Tort law and Private Ordering[*]

Preamble: A Tale of Two Tort Laws

1. *Courvoisier v. Raymond* [1896][1]

Defendant Courvoisier was asleep in his bed in the second story of a brick building in South Denver, Colorado; his jewelry store occupied a portion of the first floor of the structure. He was aroused from bed shortly after midnight by parties shaking and trying to open the door of the jewelry store. When asked by him what they wanted, these parties insisted upon being admitted, and when Courvoisier refused to comply they used "profane and abusive epithets" toward him. Being unable to gain admission, they broke some signs on the front of the building and then entered by another aperture. Passing upstairs, they commenced knocking on the door of a room where defendant's sister was sleeping. Courvoisier partially dressed himself and, with the help of his revolver, expelled the intruders from the building. At this point the latter were joined by two or three others at the rear of the store. In order to frighten the group away, defendant fired a warning shot. Unfortunately, instead of retreating the intruders passed around to the street in front, throwing stones and brickbats at the defendant, who fired a second and then a third shot in the air.

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[1] 23 Col. 113, 47 P. 284

The shooting attracted the attention of plaintiff Raymond, a police officer, who was at the tramway depot across a dark street. With two deputies, Raymond started toward Courvoisier. The deputies stopped to arrest the rioters and Raymond rushed toward Courvoisier, calling out simultaneously that he was an officer and that Courvoisier should stop shooting. When Raymond put his hand in his pocket[2], defendant shaded his eyes and, taking deliberate aim, fired, causing the injury complained of. At trial, Courvoisier stated: "as I looked... I saw this man put his hand to his hip pocket. I didn't think I had time to jump aside, and therefore turned around and fired at him. I had no doubt but it was somebody that had come to rob me, because some weeks before Mr. Wilson's store was robbed. It is next door to mine."

The Colorado appellate court reversed the lower court judgment in favor of the plaintiff. It stated that if a reasonable man would have believed his life was in danger, then the shooting of this innocent "attacker" was justified and no tort liability ensued.

2. *Obstetrics and Gynecologists v. Pepper* [1985][3]

Obstetrics and Gynecologists , a clinic, required its patients to sign a standard agreement before receiving any treatment. The agreement provided that all disputes arising between the parties would be submitted to independent binding arbitration, both parties expressly waiving their right to a jury trial. The arbitration procedure is substantially faster and cheaper than jury trials: it also typically results in awards likely to be more favorable to the defendant than 1980's medical malpractice jury trials. Evidence suggests that the fees of

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[2] This fact was denied by plaintiff.

[3] 693 P.2d 1259

Obstetrics and Gynecologists were more modest than those charged by comparable groups whose contracts did not contain an arbitration clause.[4]

Following the standard procedure of the clinic, the receptionist hands patients the arbitration agreement along with two information sheets, and informs him or her that any questions concerning the agreement will be answered. Patients must sign the agreement before receiving treatment; the physician signs later. If the patient refuses to sign the arbitration agreement, the clinic refuses treatment.

On November 28, 1979 plaintiff Pepper entered the clinic to obtain a prescription for an oral contraceptive. Her signature appears on the agreement. However, while admitting that the signature was hers the plaintiff disclaimed any recollection of either signing or reading it. The contraceptives were accompanied by a detailed written warning of the possible side effects of the contraceptive pills, including the risk of stroke. Paradoxically, nine months after receiving her prescription plaintiff unfortunately suffered a stroke which left her partially paralyzed. She sued *Obstetrics and Gynecologists* , claiming that it should have refused to prescribe the contraceptive because of her peculiar medical history. Defendant moved to stay the lawsuit pending binding arbitration.

The Nevada Court of Appeals confirmed the lower court's judgment that the arbitration agreement was an "adhesion contract", that the plaintiff was a "weaker party" who had "no choice as to its terms", and that the agreement was "unduly oppressive". The motion to stay was rejected, and a jury trial granted.

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[4] This is, of course, logical, since the 'insurance policy' offered as part of its contract had a lower expected payout than did its competitors' policies.

It's frequently useful in legal analysis, to spotlight complicated theoretical issues by citing cases, i.e. by telling stories. These two tort stories contain seeds for much of the discourse about the connection of Tort law with liberty and coercion.

II: Cogitations on the Nature of Tort Law

Dire losses occur in life. Sheriffs are shot. People get sick and die. Others are struck by lightning. Rapist devastate people's lives as they walk across university campuses. Kind, gentle merchants go bankrupt or 'lose their shirt' when savvy competitors set up shop next door. Nice people have car accidents, where one driver emerges spectacularly uninjured while another is crippled for life. Consumers purchase cars in Europe, only to learn that the ship transporting it to the 'States has perished (because of an act of war, or a totally unexpected iceberg, or the pilot's drunkenness...).

In each of these cases, indeed in all cases where losses are suffered, a mature legal system must determine whether the 'natural' victim[5] of this injury may obtain its forced transfer to some other person. This is typically done through Tort and Contract law. Both (it will be shown below) constrain our liberties. But they do so in very different ways.

Contract, to paraphrase a classical liberal paradigm[6], arises from man's realization that natural liberty[7], if unaccompanied by (binding) cooperation, will result in a self-sufficient life that is "solitary, poore, nasty, brutish and short".[8] From this realization springs the deep and meaningful paradox that liberty (*dominium* over one's self and one's

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[5] i.e. the person who will be impoverished in the absence of any judicial or contractual redistribution of the loss.

[6] The 'Autonomy of the Will' theory, fundamental to the elaboration of classical liberal theories of contract, holds that humans are characterized by their sovereign capacity to self-determine their future through free choice. Although all choice is influenced by people and by circumstances (uninfluenced action is the result of instinct, not choice), the Autonomy of the Will theory refuses to equate influence to duress.

[7] This liberty must include the freedom to possess property, which property includes one's body, etc.

[8] Hobbes, *Leviathan*

possessions) is most meaningfully implemented when it is voluntarily traded away. Though man may not alienate his freedom entirely[9], he can and indeed must parcel bits of it off if he wishes to partake of social life. By doing this, of course, she produces consumer surplus, i.e. wealth for her fellows[10] while at the same time receiving from the latter more (according to her own, freely determined function of values) than she gives up. Contract law is, thus, all about voluntary obligations, or limits on liberty, which are necessary if liberty is to be satisfactorily consummated. This unfamiliar nexus of contract law and liberty is at the source of many of its most acute doctrinal disputes[11].

Tort, to repeat, concerns liberty in a different way than does contract. Like contract, tort law results from free, i.e. voluntary acts: a reflex act cannot result in liability in classical

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[9] For a representative liberal attempt to justify the legal prohibition of contracts of slavery, see M. ROTHBARD, *The Ethics of Liberty*, Atlantic Highlands, NJ, 1982, pp. 39 ff.

[10] This simple reflection is an application of the notion of Pareto-superiority. See *infra,* note 21. If X trades something (a good, a service, or a currency) with Y, then (absent force or fraud) X prefers Y's payment to X's. X thus gets, meaningfully, 'more than what she pays for'.

Of course, it is possible that the whole transaction between X and Y may produce a negative externality for Z. Sometimes this externality will result from a violation of Z's rights, and sometimes it will be the product of a pure moralism. An example of the first case is a 'murder-for-hire' contract between X and Y, where Z is the intended victim; an example of the second is Z's revulsion upon knowing that X and Y (who are, say, of the same sex, or of different races) have contracted to sleep together. In a free country respectful of individual rights, the externality in the first case will be recognized by the legal system's refusal to recognize the contract: if the hit-man' performs, he will have committed a tort. The externality in the second case should not be recognized in a free society, even if a majority feels the presumed revulsion. See *Loving v. Commonwealth*, 206 Va. 924, 147 S.E. 2d 78 (Va. 1966) [laws prohibiting interracial marriage are unconstitutional]. *But see* Bork, *The Tempting of America*, 1989, p. 8, *contra* ["One of the freedoms, the major freedom, of our kind of society is the freedom to choose to have a public morality."]

[11] For example:

> If the contract promisor refuses to live up to her promise, should the creditor be entitled to specific performance or must she be content with court-determined damages.?
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> If a creditor fears that her debtor is about to do something which will render performance impossible, can she get preventive relief from the court, or must she wait for the breach to occur and then bring suit *ex post* ?
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> Are freely negotiated contracts necessarily just, or can an objective criterion of value determine bounds of unconscionability?

tort theory.[12] Also like contract, tort produces legal obligation; courts force both tortfeasors and recalcitrant contractual debtors to sacrifice their property[13] (part of their liberty).

Tort differs from contract, however, in that contract concerns voluntary acts ***designed to*** result in a loss of liberty. When a contract is concluded, some risk has been intentionally purchased and sold and some obligation deliberately assumed.[14] When a tort is committed, however, the liability-incurring act is typically not undertaken with the *intention* of incurring an obligation.[15] Whereas in contract law *parties* apportion risks, *before discovering whether they have occurred*, in tort adjudication a *tribunal* will allocate among the parties the cost of a perilous event *post facto* . In this special sense, tort obligations are not freely consented to. This important point deserves emphasis. In no meaningful way can a negligent tortfeasor be said to consent to compensating her victim. Commensurately, the victim of a non-negligent (or, for that matter, an insolvent) tortfeasor does not consent to *not* being compensated for her injury. Both tort liability and absence of liability are independent of meaningful consent[16]. Tort is in some ways more like criminal law than contract law.[17]

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[12] See , e.g., *Hammontree v. Jenner*, 20 Cal. App. 3d 528, 97 Cal. Rptr. 739 (1971) [no tort liability when unexpected epileptic seizure results in accident]

[13] Since the (relatively recent, in Western law) abolition of debtor's prison, courts will not directly deprive a person of her liberty if she refuses to abide by an obligation. Usually, severe threats against the person's wealth suffice.

[14] Even when a contract calls for instantaneous performance, risks (such as the risk of a drop in market value of the object sold, or of a modification in subjective value when a purchaser's tastes change) , are exchanged.

[15] In civilian parlance, contracts are juridical acts (*actes juridiques*), while torts are juridical facts (*faits juridiques*), reflecting these differing intentions.

[16] See R. POSNER, "The Ethical and Political Basis of Wealth Maximization", in his *Economics of Justice*.

[17] As the brief historical overview below shows, "trespass" is the formal foundation of criminal and tort law. The similarity is, of course, superficial, as the two areas of law are as different as private and public order. Tort law presents an aspect of corrective justice entirely lacking in criminal law, of course: in the former the aggrieved party receives the penalty, while in the latter the state enforces its *fiat*.

