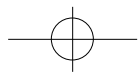
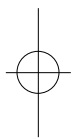
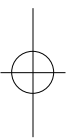
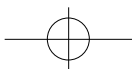
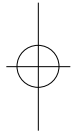
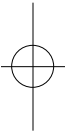


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# Tort Law and Culture

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# Tort Law and Culture

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**Carolina Academic Press**  
Durham, North Carolina

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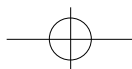
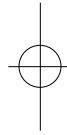
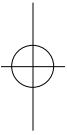
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For Helene,  
*The Nonpareil*

For Nat For Ben  
For Gabrielle

To the memory of my parents  
Norma S. Shapo Mitchell Shapo



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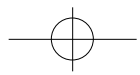
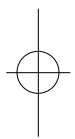
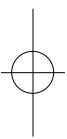
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## Preface

This book reflects debts to many people whose writings I have read, who I have heard speak and with whom I have conversed over many years. I can mention only a few.

My colleagues and students at Northwestern, at Virginia and at Texas have proved much stimulation for my thinking on this subject. I especially want to mention Victor Rosenblum, who has for a quarter century been a font of conversation for me on a wide range of topics, and who sets an example for character and bravery. Among dozens of colleagues at other institutions, I particularly thank Beth Mertz for helpful criticism of an early fragment of this work and Diane Maleson for her encouragement of an initial presentation of these ideas.

A fine platoon of librarians at all my institutions has provided the great bulk of the sources I have consulted. I appreciate especially the always competent and cheerful help of Marcia Lehr at Northwestern, who marches in the very front rank of reference librarians, and of her colleagues Pegeen Bassett, Irene Berkey, and Jim McMasters. I appreciate also the overall leadership of Chris Simone at Northwestern and of Roy Mersky at Texas, who first taught me what libraries can give to scholars.

I am grateful for research funds provided by my deans at Northwestern: David Van Zandt, Bob Bennett and David Ruder. In particular, I acknowledge the research support of the Clemens and Jane Werner Faculty Enrichment Fund and support during my year as the Stanford Clinton Sr. Research Professor at Northwestern.

I did intensive work on the manuscript at Wolfson College, Cambridge, where I was a visiting fellow in the spring of 2001, and I thank Gordon Johnson, President of the College; Julie Jones, the College Secretary; and their staff. I appreciate very much the help of David Williams, former vice-chancellor of Cambridge Uni-

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versity as well as former President of Wolfson, in helping to arrange my visit there.

Derek Gundersen, my faculty assistant, has been indispensable in the preparation of this manuscript, as he has been with several books over a number of years. I am grateful for his diligence and his patience.

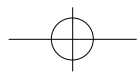
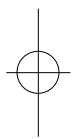
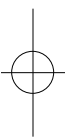
My children, Ben and Nat, frequently contribute wisdom to my view of the law. It is a great pleasure to learn from them. I also appreciate the views of Jacqueline Shapo, Ben's spouse, who combines a lawyer's training and a psychologist's keen eye. And I mention the learning I have already absorbed about fundamentals of human existence from the dynamic Gabrielle Faith Shapo.

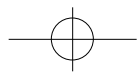
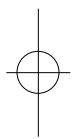
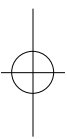
Most of all, I give thanks to Helene S. Shapo, my wife and colleague. Her sense of the law, her insistence on clear expression, and her intellectual courage have provided a constant guide to my analysis and writing across the years.

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# Tort Law and Culture

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# Introduction

On May 8, 1991, Paula Corbin Jones, an employee of an Arkansas state agency, had an encounter with Governor Bill Clinton in a suite in the Excelsior Hotel in Little Rock. As every American knows, the dispute about what happened there is the stuff of one of the longest running, and strangest, personal and political dramas in the nation's history.

