

INTERVIEWER 1: Welcome, everyone what a pleasure to see you all here and to need more chairs going to talk about torts. I would like our guests to that every one of these students is here utterly voluntarily, and that they always wear this much UVA Law gear, and it has nothing to do with spirit week.

I am delighted to welcome you all today. I want to thank Leslie Kendrick and Rebecca Klaff for organizing this event and for everyone who helped make it happen. And I also really want to thank our panelists Michael Green, John Goldberg, and Kathy Sharkey for joining us today. What an all-star cast we have to talk about this book. We are very fortunate.

What a pleasure to celebrate *Tort Law and the Construction of Change* co written by two of the intellectual anchors of UVA Law's faculty, Ken Abraham and Ted White. When we have--

[APPLAUSE]

This is going to be good. When we host events like this one, I often remark that writing scholarship can be lonely, and so it's especially nice to be able to celebrate the person who has toiled for long time by themselves with a communal event. Obviously, in this case, it wasn't quite as lonely, because Ken and Ted had each other. And so this is a wonderful way to celebrate our whole intellectual community and also this very special collaboration.

So I am just going to say a few words, and then I will turn things over to our panel. So first, I'll introduce Ted and Ken briefly. Ted White is a David and Mary Harrison distinguished professor of law here at UVA.

He is an acclaimed legal historian. He has written 20 books in addition to more than 100 scholarly articles and other pieces. He has taken on topics as singular as the histories of baseball and soccer in the United States, as well as sweeping books like his definitive three volume survey *Law in American History*.

Ted is a fellow of the American Academy of Arts and Sciences, the Center for Advanced Study in the Behavioral Sciences, and the Society of American Historians, as well as a member of the American Law Institute. He is a recipient of a Guggenheim Fellowship to National Endowment for the Humanities Senior Fellowships, and too many honors and awards to name.

Ken Abraham is also a Harrison distinguished professor of law here at the Law School. He is one of the nation's leading scholars in tort law and insurance law. A prolific scholar, Ken has also written around 100 law review articles, book chapters, and other essays, as well as his previous six books which are landmarks in their fields. His insurance law casebook is in its seventh edition, his torts treatise is in its sixth edition.

Ken is a fellow of the American Academy of Arts and Sciences as well and an honorary fellow of the American College of Coverage Council. He has received many awards, including the all University of Virginia Outstanding Teaching Award, the American Bar Association's Robert B. McKay Law Professor Award, and recognition from the State Council of Higher Education's Robert B MacKay-- sorry. I take that back Higher Education Award for Outstanding Achievement in Teaching, Research, and Public Service.

As I said, Ken and Ted have been anchors of this faculty for a long time, maybe longer than you realize. They have been on this faculty for a combined total of nearly 90 years, both of them spending most of their professional lives here. It has been wonderful to watch their collaboration. Over the past 10 years or so, they have both taught torts to generations of UVA Law students among other things. They have, both written about the history of tort law separately and now together. And I count several, I think, seven, I don't if I'm right about that, co-written article since 2013 on different aspects of the history of tort law.

This remarkable book builds on those articles and transforms them. It is a really insightful and important book that studies the interaction of law and social change in American history. It has been called, timely, lucid, and compelling. And what it tries to do is identify the intellectual and conceptual mechanisms for constructing change in tort law. And in particular, how courts have maintained continuity even as they were constructing that change.

The combination of historical, conceptual, and doctrinal that has been a hallmark of both their work throughout their careers is now beautifully brought to us together in this book. So I am thrilled to be able to honor Ken and Ted this book in their are many years of incredible writing and teaching that preceded it.

Before I turn things over to Leslie Kendrick, who is serving as today's moderator, and I'll briefly introduce her. Leslie is the Burkett white-- the White Burkett Miller professor of law and public affairs here at UVA. She is also the director of our Center for the First Amendment and our former vice dean.

She's a 2006 graduate of this law school. She also holds a DPhil from Oxford where she studied as a Rhodes scholar, and a BA in classics from the University of North Carolina at Chapel Hill, where she was a Morehead scholar. Leslie joined the UVA Law faculty in 2008 after clerkships for Judge J. Harvie Wilkinson III of the US Court of Appeals for the Fourth Circuit and Supreme Court Justice David Souter.

Leslie scholarship focuses on freedom of speech, torts, and property law. She is the author of numerous scholarly articles and book chapters, as well as co-author of the fifth edition of leading casebook, tort law, responsibilities, and redress. There's so much more I could say about Leslie, about Ted, about Ken, about this book, and about our terrific panelists, but I know when to stop. So I also that I will very much enjoy hearing from every member of this panel, and I trust you will as well. Leslie, over to you.

**LESLIE
KENDRICK:**

It's delightful to see such great turnout here, and thank you all for being here. It's a privilege and a pleasure to be able to moderate this panel today, featuring three distinguished guests, and focusing on the book of two distinguished colleagues. Our format for today is that our guests will each offer remarks on the book in turn, and after that, we will turn to Professor Abraham and Professor White for responses and for some discussion among the panel. And finally, we'll open the floors for-- the floor for questions and will conclude at 5:15.

But here at the outset, I'd like to say thank you to Rebecca Klaff and to the communications team and the IT team and everyone else here at the law school who made this event happen, thank you very much for all of your work. And I'd like to say a quick word about our two honorees before then introducing our distinguished guests.

So Ted, I never got to take a class from you in law school, but I knew you as a superstar historian. Your reputation preceded, you and you've been a superstar colleague for 15 years. Between your work on torts and freedom of speech, your scholarship has informed all of the work I do, and I'm filled with admiration and gratitude to you.

Ken, I did take a class with you in law school. That turned out to be a life-changing event, a seminar on tort theory co taught by Ken Abraham and Vince Blasi. And you've been my mentor ever since. You got me started in the field of torts, and between your wisdom, your virtuosity, and your generosity, I owe you a greater debt than I can possibly express. So thank you, both, for being here.

[APPLAUSE]

I now get to introduce our phenomenal all-star lineup of guests, and I'm going to introduce them in the order in which they're going to be speaking. Michael Green is the Mel and Pam Brown visiting professor of law at Washington University School of Law in Saint Louis. Professor Green is an expert in torts who has received the ABA's Robert B. McKay Award, the American Association of Law School's William L. Prosser Award, and the John G. Fleming Memorial Prize all for his contributions to the field of torts.

Professor Green served as co reporter for the restatement third of torts liability for physical and emotional harm, and for apportionment of liability. He's now a co reporter on the concluding chapter of the *Third Restatement of Torts*.

Professor Green is a member of the European Group on Tort Law, which prepared and published principles of European Tort Law in 2005. He's a founding member of the World Tort Law Society and past chair of the American Association of Law Schools section on Torts and Compensation Systems. He's a co-author of a leading torts casebook and of two advanced torts casebooks.