Since the interface between contract and tort will resurface throughout this paper, it is useful to note their inevitable technical interdependence.[18] Imagine a world where all persons susceptible of having conflicting interests could costlessly negotiate with each other. In this transaction-cost-free universe, an array of contracts would voluntarily allocate the risks of persons' interaction among themselves in a Pareto-optimal way[19]. For example, motorists wishing to travel at high speed could negotiate risks among themselves, and could purchase from slower motorists and pedestrians a promise to keep off the streets at the appropriate time in exchange for suitable payment. In case an "accident" occurred, the sharing of its costs would be determined entirely by these contracts, which will have allocated foreseeable risks. If a suit arises, it will be a contract suit, provoked by interstitial ambiguity or by the failure of a party to keep her word. In a free society, the court's role will consist of interpreting the contract [i.e. determining which risks had been assumed by which contracting party], and of holding the recalcitrant debtor to the payment she had freely agreed to.[20] Of course, *ex post*, this debtor would prefer not to have taken on the risk she had been "paid" to assume. Given that the accident has indeed happened, she will consider her *ex ante* compensation inadequate. This is natural: we all prefer to get

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For this reason, anarcho-libertarians often advocate replacing criminal law by tort law. See Bruce Benson, *Justice Without the State*, Pacific Research Institute for Public Policy, 1990. This thesis assumes away public goods problems, of course (who sues when the park or the roads are damaged ?). It also assumes away any need for *ex ante* coercive restraint. If X has destroyed the homes of my immediate neighbors A, B, and C (all of whom are too terrified or too gentle to sue X in tort), am I obliged to wait until X destroys my house in order to sue him? Only criminal law will in effect allow me to intervene in X's relationship with A, B, and C by having X arrested, thus preventing arson to my house. My thanks to Gary Lawson for suggesting this point.

[18] This important point was an implicit thesis of the seminal article of Ronald COASE, "The Problem of Social Cost", 3 *J. of L. and Economics* 1 (1960).

[19] W. PARETO, *Théorie d'Économie politique*. A distribution is Pareto-optimal if any voluntary reallocation of goods (i.e. that produces no loses, seen subjectively and *ex ante*) is impossible. Pareto-*optimality* has weak normative implications, because two Pareto-optimal allocations are non-Pareto-comparable in that a move from one to the other requires a coercive redistribution. See also *infra*, footnote 20.

[20] Art. 1134 of the French *Code civil* states, "Agreements lawfully formed are law for those who have made them."

something for nothing. If this *ex post* desire were judicially implemented, however, it would follow that Pareto-superior[21] contractual allocations would be ineffectual. In essence, contract would be of no legal value. This would frustrate the 'autonomy of the will' conception of man.[22]

Of course, our world is not the fluid utopia sketched above. 'Collisions' of interests, or accidents, occur between parties that could not have efficiently contractually allocated the risks of their behavior. Some such collisions are literal ones, i.e. on the public road. Others concern use of public water or air resources. [Note the dovetailing between the technological feasibility of privatizing a resource, on the one hand, and the viability of contractual, *ex ante* allocations of the risks of using them on the other.[23]] But of course in real life many contracts can and do arise.

The early Common law of Contracts was acutely sensitive to the resemblance of tort and contract as means of allocating risks, and to the moral and economic preferability of the latter when available. With the growing merchant trade of 15th Century England, courts began to hear complaints against persons professing a particular skill (say, carpentry), but who botched their jobs (say, by contracting to build a house which caved in shortly after its completion). There gradually developed a new action called *trespass for deceit* [note that 'trespass' is the basic *tort* action]. Courts typically assigned the risk of a cave-in to the builder, reasoning that plaintiff's rights had been trampled upon in much the same way as if

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[21] Pareto-*superiority* has great normative content. See *supra,* note 10. A distribution of goods [#1] is Pareto-superior to another [#2] if and only if at least one person prefers (as measured by her own standards, or utility function) #1, while no one prefers (again, as measured by their own utility functions) #2. On the differing normative contents of Pareto-optimality and Pareto-superiority, and the implications of this difference for Economic analysis of law, see M. KRAUSS, "Good as Gold? An Overview of Economic Jurisprudence", unpublished manuscript on file with the author.

[22] *Supra*, note XXX

[23] Were the road private, would contracts for its use be complete: i.e. might they establish a detailed system of loss allocation for all accidents? Arguably, these contracts would establish principles for allocation of accident losses that would, in essence, look like tort law rules. Thus, again, are tort and contract close cousins.

a stranger had walked onto his estate and smashed the building. To quote a foundational judgment:

> "If a carpenter [agrees to] make me a house good and strong and of a certain form, and he makes a house which is weak and bad and of another form, I shall have an action of *trespass on my case*."[24]

Note that the court is borrowing tort terminology. This is a classic recognition that both tort and contract assign risks, and that contract (voluntary, *ex ante* acceptance of risks) expands and tort (involuntary, *ex post* assignment of them) shrinks as technology (aided by law) permits free people to get together and exchange rights. Through cases like these, gradually the legal systems of free societies elaborated rules of interstitial interpretation of contracts, positing a given allocation of risks unless parties stipulated otherwise explicitly or impliedly.

This notion of 'interstitial interpretation' bears fleshing out. One can imagine a spectrum of contractual explicitness. At one extremity ("radical formalism"), only formal, explicit contractual clauses would be enforceable. At the other are "hypothetical contracts", characterized by wholesale judicial imposition of 'contractual' obligations to which (it is imagined) parties *would have* consented, even though there is absolutely no indication that they did, expressly or impliedly.

The idea that explicit contracts with implied terms (discoverable through typical interpretive methods) should be enforced denotes the concept of 'interstitial' obligations. This concept transcends radical formalism, but falls significantly short of endorsing hypothetical contracts. Intersitial interpretation mandates court enforcement only of contracts that are *actual* in parties' minds, though it requires that courts complete actual contracts where necessary, 'filling in the blanks' through traditional exegetic and

[24] Y.B. 14 Hy VI p. 18, pl. 58 (1436); quoted in Holdsworth, *History of English Law*, London, 1909, v. 3, p. 330. The italics are mine.

hermeneutic methods. This distinction between implied and hypothetical is quite important, jurisprudentially, for while enforcement of the former is dictated by respect for liberty, resort to the latter disavows individual liberty by imposing socially-maximizing allocations on (quite possibly unwilling) parties.[25]

It should be noted that a defense of 'radical formalism', i.e. a critique of including implied promises in the class of valid contractual obligation, is conceivable. A deontological argument for radical formalism could look like this:

> 1] Imprecision in contractual terms may sometimes be a deliberate way for one party (who may be endowed with greater information about, say, the state of the facts or the law) to get a concession without paying for it. In these cases there is no real meeting of the minds, since A expects that B is unaware that a particular clause will probably turn to A's advantage: A consciously refuses to 'fess up' to B for fear that B would refuse to contract at the proposed 'price'[26];
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> 2] It may well be that to require disclosure by A would be inappropriate from an efficiency perspective (reducing B's incentive to collect information, etc.).[27] Similarly, to force all contractual terms to be spelled out would be very expensive. But, even if true, this response is not available to a non-consequentialist, liberty-based defense of contract;
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> 3] Liberty would, then, be better served by radical formalism, according to which a contract is seen as a request from contracting parties to the State to coercively

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[25] See M. KRAUSS, "Good as Gold?" *loc cit supra*.

[26] 'Price' here refers, generically, to the consideration B is receiving for her promise.

[27] *See* A. Kronman, *Mistake, Disclosure, Information and the Law of Contracts*, 7 J. Legal Stud. 1 (1978)

enforce only explicit mutual promises. Nothing merely implied could thus be deemed to call for coerced enforcement.

The response to this critique is conspicuous. I assert that parties actually do not *desire*, generally, to be forced to spell out all possible contingencies by contract.[28] If parties prefer that the judicial reader behave intelligently, thereby inferring probably desired (as opposed to merely socially desirable) obligations, then a legal system which thwarts this desire is not a legal system respectful of liberty.

"Contracts" sections of European Civil Codes are prime examples of classical liberal backdrops for contracts. They provide non-compulsory[29] assignments of risk, based on an analysis of customary transactions. They are designed to lower transaction costs: parties can 'buy into' it cheaply and write simple contracts, or they can (if the default position of the code are unsuitable) draft their own fully contingent contract. In the French Civil code, contract occupies nearly 200 articles, while Delict (tort) is contained in merely five. The 2200-article Quebec code[30], inspired by the *Code Napoléon*, establishes (art. 983) that "obligations can be incurred through contracts or delicts". Contracts occupy the next 170 articles of the Code. Delicts [torts] are deliberately placed after contracts, as they are seen as a morally subordinate source of obligations[31]. Delicts are discussed in exactly four articles. The primary operative article, 1053, states simply:

> "Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill."

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[28] Indeed, painstakingly long contracts with 'everything spelled out' and all interpretive conventions explicitly itemized, are not illegal. Despite their legality, they are rarely if ever chosen by the parties. People *want* the court to engage in 'fill-in-the-blank' enforcement.

[29] The Code's allocations of risk are, in other words, not questions of "public order".

[30] selected because it has an official English version

[31] see *supra* Section II, TAN 15

The Common law reaches similar results, although it has done so more slowly and less efficiently[32]. Both systems carved out clear exceptions for minors and for the feeble-minded: mentally unfulfilled, these people are seen to be unable to bind themselves by contract. 'Tort-like' (i.e. judicially imposed) allocation of risks remains the rule for them until they attained the moral status of adults. This judicially imposed allocation resembles 'hypothetical contracts', in that it abstracts from subjective desires. And, of course, tort would similarly remain for areas where contract was simply not feasible.

Clearly, as free society progressed, contract (express and implied) would become the prime allocator of risk while tort (allocation of 'hypothetically' agreed-to risks) recedes to a necessary, but secondary, background.

III Two models of Tort law

Using Weberian methodology[33] for heuristic purposes, it is possible to set up a continuum of "ideal" images of Tort law as they relate to these underlying premises of political philosophy, then briefly trace the presence of these ideal types throughout the history of western tort law.[34]

At one pole we find what may be entitled a *moral* tort system. A moral tort system presupposes the wickedness and technical infeasibility of attempts to socially engineer the

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[32] See M. KRAUSS, "*Max Weber* ", 62 *Canadian Bar Review* 451 (1984).

[33] See *Max Weber on Law and Society*, M. RHEINSTEIN, ed., and intro., 1954, passim.