Among other things, Ms. Jones alleged that the Governor:

- Had a state trooper invite her to the suite and escort her there
- Shook hands with her when she came to the suite, "invited her in, and closed the door"
- Mentioned that Ms. Jones' boss was the Governor's "good friend"
- "Unexpectedly reached over to [her], took her hand and pulled her toward him, so that their bodies were close to each other"
- Remarked admiringly on her physical characteristics
- Put his hand on her leg and began sliding his hand to her pelvic area
- Bent down to try to kiss her on the neck
- Exposed his erect penis to her and "told [her] to kiss it"
- On being refused, told her, while fondling his penis, that he did not want to make her do "anything you don't want to do"
- "Detained" her momentarily
- Told her "sternly" as she left the room, "You are smart, Let's keep this to ourselves."

Jones presented testimony that she was "upset and crying" after the incident, and, within the next couple of days, was "bawling" and "squalling" and "appeared scared, embarrassed, and ashamed." However, she "never missed a day of work" after the incident, continued to work for 19 months at the job she had when the incident

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occurred, and left only because of a job transfer for her husband. She never sought psychological therapy or incurred medical bills because of the incident.

After a landmark holding by the U.S. Supreme Court<sup>1</sup> that permitted Jones to go ahead with her action while Mr. Clinton, who had become President, was still Chief Executive, the case returned to the federal district court in Arkansas. Judge Susan Webber Wright of that court ultimately dismissed the entire action.<sup>2</sup>

Because of its fame, or infamy in our recent history of litigation concerning alleged personal injuries, *Jones v. Clinton* is an excellent introduction to a subject that is all around us—the way American injury law provides a mirror of our culture. In setting out to show how tort decisions reflect who we are as a people, we may begin by analyzing Paula Jones’ claims from a legal point of view. In political discourse, the “civil rights” character of those claims has attracted the most comment. Judge Wright, viewing Jones’ action under a general federal civil rights statute as strongly analogous to Title VII claims for sexual harassment,<sup>3</sup> found it wanting. On the so-called “quid pro quo” branch of the claim, she found that the plaintiff had suffered no “tangible job detriment or adverse employment action.”<sup>4</sup> With respect to the “hostile work environment” branch of the action, she concluded that the incident itself, and later encounters that Jones had with the Governor and the trooper, were not so “severe or pervasive” as to constitute an “abusive working environment.”<sup>5</sup>

As a cultural matter, however, the most interesting part of Jones’ action was her relatively untechnical claim for the tort of “intentional infliction of emotional distress.” This legal doctrine requires a plaintiff to show that the defendant intentionally engaged in outrageous conduct—sometimes the tort is called the tort of “outrage”—that caused the plaintiff severe emotional distress.

Judge Wright could find no “outrage” in the Governor’s conduct. It was “boorish” and “odious,” she said. However, she opined that

---

1. 520 U.S. 681 (1997).

2. *Jones v. Clinton*, 990 F. Supp. 657 (E.D. Ark. 1998).

3. See *id.* at 668–69 & n.11.

4. *Id.* at 674.

5. *Id.* at 675.



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the plaintiff's allegations "describe[d] a mere sexual preposition or encounter . . . that was relatively brief in duration, did not involve any coercion or threats of reprisal, and was abandoned as soon as plaintiff made clear that the advance was not welcome."<sup>6</sup>

This holding is particularly interesting because the full cluster of Governor Clinton's alleged actions would comprise a substantial chapter in a mini-textbook of acts commonly known as torts—intentional torts in particular. The term tort is not susceptible of an easy, crisp definition. But for our present purposes we may describe it as an action for personal injury, for property damage, and sometimes even for injury to economic interests, that the law denominates a "wrong" — except for the sort of wrong chalked up as a breach of contract. The textbook-like aspects of Jones' claims lie in the cornucopia of tort actions the case theoretically presented — besides intentional infliction of emotional distress, these included assault, battery, and false imprisonment.<sup>7</sup>

This book analyzes American personal injury law as a reflection of our society, filtered through the complex mechanism of the legal process. My thesis is that tort law is a rather accurate — often wonderfully accurate — representation of local, even national, culture. I have been mindful, in the final drafting of this book, that we now live in the shadow of a world-shaking set of events that resulted directly in the deaths of thousands of human beings and also enormous property damage. These events have radiated outward into hundreds of millions of lives, producing grief and dislocations of all kinds. We can now sense only dimly the challenges that these events will pose for our social order, its policies and its laws.

