Tort Law and Commonsense Justice:

Convergence and Divergence

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Most judges, by necessity, work case by case, addressing only the legal questions that must be decided to handle that case. For many, there's little opportunity to reflect on how the law may change over time—either about how and why those changes may occur or about whether such changes are for the better. In this article, we analyze the links between tort law and legal practice on the one hand and psychological notions of justice on the other. We explore situations in which commonsense notions of justice have converged with legal doctrine and legal practice in tort cases, creating changes in tort law, as well as circumstances in which tort law and legal practice have diverged from commonsense justice. We think judges will enjoy having the chance to step back from day-to-day case consideration to reflect on these intriguing patterns in tort law and practice.

In his book on commonsense justice and law, Norman Finkel described a dispute at his university that arose each spring. The grounds crew carefully maintained walking paths in a grassy quad, but students ignored those paths and created their own, romping along the once-beautiful grass until bare earth began to show. The grounds crew reseeded, placing "Keep Off" signs around the tender area. But the signs were routinely ignored, and the new grass failed to thrive. Finally, the grounds crew laid new sod on the bare earth just in time for late spring graduation. The following spring, the cycle repeated. Eventually, the grounds crew conformed their paths to the improvised student paths, breaking this perennial cycle. Finkel analogizes this dispute to the challenge raised by divergence between law and commonsense ideas of justice, asking: "Should the law follow the path laid by community sentiment, or should the community follow the path the law has laid?"[1]

When it comes to tort law, we see much convergence between the law and community sentiment—places where tort doctrine and psychological intuition are aligned—with tort law both reflecting and shaping community views of civil justice. Convergence is understandable, even to be expected in many cases. Many societal and cultural expectations, values, and norms are embedded in the form and content of laws. Over time, commonly shared ideas of justice in torts are incorporated into specific legal rules.

However, we also see instances in which law and intuition diverge. In some cases of divergence, it seems that the differing assumptions of the law and the tendencies of human psychology can quietly coexist. In other cases, the perceived legitimacy of the tort system may be undermined when the law diverges from community sentiment. And in still others, psychological tendencies may run counter to the legitimate purposes of tort law.

CONVERGENCE

At the intersection of psychology and torts, we observe many instances in which the two paths coincide, instances in which psychological intuitions are in accord with the foundational principles and rules of tort law. One example of this pattern is the shift from contributory to comparative negligence in most jurisdictions. The classic 1809 English case of *Butterfield v. Forrester*[2] ushered in the English regime of contributory negligence, a legal doctrine that was quickly adopted in the United States and proved to have considerable staying power. Many defendants in the nineteenth and early twentieth centuries availed themselves of the defense of the plaintiff's contributory negligence. Proving that the plaintiff was even slightly at fault in causing his or her own injury completely barred recovery. But over time, the wisdom of refusing to hold negligent defendants liable—particularly when their victims were much less at fault than they were—was increasingly questioned. Such an approach was hard to justify on either deterrence or compensation grounds. Juries operating under a contributory negligence regime reportedly practiced, under the table, a rough version of comparative negligence. They were said to reject defense verdicts in favor of reduced awards for negligent plaintiffs who contributed to their own injuries.

Eventually, the contributory negligence regime's complete bar to recovery fell out of favor. In most U.S. jurisdictions, it was replaced with comparative negligence, an alternative that reduces rather than bars recovery. When the negligence of both the plaintiff and the defendant constitute legal causes of an injury, lay observers favor responsibility and damages that are proportionate to the responsibility of each party. The current laws of most states are now in accord with this commonly held community view of justice.[3] Tort law has followed the path laid by the community.

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Footnotes

1. NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS' NOTIONS OF LAW 1 (1995).
2. Butterfield v. Forrester, 11 East. 60, 103 Eng. Rep. 926 (K.B. 1809).
3. Eli K. Best & John J. Donohue III, *Jury Nullification in Modified Comparative Negligence Regimes*, 79 U. CHI. L. REV. 945 (2012).

