

# A BROADER VIEW OF THE CATHEDRAL: THE SIGNIFICANCE OF THE LIABILITY RULE, CORRECTING A MISAPPREHENSION

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## I

Recent years have seen a resurgence of Torts viewed as a purely private legal arrangement: whether described in terms of compensatory justice—the right of an injured party to be made whole<sup>1</sup>—or of redress for civil wrongs—the right of an injured person to get back at the one who injured him.<sup>2</sup> These positions reject the approach of the system builders (to use Izhak Englard’s felicitous phrase),<sup>3</sup> those who see torts as part of a legal–political–economic structure of a polity. This latter, “public,” view of torts has been dominant, at least since my first article,<sup>4</sup> and Walter J. Blum and Harry Kalven’s answer to it, aptly titled *Public Law Perspectives on a Private Law Problem*.<sup>5</sup> It is of the relationship between these approaches, and of the inevitability of the public-law (and hence, in part, economic) view of torts that I wish to write today. In doing so, however, I mainly want to correct an error that many system builders have made: that is, of viewing the liability rule (in torts and in its cognates) as a “second best” way of mimicking markets when markets “will not work,” or “are not available.” I want to claim a more significant economic role for the liability

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1. See, e.g., Jules Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421 (1982).

2. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 FORDHAM L. REV. 1563 (2006).

3. Izhak Englard, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEGAL STUD. 27 (1980).

4. See Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

5. See 31 U. CHI. L. REV. 641 (1964). Blum and Kalven offered a superb intervention that moved the discussion forward in fruitful ways. See Guido Calabresi, *Fault, Accidents and the Wonderful World of Blum and Kalven*, 75 YALE L.J. 216 (1965); Walter J. Blum & Harry Kalven, Jr., *The Empty Cabinet of Dr. Calabresi: Auto Accidents and General Deterrence*, 34 U. CHI. L. REV. 239 (1967); cf. Steven G. Medema, *Juris Prudence: Calabresi’s Uneasy Relationship with the Coase Theorem*, 77 LAW & CONTEMP. PROBS., no. 2, 2014 at 65, 85 (discussing the interaction between me, Blum and Kalven, and Coase).

rule, and hence for torts, than that. For reasons that will be clear in due course, I call this *A Broader View of the Cathedral*.

## II

Interestingly, the new privatists distinguish torts from contract and criminal law, by recognizing the public-law role of the latter two (while essentially ignoring their private roles) and suggesting that torts instead has primarily a private role. As to torts, they seem to say that if a direct Injurer–Victim relationship is destroyed, the field would be gone.<sup>6</sup> I, instead, will contend that although something might be lost, an essential part of torts would remain alive and well even without that relationship, as is the case in New Zealand.<sup>7</sup> But let us first look at the privatists’ strangely limited view of contract and criminal law.

At least when they are contrasting these fields to torts, the privatists seem to talk of contract and criminal law as if they only had a public function. Contracts is seen as a market way of regulating the economy—of shifting entitlements and deciding what is mine and what is yours—by consent of the parties. Criminal and regulatory law is viewed as a collectivist approach to doing the same thing—deciding by state command what is mine and what is yours. This way of speaking, however, ignores the very important private-law functions of both fields. In contracts, and in criminal or regulatory law—*as in torts*—once a way of determining when and how entitlements can be shifted has been established, a set of private expectations grow up around the means chosen. And these private expectations come to have a value of their own that cannot, at any given moment in the law’s time, be ignored without significant harm.

That is why Justice Holmes’s position that anyone has a right to break a contract when performance is more expensive than breach<sup>8</sup> has historically been called a heresy.<sup>9</sup> His position ignored the private role of contract law. In fact, contracts is not *only* about its very important public function of shifting entitlements by consent, but comes, in time, also to protect the private expectation that promises are to be kept. As a result, it is in some sense wrong and perhaps even immoral not to do so.

Similarly, criminal and regulatory law do not merely represent public, collective assignments of entitlements. Criminal law and regulatory law involve, as well, the right of the Victim and the Victim’s family to invoke the state to punish those who have wronged them. Here, too, once the collectivity determines when and how what is mine can be taken by you, and when it

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6. See John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 918 (2010).

7. See, e.g., Marc A. Franklin, *Personal Injury Accidents in New Zealand and the United States: Some Striking Similarities*, 27 STAN. L. REV. 653 (1975); Geoffrey Palmer, *The New Zealand Experience*, 15 U. HAW. L. REV. 604 (1993).

8. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

9. See, e.g., Karl L. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 437 (1930) (“It is a heresy when Coke or Holmes speaks of a man having liberty under the law to perform his contract, or pay damages at his option.”).

cannot, all sorts of private expectations come to surround that decision. It follows that criminal and regulatory law do not merely represent the most efficient way of enforcing that collective decision, but must also do what is needed to “compensate” the feelings of those who have been privately wronged by the rule breaker. This is why Becker’s celebrated article on criminal penalties represents an incomplete picture and inadequately describes the penalties criminal law imposes.<sup>10</sup> Indeed, it is why the death penalty perdures in the United States despite its often-demonstrated inadequate bases either in deterrence,<sup>11</sup> or in the justice of its application.<sup>12</sup> It remains because it is believed that the Victim’s relicts have a right to be made whole, to closure, and that—rightly or wrongly—capital punishment will achieve that closure.<sup>13</sup>

Thus, in both contract and criminal or regulatory law, the structure chosen is one designed to control the shifting and the nonshifting of entitlements in a way that the polity deems desirable. But around that public—in part economically based—decision, private rights accrue, and something would be lost if the public result were achieved without giving weight to, and recognizing the importance of, the private rights that have adhered to the public decision.

### III

And so it is in torts. Except that here, the privatists, the “Colebergzurkys,” as I sometimes call them, claim that the private side is the only significant one present, the only one that defines the field. I, and others, have noted that without some kind of public—system building—side of torts, one cannot determine when a private “wrong” that needs compensation has occurred.<sup>14</sup> I

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10. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

11. See John J. Donohue, III & Justin Wolfers, *Estimating the Impact of the Death Penalty on Murder*, 11 AM. L. ECON. REV. 249 (2009). This analysis of the death penalty’s weakness as a deterrent goes back to the eighteenth century and Cesare Becarria. See CESARE BECCARIA, *The Death Penalty*, in ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 66 (Richard Bellamy ed., Richard Davies trans., 1995) (1764).

12. See CHARLES L. BLACK, JR., *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* (1974). If it served as a powerful deterrent, the execution of innocents might not trouble a utilitarian. But anyone concerned with justice must consider that horrendous. Furthermore, as Black argued, error in capital cases comes not only from the execution of innocents, but from the disparate application of the penalty. *Id.* at 84–96.

13. In most American capital cases, the relatives of the victim demand vengeance as a condition of being “made whole.” If revenge killings are indeed capable of making victims’ families whole, then a utilitarian might approve of the death penalty, and might even tolerate some error in the penalty’s application. For complex reasons that I cannot go into in this short article, I do not believe that this utilitarian argument ultimately works. But it is one that has not been analyzed as thoroughly as the deterrence argument. In any event, the idea that I must obtain everything that is my right is part and parcel of a deep-seated American way of looking at things. See Guido Calabresi, *Civil Recourse Theory’s Reductionism*, 88 IND. L.J. 449, 465–66 (2013) [hereinafter Calabresi, *Civil Recourse Theory*]. I have noted that this dynamic plays out in calls for vengeance in other areas of the law, as well. See Guido Calabresi, *The Complexity of Torts—The Case of Punitive Damages*, in EXPLORING TORT LAW 333 (M. Stuart Madden ed., 2005) [hereinafter Calabresi, *The Complexity of Torts*].

14. See Calabresi, *Civil Recourse Theory*, *supra* note 13; Richard A. Posner, *Instrumental and Noninstrumental Theories of Tort Law*, 88 IND. L.J. 469 (2013).

have also suggested that although there may be some system builders (law-and-economics types) who, like Holmes in his heresy, write as though nothing would be lost if the private rights were done away with, neither I—nor certainly Blum and Kalven—have taken such a position. What I have said is simply that there is an important significance in the torts approach to entitlement shifting that has always been there and would continue to define this field of law (and other cognate fields) even if the private relationship between Victim and Injurer were abolished.