I'm going to go ahead and introduce all three of our panelists here at the outset. So John Goldberg is carter professor of general jurisprudence at Harvard Law School. Professor Goldberg is an expert in tort law, tort theory, and political philosophy. Along with Benjamin Zipursky, he's co-author of the *Oxford Introduction to Torts*, and a recent book on tort theory recognizing wrongs from Harvard University Press.

Professor Goldberg currently serves as associate reporter for the American Law Institute's fourth restatement on property, as well as an advisor to the third restatement of torts. He's a member of the editorial boards of the *Journal of Tort Law and Legal Theory* and is past chair of the tort and compensation systems section of the ALS.

After receiving his JD from NYU, professor Goldberg clerked for Judge Jack Weinstein on the Eastern District of New York and for Justice Byron White of the Supreme Court. He's also the co-author of a leading torts casebook, on which I am fortunate to be one of his co-authors.

Catherine Sharkey is the single family professor of regulatory law and policy at NYU School of Law. She's one of the nation's leading authorities on tort law, business torts, product liability, administrative law, remedies, and class actions. Professor Sharkey is an appointed public member of the Administrative Conference of the United States, and the principal advisor on administering by algorithm artificial intelligence in the regulatory state, a project for the Office of the Chairman.

She's an advisor to the American Law Institute's restatement of tort liability for economic harm and the remedies projects. She was a 2011-2012 Guggenheim fellow and has served as the chair of the tort and compensation system section for the ALS. She's co-author of the book *Foundations of Tort Law* and of a leading torts casebook.

Professor Sharkey studied economics at Oxford as a Rhodes scholar. And after receiving her JD from Yale Law School, served as a law clerk for Judge Guido Calabrese on the Second Circuit and Justice David Souter on the Supreme Court.

Now, part of the reason that I decided to introduce all of them at the beginning of this distinguished panel rather than each in turn is I wanted to point out a few similarities in them. All of them are past chairs of the American Association of Law Schools section on Tort and Compensation Systems, which is where I met John and Kathy for the first time.

All of them are members of the American Law Institute and are active on tort-related projects there, and all are co-authors of leading tort casebooks. You may recognize their names from Epstein and Sharkey, Franklin, Rabin, and Green, or Goldberg, Kendricks, Seaborg and Zipursky, and I think, if I'm not mistaken, that every single student in this room is learning torts from one of the people on this panel, and indeed that every law student at UVA Law is learning torts from one of the people on this panel.

So I'm thrilled and honored to see everyone here, students and casebook authors getting to meet each other, and for all of us to be here to celebrate Ken and Ted's book. So, Professor Green.

[APPLAUSE]

MICHAEL Are you going-- would you remind me of 15, I think you want me to finish.

GREEN:

LESLIE I'll pass a note down this way.

KENDRICK:

MICHAEL So thank you, Leslie. That's an invitation that only my mother would appreciate. And I'd like to say thank you to
GREEN: Leslie and to Rebecca for about as well organized and planned symposium as I've ever attended. This has just been-- couldn't have asked for better administration.

I should tell you a little bit about how I got here. I don't remember when we had this conversation, but Leslie called me and she said, Mike, we're going to have this celebration of Ted and Ken's book, and I've got two really good people who are coming, John and Kathy, who I obviously knew. And she said, I'm looking for, this is a late afternoon, students are tired, I need a scintillating, entertaining, really smart torts person who can step into history as well.

And I sat back for a minute on the phone and I thought, should I tell the truth? And I decided to. I said, oh, Leslie, I think there's at least two or three other people that can better serve what your needs are. She didn't miss a beat. She said, Mike, two or three? There's a dozen. But every one of them has turned me down.

So with my humility reinforced, something that law faculty are not very well known for, I come here to talk about this book. I'm really grateful to Ken and to Ted for writing this book, and their look at tort law from outside tort law's skin. They step outside of it and look at it structurally.

I've never operated outside that skin. I've spent my career inside of tort law, looking at doctrinal stuff and causation and coherency, but I've never taken the step out that you guys had me do. And I'm grateful for that opportunity. You shoved my face in the lack of structural coherence to a subject that I've been doing since the early 1980s.

I'm also grateful that by focusing on structure, I think you've sidestepped the need for John and Kathy and I to put on boxing gloves and to argue about the theory that explains tort law. I don't think we're going to need to get into that. I'm going to proceed and just talk about comments about each of the chapters in order.

As I read the introduction to your book, I thought it immediately got me to come to *The Form and Function of Tort Law*, where you explain the subjects that I'm trying to teach to my students. And it struck me that you should really import, into the seventh edition of *Form and Function* when you write that, some of what you talk about precedent and how tort law-- how law changes, because that's something my student-- I try and teach to my students. And you seem to explain to my students, better than I do, what I want them to learn.

One thing that struck me in the introductory chapter, and actually throughout, the role of the jury in influencing the shape of tort law. More precisely, the role of judicial attitudes about juries and the way in which those attitudes affect what substantive tort law is. New York Times versus Sullivan, which Ted and can address in, I think it was chapter 4, fairly reeks, when you read the opinion of the concern by a court about a Southern jury making determinations about a liberal Northeastern newspaper and what it said about the controversy, that didn't say much about the controversy there.

Another example, I think, is in strict products liability. We toyed for a while with the idea that we should judge design defects with a consumer expectations test. And that was actually what was in Section 402(a), the famous strict products liability section that was in the second restatement of torts. And courts have largely put that aside. They've gone on.

And I think the reason they've done that is because consumer expectations, particularly with regard to how safe products should be, was too open ended, and it gave juries too much discretion, and it was discomfort with that that led to us moving toward a risk benefit test. And yet if you go to Europe, which adopted much of what was in section 402(a) including consumer expectations, consumer expectations remains the rule for judging product defects. My explanation is because in Europe, there's no civil jury, and it is judges, with whom we have more comfort, making those kinds of determinations. Those are examples of where I think juries have affected the scope and substance of tort law.

In chapter 1, I learned something I really didn't know, and that was the reformation of who was qualified to testify as an expert. It struck me as I was reading-- as a witness, not as an expert. It struck me in reading that chapter that we actually have a large slug of cases, tort cases today, in which the injured party doesn't testify. And that's wrongful death cases.

In wrongful death cases, the injured party is dead and doesn't testify, at least on Earth. And it struck me, I wonder, if what you describe about the cases that ended up being brought, or more importantly, not being brought has any currency in today's wrongful death cases. They have always struck me as simply tort cases. But maybe because of what you identify, there may be differences. Now, we've got different world today. We have technology, and that may make up for not having injured party testimony. But I'd be interested in your thoughts about that.

I found your statement about the state of tort law after Francis Bohlen. Francis Bohlen was the reporter for the ALI when it first did a restatement of torts. So there have been three statements of torts. Francis Bohlen was responsible for the first one, mostly responsible for the first one, William Prosser was mostly responsible for the second one. And it is a cast of characters responsible for the third one. There are about, I don't know. How many are there, John? 10, 12? Too many. There's a lot of people involved in third restatement. But Bohlen took this on, and it was an unruly beast when he took it on.