[34] Also relevant here is the pathbreaking work of Ernest Weinrib in ascertaining the inner essence of tort law. See., e.g., "Toward a Moral Theory of Negligence Law", 2 *J. of L. and Philosophy* 37 (1983); "The Insurance Justification and Private Law", 14 *J. of Leg. Studies* 681 (1985); "Understanding Tort Law", 23 Val. U. L. Rev. 485 (1989)

course of human conduct.[35] Far from being a master planner, the court here is seen as a necessary but non-omniscient arbiter between (at least) two citizens having a disagreement. One of these citizens has suffered a loss and wishes that it be shifted to the other(s). The court must, if it decides to transfer this loss, have reasons for doing so. These reasons must be understandable for the parties to the dispute. Indeed they must, at least in some deep way[36], appeal to common values, for the court is incapable of supplementing these with Platonic decrees. This appeal to values is simultaneously an appeal to the intelligence of free and responsible people. It communicates that, if they learn from their experience and conform to common values, they may avoid tort liability. In a Kantian sense[37], this kind of tort law treats parties as *ends*. It tolerates no *ex ante* interference with people's liberty unless they have consented to limitations of their liberty[38], or have manifested their intention to violate other peoples' rights.[39]

At the other pole of this coninuum is an *amoral* tort system with premises that are very different. Tort law is ascribed no necessary moral content and makes no appeal to social values. Rather, tort law is a means of manipulating sanctions through commands, in

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[35] On the perils that await those who would plan human interaction, see, e.g., F. HAYEK, ed., *Collectivist Economic Planning: Critical Studies on the Possibilities of Socialism* , London 1935, and *The Fatal Conceit*, 1989.

[36] i.e. such that, even though the losing party may disagree with the court's interpretation of the facts, or with the way the rule is enunciated and applied in the instant case, she agrees with the Rule of Law if she is a moral person.

[37] Kantian moral theory holds that the basic moral requirement is to act with respect for persons. If we think of a person as being capable of choices, plans and projects of her own, the idea of respect may be interpreted in the following way. One should never treat another person purely as a means to your own goals and objectives, but should always respect the fact that the person has her own goals and objectives. Theories of this kind place high emphasis on liberty, and stress the importance of not interfering with the liberty of a person merely because it would make her (or, *a fortiori* , someone else) better off. Liberty should be interfered with only to restrain violations of liberty. *See* G. Fletcher, "Law and Morality: A Kantian Perspective", 87 Colum. L. Rev. 533 (1987)

[38] See supra, discussion of contracts.

[39] This justifies treating intentional torts as a separate rubric. It also constitute's the moral tort system's sole rationale for prior restraints.

Skinnerian[40] fashion, so as to achieve a social optimum which by definition the court believes it can locate. This paradigm is of a constructivist[41] and positivist tort law. Parties affected by (and readers of) judgments need not morally 'internalize'[42] them any more than the rat 'internalizes' the structure of its maze. In a Kantian sense, this system treats parties as *means* to a social end which the court has discovered and believes is good. Liberty is of secondary (if any) importance. There is, additionally, no particular requirement that the planner's social optimizing be corroborated by customary opinion or morals.

Note that this tort system accommodates both prior regulation of human conduct and after-the-fact liability for unregulated conduct[43]. The constructivist choice between these two methods is a technical one. If the regulator possesses enough information, she can issue commands in advance. If not, the additional information provided in each case will supply clues to the socially optimal solution. Indeed, there seems to be a 'natural' preference for *ex ante* regulation in this view, for at some point information should become 'thick' enough to permit efficient prior control of behavior.

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[40] B.F. SKINNER, *Beyond Freedom and Dignity*, New York 1975. One can scarcely imagine two thinkers more methodologically antagonistic than Skinner and Hayek (see supra)

[41] 'Spontaneous order' is Hayek's explanation of how legal rules necessary for the servicing of the market order are the product of spontaneous judicial decision-making, analogous to the generation of prices in the market. 'Constructivism', on the contrary, imposes a patterned, planned order on the market. Constructivism assumes a degree of knowledge that, to 'Austrian' economists like Hayek and Mises, is not available. For an accessible introduction to Austrian thought, *see* N. Barry, *On Classical Liberalism and Libertarianism*, New York, 1987, ch. 4. For a different type of critique of patterned (as opposed to spontaneous) structurings of the social order, *see* R. Nozick, *Anarchy, State and Utopia*, Cambridge MA, 1975.

[42] see H. L. A. HART, *The Concept of Law* [Mr. Galbraith, describe briefly Hart's 'internal point of view' with appropriate cites]

[43] See, on this point, D. WITTMAN, "Prior Regulation vs. Post Liability": The Choice Between Input and Output Monitoring", 6 *Journal of Legal Studies* 193 (1977).

The first ideal type of tort law is portrayed by our historical bases for liability. In Anglo-American law, two distinct types of acts could lead to tort liability.

1• On the one hand, individuals were liable for damage that ensued when they deliberately and knowingly performed an act that violated[44] another person's property rights. This is the rubric of *intentional torts*, of which trespass, assault and battery are the most well-known.[45]

Many American law students study *Vosburg v. Putney* [46] as their first case in Torts. In that case, a school boy kicked a companion in the classroom after order had been called. The 'kicker' had no desire to cause injury. Unbeknownst to him, however, the 'kickee' was recovering from an infection in just the spot where the contact occurred. The blow reactivated his wound, eventually resulting in permanent impairment. Defendant was held liable for the entire injury, despite total lack of knowledge of the plaintiff's 'egg-shell skull' status, since he had knowingly violated plaintiff's person. In an interesting aside, the court suggested that its decision might have been different had the kick occurred during recess on the playing field.[47]

The underlying propositions of *Vosburg* are worth fleshing out. Clearly the court felt that plaintiff, regardless of his fragility, retained his right to bodily integrity. Sitting peacefully in his seat in class after order had been called, he had given no sign, express or tacit, of consent to yield this right. His presence on the playing field during recess, on the

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[44] Civil law quite clearly distinguishes between delict (intentional invasions of others' property), for which the actor's "fault" is in deliberately committing the act itself, and quasi-delict, for which "fault" translates as negligence (see *supra*).

[45] See, e.g., D. DOBBS *et al.*, *Prosser and Keeton on the Law of Torts*, 5th ed., St. Paul, MN, 1984, pp. 39-66

[46] *Vosburg v. Putney* , 50 N.W. 403 (1891) (Wis.)

[47] Mr. Galbraith, find the page and type in the exact quote here, along with the complete reference.

other hand, might well have conveyed an implied authorization to engage in usual, accepted, on-the-field roughhousing. The court emphasized that a crucial factor in the case was defendant's intention to strike plaintiff: had their bodily contact been accidental, the court's reasoning would have been vastly different.

Vosburg symbolizes, I think, the moral content of the law of intentional tort. On the one hand, individuals are deemed to possess rights that may not be traded off by the court. Deliberate violation of these rights by a responsible person[48] is a tort[49] and requires that the tortfeasor make good for all damage caused.[50]

Note that the court did not accept a utilitarian defense. For example, it might have been argued by defendant that plaintiff was the 'least-cost-avoider' of the damage, as he alone knew of his injury and could have stayed home or worn a special leg brace designed to protect the tender spot until healing was complete. Thus, wealth could arguably have been maximized if plaintiff had protected himself, or at least if he had advertised his disability. If

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[48] Defendant in *Vosburg* was a child, but was old enough to know that it was forbidden to kick another person without consent. In other words, defendant was old enough to be able to commit an intentional tort. Note that defendant was probably *not* old enough to be *negligent* during the commission of a non-intentional invasion of rights.

[49] More precisely, deliberate performance of an act that violates these rights is a tort. Thus, if X deliberately chops down fifty trees, honestly thinking that he owned them while in reality the trees and the land belong to Y, he will be liable in damages for his *intentional* tort of trespass. See, e.g., *Maye v. Tappan*, 23 Cal. 306 (1863). Oliver Wendell Holmes justified this result in his classic book, *The Common Law* (1881) in these words:

> "When a man goes upon his neighbor's land, thinking it is his own, he intends the very act or consequence complained of. He means to intermeddle with a certain thing in a certain way, and it is just that intended intermeddling for which he is sued....[H]e does intend to do the damage complained of. One who diminishes the value of property by intentional damage knows it belongs to somebody. If he thinks it belongs to himself, he expects whatever harm he may do to come out of his own pocket. It would be odd if he were to get rid of the burden by discovering that it belonged to his neighbor. " [from p. 97]

[50] The response "the defendant did not *cause* the damage; rather the plaintiff's 'egg-shell-skull' fragility *caused* it" must be addressed. As I assert below, causation here is indissociable from moral culpability. If plaintiff has a property right in his leg, and in no way consented to its deliberate invasion by defendant, then only the defendant is morally culpable in his choice to violate rights. The plaintiff's refusal to pad his leg is not morally culpable, as it violates no person's rights. Only the defendant has thus *caused* the damage.

the court had allowed this sort of a defense against an *intentional* kick, it would in essence have denied plaintiff's property right in his leg.[51]

On the other hand, consent (express or implied, as by presence on the playground) to abandonment of rights is possible, and bars compensation. Such consent would be part of a contract reallocating the risk of damage to the leg. The paradigm is of free individuals who own property which, absent their consent[52], may not be deliberately taken by anyone else.

2• But most disputes resulting in tort litigation are not the result of intentional torts. Most 'collisions' are 'accidental', i.e. unintended by both parties. The moral stance of the law of intentional torts doesn't concern such cases.[53] Who should bear the loss here?

For our purposes, two possible solutions may be distinguished. One solution, divorced from common-sense morals, essentially identifies causation as the sole determinant of liability. It suffices[54], it is thought[55], to determine who harmed whom; the author of the

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[51] See generally, on this point, the seminal article by G. CALABRESI & D. MELAMED, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral", 85 *Harvard L. Rev.* 1089 (1972)

[52] Thus, the American Law Institute's Restatement (Second) of Torts §60 (with reference to §892 C (1)), has adopted this view regarding suits following boxing matches. If the combat was consented to, then the damage incurred by each boxer is not actionable as an intentional tort. Consent is thus the quintessential defense to intentional tort. See, e.g., *Hart v. Geysel*, 159 Wash. 632, 294 P 570 (1930). Consent is not, of course, the *only* justification in cases of intentional tort; see *Courvoisier v. Raymond* , supra (self-defense).

[53] Holmes pointed out [in*The Common Law*, p. 97]:

> "It is a very different thing to say he who intentionally does harm must bear the loss, from saying that one from whose acts harm follows accidentally, as a consequence which could not have been foreseen, must bear it."

[54] The word masks the immense, indeed (I think) insuperable difficulty of determining causation amorally. In *Courvoisier v. Raymond*, supra, for example, who 'caused' the shooting, the terrorized jeweler or the onrushing sheriff? Try to answer this question without determining which of the parties acted wrongfully... Ronald Coase pointed out almost thirty years ago (loc. cit., supra) that, in tort disputes between two people, causation divorced from evaluation of behavior is perforce bilateral and therefore unhelpful as an arbiter of liability.

