

# Torts—The Law of the Mixed Society†

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Most of the other participants in this festschrift have been personally associated with Dean Leon Green as students, colleagues, and friends. They have benefited directly from his extraordinary intellect and personality. It is no wonder that they have contributed to this issue.

My first serious discussion with Dean Green took place just a few months ago. Yet such is the nature of Dean Green's scholarly achievements that, as a torts teacher nearly half a century his junior, I could view him as *my* teacher, colleague, and friend long before I met him. It is particularly fitting, then, that I participate in honoring Dean Green, for when I write I represent not only myself, but countless other unknown students, colleagues, and friends, past and yet to come. On their behalf as well as my own, I gratefully dedicate this article to him.

Losses are best left on the victims. Only if it can clearly be shown that injurers could have cheaply avoided the loss—were at fault—should incentives to avoid injury rest on them.<sup>1</sup> And even when injurers can readily choose the safer path, the victim should frequently still bear the loss and the incentive to avoid it.<sup>2</sup> That this allocation

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1. Fault implies not only that injurers can cheaply avoid the loss, but also that they either know or should have known this. For a twentieth century definition of fault that attempted to state systematically the relationships involved, see *Conway v. O'Brien*, 111 F.2d 611, 612 (2d Cir. 1940) (Hand, L., J.), *rev'd on other grounds*, 312 U.S. 492 (1941). See also *United States v. Carrol Towing Co.*, 159 F.2d 169 (2d Cir. 1947); Terry, *Negligence*, 29 HARV. L. REV. 40 (1915).

2. Diverse, often self-contradictory, reasons were given in the high days of the fault system to explain why in many instances victims should bear losses despite the availability of a "faulty" injurer. Some of these were consistent with the goal of efficient reduction of accident costs; some were not. Perhaps the two most important were contributory negligence (which treated victim fault, and by implication the possibility of injury avoidance by victims, as a different order of things from injurer fault and avoidance) and proximate cause (which had the effect of leaving the burden of avoidance on innocent victims—those of whom it could not be said that they ought to have avoided harm—rather than placing it on injurers who, *by definition*, could and should have avoided the harm). Imputed contributory negligence, intra-family immunities and, most dramatically, assumption of risk went in some ways even further in establishing a system in which, even where injurer precautions were feasible and cheap, the incentive to avoid the harm often rested on the victim. I have expressed this view of the fault system more fully in various recent writings. See

places all unavoidable losses, as well as the cost of avoiding many avoidable losses, on those activities or social classes that give rise to victims, is either irrelevant or beneficial from a wealth distribution standpoint.<sup>3</sup>

These related notions were nearing the high point of acceptance in 1876 and yet the first signs of a reversal were already discernible, though perhaps only to those with hindsight.<sup>4</sup> Typically, for this is common law and not nature, the tide had started to turn even though it had not yet quite reached its high point. Today, one could state the same propositions substituting victims for injurers and injurers for victims throughout and approach the way in which most commentators and many courts would describe tort law.

Given this recent history, it would be foolhardy to predict how the curious mixture of desire to reduce injuries and to favor certain wealth categories that we call tort law, and quickly describe in the language of justice,<sup>5</sup> will develop in the *next* century. Too much depends on the

*generally* Calabresi, *Concerning Cause and the Law of Torts*, 43 U. CHI. L. REV. 69 (1975); Calabresi, *Optimal Deterrence and Accidents*, 84 YALE L.J. 656 (1975); Calabresi & Hirschhoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972).

3. It would be irrelevant if one believes that efficient accident avoidance, through the placement of the incentive to avoid on the appropriate party, is more important than what categories are made richer or poorer. "Efficiency" might be short run (minimizing the sum of accident costs and safety costs); it might include administrative costs (avoiding unnecessary costs of shifting); and it might even include long run cost avoidance (giving a subsidy to new industries whose development would benefit "injurer" and "victim" categories alike, at least in the long, long run when, unfortunately, all those now present might long since be beyond benefiting). The allocation of losses described in the text might be viewed as beneficial from a purely distributional standpoint if one believes that injurers, as a category, are "worthier" than victims as a category. Oliver Wendell Holmes, Jr. certainly believed in the efficiency reasons for normally burdening victims (even though he accepted some very limited non-fault injurer liability). Whether he believed that such allocations were also distributionally beneficial is less clear. He clothed his undoubted preference for victim loss bearing in language that can be read to rely either on long run efficiency or on worthiness. *See, e.g.*, O. HOLMES, *THE COMMON LAW* 76-77 (M. Howe ed. 1963). *Cf.* G. CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 261-63 (1970) (criticism of Holmes efficiency justification) [hereinafter cited as *THE COSTS OF ACCIDENTS*]. *See also* Calabresi & Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

4. In 1876 *Rylands v. Fletcher* had already been decided and one can, with hindsight, see at least in Justice Blackburn's opinion, the seeds of ultrahazardous activity, non-fault, injurer liability. Other opinions, however, make the case seem like a last bastion of a pre-fault approach, preserved for a particular category of victims, the landed gentry. *See* *Fletcher v. Rylands*, 3 H. & C. 774, 159 Eng. Rep. 737 (1865), *rev'd*, L.R. 1 Ex. 265 (1866), *aff'd*, L.R. 3 H.L. 330 (1868). Only with hindsight can we say that Blackburn's approach was to prove more important than Baron Bramwell's or Lord Cairns'.