In this fundamental sense, torts would survive—just as contract and criminal law would survive—even if a polity were to decide that the *private* values that have adhered to the field were not worth respecting. This elimination of private rights might come about in each of these fields if the polity concluded that the private expectations—become rights—cost too much. (That is, the polity might decide that recognizing such private rights made accomplishment of the public purpose too awkward or expensive.) It could also occur if the polity found other, more desirable, means of giving weight to the values that the private rights sought to preserve.<sup>15</sup>

What, then, is this “public meaning” of torts, which survives even if Victim and Injurer are disaggregated? What is the torts equivalent of the shifting of entitlements by mutual consent (contracts), or by collective fiat (criminal and regulatory law)? It is, as I have written before, the liability rule. It is the societal decision to let entitlements be shifted, not solely by private agreement, nor solely by collective fiat, but by *private decisions* in which the *price of the shift is collectively set*.<sup>16</sup> And in this respect torts is only one of various cognate fields, of which eminent domain is the most obvious.<sup>17</sup>

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15. For instance, the polity might offer public financing to victims or otherwise honor them. *See, e.g.*, 49 U.S.C. § 40101 note (2006) (September 11th Victim Compensation Fund of 2001). Similarly, the state might give special honors to those who keep their promises, even when keeping promises is costly.

16. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) [hereinafter Calabresi & Melamed, *One View of the Cathedral*]. It is important to note that the framework that Melamed and I developed in that article applies to the *situations* in which entitlements are shifted, not to the things that are shifted. My entitlement to my watch can be shifted through contract in certain situations; in others, it might be inalienable; and, in an accident, my entitlement is subject to shifting through tort. The framework is situational, contextual, or, if you like, transaction focused.

17. As this article means to show, the use of the word “price” as the assessment that is made collectively is misleading. It inevitably makes one think of a market. If one believes the collective decision to be an attempt to approach criminal law or regulation, the words that would most likely be used to describe the assessment are “penalty” or “sanction.” *See* Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984). If, finally, the charge made was neither intended to approach what a market would do nor what criminal law or regulation would impose, but a collective determination of how readily an entitlement should shift, then a word like “assessment” would seem appropriate. Because the literature about liability rules has used the word price almost exclusively, I will, in this article, continue to use that word, but I wish to emphasize how problematic that use really is. I am grateful to Greg Keating for this and many other useful suggestions.

## IV

I have elsewhere written that the liability rule—this torts approach to entitlements—has been used in all societies, whether libertarian or collectivist. This has been so for practical reasons, including reasons deriving from the “overcrowding” of each society’s preferred approach and the comparative advantage that the liability-rule way has as to some allocations, given that overcrowding.<sup>18</sup> I have also noted that in many modern societies—including ours—it is used when it need not be,<sup>19</sup> for example in medical, workers-compensation, and products-liability contexts. And I have asserted that its broad use speaks to the ideology of the society that relies on the liability rule in such contexts. I have said that its broad use defines such a society as social democratic, just as the broad use of contracts defines a society as libertarian, and of criminal or regulatory law as collectivist. All these are the public-law functions of these (to some extent also private) fields of law.

Today, however, I want to emphasize something else about the liability-rule approach. I want to focus on how this social-democratic way of organizing law and entitlements fixes the size of the liability. I want to ask, How is the collectively set price, on the basis of which entitlements can be shifted, determined? In other words, I wish to analyze what the collectivity means to do when it decides the size of the tab to be assessed when entitlements are shifted.

## V

It is both interesting and speaks wonders about the early system builders—and their economic training and unspoken promarket bias—that many liability-rule analyses (perhaps my own included) viewed the collective price to be entered into the liability rule as being one designed to mirror, or mimic, the market price that would have been present had a free market been possible.<sup>20</sup> The liability rule was used—or so it seemed—to remedy market failure. Where, because large-number problems, high costs of entering into transactions, and so on, were present—where, in other words, a libertarian market was either not possible or too expensive to justify its use—then the liability rule was to be employed to bring about the result that the free market would have achieved had it been available. In this view, the liability rule was there to accomplish as

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18. See Guido Calabresi, *Torts—The Law of the Mixed Society*, 56 TEX. L. REV. 519, 526–29 (1978).

19. *Id.* at 529–34.

20. See, e.g., Keith N. Hylton, *A Missing Markets Theory of Tort Law*, 90 NW. U. L. REV. 977, 980 (1996) (“[A]ccording to Calabresi and Melamed, the law provides a liability rule that allows the nonholder to transfer without the holder’s consent and to pay a market price for the transfer of the entitlement.”); Eugene Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, 91 VA. L. REV. 1135, 1143–44 (2005) (stating that liability rules require entitlement takers to pay “a sum that approximates the price that would have been paid under a property rule,” and noting that “approximating the market price is not always easy”); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1864 (1987) (describing the framework Melamed and I developed as defining liability rules as “a scheme of allowable coerced transfers at market prices set by official entities”).

nearly as possible what the parties would have done had they been able to contract, to shift entitlements entirely consensually.