And you say what it started out as a new conceptual scheme which Bohlen tried to impose on this unruly beast that it just emerged in well, 30 or 40 years as he tried to provide an organization that was more modern than that developed by previous scholars, but it was not much more coherent or cohesive. He's gotten a lot of credit for trying to tame this unruly beast.

Ted and Ken explain why he really didn't get quite as far as we might have hoped that he would. But I think they probably say, well, yes, but that was the nature of the beast. And that made me wonder about other subjects. Are there other subjects that have the structural coherency that you well identify as being missing from torts? Or are other subjects similarly a structural mess?

And one area that I know fairly well, because I used to teach it as civil procedure, and it strikes me that civil procedure is really not this coherent thing. I mean, it's a agglomeration of a lot of different aspects from jurisdiction to discovery to judgments as a matter of law that really doesn't hang together. In a trust, just to ruminate, I think antitrust does have that coherency, because it is largely right about consumer welfare, and that structures it, that holds it together, although sometimes we're worried about whether just being too big is a problem that we need to be concerned about.

The question of structural principle takes me back to when the American Law Institute, and now I'm talking about chapter 2, which is really that's the chapter that I was most grabbed by, because it has to do with work that I have done over my career and continue to do.

And it made me think back to a meeting in the early '90s. Ken, were you at that meeting? The one post products liability, where the ALI was trying to figure out what to do next? The question then was after the Institute decided to do a project on product liability. That would be the first piece of what is the third restatement of torts.

Somebody suggested that the next project should be one of general principles, general tort principles. I was skeptical, at the time, as I imagine you would have been, Ken and Ted, had you been there, that you would have been as well, because tort law isn't really made up of general principles. It's made up of bricks. It's made up of things like *res ipsa loquitur* and the emergency doctrine. And general principles just didn't make sense.

Despite that, the next project was named General Principles. And it went on for a while. And guess what happened? It got renamed. It became liability for physical and emotional harm. And in the process, dealt with those bricks that make up a maybe not want to live in edifice that we call tort law.

I don't want to leave the topic though without acknowledging that there are two, maybe three central principles in tort law. I don't that they're general principles, but there's three central principles to tort law. Tort law is about recovering for harm. And any tort that has harm to it, and almost all of them do, we need a concept of factual cause. Can't do it without an idea about what constitutes factual cause.

Similarly, I think, unless we're prepared to hold Eve responsible for all the evils of today, we need to have a limitation, called scope of liability or proximate cause, on how far a tort features liability can go. And I want to suggest those are common to every tort. I'll go out on a limb here and say, every tort we need to use scope of liability and factual costs.

And we also need, if we're going to provide compensation for harm, we need to identify legally-cognizable harm. What Leslie said to me in that phone conversation is not harm that I could sue her for. Law would not recognize that pride that got hit when Leslie said that to me.

That's a nice segue into the third point that I want to make, which is to take issue. I'm going to take issue with you two honorees. And you said in chapter 3 that third restatement is a collection of independent modules, because that is much of what tort law is. They are atomistic and can proceed separately and independently. Well, no. Product liability proceeded, but what it didn't have was what was going to come later with factual cause and scope of liability had to go back to the second restatement and incorporate that into it.

The lines between substantive projects and remedies, for example, is does wrongful birth and pregnancy belong in remedies or does it belong in liability for physical and emotional harm, or concluding provisions? Medical malpractice is about to become its own project. It is now confronting how to get cause, in fact, and scope of liability into it.

And as we were walking here, John Goldberg, who is doing restating property torts, and I were talking about where a subject that I had thought he was going to do is now-- may now be up for grabs as to where it's going to fit. So the projects are not nearly as atomistic as-- they're not that atomistic. There's quite a lot of overlap, and one of the things that the reporters of current projects are doing is consulting with each other about where different things will get covered.

On chapter 3, I suspect the timing was such that you guys could not incorporate Steve Sugarman's article on the dignitary torts. Steve makes a fairly heroic case that a wide swath of dignitary torts from assault to offensive battery to privacy and defamation. I'm getting my timing down. Thank you, Leslie. That those actually have a great deal more in common with each other. And that indeed, and this is what's interesting, is that they're separate development they developed at different times obscured the commonality that they have. He makes a great case. I don't know if he persuaded me. I'd be interested when we have comments about your view about that.

In chapter 4, I hope we'll have time in talking about intangible claims that may arise, is Dov Fox's work on reproductive freedom. And the idea that reproductive freedom is an interest. And harms to it are ones that the law should recognize interfering with reproductive freedom. This would include losing an embryo, which right now is treated as property, although maybe in some states it's a living person, that losing an embryo would be an offense to this interest in reproductive freedom.

Genetics counseling that is inaccurate or incorrect about sterilization procedure. These would all be common in interfering with this freedom of reproductive rights that Dov has been writing about for a while. Your whether this will be one of the new intangible torts is what I'm thinking would be an interesting thing to talk about.

And another subject, if I can, why do certain tort claims die off? We've seen a number of tort claims in the last 50 years, alienation of affections, criminal conversation, a strict liability for product warnings and design defects that have gone by the boards. I think a torts medical examiner would find different causes of death in all those cases, but it's interesting to think about why we lose case-- why we lose cases.

I do think, and I want to suggest that you guys say in the book that there hasn't been a new tort recognized in the last 50 years. And as somebody who has been charged with restating new torts, I think we have had new ones. We have medical monitoring, for example, we have spoliation of evidence, we have the wrongful birth and wrongful life, at least we recognize those as new torts. We have had torts born in the last 50 years that are around today.

I want to end up by talking about prima facie tort, which takes a lot of chapter 5. The intentional torts restatement has a section on purposefully harming another in their bodily integrity. I want to suggest that really is the prima facie tort when it comes to personal injury.

The big place where prima facie tort has played a role is with regard to economic harm. And Ward didn't dismiss it in intentional and economic harm, he basically ignored it, which means that prima facie tort causing economic harm falls to the project that I'm currently working on concluding provisions.

And I hope we will have a chance again during discussion to talk about what it makes sense for the third restatement to do with regard to that prima facie tort. Should the ALI disavow it? Should the ALI bring it forward in the way that it is in the second restatement? Or should we say, well, we're doing neither of those, but we're recognizing that some courts in some unusual circumstances may want to use it and leave it at that. I'd love to hear a discussion of that.

Thank you, Ted, and thank you Ken for taking me outside tort law skin and making me think about a subject I had done very little thinking about in the past.

[APPLAUSE]

**JOHN
GOLDBERG:**

Great. Thank you. Thanks to Dean Goluboff, to Rebecca Klaff, to all of you for coming out and listening and, I hope, asking questions if there's time. And especially, thanks, to Leslie Kendrick for organizing us and putting this great panel together. And, of course, congratulations to our honorees.

