body of decided cases and some consistency to future decisions."). Maxims developed, at least in part, to reflect the attempt by the courts of equity to create guiding principles, in the same way that the courts of law have developed binding precedents. *See, e.g.*, Swetland v. Curtiss Airports Corp., 41 F.2d 929, 936 (D. Ohio 1930) ("Maxims are but attempted general statements of rules of law. The judicial process is the continuous effort on the part of the courts to state accurately these general rules, with their proper and necessary limitations and exceptions.").

195. *See, e.g.*, Zechariah Chafee, Jr., *The Progress of the Law, 1919–1920*, 34 HARV. L. REV. 388, 393–94 (1921) ("[I]t is important to ascertain the nature of [coterminous legal theory] to understand the basis of equity jurisdiction, [because] courts of equity [often] are not really dealing with

afford relief in the form of remedies unhampered by taxonomic classification.[196] The true merger of law and equity makes possible a more rational system in which at long last the old maxim will hold true that "for every right there is a remedy."[197]

Of course, not all legal scholars have applauded or will welcome encroachments upon contemporary doctrinal distinctions.[198] For the past

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any question of equity but with the law of torts, just as they determine the law of contracts, when they ask whether a promise has consideration before they specifically enforce it.").

196. *See, e.g.*, T. Leigh Anenson, *Treating Equity Like Law: A Post-Merger Justification of Unclean Hands*, 45 AM. BUS. L.J. 455, 509 (2007) ("Continued reliance on outmoded anachronisms of law and equity in order to determine the availability of [a particular defense] is to chase ghosts and leave courts in a constant state of epistemic failure. It also limits the legal reasoning process of judges to formulations designed in the dark days of the common law. Adherence to the increasingly irrelevant labels of law and equity additionally diverts judicial resources from the true interests at stake and deprives the law of its ability to meet the needs of an ever-changing society. Distinctions between legal and equitable defenses are dead. They were buried with the merger. It is time for courts to begin writing their obituary.").

197. *See, e.g.*, Andrew Burrows, *We Do This At Common Law But That In Equity*, 22 OXFORD J. OF LEGAL STUDIES 1, 4 (2002) ("While there are areas where common law and equity can happily sit alongside one another, there are many examples of inconsistencies between them. It is important to remove the inconsistencies thereby producing a coherent or harmonized law. In developing the law it is legitimate for the courts to reason from common law to equity and vice versa. A harmonized rule or principle that has features of both common law and equity is at the very least acceptable and, depending on the rule or principle in question, may represent the best way for the law to develop. It is submitted that the latter view is to be strongly preferred. There are numerous instances of inconsistencies between common law and equity; and to support fusion seems self-evident, resting, as it does, on not being slaves to history and on recognizing the importance of coherence in the law and of 'like cases being treated alike.'"); *see also* Bone, *supra* note 124, at 26 ("For those who subscribe[] [to the view that the rights enforced by the common law should duplicate much of the rights structure of equity], the solution [is] clear. First, the anomalous and indefensible distinction between law and equity ha[s] to be eliminated, that is, law and equity ha[ve] to be merged. Second, the antiquated forms of action [need] to be abolished and the natural classification of causes of action based on the nature of abstract rights and duties substituted for the irrational categories defined by the forms. With law and equity merged and the forms of action abolished, judges [will] be free to apply the ideal system of substantive general principles to resolve all controversies openly and without use of fictions. And abolition of the forms of action [will] have the additional benefit of jettisoning the arbitrary common-law limitations on types of remedies and extending the equitable principle of remedial flexibility to the merged system as a whole."); Laycock, *supra* note 189, at 71 ("Equitable doctrine . . . should continue to develop in harmony with related legal doctrines, and on the basis of sound policy in a modern democratic society. I submit that no question concerning the scope or content of these doctrines should any longer depend on whether they historically arose in law or equity. The substantive rules that govern our behavior should not depend on the historical jurisdiction of ancient courts that were merged fifty-five or one hundred forty-five years ago."); Anenson, *supra* note 196, at 457–58 ("[T]he content and application of a particular law in any given controversy should not depend on the historical happenstance of whether it originated in law or equity. Because the historic boundary between law and equity was accidental and not functional, functional choices about the role of discretion, the method of adjudication, or an award of damages or specific performance should be considered outwardly and independently on their merits.").