[55] See, e.g., R. EPSTEIN, ."A Theory of Strict Liability", 2 *J. of Leg. Studies* 151 (1973); "Defenses and Subsequent Pleas in a System of Strict Liability", 3 *J. of Leg. Studies* 165 (1974).

harm is then held liable to the sufferer, even if the former's act is innocent or morally appropriate.

Another opinion would hold causation to be a necessary but not a sufficient criterion for tort liability. This alternative refuses to transfer losses resulting from possibly tragic accidents from the "natural" victim to anyone else unless the proposed transferee has misbehaved. This is, of course, the negligence standard, seemingly more morally laden than its strict-liability alternative.

Some writers feel that American Common law initially instituted strict liability as the rule for accidental torts, and only (relatively) recently reverted to negligence.[56] [Some of these authors thus see the recent drift towards absolute liability, to be discussed below, as a return to the origins of the Common law[57]]. This thesis would, if true, put the Common law at odds with Civil law countries, virtually all of whose Natural-Law-inspired 19th Century Civil Codes clearly establish negligence as the basic rule of liability.[58] Indeed, many socialist authors view these codes as bourgeois tools: to them, the rise of the negligence standard in American tort law was a subsidy for the protection of infant industries who would have been unable to prosper had they been forced to compensate those whose lives they ruined.[59]

This thesis that negligence supplanted strict liability as the basis for unintentional torts can be attacked as being historically confused. The basic problem arises from the 'forms-of-

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[56] See, e.g., EPSTEIN, *Cases and Materials on Torts* , 5th ed., Boston 1989, pp. 61 ff.

[57] See, e.g. C. GREGORY, "Trespass to Negligence to Absolute Liability", 37 *Virginia L. Rev.* 359 (1951)

[58] See supra, citing the Quebec code. Mr. Galbraith, fill this in with various civil code cites.

[59] E.g., M. HORWITZ, *The Transformation of American Law, 1780-1860* , New York 1977

action' system unique to Common law pleadings.[60] Forms of action had permitted Royal courts to assert their dominance over baronial tribunals following the Norman conquest. As is well known, if a subject could pigeon-hole his complaint against a fellow citizen into one of the Royal forms of action then upon payment of the appropriate fee the Chancellor's representative would issue a writ to the local constable ordering that the defendant be brought before the King's court, where law *common to the land* would be administered. For political reasons relating essentially to the shifting balance of power between the King and local lords, the number of forms of action became limited. The main form of tort action was *trespass*, related as it was to crimes committed on land (ultimate title to which was vested in the King), and thus politically amenable to Royal jurisdiction. The writ of trespass gradually became fossilized, and in the 14th Century a political compromise created the new writ of *[Trespass on the Similar] Case*, destined to cover trespasses in which the harm did not result 'directly' from physical force.[61]

When old cases are read with a view to seeing whether strict liability or negligence was the operative rule of liability, the problem of disingenuous pleadings (caused by Plaintiff's obligation to phrase the facts so as to satisfy a form of action, and Defendant's concomitant duty to shape facts to satisfy a formulary defense) is often an insuperable obstacle to understanding. Thus, for example, if negligent conduct by X directly results in physical harm to Y, the appropriate remedy was an action of trespass. Negligence was never mentioned in the direct pleadings; whatever the real facts, it had to be *alleged* (under pain of dismissal of the suit for lack of jurisdiction by the Royal courts) that "defendant assaulted,

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[60] See, generally, J. BAKER, *An Introduction to English Legal History*, 2d ed, London 1979, chapter on torts.

[61] The textbook example distinguishing Trespass from Case concerns the person cutting down a tree which falls on X's land. If the tree actually falls on X, this is a trespass. If it hits the ground, then rolls into X, it is a trespass. But if it rolls to a halt, and one second later hapless X stumbles over it, this is [trespass on the] Case, and a suit in Trespass will be thrown out! This isn't logical, but no one has ever accused the Common law formulary pleading system of being logical...

beat, and wounded the plaintiff with force and arms".[62] If defendant wished to invoke her lack of negligence as a defense[63], his written defense would (again, under pain of rejection) simply deny that the damaging act ever happened! Orally, the jury would of course hear the claims of negligence and lack of same, and would make its decision based on the parties' behavior. But to get to the jury a very different written record (all we have today) was created.

For centuries, then, the law relating to accidents was suppressed. What happened before the jury was treated as a question of fact and not entered on the record. In the casebooks, the question of negligence only presented itself in exceptional cases where, by mistake, the defendant invoked his lack of fault by special plea (i.e. in answer to the claim of trespass) instead of denying that the accident ever occurred and then waiting to present the defense of lack of negligence to the jury. These mistakes[64] resulted in a rejection of the defense as unfounded in law, since the court officially had jurisdiction only to decide whether the trespass act had or had not occurred. Clearly, negligence might well be a basic rule of tort law, but to invoke it to the jury one had to indulge in word games in the written record.[65]

Nevertheless, clues to the omnipresence of the negligence rule remain.[66] How else to explain, for example, that many suits for wounding of horse (an 'intentional' tort of trespass to property), were laid against defendants described by the courts as *blacksmiths* , who responded in the written pleadings with denials that the incident ever occurred! Clearly, the

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[62] For an analysis of the epistemological wisdom of these formulary fictions, see A. KRONMAN, *Max Weber*, Palo Alto 1983 pp. 88 ff.

[63] Accidents without negligence are and have been known in the pleadings as "inevitable accidents". Of course, every accident can be avoided, if enough resources are devoted to prevention ....

[64] See, e.g., *Weaver v. Ward* , Hobart 134, 80 Eng. Rep. 284 (K.B. 1616)

[65] See also, on this point, ARNOLD, "Accident, Mistake and the Rules of Liability in The Fourteenth Century Law of Torts", 128 *U. of Pennsylvania L. Rev.* 361 (1979)

[66] *Id.*

true claim was that the smithy had negligently shoed a horse, but the claim had to be formulated to abstract from the negligence.

When finally the courts tired of these games and decided that Trespass would henceforth be reserved for intentional torts[67], the action of Case was at last used to try other tort suits, using a negligence standard.

Sensitive American scholarship has duplicated these English findings. Professor Gary Schwartz read and analyzed *every* nineteenth century tort case decided in California and New Hampshire. Not only did he find widespread indicia that negligence was an operative principle of tort law, he also found no proof for the Marxian subsidy thesis.[68] Indeed, the first cases to explicitly invoke negligence involved individuals, not corporations.[69] When the clutter of the forms of action is cleared away, classical tort law is in the business of evaluating conduct. Indeed, once the forms of action were abolished allegations of negligence spread from the writ of 'Case' to all ordinary declarations in tort which did not allege intent.

Only a negligence rule respects man's character as a moral animal, free to act but *obliged* to act with as much concern for his neighbor's welfare as for his own. Only a negligence rule makes questions of causation, linking human action to results, meaningful. Holmes made this abundantly clear in *The Common Law* :

> "An act is always a voluntary muscular contraction, and nothing else.....

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[67] See *Williams v. Holland* , 10 Bing. 112, 131 Eng. Rep. 848 (1833)

[68] G. SCHWARTZ, "Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation", 90 *Yale L. J.* 1717 (1981)

[69] See, e.g., *Brown v. Kendall*, 60 Mass. (6 Cush.) (1850), [defendant accidentally hit plaintiff with stick while attempting to separate plaintiff's and defendant's dogs]. Chief Justice Lemuel Shaw's decision in this case is an admirable moral grounding for the negligence rule.

When a man commits an assault and battery with a pistol, his only act is to contract the muscles of his arm and forefinger in a certain way, but it is the delight of elementary writers to point out what a vast series of physical changes must take place before the harm is done. ...Not only natural causes, but a living being, may intervene between the act and its effect. *Gibbons v. Pepper* [70], which decided that there was no battery when a man's horse was frightened by accident or a third person and ran away with him, and ran over the plaintiff, takes the distinction that, if the rider by spurring is the cause of the accident then he is guilty. In *Scott v. Shepherd* [71]... trespass was maintained against one who had thrown a squib into a crowd, where it was tossed from hand to hand in self-defence until it burst and injured the plaintiff. Here even human agencies were a part of the chain between the defendant's act and the result....

Now I repeat, that, if principle requires us to charge a man in trespass when his act has brought force to bear on another through a comparatively short train of intervening causes, in spite of his having used all possible care, it requires the same liability, however numerous and unexpected the events between the act and the result. If running down a man is a trespass when the accident can be referred to the rider's act of spurring, why is it not a tort in every case, ... seeing that it can always be referred more remotely to his act of mounting and taking the horse out?

Why is a man not responsible for the consequences of an act innocent in its direct and obvious effects, when those consequences would not have followed but for the intervention of extraordinary, although natural events? The reason is, that, if the intervening events are of such a kind that no foresight could have been expected to look out for them, the defendant is not to blame for not having done so....

The difference taken in *Gibbons v. Pepper*...is not between results which are and those which are not the consequences of the defendant's acts: it is between consequences which he was bound as a reasonable man to contemplate, and those which he was not. Hard spurring is just so much more likely to lead to harm than merely riding a horse in the street, that the court thought that the defendant would be bound to look out for the consequences of the one, while it would not hold him liable for those resulting merely from the other; because the possibility of being run away with when riding quietly, though familiar, is comparatively slight. If, however, the horse had been unruly, and had been taken into a frequented place for the purpose of being broken, the owner might have been liable....

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[70] [91 Eng. Rep. 922 (1695)]

[71] [96 Eng. Rep. 525 (1773)]

To return to the example of the accidental blow with a stick lifted in self-defence, there is no difference between hitting a person standing in one's rear and hitting one who was pushed by a horse within range of the stick just as it was lifted, provided that it was not [reasonable] under the circumstances in the one case to have known, in the other to have anticipated, the proximity. In either case there is wanting the only element which distinguishes voluntary acts from spasmodic muscular contractions as a ground of liability. In neither of them, that is to say, has there been an opportunity of choice with reference to the consequence complained of,- a chance to guard against the result which has come to pass. A choice which entails a [reasonably] concealed consequence is as to that consequence no choice.[72]

The general principle of our law is that loss from accident must lie where it falls....[R]elatively to a given human being anything is accident which he could not fairly have been expected to contemplate as possible, and therefore to avoid....If this were not so, any act would be sufficient, however remote, which set in motion or opened the door for a series of physical sequences ending in damage; such as riding the horse, in the case of the runaway, or even coming to a place where one is seized with a fit and strikes the plaintiff in an unconscious spasm. Nay, why need the defendant have acted at all, and why is it not enough that his existence has been at the expense of the plaintiff? **The requirement of an act is the requirement that the defendant should have made a choice.** .... Unless my act is of a nature to threaten others, unless under the circumstances a prudent man would have foreseen the possibility of harm, it is no more justifiable to make me indemnify my neighbor against the consequences, than to ... compel me to insure him against lightning."[73]

Another virtue of the negligence standard is that it regulates the relationship between persons on the basis of equality. It requires an objective comparison of the *ex ante* risk and the cost of prevention.[74] *Ceteris paribus,* the greater the risk of injury and the more serious

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[72] The word 'reasonably' is added. Does it transform the text? Obviously not. Any consequence of a choice is foreseeable for a person with enough imagination. Clearly, Holmes is stating that meaningful choice requires that reasonably probable outcomes of one's action be considered.