I'm particularly honored to be here on this occasion for personal reasons. I've mentioned this in other contexts, but I want to mention it here. I've now been a law professor for far too long, but there was a time when I wasn't a law professor. And when I first got going, it's rough sledding in some ways.

I'm not complaining. Life is good, but it's hard finding a job, and it's hard getting your feet under you as a scholar. And anyone who starts in this business, needs mentors and people who will help them and guide them and move them forward in good directions. And I want to say, publicly, that both Ken and Ted played that role for me, even though I was not their colleague, and went out of their way to help me and help my scholarship, and I owe them a great debt of gratitude. And I hope to carry forward what they did for me to other people, so thank you both.

[APPLAUSE]

So now let's talk about the book. And you might have thought, well, at this point, the love fest is over, and the knives are coming out. Well, that just means you haven't read the book, or at least not closely. Why is that? Well, if you read the book, you would know I am actually compelled to say that this is a great book.

Why am I compelled? Well, if you go to page ix, 9, right? ix, there's a claim there that I am responsible for this book existing, so I have to like it. They thank me for that. I'm not sure I deserve those things, but thank you. And then if you go all the way to the end of the book and flip it over and look at the back, I've written a very nice blurb on the back of the book. So I'm pretty much stuck here. I can only say nice things. And I'm more than happy too because it turns out the nice things, in this case, are true.

This is a wonderful book. I encourage you to read it. It is meticulously researched, it is historically rich, it is doctrinally lucid, and it is sociologically wise. Anyone who reads it will just learn a lot. And among the things you'll learn at a most general level is an important set of lessons as I think Mike's comments alluded to about historical contingency and the fact that much of what we teach and learn in our torts classes and take for granted didn't have to be this way, and, in fact, wasn't this way for a long time and could easily tomorrow be different. That's a really important lesson for lawyers. History looms especially large in our profession. And those who do not understand the history of the law are doomed to not understand the law.

At the same time, the book manages somehow to convey that amidst all the contingencies and historical change, there has been extraordinary continuity. And there really has. Let's put it this way. If you saw the worst Bill and Ted's excellent adventure movie ever in which they travel back to 15th century England to talk to a bunch of common lawyers, it would turn out that they'd actually have a lot to talk about.

If you talked about battery or false imprisonment or trespass to land to a bunch of lawyers from English lawyers from the 15th century, they'd what you're talking about. And it's astonishing given how little of our world they would understand that they would understand that. So there is this extraordinary combination of contingency on the one hand and continuity on the other, and their book just captures beautifully how law is both of those things at the same time.

In my remaining few minutes, I'm going to focus on what I take to be two of the main or larger claims of the book and try to explain them a bit, and then maybe ask a couple of questions about them. So the first of these two larger claims goes something like this. And again, Mike alluded to it. Tort law is a mess, and it is destined to be a mess, at least as long as it is primarily judge made law.

So what does that mean? Well, for you students, good news and bad news. The bad news is the book isn't going to clear things up, because the whole point is, it's a mess. The good news is, you're in great company. If you think tort law is a mess, so these two Titans think so as well, so feel better about yourselves.

Now, the claim that tort law is a big mess comes across in several chapters that discuss failed attempts to impose order on the field. Most on point is chapter 2, which describes the ongoing struggle of scholars to, quote unquote, conceptualize tort law. The same idea is lurking in chapter 3, is discussion of the failure to of the idea of dignitary torts to take hold as a kind of distinct class of torts.

So in what sense exactly is tort law a mess? And here I think we need to do some unpacking. The core idea, I think, is that no one has ever identified a master organizing concept for the field. And to answer Mike's question that he asked a moment ago, this is in contrast to other fields of law. So on page 75 of the book, in passing at least, Ken and Ted mentioned other fields that, from their perspective, seem to be less messy, less of a mess. And they mentioned both property and contract.

So let's talk about contract, which maybe something about. In contract, they say there's an organizing concept. The organizing concept is roughly promises. Contract law enforces a subset of the promises that we make each other. So contract is a law of promising. There is no equivalent statement you can make about tort. Tort law is a law of blanking and can't come up with it.

Now, Ken and Ted, sometimes, flirt with the idea that tort law was destined to be a mess because it's based on the old English writ system. And I won't bore you with the old English writ system, but I think they can't maintain this position. Why not? Well, because of course contract law and property law also come out of the writ system, and according to Ken and Ted, they are not a mess or is not as much of a mess.

Indeed, I would suggest that contract law, are you ready for this, came out of tort law. Breach of contract is a tort, or at least it was understood as a tort a while back and it hived off and became its own special tort. The special tort of, if you want, breaching a promise so as to injure another. So take that contract, professors.

So I don't think it's the history here that dooms tort law to messiness. I think it's something else. And I think they say it in the book. What dooms tort law to messiness is something like this. There's just a zillion ways to mistreat each other. Humans are geniuses when it comes to figuring out ways of wrongfully injuring each other. Nobody can come up with a complete list of that, because it's one of our uncanny abilities as human beings to find new and exciting ways to mistreat each other.

And if you're going to be a field of law, that's all about people mistreating other people. You're never going to be able to come up with a final catalog or a general description of that. I think that's their basic claim. And I think it's quite plausible, and there's a lot with which I agree there.

I would suggest that the word mess perhaps carries too much of a negative connotation. Why do I say that? Well, for a couple of reasons. First, I'm pretty sure, and I think Mike alluded to this, that if we spend some time with contract property, et cetera, we'd find equivalent messes. Last time I looked at contracts, which admittedly was before the invention of the telephone, there was some fight going on between promises and detrimental reliance and stuff like that in which was more basic and fundamental to the field. So that's just a taste of why I'm not convinced that tort is doing so much worse on the score of coherence than these other fields.

And I'll go even further. And now sadly, Mike, we are getting into tort theory. I apologize. Tort law actually can be organized, and indeed is organized, around an idea or a set of ideas. It's just those ideas are relatively abstract or general. The idea is roughly, and I'm on record saying this so no one who knows me will be surprised to hear this, tort law is all about wrongfully inflicted injuries that the law recognizes as such and gives victims of wrongs the opportunity to use the courts to obtain redress from the wrongdoer.

Now, that's a mouthful, I grant, and it's very vague, I grant, but it's not empty. It's not meaningless, and it does organize the field. So what do I mean by that? How does it organize the field? Well, torts are wrongs. That's what the word means, look it up. A tort is a wrong. That matters. What does it matter-- why does it matter? Well there's lots of liability in the world that has nothing to do with wrongs.

So when you pay your taxes as, of course, all you all should, you're not being made to pay because you've done something wrong, you're being made to pay because there's a rule out there which says you as a earning who earn a future you, who's earning income, are required to pay taxes. You didn't do anything wrong by earning money. I mean, yes, we can get into theories of distributive justice, but let's not. Nothing wrong there. You just have to pay.

