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The Modern Transformation of Civil Law

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This Essay addresses the transformation of civil law that began in this country, roughly around the mid-1960s, from a legal system that intervened in the lives of citizens only on occasions of serious moral dereliction, to the most extensive and powerful regulatory mechanism of modern society.¹ Prior to the 1960s, civil law served a modest role in U.S. affairs. It enforced property rights and policed boundary disputes through property law, enforced promises as well as disclaimers of liability through contract law, and provided damages for personal injury through negligence law (tort law) when an individual was injured by an egregious breach of standards of normal behavior. Though the negligence standard proved loose enough to allow substantial subsequent expansion, courts prior to the 1960s employed this standard only where a party showed clear moral culpability that was substantially antagonistic to social norms. Standards determined by private contract

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were far more significant to the determination of the obligations of citizens.

Since the 1960s, however, our civil law has changed dramatically. Contract law, property law, and especially personal injury law have transformed both in function and effect. The transformation occurred through neither a sudden change in legal doctrine, nor legislative statute or popular referendum. Instead, the transformation occurred through the triumph of a set of ideas: the acceptance by the judiciary of the proposition that civil damages judgments can serve as the most effective public policy instrument for regulating the level of harm suffered by citizens in the society.

It is surely not coincidental that the outset of this transformation of civil law was roughly contemporaneous with the creation of various federal regulatory agencies charged with controlling levels of harm, such as the Environmental Protection Agency (created in 1970), the National Highway Traffic Safety Administration (1970), the Occupational Health and Safety Administration (1971) and the Consumer Product Safety Commission (1972). In many respects, however, the transformation of civil law developed in ways that gave it a far more ambitious and extensive regulatory authority than any of these agencies. All regulatory agencies have limited budgets and, as a consequence, are constrained to thresholds of concern. Thus, even agencies with broad authority—such as OSHA or EPA—can effectively regulate the decisions of only a limited number of corporations. Other regulatory agencies—such as NHTSA—possess jurisdiction over only a single industry (auto manufacture).

Our modern civil justice system, in contrast, aspires to regulate the sources of harm with respect to all activities of the society. Our civil courts can entertain the question of whether a victim should receive compensation from the party that caused it harm as long as it is economically worthwhile for a person feeling victimized to initiate litigation; all such claims will be entertained. Indeed, to perfect the system, the incentives for initiating litigation themselves have been enhanced by various statutes awarding attorneys' fees and shifting litigation costs, as well as expansive notions of "harm"—for example, awarding damages for medical monitoring to individuals who only suspect or fear they have been harmed. As a result, our
courts today employ civil damage judgments to regulate all activities implicating harm within every industry, and indeed, by every citizen. Through the daily aggregation of civil damage judgments (or the settlement of lawsuits informed by expected judgments), our courts provide fine-tuned control of all societal behavior.

How did this transformation of civil law come about? In the nineteenth and early twentieth centuries, the basic doctrines of civil law remained generally stable. Yet, there was serious debate in the legal academy, as well as in the public policy community generally, over the role of civil law with respect to harms suffered in society. An important initial step in the transformation of civil law occurred in the early years of the twentieth century when civil law was abandoned as a mechanism for dealing with injuries suffered by workers during the course of employment. The adoption by state legislatures of worker compensation statutes during the period, roughly 1907-1915, creating mandatory employer insurance programs, represented the rejection of both tort law and contract law as means of regulating the sources of worker injuries.

Prior to the establishment of workers’ compensation insurance, injured workers could seek recovery against their employers in tort law where they could show employer negligence as a cause of the injury. Employers could defend such claims, however, by showing that the worker had been contributorily negligent, that the worker had assumed the risk of injury, or that the worker’s injury resulted from the negligence of a fellow worker, according to what is called the “fellow-servant doctrine.” Workers could sue their fellow workers for negligence, but recovery was not likely to be substantial, given workers’ limited resources. Thus, it became widely accepted that tort law was largely ineffective in providing recovery to injured workers, and tort law was rejected as a mechanism for recovery. In its place, workers’ compensation statutes compelled employers to provide insurance for worker injuries and, at the same time, prohibited workers from suing employers in tort.

2. For a more thorough account of this history, see generally Priest, Invention of Enterprise Liability, supra note 1; Priest, Strict Products Liability, supra note 1.
Though somewhat less sharply, workers’ compensation insurance also represented a rejection of contract law as a mechanism for dealing with injuries. Few believed that workers, individually, were able to negotiate safer working conditions, and only a small portion of the working class was unionized. In addition, the concept of compensating wage differentials was not widely understood. Contract law, therefore, was not viewed as an answer. To the contrary, employer-provided insurance was necessary if workers were to receive compensation for injuries.