[73] *The Common Law*, pp. 92-96. Citations omitted, and boldface added.

[74] The objectivity of the evaluation of defendant's behavior has allowed courts to operationalize negligence using an explicit calculus: see United *States v. Carroll Towing*, 159 F. 2d 169 (2d Cir., 1947). [Mr. Galbraith: provide quote and page from the case]

From cases like *Carroll Towing* the economic analysis of tort law has been spawned. See, e.g., R. POSNER & W. LANDES, *The Economic Analysis of Tort Law*, Cambridge MA, 1987; S. SHAVELL, *Economic Analysis of Accident Law*, Cambridge MA, 1987.

the amount of potential harm to strangers, the more care must be taken by a moral person.[75] Thus the defendant must implicitly acknowledge not only that the persons he might affect have property rights, but also that their interests have the same claim to consideration as his own. These persons cannot insist (as is implied by strict liability) that their holdings are more valuable than the defendant's freedom. Furthermore, by measuring the risks and costs objectively a tortfeasor is precluded from invoking her subjective capacities as justification for a preferential vantage point for the determination of her relationship with others.[76]

Along with a negligence rule, three other elements seem inherent to a moral, (classical) liberal approach to tort law.

1• First among these is the *requirement of causation*. In a liberal society, it seems clear that negligent behavior alone cannot ground liability. Tort law must fix dividing lines between those cases where man is liable for harm he has done, and those where he is not liable. The act for which a tortfeasor is sued must cause injury if tort is to be distinguished

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[75] Thought experiments bear this out. Is turning one's head for 0.5 seconds to speak to a passenger while driving down an isolated Wyoming road (low probability of accident, low cost of accident should one occur) as negligent as performing the same act while travelling on Broadway during a New York City rush hour?

[76] A motorist rounds a bend to find unexpectedly, obtstructing her path two objects, one of which she must strike with her car (say, a prize animal and a cheap piece of furniture). Would we blame the motorist for directing her car towards the less valuable object? But what of the owner of the cheap furniture, who placed a high subjective value on it? Symmetrically, a tort victim is precluded (as she *should not* be in a low transaction cost, contractual situation) from invoking the high subjective value she places on her lost property to limit the tortfeasor's freedom.

Subjective tastes and capacities will of course suffer as a consequence of reliance on market-determined values. These values in turn depend to some extent of *ex ante* distributions of resources. See Krauss, *op cit supra*, note 20. In a relatively competitive economy, however, individual influence on market prices is slim to non-existent. Thus, reliance on objective values in non-consensual situations does indeed treat the parties equally, and with respect.

from state regulation of human behavior *via* criminal law[77]. The requirement of causation is an expression of the transitivity of the defendant's injuring the plaintiff.[78]

The causation requirement poses sticky problems in limit cases. In *Summers v. Tice* [79], for example, plaintiff was accidentally injured by one of two hunters who negligently shot in his direction, thinking he was an animal. Plaintiff was unable to identify which defendant's gun shot the pellet that pierced his eye.[80] He nonetheless obtained a verdict against both defendants, each of whom was obliged (and failed) to prove that his shot did *not* cause the harm.[81] This "alternate" liability appears justified by the facts that defendants were hunting together and were *both* negligent. It seems appropriate to transfer to them the burden of disproving causation, because their wrongful actions hurt the plaintiff[82] and because such a move eliminates the moral hazard of multiple tortfeasors misbehaving together and thereby avoiding tort liability.[83] On the other hand, it is clear that

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[77] Tort law partakes of private ordering; it involves people morally arranging property rights in a positive-transaction-cost society (again, if transaction costs were nonexistent, all such arrangements would be contractual -- see *supra*, [Mr. Galbraith: provide page] Criminal law is public ordering; it implies state coercion of individuals. It does not require that any damage be in fact caused. Unsuccessful attempts to cause damage to others are criminal acts.

[78] See generally, on this question E. WEINRIB, "Causation and Wrongdoing", 63 *Chicago-Kent L. Rev*. 407 (1987).

[79] *Summers v. Tice*, 33 Cal. 80, 199 P.2d 1 (1948)

[80] More precisely, since the burden of proof in private law is the "preponderance of evidence" standard, and since each shooter was 50% likely to have caused the injury, the plaintiff was unable to establish that it was probable (i.e. more likely than not) that any one defendant injured him.

[81] This is an example, albeit an atypical one, of "joint and several liability", to be discussed infra.

Some may object that the shifting of the burden of proof is an indirect way to avoid the causation requirement. Does a classical liberal requirement of causation require a reversal of *Summers v. Tice* ? This is a close case, but I don't think so. Here the negligent act of one defendant has caused harm. The negligent act of the second defendant has prevented plaintiff from proving that the first defendant caused him harm. Analytically, this resembles the collision case where two cars hit a third (see infra), and where findings of joint and several liability have appeared non-problematic.

[82] See note 80, *supra*

[83] It is true that this argument is a consequentialist one: it doesn't *directly* argue in favor of an absolute (deontological) moral tort rule. However, consequentialist arguments can often be offered to reinforce a case

had evidence established that the pellet probably came from one defendant's gun, the other would have been exonerated in tort.[84]

A corollary of the causation requirement is that joint and several liability[85] only be granted in limit cases[86], and for "collective torts"; i.e. where joint action causes damage.[87] Holding two people liable for damage when, at most, one of them has acted wrongfully, is incompatible with the moral character of tort law.[88]

2• Tort law should *play second fiddle to contract law*, for parties are better able to implement their rights than is the state.[89] Thus, if two parties allocate risks between themselves by valid contract, there is no role for tort law. If tort law becomes, on the contrary, the judicial means to alter contracts[90], then its property/liberty nexus will have been turned topsy-turvy. The *Gynecoligists and Obstetrics* case[91] is a case where contract

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built on deontological moral grounds. Here it seems clear that negligent violations of natural rights to person and property would be encouraged by dismissing plaintiff's suit.

84 Philosophers, but not philosophically oriented jurists, at times seem baffled by this. See, for example, J. THOMSON, "Remarks on Causation and Liability", 13 *Philosophy and Pub. Affairs* 101 (1984) [arguing that both should be held liable, even if it is proven that the pellet came from one rifle]. I assert that this is because they have no deep understanding of tort law.

85 Under joint and several liability, each of several defendants is held liable for the full amount of damage, with the proviso that plaintiff may not recover in total any more than the damages actually suffered. The effect of joint and several liability is to shift to solvent co-defendants the risk of other codefendents' insolvency. If liability were purely 'several' (or divisible), this risk would be born by the plaintiff.

86 A similar kind of limit case to that of *Summers v. Tice* is the traffic accident where drivers A and B negligently collide with innocent driver C. C, rendered unconscious by the crash, is unable to determine what proportion of her damages are due to each of the tortfeasors. Indeed, it may be the case that one driver has caused virtually all the damage. Both will be held liable, jointly and severally, nonetheless.

87 E.g., A and B are drunk, and negligently paddle a canoe until it strikes C's dock, damaging it.

88 As where, for example, the manufacturer of a medical instrument which breaks inside the patient's body is held jointly and severally liable with the surgeon, despite the fact that neither has been shown to be negligent and that no joint action was involved. See *Anderson v. Somberg*, 338 A. 2d. 1 (N.J. 1975), *cert. denied,* 423 U.S. 929 (1975)

89 See supra, Part II.

90 I.e. obtained without force or fraud.

91 *supra*

is present, and should dominate. *Courvoisier* [92] is an example where recourse to contract is impossible, so tort governs.

3. Tort law should be concerned with correcting injustices caused by a tortfeasor's damaging abuse of his liberty. Thus, the tort victim should never receive an award greater than the damages she has suffered. *Punitive damages* in tort[93], in many ways a distinctly American phenomenon[94], impart an instrumental, criminal tint to tort law. They change its nature from private ordering to state regulation.[95]

The Unites States is also virtually alone, in the West, in its refusal to allow winners of tort suits to recover court costs from losers. This means that in the absence of punitive damages the compensation received, if any, will necessarily be insufficient to repair the harm. Additionally, the contingent fee arrangement (also virtually unique to the USA) ensures that successful plaintiffs will come up some fixed fraction (typically one-third) short of full recovery. Both these factors make some punitive award attractive as a way to approximate full insurance-style compensation. [See also *infra*, where other ways to achieve this goal are discussed.] Finally, for all practical purposes the USA is alone in its

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92 *supra*

93 i.e. damages over and above the amount judged to be necessary to compensate the victim for her loss.

94 Civil codes typically do not allow punitive damages as a matter of course. Cite art. 1074 CCQ, for example.

95 It is refreshing that the Supreme Court has finally accepted to judge , in the case of *Pacific Mutual Life Insurance Co. v. Haslip* [Mr. Galbraith; retrieve docket number] whether punitive damages in tort cases are constitutional. The implication of this paper is that the penalty transforms the nature of tort law, and should thus serve to set off the anti-statist safeguards (against double jeopardy, heightening the required burden of proof, entitling the 'accused' to a presumption of innocence) provided for by the constitution in public adjudication. See *Browning-Ferris Industries of Vermont v. Kelco*, 845 F2d 404 (1988) [2nd Circuit], 1989 Supreme Court Docket # 88-556, June 26, 1989. [indicated, *obiter dictum*, that punitive damages may violate due process requirements of the Fourteenth Amendment]

insistence that tort liability be essentially the domain of the jury: jurors arguably view punitive damages as a lottery that they themselves may win someday....[96]

IV The Shift of Models in Modern Tort law

Many recent developments in tort law can be usefully understood as depicting a paradigmatic change whereby the 'moral' idea of tort, centered on property and individual freedom, is abandoned in favor of a tort system that is a component part of a constructivist, regulatory, public-centered legal structure. In this part of the paper illustrations of this paradigm shift are offered.

A. Products Liability Law

Many suits for what is now known as Products liability are intrinsically contract problems. If I think my new car is a 'lemon', I also think that my seller (and, through her, the manufacturer) has misperformed her implied contractual obligation to deliver adequate goods.[97] Tort law more properly gets involved when no explicit or implicit contractual link (i.e. no agreed-upon allocation of risks) binds the victim to the tortfeasor.