So torts are wrongs. And they're civil wrongs. They're not criminal wrongs. You don't go to jail when you commit a tort. Oh, and they're injurious wrongs. No torts without injuries or harms. There's no attempted torts, as we're reminded by this book. You can't get in trouble for trying to hurt someone in tort law, you can only get in trouble for actually hurting someone.

All of these things are important substantive things to say about tort law, and all of them help organize the field at a certain level of generality. Tort law is not contract law, it's not criminal law, it's not tax law, it's not all these other things.

Finally, in their eagerness to deem tort law a mess, Ken and Ted sometimes, not always, sometimes partake of what I will call, with all due respect to them and to others, a kind of pathology that afflicts many torts professors. And the pathology is they seem really proud of tort law being a huge mess. It's almost like a badge of honor. We teach and write in the field that makes no sense.

Now, this might seem puzzling way for scholars to approach their chosen subject, but I think torts professors do this for a reason. And for some good reasons actually. One reasons is they like to emphasize rightly that tort law is, if you will, bottom up rather than top-down law. It comes up from individual cases, judges deciding individual disputes trying to figure out whether this behavior under this circumstance was wrong, and that's not grand theory.

We have some good friends north of the border in Toronto who will tell you that if you just read Immanuel Kant work closely enough, you will be able to extract tort law from it. I kid you not. Not my view, not the view of any people on this panel. Tort law is the opposite. Tort law is judges deciding individual cases all true. And cases are very fact intensive as you're surely learning. Change the facts just a little bit, and what goes from being not a tort becomes a tort. So all true.

None of this, I would suggest, true stuff establishes that tort law is a mess. Is a there there. It's just not-- those who love to emphasize its messiness, I think, have an overblown notion of what it means for there to be there there.

One so question, and then I'll move on to the last topic and then I'll be done, a question for our esteemed authors. What would tort law look like if it were not a mess? Imagine a legislative overhaul of the common law of tort. What would that look like? Would we be looking at an equivalent to the general part of the Model Penal Code where they've got act and mens rea and consequence, and it's all laid out nicely and analytically, and gives you the elements of each crime.

But even the Model Penal Code then goes on to list each of the crimes, the major crimes, murder, arson, well, gee, that sounds a lot like tort. Nobody thinks criminal law is a mess. Everyone thinks it's evil, but nobody thinks it's a mess. Why is tort law a mess? Or what would the non-messy version of tort law look like?

Now, that's all on the first claim that tort law is a mess. Second claim that the book makes, which, I think, is really interesting, and it goes something like this. Human history is a record of change. But in law, or at least judge-made law, changes filtered or funneled through prevailing legal categories. This means that the influence of all these changes that are constantly going on around us, technology, morals, other dimensions of human existence, always have to be refracted through the lens of tort law.

And more specifically, what that means is that typically, if courts are going to recognize a new claim or a claim that doesn't look quite like any other claim, they're typically going to have to stuff it into an existing tort. So a plaintiff comes along and says, I've been injured in this new way. That doesn't quite fit anything that's on the books. It's going to be the plaintiff's lawyers job to say, oh, no. It's really what battery. It's just another version of battery or negligence, or whatever.

Occasionally, if you're lucky, as a claimant, you can come in and convince a court to recognize an entirely new tort, intentional infliction of emotional distress or invasion of privacy in the 20th century, but that's hard to do. And Ken and Ted, I think, explain why courts in the common law tradition are nervous about that level of innovation. Often they'll say things like if you want a new tort, go to the legislature. Not saying they should say that, but they often do say that.

And I think it's also because when courts, if they're going to recognize a new tort, what they're looking for is that it's really a, get ready for it, a tort. Well, that presupposes we have some notion of what a tort is. So when courts say, you know what? We should have a new tort called IIED, intentional infliction of emotional distress, it looks like battery and it looks like defamation and it looks like assault, but it's none of those exactly, but it's close enough, because there's wrongful conduct causing injury to a victim, and this seems like a plausible candidate for the victim to be able to obtain redress from the wrongdoer, so we're going to create a new tort called intentional infliction of emotional distress.

That wasn't legislative, that wasn't out of whole cloth, that was teasing out a new tort from the old tort. And that's because why? Because we have a conception of tort of what a tort is. So I think they're actually less convinced. The second part of their book, if you will, pushes against the first part. I don't think they think tort is as much of a mess as they say. I think they're on the non-mess team with me, which is where one should be.

But regardless of whether I'm right about that, I want to say that this is just a fantastic book. And you really should read it. You'll learn tons from it. It'll help you think and give you a perspective on what you're learning in class, so congratulations, Ted and Ken.

[APPLAUSE]

**CATHERINE
SHARKEY:**

Great. It's fantastic to be here as part of this celebration. I have three points I want to make. The first is going to be some praise. There's a lot that's praiseworthy in the book. The second is going to be a quibble and the third is going to be a thought about the future.

So first, for the praise. I'm going to be very specific. I've been teaching torts for a long time. I actually was this idiosyncratic law student who went to law school for torts. Imagine that. That's like I might be in an n of 1. It's very rare. I read a lot of tort articles. I read a lot of good tort books, but it's very rare. That someone has put forward an image or a metaphor that's so sticks and that I find deploying when I'm teaching torts, I find in conversation, including at dinner, it's an idiosyncratic family too where we talk about lots of tort-related concepts and how they relate to life.

So if you have-- I don't want to ruin the surprise, but the praise is going to be for this notion of cloaking that they introduce. And cloaking is their metaphor, for what John described as their thesis, about the idea of how courts try to merge continuity and change. And specifically, they describe cloaking as this legal convention about how to construct, explain, and justify change. And more specifically, they give some examples about how the availability of precedent gives this tool for this deployment of cloaking.

And so just first, a personal note. I recognize I can be-- I can get excited about things in tort, including new metaphors. And at the time I happened to be reading this book, it was my vacation book, yes, I've already shared a lot about my life, but I read this on one of the greatest vacations of my life, actually this past summer.

And while I was reading about cloaking, and this is a true story, I was in Etretat in France, and we were visiting-- I was in the garden of this home. We were visiting the home of Maurice LeBlanc, who is the creator of the *Gentleman Thief Detective Arsene Lupin*. Some of you, maybe-- this is where I get to seem cool. There's like a Netflix, *Omar Sy*, *Lupin* series that many people have seen.

And I was thinking about this, and now every time I think about cloaking, because inside this home that I don't think anyone visits, but it's really funny, because they have an audio that lasts about six hours. So even I couldn't stay that long. And the person pretends he's Arsene Lupin. But they have lots of cloaks and top hats. So this imagery it's almost like this Proustian madeleine that takes me back to a very, very happy time in my life.

But the serious point is, I mean it when I say I see this now and I realize, in class in particular, that I was using a lot of words in probably not an effective way to communicate the idea to students. So I'll give you one scintillating example. That's not in their book, but I think they might see this as a good example.

