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Restoring the Boundary Tort Law and the Right to Contract

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# *Restoring the Boundary*
## *Tort Law and the Right to Contract*

**by Michael I. Krauss**

## Executive Summary

Today courts regularly resolve disputes by applying tort principles when they should apply the law of contracts. When parties have an opportunity to negotiate the terms of their relationship, the resultant contracts ought to be enforced. Tort law is an acceptable substitute only if parties have no opportunity to bargain.

Over the years the boundary between tort and contract has shifted sharply toward tort. For example, physicians serving rural areas are often not allowed to contract with patients for a lower price in return for diminished care. And courts have allowed consumers who buy cars without air bags to recover from manufacturers for injuries that only air bags would have prevented. Sometimes courts even ignore compulsory arbitration provisions that waive the usual judicial procedures for resolving disputes.

Even worse, rules have sprung up that prohibit ordinary commercial contracts. A person forbidden to sell certain products—because a government agency has determined they are too dangerous—may also be forbidden to sell his own labor—because the state has determined that the wages he would accept are too low. Contracts once freely negotiated, and subject to private suit in the event of fraud or failure to perform, are increasingly replaced by regulation. Unhappily, once government has advanced a plausible rationale for prohibiting consensual behavior in one area, its tentacles inevitably extend to other areas as well.

Today's torts "crisis" does not exist because corporations are oppressing individuals, or because we need federal legislation to replace state tort rules. The crisis exists because our rights have been given increasingly less respect by government. The crisis exists because we have not allowed tort to be tort, and contract to be contract. We need to restore the boundary between contract and tort.

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# Introduction

"Tort reform" has been a staple in Congress and state legislatures for some time—and not without reason. Over the last 40 years or so, the law of torts, which common-law judges crafted over the centuries to hold people and organizations responsible for the harms they cause, has been transformed into a kind of general social insurance scheme. As a result, traditional rules of liability have all too often been replaced by rules, if they can be called such, that are little connected to common-sense notions of individual responsibility.

Today the "deep-pocket" principle dominates tort law. Large corporations and sometimes whole industries are held responsible for compensating "victims," even when the victims themselves would ordinarily be thought to be responsible for their losses and even when responsibility may already have been decided by a prior agreement between the parties. Given the uncertainty those legal changes have brought about, individuals and organizations find it increasingly difficult to assess risks or to plan their affairs in a rational way. Opportunities are forgone, financial disaster is always just around the corner, and the aggregate costs for everyone grow ever larger. Consider just two examples of the modern dilemma:

1. A mother and father allow their four-year-old daughter to play with a disposable butane cigarette lighter, which leads to a tragic fire killing the four-year-old and her two siblings. The courts allow the parents to claim that the lighter was defective in design because "it lacked feasible child resistant features."[1]
2. A woman who requests and obtains a prescription for birth control pills, and who receives a written warning about the increased risk of liver tumors among those who take such pills, sues the manufacturer after developing a liver tumor. She claims she never would have taken the pills had the warning been more "stringent." She wins.[2]

As those examples suggest, we are a long way today from having a body of tort law that reflects ordinary principles of individual responsibility. Under the old common law, for the most part, those who harmed their neighbors without justification, as specified by law, were held responsible for making them whole again. The law presumed that people were free to choose how to act, but it also held them liable for the harmful consequences of their wrongful choices.

One of the principal ways traditional tort law regulated or policed the freedom to act, and the right to be free from harms wrongfully caused by others, was through close connection with the law of contract. People were free to act on the understanding that if their acts unjustifiably harmed others they would be held liable for making those others whole again. But they were also free to associate with others and to agree, through contracts, to allocate in any way they wished the risks of harm that might arise from the association. Thus, by limiting their freedom, through promises made and obligations incurred, such people actually expanded their freedom. They did not have to leave everything to chance and then try to sort things out only after something went wrong. They could anticipate what might reasonably go wrong and allocate the risks of that in a way that seemed best to serve their respective interests.

Through explicit contracts, then, people allocated risks among themselves and avoided having later to rely on courts to determine liability through tort law when one of those risks materialized. At the same time, tort law often invoked implicit contracts in assigning liability after a loss had occurred. Courts said that certain victims, by their actions, implicitly assumed the risk of a loss. In that case, they must bear any such loss rather than have the court shift it to the person causing it.

Of late, however, the boundary between tort law and contract law has shifted sharply toward tort. In the product liability arena, for

example, courts often reject the notion that a buyer has implicitly contracted to assume the risk, fully disclosed, associated with purchase and use of a particular product. In medical malpractice cases, courts typically disallow written contractual waivers, by which consumers might express their willingness to receive a lower standard of care, and to relinquish certain legal remedies, in return for a lower price. Sometimes courts will even ignore compulsory arbitration provisions that, while leaving the standard of care unchanged, waive the usual procedures for resolving contract disputes. In each of those instances, the court will substitute tort redress, notwithstanding that the parties assigned risks by contract prior to any injury having occurred.

The first section of this study looks at the boundary between tort law and contract law as it has evolved over time. The second section contrasts how the legal system does and how it should protect us from harm by others. The third section examines contractual waivers and the modern tendency to ignore them or replace them by tort law. Finally, the fourth section explores the concept of "inalienability," asking whether there are certain narrowly defined categories of rights, the contractual exchange of which should not be enforceable.

## The Boundary between Tort Law and Contract Law

Three tort stories, taken from real cases, will help illustrate the connection between torts and contract. The first case was decided over 100 years ago. The other two are more recent. Each made local newspaper headlines. In each, the plaintiff won and the defendant protested the decision.

1. In *Vosburg v. Putney* (1891),[3] a 12-year-old Wisconsin schoolboy kicked a classmate in the shin during class. He apparently had every wish to annoy the classmate but no desire to injure him—the kick was slight and was in fact called a "touch" by the court. Unbeknownst to the boy, however, his victim was recovering from an infection in precisely the spot where contact occurred. The blow reactivated the wound, eventually resulting in permanent incapacitation. Despite knowing nothing about the victim's fragility, the young defendant was held liable for the entire injury. The court refused to force the victim to assume the risk of injury to his shin; it did not say, for example, that he should have "self-insured" (perhaps by wearing a shin guard). Rather, the plaintiff's bodily integrity was his by right and its violation by the defendant was a tort. In a noteworthy aside, however, the court suggested that its decision would have been different had the kick occurred, say, while roughhousing on the playground during recess. In that case the victim, by an "implied contract," would have assumed the risk of being kicked. Thus, the defendant's action would not have been wrongful even though it caused harm to the victim.
2. In *Obstetrics and Gynecologists v. Pepper* (1985),[4] a Nevada clinic (O&G) required all patients to sign a standard agreement before receiving any treatment. The agreement provided that any disputes arising between the parties would be submitted to independent binding arbitration, both parties expressly waiving their right to a jury trial. The arbitration procedure was beneficial to O&G because it was faster and cheaper than a jury trial and it would likely result in awards more favorable to defendant O&G than jury awards would be in malpractice trials. The procedure was arguably beneficial to patients as well. Evidence suggested that the fees charged by O&G were more modest than those charged by comparable groups whose contracts did not contain an arbitration clause. That is not surprising, of course. As part of

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their contracts for services, O&G and other clinics in effect packaged an "insurance policy"—a commitment to pay damages in the event that a customer could demonstrate that the clinic was negligent. O&G's "policy" had lower administrative costs and a lower expected payoff than competitors' policies, so O&G could afford to charge less.

