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# FAULT AT THE CONTRACT-TORT INTERFACE

Roy Kreitner\*

*The formative period in the history of contract and tort (in the second half of the nineteenth century) may be characterized by the cleavage of contract and tort around the concept of fault: tort modernized by moving from strict liability to a regime of “no liability without fault,” while contract moved toward strict liability. The opposing attitudes toward fault are puzzling at first glance. Nineteenth-century scholars of private law offered explanations for the opposition, reasoning that alternative ideas about fault account for the different character of state involvement in enforcing private law rights: tort law governs liabilities imposed by law on nonconsenting members of society (and thus, it should limit itself to fault-based conduct), while contract law governs bargained-for duties and liabilities of parties who exercise freedom of contract (and thus, liability voluntarily undertaken need not consider fault). These theories are problematic, especially because they cannot offer a complete account of contract or tort. Tort retains too much strict liability to be thought of as a regime of no liability without fault, and contract has too many fault-based rules to be conceived of through strict liability. While these justifications for the distinction between contract and tort were questioned in ensuing generations, they still structure much of the debate over the current boundary between contract and tort.*

## INTRODUCTION

Despite a number of notable exceptions, the concept of fault has not been central to contemporary contracts scholarship.<sup>1</sup> I would like to suggest that this is no simple oversight. Indeed, fault may be a good prism through which to understand the modernization of contract and tort—or, in other words, the making of modern private law. Moreover, an enhanced role for

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1. For some of those notable exceptions, see GOOD FAITH AND FAULT IN CONTRACT LAW (Jack Beatson & Daniel Friedmann, eds., 1995); George M. Cohen, *The Fault Lines in Contract Damages*, 80 VA. L. REV. 1225 (1994) [hereinafter Cohen, *Fault Lines*]; George M. Cohen, *The Negligence-Opportunism Tradeoff in Contract Law*, 20 HOFSTRA L. REV. 941 (1992) [hereinafter Cohen, *Negligence-Opportunism*]; and Ariel Porat, *The Contributory Negligence Defence and the Ability to Rely on the Contract*, 111 LAW Q. REV. 228 (1995). Of course, the articles published in this Symposium may change all that.

the analysis of fault in contract might go some way in clarifying persistent puzzles that revolve around the relationship between contract and tort.

Telegraphically, my thesis is as follows: the second half of the nineteenth century was a formative period for contract and tort, during which the understanding of these categories modernized by shifting and, in a sense, switching positions regarding fault. Tort modernized by moving from causality-based liability to a regime of “no liability without fault,” while contract modernized by abandoning the relevance of fault and adopting, at least rhetorically, a theory of strict liability. While this shift vis-à-vis fault was never complete and never represented a truly adequate account of the working rules of contract or tort, it was important for the conceptualization of the different aspects of private law. That conceptualization was powerful and long lasting, but in important ways misleading, particularly because it implied a strict separation between public regulation and private ordering. Further, it is precisely that misconception that haunts our current attempts at making sense of the contract-tort boundary, particularly with respect to the range of problems that reach courts under the guise of warranty products liability.

The Article comprises three parts. I begin in Part I by describing the modernization of contract and tort, concentrating on the crucial role that fault played in that development. Part II offers an explanation for the way classical legal theorists conceptualized (and modern theorists continue to understand) the modernization of tort and contract. It also claims that the conceptualization was problematic because it sketched the border between tort and contract along the border between public regulation and private ordering. Part III investigates the current boundary between contract and tort in the context of products liability and suggests that elements ingrained in private law thinking since the last third of the nineteenth century continue to exert a damaging influence on our thinking about current problems.

## I. MODERNIZING TORT AND CONTRACT AROUND FAULT

The familiar part of the story of modernization and fault deals with the development of tort law. While the level of historical nuance may be increased nearly indefinitely, the dominant narrative holds that prior to modernization, the common law was concerned chiefly with the causation of damage and not with the fault of the actor. James Barr Ames’s articulation of the shift remains cogent a century after he wrote:

The early law asked simply, “Did the defendant do the physical act which damaged the plaintiff?” The law of today, except in certain cases based upon public policy, asks the further question, “Was the act blameworthy?” The ethical standard of reasonable conduct has replaced the unmoral standard of acting at one’s peril.<sup>2</sup>

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2. James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 99 (1908).

Tort scholars from the late nineteenth century until today have squabbled about the details,<sup>3</sup> but most would agree in summing up that, "It is most likely that theories of strict liability were dominant during the formative years of the common law. But during the nineteenth century . . . there was a decided and express shift towards the theories of negligence."<sup>4</sup>

Two points bear emphasis in this account of the modernization of tort law. First, it is only a generalized historical hindsight that can locate the shift in the basic background assumptions that organized the field, or that created "classical legal thought." The accounts of such a shift are persuasive, but only when one acknowledges that the shift took place over the course of decades (rather than, say, through one key judgment of an individual court) and that it solidified quite late in the nineteenth century. The evidence lies not only in the new framework for thinking about torts, visible in treatises and scholarly articles, but also in the development and refinement of particular doctrines, most notably contributory negligence, assumption of risk, and *damnum absque injuria*.<sup>5</sup> Second, the importance of the shift in background assumptions about liability could hardly have been imagined early in the nineteenth century, when the number of serious injuries from industrial activity was miniscule in comparison to what would emerge in the last third of the century. By the last two decades of the nineteenth century, the question of the extent to which injuries from industrial accidents could go uncompensated had become a major economic battleground in ways that would have been difficult to appreciate early in the century.<sup>6</sup>