Another example of the convergence between tort law and psychological intuition comes from the rules of causation. Consider the classic case of *Kingston v. Chicago & N.W. Ry.,* the "twin fires" case, in which two independent fires of roughly equal size combined into a single fire and destroyed the plaintiff's property.[4] What makes such cases interesting is that they cause problems for the standard rule for causation in tort law, the "but-for" rule of causation. The difficulty lies in the fact that even if only one of the fires had occurred, the plaintiff's property would still have been destroyed. Nevertheless, when asked to evaluate causation in such cases of multiple sufficient causation, people still tend to attribute causation to each of the two causes (the fires). Or consider another situation involving multiple sufficient causes in which two snipers simultaneously fire at a victim, both shots hit their mark at the same time, and either shot would have been sufficient to cause death. In such a case, people tend to classify both snipers as causal, even though a straightforward counterfactual analysis would indicate that neither shooter is a but-for cause.[5]

This lay intuition is consistent with an exception to the but-for rule of causation, as embodied in the *Restatement (Third) of Torts*, which provides that "[i]f multiple acts occur, each of which . . . alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm."[6] The commentary to the *Restatement* affirms this intuitive connection:

> Perhaps [the] most significant [justification for this exception] is the recognition that, while the but-for standard . . . is a helpful method for identifying causes, it is not the exclusive means for determining a factual cause. Multiple sufficient causes are also factual causes because we recognize them as such in our common understanding of causation, even if the but-for standard does not. Thus, the standard for causation in this Section comports with deep-seated intuitions about causation and fairness in attributing responsibility.[7]

Thus, both the shift from contributory to comparative negligence and the exceptions to but-for causation are consistent with lay intuitions about causation.

DIVERGENCE

Yet in other instances, we see divergent paths, places in which psychological predispositions are at odds with tort-law principles. To continue an earlier example, although comparative responsibility accords with current societal norms, some states continue to employ contributory negligence regimes. In four states and the District of Columbia the plaintiff's contributory negligence remains a complete barrier to recovery.[8] But strict adherence to the legal regime of contributory negligence and its vestiges in modified forms of comparative negligence can produce results at odds with commonsense justice. These instances may lead fact finders to engage in motivated reasoning about the evidence to arrive at a just result in the case.

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Consider an experiment that presented a product-design-defect lawsuit to mock jurors. The case included evidence of defective design, as well as testimony that supported an inference of plaintiff fault. One group of mock jurors was given comparative negligence instructions, and asked to assess the relative responsibility of the defendant and the plaintiff. Other jurors were instructed to decide the case under contributory negligence rules. Only 8 percent of those who received the comparative negligence instructions concluded that the plaintiff was not at all responsible. In contrast, 24 percent of those deciding under contributory-negligence instructions found that the plaintiff was not at all at fault, a finding that permitted recovery.[9] In short, the jurors generously interpreted the facts in the case to allow them to reach what they considered to be a just result.

This experimental study is consistent with analyses of outcomes in real-world civil jury trials. Eli Best and John Donohue examined two large national samples of civil jury trials from 2001 and 2005, focusing on those cases in which the jury attributed a percentage of negligence to the plaintiff.[10] In pure comparative-negligence jurisdictions, where partial recovery was permitted even when plaintiff fault was greater than 50 percent, juries found that plaintiff responsibility exceeded 50 percent in 22 percent of the cases. In modified comparative-negligence jurisdictions, where plaintiff recovery would be barred if juries found that plaintiff responsibility exceeded a threshold around 50 percent, relatively few juries (7.5 percent) found the plaintiff's responsibility to be above 50 percent. Compared to their counterparts deciding cases in pure comparative-negligence jurisdictions, the juries in modified comparative-negligence jurisdictions found lower levels of plaintiff responsibility (particularly in the 40–49 percent range, and at exactly 50 percent), ensuring that plaintiffs would receive some compensation for their injuries.[11]

4. *See* Kingston v. Chicago & N.W. Ry., 211 N.W. 913 (Wis. 1927).
5. Barbara A. Spellman & Alexandra Kincannon, *The Relation between Counterfactual ("But For") and Causal Reasoning: Experimental Findings and Implications for Jurors' Decisions,* 64 Law & Contemp. Probs. 241 (2001).
6. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 27 (2010).
7. *Id.* at cmt. c.
8. Alabama, Maryland, North Carolina, Virginia, and the District of Columbia still employ contributory negligence. Peter Nash Swisher, *Virginia Should Abolish the Archaic Tort Defense of Contributory Negligence and Adopt a Comparative Negligence Defense in Its Place*, 46 U. Rich. L. Rev. 359, 360 n.8 (2011).
9. Kristin L. Sommer, Irwin A. Horowitz and Martin J. Bourgeois, *When Juries Fail to Comply with the Law: Biased Evidence Processing in Individual and Group Decision Making*, 27 Personality & Soc. Psychol. Bull. 309 (2001).
10. Best & Donohue, *supra* note 3.
11. *Id.* at 976.

