

# POLICY-DRIVEN TORT ANALYSIS: PEELING THE ONION FROM THE INSIDE OUT!

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## I. INTRODUCTION

The law of torts is undeniably one of the most challenging and rewarding courses in the first-year legal curriculum. I think that first-year students enjoy Torts for a number of different reasons. First, the first-year student is at least familiar with many basic torts such as assault, battery and conversion and in all likelihood, has had some level of experience with such violations. Second, these torts resemble criminal violations in ways that the first-year student has most likely experienced via movies or television.<sup>1</sup> Third, Torts makes sense on a conceptual level to first-year students whose moral sense of right and wrong are often consistent with existing tort law. Finally, at first blush, tort law is predominantly black letter law,<sup>2</sup> which appeals to first-year students who have not yet become comfortable with the endless levels of ambiguity ever present in the American legal system. For some of the same reasons, teaching Torts is an appealing proposition for many professors, who capitalize on students' inherent interest in the subject by encouraging them to examine their emotional reactions to Torts against the backdrop of what the law is or should be.

Such colorful and multi-faceted doctrine presents professors with multiple options regarding method of instruction. Many professors begin by establishing a firm understanding of the black letter law and later progress into analysis of the resulting policy implications.<sup>3</sup> Others attempt to integrate black letter law with policy by examining decisions and consequences contemporaneously. Still others base the examination of tort doctrine on the policy consequences of the decisions and the incentives and disincentives created by such decisions. Allowing public policy to drive the class' analysis

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1. The modern portrayal in movies and television of torts as "colorful" crimes whose images instantly stir emotions further increases its attractiveness in the first-year curriculum.

2. Ironically, as first-year students are immersed in tort doctrine, the jurisprudence becomes much more policy-driven and the black letter law, which initially appeared to drive courts' decisions, eventually serves merely as a means to an end.

3. Although my professor did not take this approach, it is an oft-used method of teaching Torts.

of black letter law provides challenges and benefits to both students and teachers, whose approach is analogous to peeling an onion from the inside out!<sup>4</sup>

## II. POLICY-DRIVEN ANALYSIS IN PRACTICE

My Torts professor<sup>5</sup> peeled the onion from the inside out. The policy-driven instructor believes that looking at tort law simply as a template for applying facts and obtaining results is neither advantageous nor predictive. While examining how the facts of a particular case match up with the elements of a tort action is undeniably important, this is merely the outside layer of the onion and independently never gets to the core of what drives tort liability: public policy. Public policy, according to policy-driven analysis, is the key to understanding why the courts find one way or another in tort cases. While black letter tort law remains vital to torts analysis, policy-driven analysis demotes its importance from the primary determinant of the court's decisions to the means by which courts send messages to society. Under policy-driven analysis, courts use the tort system to send messages to society about which behaviors are appropriate and inappropriate. The difference is significant. Under "traditional analysis"<sup>6</sup> the professor initially focuses on how the court's decisions reflect a consistency within the elements of contemporary prima facie tort law. In contrast, policy-driven analysis reverses the order by first attempting to define the behaviors that are beneficial to society and should be encouraged, and those that are detrimental to society and should be discouraged. Second, the analysis focuses on the judiciary's role and effectiveness in pronouncing and enforcing such societal norms via its tort decisions.<sup>7</sup> Next, it attempts to measure the effectiveness of such lessons by comparing the occurrences of undesirable behavior with the expansion and contraction of the tort system itself. Finally, the analysis completes its perpetual cycle with a reexamination of desirable and undesirable behaviors and appropriate adjustment of the judiciary's action to reflect desired changes.

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4. "Peeling the onion from the inside out" is a phrase I use to describe the process of beginning with policy objectives and consequences and then progressing to examine how the elements of particular tort causes of action effectuate these objectives.

5. Professor Griesbach, B.A. Marquette Univ.; J.D., LL.M., Harvard Law School, teaches Torts, Administrative Law, Environmental Law, Natural Resources Law, State and Local Government and Jurisprudence at Saint Louis University School of Law. His enthusiastic style made learning torts an enjoyable and memorable experience.

6. I will use "traditional analysis" to refer to the method presumably used by most Tort professors to teach the black letter law initially, then focus on the resulting policy implications secondarily ("peeling the onion from the outside in").

7. As discussed *infra*, frequently this stage of the analysis will show the student that the judiciary may not be the most effective agent for pronouncing object lessons in a particular area. In these areas, the judiciary will refuse to allow the tort system to operate by dismissing the case.

### III. CASE LAW FROM THE POLICY-DRIVEN PERSPECTIVE

One case that well illustrates the process of peeling the onion from the inside out is *Rinehimer v. Luzerne County Community College*.<sup>8</sup> In *Rinehimer*, the Superior Court of Pennsylvania was asked to determine whether a college who had fired its president<sup>9</sup> had wrongfully discharged him in violation of tort law.<sup>10</sup> Although students could easily make the facts of *Rinehimer* fit the elements of wrongful discharge, the court held that the college had not wrongfully discharged the president. In so holding, the court relied on the fact that the president was an at-will employee stating that “where the complaint itself discloses a plausible and legitimate reason for terminating an at-will employment relationship . . . an employee at will has no right of action against his employer for wrongful discharge.”<sup>11</sup>

Under policy-driven analysis, discussing the court’s holding becomes more of an exercise in assessing cause and effect than an application of the facts to the elements of wrongful discharge. Using this approach, the student is first asked to determine what is appropriate in college employment relationships.<sup>12</sup> Most students agree that though a college should be loyal to its employees, if the employee takes actions that are detrimental to the college’s organizational purpose, then termination of employment may be appropriate. Next the student is asked to determine whether the judiciary<sup>13</sup> would be an effective agent to enforce this object lesson, and if so, exactly how it should do so. Most students will try to manipulate the black letter law to encompass such behavioral concerns, however the policy-driven instructor will quickly contain the discussion to existing law,<sup>14</sup> forcing the student to realize policy objectives through the less than perfect fit of the existing legal elements. The instructor next helps the student discover that the Pennsylvania Superior Court used *Rinehimer* to display the judiciary’s belief that the tort system will be very hesitant, if not completely resistant, to intervening in disputes between

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8. 539 A.2d 1298 (Pa. Super. Ct. 1988).

