

THE RIGHT TO CIVIL DEFENSE IN TORTS

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*For
Sophie,
who taught me how to catch the devil.*

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PREFACE

Legal theorizing is a lot like assembling a jigsaw puzzle without knowing its subject. You spread out and scan the puzzle pieces, taking in their general features of size, shape, color, and so forth. Your eye is quickly drawn to an intriguing piece that looks like it might serve as a good foundation for illuminating the larger image. You locate another piece that fits the first, building upon its unique patterns and characteristics. After awhile, you begin to see structures that seem familiar, yet could be construed in a variety of ways. It might be a person, or an animal, or maybe even a natural landscape. Through trial and error, you continue adding contiguous pieces that simultaneously clarify the image and dispel prior interpretations. Still, the picture remains too vague to make any definitive call.

Then comes the magic moment. You configure a few key pieces that suddenly tie everything together. You immediately realize the subject cannot be an animal or a landscape; it is a person, and a very distinctive and famous person at that! You are amazed by the revelation but shocked by just how inaccurate your factually grounded and seemingly reasonable initial impressions could be.

Tort theory is especially prone to this approach. A quick survey of torts' puzzle pieces reveals a few obvious features. On a general level, torts consists of two parts: tort *law*, a body of substantive rules, principles, and policies; and the tort *system*, a structure and process for resolving tort disputes. While some of these concepts regulate ongoing tortious *encounters* (as is true of the privilege of self-defense), others apply solely to post-injury tort *claims* (as does the requirement of damages). Together, these features create *conditional rights and duties*—like the right to sue and the duty to compensate for negligence—when certain substantive, procedural, or evidentiary prerequisites are satisfied. Of course, these powers and liabilities are not randomly assigned. Instead, they are consistently distributed among the three main participants in a tort case—the *plaintiff*, the *defendant*, and the *government* that hosts the proceedings.

Although torts has spawned many explanatory theories, none of the leading contenders can account for all these critical pieces. In fact, most accounts do not even try. For decades now, tort theory has been stuck in the middle stages of the puzzle assembly process—relying on a scattered array of powerful insights to generate a plethora of imaginative interpretations but still awaiting its decisive break-through moment. The cause of this simultaneous stagnation is the same inherent deficiency. All of these approaches single out certain pieces of the puzzle as fully representative of the whole. Though they strongly disagree about which piece is most emblematic, they uniformly dismiss everything else as unimportant or irrelevant.

First came the pragmatists who explained tort law as merely a governmental tool for promoting social goals of compensation and deterrence, but who largely ignored the litigation structures, procedural processes, and private rights and duties that intrinsically inhibited the realization of those ambitions. The legal economists followed close behind. Pragmatists by trade, they used the same blinkered approach to serve the even narrower objective of efficiently reducing the costs of accidents. These theories soon were countered by the deontologists, who saw the tort system as a form of corrective justice. While the deontologists addressed torts' trilateral structure and some of its moralistic rights and duties, they failed to acknowledge its no-fault concepts, non-corrective remedies, and massive state influence.

Eventually, other theorists challenged the notion that a subject as complex as torts could be captured by any isolated puzzle piece, no matter how telling that piece may seem. These pluralists asserted instead that the law consists of a copious array of disjointed and irreconcilable components strategically maneuvered into an awkward yet workable arrangement and disassembled and rearranged whenever social circumstances so required. But this approach also was not problem-free. Rather than placing too much faith in individual pieces, it agnostically rejected the very existence of the puzzle. Under this view, the only reliable theory of torts was that no unified theory was possible.

Yet just such a theory would soon emerge. Recognizing the holes in its predecessors, civil recourse theory purported to harmonize all of torts' presumably disparate puzzle pieces. In this account, torts is both a system of private redress and a complement of substantive rights and duties triggered by the existence of wrongs. While it creates tort claims and empowers tort claimants, it also regulates and restricts the state, which is constitutionally required to offer such a forum. By interlocking the pieces of tort law and process, this more robust theory certainly improved upon past efforts. But its "right to recourse" got one thing terribly wrong. It offered no reasonable defense. Though plain-

tiffs' puzzle pieces were featured front and center, defendants' role in the big picture was hidden, neglected, or entirely overlooked.

The goals of this book are to reveal these missing pieces and assess their theoretical ramifications. Drawing upon history, tort doctrine, and constitutional analysis, it shows that torts actually arose to forestall aggressive personal vengeance and arbitrary state coercion. The resulting right to civil defense is not just a political corollary to the guarantee of civil recourse. Instead, it is the long-awaited centerpiece to the torts puzzle. Indeed, its discovery is *the* magic moment of tort theory. Civil defense dramatically exposes the pro-litigation bias currently skewing the existing approaches. With eyes wide open, we suddenly realize that torts' diverse objectives all depend on the same offensive posture. Compensation occurs only when plaintiffs win liability judgments. Efficient deterrence results only when courts burden defendants with duties, injunctions, or financial sanctions. Supposed injustices disappear only when victims get redress for their wrongs. And civil recourse takes place only when aggrieved parties assert their rights to sue. Since each goal is slanted, pluralizing them only magnifies the preference.

Once torts' defensive side is acknowledged, no partial explanation can ever suffice. Defendants' private rights will always temper the judiciary's public policies. Fundamental due process will always thwart economic efficiency. Political prerogatives will always curb corrective justice. Pleading and proof burdens will always impede civil recourse. And while the multiplicity of stakeholders necessitates plural perspectives, the precariousness of the accused's interest will always warrant special concern. So what the pragmatists began as a single-minded crusade inevitably must end as a hotly contested conflict. From now on, all self-proclaimed puzzle masters will need to account for the coordinated competition, systemic symmetry, and inexorable equilibrium which permeates the majestic mosaic of torts.

Before beginning my own rendition of these elements, however, I must acknowledge those who have helped me attempt to solve this enigmatic puzzle. Many of the core ideas for the book were first posted and debated on Tort-Prof Blog. Thus, I must thank the blog editors, Chris Robinette and Sheila Scheurman, for facilitating the dialogue and commend the participants, John Goldberg and Ben Zipursky, for engaging in the provocative and productive exchange. In addition, I benefited over the years from the hard work, dedication, and talent of various research assistants, including Jahmy Graham, Adam Houtz, Deborah Kahn, Ron Miranda, and Sherin Parikh. Because puzzle-solving takes time, and time is money, I cannot forget the financial assistance of Southwestern Law School, which helped fund my work with several sum-

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On the home front, my wife, Marcy Calnan, continues to inspire and support everything I do, and this project was no exception. My words here cannot adequately express the depth of my gratitude for her contributions. Finally, every puzzle requires a little crazy intensity, joyous exuberance, and unbounded energy. Sophie, our loyal Italian Mastiff (yes, Mastiff!), gave me this gift before she left. It remains the gift that keeps on giving.

Of course, every puzzle player has her own style, so mine deserves brief explanation. Generally speaking, I shall use feminine pronouns for generic references to people. However, this tactic seemed awkward and out of place in historical discussions where virtually all of the actors were male. Thus, in this exceptional context, I will employ the more factually accurate male voice.

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June 12, 2013