[T]he plaintiff's comparative negligence can work to reduce the plaintiff's recovery beyond that contemplated by the law.

These studies suggest that fact finders are motivated to perceive, construe, and discuss plaintiff responsibility in a way that allows recovery when they believe that recovery would be just. Courts are sometimes sensitive to this tendency. Consider, for example, a decision by the Tennessee Supreme Court in which the court adopted a modified form of the comparative negligence rule that bars the plaintiff's recovery if the plaintiff is found to be 50 percent or more responsible. The court hesitated to credit a jury's 50–50 split of the responsibility to the plaintiff and the defendant because the jury made the allocation without having been instructed about the consequences of that allocation.[12] The rules of contributory negligence and modified comparative negligence, therefore, cause problems for the justice intuitions of fact finders and may motivate them to find workarounds that allow them to fulfill their concepts of justice.

Another related instance in which the law and lay intuition are at odds is in the calculation of damage awards in comparative-negligence cases. The processes by which we ask jurors and judges to make and report their comparative decisions and to calculate final damage awards do not appear to comport with the psychological tendencies of fact finders, ultimately inviting what has come to be known as "double discounting."

Consider what we ask fact finders to do when defendants raise the plaintiff's fault as a defense. Fact finders must first determine whether the plaintiff has met the burden of proving that the defendant acted negligently and that such negligence was a legal cause of the plaintiff's injury. Then, they must determine whether the defendant has met the burden of proving that the plaintiff acted negligently and that this negligence was a legal cause of the injury. Next, fact finders must determine the percentages of responsibility that ought to be assigned to the defendant and to the plaintiff. Separately, they must calculate the total amount of damages suffered by the plaintiff without regard to this division of responsibility. The final step is the reduction of the total damage award by the percentage of plaintiff responsibility. In many jurisdictions, if the fact finder is a jury, this final task is done by the court.

As we described above, fact finders may be motivated to ensure some recovery to a plaintiff injured by a defendant's negligence, even when the plaintiff has also been negligent. At the same time, however, the plaintiff's comparative negligence can work to reduce the plaintiff's recovery beyond that contemplated by the law.

Neal Feigenson, Jaihyun Park, and Peter Salovey conducted a mock juror experiment using comparative negligence cases, and found participants appeared to attribute more fault to plaintiffs than was justified by the scenario facts.[13] Mock jurors read about the actions of both the defendant and the plaintiff as well as the severity of the plaintiff's injury in four accident scenarios. Participants answered a series of questions about the plaintiff and the defendant, and attributed percentages of fault to both the plaintiff and the defendant. They were then asked to give two damage awards—a gross damage award that represented the total damage associated with the injury and an adjusted damage award that discounted the award to account for plaintiff fault. In an actual jury trial, this adjustment for plaintiff fault is typically done by the judge once the jury's damage award is submitted.

As expected, high plaintiff responsibility led to a higher apportionment of fault to the plaintiff. The damage awards, however, showed a striking pattern. Recall that from a legal perspective, the initial, unadjusted damage award should not reflect a discount for plaintiff responsibility, but should represent the full cost of the plaintiff's injuries. The adjustment takes place afterwards, when the percentage of plaintiff fault is taken into account and a proportionate amount is deducted from the full compensatory award number to arrive at the adjusted award. What Feigenson and his colleagues discovered, however, was that the initial, *unadjusted* damage awards were significantly lower in the conditions in which the plaintiff was described as also blameworthy. The award to the plaintiff, therefore, was discounted twice—once when jurors made their initial valuation of the plaintiff's total damages and again when those damages were reduced to take account of the plaintiff's responsibility.

Researchers have also found evidence of double discounting in patterns of real-world torts. In a study of automobile-accident cases, researchers found that initial damage assessments were systematically lower in cases with partially negligent plaintiffs, declining "almost in proportion to the plaintiff's negligence."[14] The researchers concluded that "awards to negligent plaintiffs are double discounted—the jury reports smaller (gross) damages, which the court (or jury) further discounts in accordance with the plaintiff's negligence."[15]

Psychologically, it is not surprising that participants would reduce an award to take into account the plaintiff's responsibility for his or her own injury. A holistic perspective that takes relative responsibility into account is part of why comparative negligence seems fair to many observers. And we have already seen the holistic approach that was said to be practiced by juries who decided cases under regimes of contributory negligence, with juries adjusting plaintiff responsibility and awards downward rather than eliminating the pos-

12. McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992).
13. Neal Feigenson, Jaihyun Park & Peter Salovey, *Effect of Blameworthiness and Outcome Severity on Attributions of Responsibility and Damage Awards in Comparative Negligence Cases*, 21 LAW & HUM. BEHAV. 597 (1997). For another demonstration of double discounting of plaintiff fault, see Douglas J. Zickafoose & Brian H. Bornstein, *Double Discounting: The Effects of Comparative Negligence on Mock Juror Decision Making*, 23 LAW & HUM. BEHAV. 577 (1999).
14. James K. Hammitt, Stephen J. Carroll & Daniel A. Relles, *Tort Standards and Jury Decisions*, 14 J. LEGAL STUD. 751, 756–58 (1985).
15. *Id.* at 757.

sibility of any recovery for negligent plaintiffs.

It is reasonable to expect to find that the parties' relative responsibility contributes to the jurors' underlying sense of deserved damages.[16] However, the structure imposed on the fact finders' decision making in comparative-negligence cases results in double discounting. An initial reduction occurs implicitly as fact finders calculate the total gross-damage-award amount, and a second reduction occurs when the percentage of plaintiff responsibility is used to adjust the award amount. In effect, the plaintiff is penalized twice for the same negligent behavior.

How might judges manage the problem of double discounting? Maine has adopted an interesting approach to the problem of double discounting. In Maine, the judge instructs the jury to return both an assessment of the total damages and an adjusted damages figure. The judge informs the jury that it should "reduce the total damages by dollars and cents, and not by percentage, to the extent deemed just and equitable, having regard to the claimant's share in the responsibility for the damages."[17] The judge reminds the jury that the lower figure will be the final verdict. It would be interesting to study whether Maine's approach to comparative negligence is an effective way to address the possibility of double discounting.

Divergence can also be seen in other areas. Imagine, for example, a case alleging that a doctor was negligent in failing to identify the presence of a cancerous tumor in a patient's X-ray. A recent scan clearly shows the tumor, and the patient alleges that the doctor should have detected it in the earlier X-ray as well. Had the cancer been detected earlier, the patient's prognosis would have been much better. The difficulty for the fact finder (and for any medical experts called to testify) is that the assessment of the earlier X-ray is inevitably conducted with the knowledge now possessed—the fact that we now know about the tumor.[18]

But legal determinations of whether particular conduct is reasonable are supposed to be made from an ex ante perspective, judging the reasonableness of the conduct *before* the consequences of the chosen action were known. As Prosser and Keeton note,

> The actor's conduct must be judged in the light of the possibilities apparent to him at the time, and not by looking backward "with the wisdom born of the event." The standard is one of conduct, rather than of consequences. It is not enough that everyone can see now that the risk was great, if it was not apparent when the conduct occurred.[19]

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Research in psychology, however, has demonstrated that people have difficulty taking a forward-looking perspective when making judgments in hindsight. The *hindsight bias* makes it difficult to figure out what predictions one would have made in foresight.[20] When outcome information is known, other information about the event can be reconstrued in light of that outcome, creating an integrated picture of the event and its outcome that is hard to disentangle and leading to a feeling that one "knew it all along." Of particular importance for tort law, people "not only tend to view what has happened as having been inevitable, but also to view it as having appeared 'relatively inevitable' *before* it happened. People believe that others should have been able to anticipate events much better than was actually the case."[21]

A related phenomenon, the *outcome bias,* occurs when people judge the quality of a decision based on its outcome. That is, decisions resulting in negative consequences are judged to have been bad decisions.[22] Thus, for example, people tend to judge the quality of the same medical decision more favorably when the treatment turns out to be successful than when it does not.[23]

Hindsight biases have implications for the types of judgments and decisions required of experts and fact finders in tort cases, as they will typically know that harm has in fact occurred. Hindsight and outcome biases are likely to affect judgments about the range of risks that were foreseeable, whether a particular risk was foreseeable, the likelihood that a particular risk would materialize, and estimates of the likely severity of harm. In the aftermath of an injury, the risk of loss is likely to seem significant and any precautions taken are likely to seem less reasonable.