9. *Id.* at 1299-300. The president was fired for insisting on the employment termination of two high-level employees who he believed, and the evidence supported, were embezzling college funds. *Id.*

10. *See id.* at 1300. The elements of the tort cause of action of wrongful discharge are: (1) Defendant acts, (2) Intentionally, (3) Discharging the plaintiff, (4) In violation of clearly mandated public policy.

11. *Rinehimer*, 539 A.2d at 1301.

12. In this case, the employee was the president of the college.

13. And more specifically the tort system, via the judiciary.

14. In so doing, the instructor refuses to provide an easy answer to the dilemma and instead forces the students to expand and contract the existing black letter law to enforce the desired object lessons. In this step, to the policy-driven instructor, lies the key to understanding and predicting the outcomes of tort cases and, more broadly, to understanding how the courts are an interested and dynamic force in curbing certain societal behaviors rather than a static administrator of justice.

employees and employers. After minimal consideration, students realize that judges and juries may not be experienced enough in dealing with labor conflicts and business decisions to effectively decide such disputes.<sup>15</sup> Thus, the student learns that given the objectives and the means by which those objectives could be achieved, the court in *Rinehimer* correctly affirmed the lower court's decision, thereby leaving the president to pursue a cause of action for breach of contract rather than allowing the tort system to operate in an area in which its qualifications are questionable.

Indeed, the distinguishing characteristic of policy-driven analysis is the secondary importance of the legal elements and the primary focus on policy achievement. By engaging in this process, the student learns not only that policy drives tort law, but also that it is an extremely effective indicator of tort outcomes.

#### IV. PROS AND CONS OF POLICY-DRIVEN ANALYSIS

Policy-driven analysis is not without its pros and cons. As discussed above, the analysis is vital to the instructor who believes that public policy dominates the tort system and its resulting outcomes. Furthermore, the analysis can help first-year students reach beyond black and white answers when operating in the gray area in which so many of today's tort decisions reside. Increasing a student's comfort level with ambiguity assists the first-year student not only in his or her understanding of tort law, but also with the moral and economic consequences of the law in other areas of first-year emphasis. Thus, teaching Torts via the policy-driven approach can be a wonderful method for introducing the first-year student to the law and its functionality.

On the other hand, policy-driven analysis can prove immeasurably frustrating to the student who fails to quickly grasp the theory that the court's decisions are policy-dependent. The student who has difficulty thinking beyond the confines of black letter law may find the analysis overly theoretical and simply an exercise in justifying the ends by the means.<sup>16</sup> Likewise, the philosophical student may have theoretical objections to the particular behavior lessons that the tort system chooses to advance and the potentially objectionable role of the judiciary as an instructor. Finally, first-year students may find a regulatory tort system that bases the utilization of its doctrine's

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15. According to my Torts professor, one theory is that the tort system is under-qualified at analyzing such disputes because judges and juries themselves generally have inadequate experience in the market to scrutinize employer's decisions to terminate employment.

16. One of the most difficult abilities I had to acquire in law school was developing a comfort level with ambiguity. Coming predominately from a business and economics background, I found myself looking for definite answers in many of my first-year classes. Thus, the ambiguity inherent in policy-driven analysis, and first introduced to me in Torts class, quickly increased my tolerance and appreciation for ambiguity.

elements on policy objectives unjust to plaintiffs whose meritorious suits fail or are dismissed because the judiciary feels the tort system should not operate.

#### V. SUGGESTIONS TO MAXIMIZE THE UTILITY OF POLICY-DRIVEN ANALYSIS

The value of policy-driven analysis is heavily dependent on the timing of its comprehension. For the student to appreciate the analysis throughout the semester, Torts professors must explain the theory at the start of the course and thus allow students to verify, or disprove, its validity through the subsequent examination of case law. Unveiling the theory too late risks frustrating and confusing students who, looking to black letter law for answers, have difficulty understanding why two cases with analogous facts yield opposite results. Another risk of policy-driven analysis is the tendency for professors to assume that students understand how the policy is driving the analysis without formally explaining it.<sup>17</sup> In so doing professors risk hindering their student's ability to group the cases in a manner that conceptually makes sense and achieves the true goal of policy-driven analysis: predictability.

#### VI. CONCLUSION

Policy-driven analysis provides its student with a colorful and valuable perspective of contemporary torts jurisprudence. The professor who implements the method can expect lively classroom debates on the behaviors of society and the role of the judiciary in providing incentives for behaviors that society finds appropriate and wishes to encourage. While there remain risks to teaching Torts through the policy-driven method, the policy awareness gained by performing the analysis make peeling the onion from the inside out well worth the effort.

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17. In this regard, the easiest method could be to spend some time at the end of each section of the class (intentional torts, negligence, strict liability, etc.) reconciling the cases and helping students see the common threads that run through the courts' decisions.