I teach this case, when we get to talking about conversion. And you'll conversion is this tort where you're acting antithetical to someone else's ownership interest in something. But there's a very interesting case called *Cremin v. Cohen*, that's all about can something intangible, in this case, a domain name, and to make it racier, the domain name is in any domain name, it's sex.com.

And it turns out someone had registered. This was back in the day when you registered but you got these. They were free for the grabbing. Someone had taken this and someone else purloined it, and the rest was history. But the purpose that for here is in that case, I teach it in class, it's a 2003 case, I think I teach it next to no *Moore v. Regents of California*, which is the case also about conversion about the individual whose spleen was being exploited, because it was commercially viable.

And the California Supreme Court in that case is like, we don't what to do in this new area of biotechnology and human body parts. And if we were to go forward and expand conversion liability, it would lead to all these disastrous consequences, and there's no precedent to do that, so we raise this red flag of caution.

And when I show students, by the way, the punch line in *Cremin v. Cohen* is the court's going to go forward and recognize this expansion of conversion liability in a brand new sphere of internet domain names, et cetera, I ask my students things like, are we going to see is the gestalt, I think I've used that word, or the reasoning of the court? Are they going to say, we're breaking new ground. We're going for it for these policy reasons? No. What did they do? They cloak.

And I never knew how to do that succinctly, but they cite Moore, which, by the way, didn't recognize a tort in the same new area, but they talk about how when there's not precedent. You go cautiously, et cetera, and they do all the things that this book talks about is ubiquitous in tort law.

And I think it's a fascinating project. I've actually started asking some of my students to be on the lookout for these explicit examples where it's very, very clear that a court is breaking very new ground. And they're even citing precedents you where they decided in an area of lack of precedent not to go there, and how it is that their reasoning.

I think it's a very powerful not only vivid metaphor, but it's a useful construct. And it's also to use-- actually, this was a phrase, Ted, I found in-- I haven't met you before today, but I've read lots of your work. And I think it was when you were describing training, you use these words of irresistible simplicity. And I find this cloaking idea or this idea that courts are going to, of course, be faced with external pressure, and they're going to refract that in their doctrinal structures. It seems like a very simplistic notion, but once it's been written about and you have it before you, I think can find it in very, very nuanced places.

So now my quibble. So this harmonious world in which courts are reacting to external pressures and refracting it within existing doctrinal structures, I think doesn't exist in one of the places that they try to force into that frame. And that would be in the institutionalization of tort law.

So in the book, they talk about it. Mike alluded to this briefly before in terms of *New York Times versus Sullivan* constitutionalizing defamation law. They advert very briefly to *Snyder v. Phelps* and the institutionalization in IIED and in privacy. And it's unfortunate. It would be great to tell this story not only I'll get to a minute John's be on his-- be on a non-messy team, but don't join his team. Or just hold out before you decide to join his team.

But in thinking through this harmonious structure, to me, it seems like instead the US Supreme Court, in some of its areas of constitutionalizing tort law, has actually been an assault on the common law, and has stymied and done some bad things to the common law. And it's secondly been a really pretty frontal aggressive attack on the jury.

So Mike mentioned the jury. The book doesn't talk a whole lot about juries. There are some passing references to juries, but I would argue, and I'm just going to give you some quick highlights. This is some language from *Snyder v. Phelps*, where they're discussing the great tort of IIED. They say outrageousness.

You all know. You're tort students. I don't if you've studied IIED, but one of the things the restatement says what the standard for intentional infliction of emotional distress is I would start saying something very awful and offensive, and you would all stand up and shout in unison, outrageous. So we won't do this experiment, but it's a very high threshold extreme and outrageous conduct outside the bounds of all civilized society.

Tort scholars, if you've ever looked in this area, you could go meticulously across different state jurisdictions. There's some variation, but it's a very, very high threshold. Very few claims get through, because the common law has developed, with a very strong appreciation, that they're in the world of speech tort, and that there are free speech interests.

In the same way in defamation, and this is alluded to in the book, so it's I'm not making unfair criticism, but the common law of torts was doing quite well in defamation. It's not like free speech just came upon it in *New York Times v. Sullivan* there were all sorts of privileges the entire structure of how that tort evolved is about weighing the balances of tort and free speech interests.

But in any event, this is what the US Supreme Court has to say, outrageousness is a highly malleable standard with inherent subjective, and a jury can impose liability based on its tastes or views. This is a court, that's Chief Justice Roberts, but I've looked at this in a lot of different areas, even outside of the speech torts areas, you don't have to go that far. Look at punitive damages, look at the institutionalization of that field that started in *BMW versus Gore*, and then a whole trilogy of cases where the court is just outrage.

It jars the justices constitutional sensibilities, that juries could award verdicts of that size. Final area, look at all of the US Supreme Court cases in federal preemption of state tort law. It's really not giving some guidance or advice that then the lower courts can incorporate straight into their structure. They say things. This is from a dissent in a case about drug warnings. Who, the FDA or a jury in Vermont should decide about jury labels? And you can imagine the conservative majority that then emerges and the medical device area comes back. And basically, has a disdain for juries deciding product cases that have to do with medical devices or drugs.

I've argued, for example, this gets us a little bit into administrative law. This is a court that, probably it's not a surprise to any of you, has been really critical of the behemoth administrative state and seems to be going out of its way to reconfigure administrative law, as we know, disdainful of agencies. I've argued, and I think I have a lot of evidence of this, that even though they have this caustic criticism of the ever inflating administrative state, it pales in comparison to their disdain towards the common law of torts.

And in fact, in areas they will-- in areas where they are forced to choose, they will bite their tongues and give a lot of deference to something the FDA or an agency has done if it's going to get rid of the common law tort premise. Just oust it entirely. And so I'm a little-- that's my quibble. It doesn't surprise-- it's not going to surprise anyone.

I've written an article in the punitive damages space called *Federal Incursions and State Defiance*. So states don't actually always just sit back and incorporate and refract on their existing doctrine when it comes to these kinds of external threats. So I think that that's a caveat to the thesis, and that's my little quibble.

For the future, for tort law, and this comes back to John, was, as usual, extremely eloquent. Fear not. I save my boxing gloves to go one on one with John. They're back at the hotel. This won't be to give just a footnote on that, because it's not the subject. Here John wrote this wonderful book recognizing wrongs, and I wrote a review called *Modern Tort Theory*, preventing harm, not recognizing wrongs.

We disagree about what the kind of coherent organizing principle of tort law is. I would agree with John in a 19th century view of tort law. I would vehemently disagree in a 21st century modern tort view, just to make sure there's we're clear on that. But for the future of tort law, in connection with this book, two points to make.

So first, I found it very intriguing. The book talks a lot about external pressure for new torts. And at places, it is true that they are pluralistic in the sense that John could find and selectively, quote, things here that would talk about birth of tort or pushing tort forward on the frontier in terms of morality or wrongs, as he said many times in his remarks.