So much for the familiar story in tort. The distinctly less familiar aspect of the story deals with the modernization of contract. Everyone is familiar with the idea that contract rests on a species of strict liability, namely the claim that in general "duties imposed by contract are absolute."<sup>7</sup> While a few scholars have challenged this view on both descriptive and normative grounds,<sup>8</sup> it remains an ingrained aspect of mainstream understandings of

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3. For a representative sampling of some of the early haggling, see OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881); Nathan Isaacs, *Fault and Liability*, 31 HARV. L. REV. 954 (1918); Jeremiah Smith, *Tort and Absolute Liability—Suggested Changes in Classification* (pts. 1–3), 30 HARV. L. REV. 241, 319, 409 (1917); Ezra Ripley Thayer, *Liability without Fault*, 29 HARV. L. REV. 801 (1916); and John H. Wigmore, *Responsibility for Tortious Acts: Its History* (pts. 1–3), 7 HARV. L. REV. 315, 383, 441 (1894). For modern articulations with greater historical complexity, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 85–99 (1977); DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT 228–34* (BeardBooks 2006) (1975); JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 43–54* (2004); and Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641 (1989).

4. Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 152 (1973).

5. See KENNEDY, *supra* note 3, at 232–34; WITT, *supra* note 3, at 47–51. See generally WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937* (1998).

6. See WITT, *supra* note 3, at 51–52, 67–70.

7. E. ALLAN FARNSWORTH, *CONTRACTS 617* (3d ed. 1999); see also RESTATEMENT (SECOND) OF CONTRACTS, ch. 11, introductory note, 309 (1981).

8. For the most direct challenge, see Cohen, *Fault Lines*, *supra* note 1.

contract. What generally escapes appreciation is that the understanding of contract as a strict liability regime is anything but an age-old phenomenon. In fact, such a regime emerged in the United States only at about the same time as the solidification of the no-liability-without-fault regime in tort, during the final decades of the nineteenth century.

During the first half of the nineteenth century, although receding slowly in the decades following, contract was understood as a fault-based regime. The most important reason for this is that contract as a *category* was understood in direct reference to the typical contractual relationships that constituted it. This world of contract was inhabited by people in relational pairs: bailor and bailee, principal and agent, master and servant, principal and factor, landlord and tenant, vendor and purchaser, husband and wife.<sup>9</sup> Within those relational pairs, actors had standardized duties, whose contours were shaped by the relation itself.<sup>10</sup> Individual agreement tailored these duties only on the margins. And while some of the relations included duties we could characterize as absolute, it was far more typical for duties to be framed in terms of reasonable skill, reasonable diligence, or reasonable care. It was a failure to meet the standard of care, often phrased directly in terms of negligence, that triggered *contractual* liability.<sup>11</sup> Thus, the basic standard of liability was one of fault, even if fault of an objective variety.<sup>12</sup>

Only late in the nineteenth century did the strict, or almost absolute, version of contractual liability come into its own, and then only through a thorough reworking of the framework for thinking about contract.<sup>13</sup> The transformation in the concept of contract entailed a reevaluation of the source of contractual obligation as well as its basic purpose. In terms of the source of obligation, the parties were conceived as making private law for themselves, rather than entering into preexisting standardized relations; in terms of contract's basic purpose, there was a decline of the view of parties entering into a type of cooperative endeavor and a rise of the vision of

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9. For one of many accounts, see WIECEK, *supra* note 5, at 102.

10. For a detailed statement of the relational idea in the common law as opposed to the idea of will in Roman law, see Roscoe Pound, *The End of Law as Developed in Juristic Thought* (pt. 2), 30 HARV. L. REV. 201, 211–17 (1917).

11. This point is intuitive regarding a category like bailment, in which various standards of duty aligned with the different types of bailment, and where slight, ordinary, or gross negligence could trigger liability, or their absence shield from it. But the same idea is actually applicable to a host of other contractual relations that made up the early nineteenth-century scheme of contract law.

12. Of course, fault in the late nineteenth century under a regime of no liability without fault is also objective fault, and not a simple version of moral blameworthiness. For the early articulation, see HOLMES, *supra* note 3, at 161–63.

13. See GRANT GILMORE, *THE DEATH OF CONTRACT* 46–48 (1974). More specifically, the idea of absolute liability coming of age is intertwined with the dominance of the will theory of contract. See James Gordley, *Contract, Property, and the Will – The Civil Law and Common Law Tradition*, in *THE STATE AND FREEDOM OF CONTRACT* 66, 79 (Harry N. Scheiber, ed., 1998) (“In the common law world, a genuinely dogmatic will theory did not appear, perhaps, until Langdell, and the best worked out version was developed by Pollock under German influence in the 1880s.”).

parties allocating particularized and accountable risks.<sup>14</sup> A simple comparison should render this claim intuitive. Early nineteenth-century lawyers saw bailment as a paradigmatic contractual relationship, and they understood the content of the duties as part of the relationship itself. The level of care required by the bailee was a function of the type of bailment. The bailee was responsible for his behavior and liable only for failing to exercise the proper level of diligence in caring for the bailed property. Compare this with a transaction that late nineteenth-century—or for that matter, early twenty-first-century—observers of contract might think of as paradigmatic:<sup>15</sup> mutual promises for the future delivery of an agricultural commodity. Even if we assume that the parties contemplate actual delivery,<sup>16</sup> the observer of their contract does not need to imagine anything but minimal cooperative activity; in fact, the parties are allocating risks regarding the future price of the commodity and nothing more. They act, in a sense, as mutual insurers, and thus considering anything but absolute liability would be an anomaly.