The immediate focus of national concern has been responses to these challenges on a comprehensive scale. This book, which also deals with death, injury and dislocation, has a much tighter focus. Yet, if it lacks the scale of national crisis, it may also may be instructive about larger questions. Sometimes, a mosaic in a vast building may teach us a great deal about the people who constructed it. The district court decision in *Jones v. Clinton*, which dis-

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6. *Id.* at 677.

7. Judge Wright pointed out in an earlier opinion that Mr. Clinton had argued that these particular claims, as well as a state law claim for "harassment," were barred by a one-year statute of limitations. 974 F.Supp. 712, 729-30 (E.D. Ark. 1998).

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tills the tort potential of the case down to one claim — that for intentional infliction of emotional distress — is one tile in that mosaic.

The opinion was a product of a female judge, a veteran lawyer in the locality where the events allegedly took place. She — in piquant fact, formerly a student of Mr. Clinton's when he taught law at the University of Arkansas — indicated that disgusting behavior is not necessarily grounds for a legal claim. As is often the case with tort decisions, her ruling does not tell us what is proper for us to do — or exactly what we must not do — but what we must stomach as part of our everyday lives.

I will speak, from time to time, about “injury law,” by which I generally refer to a broad body of legal rules concerning injuries created not only by courts, but by Congress and state legislatures. But principally I will be discussing tort law — those rules and principles that grow out of judicial resolution of individual disputes about alleged injuries. One reason that this body of law is so interesting as a cultural reflector is that the legal system serves as a filter for cultural attitudes, taking into account both our material desires and our spiritual aspirations.

As judges execute their craft in ordinary tort cases, their decisions come to embody the reactions of ordinary people in ways that define our society. Yet, when judges decide cases, they do not consciously visualize themselves as cultural agents. Instead, they adjudicate specific grievances, usually against a background of legal rules growing from analogous situations, and they must do so within a complicated body of procedural constraints. This technical complexity itself guarantees that tort law is a relatively accurate cultural reflector. For when rules emerge from this complex process that carry symbolic meaning, they do so almost in spite of the process itself, which is designed not as a cultural barometer but rather as a mechanism for judging concrete cases.

In analyzing both actual and hypothetical tort cases, I acknowledge the debt of American legal scholarship and social science to Tocqueville, who observed more than 170 years ago that important political issues in America have a tendency to wind up in court.<sup>8</sup>

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8. Alexis de Tocqueville, *Democracy in America* 248 (J.P. Mayer & Max Lerner, eds., Harper & Row 1966) (“[t]here is hardly a political question in the United States, which does not sooner or later turn into a judicial one”).

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Tocqueville's insight will not be news to a generation familiar with such issues of constitutional law as abortion, school desegregation and the reapportionment of state legislatures. However, in focusing on less overtly politicized types of litigation, this book confirms Tocqueville's observation with respect to workaday issues raised by more ordinary cases, usually classified under the heading of tort. Over the last generation, these seemingly more mundane issues have increasingly intersected with constitutional law.<sup>9</sup> But they remain rooted in the simpler soil of tort, linked to the effort of judges to do justice between individual parties, without self-consciously involving themselves in broader agendas.