Clearer signs of reversal can be seen in some statutes dealing with liability of railroads for fire. *See, e.g.*, CONN. GEN. STAT. § 16-177 (1975), enacted in 1875 (injury suffices to establish a prima facie case of negligence), followed by CONN. GEN. STAT. § 16-175 (1975), enacted in 1881 (negligence no longer needed for liability), and upheld against a constitutional challenge in *Griswell v. Housatonic R.R. Co.*, 54 Conn. 447, 9 A. 137 (1886).

5. This is not the place to go into the relationship between efficiency and distributional desires and justice. That results which can be analyzed with some success in terms of their effi-

industrial structure of society.<sup>6</sup> And what *that* will be in the next hundred years I happily, but not confidently, leave to the economists. Yet, even if one abstains from attempting that most intriguing of guesses, if one refuses to try to figure out who in what areas will bear unavoidable losses and, hence, the incentive and burden of avoiding most *avoidable* losses, something can still be said about tort law and the next century.

Tort law and more particularly the rule of liability is, I submit, the paradigmatic law of the mixed society. The purely "liberal," *laissez-faire* polity prefers contracts, the truly collective state the criminal sanction; tort law lies in between. That torts has always been present and significant, that it is so today in the so-called "people's democracies," are testimonies to the fact that purely "liberal" and purely collective systems exist solely in the minds of theoreticians and ideologues. The world knows better. That the role of torts has changed testifies to the fact that not all mixtures are the same and in some times and places individual atomistic choices dominate the blend, while at others collective decisions control.

Why do I say that tort law is the law of the mixed society? Let us spend a few minutes examining how injuries would be approached by ideologically pure states. It will help us see why the approach of tort law is, at a minimum, the compromise that the ideologue must make with reality, and at a maximum the preferred choice of the ideologically skeptical and of those whose ideology is skepticism.

A purely collectivistic society would approach each situation or activity which has injury-causing potential in a way that would leave

ciency and distributional effects are commonly, and often quite properly, described by courts and commentators in justice terms is a commonplace. Sometimes the use of justice language can be helpful (for one brief explanation see Calabresi, *Concerning Cause and the Law of Torts*, *supra* note 2, at 105-108). At other times justice language can serve mainly to obfuscate; a particularly egregious example is *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 94 N.E. 431 (1911).

Among recent attempts to explain tort law in terms of justice language, the most interesting include Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391 (1975); Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974); Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Epstein, *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556 (1973); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

6. In a society where unions do not exist or are small and disorganized, the placement of industrial accident costs on the employer-injurer, rather than on the employee-victim, is likely to lead to a greater recognition of accident costs and to greater incentives toward accident avoidance. (The individual worker is not as likely to know and evaluate the risk as is the employer for whom such harms are a statistic.) In a society in which both unions and employers are large enough to treat industrial accidents as a statistically "known" risk, the legal placement of the cost burden is unlikely to have any great significance. (It will be renegotiated by the parties either openly or through wage rate changes.) In a society where unions are large and employers small and scattered, greater incentives to safety are likely to result from placement of initial losses on the unionized employees, at least absent compulsory employer insurance. (The employers are less likely than the unions to know the precise extent of the risk; many may choose to "chance it" and go under.)

no room for tort law. A judgment would be made whether a particular act or activity engaged in at a particular time in a particular way by particular people is too dangerous to be permitted, or alternatively is desirable despite its risks. If an act is deemed too dangerous it would be forbidden and a penalty sufficiently severe to deter it would be imposed whenever it occurred and regardless of whether in the specific instance "harm" to victims occurred. The act—it might be driving by people below a certain age, or driving at all, or driving between certain hours—would have been deemed wrongful and punished accordingly by the criminal law. If instead, the act was not wrong, then, even if harm resulted, there would be no purpose in burdening the doer of the act (whether injurer or victim) with the damages. The act was deemed worth doing despite its risks when judged from a collectivistic, societal point of view and the harms, if any, like the benefits, would be borne by the society.<sup>7</sup> If consistent, that is, ideologically pure, the collectivistic nonmarket society would handle damages collectively. These, like all the ills that can befall one, would be socially insured and paid out of the general coffers of the state.

Such a society would handle entrepreneurial activities analogously. No one could start a shoe factory—under penalty of law—unless such a factory were deemed collectively desirable, in which case such a factory would be mandated. If harm to some previously made investment resulted or if the shoe factory turned out to be a mistake, that would be the state's worry. Conversely, if the factory was as, or more, beneficial than expected, the benefit would also be the state's. Risk taking would exist (because the collective society cannot destroy risk any more than can the liberal atomistic society) but the benefits and harms—the profits and losses—of risk taking would accrue to the state to be parcelled out among its citizens according to its prevailing notions of appropriate distribution of wealth.

What we think of as the province of tort law, injury-causing activity, is but one kind of risk taking and would be handled in the same way. Accordingly, risky behavior would either be forbidden and sub-

7. An "act," as I am using the word, is simply a subcategory of an "activity." For that reason a collective decision to deter an activity only "to some extent" or when done by "some people" or in "certain ways" can be described as a decision fully to deter some acts.

It does not matter, for these purposes, what the governmental structure of the collectivistic society is. It might be democratic and governed by elected individuals who can be voted out if they do not choose in accordance with popular desires. It might be dictatorial—of the proletariat or otherwise. What is crucial is that the decision makers—however chosen—are expected to decide for the mass of the people which risks are worth taking and which, instead, are not.

ject to criminal law sanctions, or required and socially insured. Either way civil liability rules and damages would have no place.

That such a purely collective society is unworkable (and would to my way of thinking be extremely undesirable) I will pass over for the moment. The same is true of its converse, the purely atomistic or market society, at which I would now like to look.