The standard procedure of the clinic required the receptionist to hand prospective patients the arbitration agreement, along with two information sheets, and to inform them that any questions concerning the agreement would be answered then and there. Patients signed the agreement before receiving treatment; the physician signed later. If a patient refused to sign the arbitration agreement, the clinic would refuse treatment.

Plaintiff Pepper entered the clinic to obtain a prescription for oral contraceptives. After signing the agreement, she was given the contraceptives, which were accompanied by a detailed written warning of possible side effects, including the risk of stroke. Nine months after receiving her prescription, Pepper suffered a stroke that left her partially paralyzed. She sued the clinic, claiming that it should have refused to prescribe the contraceptive because of her unusual medical history. Defendant O&G moved to stay the lawsuit pending arbitration. Thus, the question before the court was whether the arbitration contract was binding on the parties. If not, the tort suit should proceed. The Nevada Court of Appeals affirmed the lower court's judgment that the arbitration agreement was an "adhesion contract" (a contract drafted entirely by one party, with no individualized negotiation); that the plaintiff was a "weaker party"; that the agreement was "unduly oppressive"; and that, as a result, it should not be enforced. The motion to stay the tort trial was denied.

3. The following chain of events gave rise to *Minton v. Honda of America*.[5] Jeffrey Minton was driving his 1990 Honda Accord in Miami County, Ohio, when a vehicle traveling in the opposite direction crossed the center line and collided with Minton's automobile. Minton was killed. In the past, the negligent driver of the oncoming car would have been the sole defendant in a tort suit. Not today. A wrongful death suit was filed against deep-pocketed Honda, on the grounds that the Accord it sold to Minton was not equipped with air bags. (Honda did not ship Accords with air bags until 1992. The 1990 Accord was equipped with seat belts and shoulder harnesses, in strict conformity with existing law.) Minton knew, of course, when he purchased his 1990 Accord that he was not getting air bags. He did not pay for air bags. He did not elect to buy a competing brand vehicle equipped with air bags. Can the plaintiff legally claim that Minton was entitled to get something he never thought he was buying? Yes, said the Ohio Supreme Court.

**Imagine that everyone could effortlessly negotiate with everyone else. In such a world, an array of contracts could allocate all risks of harms that might arise.**

The connection between tort and contract law in those three cases will be developed more fully below. Because that topic recurs throughout this study, however, a few preliminary observations might be useful. At the outset, imagine that everyone could effortlessly negotiate with everyone else. In such a world, an array of contracts could allocate all risks of harms that might arise from human interaction. Thus, assuming price was no object, motorists wishing to travel at high speeds could negotiate risks among themselves and could purchase from slower motorists and pedestrians promises to keep off the streets at the appropriate times. The motorists and pedestrians would make such promises in exchange for adequate compensation for their inconvenience. If an "accident" occurred, the allocation of its costs would be determined by those contracts, which would have considered all foreseeable risks.

Any suit in this fictitious world would be

a contract suit, provoked either by the failure of a party to keep his word or by the ambiguity of a written agreement. In a society of free and responsible individuals, the court's role would consist simply of interpreting contracts—of determining which risks had been assumed by which parties—and of holding the parties to their agreements. After an accident, of course, those parties who had assumed the risk of a loss might wish they had never done so. They might consider what they were "paid" for assuming the risk inadequate. Were the courts to "rewrite" or fail to enforce such contracts, however, there would be no point to contracts in the first place and the practice of allocating risks before a loss occurs would disappear.

In the real world, of course, we cannot contract effortlessly. Transaction costs are often high, which means there are accidents that involve parties who have not allocated the risks of their behavior in advance. Some collisions of interests are literal—on the public roads, for example. Others are more subtle—those concerning the use of public resources such as water or air, for instance. One person might have an interest in polluting those resources while others have an interest in keeping them clean—yet no contract is drawn to determine which interest will prevail. Still, in real life many contracts can and do arise.

The common law of contract was sensitive early on to the respective roles of tort and contract in allocating risks—and to the moral and economic preferability of contract when available. With the growing merchant trade of 15th-century England, courts began to hear complaints against persons professing a particular skill—say, carpentry—who preformed their jobs poorly. Thus, there gradually developed a new legal action or claim called "trespass for deceit." In construction disputes, for example, courts typically assigned the risk of a cave-in, say, to the builder, reasoning that the homeowner's rights had been "invaded," much as if a stranger had invaded the owner's estate and smashed the building. To quote a foundational judgment: "If a carpenter [agrees to] make me a house good and strong and of a certain form, and he makes a house which is weak and bad and of another form, I shall have an action of trespass on my case."[6]

Note that "trespass" was the basic tort action; thus the court borrowed tort terminology—a classic recognition that both tort and contract assigned risks. As technology advances, free people are more easily able to get together and, aided by law, exchange rights. Over time, therefore, one would expect that contract (voluntary, pre-injury assumption of risks) would expand and tort (involuntary, post-injury assignment of risks to actors who behave wrongfully) would shrink.

But if advances in technology and legal understanding ought to encourage contractual arrangements, while discouraging reliance on tort law, it is hard to explain two of the three tort stories recounted above. *Vosburg v. Putney* looks correctly decided: the victim had never consented, even implicitly, to the risk of being kicked; he was unilaterally "invaded" by the wrongful action of the defendant. But what of *Obstetrics and Gynecologists v. Pepper*, where the arbitration contract was set aside by the court and the parties had to rely on tort law instead? And what of *Minton v. Honda*, where the negligence of an oncoming driver killed Minton, yet Honda was deemed liable because Minton's car did not have air bags, which were neither required by law nor demanded by the buyer?

Instead of contract expanding and tort shrinking as changes in technology and legal understanding facilitate consensual allocation of risks, in many ways the opposite has occurred: postwar America has witnessed a successful invasion of much of contract law by tort law.[7] Virtually all medical malpractice suits pit contracting parties against each other, for example, yet allegations of inadequate care are usually decided under the law of torts, not the law of contracts. And product liability suits usually accord little respect to contractual provisions, even though they involve a contractual chain, including wholesalers and retailers, that affords many opportunities

**Product liability suits usually accord little respect to contractual provisions.**

for the voluntary assumption and exchange of risks.