Today I will argue that such a view of the liability rule, of the public function of torts and its cognates, reflects an impoverished picture of law and of economics. And, more important, that it is a totally inaccurate description of what occurs in the world. Yes, there are times when the collective price inherent in the liability rule is designed to mirror a market price, had one been feasible. But there are also times when the liability-rule price is designed to approach what a collective allocation of entitlements, through regulatory or criminal law, would have ordained. And, most interestingly, there are times when the collectively set price is there to reflect the polity's views of the desirability of certain entitlement shifts. And that these views may be neither predominantly libertarian nor fully collectivist in ultimate object.

## VI

Before I return to real-life examples of such a diverse use and definition of liability rules, let me spend a moment on why such a use can be justified as a theoretical matter. First, there is nothing in economic theory that requires the view that entitlements should be shifted only if such a shift is consensually desired by the parties to a transaction. On appropriate empirical and knowledge assumptions every bit as good, or better, results can—from a strictly efficiency point of view—be achieved by direct collective allocation and regulation of entitlements. With perfect knowledge and no transaction costs, market and collective determinations can be equally good. They are completely symmetrical.<sup>21</sup> Once one introduces knowledge and other transaction costs, determining which works best becomes an empirical matter. At that point, it is also an empirical matter whether the pure market, or the purely collective approach, works better than a liability rule with a collectively set price designed to achieve—more effectively—what the collective or the market approach would have accomplished.

Moreover, when the empirical difficulty in either pure market or pure command derives from the existence of significant third party–utility effects, then a liability rule whose aim is to reflect those effects may well be better than either a collective rule or a market rule, or even than a liability rule designed to approximate what the market or the command result would be. The empirically dominant approach might be a liability rule with a “price” set to achieve directly that level of entitlement shifting that, given the existence of third party–

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21. Compare R.H. COASE, *Notes on the Problem of Social Cost*, in *THE FIRM, THE MARKET, AND THE LAW* 157, 159 (1988) (“[W]hen there are zero transaction costs, negotiations will lead to an agreement which maximizes wealth.”), with LEON TROTSKY, *SOVIET ECONOMY IN DANGER: THE EXPULSION OF ZINOVIEV* 29–30 (1933) (“If there existed the universal mind, that projected itself into the scientific fancy of Laplace; a mind that would register simultaneously all the processes of nature and of society, that could measure the dynamics of their motion, that could forecast the results of their inter-reactions, such a mind, of course, could a priori draw up a faultless and an exhaustive economic plan, beginning with the number of hectares of wheat and down to the last button for a vest.”).

utility effects, the particular polity desires.

Let me be more specific. If many people object to the sale of body parts—even if consensual—because they do not like the fact that such sales—given the existing distribution of wealth—result in transfers between poor and rich that they find objectionable, a pure market may not be permitted. But collective allocations of body-part entitlements may be equally offensive. (People may object to such direct determinations of who shall live or die, without adequate regard for individual desires.)<sup>22</sup> In such a situation, a—very complex—liability-rule approach, with a price that mimics neither the market nor collective regulation, may be optimal.

This is but one example, and this short article is not the place to go into depth in discussing what are appropriate theoretical treatments of such, properly termed, merit goods. That is the topic of a much larger work on which I am currently engaged.<sup>23</sup> My point today is merely to assert that what I shall shortly claim is the real-life use of liability rules—sometimes to approach free-market results, sometimes to approach the desire of collective fiats, and sometimes to achieve results that have their own logic—is not a bizarre happenstance, but can, in a more complete analysis than I can give here, be shown to have theoretical efficiency validity as well.

## VII

Let us then turn to the actual use of liability rules in torts and in its cognates and see instances when the collectively set price seems to be defined to mirror the market, when it appears to further collective allocation decisions, and when, instead, it can best be explained by a desire to achieve more nuanced social-democratic goals.