The atomistic market society would establish starting points, "entitlements," based on its views of what wealth distribution is desirable and on its guesses as to what starting points could make contracts and transactions least costly. Once these starting points had been established, it would *forbid* nothing except what I shall call noncontractual behavior. That is, it would *prohibit* the taking of anyone else's entitlements; it would permit, indeed *enforce*, all consensual transfers of entitlements, and except for (a) determining these—unavoidably collective—starting points, (b) requiring agreement by the parties as a precondition to the transfer of entitlements, and (c) enforcing all contracts representing such agreements, the state would play no role.<sup>8</sup>

The "entitlements" would establish who would bear a harm if it occurred—that is, who would be the initial risk bearers. Risky behavior would then be handled in one of two ways. If the harm fell on the party whom the starting point had burdened, it would stay there—unless an "indemnity" or "insurance" contract had been entered into with another party who willingly, and presumably for a price, had undertaken to bear the risk. (Such contracts would not, of course, be required.) If instead the harm initially fell on a party *not* originally burdened with

8. I have elsewhere said that the market society would (apart from distributional considerations) establish entitlements so as to put the burden of accidents on that activity which can avoid accidents most cheaply. See, e.g., G. CALABRESI, THE COSTS OF ACCIDENTS, *supra* note 3; Calabresi & Melamed, *supra* note 3. That statement may seem inconsistent with the one made here. But it is not, for included in the definition of the cheapest cost avoider was the ability to negotiate cheaply and, by implication, to establish contracts that could be enforced cheaply. Conversely, placement of the initial burden on the party who could, *literally*, avoid the harm most cheaply, would also entail that placement which would make contracts and transactions least costly. For such a placement would obviate the need for *any* transactions or contracts with respect to that risk, and hence reduce such costs to zero. Where there is sufficient uncertainty about the identity of the cheapest cost avoider, however, the party that seems most able to alter its behavior cheaply may not be the party that seems most able to negotiate cheaply. In such cases a judgment must be made, based on the particular facts, as to which ability offers the greatest promise of reducing the sum of the costs of accidents and of their avoidance.

The collectively determined starting points are frequently described by advocates of a pure market society as based on a series of essentially utilitarian judgments. These are *collective* judgments of utility, however. Ironically, once such collective utilitarian judgments have been made, the pure market ideology permits changes only on the basis of atomistic, libertarian-contractarian utility judgments, *i.e.*, only free market transactions are permissible means to further utility improvements. See notes 10 & 11 *infra*. See also Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

the risk, the other party would be bound to pay the damages. But the damages would not be collectively determined; they would be arrived at contractually. The original risk bearer would only be permitted to engage in the dangerous activity if he had either purchased from the victim the right to inflict the loss (an exculpatory agreement) or agreed ahead of time with the victim on the compensation to be paid if harm occurred (contractual compensation schedule), or agreed with him on a procedure to determine, after the event, the damages to be paid (arbitration agreement).<sup>9</sup> Such contracts would be mandatory (a requirement that would be enforced penally), for only through them could the atomistic market society be assured that, within its ideology, a beneficent shifting of the risk had occurred.<sup>10</sup>

9. The analogy to liquidated damages and to resolution of commercial disputes through arbitration is obvious and intended. From this point of view, the limitations placed by contract law in some jurisdictions on liquidated damages and on arbitration agreements "in derogation of law" are deviations from the pure market ideal. They, like all restrictions on the legal ability of one of the parties to take on risks by contract, smack of tort law and represent "mixed society" incursions into the very citadel of the market. The expansion of old, and proliferation of new, constraints on the ability to contract (whether because the result would violate public policy, be unconscionable or what have you) are part of the ascendancy of the liability rule—torts—approach that I am describing in this paper. I do not, however, wish to be taken to suggest that contract law ever represented pure market ideology. Specific performance and promissory estoppel are but two examples of contract doctrines whose relationship to pure market ideology is at best uncertain. Because contract law was not as brittle as market ideologues would have had it be, it has been able to survive the decline of that ideology. See also notes 17 & 24 *infra*.

10. The ideology of the market society is premised on the notion that—absent unanimous societal consent—an improvement from any given starting point can be shown to occur only if an individual or group freely transacts with another individual or group to bring about a change. Such a move leads to what is termed a Pareto-superior position, and the parties are by definition better off; by definition because the pure market ideology premises that individuals always know best for themselves what they want and what will better their state. There is no need to go into the host of practical and theoretical limitations of this approach, many accepted by strong free market advocates. It is enough for us here to note that unless the parties agree *before the accident* on the compensation to be paid for bearing a loss or for bearing its risk, in derogation of the initial entitlement, the free exchange of rights mandated by the market ideology will not exist. A collective determination of the loss, that is, tort damages, or eminent domain compensation for that matter, does not constitute an agreement by the parties to sell and buy an entitlement for the price that suits them. As such it may over or under compensate and hence does not necessarily leave both parties—still presumed to know best for themselves—better off than before. There will be some losers—*e.g.*, those who would not have sold at the eminent domain price—and the change cannot be shown to constitute a Pareto-superior move. Unlike "legal compensation," an agreement (before an accident) on the procedure to be used for determining damages (after an accident) does meet the requirements of the market ideology. Once again since the parties "knew best for themselves" when they accepted the procedure, they by definition are fully compensated through that procedure. The analogy is to a free sale of a good at a price to be determined later by an expert chosen by the parties.

