1990

Tort Reform: The Problem of the Missing Tsar

Marshall S. Shapo

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlr

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/hlr/vol19/iss1/6
TORT REFORM: THE PROBLEM OF THE MISSING TSAR

Marshall S. Shapo*

"Tort reform" has been the rage for a decade. Many articles and books have been written on the topic. The subject will require even more discussion in the context of a recognition of the place of tort in a broader jurisprudence of injury.

This Commentary seeks to contribute to the discussion. It deals briefly with a beguiling idea, focusing on analysis of institutions that deal with injury, that has attracted adherents recently. There is a special irony in the fact that this idea—which seems to embody notions of centralized direction of the social response to injuries—has come to the fore as the system of the twentieth century Tsars appears, if with much pain and uncertainty, to be breaking down in Eastern Europe. For the approach that I criticize here embodies the Problem of the Missing Tsar.

In 1987, Richard Stewart wrote of the importance of an "institutional perspective" on tort-related law.1 He suggested that a "comparative institutional analysis" could "educate us about the decisional characteristics and tendencies" of the "different institutional processes"2 that bear on "personal injuries caused by business, professional and government enterprise activities."3 Stewart's catalog of these processes, apart from tort litigation, ranged from "contracts and markets"4 through "no-fault liability and compensation systems"5 and included government regulation and loss insurance.6

* Frederic P. Vose Professor of Law, Northwestern University School of Law; A.B. University of Miami, 1958; A.M. Harvard University, 1961; LL.B University of Miami, 1964; S.J.D. Harvard University, 1974.

2. See id. at 196-97.
3. See id. at 184.
4. See id. at 190.
5. See id. at 191.
6. See id.
Stewart also spoke of the possibility of a "radical[ly] restructur[ing]" of the litigation system and of "a 'public law' model of tort litigation."\(^7\)

By analyzing these different approaches to the problem of injuries caused by enterprises, Stewart sensibly suggested, one could secure important information, for example, about "the levels of compensation and the administrative cost-effectiveness of different institutional systems."\(^8\) With particular regard to "whether the tort system should be modified and its jurisdiction altered," Stewart suggested that "[w]e must . . . give due regard . . . [to its] comparative performance in providing appropriate incentives, delivering cost-effective compensation, and imposing fit sanctions."\(^9\)

A very recent article by Neil Komesar\(^10\) makes explorations along this line. Komesar has provided an important theoretical analysis of three institutions: tort, criminal law and administrative regulation, and the market, classified according to the potential and actual impacts of given injuries on victims and on injurers.\(^11\) Carrying forward the great tradition of institutional analysis associated with the University of Wisconsin, Komesar suggested that application of this framework "should help us to understand and rearrange the boundaries between common, statutory, and administrative law, and the boundaries between criminal, tort, and contract law."\(^12\) However, according to Komesar, no one had "attempted to integrate consideration of the various roles and institutions in one framework."\(^13\) Although Komesar credited Stewart with calling for "a comparative institutional approach,"\(^14\) he added that "to date, no one has responded."\(^15\)

In fact, I took a preliminary cut at that problem in 1984, analyzing at some length certain practical consequences of social choices among different institutions.\(^16\) For example, I noted various costs of

7. Id.
8. Id. at 197.
9. Id. at 198.
11. See generally id. at 27-50.
12. Id. at 76.
13. Id. at 25 n.8.
14. Id. at 25 n.8 (emphasis in original).
15. Id.
16. See generally AMERICAN BAR ASS'N SPECIAL COMM. ON THE TORT LIABILITY SYSTEM, TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW (1984) [hereinafter TOWARDS A JURISPRU-
compensation legislation that might render it inferior to tort law. I also described numerous problems associated with federal regulation of product and process hazards that indicated that "as social legislation expands and contracts, and the polity's enthusiasm for regulation waxes and wanes... the law of torts sometimes provides a welcome anchor." There is a major practical problem inherent in calls for institutional rearrangement, which this Commentary identifies. Presenting here a wedge of my own work in progress on this set of issues, I suggest that an answer to votaries of comprehensive restructuring is especially apparent in this year of turmoil, which has brought such striking, if at this writing, unpredictable changes in the Tsar-like autocratic system that supplanted the Tsars.

The problem is precisely one of Tsarlessness: The Problem of the Missing Tsar. One may speak facilely of "assign[ing]" injury law tasks to one "system" or the other—to tort, to compensation legislation, to social insurance, to regulation. But that is not the way our system works. Even taking into account the wastefulness of the gaps and overlaps that afflict a relatively uncoordinated multi-system approach to injuries, the American system has refused to adopt the solution of the Tsar.