Let us start with torts—I shall discuss the more dramatic eminent-domain examples in a bit. What is going on when a legal system allows punitive damages, or gives juries a free rein to set compensatory damages at levels that are far greater than those that would make the Victim whole? At times, such punitive damages do act as market mimickers. I think this is implicit in Catherine M. Sharkey's, and A. Mitchell Polinsky and Steven Shavell's, favorable discussions of the multiplier effect (as well as opinions by Judge Posner and by me) that suggest the multiplier's efficiency.<sup>24</sup> They do the same

22. See GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* 154–57 (1978).

23. See Guido Calabresi, Inaugural Lecture of the Academic Year of the International University College of Turin: Merit Goods, the Commons, and Their Significance for Justice, Efficiency, and Equality (May 19, 2011), *available at* <http://www.youtube.com/watch?v=iQnLakWMycM>; cf. RICHARD A. MUSGRAVE, *THE THEORY OF PUBLIC FINANCE* 13–15 (1959) (offering an early discussion of merit goods); James Tobin, *On Limiting the Domain of Inequality*, 13 *J.L. & ECON.* 263, 267 (1970) (discussing what he terms “specific egalitarianism”).

24. See A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 *HARV. L. REV.* 869, 887–96 (1998); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 *YALE L.J.* 347, 363–72 (2003); cf. *Ciraolo v. City of New York*, 216 F.3d 236, 245 (2d Cir. 2000) (Calabresi, J., concurring) (“Such a [multiplier] conception of damages . . . is not new.”); *Kemezy v. Peters*, 79 F.3d 33, 35 (7th Cir. 1996) (Posner, J.) (offering a deterrence rationale for punitive damages);

when punitive damages are given to reflect an extra value that a particular person places on a good, because that person would not consensually agree to give up that good in a free market at the good's ordinary market price. That is why I find W. Kip Viscusi's discussion of airplane luggage to be inadequate.<sup>25</sup>

But there are other times when punitive damages, and run away-jury "compensatory" ones, cannot be so explained. In such cases another explanation can be readily seen. The collectivity does not *want* the entitlement shifted in such contexts. It may be reluctant, for any number of reasons, to make the taking of the entitlement a penal matter. But it may still want to deter its occurrence, and not let the entitlement shift happen merely because the would-be taker is willing to pay a "market price"—even with an appropriate multiplier. By assessing very high extra damages, by making these part of the liability rule, the collectivity seeks to make that entitlement approach *inalienability*,<sup>26</sup> without formally forbidding its shift.

Conversely, there are areas of torts in which the damages assessed are self-consciously less than their market value. The denial of so-called fanciful damages, and the strict limitations on the granting of purely emotional damages and solely economic ones are obvious examples.<sup>27</sup> Again, such rules can at times find market-mimicking cost-reduction explanations. The sufferer of fanciful damages may be the least-cost avoider.<sup>28</sup> Purely emotional damages may, if compensated, increase in size (people may feel emotional harm more if they are given the right to recover for it).<sup>29</sup> And solely economic damages may be best handled directly through contracts. Yet these explanations—though in my view worthy—have never seemed completely satisfactory.

I would suggest that another set of reasons may, at times, be at work. These may be areas in which the collectivity wishes—for whatever reasons of its own—to make easier the shifting of entitlements—and the engaging in activities

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Calabresi, *The Complexity of Torts*, *supra* note 13, at 338–40.

25. In his article arguing that juries err in myriad ways, Viscusi assumes that punitive damage awards are irrational when the dollar-denominated value of damaged luggage is less than the cost of the repair that would have prevented the luggage damage. See W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. LEGAL STUD. 107, 111–15 (2001). I do not dispute that luggage may well not be worth the protection that Viscusi's survey participants sought to give it, but to assume this based on dollar values is to overlook the private value that people often place on their possessions. Indeed, I may love my luggage more than I love Ronald Coase—unlikely, but possible. In such cases, punitive damages can help approximate a property rule protecting the beloved luggage.

26. It is for that reason that what *One View of the Cathedral* termed "inalienable" actually is a set of collectively determined rules that at times allow a person to give, but not to sell; to sell, but not to destroy; or even perhaps to destroy, but not to sell or give. Calabresi & Melamed, *One View of the Cathedral*, *supra* note 16, at 1092–93, 1111–15; see Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985).

27. See DAN B. DOBBS, *THE LAW OF TORTS* § 302 (2000) (discussing emotional harm); Anita Bernstein, *Keep It Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss*, 48 ARIZ. L. REV. 773 (2006).