Besides serving the ambition of increasing payments to injured workers, workers’ compensation insurance came to be justified by a concept that derived from economics: the concept of internalizing costs. According to this concept, if a party engaging in some activity fails to take into account the full costs that the activity generates, the party is likely to engage in more of the activity than is appropriate for the society. Where the costs are injury costs, there will result higher levels of injurious activities and thus larger numbers of injuries than societally appropriate. If, however, injury costs are internalized—if the injurer must pay the costs of the injury—the party causing the harm will be led to prevent losses where possible and to readjust its activity level to reduce the aggregate number of injuries. Compelling employers to provide insurance for all injuries suffered by workers during the course of employment serves to internalize the costs of worker injuries to employers.

The adoption of workers’ compensation programs was widely praised in the legal academy. Indeed, some academics thought the concept so meritorious that they sought to extend such insurance programs more broadly, to provide compensation for all injuries suffered in society.


4. By contrast, failing to compensate workers for their injuries, say, by enforcement of the common law tort defenses of contributory negligence, assumption of risk, or the fellow-servant doctrine, serves to internalize worker injury costs to the workers themselves. Many years later, Ronald Coase would show that, with respect to activity levels, internalizing injury costs to workers will have economic effects equivalent to internalizing those costs to employers. See R. H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1 (1960). This profound idea, however, remains foreign to the debate today.
Fleming James was a prominent promoter of this idea. The ambition of James and others to have enacted general societal accident insurance, however, never found success. First, a general social insurance program is, basically, socialism, to which there was deep political opposition. Even during the New Deal, insurance programs were established only with respect to particular risks—such as crop insurance, savings and loan insurance, and Social Security. Second, general social insurance is, at heart, inconsistent with the internalizing costs rationale. General social insurance is not self-contained as is insurance for workplace injuries. To provide general insurance for injuries does not serve to internalize costs to the specific activities that generated the injuries. General social insurance would provide compensation to injured parties—sufficient grounds for support to James and others—but it would not serve to create incentives for reducing the accident rate.

Faced with the failure of their social insurance proposals, and with no serious prospect of future success, many academics pressed for the expansion of civil law as a means of providing broader compensation to injured parties. James, again, was the most prominent toward this end. In a set of roughly fifty articles, James urged the expansion of tort liability in all of its forms and the restriction of available defenses, moving toward a standard of absolute liability.

For many years, James' advocacy had little effect. An opening wedge appeared, however, in the early 1960s with regard to the subject of manufacturer liability. Until the 1960s, recovery for injuries resulting from product use was chiefly determined by contract law. Contract law allowed the specific purchaser of the product to recover according to the terms of the express product warranty or of the implied warranty of merchantability. Recovery was available to the specific purchaser and, generally, only to the specific purchaser, because that person was the only party to the contract of sale (privity of contract). Virtually all product

5. See Priest, *Invention of Enterprise Liability*, supra note 1, for a more detailed description of James' work.

6. Franklin Roosevelt justified Social Security as providing protection for the "risk of old age."
warranties at the time, however, disclaimed liability for any personal injury associated with use of the product.\(^7\) Thus, according to contract law and the terms of product contracts, there was no recovery for personal injury.

There had been some concern about the operation of these contract doctrines prior to the 1960s, but it remained chiefly academic. Some jurisdictions recognized an action in negligence by a victim not a party to the contract. \textit{MacPherson v. Buick Motor Co.},\(^8\) decided in 1916, extended negligence liability only to manufacturers of products regarded as "imminently dangerous," and only where it could be shown that the purchaser or an intermediate dealer would not inspect the product for defects. Over the four decades that followed \textit{MacPherson}, some jurisdictions extended the scope of the negligence doctrine, in particular, to cases involving spoiled food, although the jurisdictions were far from unanimous. Thus, through the late 1950s and early 1960s, defective product cases were controlled by contract law with its privity requirement and, to a substantially lesser extent, by negligence law.

This changed dramatically, however, in the early 1960s and 1970s, beginning in the then-limited field of product liability. In my judgment, there were two conceptual forces leading to this change. The first was the delegitimation of contract law—in particular, warranty law—as a means for dealing with product injuries. The second was the growing belief that the expansion of tort liability in the context of personal injuries could have beneficial effects for society.

The delegitimation of contract law followed from the work of another law professor, Friedrich Kessler.\(^9\) Kessler was a German scholar who had fled the Hitler regime to the United States. Kessler had no specific interest in product-related injuries. His attack on contract law was far more

\(^7\) The central warranty remedy then (as now) was repair and replacement if a product were found to be defective. There are good economic reasons for manufacturers to disclaim liability for personal injury—chiefly because manufacturer-provided insurance is a very poor insurance mechanism—though these reasons were never articulated at the time. \textit{See generally} George L. Priest, \textit{A Theory of the Consumer Product Warranty}, 90 \textit{Yale L.J.} 1297 (1981).

