Introduction

The driver of one car rear-ends another, causing damage to both cars; the driver’s liability insurance covers the cost of repairs. A jury debates the appropriate damage award for a baby who was born disabled after a doctor’s error during a difficult delivery. A judge evaluates a claimant’s whiplash injuries. A patient confides in his therapist about his desire to kill the woman who has spurned him; the therapist wonders whether to warn her. A package of fireworks falls and explodes; in the crowd’s rush to get away, a heavy object falls and hits a bystander. After receiving a common childhood vaccine, a child experiences a life-threatening allergic reaction. A teenager disregards the warning label on a lawn mower and loses a finger. Each of these cases implicates the law of torts. Each of these cases also implicates psychology.

The law of torts governs the circumstances under which one person or entity, a defendant, is to be held civilly liable for having caused harm to another, a plaintiff. Tort law is primarily concerned with determining whether an actor has acted intentionally or negligently in harming another, whether the act at issue caused the injury, and whether there should be any limits on liability for the harm caused. In addition, when liability is found, tort law is concerned with how to appropriately compensate the plaintiff for that harm through compensatory damages, and whether and how much punishment in the form of punitive damages is warranted.

Both authors of this book have backgrounds in psychology, and teach classes and conduct research on tort law and the civil justice system. As we have presented and debated tort law principles and practices and shared our research findings with our law students and colleagues, we have been continually intrigued by the overlaps between the legal and psychological dimensions of torts. Our research projects on lawyers, litigants, and fact finders in tort cases have generated many findings that strongly resonate with psychological principles, but have also produced
other results that are surprising. Our discussions about the convergence and divergence of psychology and torts have led us to take on this wide-ranging examination of the psychology of tort law.

Psychology and the Objectives of Tort Law

Tort law has a variety of aims, including deterring harmful behavior, offering a mechanism for remedying wrongs, allocating the costs of injuries, and providing compensation to those who are injured.

Some scholars see the primary objective of tort law as deterrence. If it works well, tort law creates incentives for desirable behavior and disincentives for unacceptable behavior. Under an economic model of tort law focused on deterrence, tort liability aims to minimize the combined cost of accidents and accident prevention by forcing actors to take into account the consequences of their decisions to act or not act. Requiring actors to pay compensation to injured victims provides an economic incentive to engage in behavior that is legally acceptable. Perhaps it is not surprising, then, that economic thinking has dominated recent theories about tort law.

Even so, an economist might be puzzled that tortious behavior ever occurs. Rational decision makers should weigh the costs and benefits of any course of action and act appropriately. The prospect of tort liability should deter all negligent accidents, at least as long as the tortfeasor is able to pay the costs. Yet it is clear that tortious behavior frequently occurs. Any review of the tort case law will unearth “a veritable goldmine of ‘objectively’ unreasonable behavior” that has not been deterred.

From a psychological standpoint, however, the fact of tortious behavior does not seem odd at all. For tort law to effectively deter tortious conduct, the targets of the law must be aware of and understand the rules, willing to follow the rules, and able to conform their conduct to the requirements of the rules as they make decisions about activities in which to engage, the extent and location of those activities, and any precautions to undertake. Psychological theory and research inform each of these assumptions.

First, decision makers are not always aware of the rules that apply to them. In addition, the incentives provided by the tort system are not always straightforward in practice. As we will see, many meritorious tort
cases are not brought, muting the deterrence signal between behavior and tort. The significant length of time it takes for a tort suit to conclude and the buffer of liability insurance can both further weaken this link. At the same time, however, many potential defendants overestimate the likelihood that they will be sued. Beyond this, it is surely not the case that people are solely self-interested or only motivated by the incentives provided by the tort system. Tort-related behavior may be influenced by an actor’s own morality, social norms, incentives provided by the market, the desire to help others, self-expression, the actor’s own safety, emotion, and much more.