Any attempt (through "social contract theory" or by implying consent) to convert state determination of tort damages into such an "agreed upon procedure" proves too much, however. The same "consent" can be implied for any state action, and Pareto-superiority can then be claimed for any state-made collective decision. The term, at that point, loses all significance and . . . utility. See generally J. BUCHANAN, *THE LIMITS OF LIBERTY* (1975); J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT: LEGAL FOUNDATIONS OF CONSTITUTIONAL DEMOC-*

To state either of the two “pure approaches” is to deny the possibility of using them *universally*. Can any society, however collectivistic, as a *practical* matter decide whether each and every act is undesirable, and hence forbidden, or worth doing, and hence required? It would be manifestly impossible. Conversely, can any society require that before a person engages in an act he contract with all those potentially harmed by it? One need only think of the automobile driver seeking out and contracting with all possible victims to recognize the impossibility of the approach. Of course, if victims were chosen to bear *all* risk initially, total atomism would be possible. Such a starting point—essentially a might makes right entitlement—is not *logically* impossible. But no atomistic *laissez-faire* society can, in fact, tolerate it. Total risk bearing by victims would neither avoid injuries cheaply (be efficient) nor result in an acceptable wealth distribution (be fair). At its extreme it would entail no property or bodily integrity. Those we now call thieves or murderers or rapists could steal or injure to their hearts’ content. The victims could be safe only by buying protection. No, the market society cannot be indifferent to who bears the initial risk of harm resulting from the behavior of others. It cares, both for efficiency and distributional—not to say justice—reasons about the placement of the initial entitlements, and it cares even when contracting before the injury is not feasible; hence the market society can no more exist in its “pure” form than can its converse, the purely collective society.<sup>11</sup>

RACY (1962); Buchanan, *Positive Economics, Welfare Economics, and Political Economy*, 2 J. LAW & ECON. 124 (1959).

All this emphasizes the too-often-ignored difference between a pure utilitarian ideology and a pure libertarian-contractarian one. The first would have no problems with collectively determined shifts in entitlements and, *a fortiori*, with collectively determined compensation, so long as it appeared that winners gained more than losers lost. The second rejects such shifts unless the gains, losses, and compensation are demonstrated through freely established contractual-market transactions. See note 8 *supra*.

11. The tension between the utilitarian bases of free market thinking (whether collective or not) and the libertarian-contractarian aspirations of that ideology are all too rarely recognized explicitly. But see J. BUCHANAN, *supra* note 10.

In the absence of what Professor Coase has called transaction costs, any initial allocation is as efficient as any other. But transaction costs (as the term is used by Coase, to mean *any impediments to bargaining* including absence of information and knowledge) are—like friction—only absent in theoretical models. The question then inevitably becomes how significant in any given situation is “the friction.” Where impediments to bargaining (transaction costs) are significant, the initial entitlement can be crucial in terms of efficiency. See Calabresi, *Transaction Costs, Resource Allocation and Liability Rules*, 11 J. LAW & ECON. 67 (1968); Calabresi & Melamed, *supra* note 3; Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960). And a *laissez-faire* society knows this as well as any other. Indeed, the *efficiency* basis of the nineteenth century’s preference for victim loss bearing lay precisely in the existence of transaction costs. Injurers could not seek out and contract with all possible victims. When, nevertheless, injurer avoidance seemed *patently* cheaper, efficiency, given the presence of transaction costs, required that the initial burden be placed on injurers. A simple “always let the loss lie on the victim” was, therefore, unacceptable to these utilitarian nineteenth century free marketeers and liability for many fault caused injuries

But if to describe the two pure approaches is to deny the possibility of their universal application, it is also to recognize how frequently both are in fact used in their pure forms in all societies to deal with particular problems or segments of problems. Even a cursory look at traditional situations close to tort law in which behavior is forbidden (driving by infants) or—for it is the same thing—is required (driving with lights after dark) demonstrates that collective approaches have always had their due. When one moves to those areas that have traditionally been “criminal” the spectrum of collective controls, of course, broadens still further. Conversely, even in traditional tort areas, there has always been a place for contracts that shifted the risk onto a party initially protected from it. And again, as one moves away from traditional tort areas to those we think of as governed by contract or sales law, one sees how frequently the pure atomistic approach is used. Theft (noncontractual behavior) is forbidden, but by contract it can become a valid sale.<sup>12</sup>

We can conclude that legal systems generally employ mixed collective and atomistic approaches. We can also see that the simplest mixture involves using both of the pure approaches but limiting their scope. Some acts are forbidden or required, a fact that neither contractual arrangements nor payment of damages will alter. Other acts are permitted without sanction *but only if* contractual behavior precedes the action or ratifies it after the event.

This simple mixture does not suffice, however. Too often neither pure approach is acceptable. The atomistic approach is rejected for one of two reasons:

- a) contractual behavior is too expensive to be required before action,<sup>13</sup> or

followed. *See also* Demsetz, *When Does the Rule of Liability Matter*, 1 J. LEGAL STUD. 13 (1972); Stigler, *The Law and Economics of Public Policy: A Plea to the Scholars*, 1 J. LEGAL STUD. 1 (1972); notes 8 & 10 *supra*.

12. To say that illegitimate noncontractual behavior can become valid through a contract or sale is not to say that a society must always permit all contracts. Rape, by contract, can become prostitution—a very different thing, but not necessarily legal. Murder cannot be made legal through victim consent. All such restrictions on contract are, in a sense, limits on the “pure” market society, though many were recognized even in the high days of that ideology. Some restrictions on alienation can in fact be explained in terms that are, on the whole, consistent with “pure” markets in the “real” world. As such restrictions become more widespread, however, explanations inconsistent with market ideologies become more plausible. *See* Calabresi & Melamed, *supra* note 3.