\(^8\) 111 N.E. 1050 (N.Y. 1916).

\(^9\) \textit{See generally} Priest, \textit{Invention of Enterprise Liability}, supra note 1, for a more detailed description of Kessler's work.
expansive. Kessler believed that fundamental changes had occurred in the character of Western economies that deeply threatened democratic societies and the individual freedoms achieved in modern times. Kessler attributed these social changes to the “decline of the free market system,” which he saw as a consequence of “the innate trend of competitive capitalism towards monopoly.”

Kessler’s criticism of the capitalistic world was quite pointed. He described the modern industrial culture as a form of fascism: “the rise of fascism in our industrial world has made us realize that democratic freedom is not inevitable.”

According to Kessler, single firms were able “to control and regulate the distribution of goods from producer all the way down to the ultimate consumer.”

Quite curiously, Kessler saw the principal mechanism for this new means of fascist control to be contract law. The formation of large “industrial empires” had been made possible by contracts, and standardized contracts in particular. Standardized contracts—such as insurance policies or consumer product warranties—were to Kessler the equivalent of the forms of bondage typical of the feudal era. According to Kessler, “[s]tandard contracts could . . . become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals.”

Kessler’s most influential article with respect to the transformation of modern civil law is the classic Contracts of Adhesion—Some Thoughts About Freedom of Contract. The article presents a moral narrative that contrasts the ancient to the modern, the good to the evil, the redeemable to the unredeemable, that possesses a persuasive power that continues to command acceptance today. Kessler


14. Id.

15. Id. at 640.
contrasts a “society of small enterprisers, individual merchants and independent craftsmen” for whom nineteenth century contract law was designed, with large-scale enterprise and monopoly capitalism characteristic of modern times. Freedom of contract may have had meaning in the earlier world. Today, however, the prototypical modern contract is a standardized form employed by enterprises with strong bargaining power against weaker parties—consumers—in need of necessary goods and services. Modern contracts are contracts of adhesion that consumers must take or leave without ever understanding their terms at all. In this context, the enforcement of contract terms according to the principle of freedom of contract serves only to protect “the unequal distribution of property.”

The second principal conceptual force toward the transformation of civil law was the insistence by James and others that an expansion of tort liability would substantially improve social welfare. James, as mentioned, was principally concerned with providing compensation to injured parties. He supported general social insurance and, in its absence, the expansion of tort liability to achieve that end. His ambition was valuably aided by judicial opinions that focused more sharply on the positive societal gains from expanded tort liability.

Judicial acceptance of the broader role of tort law toward these ends first appeared in 1944 in California Supreme Court Justice Roger Traynor’s concurring opinion in Escola v. Coca Cola Bottling Co. Traynor’s opinion sets forth the grounds for the strict liability standard for product defects that was later adopted by the California Supreme Court and virtually all other states. The case was simple. A waitress at a restaurant was moving some bottles of soda pop when one of them exploded, injuring her. (The context of the incident was never made clear. The California Supreme Court, and Traynor, approached the issue as if the bottle exploded spontaneously. Whether the waitress dropped the bottle, hit the bottle against something, or stumbled and fell was not present before the Court.) The

16. Id.
17. Id.
18. 150 P.2d 436 (Cal. 1944).
majority of the California Supreme Court also found the case simple: they invoked the tort doctrine of res ipsa loquitur (roughly, the event speaks for itself) to hold that, despite the terms of any contractual arrangement between the distributor and the restaurant (in fact, the Court did not even discuss the contractual arrangement), the manufacturer should be liable because Coke bottles should not explode.

Justice Traynor’s concurrence was subtler and more policy oriented. He concurred with the Court’s finding of liability, but provided deeper grounds for the appropriateness of shifting the costs of the waitress’s injury to Coca-Cola. Traynor embraced a theory of strict liability in tort of the manufacturer. Strict liability was to be distinguished from negligence liability—in which the victim has to show that the defendant committed some negligent act. Traynor analogized the strict liability standard to the standard of res ipsa loquitur: if there is something defective with respect to the product, the manufacturer is to blame. That analogy—important as it was for many courts in the future—was not Traynor’s principal point. Traynor argued that there were important social grounds to extend liability to manufacturers for product-related injuries. First, such liability would lead manufacturers to invest in preventing future product-related injuries. Second, tort liability, resulting in the payment of compensatory damages to injured consumers, would provide a form of insurance to the injured that could be passed along in the product prices paid by all consumers. The expansion of tort liability, thus, would—like workers’ compensation insurance—serve to internalize injury costs to the firms that generated them. In 1944, however, Traynor’s concurrence was only a concurrence, and received little notice, though that would later change.