In *Thomas v. Winchester* [98], a package of the poison belladonna was incorrectly labelled as a therapeutic drug by a manufacturer, who sold it to a pharmacy. The latter sold

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[96] See R. NEELY, *The Products Liability Mess*, 1988.

[97] This is the traditional Civil law solution to consumer cases. See, e.g., *General Motors of Canada v. Kravitz*, [1979] 1 S.C.R. 790 [Quebec case in the Supreme Court of Canada]. This is vastly superior, intellectually, to a tort treatment. Surely there has been explicit assumption of risks, in a low-transaction cost setting. Qualifying cases like these as torts cases dulls one's intuitive idea of what tort is, thus contributing to the eventual erosion of the moral idea of tort.

[98] *Thomas v. Winchester*, 6 N.Y. 397 (1852)

it to Thomas, who gave it to his wife. She took it and was injured. The manufacturer was, uncontroversially, held liable to the woman. It is obvious that the manufacturer knew the pharmacy would resell the drug, and that its implied warranty to the pharmacy about the product's contents was destined to benefit the ultimate consumer.[99] In *Macpherson v. Buick* [100], the defective wheel of a brand new car collapsed, injuring its driver. Again, if the legal jargon is cleared away it becomes clear that the car was not as represented (implicitly or explicitly) by Buick[101], and that such representation was relied upon by the plaintiff.

Holdings like these seem congruent with moral paradigms of tort and contract, traced earlier. A shift in paradigms does occur, however, in a series of New Jersey and California judgments[102] based on illiberal legal scholarship of the 1950's and 1960's. As George Priest has shown[103], influential law professors like Friedrich Kessler denigrated contracts morally and in economic theory, as necessarily iniquitous products of "unequal bargaining power" (resulting, therefore, in oppression of weak consumers by strong manufacturers).[104] Paternalistic direction of human conduct became an favored substitute for private ordering to these authors -- if the legislator would not accomplish this then the

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[99] England, unlike the United States or Civil law countries, has been notoriously inflexible when it comes to seeing contractual rights as passed on to third-party acquirers of goods. See K. ZWEIGERT & H. KOTZ, *An Introduction to Comparative Law*, 2nd edition, v. II, London, 1987, pp. 142 ff. This inflexibility , or inability to see the economic equivalent to contractual allocation of risks, may have contributed to the need felt by English courts to "tortify" much of Products liability. See, e.g., *Winterbottom v. Wright*, 10 M. & W. 109 (Ex. 1842).

[100] *Macpherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916)

[101] The manufacturer, through its representations as to the nature of the product sold, is seen as contractually warranting that the car is fit to drive: if it is not when it leaves the factory, the manufacturer is liable regardless of the cause of the defect, as he has impliedly assumed the risk involved.

[102] E.g.: *Henningsen v. Bloomfield Motors*, 32 N.J. 358, 161 A. 2d 69 (1960) [N.J. Supreme Ct.]; *Greenman v. Yuba Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897 (1962) [CA Supreme Ct.];

[103] G. PRIEST, "The Invention of Enterprise Liability: A Critical History of the Foundations of Modern Tort Law", 14 *J. of Leg. Studies* 461 (1985)

[104] see Priest, supra p. 461. Today, of course, Ralph Nader is the most well-known advocate of state allocation of risks in replacement of contracts. See, e.g., R. NADER, "The Assault on Injured Victims' Rights", 64 *Denver U. L. Rev.* 625 (1988)

courts could, by substituting tort judgments for contract law. Indeed, Tort theory was revolutionized as an instrument of state planning: leading authors like Fleming James[105] and William Prosser[106] insisted that absolute liability would serve as cheap risk-spreading (i.e. third-party insurance) by (wealthy) manufacturers, favoring (poor) consumers unable to purchase first-party insurance.

This theory, based on catastrophically incompetent notions of what insurance is[107], has triumphed today. Products liability has become an amoral attempt to implement public ideas about distributive justice, rather than an effort to enhance private ordering through corrective justice. The central thrust of enterprise liability --the underpinning for strict liability doctrine -- is its indifference to moral-based notions of assigning responsibility for harm. The constant litany that modern cases focus "upon the safety of the product, rather than the reasonableness of the manufacturer's conduct"[108] masks the fact that liability for products has abandoned any search for careless behavior in favor of an impersonal taxing/redistribution system.

Thus transformed, this subset of tort law has, *inter alia* :

a) extended liability for defective manufacture (the product is different from manufacturer's representation) to liability for "defective" *design* (the product is exactly as represented by the manufacturer, but remains 'unduly' dangerous).[109] "Defective" here is loosely defined, and after extraneous legal jargon is swept away it seems that a design is defective if a jury uneducated as to engineering trade-offs

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[105] *The Law of Torts* (1956)

[106] *Handbook of the Law of Torts* (2d ed., 1955)

[107] See PRIEST, "The Current Insurance Crisis and Modern Tort Law", 96 *Yale L. J.* 1521 (1987)

[108] e.g., *Feldman v. Lederle Laboratories*, 97 N.J. 429, at 449 (1984)

[109] e.g., *Larsen v. General Motors*, 391 F.2d 495 (8th Cir., 1968)

thinks *it* would have designed the product differently. So Honda is liable for putting "lightweight materials" in its cars[110] although the plaintiff admitted that he had purchased the car for the fuel economy the light weight helped achieve;

b) refused to allow consumers to assume risks inherent in product consumption. A trespasser who dives head-first into a 4-foot-deep, above-ground pool, collects from the manufacturer for its failure to warn adequately of the risks of such activity[111]. A ladder manufacturer instructing buyers to place the ladder at a 75° angle against a wall is held liable when a user places the ladder at a more dangerous angle and falls.[112] A mother is allowed to reach the jury with her claim that a peanut butter manufacturer breached its "duty to warn" her that her baby might choke if its mouth was filled with the product.[113]

c) "softened" causation requirements so that no moral link need be shown between the defendant and the plaintiff's injury. The tip of a well-used surgical instrument breaks during an operation- the jury is instructed that it *must* hold liable one or all of the (manufacturer/wholesaler/hospital/dozens of doctors who had previously used the tool/doctor who used it this time), even though it is highly probable that each of these unrelated parties did not cause the tool's weakness.[114] The manufacturer of

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110 e.g., *Dorsey v. Honda Motor Company*, 655 F. 2d. 650 (5th Cir. 1981) [NB $5,000,000 in punitive damages in this case. See infra]

111 *O'Brien v. Muskin Corp.*, 94 N.J. 169 [N.J. Supr, Ct.] There *was* a warning sign on the pool, but it was judged to be too small, presumably because the diving trespasser didn't see it....

112 *Tesmer v. Rich Ladder Co.*, 380 N.W. 2d 203 (1986) [MN Ct. App.]

113 *Fraust v. Swift Co.* [E. D. Penn., May 23, 1985], discussed in *Product Liability Newsletter*, July 1985, p.5

114 *Anderson v. Somberg*, 67 N.J. 291, 338 A. 2d 1, cert. denied 423 US 929 (1975) [N.J. Supr. Ct.] Note the obvious difference between this case and limit cases like *Summers v. Tice*, discussed *supra*. In *Anderson*, there is no claim of joint action. The co-defendants did not even know each other, and could not possibly have monitored each other's behavior. In addition, while in *Summers* each defendant acted negligently, none of the *Anderson* defendants has been shown to be negligent. Only *Summers*, not *Anderson*, provides a liberal justification for joint and several liability exists here.

the pregnancy anti-nausea pill "Bendectin" has been held liable for birth defects in children of mothers who took the drug, despite the lack of any conclusive evidence that Bendectin leads to birth defects.[115] Combining these ‘theories of liability’, some courts[116] have held that if daughters of women who took D.E.S.[117] develop vaginal or cervical growths at puberty, they may sue *any* manufacturer of D.E.S. for full compensation, despite: i) lack of evidence that D.E.S. was the cause of these damages; ii) lack of knowledge at the time of absorption, at any rate, that D.E.S. could have this side effect[118]; iii) the possibility that plaintiff might not have been born were it not for D.E.S.; iv) last but not least, the total lack of proven connection between the ‘chosen’ manufacturer[119] and the pill taken by plaintiff's mother.

d) institutionalized punitive damages to the point where they typically far outweigh compensatory damages[120]

As insurance theorists know, impossibilities of adequate risk aggregation, along with intense adverse selection[121] and moral hazard[122] problems, make third party insurance

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[115] See, e.g., *Oxedine v. Merrell Dow Pharmaceuticals*, 506 A. 2d 1100 (1986) [D.C. App.] The F.D.A. , after review of the medical evidence, has left Bendectin on the market, but Richardson-Merrell has now withdrawn it because of its fear of continued lawsuits. Bendectin was the only anti-nausea drug available for pregnant mothers.

[116] See, e.g., *Collins v. Eli Lilly*, 116 Wis. 2d 166, 342 N.W. 2d 37 (1984) [Supr. Ct. Wis.]

[117] Diethylstilbesterol, a drug which is a synthetic compound of the female hormone estrogen. DES has many valuable pharmacological applications, one of which is to prevent miscarriage of pregnant mothers.

[118] See generally, regarding the 'state of the art' defense, *Beshada v. Johns-Manville Products Corp.*, 90 N.J. 191, 447 A 2d 539 (1982) [Supr. Ct. N.J.] and *Carrecter v. Colson Equipment Co.* 346 Pa Super. Ct. 95, 499 A. 2d 326 (1985) [disallowing as a legal defense the manufacturer's claim that technology at the time of the alleged tort did not give it the ability to prevent the injury or detect the risk].

[119] The 'chosen' manufacturer tends to be the most solvent, or most accessible to the plaintiff's jurisdiction.

[120] see PRIEST, supra on insurance crisis [Mr. Galbraith, get me the reference]; also D. OWEN, "Problems with Punitive Damages Against Manufacturers of Defective Products", 49 *U. Chicago L. Rev.* 1 (1982); also, Mr. Galbraith, cite the studies by the Rand Corp.

vastly less efficient than first-party insurance. By reducing the amount of efficient insurance available, products liability law has thus increased risk in many ways.[123] If the new ladder with its huge built-in "insurance" premium is too expensive, some consumers will keep their rickety old one. Liability suits have precluded insurance for, and thus the economical manufacturing of, safe intra-uterine devices (IUD's). It is estimated that 160,000 unintended pregnancies that will result from their non-availability: these pregnancies in turn will provoke 88,000 abortions- far riskier than any IUD side-effects.[124] Again, these utilitarian considerations reinforce the moral objections already alluded to. If people are prevented from self-determining their future, it is not irrelevent to note that this prohibition also increases their risks.