13. Any time initial injurer liability is appropriate, and finding and contracting with all possible victims is impossible, a clear instance of this first reason exists. Negligent driving is the classic example. Burdening injurers was widely deemed to be appropriate; *ex ante* contractual arrangements with possible victims were prohibitive; fault-based tort liability followed. A somewhat more complex example of the first reason is the case in which contractual behavior harms “third” parties with whom contractual arrangements are not feasible.

- b) the society does not trust the parties to contract in their own best interest.<sup>14</sup>

But the collective approach is also rejected for either of two analogous reasons:

- a) it costs too much collectively to decide on, and enforce controls on all behavior; or
- b) the society is not sure enough about the desirability of the behavior to wish to require or forbid it.

Where *either* reason for rejecting pure market controls joins with *either* reason for rejecting collective controls, one is apt to find the torts approach in one of its many forms.

Note that each set of two reasons for rejecting a pure approach contains an *ideological* ground (lack of faith in the ability either of the atomistic contract or of the collective decision to achieve desired results) and a *practical* reason (contractual behavior is costly, but so are collective decisions). Obviously the more a society is *ideologically* pure, the more it will employ torts *only* when using its favored “pure” system is not feasible, *i.e.*, is too costly. The nineteenth century tended to employ torts only when letting losses lie on victims was manifestly inefficient or distributionally intolerable, and when requiring possible injurers to engage in contractual behavior before acting mandated the impossible and precluded potentially desirable activities. Skepticism as to people’s ability to contract in their own best interest was only rarely a basis for torts. Conversely, a truly collective society uses torts only when it wishes to be freed of the *costs* of deciding the desirability of every minute action, not because it wishes to let individuals decide—to some extent—whether an action is worth doing. The ideologically skeptical society, instead, will use torts even when pure approaches are feasible, precisely because it is skeptical of the desirability both of pure contractual behavior and of collective decisions.

What then is the mixture I have been calling torts and which in Europe is more felicitously called “civil responsibility”? *Its essence is the liability rule* which itself mixes individualistic and collective deci-

14. This second reason may be present because the parties do not have adequate knowledge to contract in their own best interests. And making such knowledge available in an *effective* way may not be deemed feasible or may be prohibitively expensive. For a discussion of what is an *adequate* warning or disclaimer, even in contractual situations like those involved in products liability cases, see *Sills v. Massey-Ferguson, Inc.*, 296 F. Supp. 776 (N.D. Ind. 1969); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

It may also be present because the society believes that the parties, even if informed, will not decide in their best interests since they are incapable as a result of age, poverty, lack of education, or any other “limitation” that seems crucial to that no longer purely individualistic society.

sions. Behavior is not collectively forbidden merely because it is risky or required despite its risks. Individuals are free to choose, but their choice entails civil liability, that is, the payment of *collectively* determined damages if harm occurs.<sup>15</sup> Conversely, contractual behavior to purchase the right to harm those entitled not to be harmed is not required.<sup>16</sup> Again, the payment of collectively determined compensation to those injured takes its place.

The ideology that underlies use of liability rules is a mixed ideology. The party entitled to be free from harm is not compensated to the degree or in the way that he might have chosen. He has not sold his entitlement for a price satisfactory to him; it has been taken from him and he is given damages, which may be greater or less than what he would have negotiated for, but which are, in any event, decided upon collectively.<sup>17</sup> Conversely, decisions on the desirability of engaging in risky activities are not made collectively. They are left up to individuals who will, presumably, be influenced by the damages they may have to pay or bear if harm occurs.<sup>18</sup>

15. The behavior may also be forbidden criminally, as is the case in many automobile negligence situations, but that additional bit of collective intervention is for my present purposes beside the point. To the extent that civil responsibility or liability exists, the actor must take that possible—collectively determined—payment into account in deciding whether the behavior is worth undertaking. It might seem that damages in contract cases are also collectively determined. But if the parties to the contract had the option, at the time the contract was made, of agreeing to liquidated damages or to arbitration and chose not to do so, then judicial damages would be fully consistent with the libertarian ideology. *See* note 10 *supra*. If arbitration and liquidated damages are forbidden, however, the approach is closer to that of the ideology mixture I am here describing. *See* note 9 *supra* & note 17 *infra*.

16. As a general rule, it is not forbidden. Exculpatory agreements exist, as do agreements to let damages—should harm occur—be determined by arbitrators chosen by the parties. Such “contractual behavior,” however, even if permitted, is not a prerequisite for acting.

17. Tort law is only one instance of this ideological mixture; it is only one area in which what I call liability rules are used. Eminent domain is another, for in that area too a transfer of an entitlement is imposed at a price that is not negotiated by the parties. Closely analogous are prohibitions on particular means of assessing damages agreed to by the parties. Thus, from the point of view of this paper, restrictions on the use of liquidated damage clauses or of arbitration agreements are examples of the same mixed approach of which torts is my paradigm. Moving a bit further, but still close, is the unenforceability of certain contracts as “against public policy” or as “unconscionable.” The analogue here, of course, is to the invalidity of certain exculpatory or indemnificatory agreements and the “inadequacy” of some warnings in torts. In all these instances there is substituted for the “agreement” of the parties a collective determination. But also in these instances, the collective determination does not cover the field; it leaves substantial room for individual decisions and for the play of incentives. *See generally* Calabresi & Melamed, *supra* note 3.

18. One could, of course, look at criminal law and criminal penalties analogously. From this viewpoint the penalty becomes the price that the criminal is free to risk and, if caught, pay in order to engage in the criminal behavior. Those who have looked at criminal law this way are, understandably, led to take the next step; in attempting to convert that area of law into a torts-like mixture they frequently urge fines or victim compensation instead of more traditional criminal sanctions. *See, e.g.,* Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); Del Vecchio, *Equality and Inequality in Relation to Justice*, 11 NAT. L.F. 36, 43-45 (1966). *See also* R. POSNER, *ECONOMIC ANALYSIS OF LAW* 66-69, 357-73 (1972).