These ideas—contract law is perverted by market power, and tort law is a means of encouraging investments in accident prevention and insurance for resulting losses—transformed modern civil law. The first applications, again, were in the products liability field. In 1960, in Henningsen v. Bloomfield Motors, Inc., the New Jersey Supreme Court marked the effective end of the relevance of contract law in
The permanent shift from contract to an expanded tort law as the basis for the resolution of product defect claims occurred in 1963 in the California Supreme Court decision in Greenman v. Yuba Power Products, Inc. 21 The case involved personal injury from an allegedly defectively designed machine tool. 22 The manufacturer-defendant believed that its strongest defense was the failure of the victim to provide notice of the alleged breach of warranty within a reasonable time. The strict notice requirement of contract law, however, had been flagged as illustrative of the outdated character of warranty law in many treatments of the product defect question, including those by James and a scholar writing in a similar vein, William Prosser. In

20. Id. at 95, 85.
22. Id. The product was a wood lathe in which a piece of wood being turned had detached and injured the plaintiff. Id. The Court gave no attention as to whether Mr. Greenman had fastened the piece of wood adequately prior to turning on the lathe. Id.
Greenman, it triggered the final acceptance by a majority of the California Supreme Court of Traynor’s strict liability argument first presented nearly two decades earlier in Escola.

In Greenman, Justice Traynor, writing for the Court, announced the standard of strict liability in tort, applicable to a manufacturer whenever “an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.”23 The purpose of strict liability, according to the Court, “is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.”24 For a further elaboration of justifications of strict liability, the reader was referred to writings by James, and Prosser, and to Traynor’s concurring opinion in Escola.

Henningsen and Greenman were important moments in the transformation of civil law. One further event, however, vastly accelerated the transformation by jurisdictions skittish of the cutting edge. In 1964, the American Law Institute adopted Section 402A of its second Restatement of Torts, extending strict liability to sellers of all products defective and unreasonably dangerous without regard to the seller’s fault. The Reporter of the Restatement, William Prosser,25 represented to the Institute that sixteen separate jurisdictions had adopted strict liability, or some standard resembling it, citing forty different cases. This was blatant exaggeration. A re-reading today shows that there were only three cases actually supporting Prosser’s recommendation: Henningsen, Greenman, and a 1963 New York decision, Goldberg v. Kollsman Instrument Corp.26 But Prosser’s recommendation was sufficient for the Institute, and the Institute’s adoption of the strict liability standard was sufficient for the various states to adopt the standard as well. Within a little more than a decade following the

23. Id. at 900.
24. Id. at 901.
25. James and Traynor, among others, were Advisers to Prosser on the Restatement project.
Institute's adoption of the strict liability standard, forty-one of the fifty jurisdictions had adopted the rule.

As mentioned, the change in the legal standards regarding product liability was only an opening wedge—though, surely, a significant wedge—in the more general transformation of modern civil law. The broader transformation of the law resulted from the extension of the underlying ideas that had motivated the change in products liability, first, to all other areas of civil law and, second, conceptually by the acceptance of the proposition that civil law could serve as a mechanism for regulating all risks faced by the society.

First, although the strict liability standard itself has been limited to the products field, the concept of cost internalization that underlies it has been extended across the various fields of civil law. Thus, the internalization policy has been extended to justify awarding damages in pollution cases,27 in sexual harassment cases,28 and in false arrest, malicious prosecution and Section 1983 civil rights violation cases,29 among others. In these various contexts, as with product manufacture, it appears evident as to which party costs should be internalized: the manufacturer rather than the consumer, the polluter, the party harassing the victim, and the official committing misconduct.

27. See, e.g., Atlas Chem. Indus., Inc. v. Anderson, 514 S.W.2d 309, 316 (Tex. Civ. App. 1974) ("The costs of injuries resulting from pollution must be internalized by industry as a cost of production and borne by consumers or shareholders, or both, and not by the injured individual.").

28. See, e.g., Horn v. Duke Homes, 755 F.2d 599, 605 (7th Cir. 1985) ("[G]oods produced by entrepreneurs who do not assume the costs of remedying a tort (in this case sexism) are artificially cheap; forcing them to internalize the costs of the tort regardless of fault eliminates incentives to be sexist and ensures proper allocation of societal resources . . . ." (citing Guido Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 YALE L.J. 499, 500-07, 514-17(1961))).