198. *See, e.g.*, Israel Gilead, *Non-Consensual Liability of a Contracting Party: Contract, Negligence, Both, or In-Between?*, 3 THEORETICAL INQUIRIES L. 511, 514 (2002) ("To achieve its goals, the legal system functions through 'intermediaries' such as tort and contract, each of which has a different agenda, different characteristics, and built-in limitations. Liability must, therefore, be characterized as tortious, contractual, or both. There should not be 'liability in the air,' liability that has no defined origins."); R.P. MEAGHER, W.M.C. GUMMOW & J.R.F. LEHANE, EQUITY, DOCTRINES AND REMEDIES (3d ed. 1992) ("[The fusion fallacy] involves the conclusion that the new system was not devised to administer law and equity concurrently but to 'fuse' them into a new body of principles comprising rules neither of law nor of equity but of some new jurisprudence conceived by accident, born by misadventure and nourished by sour but high-minded wet-nurses."); T. Leigh

fifty or so years in particular, as the pace of erosion of the boundaries between tort and contract law has accelerated, more than a few scholars have mourned the "death of contract," albeit in various ways.[199] Most of this mourning is misplaced, however. A synthesis of tort and contract theory is more historically sound than the unsound distinctions between the two that it displaces.

To be sure, any prescriptions for progress based on the exercise of equitable jurisdiction must necessarily be undertaken cautiously. Faults associated with the exercise of equitable jurisdiction are inevitable. There are particular grounds for concern insofar as trial courts in the United States continue to indulge the untoward fiction that unfettered discretion is inherent in the exercise of equitable powers.[200] Trial judges who purport to "sit in equity" are inclined on occasion to act on the faulty belief that this fictional position affords them nearly absolute discretion. And this faulty belief is encouraged because decisions in "equity" are too often insufficiently checked by the courts of appeal.[201] Insufficient precedential value afforded to decisions in "equity," together with ineffectual appellate review of ad hoc adjudication, can promote outcomes just as dysfunctional and confused as those that rely on contemporary legal taxonomy.

Yet, a carefully reasoned response to these concerns overcomes them. Failings in the course of the common law are more often than not corrected. The English courts of equity ultimately established distinct precedents and adhered to them.[202] Indeed, by the eighteenth century,

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Anenson & Donald O. Mayer, *"Clean Hands" and the CEO: Equity as an Antidote for Excessive Compensation*, 12 U. PA. J. BUS. L. 947, 982 n.134 (2010) (collecting authorities addressing the "fusion wars" in various common law countries).

199. *See, e.g.*, GILMORE, *supra* note 2, at 103; Robert E. Scott, *The Death of Contract Law*, 54 U. TORONTO L.J. 369, 370 (2004) ("Grant Gilmore predicted the death of contract. He saw the expansion of legal liability for relied-upon promises as evidence that contract was being swallowed up by tort and would soon disappear as an independent, coherent body of law. . . . [Notably,] for Gilmore, the triumph of reliance over bargain was an entirely salutary development.").

200. *See, e.g.*, T. Leigh Anenson, *From Theory to Practice: Analyzing Equitable Estoppel Under a Pluralistic Model of Law*, 11 LEWIS & CLARK L. REV. 633, 641–42 (2007) ("The chaotic state of equity jurisprudence makes . . . cases easy to distinguish. Moreover, a risk in equity, or in any other area of law with abstract concepts like justice, is that the rules of decision become a free-for-all for the courts and make the identification of decisional patterns difficult.").

201. There unfortunately remains today a distinct reluctance on the part of appellate courts to disturb the judgments of a modern-day "Chancellor," even though the role of a current American judge has little or no relation at all to the role of an eighteenth-century English "Chancellor." *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975) (explaining that "discretion" is "unfettered by meaningful standards and shielded from thorough appellate review"); Cravens, *supra* note 116, at 958 ("For discretion to have real meaning, lower court judges must not be subject, in their exercise of judgment, to reversal based on mere second guessing or differences of opinion by the appellate court. Indeed, that would change what the law is."); Denham v. Superior Court, 468 P.2d 193, 199 (Cal. 1970) ("[U]nless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power."). *But see* Barnett v. Gomance, 377 S.W.3d 317, 323 (Ark. Ct. App. 2010) ("Equity cases are reviewed *de novo* on appeal.").

202. *See, e.g.*, 30A C.J.S. EQUITY § 6 (2012) ("The doctrine of stare decisis became an established part of equity jurisprudence. Thenceforth, equity ceased to be a mere corrective agency and

critics complained that the English courts of equity were as hide-bound as the courts of law.[203] Thus, "equitable jurisdiction" properly understood and viewed in actual practice for centuries has not been a pretext to justify *any* solution to a difficult problem that is irreconcilable with rigid adherence to formalistic rules of law.

Modernly, most judges and attorneys agree that courts are obliged to provide predictable guidance and equality before the law, and to that end, may not change the rules at will to suit personal predilections or idiosyncratic notions of "fairness."[204] Resorts to "divine law" are rare.[205] Contemporary courts are much more likely to avoid haphazard or ad hoc adjudication. The common law possesses its own dynamic, subject to external influences, but is nearly always typified by slow and careful incremental adjustments.