28. See GUIDO CALABRESI, *IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM* 72–76 (1985).

29. *Id.* at 77–78.



that result in entitlement shifts—than would occur in a purely consensual market.<sup>30</sup> Just as large, extracompensatory damages may reflect a collective decision to approach inalienability, so systematically undercompensating damages may be the result of a collective decision to encourage those acts or activities that result in entitlement changes! And, incidentally, the failure to give multiplier damages (or, for that matter, to permit class actions as a way of recognizing multiplier effects),<sup>31</sup> may represent a decision of exactly the same sort.

The moment one realizes that the liability rule is used not merely to do what a market is unable to do, but is, instead, an independent instrument of collective decision making, then its seemingly peculiar application in these areas becomes readily explainable. Whether the size of damages is designed to approach inalienability, or to make shifts in entitlements relatively easier or harder than would occur consensually, the explanation for the price chosen lies in a collective decision with respect to what and when entitlement shifts are relatively desirable and when they are not.

Let me be clear, though. I am not saying that such decisions are necessarily wise or good. That is a different matter; they may or may not be. What I am saying is that when one looks at the world of torts, and torts damages, *as it actually is*, one sees significant instances—and occasionally dramatic ones—of the use of liability rules to mimic the market, to approach criminal or regulatory law results, and also to bring about shifts in entitlements, and in levels of activities that cause entitlements changes that are *different* from those that would occur in either a full market or in a full command structure. Once one realizes that this is what is happening, one is much better placed to analyze and discuss whether the collectively set price and the goals that the collectivity had in mind in setting that price are good, bad, or indifferent. One is, in other words, able to examine and criticize social-democratic objects *on their own terms* and not merely in how well they achieve purely libertarian or collectivist aims.

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30. Morton Horwitz famously argued that nineteenth-century tort law amounted to a subsidy in support of industrialization. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 63–108 (1977); cf. Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981) (arguing that the nineteenth century was not entirely a “fault” century, but rather was in significant aspect a nonfault century where rules like the fellow-servant rule were employed to favor defendants). Some also argue that developing countries often have liability rules that are “low priced” in comparison to developed countries in order to spur industrialization and economic competitiveness. See, e.g., Jack L. Goldsmith & Alan O. Sykes, *Lex Loci Delictus and Global Economic Welfare: Spinozzi v. ITT Sheraton Corp.*, 120 HARV. L. REV. 1137, 1137–42 (2007) (discussing Judge Posner’s economic account of the choice-of-law rule *lex loci delicti commissi*).

31. See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *AT&T Mobility L.L.C. v. Concepcion*, 131 S. Ct. 1740 (2011).

## VIII

If this can be seen in torts, it is even more obvious and dramatic in eminent-domain and takings law—that other great employer of the liability rule. There are, of course, situations in which a taking is not permitted and a change in entitlements can only occur consensually. There are others in which a taking is banned and a consensual exchange is also forbidden. But takings law concerns itself primarily with contexts in which a taking is allowed *and* a collectively set price is assessed on the taker. That is, much takings law is liability-rule law. But what is the price to be assessed?

We commonly assume that the price must be that which would obtain in an unforced sale, in other words, the free-market price. That is, we commonly assume that takings law is designed to mimic the market. But that is not, in fact, always the case or always what is desired. In Italy (and I believe at one time in many other countries as well), when property was taken for a public purpose, the compensation paid was not the market value of the property, but its value in use.<sup>32</sup> If the owner of a large estate preferred to keep the property in a luxury or farming use, even though selling it for development would yield a far higher price, the owner was free to do so. But if the state decided to expropriate the property for a public purpose, then the owner was stuck with the use he or she had opted for and would receive no more than the value of the property in that use.

I have some personal experience with this; at least in family legend. It is said that my great uncle's lands outside Bologna had significant value. He, however, chose not to develop the lands or sell them for development. Whether he did so because—as an economist—he had figured that the lands' development value would increase faster than the interest rate he would receive on an earlier sale's gains, or because he enjoyed being a landowner, does not matter. He kept the land in farming use. When the polity decided to build an airport near Bologna and saw that the large, undeveloped lands belonging to my uncle were well situated for an airport, they took his lands by eminent domain. They paid him only the lands' rather meager farming value, making him, and I suppose me, much less well off than had they been required to pay the market value of the property.