Stewart, apparently skeptical of the employment of tort at its present levels, recognizes the probability that in practice "[w]e likely will continue to rely on a combination of institutions." And

DENCE OF INJURY].
17. See id. at 10-45 to 10-58.
18. Id. at 10-190.
19. Cf. Stewart, supra note 1, at 199 (saying that "the recent advances of tort have exposed weaknesses in the foundations that may presage large-scale institutional restructuring.").
20. See id. at 186. The most recent expression of this idea appears in a series of drafts for the American Law Institute's Project on Compensation and Liability for Process and Project Injuries. One may find an evocative, though significantly qualified, summary of the proposition in the latest rendition of the Project, as of this writing, in American Law Institute, I Compensation and Liability for Product and Process Injuries (Proposed Final Report, Nov. 5, 1990). The drafters summarize the notion that instead of "using only one policy instrument—tort law—to serve multiple goals that are often conflicting... we might employ a variety of devices, each tailored to the particular role that is parcelled out to it." Id. at 40-41. They conclude, however, that experience with "alternatives to tort law" indicates that "it is not clear that any of them performs appreciably better than the tort system." Id. at 41. Stewart himself had advised that "[w]e... move cautiously before adopting entirely new systems to replace tort law," saying that "[e]ven accepting the systematic view of the crisis, it is not clear which of the suggested alternatives will best serve the functions—compensation, deterrence, and condemnation— that are now assigned to the tort system." Id. at 185-86.
21. Stewart, supra note 1, at 198.
Komesar, already having instructed us about certain strengths of the tort system,\textsuperscript{22} expresses his skepticism "of what . . . passes for tort reform."\textsuperscript{23}

Anyone who has written at length about the problems of tort law and tried to fashion solutions for them\textsuperscript{24} is in debt to Stewart for his critical overview and to Komesar for his particularized analysis of institutional characteristics. They have usefully emphasized to us the importance of acquiring and analyzing information about legal institutions that deal with the injury problem. Yet as we pursue the obstacle-strewn course of data collection,\textsuperscript{25} and strive for an injury law that is both fairer and more efficient,\textsuperscript{26} we would do well to keep in mind the Problem of the Tsar and the advantages of Tzarlessness.

In our need for a womb of comprehensive solutions, we are all probably drawn to the metaphor of the "tireless . . . administrator with a file-cabinet mind, superior intelligence, and a computerized grip on dangerous activity . . . sitting at a great control board at which he adjusts risks twenty-four hours a day."\textsuperscript{27} But in a politico-legal climate that changes from decade to decade, in a system where there is no Tsar—no one to issue sumptuary edicts that assign so much of the injury problem to the market, and so much to tort, to compensation systems, and to regulation—tort has a special utility. Ironically, for all the criticism of the allegedly wild expansionary tendencies of tort and of its uncertainties, it provides an island of relative certainty in our injury law: as an aid to the workings of the market, as a powerful set of symbols for proper behavior, as a gyroscopic mechanism in changing political weather.

In seeking ways to improve the response of our law to injuries—as we should and must—we are well advised to number its advantages, in a tradition that John Marshall captured in his declara-

\textsuperscript{22} See Komesar, \textit{supra} note 10, at 60-70 (discussing punitive damages and joint and several liability).

\textsuperscript{23} See \textit{id.} at 76.

\textsuperscript{24} See, \textit{e.g.}, \textit{TOWARDS A JURISPRUDENCE OF INJURY}, \textit{supra} note 16, at 13-1 to 13-23.

\textsuperscript{25} The first recommendation of the A.B.A.'s Special Committee on the Tort Liability System, in a chapter of its report devoted entirely to recommendations for improvement, was for "the creation of a permanent organization for the comprehensive collection of data on injuries and injury-causing events, and the ways in which individuals, communities, and the legal system respond to the problems created by injuries." See \textit{id.} at 13-1.

\textsuperscript{26} It would be well if legal educators and lawyers began to view the problem explicitly as one of the jurisprudence of injury. See, \textit{e.g.}, \textit{TOWARDS A JURISPRUDENCE OF INJURY}, \textit{supra} note 16; M. SHAPO, \textit{TORT AND INJURY LAW} (1990).

\textsuperscript{27} M. SHAPO, \textit{THE DUTY TO ACT: TORT LAW, POWER, AND PUBLIC POLICY} 116 (1977) (employing this image in a different context).
tion in *Marbury v. Madison*\textsuperscript{28} that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."\textsuperscript{29}

This declaration throws into relief the Problem of the Missing Tsar. At once, it limns the practical benefits, as well as the constraints, of Tsarlessness.

\textsuperscript{28} 5 U.S. (1 Cranch) 137 (1803).
\textsuperscript{29} Id. at 163.