Jurisdiction in equity is a grand fiction in a contemporary American court. Still, it is an analytical construct that focuses more on remedies for violation of primary rights than on restricting remedies based on unattainable taxonomic purity. There is a poetic symmetry in the notion that the legal fiction of equitable discretion unburdened by doctrinal distinctions may be ultimately the analytic convention that can overcome an

became a definite system of jurisprudence occupying the field side by side with the common law, each with a distinct jurisdiction, and, therefore, necessarily there also grew up, not only two distinct systems of practice in these courts, but also two distinct systems of substantive jurisprudence . . . .").

203. Anenson, *supra* note 200, at 643–44 ("In fact, the English Court of Chancery during the eighteenth and nineteenth centuries came to be called a court of 'crystallized conscience.' This rigidity, or *rigor aequitatis* as it was called, emitted equitable precepts that came to suffer the same fate as the rules of the common law. The court's inability or unwillingness to account for the surrounding circumstances was denounced as defeating the ultimate purpose of the legal system to provide just results."); Bellia, *supra* note 109, at 783–84 ("Though the prescribed forms of proceeding in equity were more 'flexible' than those at law, they were 'prescribed' nonetheless."); *id.* at 789–90 ("If the common law failed to fulfill the maxim *ubi jus, ibi remedium*, did equity, with its own maxim that it 'will not suffer a right to be without a remedy,' fulfill it? In its early days, equity jurisprudence may well have been thought to derive from principles of conscience and natural justice. . . . By the eighteenth century, however, Blackstone would describe equity as a system of jurisprudence as 'equally artificial' as the common law, different only in its usages in the forms and modes of its proceedings. . . . In 1815, in the preface to his treatise on equity practice in the High Court of Chancery, Henry Maddock mused that 'if it were true, that the Chancellor, in the exercise of his Jurisdiction, acted only, as is vulgarly supposed, according to an unbounded discretion . . . it would be a folly to attempt to systematise the doctrines of Chancery.' The Chancellor's discretion, in fact, was anything but unbounded. . . . Equity practice in America, as a general matter, was similarly bounded [as i]n 1836, [when] Joseph Story explained the formal, remedies-based nature of equity practice that prevailed around the time of the American Founding . . . .").

204. *See, e.g.*, Burrows, *supra* note 197, at 2.

205. *But see, e.g.*, State Mut. Life Assurance Co. of Am. v. Hampton, 696 P.2d 1027, 1031 (Okla. 1985) ("Human law is the offspring of divine law. One of the strongest principles of law is compensation. Every man compensates his own wrong. He cannot claim the benefits of it." (quoting Equitable Life Assurance Co. v. Weightman, 160 P. 629, 631 (Okla. 1916) (holding a life insurance beneficiary was not entitled to the benefits of a policy despite her acquittal in a murder trial after she killed the policyholder)) (internal quotation marks omitted)).

equally untoward legal fiction that elevates taxonomy to a set of governing legal principles.[206]

V. CONCLUSION

Inequities arise from the present system of legal taxonomy. These inequities are not the inevitable derivative of an unavoidably imprecise but necessary system of doctrinal classification. Rather, these inequities are the product of the choices made during a period of great reform of the legal system in the United States about one hundred years ago.

During this period, referred to herein as the "fin de siècle," John Norton Pomeroy and others proposed a rights-based organization of legally cognizable claims analytically superior to the methodology of restricting relief based on the fuzzy taxonomic classifications familiar today. This achievable alternative would have consigned the then-nascent precepts of contemporary taxonomy to the dustbin of legal history. Instead, the precepts of an *ancien régime* prevailed.

The question remains how best to achieve the goal of allowing all appropriate relief upon infringement of cognizable primary legal rights, within the bounds of precedent and the incremental development that is associated with the common law. At present, there is again a rising appeal to move incrementally to a rights-based system of legal claims and remedies that focuses more on upholding enduring values than on enforcing formalistic taxonomic distinctions.

For those who hold that the design of any functioning judicial system will be inevitably imperfect, no paradigm can be genuinely propounded as the perfect solution to every legal challenge. Yet, in the foundations of the legal system in the United States, one finds an elegant legal theory fashioned from the roots of established primary rights that abjures the sort of senseless legal taxonomy that demands bloodletting debates typified by a recent mêlée about whether negligent misrepresentation should be classified as a breach of contract.

Primary rights theory, albeit elegant, is not without faults but in practice obliges and relies upon the incremental improvement that is the hallmark of the common law. It is in the inexorable currents of legal history that grounds for optimism can be found, but not in the work of legal taxonomists who, over the past century in particular, have created so much dysfunction to the pointless end of demonstrably unsound dogma about contracts and torts.

206. To paraphrase former President William J. Clinton Jr., there is nothing wrong with the American judicial system that can't be fixed with what is right with American judicial system. *Larry King Live*, (CNN television broadcast June 1, 2005).