If ideologically mixed, liability rules are also intensely practical. They enable actions to take place when contractual behavior, before harm, would not be feasible. Damages after harm replace such unfeasible agreements. And they permit control of behavior that could only at too great an expense be governed collectively. By varying the size of the applicable damages according to the various circumstances involved, the collective decision makers can go a long way toward enforcing their views without engaging in minutiae of control that would not be worthwhile.

We are now, finally, in a position to talk briefly about the future of torts—about the next hundred years. That future depends fundamentally on the degree to which our society will be relatively pure ideologically—and use torts mainly out of necessity (as a hundred years ago), or will continue to be ideologically skeptical (as it is now)—and opt for

But this approach, to my way of thinking, misperceives the societal judgment involved in criminal law. Leaving aside ambiguous areas like parking tickets and other “administrative” violations (which are in fact normally subject only to fines), the societal intention in criminal law is not to permit individuals to choose whether or not committing the crime is worthwhile. The object, though never fully enforceable, is to keep the crime from happening regardless of the criminal’s desire to commit it because a *collective* decision has been made that the criminal conduct is not worthwhile regardless of individual desire to engage in it.

This collective determination is easily reconcilable with a market ideology whenever negotiations between the victim and the criminal are eminently feasible. Indeed, the *criminality* in such cases can be viewed as consisting simply in the willful refusal on the part of the criminal to engage in contractual behavior before acting. Theft is the most obvious case; criminal sanctions are imposed in order to require a negotiated sale rather than a *taking* at a collectively determined “price-penalty” (as Becker would have it). Rape, when prostitution is permitted or in practice tolerated, is another. Ideologically, traditional criminal sanctions in these areas can be justified in order to protect the integrity of a market society and are totally consistent with it.

At times, however, the collective nature of the decision to forbid behavior is more basic. Criminal sanctions are used to prohibit consensual behavior (the fact that the victim was willing does not exonerate the killer), or are used where negotiations are not feasible (where a pure marketeer would accept a liability rule, but not a criminal sanction, as the necessary second best). The societal decision in these cases is, typically, *ideologically* collective, because it attempts to make some entitlements inalienable despite the desires of the immediate parties. See generally Calabresi & Melamed, *supra* note 3. Those who are devoted to pure market approaches and ideologies are, understandably, likely to chafe at criminal sanctions in such areas. In the consensual cases, where negotiations between all the relevant parties are possible, the pure marketeer would abolish all criminal penalties except those needed to enforce the requirement that such negotiations take place. In the areas where negotiations are not feasible he would also decriminalize, but would require, as a second best, that the injured parties be compensated by the injurers at a collectively determined price.

If one views Becker *et al.* as ideologically committed pure marketeers, one can readily understand their desire to convert the sanctions in these last areas of criminal law to torts-like, liability rule, sanctions. (One cannot, however, understand their desire to apply liability rules to crimes where negotiations are feasible.) But to say that one can *understand* what they are about is very far from saying that they are right from the society’s point of view. A society that has chosen (wisely or not) a rule of inalienability (a collective prohibition of some behavior) has rejected in that instance the market ideology, and hence is not likely to be talked into accepting a torts-like sanction in lieu of a traditional criminal penalty merely because a liability rule would serve as the market’s feasible second best.

the liability rule even when contractual behavior or collective prohibitions are eminently feasible.

Torts, or the rule of liability, is currently used in many areas that reflect the prevailing ideological skepticism. Skepticism toward pure collectivism—even where collective judgments are feasible—can be seen in all those areas where the fault standard prevails. In these areas the initial entitlement (the right to act without bearing the burden of the injuries one causes) is negated by the fact that the faulty party acted in a way that was collectively judged to be undesirable—wrong.<sup>19</sup> Despite this, the “undesirable” act is not forbidden, and criminal law even if applied is not viewed as sufficient to control it. Rather, the actor is—in effect—given the opportunity to second guess the collective determination and to decide that acting in the faulty manner or taking the chance of so acting, is worth the—collectively determined—damages he must pay. In other words, the collective decision is subjected to another, atomistic or market, review by the faulty party.<sup>20</sup> This skepticism toward collective judgments takes its most dramatic form in the acceptance of insurance for injuries caused by faulty behavior. Insurance is, after all, essentially contractual behavior that permits the insured to buy the right to risk injury to those entitled to be free from risk bearing.

19. For present purposes it does not matter whether the collective judgment was based solely on an efficiency calculation or on broader grounds.

The initial entitlement to act without bearing the burden of the injuries can be given to the victim or to the injurer. Letting the loss lie where it falls (unless the injurer is at fault) is an example of injurer entitlement. Strict injurer liability (unless the victim is negligent) gives the entitlement to the victim. See Calabresi, *Optimal Deterrence and Accidents*, *supra* note 2; Calabresi & Hirschhoff, *supra* note 2.