And I'm going to selectively quote the parts that were music to my ears where it seems like prevention of harm and deterrence is very, very key in these moments of external pressure. Namely, they talk about the area of data breaches. This is a new risk to society, and I'm going to just quote specifically what they say, which as I said this is music to my ears.

On page 194, they say if the disclosure of private information from hacking becomes common and widespread and there is no statutory or regulatory regime vigorously-- rigorously, sorry, deterring negligent failure to provide adequate data security by imposing severe penalties, then eventually some courts will expressly or impliedly recognize this under some circumstances.

Why is that music to my ears is this beautiful rendition of external pressure, namely, there's this risk, people are being harmed by something. Torts steps in as a quasi regulator. There's no other, as they say, there's no other statutory or regulatory regime. And it does its job as it should to prevent harms. Because after all, we're all better off any version of justice, whether we're going to talk about any philosopher you want to mention to me, any version of justice has to cheer hard for preventing harm or injury from individuals as opposed to worrying about cataloging them as wrongs and what do we do about them.

And when John talked about we live in a world where people come up with lots of forms to mistreat each other, I would say we live in a world of a lot of socially productive extremely risky behavior and risky conduct, products liability, life-saving drugs, et cetera, and we have to have a mechanism whereby society responds to those risks, and their first response should be to try to minimize and prevent some of those harms. That's what I think is important. And I find that at least in this part of the book.

The second piece of the future of tort law. So there's this first component that needs to focus on external pressures leading to preventing harm and deterrence. The second piece has to do, I think, with insurance, and this is what they have to say in the context of data breach on page 195. They're talking about defendants here may find it in their interest to purchase substantial amounts of insurance against such liability in the same manner that major corporations now purchase hundreds of millions of dollars worth of insurance against liability for bodily injury and property damage.

And it's led to some interesting ruminations. I say the future of tort law, I think, the next book or a really interesting project is one that would harness those two components. And it would remember at previous historical junctures.

So now I'm going to end with a case you may or may not have come to *Roland v. Christian*, which is the story of friends who sue friends. Someone comes to someone's apartment and is injured by a defective faucet, but the booming idea that the California State Supreme Court comes down with there is it crashes down. It completely collapses a very historical tripartite distinction between trespassers, licensees, and business invitees.

And people forget this. First of all, it's an eight part test and they throw a bit of everything. They throw some for John's team. It's about morality and wrongs. They throw some for my team. It's about, they say, one of the factors policy of preventing future harm. But people seem to forget they also throw in there as an affirmative factor, something to think about when the court's deciding whether to expand liability, in a particular area, the availability cost and prevalence of insurance for the risk involved.

And I think that merging that deterrence idea with this idea of thinking about insurable risks is kind of what-- is not kind of-- is actually what is going to be driving courts forward when they're deciding where they're going to recognize new torts or not.

So thank you very much. I'll come back. Just on a personal note, I can't claim Ted other than inspiration from much of your writing, but Ken has been-- is remarkable, almost improbable, what a mentor he's been to me from afar. And to this day, and this is a true story, I had a student come in. I hadn't read their book to be about tort law is a mess. Maybe I could have used this.

A student came in recently to say professor Sharkey, is there any structure in your class? And I thought, I don't think that was like the highest praise. But where did I send this student? To Ken's *Forms and Function of Tort Law*. I've always felt like I don't have the Holy Grail. I don't tell students there is this. I teach this way, and then there's the secret over here. I tell them at the outset the secret is in Ken's *Form and Function of Tort Law* so they can read that along with whatever it is that I'm trying to do in class. So it's wonderful to be here, and thank you very much.

[APPLAUSE]

KEN ABRAHAM: Well, it's great to see you all here. Let me begin by thanking Dean Goluboff for sponsoring this book panel and all of our book panels. She lends her good offices to these events and enriches our lives here.

Thanks so much, Mike and John and Kathy. We're all a part of a quest, a quest to understand tort law and what tort law is. In our book, Ted and I try to push that quest further. So your insights and your observations are your part in pushing the quest forward.

And to Leslie, Professor Kendrick, there's nothing like having someone be first your student, then then be your boss. I can't even begin to express how gratifying that has been. And now, a mere colleague for a while.

So this audience is so full of first year students. Let me just say something about that. It might be a little early to say this, but I have you all here and so I want to say it now. Isn't it amazing that a month ago, this all would have been incoherent to you. And that could sit here and basically follow most of what is going on.

You are really in an important sense. You're more like us now than you are like the people you were a month ago. You're native speakers now. And we may use-- we may have more vocabulary, but we all are speaking the same language. And if you get discouraged in any way, make take note of that.

So let me just try, in the spirit of speaking mostly to the students, to just make a point about a couple of themes that I think ran through all these remarks. First of all, juries. It's true, we don't talk a lot about juries in this book, but make no mistake about it. I'll speak only for myself, but I'm sure Ted thinks this too.

American tort law, the common law of torts is all about the relationship between judges and juries. It's only a slight exaggeration to say it's about nothing other than the relationship between judges and juries. We wouldn't need as much tort law or all the rules that we have if it weren't for the fact that we have juries in civil cases. Much of the law of torts could be left unset or at least ungoverned by rule. So there's the whole world that you could write about, and you have to pick some of it when you write, and it's true we didn't say much about juries.

Then the big mess. I'll tell you what we think about that issue. We think tort law is organizationally messy. I don't think we took a position in the book about whether it was normatively messy, and, of course, when we were writing the passages that John quoted, we knew that he and Ben Zipursky had said that tort law is a law of wrongs. We weren't forgetting that or ignoring it, we said what we said with that in mind. And I think what we said was that saying that tort law is a law of wrongs is saying something at a level of generality that doesn't deal with the organizational messiness of tort law.

And it wouldn't be a surprise, at least it's not a surprise to us, that tort law would be messy. Maybe it's no more messy than contract law. I think you're right to call us on that. I wrote that passage and I realized when I wrote it that I don't really anything about contract law. Just seemed like a good line at the time.

There's a phrase that you see in writing about law, which is the common law works itself pure. I don't know. I'm drawn to another phrase that you see in writing about the common law describing the common law, chaos with an index. Well, it's neither. It's organizationally messy.

Look at any table of contents of a restatement or of a tort treatise. And some of it is organized by reference to the standards of conduct, intent negligence, strict liability, and then you get halfway through the table of contents, and it stops with that organization, and it moves on to something else that doesn't map on to the distinction between intent negligence and strict liability. That seems messy to me.

Now, what would tort law look like if it weren't messy? It wouldn't look like tort law. It'd be some other thing. We're not suggesting that it could be made unmessy. It's just what it is. The aforementioned Immanuel Kant, sorry to take his name in vain here, but he said, out of the crooked timber of humanity, nothing straight was ever made.

Tort law is made by people. We shouldn't expect that it's going to be completely coherent. We have somewhat incompatible values, all of which we adhere to at the same time. So what gets produced is not going to be pure or coherent or straight at the intermediate level at which we want to operate.