As noted, the no-liability-without-fault regime in tort required, in addition to a new organizational scheme, the development of new doctrines or innovative revision of old ones. The same was true for contract. Thus, the late nineteenth century saw the expansion and refinement of the rules on formation; a thorough reworking of the rules of consideration; and a heightened emphasis on intention in the rules on interpretation, even while contract theory was becoming more and more adamant about its objective basis.<sup>17</sup> In all, then, contract and tort formed the central pillars of classical legal thought, and their modernization entailed switching their respective positions on the question of fault.

## II. EXPLAINING THE FAULT SWAP

There is abundant evidence explaining why nineteenth-century American jurists made no liability without fault a rallying cry in their attempt to reformulate tort law. The evidence regarding the purging of fault from contract is more subtle, but closely related. I begin, then, by outlining the case for the new understanding of tort, and follow with a discussion of contract and of the relationship between the two. I conclude by showing that while the theoretical underpinnings that justified this “fault swap” are no longer

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14. See JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* 158–60, 201–13 (1991); John V. Orth, *Contract and the Common Law*, in *THE STATE AND FREEDOM OF CONTRACT*, *supra* note 13, at 44, 45–49.

15. For the rise of mutual promises (or executory contracts) as the paradigm of modern contract thought, see P.S. ATIYAH, *ESSAYS ON CONTRACT* 10–31 (1986) and P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 420–40 (1979).

16. Of course, this is a counterfactual assumption if the transaction is conducted on an organized commodity exchange, rather than between actual farmers or merchants whose specific trade is in this type of commodity.

17. See LARRY A. DiMATTEO, *CONTRACT THEORY: THE EVOLUTION OF CONTRACTUAL INTENT* (1998); GORDLEY, *supra* note 14, at 201–13; KEVIN M. TEEVEN, *A HISTORY OF THE ANGLo-AMERICAN COMMON LAW OF CONTRACT* 223–40 (1990).

persuasive, they continue to structure much of the current debate over the contract-tort interface.

### A. Tort

A few nineteenth-century jurists justified the preference for a fault-based negligence standard over strict liability through a utilitarian claim that a strict liability standard would waste resources and could even grind economic activity to a halt.<sup>18</sup> However, the more dominant view justified the new structure on the basis of its advancement of a liberal ideal of freedom.<sup>19</sup> The idea was to elaborate the conceptual structure within which each person had the maximal freedom of action that would not interfere with others' own freedom of action. Strict liability did not fit the framework because it rested on state-imposed responsibility detached from wrongdoing. Negligence, on the other hand, imposed a limitation on freedom of action, but only where such action wrongfully violated the rights of others. The state was still imposing responsibility, but only for actions that by definition went beyond the rights of the injurer, since there was no right to violate others' entitlements. In this sense, it could be argued that the state was only protecting existing entitlements and not pursuing a public or redistributive purpose.

Classical theorists were not oblivious to the tension between the freedom of action for one who exercised reasonable care and the freedom from injury (or the right to bodily integrity or quiet enjoyment of property) of those who might be victims of nonnegligent but damaging behavior. They mediated that tension through the category of *damnum absque injuria*, which represented a loss that did not violate a legal right and therefore entailed no remedy. *Damnum* transitioned from a minor doctrine used early in the century mostly to explain why government actions that caused indirect damages to property owners were not compensable takings, to the cornerstone of the regime of no liability without fault, with cases mushrooming in the last decades of the century. The result of the widespread use of the doctrine was that many injuries would be considered inevitable accidents. But more importantly for tort theorists, the theory of inevitable accidents served to police the border between public and private realms. So long as only wrongdoers (i.e., those at fault) were liable to compensate for injuries they caused, the state was not intervening in their autonomy (which did not include a privilege to wrong another); conversely, imposing liability in the absence of fault seemed like precisely such an invidious intervention.<sup>20</sup>

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18. *Losee v. Buchanan*, 51 N.Y. 476, 483–84 (1873). For additional examples, see WITT, *supra* note 3, at 48.

19. See WITT, *supra* note 3, at 45–49; Roscoe Pound, *The Role of the Will in Law*, 68 HARV. L. REV. 1, 7, 17 (1954).

20. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 54–60, 123–26 (1992); KENNEDY, *supra* note 3, at 230–34; WIECEK, *supra* note 5, at 184–85; WITT, *supra* note 3, at 46–51, 65–70.

## B. Contract

The movement sometimes referred to as the triumph of negligence or the rise of the regime of no liability without fault was self-consciously framed in these terms by tort theorists late in the nineteenth century. In contract, on the other hand, the rise of a regime of strict liability is visible primarily in hindsight. Late nineteenth-century theorists were intensely aware of the modifications they were pursuing in the field of contract, but they typically did not discuss these modifications directly in terms of fault.<sup>21</sup> What contract theorists did discuss overtly was the source of the duties that instantiated contractual relationships. And on this plane, their maneuver in purging contract of fault-based liability was in many ways analogous to the inverse maneuver in tort.