20. We can now begin to understand why writers like Richard Posner, who are devoted to a market ideology, support a fault approach in torts law. Use of fault in lieu of a broader collective prohibition (*i.e.*, the employment of a liability rule based on a collective determination that behavior is wrongful, instead of a criminal sanction) manifests deep skepticism toward collective decisions, for a feasible (indeed an *actual*) collective determination of the merits of individual behavior is not enforced criminally but instead is subjected to an atomistic, market review. This skepticism, while it explains a reluctance to use criminal sanctions instead of fault, *see* note 18 *supra*, does not, of course, explain why, in the absence of fault, the pure marketeer prefers universal *victim* liability to universal *injurer* liability or, more plausibly, to strict non-fault liability sometimes on one and sometimes on the other party. That preference can, however, also be explained once one understands the fact that liability rules are only a poor second best for the pure contractarian-market ideologue, and that victim liability may render *any* non-contractual behavior unnecessary. *See* text accompanying notes 8-11 *supra* & notes 21-22 *infra*. Such a preference may, however, be quite costly from both an efficiency and a distributional point of view. Once again, the difference between utilitarian and libertarian-contractarian approaches becomes crucial. Compare R. POSNER, *supra* note 18; Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205 (1973); and Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972), with G. CALABRESI, THE COSTS OF ACCIDENTS, *supra* note 3; Calabresi, *Optimal Deterrence and Accidents*, *supra* note 2; Calabresi, *supra* note 11; Calabresi & Hirschhoff, *supra* note 2; and Calabresi & Melamed, *supra* note 3. *See also* notes 8, 10-11 *supra*.

The contrast to the criminal sanctions that a “pure” collective society would employ is both obvious and dramatic.

Similarly, torts today also reflects skepticism toward the pure market even where contractual behavior—before action—is feasible. One need only consider the restrictions commonly placed on exculpatory or indemnificatory agreements, and the decline of the doctrine of assumption of risk, to see how far from the “pure” market ideology we have come.<sup>21</sup> An equally significant sign of this skepticism, if one stops to think about it, is the move away from entitlements that placed losses on victims. These entitlements were favored by a pure market ideology because they did not require that unfeasible contracts be made before action could take place. The victim did not need to buy indemnity from the risk of injury from all his potential injurers (who might be hard to identify and pay); he could relatively easily find an insurance company ready to take on the monetary risk. Therefore, the pure market society tended to place risks of loss on the potential victim, unless such an allocation was *clearly* unjust or inefficient or unless contractual behavior by injurers was clearly feasible before action.<sup>22</sup> The turn away from this allocation inevitably suggests skepticism toward pure market ideology. Moreover, even when the entitlement to be *free* of the risk is given to the potential injurer, and the potential victim is burdened with the risk, the victim is typically *required* to insure himself. We call this first party insurance, but whatever its name, the requirement of insurance represents a deep skepticism of pure market choices. We wish the burden to lie on the victim, but we do not trust his atomistic judgment in evaluating the entity of the burden or the desirability of risking it.<sup>23</sup>

21. See, e.g., *Sills v. Massey-Ferguson, Inc.*, 296 F. Supp. 776 (N.D. Ind. 1969); *McGrath v. American Cyanamid Co.*, 41 N.J. 272, 196 A.2d 238 (1963); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). See also *Calabresi & Hirschhoff*, *supra* note 2, at 1073 n.65; note 16 *supra*.

22. Protection of property through criminal sanctions in pure market societies is readily explained by the feasibility of contractual behavior (purchase rather than theft) before injury, as well as by the efficiency and distributional intuitions of such societies. See also *Demsetz*, *supra* note 8. Similarly, injurer liability for at least some fault-caused injuries was generally justified in such societies on efficiency grounds. See Richard Posner's writings cited at note 20 *supra*. See also O. HOLMES, *supra* note 3. The same would be true, *a fortiori*, for intentional or willful torts, where the feasibility of contractual behavior, before the injury, cannot be excluded. *Punitive damages* would seem particularly appropriate in such cases even in pure market societies. See note 18 *supra*.

23. Compulsory insurance for at least part of the loss is a common feature of all so-called no-fault or first party automobile insurance plans currently being debated. The insurance is not merely compulsory toward third parties to whom the motorist is held strictly liable (e.g., passengers and pedestrians) but is also compulsory with respect to the motorist's own injuries. See, e.g., R. KEETON & J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM* (1965), from which most such plans derive.

The death of contract has taken many forms, not the least of which has been the movement from a tort law designed to be the minimum necessary to make a pure market feasible, to one that glories in its limited but not unavoidable collective interventions.<sup>24</sup>

What does this suggest about the next hundred years? It is hard to conceive of a return to the ideology of the pure market. Even the nineteenth century found too inflexible the notion that the best we can do with respect to risks is to decide who seems to be able to avoid harm most cheaply<sup>25</sup> and make him act at his criminal peril should he harm others, unless he can induce these others to take on the risks for a price. Nor is it likely that we will return to the compromise with reality that the *laissez-faire* period made—

- (a) not to *require* contractual behavior but to allow actors, who have been chosen to bear the risk and have not shifted it contractually, to pay collectively determined damages, and
- (b) (in order to keep such collectively determined liability at a minimum) to let the loss lie on the victim unless efficiency and distributional imperatives required burdening the injurer.

This *minimal* use of torts will remain unacceptable because it depends too much on a willingness to believe that victims (1) are frequently the cheapest avoiders of harms, or (2) are distributionally desirable loss bearers, *and*, in addition, (3) can intelligently value the risk they are bearing. The decline of faith in the first two propositions has led to more “strict injurer” liability and hence to a greater use of torts and liability rules on feasibility grounds, which must inevitably trouble the

24. See generally G. GILMORE, *THE DEATH OF CONTRACT* (1974).

One can, from this standpoint, usefully compare the various attempts made by courts to distinguish between contracts limiting liability in the case of a toaster that is defective in the sense that it fails to work and that of a toaster that is defective in the sense that it blows up or sets a house on fire. The most common first try was, of course, in terms of property versus personal damages. See, e.g., Justice Traynor’s “defect causing damage to humans” test for strict liability, *Greenman v. Yuba Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Calif. Rptr. 697, (1963); *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring). But such an approach failed because the same society that is sufficiently *laissez-faire* to permit an ordinary contract to determine who bears the risk of a toaster’s failure to work (or of other relatively frequent minor damages, whether personal or property) is not willing to permit major, relatively rare victim-property damages (like those following on toaster caused fires) to be so allocated. Where the law of sales ends and the law of torts begins, in other words, tells us a great deal about the ideological makeup of the society, about how far from a pure market it has gone, without, for all of that, becoming ideologically committed to collectivism.