Why might such a nonmarket compensation price be set? My uncle, good economist that he was, always described this as one of the many instances in which the law failed to understand economics. And in his case that may even have been true. But it is also conceivable that a polity might have wished to encourage entitlement shifts from passive landowners to more aggressive uses—including public purposes. By setting the liability rule price at the value-in-use level, the polity tells landowners that they retain their “lordly” use at a peril (if the polity desires the property for a public purpose). And this furthers a private,

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32. See Giuseppe Franco Ferrari, *Fundamental Rights and Freedoms*, in INTRODUCTION TO ITALIAN PUBLIC LAW 255, 271–72 (Giuseppe Franco Ferrari ed., 2008) (discussing the divergence between market value and compensation paid in Italian cases of expropriation).

consensual, market-value, change in entitlements, as well as the public-purpose one, should that latter become desired. Again, it is not for me today to discuss the pros and cons of such an approach. But the social-democratic decision to value “lordly” uses of entitlements below other ones, is readily apparent.

Significantly, there are also times when a polity’s collective values seem to justify pricing private property at *more* than its market value for takings purposes. Recently, private homes were expropriated in New London, Connecticut to further a redevelopment scheme.<sup>33</sup> The public purpose was the commercial improvement and upgrading of the area (and perhaps even its gentrification) for the benefit of the city. But the immediate beneficiaries of the right to take the property by eminent domain were private developers. The home owners objected angrily to the taking of their properties. Ultimately, however, the U.S. Supreme Court upheld that taking.<sup>34</sup> The result was considerable anger and even demonstrations at the home of Justice Souter, who had joined the majority Supreme Court opinion.<sup>35</sup>

Interestingly, during oral argument, Justice Kennedy asked whether the whole thing would not be much more acceptable if—in such circumstances—while a taking for the public purpose would still be allowed, the price to be paid were some multiple, say four times, the market price.<sup>36</sup> What he was suggesting, it seems to me, was that while nonconsensual entitlement shifts might still be properly permitted, in situations like those in *Kelo* the change in entitlements might—for good collective reasons—nonetheless be discouraged through the setting of a higher liability-rule price. In other words, the polity could appropriately take the opposite view of the ease with which such entitlement changes should occur from that taken by Bologna with respect to my uncle’s lands. Both Justice Kennedy’s suggestion in *Kelo*, and the value-in-use approach, are examples of a liability rule being employed to further *collective* aims, rather than market-mirroring aims, while still not going to a fully command entitlement structure.<sup>37</sup>

The same would be true for a polity that assessed larger than compensatory tort damages, when environmentally desirable uses were infringed upon.<sup>38</sup>

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33. See *Kelo v. City of New London*, 545 U.S. 469 (2005).

34. *Id.* at 489–90.

35. See David de Sola, *Souter’s Home an Activist Target*, CNN.COM (Jan. 22, 2006, 11:39 AM), <http://www.cnn.com/2006/LAW/01/21/eminent.domain/>.

36. Transcript of Oral Argument at 22–23, *Kelo*, 545 U.S. 469 (No. 04-108) (“Are there any writings . . . that indicate[] that when you have property being taken from one private person ultimately to go to another private person, that what we ought to do is to adjust the measure of compensation, so that the owner . . . can receive some sort of a premium for the development?”).

37. For an interesting and very recent discussion of this question, see Lee Anne Fennell, *Just Enough*, 113 COLUM. L. REV. SIDEBAR 109 (2013) and Brian Angelo Lee, *Just Undercompensation: The Idiosyncratic Premium in Eminent Domain*, 113 COLUM. L. REV. 593 (2013).

38. This kind of thing happened even in the nineteenth century. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 170–75 (1985) (discussing Mill Acts that required those who flooded neighboring lands to pay above-market prices to the owners of the land they damaged).

Conversely, the limiting of damages to further industrialization over passive uses seems like more of the same thing. And if this, inevitably, makes torts scholars think of the development of negligence as a general requirement for liability in the nineteenth century, together with the continued applicability of nonfault liability in England when industry infringed on traditional, “natural” uses of land (as in *Rylands v. Fletcher*),<sup>39</sup> I would just add that this shows that the nuanced, middle view of liability rules that I am describing is nothing new. The liability rule, 150 years ago, as now, was not merely the mimicker of the market or of full collective aims; it was, and continues to be, the instrument of goals that reflect both collectivist and libertarian choice elements!