The idea underlying the shift from relational duties to consent-created obligations was yet another attempt to delineate a firm and fixed boundary between public and private. Where bailment or agency (or even marriage) was thought of as a typical contractual relation, enforcement was in a strong sense a public matter because the content of the duties implied in the relationship stemmed from the law, not from the agreement of the parties.<sup>22</sup> In this sense, relational pairs shared something with status. Unlike status, entry was voluntary. But like status, once one was in the relationship, its incidents were given: they were societally imposed standards. So when classical theorists tried to put agency on a contract footing,<sup>23</sup> claimed that bailments were not actually contracts but rather some other form of undertaking,<sup>24</sup> took pains to distinguish contracts from quasi-contracts,<sup>25</sup> or reworked the law governing interpretation to focus on intent rather than on which category of relations the transactions fit,<sup>26</sup> they were reiterating the same basic maneuver of setting up contract as a realm wholly governed by the parties themselves, rather than by legally determined obligation.<sup>27</sup>

The problem with fault in contract, then, was that the standards by which fault was judged preexisted the parties; those standards inserted the state (or at least the common law) into private relations. In order to exclude the state, the theory of contract had to place the parties in full control of the relationship. Once that was accomplished, the road was open for the parties' self-imposed obligation to be construed as absolute. Classical theorists of

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21. For opposing evaluations of late nineteenth-century contract theory, which, however, share the view that those theorists were self-conscious about their modification of contract, compare GILMORE, *supra* note 13, with Jody S. Kraus, Essay, *From Langdell to Law and Economics: Two Conceptions of Stare Decisis in Contract Law and Theory*, 94 VA. L. REV. 157 (2008).

22. See Orth, *supra* note 14, at 51–53.

23. James Barr Ames, *Undisclosed Principal—His Rights and Liabilities*, 18 YALE L.J. 443 (1909).

24. Joseph H. Beale, Jr., *Gratuitous Undertakings*, 5 HARV. L. REV. 222 (1891).

25. WILLIAM A. KEENER, A TREATISE ON THE LAW OF QUASI-CONTRACTS (1893).

26. See GORDLEY, *supra* note 14, at 208–13.

27. For a wide ranging account, see HORWITZ, *supra* note 20, at 33–63.



course recognized that a residue of imposed obligations would continue to exist within and surrounding contract. But placing the parties in the commanding role through their promises made consented-to, freely undertaken obligations central, and imposed duties marginal and anomalous.<sup>28</sup> Contract was thus established as the very center of the private realm, in part by purging its fault-based standards. Indeed, it is the image of strict liability that heightens the sense of party control and autonomy, since it is always assumed that the parties could, if they wished, contract for any other standard of liability within their contract.<sup>29</sup>

### C. Private Law Between Tort and Contract

It has often been remarked that classical legal thought imposed a firm boundary between contract and tort.<sup>30</sup> The reason for the importance, already alluded to, was that distinguishing between tort and contract was part of a wider project of distinguishing between the public or regulatory realm on the one hand, and the private realm on the other. This may seem odd to some, since tort and contract are both typically considered part of private law. But late nineteenth-century legal thinking certainly viewed them as private in different ways. Contract was essentially private, a creation of rights and obligations initiated entirely by free consenting parties. The idea that their obligations would be absolute was not only an absence of intervention, but also a testament to their own power to generate obligations independently of the state; tempering the parties' self-imposed obligations was conceived to be a threat to their autonomy. Tort, on the other hand, was private law in the sense that the law was protecting the legal entitlements of private individuals. But at the same time, that protection required the state to impose standards of behavior, or limitations on freedom of action, to which the parties never consented. In this sense, the public involvement in tort was considered to be different in kind from the involvement in contract.<sup>31</sup> Tort was indeed private law, and classical legal thinkers found it important to emphasize that as private law it should not be used as a redistributive mechanism, but rather only as a mode for vindicating rights.<sup>32</sup> But it was contract that served as the true core of private law, with tort always retaining an air of public regulation.<sup>33</sup> This conceptualization was a significant departure from eighteenth- and early nineteenth-century legal thought, where

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28. See K.N. Llewellyn, *Forward, On the Complexity of Consideration*, 41 COLUM. L. REV. 777 (1941); Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691, 696 (1974).

29. See, e.g., *Leavitt v. Dover*, 32 A. 156 (N.H. 1892).

30. W. DAVID SLAWSON, *BINDING PROMISES* 3 (1996); WIECEK, *supra* note 5, at 103.

31. See generally POUND, *supra* note 19 (discussing the difference between tort and contract as liability stemming from aggression and agreement, respectively).

32. The most prominent of the classical thinkers advancing this claim were Thomas Cooley and Christopher Tiedeman, in treatises on torts, constitutional law, and constitutional limitations. See WITT, *supra* note 3, at 46, 49–50, 134–36.

33. See KENNEDY, *supra* note 3, at 240–41 (describing the image of contract as the core of private law).

negligence, contract, and tort (none of them fully formed) mixed promiscuously.<sup>34</sup> Teasing contract and tort apart was one aspect of erecting a firm divide between the public and the private, and one of the key doctrinal tools in doing so was exchanging their positions on fault.