As we will see throughout this book, psychology poses all sorts of complications for the assumption that decision makers can easily engage in the type of cost-benefit analysis required by standard economic models. Our capacity to pay attention is limited, we use mental shortcuts or heuristics to make decisions, we develop and rely on habits or other forms of automatic behavior, and we do not always think about risks or costs and benefits in the ways anticipated by economic models. Thus, even people who aspire to act in accordance with economic models of decision making may find this difficult to accomplish in practice.

Other scholars theorize that the primary objective of tort law is to accomplish corrective justice by remedying past wrongs. In this view, tort liability is intended to restore the moral balance between the parties, to communicate a message about the wrong that was done, and to make the plaintiff “whole” through money damages. Deterrence theories typically do not attach importance to the link between plaintiff and defendant—that is, there is nothing special about the fact that the defendant must pay money damages to the plaintiff. In contrast, theories of corrective justice emphasize the relation between the injurer and the injured. Part of what is to be accomplished is a restoration of the relational balance between injurer and injured that entails allocating the plaintiff’s losses specifically to the defendant. Empirical evidence provides support for the notion that corrective justice norms are central to people’s responses to violations of tort law and confirms that fact finders do not myopically seek optimal deterrence.

Rather than guaranteeing the righting of wrongs, however, some theorists argue that tort law is best understood as affording plaintiffs “the right to redress wrongs.” They distinguish the idea of corrective justice,
which emphasizes correcting wrongs and restoring the equilibrium between injurer and injured, from the notion of tort law as a vehicle for *civil recourse*: “In permitting and empowering plaintiffs to act against those who have wronged them, the state is not relying upon the idea that a defendant has a pre-existing duty of repair. Instead, it is relying on the principle that plaintiffs who have been wronged are entitled to some avenue of civil recourse against the tortfeasor who wronged them.”

In addition to the primary aims of deterrence, corrective justice, and civil recourse, tort law has a range of other outcomes and benefits. The tort system reveals and transmits information about hazards and injuries. Indeed, plaintiffs frequently cite the desire for information about what happened to them as a reason for filing a lawsuit. Tort verdicts provide information—about community standards, safety, vindication, and other topics—to other audiences as well. The tort system also provides a public forum within which plaintiffs and defendants can tell their stories. The opportunity to recount one’s own story of an injury is an important facet of fair process or *procedural justice*. And the tort system offers a public space within which society can debate how tort obligations should be defined.

This panoply of objectives implicates the psychology of decision making in tort. While legal scholars weigh the primacy of deterrence and corrective justice in tort law, decision makers—including defendants, plaintiffs, attorneys, judges, and jurors—are likely motivated and influenced by these multiple goals and objectives in complex ways. Each of these goals can be held with varying degrees of intensity, and goals are sometimes complementary and sometimes conflicting. In some instances there may be multiple ways to accomplish a goal. At other times, important goals may be difficult to fulfill. Jurors, for example, may simultaneously seek to construct a story of what happened that fits the evidence presented and match that story to the verdict options given to them, reach what they consider to be a defensible verdict, appropriately compensate an injured victim, send a message about wrongful behavior, take into account all the information they find relevant even if some of it is not legally relevant (for example, insurance or lawyers’ fees), strike the right balance between the parties, deter future wrongful behavior, and give voice to their expectations about personal responsibility. “In addition, jurors may show reactance in the face of blatant manipulative
tactics by counsel, attempt to comply with economic logic and attempt to reconcile [their] conflicting . . . interpretations of the judge’s instructions. At the same time, they may desire to ‘finish the trial and go home; avoid fighting with other jurors; [and] avoid the wrath of the defendant, plaintiff, or community.”

Judges, attorneys, and litigants take similarly multifaceted approaches to the range of decisions that they must make as they choose to bring, defend, settle, and decide tort claims.

Tort Law and Psychology

In seeking to accomplish its objectives, the law of torts is inevitably concerned with how legal rules influence behavior, how the psychology of decision makers interacts with the legal rules, and how jurors and judges evaluate and respond to the behavior of both plaintiffs and defendants. Tort law implicates any number of questions about human behavior and decision making. What motivates people to pursue tort claims? How do people determine whether particular conduct is accidental or intentional, reasonable or unreasonable? How do people think about what factors caused which harms? How do such judgments inform determinations of blame and liability? How do people decide tort compensation and punishment? In short, the law of torts implicates many of the same phenomena that cognitive and social psychologists study.