29. See, e.g., Dobson v. Camden, 705 F.2d 759, 765 (5th Cir. 1983) ("If the person contemplating an action will reap the benefits but will not pay the costs, we have no assurance that the socially correct decision will be made. . . . Cost internalization provides us with a mechanism for reaching the correct level of deterrence for official misconduct. If people acting under color of state law know that they will bear the consequences of their actions, they will be deterred from violating a person's federal rights, but will not be over-deterred. The 'correct' level of deterrence will be established.").
The second extension of the concept involved its application to contexts where it is less clear as to which party costs should be internalized. In such contexts, extension of the cost internalization concept requires consideration of losses viewed as risks attending the activity in question. Thus, all losses suffered in the society represent the outcome of some probabilistic process. The actions of one party or another can be viewed as contributing to the probability of occurrence of a loss, arrayed upon a continuum from losses the probability of which is one hundred percent—intentionally caused harms—to losses the probability of which is zero.

With this extension, the basic foundation of civil law is transformed into controlling risks through cost internalization. The question before the court becomes which party to the litigation is in the best position to control the risk of loss. Again, in many contexts—such as product manufacture—it may seem obvious which party is in the superior position to control risks. In other contexts, however, determining which party is in the superior position to bear the risk of loss from the activity is more complicated and requires a seemingly more sophisticated analysis of the relative abilities of the parties before the court to prevent or to bear those risks.

The adoption of risk control as the central purpose of civil law shifts sharply the focus of legal controversy in each of its various subfields. In the field of contract law, for example, only a few decades ago, contract litigation turned chiefly on differing interpretations, in terms of standard English, of the provisions of underlying written contracts. In modern contract litigation, in contrast, the issues have been completely reoriented around the question of risk. The fact that some change in underlying conditions led one of the parties to breach the contract is only the beginning of the inquiry. The issue before the court is which party should bear the risk of the change in conditions that impelled the breach. Today, courts summon sophisticated theories of economics and risk bearing to determine whether it is more consistent with the long-term interests

of the parties to assign the risk of the specific change of conditions that animated the breach to the breaching party or to the victim of the breach itself.

Similarly, in earlier years, the law of corporations and of mergers and acquisitions was defined almost exclusively by the terms of corporate documents. Today, the papers of incorporation are often treated only as other obstacles that must be surpassed as part of the analysis of how to allocate risks that affect corporate ownership and structure. In recent highly publicized litigation involving mergers and acquisitions, for example, the issue before the court is whether the market for corporate control will be facilitated by assigning the risk and the commensurate benefits of some novel method of hostile takeover to the current shareholders, to the current management, or to the corporate raiders who have initiated the struggle.

The development of risk control as the central function of civil law has been most prominent in fields involving personal injury. As in other fields, this development led to an extensive redefinition of legal issues. In cases involving claims of medical malpractice, for example, modern litigation extends far beyond the earlier, relatively simple inquiry into whether a doctor was morally culpable for breaching standards of community practice. In the most sophisticated malpractice litigation today, the issue is one of risk and its control: did the attending surgeon have sufficient control over the determinants of the risk of the medical maloccurrence to justify liability, should that risk be assigned to the supporting physicians, or to the hospital—vicariously—through a judgment against its staff?

An important implication of the adoption of risk control as the principal function of civil law is that issues of motive and volition central to the legal regime that prevailed until the 1960s are rendered largely irrelevant. In modern contract law, for example, the decision of a party to intentionally breach a contract has little legal significance. It is acknowledged that the risks are omnipresent, that changes in conditions will occur that might unsettle contracts and, that thus, it is inevitable that some contracts will be breached. The role of a court, as a result, is no longer to punish the breach of contract, but to allocate between the parties the risks of such changes in underlying conditions. Though in earlier years it was necessary to demonstrate
that a manufacturer had acted with bad motives or had behaved recklessly or negligently, today such issues are largely ignored. The concern of the courts today extends beyond specific bad motives to the broader risks of product injury. Thus, a manufacturer may have organized its production process with deep humanitarian concern for the welfare of its consumers, but if the company has miscalculated the risks and benefits of safety design, liability will follow immediately.

Many believe the derogation of issues of motive and volition in civil law as indicating a decline in commitment to individual responsibility or, perhaps, a shift of expectations toward an impersonal or a collective responsibility. The shift in standards of law may indirectly have that effect as citizens revise their expectations of the ultimate consequences of misoccurrences that afflict them. But the stimulus for the shift toward risk control as the central purpose of civil law is different and did not derive from a diminished conviction of the importance of individual responsibility.

The legal regime that prevailed from the nineteenth century through the mid-1960s functioned chiefly by categorizing certain actions that generated loss as so particularly extreme or egregious as to deserve liability for any harm that resulted. Actions subject to legal liability were those for which there was a dramatically greater than normal chance that loss would result. According to this regime, prototypical candidates for liability were harms caused intentionally and those close to the intentional because of the high likelihood of injury.