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[121] Adverse selection refers to the tendency of low-risk members to drop out of insurance pools when premiums are higher than the risks they bring to the pools. Low-risk insureds having dropped out, premiums must be raised again to reflect the now-higher average risk. This provokes another round of drop-outs, etc., until in some cases the insurance pool unravels entirely. Adverse selection problems force insurers to carefully segregate risks. This is feasible for first-party insurance (segregation by age, residence, etc. of insured). But for tort "insurance", the premium is integrated in the price of the good sold. Thus all purchasers pay the same premium, although not all present the same risks. Low-risk users may thus not purchase the product, which they find too expensive. This may lead to another price hike, and eventually to the non-availability of the good on the market altogether.

Note also the perverse distributive implications of the adverse selection problem. All purchasers of a good pay the same premium, but rich purchasers tend to be more heavily compensated (for higher lost earnings, higher medical care costs, greater material damage, etc.) Thus poor consumers subsidize high-income consumers when courts insist on transforming the tort system into a third-party insurance plan.

[122] Moral hazard is the effect of the existence of the insurance on the level of insurance claims. First-party insurers control moral hazard, in some cases by direct risk monitoring, but generally by setting 'deductible' and 'coinsurance' levels which essentially restrict insurance coverage, thereby imparting appropriate incentives to insureds. Insurance provided through tort law is less effective in controlling moral hazard. Tort defendants must pay plaintiffs in full. Plaintiff behavior is, as noted throughout this paper, often not considered by the court in deciding whether to condemn the defendant.

[123] Efficient first-party insurance actually decreases *risk* (as opposed to the chance of injury) by spreading it, thanks to the "law of large numbers": the expected average loss per insured party can be more accurately predicted, the larger the insurance pool. See PRIEST, "Insurance", loc. cit. supra.

[124] E. CONNELL, *The Crisis in Contraception*, cited in P. HUBER, *Liability*, New York, 1988, p. 162

These increases in risk are the direct result of judicial replacement of private evaluation, acceptance and trade of risk by public regulation.[125] By refusing to tolerate, in effect, that individuals choose 'dangerous' (but 'cheap') cars as opposed to the very risky (to one's employment, one's pocketbook, and thus to one's health) option of no car at all, courts in essence adopt a 'let them purchase a Mercedes' mentality. Of course, individual car owners quite rationally seek payouts even in excess of the huge insurance premium that is already bundled into their purchase. Thus, pending suits laid by injured motorists seek liability of auto manufacturers who chose not to equip their cars with Supplemental Restraint Systems, also known as "air bags". These bags are of marginal utility for drivers who buckle their seat belts: incidentally, they may in fact increase risk if they encourage unbuckled driving, because they offer no protection for lateral collisions.[126] Repeated lawsuits, if successful, would nonetheless 'regulate' SRS' into existence, thereby increasing the price of cars and the unemployment rate, and (at the margin) keeping unsafe clunkers on the road just as a regulation by a government agency might have.

B. Medical Malpractice

Judicial constructivism has also emptied medical malpractice law of its moral, corrective content. As the *Anderson*[127] and *Obstetrics* [128] cases imply, many courts seem dissatisfied with the lack of universal government paid health insurance. The same

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[125] HUBER, "Safety and the Second Best: The Hazards of Public Risk Management in the Courts", 85 *Columbia L. Rev.* 277 (1985)

[126] Even if air bags always reduced the risk of accident, their imposition on an unwilling consumer is not legitimate. Even though Mercedes-Benz cars are safer (for drivers and passengers) in every way than Yugos, legal imposition of Mercedes on car-buyers is incompatible with private ordering.

[127] *supra*

[128] *supra*

simplistic reasoning that concluded that manufacturers could cheaply insure against accidents substitutes doctors' liability insurers for first-party health plans. Despite incontrovertible demographic evidence that people are healthier than ever[129], medical malpractice suits increased by over 1,300% from 1963 to 1986.[130]

Inefficient 'preventive medicine' (i.e. excessive testing) and extensive paper trails are not iron-clad protections against suits whenever patients' treatment is unsuccessful. Troublesome 'wrongful life' cases[131] (i.e. where the plaintiff, a child, claims to have had a right to have never been born, which right was violated, say, by defendant's non-diagnosis of an abortion-provoking birth defect) present evidence of what one author has called "a revolution of rising expectations".[132] Simply put, patients increasingly expect to receive an insurance policy with their medical care. They refuse to be held (and courts refuse to hold them) to contracts whereby, in exchange for lower prices, they forgo access to inefficient insurance.[133] Warnings that treatments occasionally have unavoidable side-effects are also randomly held to be insufficient, thereby depriving their authors of the economic security such warnings would afford.[134]

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[129] Mr. Galbraith; get me some cites on this, possibly from Nexis.

[130] See P. DANZON, *Medical Malpractice: Theory, Evidence and Public Policy*, 1985, at 18; and US GOVERNMENT ACCOUNTING OFFICE, *Medical Malpractice: Six State Case Studies* (1986). It appears that the rate of suit has climbed from 1.3 malpractice claims per 100 doctors per year to 17.8 claims in 1985. Though increased health does not logically require that medical competence has improved, it certainly does not support inferences to the contrary .

[131] E.g., *Turpin v. Sortini*, 31 Cal. 3d 220, 643 P. 2d 954, (1982) [deafness]; *Curlender v. Bio-Science Laboratories,* 106 Cal. App. 3d 811 (1980) [Tay-Sachs disease].

[132] R. RABIN, "Tort Law in Transition: Tracing the Patterns of Socio-legal Change", 23 *Valparaiso U. L. Rev*. 1, at p. 7

[133] See *Obstetrics and Gynecologists*, supra.

[134] See, e.g., *McDonald et al v. Ortho Pharmaceuticals*, 394 Mass. 131, 475 N.E. 2d 65 (1985) [warning on package of birth control pills that latter at times lead to "clotting in the brain" held insufficiently explicit after plaintiff suffers "stroke" (i.e. blood clotting in the brain)]; *Unthank v. United States* 732 F. 2d 1517 (1984) [10th Cir.] [warning that a flu vaccine would prevent many illnesses, but had "severe or potentially fatal reactions", and which invited questions, held insufficient vis-à-vis plaintiff who contracted 'serum sickness'...]; *Reyes v. Wyeth Laboratories*, 498 F. 2d, 1264, (1974) [5th Circuit], cert denied 419

C. Environmental Torts

Constructivist desires to help consumers, coupled with scary revelations about multifold causes of diseases like cancer[135], have lead to products-liability-style regulation of the environment.

Mass environmental tort cases often arise from workplace problems, despite the complaint that conditions of work are, *par excellence*, contractually negotiated in consideration of the price paid. In the classic case of *Smith v. Baker & Sons* [136], Lord Bramwell couched his dismissal of one such suit in the language of contract interpretation:

> "The plaintiff here thought the pay worth the risk, and did not bargain for a compensation if hurt: in effect, he undertook the work, with its risks for his wages and no more. He says so. Suppose he had said, "If I am to run this risk, you must give me 6s. a day and not 5s.", and the master agreed, would he in reason have a claim if he got hurt? Clearly not. What difference is there if the master says, "No, I will only give you 5s."? None. I am ashamed to argue it."

Implicit in Bramwell's statement is a vision of tort repeated several times in this paper: if the parties have not re-allocated risks voluntarily, then there must be a *moral* reason for the judge to shift losses from their natural victims. This vision is absent from suits complaining that worksite presence of asbestos, dust, or even cigarette smoke has enhanced the ambient risk of contracting cancer.[137] Surely it is the case that *having a job*, when compared to unemployment, substantially *decreases* the risks of illness and death!

U.S. 1096 (1974) [warning of possibility of polio through uncontaminated virus given by pharmaceutical company to health authorities, who vaccinate girl: girl's parents sue company successfully since warning not transmitted directly to them; court refuses to allow into evidence admission by the girl's mother that she would have consented to vaccination even had she received the warning...]

[135] see, e.g., R. CARSON, *The Silent Spring* , Greenwich CT, 1962. See , however, E. EFRON, *The Apocalyptics* , New York, 1984, an excellent antidote to Carson.

[136] (1891) A.C. 325, at. p. 344. For an American equivalent to *Smith*, see *Lamson v. American Axe & Tool* , 177 Mass. 144, 58 N.E. 585 (1900) [J. Holmes]

[137] In a typical case, it is shown that asbestos workers who are also (voluntary) cigarette smokers are much more at risk, because of chemical interaction, than are non-smokers.

Moral reasons were arguably present in the "Love Canal" dispute with negligent Hooker Chemicals[138], although the damages claimed may seem high. Indeed, had residents obtained advance knowledge of Hooker's intent to let toxic poisons flow onto their property, they could arguably have obtained an injunction prohibiting the activity.[139] Was this moral basis for loss transfer present in the "workplace" *Agent Orange* case[140], where 2.4 million people (U.S. veterans, some families, foreign veterans, and others) settled their claims against seven chemical company defendants for $180 million, hours before the huge class action was to begin?[141] Is hostile Vietcong fire from concealed leafy jungles preferable to assuming a trace risk of illness?[142]

Principal doctrinal victims in environmental tort cases have surely been proximate causation and damages. The former has rapidly been cast off in the face of data that human dietary intake of "Nature's carcinogens" is likely to be over 10,000 times higher than the involuntary intake of man-made ones.[143] Theories have been proposed[144] to allow partial

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[138] *BNA Reporter,* Jan. 4, 1985, p. 1445. Hooker paid $20 million in damages to 1,300 residents of the Love Canal district of Niagara Falls, NY. , for having knowingly polluted the district's ground water and endangered the health of its residents.

[139] See, e.g., *Canada Paper v. Brown* [1910] S.C.R. 25 (Supreme Court of Canada) [injunction issued to prevent noxious pollution of plaintiff's land by defendant factory, despite defendant's claim that wealth would be maximized if the suit were dismissed.] Cases like these must be distinguished from the like of *Fletcher v. Bealey*, 28 Ch. 688 (1885), [downstream neighbor fears that upstream resident's retaining wall may collapse, and asks for injunction prohibiting such collapse; motion denied as no "case or controversy" judged present]. Cases like the latter reject preventive action only because the fear of future damage is speculative.

[140] Mr. Galbraith; get cite for the case announcing the settlement

[141] See P. SCHUCK, *Agent Orange on Trial*, Cambridge MA, 1986, for a superb analysis of the case.

[142] In accepting the record settlement, Weinstein J. admitted that evidence of causation of the plaintiffs' alleged injuries was grossly insufficient by current legal standards. Recent studies have not linked exposure to Agent Orange to any increased mortality.