Psychology is at its core an empirical discipline—a “hub science” that focuses primarily on understanding how people perceive, think, feel, and make decisions. Rather than relying on intuition, trial and error, or appeals to authority, the science of psychology depends on close observation, the testing of assumptions, and an emphasis on systematic measurement:

Thinking like an empiricist differs in important ways from thinking like a lawyer. While both modes of thinking are grounded in rigorous analysis, lawyers and empiricists often have different goals and approaches. Legal analysis places a premium on argumentation and appeals to authority, is frequently geared toward proving a particular view, is often focused on the particulars of an individual case, and is directed at reaching a definitive conclusion. In contrast, empirical analysis places a premium on observation, challenges assumptions, is oriented toward the testing of
hypotheses, is usually focused on describing patterns that operate in the aggregate, and is a continuing enterprise in which new work builds on that which came before and generates even more questions for further investigation.\textsuperscript{26}

In this spirit, we explore tort law through the lens of psychological science, examining the assumptions about human behavior and decision making that underlie the doctrinal rules, reviewing psychological research that tests these assumptions or otherwise sheds light on the functioning of the tort system, observing broad patterns in the cases and in the decisions of legal actors, and raising further empirical and psychological questions about tort law and practice.

In doing so, we draw on a range of psychological theories and research findings. For example, research on the ways people make attributions of responsibility for harms caused can enlighten questions about how and why claims are made and defended or not, how people think about intent, how people make judgments about causation, and how liability is apportioned among parties. Research on judgment heuristics can help us to understand how people make decisions about risk, judge the reasonableness of behavior, and award damages. Research on the story model of decision making can explain how jurors attempt to use the information presented to them in a tort case to reach a verdict that fits with the options presented to them. And research on social interaction, norms, and cues informs us about how people approach decisions about whether to pursue or settle tort claims, think about the role of custom in evaluating behavior, decide whether to engage in rescue attempts, and participate in group decision-making processes. These are but a few of the many psychological theories that can inform tort law (see the appendix for a more extensive list).

In the chapters that follow, we explore the operation of tort rules from four different perspectives. First and most fundamentally, we examine the premises of tort doctrines and their fit with our knowledge of human psychology. In many instances we find that tort doctrine and psychological intuition are aligned— with tort law reflecting and shaping community views of civil justice. In other cases, law and intuition diverge. In some such cases, 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. Considering tort law through a psychological lens highlights this tension between lay intuitions about the law and the requirements of the law itself.

Second, we examine whether and how the law of tort influences the behavior and decision making of potential plaintiffs and defendants—automobile drivers and passengers, doctors and patients, manufacturers and purchasers of products, property owners, and so on. We are interested in how these decision makers choose what activities and precautions to undertake and which to pass up.

Third, we consider the judges and jurors who are called upon to decide tort claims. We are concerned with how judges and jurors apply the relevant tort rules in deciding the cases before them and the insights that psychology provides into the challenges faced by these decision makers. We focus broadly on psychological phenomena that may influence decision making, rather than emphasizing individual differences among fact finders.

Fourth, we investigate how legal actors resolve tort disputes in the shadow of tort law. Most tort cases are resolved short of trial through settlement or pretrial motions, or because they are simply dropped. Accordingly, a primary effect of tort doctrine is to cast a shadow within which the settlement of cases occurs. As disputants and their attorneys resolve cases, they face the same challenges that judges and juries face in applying the relevant tort rules to their situations. These attempts to settle cases may take into account a broader range of considerations (including those that are nonlegal), but occur against the backdrop of how legal decision makers would apply tort doctrine to their cases.

Throughout this book, we examine the implications of psychology for tort law in each of these domains. We conclude by describing how psychological theories and research findings can help to inform current debates about reforming tort law and tort practice and offer our suggestions for new avenues for research.