#### D. What's Left of Classical Legal Thought?

For most legal scholars today, the explanation for the shape of private law offered by classical legal thought is unconvincing. It simply no longer makes sense to believe, as many late nineteenth-century legal minds apparently did, that the particular doctrinal structure expounded by the classics is the instantiation of the idea of freedom. Some of the reasons for this are based on internal critiques of the system. Since the realist critique of the early twentieth century, we are more accustomed to see a doctrine like *damnum absque injuria* as a question-begging statement of liability (or no liability), rather than a justification for the conclusion.<sup>35</sup> It is little more than an unsupported conclusion of a judge that in the particular case before him, no liability should attach. By imposing externally determined levels of care, objective standards of behavior to define negligence blurred the boundary between negligence and strict liability. Many areas of tort law, such as that applying to common carriers, still carry strict liability by common law or by legislation. Objectivism in contract blurs the boundary between liability based on actual consent and liability based on law-imposed standards of behavior, or, in other words, blurs the boundary between contract and tort. The protection (even sporadic) of reliance where no contract has been concluded again brings contract and tort perilously close to one another. And the presence of restitution for cases of quasi-contract seems less suspect and less marginal than the classics claimed—yet again raising the specter that private law is infused, through and through, with public decision making and a limited role for actual consent.<sup>36</sup> Finally, on top of all this, waves of legislation in fields like workers' compensation, workplace safety, and eventually consumer protection made the regulatory environment in which contract and tort were embedded a feature that could not be ignored in viewing the system as a whole. Overall, the realist attack made the explanatory basis of the classical structure an easy target for critique.<sup>37</sup>

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34. See HORWITZ, *supra* note 3, at 85–94.

35. See WITT, *supra* note 3, at 47–50.

36. For a leading view of contract as public law, see Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933). For analyses, see HORWITZ, *supra* note 20, at 35–63, and WITT, *supra* note 3, at 51–70.

37. For a sample of some of the more self-conscious examples of this assault, see JOHN R. COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* (1924); RICHARD T. ELY, *PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH* (1914); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); K.N. Llewellyn, *The Effect of Legal Institutions Upon Economics*, 15 AM. ECON. REV. 665 (1925); and Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

But the story does not end here. One of the fascinating aspects of late nineteenth-century legal thought is its structural staying power, well beyond the explanatory or justificatory force of its central tenets. The structural features of the system—such as the ideas that contract is centered on party sovereignty; that liability beyond consent is marginal and anomalous; that contract is more private than tort, which is more regulatory; or that strict liability is more interventionist than negligence—all survive, unmoored from the idea of justifying the mass of existing rules as instantiating freedom.<sup>38</sup> For classical legal thought, the “animating idea [was] the effort to make patent the hidden legal content of a free political and economic order.”<sup>39</sup> This pretension has given way to visions of law that recognize that regulation and redistribution can be legitimate aspects of government, not simply consistent with the idea of freedom, but at times necessary requirements for the effective enjoyment of rights.<sup>40</sup> And yet, the structure within which the interpretation of existing legal rules or the discussion of even wide-scale reforms is conducted is still closely tied to the basic strategies of organization of late nineteenth-century law. The puzzles engendered by this remainder or aftertaste of classical thought, as they arise at the boundary between contract and tort, will be the focus of the remainder of this Article.

### III. PRODUCTS LIABILITY AND FAULT AT THE BORDER BETWEEN CONTRACT AND TORT

#### A. *The Contract-Tort Interface*

The border between contract and tort is a long one. It stretches from questions of how to deal with misrepresentations during contract negotiations,<sup>41</sup> to questions of interpretation of actions (or words) during formation,<sup>42</sup> to questions of liability for deceitful or fraudulent behavior during contract performance,<sup>43</sup> and, of course, to questions of remedy.<sup>44</sup> Indeed,

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38. See ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 41–52 (1996).

39. *Id.* at 41.

40. *Id.* at 47.

41. In contract (via a doctrine like *culpa in contrahendo*) or in tort (through negligent misrepresentation)? Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964). Or perhaps using something (somewhat) different, in the shape of promissory fraud? IAN AYRES & GREGORY KLASS, *INSINCERE PROMISES* 59–82 (2005).

42. Clarke B. Whittier, *The Restatement of Contracts and Mutual Assent*, 17 CAL. L. REV. 441 (1929).

43. Gregory Klass, *Contracting for Cooperation in Recovery*, 117 YALE L.J. 2 (2007).

44. The literature on reliance damages is voluminous; for my purposes here it is sufficient to note that some commentators are adamant that the reliance interest is simply not contractual and that reliance damages, when awarded, are therefore best understood through tort. Peter Benson, *The Unity of Contract Law*, in *THE THEORY OF CONTRACT LAW* 118, 174–77 (Peter Benson ed., 2001); Daniel Friedmann, *The Performance Interest in Contract Damages*, 111 LAW Q. REV. 628, 632 (1995).

after legal realism and its revival of the idea that tort principles are *internal* to the concept of contract, there is scarcely a contracts issue that may not in some way be informed by tort thinking.<sup>45</sup> But in products liability, the meeting of responsibility based in tort and in contract is particularly salient.

The meeting of contract and tort in products cases is at once obvious and mysterious: Obvious because both historically and today, claims for redress from product injuries may be phrased in contract or tort language;<sup>46</sup> mysterious because it is unclear whether one set of principles or another should govern, or even whether such a choice would determine much about outcomes. In order to concretize, I present a cumulative rundown of some of the places where the boundary is touched, and where sketching a boundary might have an impact. This account shows how the issue of products liability proceeds to change the form of contact between the categories of contract and tort. After laying out these points of contact, I return to the question of how understanding the development of contract and tort in their relation to fault may help to grapple with these problems.