[143] See, e.g., B. AMES, "Dietary Carcinogens and Anti-Carcinogens", 221 Science, (Sept. 23, 1983) p. 1256. See also R. DOLL & R. PETO, "The Causes of Cancer", 66 *J. of the National Cancer Institute* 1191 (1981), and EFRON, supra

[144] See, e.g., G. ROBINSON, "Causation and Compensation for Tortious Risk", 14 *J. of Leg. Studies* 779 (1985) . See, *contra*, WEINRIB, "Causation and Wrongdoing", supra, at pp. 438 ff.

recovery when risk of any given harm is *increased*, as opposed to *probably caused*, by toxic materials.[145] These theories would, additionally, allow suits to be taken for increased risk whether or not (indeed, before) 'maturation' had occurred: i.e. before it is even known whether plaintiff has even contracted the disease in question.[146]

In this way the havoc wreaked on causation effects traditional tort requirements that damages be suffered. Suits for ‘cancerphobia’ (the fear, even if unreasonable in the light of statistics of contracting the disease *in the future*) are distinct from claims for damages generated by the disease itself. Cancerphobia suits represent, intellectually, a means to sue *ex ante* for the creation of a risk.

These suits are facilitated by new rules of procedure which encourages the consolidation of many small (and*de minimis*, if taken alone) claims into ‘common question class actions’. Such procedural rules are unobjectionable if the basic structure of tort law (requiring fault and causation) are maintained. When this structure is abandoned, the common question class action permits citizens to band together as regulators seeking to

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145 Some classic cases do seem to present a similarity with the notion of probabilistic causation. In *Steinhauser v. Hertz* , 421 F.2d 1169 (2d Cir. 1970), the issue was whether a slight automobile accident, which had not resulted in any bodily injuries, had caused Cynthia Steinhauser's subsequent schizophrenia. It was judged that, if Cynthia were to recover, it should be for the cost of her schizophrenia discounted by the probability that she would nonetheless have contracted the disease from a non-liable source. In *Dillon v. Twin State Gas and Electric*, 85 NH 449, 163 A. 111 (1932), a boy playing on a bridge lost his balance and clutched at defendant's power line as he was falling into the abyss. The power line was (negligently) uninsulated, and the boy was electrocuted. It was judged that defendant's liability should be discounted by the chance that the boy would have been killed from the fall.

146 Further dilution of tort principles of causation have resulted from the so-called Superfund Act (*Comprehensive Environmental Response, Compensation and Liability Act of 1980* - Pub. L. # 96-510, 94 Stat. 2767, 2781-2785 (1980)). In addition to various administrative remedies, this statute authorizes the government to maintain tort actions for the destruction of 'common pool' resources. Essentially, it creates a scheme of strict liability, jointly and severally, on defendants who are defined to include not only the party in possession of a dangerous substance at the time of discharge, but also those who have previously controlled the product in the chain of distribution and use. See on this point, EPSTEIN, "The Principles of Environmental Protection: The Case of Superfund", 2 *Cato J.* 9 (1982)

convince a judge and jury to fine (through damage awards) and perhaps eliminate (as economically non-viable) business activities which provoke fears.[147]

Intermingling and interdependence of public and private concerns break down the remedial, moral structure of private law. Most people are, of course, in a meaningful sense victims of the very nuisances they help create, and from which they profit. Class actions notwithstanding, it seems intolerable that, at the limit, everybody be allowed to sue everybody. Should one individual be allowed to collect from all users/ manufacturers of automobiles, for the enhanced risk due to their gaseous emissions?

The alternative to dealing with these problems through some warped version of tort, of course, is to deal with it self-consciously as a problem of public law.[148]

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[147] The best guess seems to be that the near-meltdown at Three-Mile-Island, PA may eventually result in one additional cancer being caused; yet millions have been paid out to hundreds who fear contracting the disease. No new nuclear plants are presently in the planning stage: meanwhile, illnesses resulting from the burning of fossil fuels are so dispersed that they cannot be effectively sanctioned by the torts system. In this way, again, are incentives distorted so as to increase total risk.

[148] The question of what form of public regulations, if any, should be imposed to 'control' pollution is a formidable one. As the preceding discussion implies, it is prompted by the technological difficulty in separating out the causes of maladies and the sources of the problems in that foremost of public goods, air.

One strategy is to impose a tax on pollution. Distributionally, and if translated into quasi-tort jargon, this tax is a form of strict liability to the defendant without direct compensation to the plaintiff. Allocatively, though, such a tax might cause plaintiffs to engage in different activities than if they could recover damages by direct actions. See COASE, cite. Additionally, someone must determine the level of the tax and the use of its proceeds: there is little evidence that the state possesses the information and the motivation necessary to do this job correctly. Finally, note that, for reasons analogous to those discussed *supra*, a tax is regressive in its impact on poorer citizens: all purchasers of paint pay the same price, regardless of their wealth....

Another approach is the analogue to the private injunction. Regulation might prohibit the use of the offending activity altogether, i.e. by setting maximum emissions standards. How can one decide whether the costs of such prohibition are justified by the benefits conferred? Taxes of course allow private parties to help make those choices, **if** they are set at 'appropriate' levels...

Of course, another option is to decide that inevitable imperfections in the administration of either system (tax or direct regulation) make a scheme of *laissez faire* the least-cost alternative.

See, on the choice between taxes and injunctions as proxies for the market system denied us by current technologies, M. POLINSKY, "Controlling Externalities and Protecting Entitlements: Property Right, Liability Rule, and Tax-Subsidy Approaches", 8 *J. of Leg. Studies* 1 (1979)

V *Ex Post* vs. *Ex Ante* : Suggestions for reform

Tort law has an important function in any privately-ordered society that has not reached the *nirvana* of completely-specified property rights and instantaneously-negotiated contracts. If applied as intended, tort law symbolizes the juridical equality of all property holders and the Kantian moral values embodied by the Golden Rule. Since freedom and juridical equality typically coincide with wealth maximization, tort law can also be shown be shown to be efficient in the Paretian sense of that term.[149]

As private ordering has receded and the demand for public allocation of resources increased, the structure of tort law has been invaded.[150] Instead of being a supplement to contract, tort has displaced contract[151]. But tort terminology is still used by the courts. This results in a chaotic legal structure.

The law of contracts appears incoherent in its protection of human freedom. After an accident has occurred, i.e. when the occurrence (but, importantly, not the future effects) of an injury has become certain, contract law allows for settlement of a tort claim. Certainly over 99% of all tort claims result in the conclusion of an enforceable contract before final judgment. But if consumers are able to assume a risk of future damages in return for present compensation after an accident occurs, why are they increasingly precluded from

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[149] See Posner and Shavell, supra. See also Epstein, forthcoming article in *Harv. J. of L. and Publ. Pol.* (1989) [Mr. Galbraith: get cite]

[150] Why has the moral content of tort been so much more weakened in the United States than in other countries? One hypothesis is that public ordering has been accomplished elsewhere via directly coercive laws. Since this is much more difficult to do in the US (federalism and separation of powers make the purchase of rent-obtaining legislation much more expensive; the Bill of Rights precludes some legislation altogether) it is possible that the same pressures have been channeled through tort law here.

[151] See G. GILMORE, *The Death of Contract*.

doing so[152] *before* the occurrence? Does the idea prevail that people are inherently irrational before being injured, but become rational afterwards? This does not meet my intuitions, nor have I seen empirical evidence of it. I see no reason to allow settlements on the one hand, while prohibiting contractual assumption of risk or (what is the same thing) waiver of tort liability on the other.[153] Civil law systems still allow contracts whereby tort claims are waived *ex ante*: Such contracts are enforced unless the tortfeasor is guilty of *faute lourde*.[154]

Given the incoherehce of the present system, several authors have proposed covert ways to return to the primacy of contract -- presumably, overt appeals that people be allowed to assume risks are unrealistic. Jeffrey O'Connell has been promoting a general statutory scheme to encourage settlement programs that are set up before accidents, but that are not binding on accident victims until an express ratification is made after the injury has occurred.[155]

More interestingly, Robert Cooter and Steven Sugarman have proposed[156] the creation of a state-regulated market in 'unmatured tort claims' (an unmatured tort claim is a potential tort suit against someone, for some imagined future damage, *before* the accident happens). This would in effect go beyond classic tort doctrine, which allowed tort rights to

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[152] See the *Obstetrics and Gynecology* case, supra

[153] Mr. Galbraith: find me recent articles (by Fiss, I think, or others) opposing settlements and arguing for more compulsory trials.

[154] Figuratively, *faute lourde* means gross negligence. This provision, implied in the contract of waiver, deals with the moral hazard inherent in advance waiver contracts.

[155] See, e.g., J. O'CONNELL, "A Neo-No-Fault Contract in Lieu of Tort: Preaccident Guarantees of Post Accident Settlement Offers", 73 *California L. Rev.* 898 (1985)

[156] R. COOTER, "The Economics of a Regulated Market in Unmatured Tort Claims", unpublished manuscript, Working Paper #88-2, Boalt Hall Law and Economics Workshop Series, U. Calif. (Berkeley) (1989); COOTER & S. SUGARMAN, "A Regulated Market in Unmatured Tort Claims: Tort Reform by Contract", in W. OLSEN, [ed.], *New Directions in Liability Law*, 1988.

be waived in contracts between the eventual tortfeasor and victim. Cooter's proposal would allow victims to enforceably 'sell' their tort right to anyone, not just to the eventual tortfeasor. This would eliminate problems of monopsony and so-called 'unequal bargaining power' that are arguably reasons for the present reluctance to enforce waivers. The economics of this proposal are relatively simple, and follow from tort/insurance discrepancies due to the high loading costs[157] and uninsurable nature[158] of several types of damages in present-day tort law. The victim would thus receive, for relinquishing her right to sue, enough to allow her to buy much more first-party insurance than she currently gets through the third-party tort system. Likely buyers would be insurance companies. They could buy up the waivers in quantity and process them through a clearinghouse not unlike futures markets. Indeed, the price that insurers would 'pay' under this plan could conceivably be a discount on the first-party policies they offer[159]. In this way, victims could get broader accident coverage at a lower real cost.

Both these proposals, and others like them[160], are thinly disguised ways to rehabilitate contract, and to return tort to its previous confines. A first-best solution would recognize that the root question involves our choice of tort paradigm, that is, our ideas about social ordering and *ex ante* liberty.

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[157] Loading costs consist of lawyers' fees, time, court fees, etc.

[158] Several compensated-for damages (pain and suffering, some physical losses) would not be insured voluntarily on a first-party basis: see Priest, supra.

[159] These policies would be made mandatory as part of the 'regulated' market Cooter proposes. His plan is meant to assuage paternalistic legislators by refusing to allow consumers to sell an unmatured tort claim if they do not possess adequate first-party insurance to cover them if the loss does materialize.

[160] See, e.g., C. HAVIGHURST, "Private Reform of Tort Law Dogma: Market Opportunities and Legal Obstacles", 49 *Law and Contemp. Prob.* 143 (1986)