Why does tort law intervene procedurally and substantively when contract law, with its assumption-of-risk principles, would often better and more fairly serve to adjudicate disputes? I next examine that question, criticize the rationales for the current boundary between tort and contract law, and argue for adjusting that boundary to enhance liberty and personal responsibility.

## How Are We Protected from Harm by Others? How Should We Be Protected?

**We do not want courts or other governmental agencies forcibly redistributing property simply because they believe some other person or people may value the property more than do its current owners.**

Our right not to be subjected to certain conduct by others is protected by law in various ways, often depending on the character of the harm (whether it is intentional or accidental). That, in turn, often leads to different remedies when losses arise. Consider the following example. If Jill owns a watch, her right to the watch does not depend on her valuing it at any particular level. She may value it little. Or she may value it well beyond its market value—say, because it was given to her by her deceased father. Having such a right means that if Jack takes Jill's watch, Jill can obtain a court order for its restitution and any damages that may have arisen from the theft. Only if restitution is impossible, perhaps because Jack has destroyed the watch, must Jill be content with monetary damages in lieu of the watch itself. The amount of those damages may well exceed the market value of a watch of similar brand and condition. Damages may include the sentimental value Jill attached to the watch and a punitive element reflecting societal condemnation of Jack's intentional violation of Jill's right.

In a seminal law review article, Professor (now Judge) Guido Calabresi and A. Douglas Melamed, principal deputy assistant attorney general of the Antitrust Division of the U.S. Department of Justice, characterized the protection afforded Jill in the above example as protection afforded by a "property rule."[8] That term is intuitively attractive because property rule protection appears to be what we need when we have a property right. With property rule protection, Jill is immune to any claim by Jack that he, not she, is entitled to the watch because, say, he values it more. In a free society, such a claim gets no legal recognition. If Jack really does value the watch more than Jill does, he can demonstrate that by offering to buy it from her. By definition, a voluntary sale of that kind would compensate Jill for whatever value she attached to the watch. We do not want courts or other governmental agencies forcibly redistributing property simply because they believe some other person or people may value the property more than do its current owners.

To have a property right, then, is to have a right that is immune from violation based on some state-imposed interpersonal comparison of the property's worth. In a pithy statement, legal philosopher Ronald Dworkin captured the significance of property rules when he observed that "rights trump utility."[9] Thus, in the *Vosburg* case above, the plaintiff's right to his shin barred the defendant's claim that the plaintiff could most inexpensively have avoided the injury—by wearing a shin guard, for instance. Similarly, if a victim's bodily integrity is protected by a property rule, it will be to no avail for a mugger to claim that he enjoys mugging, or that he needs the money more than the victim does, or that his victim "asked for it" by walking in the park at night.

Property rules typically protect rights against intentional, unconsented-to invasion. They are ideal for protecting rights when parties have a chance to bargain, should they wish to, about an exchange. When contracting is difficult or impossible, however, we often protect property through a "liability rule." To see how that works, consider first that we create a risk of injuring others every time we go out in public. If Jack pushes his shopping cart down the aisle at the supermarket, for example, he exposes Jill and everyone else at the market to the possi-

bility of an accident. None of the people thus exposed has agreed, prior to any accident, on just who must ultimately bear the loss, much less to what extent.

It is here that courts step in with liability rules. Unless the risk to others is unreasonably high, the courts do not stop us from engaging in the ordinary activities of life. Rather, once an accident occurs as a result of such activities, courts hold us liable for the losses we *negligently* cause others, absent some excuse such as the negligent behavior of the injured party. Thus, unlike the situation under a property rule, the loss suffered by a victim might be his to bear—if it arises through no fault of anyone else, or through the partial fault of the victim. And when the court does shift a loss to the person who caused it, the loss is typically valued at a market rate. Thus, if Jack negligently damaged Jill's watch in a supermarket collision, he would be liable for compensating her for her loss as objectively measured by the market value of the watch, not as subjectively measured by Jill.

Property rules fully protect our rights and are feasible whenever parties can bargain. Liability rules give less complete protection but are well suited for accidental losses. But property and liability rules do not exhaust the ways in which we protect our rights. As Calabresi and Melamed point out, and as others have elaborated,[10] we also use "inalienability rules." Although not without controversy, an inalienability rule precludes even voluntary alienation (sale or donation) by the right holder himself. Many corporal entitlements—the right to one's heart, for example, but not the right to one's hair—are protected by full inalienability rules. Although I "own" my liver, I may not legally sell it, notwithstanding that the right to sell is ordinarily inherent in the right to own.[11] Both property rules and inalienability rules protect rights from being forcibly transferred in the name of social utility. But only a property rule allows transfer by contract; if an entitlement is protected by an inalienability rule, not even voluntary consent authorizes transfer of the right.

I shall take up inalienability rules in the final section of this paper. But first, here are two illustrations to help flesh out the distinction between the property rule and the liability rule.

### Illustration One: A Property Dispute over Intentional Pollution

Environmental pollution illustrates the different ways of determining both the owner of an entitlement and the means of protecting that entitlement. Suppose plaintiff (P) claims that defendant (D) is polluting P's property. D admits to some small amount of pollution but insists that it is not wrongful or unreasonable, given all the circumstances. If P and D litigate their dispute, the court will have to decide two questions. First, it must decide which party is legally entitled to prevail: may D pollute moderately, or may P successfully object to the pollution? Second, the court must determine how to protect the entitlement it has found.

Suppose the court finds in favor of P. Thus P has the entitlement.

1. If P's entitlement were protected by a property rule, the court would enjoin the pollution and require D to compensate P fully for any past losses claimed and proven. D would be able to continue emitting pollutants if and only if D and P could come to some agreement whereby P would waive the benefit of the court order. The payment for that waiver would by definition compensate P for all damages he suffers.
2. If P's entitlement were protected by a liability rule, however, D would not be so enjoined but would be told that he could continue to pollute, provided he paid court-ordered damages to P. In essence the court would be imposing the terms of one of many possible post-injunction contracts that might have been negotiated by the parties in scenario 1. The court effectively condemns P's land to suffer a servitude of pollution, then fixes the value of that servi-

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tude. There is no guarantee that the court's estimation fully reflects P's assessment of his damages. Rather, the award typically reflects the diminished market value of P's land. (Nor, of course, is there any guarantee that D would be willing to pay to continue his pollution. The activity may not be worth the price the court fixes.)

On the other hand, the court might determine that D was not wrongfully polluting, in which case D has the entitlement.