Every lawyer knows that in most litigated cases of any consequence, "the evidence" is likely to consist of great piles of paper, built on scores and hundreds of questions in pre-trial interrogatories and depositions. The "headnotes" to appellate cases, which summarize the individual points in each decision, may run to the dozens, occasionally even the hundreds. Lawyers also know, however, that within this tangle of law, they need to establish at most a very few main story lines for judge and jury. Those story lines contain what advocates view as the heart of the matter, and the successful development of a central theme, or themes, is what turns cases. Lawyers must try to cast their central story in terms of a legal principle, often a negatively stated principle, for example, thou shalt not act carelessly when it is likely to cause harm to another. But the persuasive development of a story about a legal controversy usually also requires reference to cultural standards. These frequently overlap with legal principles, but often they influence courts independently, through a life of their own.

I use culture in this work to mean the vast collection of social customs, rules, standards, and viewpoints that generate the attitudes that communities and individuals bring to bear on specific disputes. The related concept of norms is currently a fashionable

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9. See, e.g., *City of Monterey v. Del Monte Dunes of Monterey, Ltd.*, 526 U.S. 687 (1999), which involved 42 U.S.C. § 1983, the modern codification of a provision that originally was part of the Civil Rights Act of 1871, known as the Ku Klux Act. In *City of Monterey*, Justice Kennedy says in his opinion for the Court that "there can be no doubt that claims brought pursuant to § 1983 sound in tort," *id.* at 709. Justice Scalia, elaborating this point in a concurring opinion, declares that "[t]here is no doubt that the cause of action created by § 1983 is, and always was regarded as, a tort claim." *Id.* at 727.

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topic in academic writing about the law, but I use that term rather sparingly. My employment of the concept of culture has a broader meaning than the definitions that have been given to norms.<sup>10</sup> It includes the sometimes unarticulate wellsprings of those states of mind — again, attitudes — that influence both judicial and lay responses to particular disputes about whether alleged injurers should pay alleged victims.

The controversies that generate tort cases frequently reflect deep divisions about the role of law and morality in our social life, so tort law often becomes a series of culture wars. The human torment involved in many of these cases often imparts to them a novelistic tint. Judges often seem to take professional pleasure in the way that they narrate the facts of a tort case. And the cases that present the most difficult legal issues frequently have a Shakespearean cast to them — in the variety of the actors involved and in the sometimes bizarre nature of the incidents. In Paula Jones' case, glossed by later revelations of a President's affair with a young intern, we see the unlikely tragicomedy of Bill Clinton as a kind of Falstaffian figure.

Tort law thus emerges as an immense, complex data set detailing the nature of an extraordinarily complex organism. Politicians refer to that organism in a sloganeering way, and I shall refer to it quite seriously, as the American people. That organism, like the business and private organizations that are a part of it, and indeed like each of us as individuals, often carries within itself views of law and morality that are in tension. When I use words like “we” and “our,” I refer to the diverse collection of people who make up the American citizenry, and to the cross-currents of thought among

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10. In the first article in a symposium entitled *Social Norms, Social Meaning, and the Economic Analysis of Law*, Robert Ellickson declares it “worrisome that the new norms scholars do not agree on basic terms, not to mention analytic frameworks,” and says that “[t]he waters are so muddy that many writers on norms feel compelled to start by proffering their own definition of *norm*.” *Law and Economics Discovers Social Norms*, 27 *J. Legal Studies* 537, 548 (1998). For a spoonful of definitions of norms, *compare* Robert Cooter, *Expressive Law and Economics*, *id.* at 585, 587 (“social norms” as “an *effective consensus obligation*”) with Richard A. Posner, *Social Norms and the Law*, 87 *Am. Econ. Rev.* 365, 365 (1997) (a social norm as “a rule that is neither promulgated by an official source, such as a court or legislature, nor enforced by the threat of legal sanctions, yet is regularly complied with”) and Dan M. Kahan, *Social Meaning and Crime*, 27 *J. Legal Studies* 609, 614 (referring to youths' participation in “nighttime street life” as doing “what others expect them to do”).

## Introduction · 9

them as groups and even as individuals. I take into account the fact that some groups have more power than others, a fact that is undoubtedly reflected in our law.