25. This assumes that the pure market ideologue is concerned solely with efficiency and is uninterested in the *distributional* consequences of the allocation of risks. In fact, it seems likely that the initial entitlement always was based on distributional as well as on efficiency grounds. See Calabresi & Melamed, *supra* note 3; O. HOLMES, *supra* note 3.

true believers in the nineteenth century liberal state. (The defense of ideologically second best positions, and the liability rule is always second best to contractual behavior, rarely appeals to true believers.) The decline of faith in the third proposition represents a direct assault on the market ideology. Together they amount to a skepticism that forecloses a return to a minimal law of torts—to a law of torts limited to being the unavoidable adjunct to a contract based society.

But what of the other ideology? Will the next hundred years bring the decline (if not the death) of torts and liability rules because there will be no room left for the individualism torts implies? Will the liability rule become that minimal concession that the collectivist state must permit only because it cannot enforce an infinity of judgments collectively? Will damage size increasingly come to depend on the relative undesirability of the payor's behavior instead of on the best estimate of what is needed to compensate for the harm caused?<sup>26</sup> Will, and this is the other side of the coin, compensation itself become increasingly covered out of general taxes? It is possible—for certainly the trend toward greater collectivism in our society is still running strong.

Still, and this may perhaps reflect only my own ideological skepticism, I am inclined to doubt that the trend will go that far. As in 1876 the tide is rising but may at the same time have started to recede. The failure of regulation, as we know it, as a means of furthering safety is too patent. The very advocates of more regulation, like Mr. Nader, base their pleas on the failure of past "regulators," that is, of regulation. The corruptibility of the "allocating state," of the state that decides too many things which affect too many people, becomes more manifest every day.<sup>27</sup> There is talk, even in societies committed to collectivism, about the utility of incentives as means of enforcement and choice. At the same time, in the United States the many experiments currently being tried with class actions, pollution licenses or taxes (simply another form of liability rule), reverse damages in nuisance suits, and even civil self-enforcement against law violations, suggest an increasing skepticism toward the pure collectivist mode of controlling risk and harm.<sup>28</sup>

26. Punitive damages or fines, used *in lieu of criminal law*, do not, of course, represent a move toward greater collectivism, quite the contrary. See note 18 *supra*. The same kind of damages and fines employed in place of *compensatory* damages, in situations where torts was traditionally used as a substitute for unfeasible contractual transactions, do represent a turning away from relatively atomistic and individualized decisions and an increase in collective decision making.

27. This corruptibility is evident both in "Western" style democracies and in the "People's" republics.

28. See, e.g., *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 108 Ariz. 178, 494 P.2d 700 (1972) (the now classic case of reverse damages in nuisance); *International Herald Tribune*, June 3, 1976,

Perhaps in this disillusionment with "pure regulation," hindsight will be able to discern the beginning of a trend. It will not be a trend toward the tort law of the nineteenth century. Nor—I suspect—will it even be a trend toward that relatively individualistic, second best market society that I have, at times, been charged with promoting. The object will not be simply to place liability on the cheapest cost avoider, taking into consideration distributional goals, and then to let atomistic decisions determine the extent of safety and harm. Rather, if there is a trend, it is a trend toward an *ideologically self-conscious use of torts as a mixed system*. The possibilities inherent in the liability rule as a device for promoting clearly collective goals and mitigating perceived incapacities of people to decide best for themselves, while still permitting a wide degree of atomistic choice and determination, under this view will be fully exploited. If that is the case, if—as I believe it will—the mixed society prevails, the next century will be the century not of contracts nor of criminal law (though both will remain dominant in limited areas as part of the ideological mixture)<sup>29</sup> but of torts and of the rule of liability.

at 3, col. 1, noting a proposed pollution tax that some United States economists and legislators believe will be more effective than regulation. The proponents of the pollution tax emphasized the administrative unworkability of regulation. An official of the National Association of Manufacturers, instead, defended regulation in a congressional seminar, saying, "It is working well and should not be scrapped for an untried theoretical approach." Cf. Washington Post, Feb. 1, 1976, § B, at 1, col. 6 (reporting the civil damage suit brought by a rape victim to buttress what were viewed as inadequate criminal law controls in the area). See also the debate between Posner & Landes and Stigler on the relative merits of "private law enforcement," Landes & Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975); Becker & Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1 (1974).

29. If this view is correct, one can expect that there will be increasing tort-like influences in areas where contracts and criminal law prevail. The concept of contracts of adhesion, for instance, will continue to grow (thus limiting the pure market even in areas nominally governed by contract law), as will the notion of compensation of victims of crimes (thus putting some market type incentives at work in a traditionally collectivist area of law).

My colleague Leon Lipson has pointed out that a disproportionate number of American and English jurists, in the last century, began their careers in contracts law, while a disproportionate number of Russian jurists, since 1917, have been scholars of criminal law. It will be interesting to see if the American legal philosophers of the next years will come from fields in which *liability rules*, as I have here used the term, are dominant.