3. If D's entitlement were protected by a property rule, P's suit would be dismissed outright. P could still stop the pollution, of course, but to do so he would have to pay D not to pollute—not to do what he had the right to do. P would have to meet D's price in a post-judgment contract.
4. The court could also protect D's claim with a liability rule if the laws of the jurisdiction permit holding a plaintiff liable for damages.[12] It could recognize D's right to pollute, then proceed to take the right away from D (i.e., prohibit future pollution) in return for damages payable to D by P. That would be equivalent to setting the terms of one of many possible post-judgment transactions between P and D in scenario 3—allowing P to buy less pollution than the law permitted while requiring D to sell his right to pollute.

Table 1 illustrates the alternatives available to the court.

**Illustration Two: Episodic, Unintentional Harm**

Unlike the pollution example, most tort suits do not involve an ongoing pattern of damage. Even in one-time harm cases, however, the distinction between property rules and liability rules is useful for understanding different ways in which rights might be protected.

Thus, in a celebrated U.S. Supreme Court decision,[13] defendant railroad conceded that it had negligently allowed sparks to land on a farmer's land adjacent to its tracks, damaging the farmer's crops. The railroad claimed, however, that the farmer had stacked his crops too close to the tracks, and that the damage from the resulting fire was therefore much greater than it would otherwise have been. That, the railroad claimed, was "contributory negligence," by the farmer, which under tort rules then in effect would bar any recovery.

In deciding the case, the Supreme Court's majority noted that the railroad had not purchased any servitude from the farmer that limited what he might do. In fact, the Court

**Table 1**
**Methods of Protecting Entitlement**

| Entitlement Holder | Property Rule | Liability Rule |
|---|---|---|
| Plaintiff | 1. Injunction against future pollution | 2. Pollution allowed, damages awarded to P |
| Defendant | 3. Pollution allowed, P's suit dismissed | 4. Injunction against future pollution, damages awarded to D |

concluded, the farmer could not be negligent in placing his own crops on his own land. By implication, the Court was protecting the farmer's right to store crops with a property rule, for absent any agreement with the railroad to the contrary, the farmer had a perfect right to use his property as he wished. In dissent, Justice Oliver Wendell Holmes, Jr., agreed that, in the absence of such a contract, the railroad could not enjoin the farmer from stacking his crops near its track. But Holmes insisted that if the farmer's decision did not maximize joint (farmer + railroad) economic output, then the farmer was "contributorily negligent" and therefore could not recover the value of his destroyed crops. In essence, Holmes would have protected the farmer's right to stack his crop with a liability rule: the farmer was entitled to damages unless another use of his land was socially optimal.

The importance of and distinctions between tort and contract on the one hand and between property and liability rules on the other should now be clear.

1. Rights protected by property rules may not be taken away against an owner's will. They are alienated only through contract and, therefore, take into account subjective evaluations of the owner.
2. Rights protected by liability rules may be taken away against an owner's will, in which case a third party (a court, applying tort law) will decide whether, to what extent, and to whom damages are payable. In making such a decision, a court will not consider subjective evaluations.
3. When parties have an opportunity to negotiate, pre-injury, the terms and conditions of their relationship, property rules are to be preferred; they effectuate the voluntary choices of the parties and fully respect property rights.
4. When parties do not have an opportunity to bargain prior to the occurrence of an injury, liability rules may be required. But because they ignore the property owner's valuations and substitute those of a third party, they should be used sparingly.

With that background, let us turn next to explore areas of the law where property rules ought to replace liability rules and contract law ought to replace tort.

## Waivers and Tort Law

Many disputes are adjudicated today under tort principles when they could and should be adjudicated under contract principles. In such cases, parties can and often do consent—explicitly or implicitly—to bear in various ways the various risks that may be involved in their relationship. If courts took that into account—invoking contract principles, by implication—their decisions would be very different than if they ignored those issues and relied instead on tort principles alone.

There are two distinct ways in which contract principles might apply:

- Substantively, the parties could agree, before any loss, to a standard of care or quality that is different than the one a court might impose *after* a loss has occurred.
- Procedurally, parties could agree to have any disputes adjudicated in a forum of their choice rather than in a court as provided by tort law.

**Substantive Waivers**

When parties contract for goods and services, there is no single level of care or quality they must agree upon—even if a court applying tort law would have to select an "appropriate" level in adjudicating a subsequent dispute. Parties could avoid having courts impose a standard by making a selection themselves, prior to any loss. Thus, a patient might demand more tests of his doctor than would be required of a "reasonable physi-

**Rights protected by liability rules may be taken away against an owner's will. A court will decide whether, to what extent, and to whom damages are payable.**

cian" under current tort law. Courts would generally enforce such a contract, holding the doctor to the higher level of care he promised. Of course, suppliers will not expose themselves to additional liability for nothing; consumers must pay for the additional care they purchase.

But is the converse true? What if a physician offers *fewer* tests than might later be thought "reasonable" by a court in a tort suit and the patient accepts the offer, presumably for a lower fee? Or suppose the patient requests a lower level of service and the doctor agrees? Is the patient allowed to assume the risk of injury? Will his subsequent claim that the level of care provided was too low be dismissed on the ground that he consented to that lower level of care?

Here the answer is decidedly mixed. Sometimes contracting parties are indeed held to their contracts. Thus, courts have held that a plaintiff who visits a doctor of chiropractic cannot sue the doctor simply because he did not have the skills or use the techniques of a medical doctor.[14] Similarly, those who purchase frame buildings cannot successfully sue builders because their lodging proved less fire resistant than a brick house.[15] And people who fell on a moving ramp in a "fun house" have been unsuccessful in suits against the owners and operators of the amusement.[16] In each such case the plaintiff asked the court to ignore the contract principles the defendant raised as a defense, but the court refused to do so. Such holdings suggest that the court is applying a property rule, and that consumers can trade their rights for other benefits—cost savings, thrills, and so forth.