Experimental studies that have explored the hindsight bias in the context of tort litigation support these predictions. Susan LaBine and Gary LaBine, for example, compared judg-

16. Valerie P. Hans & Valerie F. Reyna, *To Dollars from Sense: Qualitative to Quantitative Translation in Jury Damage Awards*, 8 J. Empirical Legal Stud. 120 (2011).
17. Me. Rev. Stat. Ann. tit. 14, § 156.
18. Example adapted from Neal J. Roese & Kathleen D. Vohs, *Hindsight Bias*, 7 Perspectives on Psychol. Sci. 411 (2012).
19. W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen, Prosser and Keeton on the Law of Torts § 31 (5th ed. 1984).
20. For reviews of the research demonstrating the hindsight bias, see Jay J. J. Christensen-Szalanski & Cynthia Fobian Willham, *The Hindsight Bias: A Meta-Analysis,* 48 Org. Behav. & Hum. Decision Processes 147 (1991); Rebecca L. Guilbault, Fred Bryant, Jennifer Howard Brockway & Emil Posavac, *A Meta-Analysis of Research on Hindsight Bias,* 26 Basic & Applied Soc. Psychol. 103 (2004); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight,* 65 U. Chi. L. Rev. 571 (1998).
21. Baruch Fischhoff, *Debiasing, in* Judgment under Uncertainty: Heuristics and Biases 422, 428 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982) (emphasis added).
22. *See* Jonathan Baron & John C. Hershey, *Outcome Bias in Decision Evaluation,* 54 J. Personality & Soc. Psychol. 569, 570 (1988); Philip J. Mazzocco, Mark D. Alicke & Theresa L. Davis, *On the Robustness of Outcome Bias*, 26 Basic & Applied Soc. Psychol. 131 (2004).
23. *See, e.g.*, Baron & Hershey, *supra* note 22, at 571–72.

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ments about therapists' assessments of patient dangerousness in foresight and hindsight. When mock jurors were told that the patient became violent, they rated the actions taken by the therapist as being less reasonable, were more likely to believe that the therapist should have done more, thought that the violence was more foreseeable, and were more likely to believe that they would have predicted violence themselves than did mock jurors who did not have this hindsight information. Ultimately, mock jurors were more likely to find that the therapist was negligent when they were told that a violent outcome had occurred (24 percent) than when no violence resulted (6 percent) or when the outcome was not specified (9 percent).[24]

A similar study compared judges' evaluation of a physician's decision to grant a resident of a psychiatric ward permission to leave the facility for three hours. The resident then escaped and caused significant harm. Judges who were told of the disastrous consequences thought that it was more foreseeable that harm would occur than did judges who assessed the foreseeability of harm in foresight. In addition, only 12 percent of judges judging in foresight believed that the physician's decision was negligent, while 30 percent of those judging in hindsight indicated that they believed that the physician's decision was negligent.[25]

The hindsight bias has proven to be difficult to overcome in the legal context. Therefore, some scholars have suggested bifurcating trials or otherwise structuring proceedings so that fact finders do not know the specific consequences of the decision or conduct at issue, using a clear and convincing standard for determining negligence, increasing reliance on strict liability or the regulatory system, or allowing for increased deference to industry standards and practice guidelines.[26]

Others are more optimistic, noting aspects of the current system that may work to minimize or offset hindsight bias.[27] The most effective debiasing technique—considering alternatives to the outcome that occurred—is inherent in an adversarial system in which the other side often proposes an alternative scenario for fact finders to consider. Other tort system features that may help are the existing reliance on deviation from custom as evidence of negligence and the availability of comparative-negligence rules. In addition, the hindsight effect may be smaller in the kinds of situations that result in tort lawsuits. Negative outcomes, real-world events, and tasks that require subjective assessments of the probability of risk tend to produce weaker hindsight effects.[28] Given that tort lawsuits tend to involve real-world case scenarios that have resulted in negative outcomes, that opposing sides present alternative conceptualizations of the case, and that fact finders are not required to provide numerical probability estimates, we might expect attenuated hindsight effects in evaluations of legal cases.

SUMMARY AND CONCLUSIONS

We have described a number of instances in which the links between tort law and practice have converged with lay intuitions of justice, and others in which they have diverged. Convergence helps to explain the direction of shifts in tort law doctrine, where community sentiment helps to shape, and in turn is shaped by, tort law.

But when paths diverge, when public views and tort law do not coincide, the legitimacy of the tort system may suffer as a result. The legitimacy of the legal system, including the rules and practices of tort law, depends a great deal on public acceptance. To the extent that the law departs from deeply held intuitions, tort law risks being perceived as illegitimate. Tom Tyler has empirically examined the consequences of public support or lack of support for legal authorities and the legal system, investigating why people obey the law.[29] Many of us might assume that people obey the law because of the criminal punishments or civil consequences that come from violating it. Indeed, this is the crux of the deterrence argument in tort law: We establish civil sanctions to attempt to shape conduct in desirable ways.