Products, whether mass produced or custom made, complex or simple, built for the consumer or for industry use, may cause damage to users or their property, or to bystanders. An injured party may sue for damages under a number of headings, which at least at first glance seem to have distinctive doctrinal features.

Warranty is the contractual home for the suit. From the plaintiff's perspective, warranty's attractiveness depends on who he is. On the one hand, warranty does not require proof of fault but only that the product did not do what such products are supposed to do (i.e., fulfill their role without injuring the user); on the other hand, warranty, at least early in the day, requires privity just as any other claim on the contract would require privity. So if the injured party is not the buyer of the product (or the seller is not the manufacturer, etc.), privity may be a serious obstacle to recovery. The creation of a regime that would come to be known as products liability is, on one level, located entirely here: most of the cases that scholars would eventually liken to an "assault upon the citadel" were cases that sounded in warranty and eroded the obstacle of privity of contract.<sup>47</sup>

But of course, the injured party may also sue in tort. There the major obstacle would be proving fault—that is, negligence—but a lack of contractual privity would not normally arise as an obstacle.

Cases like *Henningsen*, *Escola*, and *Greenman*, famous as the groundwork of products liability, combined the contract and tort issues into a single

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45. For a clear expression of this recurring idea in realist work on contract, see George K. Gardner, *An Inquiry Into the Principles of the Law of Contracts*, 46 HARV. L. REV. 1 (1932).

46. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. b (1965).

47. George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 505–11 (1985). For earlier explanations of the development, see Friedrich Kessler, *Products Liability*, 76 YALE L.J. 887 (1967); William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

policy discussion.<sup>48</sup> That discussion took on a somewhat canonical formulation in Section 402A of the Second Restatement of Torts, setting out strict liability in tort for manufacturing defects. This was conceived of as a tort problem, whose solution was an abandonment of the general requirement of fault in response to what was understood as a public policy-inspired vision of legal responsibility. This vision of responsibility and the policy behind it will remain hot topics of debate (on which more, momentarily), but structurally this is the basic contract-tort combination that animates products liability.

Note, then, that the foundation of products liability works on both contract and tort axes and that in each a basic tenet of the modernizing moment is jettisoned. When seen through the contract perspective, the parties to the contract are no longer the authors of all obligations, since some contractual obligations will even run to nonparties.<sup>49</sup> From the tort perspective, we see an adoption of liability without fault, or responsibility “although . . . the seller has exercised all possible care in the preparation and sale of his product.”<sup>50</sup>

Once a products liability regime is in place, a number of practical issues arise in drawing and maintaining the boundary between contract and tort, three of which I will briefly mention. The first is a question of the degree of overlap between a products liability action sounding in tort and one in contract. Is there any difference, in terms of liability, if the basis for the suit is the implied warranty of merchantability found in UCC 2-314, or a tort rule akin to Restatement 402A? Or, in other words, could a product be defective under one rule and not defective under the other? In *Denny v. Ford Motor Co.*, the New York Court of Appeals dealt precisely with this problem and found that regarding design defects, each claim will rely on a different test for liability.<sup>51</sup> The case brings to the fore the question of whether there is a complete overlap between contract and tort in this situation, with the court resting its conclusion of distinct causes of action on the idea that a “negligence-like risk/utility approach is foreign to the realm of contract law.”<sup>52</sup>

The second boundary issue deals with the scope of protection and takes legal form in the economic loss rule. While some commentators see the

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48. *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963); *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440–44 (Cal. 1944); *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 77–78, 80–84 (N.J. 1960).

49. U.C.C. § 2-318 (2005).

50. RESTATEMENT (SECOND) OF TORTS § 402A.

51. 662 N.E.2d 730 (N.Y. 1995). The court found that a plaintiff relying on the warranty of merchantability could succeed in a design defect claim by showing that the design did not meet consumer expectations, while a tort plaintiff would have to show that the design did not meet a risk-utility test. *Id.* at 737–39. In this case, the Ford Bronco at issue could pass the risk-utility test when all its possible uses (on road and off road) were taken into account, but might fail the consumer expectation test, because consumers would be expecting on-road safety (i.e., a car that would not roll over during on-road driving). *Id.* at 738–39. See generally Jay M. Feinman, *Implied Warranty, Products Liability, and the Boundary Between Contract and Tort*, 75 WASH. U. L.Q. 469 (1997) (discussing the differences between implied warranty and products liability standards).

52. *Denny*, 662 N.E.2d at 738.

economic loss rule as an arbitrary obstacle to recovery in tort,<sup>53</sup> others, including the Supreme Court, have analyzed the doctrine in terms of “the need to keep products liability and contract law in separate spheres.”<sup>54</sup> The Court engaged in an extended analysis of the types of damage appropriate to contract and tort, distinguishing broadly between the economic realm and the realm of safety.<sup>55</sup> The interesting common feature in *Denny* and *East River Steamship Corp.* is the argument that contract and tort have distinctive characteristics, making them applicable to different spheres, or realms, and that the overlap in fact situations should not cloud that difference.