Sometimes resolving the tension the cases reveal, and sometimes only symbolizing them, the cases become myths, usually small myths but occasionally legal icons. Illustratively, as we shall see in Chapter Nine, when a young child injures another person — child or adult — in the spirit of horseplay, the response of the law may speak pages, if not volumes, about our mores.

This book reflects some culture wars that are internal to scholarship, but more broadly, it offers some answers to the question of why the subject of tort law is so fascinating to people in many walks of life. Why is “tort reform” a conventional phrase in the media and a reality in legislative halls? Why do so many authors — journalists and other commentators as well as law professors — produce a continuing flood of books and articles about tort law? I have analyzed thousands upon thousands of torts cases — well over ten thousand cases in the controversial area of products liability alone. The cases discussed in this book are a small sampling of a great mass of decisions. I have selected them with at least two purposes. These aims, which overlap, are to illustrate the general points I make about the relationship of tort law and culture, and to make my analysis accessible to a wide range of readers.

Naturally, I seek to engage lawyers, both specialists in injury law and nonspecialists who find this branch of the law fascinating either from occasional professional encounters with it or as citizens. I wish also to explain to policymakers some of the driving forces behind this branch of the law. Beyond that, I hope that my analysis will be useful to a range of social scientists and their students, raising for both discussion and research a host of interesting questions about how and why the law fits, or does not fit, with social facts. Finally, I hope that the book will be readable by many citizens who find themselves provoked by the multitude of issues raised by well publicized episodes of personal injury. Nonspecialists in many walks of life share with professionals a constant exposure to those incidents. In every form of media, almost every day, those occurrences are part of our lives, and the way our legal system responds to them is representative of our culture.

I do not offer this analysis as a sociologist or an anthropologist, but rather as a lawyer who tries to present some observations that

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may be interesting for further investigation. On occasion I make assertions about the probable weight of social attitudes that may or may not lend themselves to research designs that can practically be implemented. I include with these observations some hypotheses about the cultural meaning of tort law. Aware that my broad argument cannot account for all the varied phenomena I address, I shall try to indicate where the observable facts fit and where they do not. One set of by-products of this analysis may be ways to predict where the law is going, based on our reading of culture.

I will explain that one principal fault line revealed by tort law arises from the collision of two sets of cultures: what may be called a justice culture and a market culture. Those who adhere to the justice culture focus on the risks of activities and products, the vulnerability of injured persons and the consequences of injuries. Stressing the responsibility of those who generate risks, they are often skeptical of the opportunity for choice of those who sustain injury when risk results in loss. Adherents of the market culture tend to focus on the “pitiless indifference”<sup>11</sup> of a universe in which injurers and victims alike must struggle for existence. They emphasize the benefits of innovation and the need to take risks to achieve innovation. A concentric legal battlefield, perhaps a broader one, features clashes between people who emphasize the rights of victims and those who stress the role of law as a conserving social process, imbued with tradition and stability.

Several issues lie in the background of this inquiry. One of the most important is whether we can, and should, continue to enforce notions of individual responsibility, and of individualized justice, in a multinational world of megacorporations. Tort law is a primary personification of those notions in that world, and of how they are embedded in culture.

Initially, the tort branch of *Jones v. Clinton* epitomizes the proposition that, as one journalistic commentator put it, “no one, not even the President, is above the law.”<sup>12</sup> Then, tort rules provide “the law” on the basis of which the court rejects the plaintiff’s claim; and the district judge’s decision is a relatively direct reflection of mores — not only morals, but our customs concerning which harms fall within the province of law and which ones do not.

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11. The phrase is that of Richard Dawkins, *God’s Utility Function*, 273 *Sci. Am.* No. 5, 80 at 85 (Nov. 1995).

12. Charles Lane, *TRB*, *New Republic*, Feb. 1, 1999, at 6.

## Introduction · 11

Most generally, the way in which a nation responds to the social and individual problems created by injuries provides significant indicators about the texture of its civilization. That response will change with technology and with changes in the social awareness that defines the concept of legal right.