**Very often, courts refuse to sanction arrangements in which consumers explicitly or implicitly assume certain risks.**

Very often, however, courts refuse to sanction arrangements in which consumers explicitly or implicitly assume certain risks. Examples in which courts insist that consumers get "the best," even when they have paid for less, are legion. Here is a short sampling:

- In most states, less well paid physicians serving rural areas are not allowed to contract with patients for a level of care less than that dispensed to wealthy patients in prosperous cities and suburbs.[17]
- Courts have allowed purchasers who knew their cars were not equipped with air bags[18] or rear seat belts[19] to recover from auto manufacturers on the ground that their automobiles did not protect them in collisions as well as cars equipped with those devices would have.
- Transit companies have been held liable for criminal acts committed by felons on buses traveling through dangerous neighborhoods, even though that danger was well known to all passengers, who could have paid for a private taxi had they wished to avoid contact with the public.[20]

Courts constantly hold that consumers lack the capacity to assume certain risks because they lack "bargaining power." Contracts with rural doctors, or sellers of inexpensive cars, or transit companies are deemed to be "adhesion contracts" that should not bind the consumer, much as children are not bound by their contractual agreements. In an oft-cited passage from a seminal products liability case, the California Supreme Court justified its preference for tort over contract in the following terms:

> Under modern conditions the ordinary layman, on responding to the importuning of colorful advertising, has neither the opportunity nor the capacity to inspect or to determine the fitness of an automobile for use. . . . In such a marketing milieu his remedies and those of persons who properly claim through him should not depend upon the intricacies of the law of sales. . . . It should rest, as was once said, upon "the demands of social justice."[21]

When courts refuse to enforce contracts through which the parties have voluntarily

assumed risks, they are denying property rule protection for entitlements. It might appear at first that they are imposing inalienability rules, preventing the parties from assuming risks at all. But that is not really the case, at least not at first. Parties may voluntarily assume risks—may sell and buy less safe cars for lower prices, for example—and enjoy the benefits of their bargains as long as no loss occurs. But once a loss does occur, and a court refuses, in effect, to enforce such a contract—holding a seller liable, for example, for a standard of safety for which the buyer never paid—that amounts to deciding complaints about such losses by a liability rule, not by a property role. The court, not the parties, decides the dispute not on the basis of the contract that was actually reached by the parties but on the basis of a contract that they "should" have reached. The court rejects the tradeoffs that the parties negotiated and the values that the parties agreed on; in their place it imposes its values on the parties—paternalistically—to reach a "fair" decision.

Once a pattern of such court decisions emerges, manufacturers, sellers, doctors, and others start to change their practices—at least insofar as they can discern the direction of the decisions. And those changes, necessitated by the court decisions, invariably result in fewer and more costly choices for consumers. The confusion inherent in the courts' paternalism, and the problems that follow, is legion.

By refusing to allow consumers to trade some safety for a lower price, for example, courts believe they are protecting poorer consumers. In fact, poorer consumers quite rationally place a lower monetary value on safety devices than do richer consumers. Because poor consumers earn less income, they are unwilling to pay as much for protection from loss of that income. Poor consumers have more pressing needs for their current income—another reason they are less likely to spend it to protect future income. In other words, it is rational for poorer consumers to bear risks that wealthier consumers will pay to mitigate. Courts that refuse to credit a consumer's willingness to assume risk are often forcing a wealthy person's set of preferences on the poor. In doing so they impoverish the most needy consumers, who already spend a larger percentage of their income on consumer goods than do the rich.

If unable to purchase anything but the highest quality, many poorer consumers will choose not to purchase at all. They will continue to drive the old, dangerous clunker if the only new car that manufacturers can sell them is "too safe" for them to afford. They may even forgo medical treatment if tort law imposes Park Avenue pricing on the rural practitioner. When the automobile company, chain saw manufacturer, and ladder maker are forced to add safety devices under threat of tort liability, they have to charge for those devices, of course. While some consumers may want as much safety as they can get, all the time, others are unwilling to pay for the safest house, the safest car, the safest whatever. We all have limited resources, and safety is only one good among many that we value.

Imagine, for example, that an expensive safety device has been developed to protect against an extremely unlikely occurrence during use of a chain saw. The device might be of interest only to those whose lost income, were they the victim of that rare accident, would be so high that they were willing to pay for the device now to "self-insure." Other consumers might be willing to forgo the device, in effect trading a less expensive chain saw for an insignificantly higher accident rate. If the chain saw manufacturer were to be held liable for such accidents—on the ground that the saw is "defective" without the safety option—it might refuse to sell the less expensive version of the saw. All purchasers would therefore have to pay the higher amount for a saw equipped with the safety device. The excess self-insurance "premium" paid by poorer consumers (i.e., the amount by which the cost of the safety device exceeds the present value of their expected future lost income) is effectively a subsidy for high-risk consumers. Should residents of south-cen-

**Courts that refuse to credit a consumer's willingness to assume risk are often forcing a wealthy person's set of preferences on the poor.**

tral Los Angeles pay fire insurance premiums based on the artwork in Beverly Hills homes? By refusing contractual assumption of risk, courts bring about precisely that kind of regressive transfer payment.[22]

When dangers are not hidden and a contract is otherwise legal (e.g., when there is no statute that requires every chain saw to have all conceivable safety features or every car to be a Volvo), contract law with property rule protection, by allowing parties to assume substantive risks, expands the realm within which we exercise our freedom. By contrast, when courts impose tort law with liability rule protection they are "regulating" in a way that makes the poor worse off. Those "regulations" often increase total risk, and they impose a regressive "tax" that subsidizes more prosperous and more risk-averse classes of the population—probably including legislators and consumer "advocates"—at the expense of the poor.

**Holdings restricting the availability of arbitration on the ground of "unequal bargaining power" are not uncommon.**

**Procedural Waivers**

Unlike substantive waivers, which address such things as the standard of care enforced by law or the level of risk the law tolerates, procedural waivers amount to efforts to bypass the state's adjudicative monopoly. They might involve the choice of a different jurisdiction's substantive law, or a different jurisdiction's courts, or private adjudication (i.e., arbitration or other alternative dispute resolution, or ADR, services), or the abandonment by a party (typically the consumer) of his constitutional right to a jury trial in a court of common law.[23]

There is a sense, of course, in which the distribution between substantive and procedural waivers collapses, for every substantive effort to select a standard of care different than that imposed by courts is perforce an effort to bypass them. But the converse is not true: efforts to bypass courts may have nonsubstantive goals (e.g., even without modifying the "default" standard of care, arbitration might be cheaper and faster than a jury trial and might prevent "hold-up" settlements that are incongruent with state substantive law).[24]

Given the monopoly it claims on the use of legitimate force, the state judicial system will determine the enforceability of procedural agreements. Most monopolists don't like competition. That fact has led many observers to predict that courts would not look kindly on rival adjudicators. In federal court, for example, the choice of a "forum" other than the one that would ordinarily have jurisdiction must be deemed "reasonable."[25] And state courts will often strike down the choice of another state's courts or substantive law if the choice shocks the forum state's "public policy."[26] Holdings restricting the availability of arbitration on the ground of "unequal bargaining power," as in *Obstetrics and Gynecologists v. Pepper*, are not uncommon. Yet consistent refusal to enforce ADR clauses would prevent contracts containing such clauses from offering savings to consumers.