The third boundary issue is the question of whether producers or sellers will be allowed to use contractual provisions to disclaim liability for damage caused by their products. Historically, courts held relatively fast to the rule that parties could not contract out of liability for their own negligence.<sup>56</sup> On the other hand, parties are traditionally thought to have wide latitude in fashioning remedies, including limiting the remedies for breach of warranty (when the warranty is not disclaimed). As will become clear in a moment, much of the discussion over how to think about products liability today centers on using contractual disclaimers, or what might be termed “freedom of tort.” Again, a crucial theme here is that tort and contract seem to have functional differences that make the categories distinctive, despite the existence of factual overlap.

The question of whether producers will be able to contract out of liability was the chief animating feature of the backlash against the expansion of products liability that held the field from the early 1960s to the early 1980s. Beginning with the economic analysis of law and spreading soon to tort theorists from the doctrinalist tradition as well as more philosophical attitudes, the 1980s and early 1990s saw an onslaught of scholarship assailing the expansion of products liability.<sup>57</sup> Of interest to our present inquiry is that much of this scholarship was framed directly in terms of a preference for contract over tort. Richard Epstein’s retrospective statement sums up the spirit of much of the critique:

The rules of product liability law are like poorly designed all-purpose screwdrivers—ill-suited and far too complex and convoluted for the many

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53. See, e.g., Linda J. Rusch, *Products Liability Trapped by History: Our Choice of Rules Rules Our Choices*, 76 TEMP. L. REV. 739 (2003).

54. See, e.g., *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 870–71 (1986).

55. *Id.* at 869–74.

56. *N.Y. Cent. R.R. Co. v. Lockwood*, 84 U.S. (17 Wall.) 357 (1873); WITT, *supra* note 3, at 51; Charles W. McCurdy, *The “Liberty of Contract” Regime in American Law*, in THE STATE AND FREEDOM OF CONTRACT, *supra* note 13, at 161.

57. Some of the leading pieces of scholarship included Richard A. Epstein, *Products Liability as an Insurance Market*, 14 J. LEGAL STUD. 645 (1985); Richard A. Epstein, *The Unintended Revolution in Product Liability Law*, 10 CARDOZO L. REV. 2193 (1989); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987); Priest, *supra* note 47; Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353 (1988).

tasks that they must perform. And the source of this complexity is the familiar one—the inveterate tendency to use complex collective, or tort, solutions in preference to contractual ones.<sup>58</sup>

Before jumping into the discussion of whether the contractual solutions for products liability are attractive, it pays to return to take note of the shifting valence of contract: at the early stages of the development of products liability, contract contained within it both expansion (since it was no-fault liability) and limitation (since it was based on privity) of liability. Doctrinal details of possible overlap similarly contain potential expansion or contraction. For example, the economic loss doctrine sees contract as a possible source of expanded liability, but almost always in the context of disclaimed responsibility. Finally, the neocontract approach to products liability is all about limitation of liability.<sup>59</sup>

One of the strange things that happened in the course of development of products liability is that the field that opened as a hybridization of contract and tort eventually saw the reemergence of a rhetoric of strict separation of spheres. If in the early 1960s legal scholars saw products liability as a regulatory field where contracts and torts mixed, by the late 1980s the voices calling for the separation of spheres had grown ascendant. And those calls for separation of spheres seemed to rely on precisely that element of classical legal thought that had once seemed discredited, i.e., the idea that tort was regulatory while contract was private. The idea that contract is wholly private and not regulatory is more of a rhetorical motif than an argument in the neocontract literature on products liability (which is based primarily on arguments about efficiency), but it recurs with enough force and frequency to warrant notice.<sup>60</sup>

### B. Contractualism and Regulation

This is not the place for a full-blown evaluation of neocontractual positions on products liability.<sup>61</sup> My intention is only to focus on those aspects of the argument that may be illuminated by rethinking them through the prism of fault and its related framework of public regulation and private ordering. Recall that the modernizing maneuver of classical legal thought positioned tort as a field that ought to be governed by fault so as to limit regulatory encroachment to behavior that infringed on the rights of others. Recall also that it positioned contract as strict liability in order to highlight that the

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58. RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 213 (1995); see also Mark Geistfeld, *The Political Economy of Neocontractual Proposals for Products Liability Reform*, 72 *TEX. L. REV.* 803, 803 (1994); Schwartz, *supra* note 57, at 413.

59. See generally PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988) (arguing for replacement of most tort liability with contractual principles); Geistfeld, *supra* note 58, at 803–04.

60. See, e.g., EPSTEIN, *supra* note 58, at 214–15; Priest, *supra* note 47, at 507–08; Schwartz, *supra* note 57, at 413.

61. For such an evaluation, see Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 *MICH. L. REV.* 683 (1993).

source of the obligations was the parties' agreement, and not any societally imposed standard of behavior. As we will see, elements of the neocontract or contractualist position on products liability replicate this maneuver.

The basis of the contractualist position on products liability is that purchasers and sellers will negotiate contracts that yield efficient levels of investment in safety and efficient levels of compensation for injuries caused by products. This much is considered nearly beyond argument if parties are perfectly informed,<sup>62</sup> and thus most of the discussion centers on the question of the extent of imperfect information and its effects.

However, even under assumptions of perfect information, certain limitations to the contractualist position should be apparent. The problem with the contractualist position in general is that the scope of interests considered when imagining a system through individual exchanges is too narrow to capture fully the social stakes of the system.