Resolving disputes according to the standards of risk control is entirely different and implies vastly different methods of legal analysis. A property law whose focus is boundary disputes, a contract law whose focus is breach of promise, and a personal injury law whose focus is serious moral dereliction are each regimes in which the law defines a clear demarcation between acts subject to liability and acts immune from it. If the property line is transgressed, a trespass action will follow. If the contract is not performed, or if the injurer is morally culpable, damages will follow.

According to this earlier conception of the role of civil law, there are certain clear actions for which liability will apply, but equally clear sets for which liability is
unavailable. Indeed, there are large sets of injuries suffered by property owners, parties to contracts, and injured victims that not only do not justify liability, but do not even justify judicial scrutiny. For example, under such a regime, a consumer who is injured by a product but cannot show that the product was intentionally or recklessly manufactured, or cannot show clear moral negligence in the manufacturing process, cannot recover damages. From the standpoint of the law, the product-related injury remains one of life’s hazards to be suffered as best as possible according to the victim’s resources, but without reference to the legal system. As another example, if a farmer promised to provide a broker 1,000 bushels of corn, but because of drought can only provide 500, the farmer has breached the contract and must pay damages to the broker for the remainder. According to the law, the farmer must suffer the loss because it was the farmer, not the broker, who promised to deliver the corn.

This is not to suggest that the earlier regime was totally indifferent to conditions generating losses. If the probability of injury from product use were exceptionally high, the law could conclude that the manufacturer should have known of the product danger and find the manufacturer liable, despite its claim of ignorance. Similarly, if the drought itself were so extreme that it prevented the farmer from delivering any of the 1,000 bushels, the law could relieve the farmer by rescinding the contract, finding it impossible to perform. Nevertheless, the method of analysis under the regime, even in these examples, was one of comparing the extremity of the factual context of the loss to some standard of normal or expected behavior.

According to this approach, some actions differ so dramatically from the normal—reckless manufacture or breach of contract—that legal liability is justified. Legal analysis under such a regime consisted of categorizing acts as either qualifying as sufficiently abnormal to justify liability, or not. Obviously, intentional harm-causing actions justified liability. Beyond the intentional, unusually egregious actions may have justified liability. In almost all other cases, however, liability was unavailable, and the law allowed the loss to lie where it had fallen.

The adoption of risk control as the central goal of civil law rejects this categorical method of legal analysis. A law
concerned with risk perceives losses as occurring probabilistically, with greater or lesser likelihood. Actions become subject to potential legal liability if they increase the occurrence of loss by some sufficient amount.

This shift does not reject, but builds upon, the liability imposed by the previous regime. Losses caused intentionally, or that are especially egregious, remain subject to liability a fortiori. The frontier of liability, instead, is extended to disputes involving actions that increase the probability of loss by some dimension, though they may not make the loss inevitable or even highly likely. Thus, a manufacturer is made responsible for avoiding more than recklessly or egregiously negligent production methods; the manufacturer must monitor all potential sources of product risk and will be held liable whenever a risk eventuates that the manufacturer could readily have controlled. Thus, manufacturers of automobiles are routinely held liable for failing to design safety features in autos that would protect even drunk drivers from injuries resulting from the accidents they cause.

Similarly, liability for breach of contract induced by a drought will turn not on the simple issue of whether it was the farmer or the broker who breached the promise. Rather, the breach of promise is viewed as a probabilistic outcome of the drought. The issue in the case shifts to the question of the appropriate assignment of the risk of drought: is it better to allocate the risk of drought to the individual farmer, locked into the specific climatic position of the farm, or to the broker, who can diversify drought risk by entering contracts with geographically disparate farmers?

A law concerned with risk control rejects a discrete demarcation between actions regarded as extreme and those regarded as normal. All actions can be arrayed on a continuum of contribution toward loss. Thus, central concepts of causation are altered dramatically. The earlier regime that imposed a sharp distinction between particularly extreme sources of harm versus all others was necessarily committed to a very strict conception of causation. Actions were subject to liability for causing harm chiefly if they constituted the sole or exclusive source of the harm. In contrast, our modern civil law, devoted to risk control, focuses less upon strict causation than upon contribution to the occurrence of the harm. Some action may generate liability because of its contribution to the risk
of occurrence, though it was only one of the many simultaneously contributing sources of the loss.

The new regime of risk control thus vastly expands the opportunity for the attachment of legal liability, as well as the importance of civil law as an instrument of social control. Many decry what they perceive as the increased litigiousness of modern society, but the level of litigiousness is only a function of the underlying legal rules in force. Our modern civil law encourages litigation as an instrument for internalizing costs to control risks. In our society, intentionally or egregiously caused harms are infrequent; therefore, the earlier legal regime that focused only upon such harms was a regime of very limited scope. In contrast, our modern legal regime, focused upon every contribution to risk, is a regime of dramatically greater dimension. Such a regime aspires to impose legal controls on all activities in the society that contribute to risk in any way. Thus, virtually every action by every citizen becomes subject to potential legal review because every action will increase the risk of some loss in some way.