Tyler argues, however, that a prime reason that most people obey the law is that they believe in the law's legitimacy. Compliance with the law is linked to its moral credibility. When those in authority enact laws that are out of step with the public's sense of justice and fairness, the authorities and the legal

24. Susan J. LaBine & Gary LaBine, *Determinations of Negligence and the Hindsight Bias*, 20 Law & Hum. Behav. 501 (1996). For another demonstration of hindsight bias on mock jurors, see Kim A. Kamin & Jeffrey J. Rachlinski, *Ex Post ≠ Ex Ante: Determining Liability in Hindsight*, 19 Law & Hum. Behav. 89 (1995) (using a scenario based on Petition of Kinsman Transit Co., 338 F.2d 708 (2d Cir. 1964)).
25. Aileen Oeberst & Ingke Goekenjan, *When Being Wise After the Event Results in Injustice: Evidence for Hindsight Bias in Judges' Negligence Assessments,* 22 Psychol., Pub. Pol'y, & L. 271 (2016). For other demonstrations of hindsight bias in judges, see Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *Inside the Judicial Mind,* 86 Cornell L. Rev. 777 (2001); Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice,* 58 Duke L.J. 1477 (2009). *But see* Jeffrey J. Rachlinski, Chris Guthrie, & Andrew J. Wistrich, *Probable Cause, Probability, & Hindsight*, 8 J. Empirical Legal Stud. 72 (2011) (finding some evidence that hindsight bias influences judges' assessments of the likely outcome of a search, but not their legal judgments of probable cause).
26. For a review, see Jennifer K. Robbennolt & Valerie P. Hans, The Psychology of Tort Law (2016).
27. The *Restatement* notes that "if there is such a [hindsight] bias, it is one that the negligence system evidently finds generally acceptable." Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 3 cmt. g (2010).
28. *See* Guilbault et al., *supra* note 20.
29. Tom Tyler, Why People Obey the Law (1990). *See also* Tom R. Tyler, *Legitimacy and Legitimation,* 57 Ann. Rev. Psychol. 375 (2006).

system may lose credibility and legitimacy. Declining legitimacy, in turn, reduces a legal system's ability to control conduct. Indeed, the dystopian image of tort law widely promulgated by tort-reform groups may already have led to decline in public perceptions of the tort system's legitimacy.

As we have described, legal decision makers may respond to divergence between their views and the law through creative fact finding and other mechanisms that allow them to achieve what they consider to be justice in a particular case. People may adjust their perceptions of the parties and the evidence so that they align better with their ideas of a fair ultimate outcome. Recall how perceptions of plaintiff fault are modified under contributory fault regimes to permit some recovery for the plaintiff even when strict adherence to the tort law rule would lead to no recovery. In essence, people walk where they want to, creating paths that serve their goals and taking small detours to accommodate the formal letter of the law.

In some instances of divergence, however, taking psychological predispositions and social norms into account might undermine the purposes of tort law. Consider the impact of implicit racial bias, which may lead fact finders to devalue the injuries of racial and ethnic minorities. Here, other important social and political values lead us to insist that the community must walk on the path laid by the law.

Psychologists have begun to study debiasing remedies, testing the effectiveness of techniques aimed at limiting the impact of psychological heuristics and other biases.[30] Some hopeful evidence of this is found in research on jury instructions about damages. In general, legal instructions may be admonitions that are akin to "Keep Off" signs, and may have similarly modest effects. But legal instructions to jurors that include reasons and explanations about the purposes of the law can be more effective in helping jurors make decisions that are consistent with the law, even when the law goes against their intuitions.[31]

Ultimately, psychological intuitions and the purposes of tort law will interact to determine the path that tort law takes. At times, convergence between psychology and tort law will further the overall purposes of the tort system, deterring tortious conduct and promoting just compensation. In other circumstances, the same policies of deterrence and compensation will be better served by demanding that psychological intuitions be put aside. In either case, understanding the relevant intuitions and the many other ways that psychology influences the real world of tort law and practice will make it more likely that the tort system will find the best path.

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30. James M. Jones, John F. Dovidio & Deborah L. Vietze, The Psychology of Diversity: Beyond Prejudice and Racism (2014).

31. *See, e.g.,* Roselle L. Wissler, Katie A. Rector & Michael J. Saks, *The Impact of Jury Instructions on the Fusion of Liability and Compensatory Damages,* 25 Law & Hum. Behav. 125 (2001).