Despite government-imposed obstacles, ADR is thriving. Private alternatives to the federal and state courts, available for over 70 years, are growing rapidly. The American Arbitration Association (AAA) now handles more than 60,000 disputes a year. For the last 20 years, AAA has faced private competition, from Judicial Arbitration and Mediation Services (JAMS, created in 1979), EnDispute (1982), and Judicate (1983), among others. Unlike AAA, those competitors actually hire former judges, who come with a ready-made "brand name" for honesty and legal expertise. Whereas AAA concentrates on ordinary commercial transactions, JAMS and the other firms take medical and product liability cases as well. Typical delays between filing and settlement run from six weeks in standard commercial JAMS cases to more than two years in some complex medical cases[27]; but even two years is far less than court adjudication usually requires. Moreover, the financial cost of ADR is much less than that of the public tort system, where litigation expenses eat up over half of all compensation awards.[28]

Is there any reason not to enforce a choice

for binding arbitration? One possible rationale, often voiced by legislators[29] and law professors, is that large corporations use their superior bargaining power to impose unwanted arbitration clauses on unwilling consumers. Professor Jean Sternlight of the Florida State University College of Law, a proponent of this view, recently summarized it as follows: "The profit-maximizing company will attempt to draft a dispute resolution contract so as to maximize its profits and minimize its losses. The company will seek an agreement that will minimize the likelihood of having any claims made against it at all."[30]

The second sentence in Sternlight's argument may not follow from the first, for it is not necessarily in a company's best interest to minimize claims against it. Naturally, consumers care about remedies when corporations breach their contracts, so they require substantial compensation to renounce the right to such remedies. Companies that frequently breach their contracts and preclude recovery through abusive arbitration clauses have to reduce the prices of their products to compensate, much as the "street corner salesman," who is difficult to reach in court, must underprice the storefront merchant in order to succeed. On the other hand, companies that desire to promote a reputation for trustworthiness have little incentive to insert oppressive arbitration clauses in their contracts. To the contrary, their profits will be maximized by the higher prices they will be able to command from consumers who value the fact that they "stand behind" their goods or services.[31] That reasoning is sound unless consumers are indifferent to those remedies available to them in case of breach. But if they are indifferent to those remedies, why would they not be similarly indifferent to reputation, service, and quality?

Arbitration is not merely a tug of war between vendors and consumers, each hoping to avoid a risk. Rather, both parties can gain from arbitration. Litigation expenses in tort often exceed the amount received by victims for compensation.[32] Savings from a more streamlined process would naturally be factored into the prices of goods and services in a competitive market.

Suppose, for example, that each side has a 50 percent chance of winning a big case before either side incurs any legal expenses. But each side believes that lawyers, experts, detailed discovery requests, sociological jury analyses, and so forth will increase the chance of winning. So each party might decide to spend, say, $100,000 on such legal costs—only to realize that, because both parties tried to gain an advantage, the probability of winning has remained 50 percent. Nevertheless, each side will spend the $100,000, fearing the consequences if it does not and its opponent does.[33] As is the case for some military buildups, the wasteful cost of escalation could outweigh what is ultimately at stake, unless some enforceable "nonproliferation agreement" can be reached. Binding arbitration, which typically limits lawyers' fees and procedures, is one type of nonproliferation agreement.

Critics of ADR not only complain about consumer oppression, they also raise narrower technical objections that warrant a response. Some critics protest that ADR produces biased results because arbitrators' pay comes from those who are affected by their rulings, while remuneration of common law judges does not depend on their pleasing anyone. "Repeat players" (e.g., corporations brought frequently to arbitration) might therefore exercise undue influence on the selection of arbitrators, to the detriment of "one-time" players (e.g., individual consumers).[34] That problem is, however, hardly unique to, or acutely present in, arbitration. Ninety-eight percent of tort suits are filed in state court, and many state court judges are elected. In the electoral process, plaintiffs' lawyers are conspicuous "repeat players" who may exert great influence.

Consumers' associations are also essentially "repeat players" in arbitration hearings, on the "little guys'" side. They can influence the process by criticizing unfair ADR services. Likely because of this, ADR firms have themselves attempted to address the problem of

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**Arbitration firms that develop efficient rules will attract long-term clients because of their reputation for effective dispute resolution.**

undue influence. JAMS, for example, carefully isolates its judges from the collection of revenue: the judge does his job, and another division collects the payment. Overall, ADR firms have a strong incentive to maintain a reputation for integrity; a consistently biased firm would undermine corporate goodwill and ultimately defeat the commercial raison d'être of dispute resolution.

Judge Richard Posner and Professor William Landes argue that a state subsidy for and monopoly over adjudication make sense because common law courts produce new law, which is publicly recognized and followed.[35] Rules of law are intellectual products; once an effective rule is developed, others can benefit from it "for free." Usually we give copyright or patent protection to intellectual property holders to encourage them to produce those intellectual products in sufficient numbers. But of course no one has a patent on rules of law. So private industry (i.e., arbitration firms), according to Posner and Landes, does not have a strong incentive to produce good law.

The argument advanced by Posner and Landes is that the production of rules of law should be an exclusive prerogative of the state in order to ensure that enough rules are produced. But as I have pointed out in another context,[36] Posner and Landes overlook how private producers can benefit from developing legal rules. Arbitration firms that develop efficient rules will attract long-term clients because of their reputation for effective dispute resolution—a reputation that is hard for competitors to emulate, given the difficulty of replicating the human capital upon which the reputation depends.[37] And although private arbitration firms might "free ride" on some publicly created rules of law, it is likely that those firms were created at least in part to escape from such rules. More fundamentally, the claim that only state agencies should be allowed to develop binding rules for private behavior is ultimately an affront to freedom. It ignores the historical importance of industry custom, which was instrumental in the development of law in market societies.[38]

Because of a rather technical federal statute enacted in 1925,[39] procedural waivers of tort via arbitration clauses are much easier to enforce than are substantive waivers. The centerpiece of the 1925 Federal Arbitration Act[40] is section 2, which reads as follows:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The Supreme Court has held that the act

- preempts any state law prohibiting arbitration, with respect to contracts containing an arbitration agreement and involving interstate commerce;[41]
- applies not only to transactions between two merchants but also to transactions between a merchant and a noncommercial consumer;[42] and
- preempts a state law requiring that the existence of an arbitration clause be mentioned "in underlined capital letters on the first page of the contract," because that state law was applicable only to arbitration agreements and not to contracts generally.[43]

Several aspects of the case law are troublesome, despite the happy fact that the cases overall appear to facilitate arbitration.