To my mind, far from incorporating a diminished view of individual responsibility, the shift of the law’s purpose toward risk control represents a vastly expanded commitment to standards of individual liability, though expanded liability is somewhat different than enhanced individual responsibility. Under the new regime, an individual may be held liable not only for intentionally or maliciously harmful behavior, but for all behavior that increases the risk of loss, though the loss itself may be remote. Under earlier law, an individual needed to make certain only that his or her actions caused no direct injury to another individual. Under modern law, in contrast, an individual must make certain that his or her actions do not increase the risk of loss in any way. Thus, for each citizen, the potential of civil liability is vastly increased. The law charges each citizen to carefully monitor every action for its potential contribution to risk of loss.

From the standpoint of the control of risk, it is difficult to define a truly solitary act—an act that does not in some way implicate risks to others. The gardener spraying plants or the recluse reading silently before the fireplace may not be subject to personal liability for the increase in the collective social risk from pesticides or particulates, but will suffer the attachment of liability as pesticide or firewood
prices rise or as the society proscribes such enjoyments directly. It is equally difficult in a society concerned with risk to truly shield or isolate oneself from others. The gardener’s yield will be affected by the acidity of the rain, just as book prices will reflect the shift to acid-free paper. The centrality of risk effectively prevents all efforts of social escape.

Beyond increasing the scope of individual responsibility, the regime of risk control dramatically changes the substantive content of that responsibility. The focus of modern law on risk control diminishes the importance of moral standards in the evaluation of harm-causing activities. It is no longer useful in such a regime to distinguish between the guilty and the innocent or the culpable and the blameless. Almost every human action will increase the probability of some loss by some amount; empirically, it would be extremely rare for an action to contribute zero toward the probability of occurrence of all losses in all contexts. It follows, therefore, that under the modern conception of risk, no action is ever truly innocent. Each of us must recognize that all of our actions are likely to harm others in the society in some way. As a consequence, every citizen stands in a position of continuous potential interaction with the law because every action is potentially subject to liability. Indeed, each of us must be aware that many of our specific actions may well lie close to the point on the risk continuum at which the attachment of legal liability becomes socially worthwhile.

Once it is accepted that all actions can be arrayed at some point upon the risk-contribution continuum, sharp moral distinctions lose moment. It is no longer possible to clearly separate the moral quality of one’s personal actions from the quality of the actions of others. On the risk-contribution continuum, there are no clear qualitative differences between actions whatsoever; all actions contribute something to risk. The only question is the extent of the contribution.

The decline in the importance of moral standards as grounds for comparing loss-contributing actions, however, should not be interpreted to suggest that our new legal regime of risk control lacks moral foundation. The moral foundation of the new regime is relentlessly utilitarian. The objective of controlling risk as effectively as possible prevails over all else. Civil law serves to internalize costs,
first, to create incentives to reduce the risk level as much as is practicable placing liability on that party in the relatively better position to prevent it. Second, if the injury could not have been practically prevented, liability will be placed on that party in the relatively better position to spread the risks of the injury as if an insurer.

The adoption of these two utilitarian principles of risk control has subtly changed the nature of modern adjudication. Modern trials have been transformed from disputes between individuals to occasions for judicial social engineering. In earlier days, the function of adjudication was to resolve specific controversies between often embittered parties. In such cases, the particular moral qualities of the parties or of their actions were of central importance, as issues of motive and goodwill were crucial. In modern litigation, in contrast, the court must evaluate not how one individual or another behaved in a moment of crisis, but whether one party or another, as representatives of generic categories of actors, was in a better position to prevent injuries or to spread the costs of them. In litigation of this nature, the qualities of the actual litigants become irrelevant because the issue before the court is how best to fashion incentives for parties in such positions in the future. An obstetrician and a nurse-midwife may have dedicated their lives to serving others. In the incident before the court, they may have exerted great effort to help the injured child and suffered as deeply as the parents over the subsequent injury. But if the court determines that the risk of injury was within their control, that it was affected in any way by some technical decision made or ignored, or that the two professionals or their insurers were in the best position to spread such injury costs, liability for a lifetime of losses may be placed upon them.