There can be grand organizing principles law, tort law is a law of wrongs or tort law as a law aimed at preventing harm or tort law as a mix of those two principles, but when you get down below that level, it's going to be messy and not completely coherent, because it's made by people and responding to things in the world that aren't always coherent themselves.

And as far as the future goes insurance, well, some of I have an interest in that subject, and I'm all for more attention being paid in the future to the relationship between tort law and insurance. And I might even do some of that myself. Thank you.

[APPLAUSE]

TED WHITE: I was going to make similar remarks about a lot of first year law students being here, but Ken has done an eloquent job with that. But I will tell a couple of stories about Ken's and my teaching first year torts. They both involve Jim Ryan, the current president of the university who was on our law faculty for many years.

And Jim didn't start off teaching torts, but for some reason, he was asked to do it, so he was teaching for the first time. And so he and I used to play tennis. And at one point in the course of a match or after a match he said, Ted, I can really understand now why you teach torts. You can get through the whole rules in about a week.

And that's so. That is, a characteristic of torts is the rules are seemingly so pliant and so fact specific and so hard to erect into some coherent conceptual structure that sometimes, as a first year student, one despairs.

And this leads me to the second story. Jim was telling me about his student evaluations after the first time he taught torts. And one evaluation said, well, Professor Ryan's class was just a rehash of Professor Abraham's Forms and Functions book, but it wasn't all that bad.

So if I recommend that at some point, there's a kind of awkward moment fairly early in my classes where students come up to me after class and say, Professor White, is there a is there a horn book or some treatise that you might recommend for tort law? And I take that to mean that he's finding my class utterly confusing and perhaps useless. And so I recommend Ken's Forms and Functions. And actually, for someone who's been ascribed to being thinking of torts is messy, it's actually a very good synthesis-- doctrinal synthesis in a very lucid manner, and it actually tells you things that are there.

So anyway, my view of torts is very much reinforced by my teaching it. I'm struck every year as I use the casebook that Mike Green is on. And the casebook, it's now in its 11th edition, and this is the 11th edition I've taught. And the casebook doesn't change a whole lot. But it has a lot of notes and questions, which is why I chose it. Initially when I came here, and some of my colleagues don't like notes and questions, but I chose notes and questions, because when I started teaching torts, I didn't the first thing about this subject, and I thought, well, at least these people can ask some good questions of students.

But I am an unapologetic adherent to the view that torts is largely messy. And let me give an illustration from some things that Mike Green said. Mike has, in my judgment, unenviable task of having to do with general principles or concluding observations about the third restatement. And he and he gave what he thought were enduring and defining principles of tort law. And he talked about factual causation, scope of liability, and legally cognizable harm.

If you expand legally cognizable harm to include both the idea of injury, why does tort law compensate some injuries and not others? And also, damages. Why is it possible to be injured but not able to bring an action because you can't bring into court damages, it will be recognized in one fashion or another by the tort system?

I think what those principles, as Mike puts it, principles do, is they just define the affirmative elements of the torts case. The torts case is ubiquitous, whether you're bleeding in defamation or you're pleading in strict liability, you do have elements that you have to show. I wouldn't call those principles. I would call those something like pleading requirements to bring this particular form of a civil lawsuit. And beyond that, I'm a little hard pressed to say what the principles are.

Now, of course, Jon Goldberg has already answer to that, which is, torts are wrongs. And if you read John's work, what he tends to do is take everything that shows up as a civil action not arising out of contract and call it a wrong, and then suggest that in some deep fashion it's immoral wrong. And so in some even deeper fashion we need civil recourse theory to really understand what tort law is about. And that's fine. I mean-- I'm not a member of John's team in that respect, but I have nothing but admiration for his efforts.

The last comment I want to say about the panelist and then I have a couple of other things to add, is Kathy's point about the constitutionalization of tort law and how she thinks that-- I'm not sure whether she's saying we haven't quite got that right or whether she's saying that this is just a very bad thing that we're not taking quite seriously enough. I think our attitude toward constitutionalization of tort law is fairly skeptical.

What we were trying to say in that chapter is, there is, and we're indebted in some respects to Leslie's work on free speech in this, we think that free speech imperialism has captured the Supreme Court. That is, we think the court is roaming around looking for free speech concerns everywhere in American law, and it's largely sympathetic to the free speech concern whether the free speech concern involves intentional infliction of emotional distress or whether it involves all variety of expressive activities.

What we're trying to point out is that if you think about some features of tort law there's a lot of speech elements in tort law that are not currently recognized as protected speech. For example, restrictions on securities transactions. That if you violate the Securities and Exchange laws, you don't do this against the backdrop of a First Amendment privilege to make misleading statements about securities. It's also true of labels on products. Products liability has a doctrine that if you convey misleading information on a product warning, that can subject you now, primarily, to negligent liability under products liability.

Well, we looked around at some recent cases, and it looked to us as if there's this creeping first Amendment institutionalization of these areas where conventionally, yes, there have been speech elements, but they've been typically regarded as subsumed in the common law. So I don't want you to think that we're hostile to the skepticism about the court's attempt to venture into this. But at the same time, this is an aggressive self-confident court that feels it now has majorities in a number of areas, and they may want to seek out tort law and constitutional as it further.

I don't quite disagree-- I don't quite agree with Kathy's view about the court looking over its shoulder and finding, how can we stick it to tort law? I don't think the current majorities on the court care a whole lot about tort law one way or another. I think they feel they have bigger fish to fry. If they're going to get on the First Amendment hobbyhorse, they're going to stake out a bolder path than just product warnings.

Well, the last thing I want to say is that Ken and I have been friends for a long time, and we started writing a work together. Oh, before I say that, I forgot to say when I first started that in my judgment, nobody gives a better introduction than Risa Goluboff. And I want to thank her for the several times in which she's introduced me at events.

But back to Ken's and my collaboration. I think that we started this in 2013 when we got an invitation to participate in a symposium honoring Jeff O'Connell, who taught at this law school for many years and was good friends with both of us and a wonderful presence in tort law, the architect, the co architect of no fault automobile insurance. And so anyway, we were invited to this symposium, and we decided to write a piece on William Prosser. William Prosser, one of the great torts people of the generation immediately preceding us, the reporter of the second restatement, the leading casebook author, published a great many illuminating articles. Almost single handedly created the tort of intentional infliction of emotional distress and privacy.

Anyway, so we decided we would do this, and it turned out that we really liked it. We really liked writing together. And we substantially edit each other's work. We assign portions at the outset. But then when someone sends over a draft, the other person basically takes it apart and vice versa.

So the joint product is pretty much honed out between ourselves. Anyway, Ken and I did this piece, and then we decided to do another one. And I said at one point to Ken, I said, let's just do one of these a year for the indefinite future. And Ken said, what? But we've pretty much done that, and it's been just a distinct pleasure for me to have that collaboration, and I look forward to many more years with it. So thank all of you for coming.

[APPLAUSE]