A concrete example is the issue of damages for pain and suffering—or more generally, nonpecuniary damages. As noted above, contractualists have usefully distinguished between two elements that informed buyers and sellers would contract for: investments in safety (in design and manufacture) on the one hand, and compensation for injury (or insurance) on the other.<sup>63</sup> Buyers would want optimal (not maximal) investments in safety, and they would want insurance (compensation by the seller) as long as sellers were better placed to insure than the buyer. As far as pecuniary damages are concerned, there is a happy coincidence in that one element can act as a guarantee for the other: so long as sellers are responsible for damage caused by their products, they will invest optimally in safety (anything more or less would cost more than it would save), and buyers would be willing to pay sellers for insurance for pecuniary losses, just as they would be willing to insure these losses elsewhere. However, the happy coincidence ceases when nonpecuniary losses are taken into account. As contractualists have been quick to point out, most perfectly informed buyers would not be willing to insure against nonpecuniary loss, and thus would forego insuring such loss by paying a premium to sellers.<sup>64</sup> However, this does not mean that buyers view nonpecuniary losses as unreal, or as nondamage. Thus, they actually would want sellers to take such losses into account when investing in safety precautions. But in the absence of liability for such losses, sellers have no incentive to do so (since by hypothesis, it is the liability structure through which sellers optimize their investments in safety). Therefore, there is a flaw in the contract setting: the informed rational buyer will not want to buy insurance for pain-and-suffering damages but will want the seller to consider such damage when investing in safety. Unless the parties can rely on some

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62. Geistfeld, *supra* note 58, at 811–12.

63. *See id.* at 809–14; Schwartz, *supra* note 57, at 362–68.

64. *See* Schwartz, *supra* note 57, at 408–11.



obligation outside their bargaining, there is a built-in tension preventing the optimal arrangement between them.<sup>65</sup>

I began with the concrete example of nonpecuniary damages because it is an area that contractualists themselves have noted as a potential stumbling block to their view of products liability.<sup>66</sup> But the point is open to generalization. Direct and compensable injuries to buyers are actually only a subset of the damages that ensue from unsafe products. Family members, employers, friends, and others who count on daily interactions with people who are injured by products typically suffer losses as well. Collateral damages, although almost always losses that are well beyond the imagination of any compensation structure, are nonetheless part of the social cost of unsafe products.

Even more obviously than with regard to nonpecuniary losses to the injured party, these are losses no rational buyer would contract to insure. Yet they are no less real in terms of social cost, and thus they should ideally fit into the calculus of investment in safety. In fact, one way to make sure that sellers do not ignore these costs is to impose a safety calculus that is not based on what particular rational buyers would contract for, but rather on a much wider basis of the social costs of accidents.

Acknowledging this means admitting that the proper baseline for manufacturer–seller duties is socially imposed and does not have its source in a narrow vision of the parties’ agreement. In other words, it implies a vision of contract where some of the duties are determined externally to the parties’ interests, narrowly construed. Or, to put it in slightly different terms, it acknowledges that part of what parties to a contract are involved in is the generation of a public good—in this case the public good of safe products.<sup>67</sup> This idea should not sound farfetched. It is intuitive that contracting parties generate a public good in the shape of trust in the market, or the idea of safe contracting. Consider, for example, the difference between analyses of non-disclosure and misrepresentation: when dealing with silence regarding features of the transaction, we are willing to consider information as a possible entitlement whose allocation should be sensitive to efficiency concerns.<sup>68</sup> But the analysis of misrepresentation is fundamentally different, quintessentially fault based, and obviously reliant on sources outside the parties’ own agreement—and yet, no less contractual for that. Nondisclosure can theoretically be overcome simply by asking the right question. Misrepresentation, however, threatens to unravel the basic background trust without which market transactions would be far more difficult.

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65. The parties will be able to bargain to a second-best solution, some compromise that takes into account the desire for more safety than the insurance component warrants, but there is no happy coincidence aligning their bargaining interests with a socially ideal level of investment in safety.

66. See Schwartz, *supra* note 57, at 410.

67. For an analogous argument in the context of medical malpractice, see Jennifer Arlen, *Contracting over Malpractice Liability*, (Law & Economics Research Paper Series, Working Paper No. 08-12, 2008), available at <http://ssrn.com/abstract=1105368>.

68. See Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 22–27 (1978).

## CONCLUSION

The point of this analysis has obviously not been to suggest the optimal scheme for governing problems of products liability. Rather, the much more modest goal has been to show that whichever side of the tort-contract boundary is relevant for solving the problem, the parties cannot be conceived of as sole originators of the solution. To paraphrase Leon Green, the polity is a party to every contract.<sup>69</sup> Contract, like tort, is a mode of social regulation whose rules ought to serve social goals. The idea that the parties' own interests, narrowly construed and bargained over, could exhaust the relevant social goals was a pipedream of late nineteenth-century legal science. Today, at times, it appears that contracts enthusiasts tap into the rhetoric of that dream—and its resurrection does more to confuse than illuminate current thinking. Recalling the roots of contract as a fault-based regime and the reasons that drove nineteenth-century theorists to characterize it as based on strict liability is a reminder of the socially imposed duties that function as building blocks of contract. One may hope the reminder could serve as a mild corrective for some of the confusion.

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69. Leon Green, *Tort Law Public Law in Disguise* (pts. 1 & 2), 38 TEX. L. REV. 1, 257 (1959–60). For the contract version of the claim, see Cohen, *supra* note 36.