- The state statute requiring "underlined capital letters on the first page of the contract" mandated nothing more than

a formal notice, at the beginning of a long contract, that the constitutional right to sue in common law court was being waived. It is hard to see how a notice requirement would be harmful; it ensures that the arbitration clause is entered into knowingly.[44] As the Montana Supreme Court noted, "To hold otherwise would be to infer that arbitration is so onerous as a means of dispute resolution that it can only be foisted upon the uninformed."[45]

- Federal ascendancy over state law based on a limitless notion of "interstate commerce" is incompatible with our Constitution. The Supreme Court itself appears increasingly to be challenging that use of the Commerce Clause. Justice Thomas dissented in the Montana case, stating that he did not believe the Federal Arbitration Act applied to proceedings brought in state court. His concurrence in the landmark *Lopez* case,[46] and to a lesser extent the majority opinion in that case, indicates that a tenuous relation to interstate commerce may no longer be enough to supplant state jurisdiction.
- State statutes restricting or conditioning arbitration are still being enforced,[47] especially when they affect professional services. Thus, for example, states generally disregard arbitration agreements in retainer contracts between clients and their attorneys.[48] And state rules that permit the revocation of contracts generally (as contrasted with rules exclusively applicable to arbitration agreements) remain enforceable under the express provisions of section 2 of the Federal Arbitration Act. Thus, the "unconscionability" technique invoked by the court to invalidate the arbitration clause in *Obstetrics and Gynecologists v. Pepper* survives the act, because the theory of unconscionability is not limited to arbitration agreements.

In summary, waivers of tort are treated incoherently and unevenly under current case law. Substantive waiver, the most direct way to implement "property rule" protection for entitlements, is sometimes allowed but often denied. The denials, when they happen, are ill-advised attempts to protect "needy" plaintiffs—attempts that in fact hurt them. Procedural waivers, especially via ADR provisions, are currently more likely to be enforced than are substantive waivers. Surprisingly, procedural waivers have been endorsed by the Supreme Court even when the waiving party may not have been fully informed.

## Inalienability and Tort Law

Enforcement of substantive and procedural waivers would mean a shift in the present boundary between contract and tort, away from tort adjudication and toward greater reliance on the law of contracts. The case for narrowing the domain of tort law, and for expanding the domain of contract, is in reality a case for expanding property rules and constricting liability rules.

But should *all* voluntary agreements be enforced? Clearly not. Imagine a "thief for hire" contract under which Y pays X money in consideration for which X promises to steal Z's property and deliver it to Y. Such an agreement is and should be deemed contrary to public order and thus unenforceable, because it involves violations of the rights of noncontracting parties (in this case, Z's right to his property).

Sometimes, however, X and Y's contract purports to transfer a right that one of them does own but may not alienate. Almost no one would call for the enforcement of a contract under the terms of which X sold himself into slavery, for example; and few would authorize a contract by which X, while in good health, sells his heart to Y for immediate "delivery."[49] Some (but not all) constitutional rights are deemed inalienable[50] as are the natural rights to life, liberty, and the pursuit of happiness, the attempted deprivation of which justified our Founders' revolt

**Should all voluntary agreements be enforced? Clearly not.**

against an oppressive English state. Still other rights are subject to a mixed property-inalienability rule: a functioning kidney, for example, may be given away (sometimes only to certain people) but may not be sold. Similarly, custody rights over our natural children may not be sold but may be given away through adoption.

Those pure or modified inalienability rules are widely endorsed. Others are the subject of considerable controversy. Use of another's sexual organs may be allowed, for love or pleasure, but not in an explicit contract for money. In many jurisdictions wombs are subject to similar restrictions, both in surrogacy contracts and in adoption cases. Such matters, grounded on moral values, are but the tip of the iceberg. Far more prevalent are inalienability rules that have sprung up in the form of legislation to restrict ordinary commercial transactions.

An economic rather than a moral rationale is most commonly advanced for the use of inalienability rules in the commercial arena. Those rules, so the argument goes, are just another method of correcting for "market failure." The claim is that when X contracts with Y to, say, build a store on previously vacant land, X may impose costs on others. It's not that the construction might violate traditional common law principles of nuisance,[51] in which case legal remedies would be available. Rather, it's that the owners of surrounding property may not, for whatever reason, approve of the new project and may believe, rightly or wrongly, that it will diminish the value of their property.

**An economic rather than a moral rationale is most commonly advanced for the use of inalienability rules in the commercial arena.**

Those perceived costs are sometimes so great, according to Calabresi and Melamed, that outsiders might theoretically be willing to pay X to leave the land in a pristine state. Yet the large number of affected outsiders makes it difficult to organize them and tempts each outsider not to offer payment to X in the hope of "free riding" on the concerns of others. To "resolve" that problem, the government simply makes the proposed construction contract illegal through, say, a zoning regulation—an example of limited economic inalienability. That saves the cost and possible inefficiencies of private litigation and transactions, so it is claimed.

Perhaps so. But in the process it infringes on the right of X to do with his property as he pleases, so long as he does not interfere with his neighbors' quiet enjoyment of their property. Moreover, the enactment of a zoning regulation assumes that legislators are somehow able to determine accurately, and cheaply, the costs and benefits of the proposed construction to third parties. To the contrary, "Austrian" economists[52] have shown that centralized state agents cannot discover information as efficiently as can transactors. The interaction of multiple economic variables is too complex and therefore too indeterminate for theoretical or empirical models. The market itself continually digests relevant information and reflects that information in purchase and sale decisions, ultimately revealed in transaction prices. By means of those prices, transactors are able to discover the impounded information necessary for economic decisionmaking. But if regulations foreclose market transactions, the requisite information is suppressed.

Another objection to the economic rationale for inalienability is that it transforms private law into public law. *Every* commercial contract has an impact on outside parties—competitors, suppliers, other customers, and on and on. The state's replacement of private by public allocation of resources on that ground is simply illegitimate. In the typical lawsuit, the plaintiff claims that the defendant behaved (i.e., used his property) wrongfully in the particular context of one individual accident. By contrast, efficiency-based inalienability rules would prohibit entire categories of behavior just because they are deemed by regulators to cause substantial third-party costs. Those blanket prohibitions are analogous to general criminal statutes implemented by the government as agent for allegedly affected third parties.

Once the state has advanced a plausible economic explanation for prohibiting consensual behavior in one area, its appetite

inevitably extends into other areas as well. A person who today is prohibited from selling certain toys—because a government agency has determined that they are "too dangerous"—or certain cars—because they consume "too much" gas or have no seat belts—may tomorrow be forbidden to sell his own labor—because he is being offered "too little" money or is not a member of a union, or because the state has determined that he is too old or of the wrong race. Contracts once freely negotiated, and subject to private suit in case of fraud or failure to perform, are increasingly replaced by regulation. Private ordering is increasingly replaced by the regulatory state. The economic rationale for overriding property rule protection and substituting inalienability rules is dangerous.

Inalienability rules are more properly grounded in morality than in economics. Societal revulsion at immoral acts is not susceptible to quick and easy cost/benefit analyses, for the reason that moral truths cannot be treated as commodities.[53] Indeed, a moral code informs our law; if it did not, we would not be a moral society. But that said, moral considerations justify far fewer instances of inalienability than does the pervasive economic rationale that so typifies the regulatory state.