In modern adjudication, the dispute between the specific litigants is of secondary, even trivial, importance to the exercise. The concern of the courts is how to best fashion broader incentives to maximize social welfare. The parties themselves and the loss that one of them has suffered become mere informational inputs to the process of judicial revision of controlling rules of law. The legal claim serves only as an empirical example of a social problem for which a more specific legal rule defining appropriate behavior is needed. Frequently, in modern litigation, the parties are unwitting instruments of this broader judicial
purpose. But increasingly in recent years, the adversarial character of litigation has become pretended rather than real. The requirements of procedure compel the parties to defend contesting positions. Yet, often the litigants and their attorneys play out their roles, not as hostile adversaries, but as characters, knowing that the drama being staged serves only to determine which of their insurers should foot the bill.

The new purpose of the law has led courts to adopt many novel and interesting rules that seem bizarre from the vantage point of earlier years. An example is the 1982 decision of the New Jersey Supreme Court in Beshada v. Johns-Manville Products Corp., a relatively early case in the transformation of civil law.\(^{31}\) The case involved a claim by a worker that an asbestos manufacturer should be held liable for damages because the manufacturer had failed to warn the worker that asbestos could cause cancer. The manufacturer sought to defend the claim by proving that, at the time the worker contracted cancer, it was not known, and could not have been known, scientifically, that asbestos causes cancer. More perceptive of the contours of our modern regime, the plaintiffs challenged the defense as irrelevant as a matter of law. The court concurred, holding that the manufacturer was liable for breaching its duty to warn the worker that asbestos causes cancer though the court accepted that, at the time of the breach, it was impossible, scientifically, to have known that asbestos causes cancer.

The notion of liability for breach of a duty with which it is impossible to comply seems to strain the most basic notions of responsibility. But responsibility in a regime of risk control has a very unusual meaning. According to the Court, the manufacturer should be liable for the loss for two reasons. First, the decision improved incentives for accident avoidance: “By imposing on manufacturers the costs of failure to discover hazards, we create an incentive for them to invest more actively in safety research.”\(^ {32}\) Second, regardless of the information available at the time of injury, holding the manufacturer liable will serve to distribute the risks of product injuries broadly, because manufacturers

\(^{31}\) 447 A.2d 539 (N.J. 1982).

\(^{32}\) 447 A.2d at 548.
can include expected injury costs in the prices of their products. Responsibility under the regime of risk control, thus, can mean a responsibility imposed ex post facto to reduce or to spread the risks of injuries.  

Many disapprove of the contours of modern civil law. But can those contours be changed? In my judgment, it is fanciful to imagine a return to the categorical analysis of civil law that prevailed until the 1960s. In retrospect, that legal regime was simplistic. There is a probabilistic character to all societal losses. All societal activities do implicate risks that some individuals will be harmed in some way.

The concept of internalizing costs to address those losses, however, can be substantially sharpened. As suggested earlier, Ronald Coase explained—now forty years ago—that with respect to activity levels, injury costs are always internalized. Civil law is not needed to achieve the economic effect. The question that remains is whether and how aggregate social welfare can be enhanced by shifting injury costs, which is to say, by changing the method of cost internalization.

Many have shown that employing civil law to provide insurance is counterproductive. Civil law may continue to possess a role, however, in creating incentives to directly reduce accident rates. Perhaps oddly, despite over forty years of experience with the expanded liability created by modern civil law, there are no empirical studies that have demonstrated that the expansion of liability has reduced the level of harm. Of course, there are strong market forces that generate greater levels of safety. No one has been able to show that legal liability serves to increase safety further.

Still, it remains possible that expanded liability enhances safety, and thus civil law can serve a regulatory

33. The Beshada opinion generated substantial criticism, and the New Jersey Supreme Court limited its scope to asbestos cases in Feldman v. Lederle Labs., 479 A.2d 374 (N.J. 1984). Several other jurisdictions, however, have adopted the approach.

34. Although Coase's article is widely known and universally accepted, this point remains not fully understood even among economists. See, e.g., Steven Shavell, Strict Liability Versus Negligence, 9 J. LEGAL STUD. 1 (1980), discussed in George L. Priest, Internalizing Costs passim (Jan. 19, 1990) (unpublished manuscript, on file with the Buffalo Law Review).
role. It is an entirely separate question whether that regulation is sensibly administered through our adversarial process with the final decision delegated to lay juries, selected intentionally because their members know nothing about the subject before them. Put differently, we cannot imagine a regulatory agency such as, say, NHTSA, setting standards for auto safety based upon the presentation of a claim by a single seriously injured individual with respect to that person's single accident, delegating the ultimate decision to laypersons.

Our modern regime of civil law, nevertheless, remains deeply entrenched both in terms of economic interests—note the to-date successful efforts of the trial bar and the unions to thwart the rejection of civil law with respect to asbestos-related injuries—and in popular conception. To change that legal regime in a serious way will require a substantial demonstration of the harms that it causes.