## IX

My point in discussing this broader view of the cathedral—in pointing out the non-market mimicking, yet not fully collective functions of the liability rule—is not just to correct a misapprehension that remains significant, and in whose creation I may have unintentionally played a role. Though this, I believe, would be more than enough to justify an article, it also serves to underscore the importance, indeed the *centrality*, of the liability rule in the law. The liability rule was crucial in the past, but is even more so currently when so many societies view themselves as ideologically mixed, as neither fully libertarian nor collectivist. In all societies, but especially today, the liability rule is an essential part of the social structure and of the law. And that is so in any number of areas of law, including, of course, torts.

This, naturally, brings me back to the beginning of the article and to what the “Colebergzurskys” miss. Torts, like contract and criminal or regulatory law, has a private function. It responds to people’s desire to receive redress for wrongs and, perhaps, to get that redress from the one who wronged them. But again, like contract and criminal or regulatory law, it has a fundamental—indeed a necessary—public function. It represents a central, complex, and nuanced way—different from the approaches of contract and criminal or regulatory law—to how and when entitlements can be shifted from one party to another. If the link between Injurer and Victim were done away with in torts, something would be lost. How important that “something” is and whether it could be substituted for by other means (say, like uninsurable tort fines),<sup>40</sup> is a worthy matter of discussion. But what cannot be seriously contended is that “torts” would cease to exist, that it would disappear as a field, were Injurers and

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39. See *Rylands v. Fletcher*, [1868] 3 L.R.E. & I. App. 330 (H.L.) 338–39 (appeal taken from Eng.); see also HORWITZ, *supra* note 30 (discussing the rise of negligence); Rabin, *supra* note 30 (highlighting the complexity of nineteenth century tort doctrine). While the doctrines discussed by Horwitz effectuated a subsidy for industry, *Rylands*, like the Mill Acts, effectuated a tax.

40. I offered a brief discussion in Guido Calabresi, *Policy Goals of the “Swedish Alternative,”* 34 AM. J. COMP. L. 657 (1986). I also find it quite fascinating to observe that some European systems connect victim and injurer by tying fines to personal wealth. This enables the kind of calibrated vengeance that a victim might seek, even when the victim and injurer are, in a system-building sense, separated. See, e.g., Sally T. Hillsman, *Fines and Day Fines*, 12 CRIME & JUST. 49 (1990).

Victims disaggregated. The central role that the use of the liability rule plays in the shifting of entitlements in the society would still remain. The public—system building—significance of the field would perdure!

The privatists would, I suppose, not want what remains to be called torts. But that is just fighting over words.<sup>41</sup> My teacher, Fleming James, Jr., used to say, “You can call it Thucydides, or you can call it Mustard Plaster, but it’s all proximate cause just the same!”<sup>42</sup> Whether one calls what would survive and be central to a legal system. Thucydides, mustard plaster, or by its ancient name of torts, it would still be the same! It would still be an ideologically mixed, complex, and highly nuanced way of affecting when, how, to what degree, and how differently in different contexts, entitlements can be taken by one from another. It would still be the liability-rule approach properly understood in a broader view of the cathedral of law.

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41. Of course, fighting over words is something that we do all the time. The privatists well know, as do I, that to call something “torts” is to carry hundreds of years of law into the discussion. One sees this in any number of scholarly debates: for example, the fight over what is “property.” If something is called “property,” immediately all sorts of protections become the baseline from which the debate launches. See, e.g., Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964); see also Guido Calabresi, *Conclusioni*, in FRA INDIVIDUO E COLLETTIVITÀ: LA PROPRIETÀ NEL SECOLO XXI 239, 239 (2013) (It.) (discussing the historical fight over the word “property”); Eduardo M. Peñalver, *Property, Power, and Freedom*, in FRA INDIVIDUO E COLLETTIVITÀ: LA PROPRIETÀ NEL SECOLO XXI, *supra*, at 79 (discussing theories of property rights, and critiquing Reich’s arguments). Another deep inquiry into fighting over words is Jan Deutsch’s exploration of the meaning of “law,” as opposed to “politics.” See Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 169–74 (1968). Words carry tremendous emotional and logical luggage.

42. See Guido Calabresi, *You Can Call it Thucydides or You Can Call it Mustard Plaster, but it’s All Proximate Cause Just the Same!*, 91 YALE L.J. 1 (1981).