## Conclusion

This study began with three stories: A century ago a young boy was intentionally, albeit innocently, kicked, with dire consequences. Some economists claimed that he should not recover damages, because he could easily and inexpensively have worn a shin guard. But the court was correct not to compromise the victim's right to his bodily integrity by subjecting him to that kind of calculation.

More recently a woman was excused from an agreement to arbitrate a dispute with her doctor. And an automobile fatality was blamed on a car maker who had not installed air bags, which were not required by law, even though the purchaser knew that they were not installed. The courts in those two cases were wrong not to enforce the contracts to which the plaintiffs had agreed. By abrogating the contracts, the courts declined to protect the rights of the parties with a property rule. Instead, the courts felt that they knew best how resources should have been allocated. So they substituted a liability rule, which offers incomplete protection of rights.

Those cases help explain today's torts "crisis." It does not exist because corporations are oppressing individuals. Nor does it exist because we need federal mandates to replace state tort rules. The crisis exists because the exercise of our property rights has been given increasingly less respect by government. The crisis exists because we have not allowed tort to be tort, and contract to be contract. We need to reestablish the boundary between contract and tort, limiting liability rules to their appropriate realm. And we need to ratify a narrow, moral theory of inalienability rules, which will allow us to identify the very few offensive transactions to which those rules should apply. Legal scholars, judges, and legislators must comprehend and act on those basic truths about private ordering in a free society.

## Notes

1. *Perkins v. Wilkinson Sword, Inc.*, 700 N.E.2d 1247 (Ohio 1998).

2. *Gurski v. Ayerst,* 953 F. Supp. 412 (D. Mass. 1997).

3. 50 N.W. 403 (Wis. 1891).

4. 693 P.2d 1259 (Nev. 1985).

5. 684 N.E. 2d 648 (Ohio 1997).

6. Y.B. 14 Hy VI p. 18, pl. 58 (1436), quoted in William S. Holdsworth, *History of English Law* (London: Methuen, 1909), vol. 3, p. 330.

7. Grant Gilmore, *The Death of Contract*, 2d ed., ed. and foreword by Ronald K. L. Collins (Columbus: Ohio State University Press, 1995), p. 15.

8. Guido Calabresi and A. Douglas Melamed, "Property Rules, Liability Rules and Inalienability:

**The torts crisis exists because the exercise of our property rights has been given increasingly less respect by government.**

One View of the Cathedral," *Harvard Law Review* 85 (1972): 1989.

9. Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), p. ix.

10. Margaret Jane Radin, "Market Inalienability," *Harvard Law Review* 100 (1987): 1849; and Susan Rose-Ackerman, "Inalienability and the Theory of Property Rights," *Columbia Law Review* 85 (1985): 931–69.

11. Sometimes the inalienability rule is partial only: donation of the entitlement is allowed while sale is prohibited. That rule applies to blood and kidney transfers in many jurisdictions.

12. See *Spur Indus. v. Del E. Webb Dev. Co.*, 494 P.2d 700 (Ariz. 1972). Spur operated a cattle feedlot miles from any community. Webb's residential development grew substantially and eventually abutted Spur. Odor and flies from the feedlot interfered with the residents' use and enjoyment of their properties. The court found the feedlot to be a nuisance and ruled that Spur must move or close down but required Webb to indemnify Spur by paying the costs of moving or closing the feedlot.

13. *LeRoy Fibre v. Chicago Milwaukee & St. Paul Ry*, 34 S. Ct. 415 (1914).

14. *Brown v. Shyne*, 151 N.E. 197 (N.Y. 1926).

15. See, for example, *Jardine Estates Inc. v. Koppel*, 133 A.2d 1 (N.J. 1957).

16. *Meistrich v. Casino Arena Attractions*, 155 A.2d 90 (N.J. 1957).

17. See, for example, Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972); *Kalsbeck v. Westview Clinic PA*, 375 N.W.2d 861 (Minn. App. 1985); and *Roberts v. Tardif*, 417 A.2d 444 (Maine 1980) (obstetrical treatment of mother did not measure up to nationally recognized standards of care).

18. See, for example, *Tebbets v. Ford Motor Company*, 140 N.H. 203 (1995); Johnson v. General Motors, 438 S.E.2d 28 (W. Va. 1993); and *Minton v. Honda of American Mfg., Inc*., 684 N.E.2d 648, 655 (Ohio 1997).

19. See, for example, *Volkswagenwerk Aktiengeschellschaft v. Merritt*, 531 S.W.2d 938 (Ark. 1976); and Murphy v. Nissan, 650 F. Supp. 922 (E.D.N.Y. 1987). See also Kurt B. Chadwell, "Automobile Passive Restraint Claims Post *Cippollone*: An End of the Federal Preemption Defense," *Baylor Law Review* 46 (1994): 141–81.

20. *Lopez v. Southern California Rapid Transit*, 710 P.2d 907 (Cal. 1985).

21. *Henningsen v. Bloomfield Motors*, 161.A2d 69, 83–84 (N.J. 1960).

22. George Priest, "The Current Insurance Crisis and Modern Tort Law," *Yale Law Journal* 96 (1987): 1821.

23. Quite frequently the election of arbitration is analytically an attempt to obtain an enforceable ex ante waiver of the right to a jury trial, which is provided in the federal and in all 50 state constitutions. A contractual clause that merely waives the right to a jury trial, without simultaneously choosing a different form of adjudication, will invariably be deemed unenforceable.

24. The high cost of litigation, coupled with the "American rule" fee structure (wherein the loser in a tort suit is not obliged to pay the winner's attorneys' fees), arguably encourages frivolous suits that nonetheless have high "settlement" or "nuisance" value. Efforts to bypass state courts may merely be ways to discourage such nuisance suits.

25. But see *Carnival Cruises Lines v. Shute*, 499 U.S. 585, 591–95 (1991), where "reasonableness" was interpreted quite liberally.

26. See *Restatement (Second) of Conflict of Laws*, §187 (2) (1971). In the Casarotto case, to be discussed below, a contract concluded in Montana chose Connecticut courts and substantive law for all disputes, however minor. The Montana Supreme Court concluded that the clause violated Montana public policy. See *Casarotto v. Lombardi*, 886 P.2d 931, 935 (1994).

27. See *Engalla v. Permanente Medical Group*, 43 Cal. Rptr. 2d 621, 629 (Cal. App. 1995).

28. Priest.

29. Rep. Patricia Schroeder (D-Colo.) was an outspoken proponent of the inalienable right to a common law jury trial. HR 3748, an unsuccessful bill she introduced in her last session before retiring, would have prohibited all pre-dispute arbitration agreements.

30. Jean Sternlight, "Panacea or Corporate Tool: Debunking the Supreme Court's Preference for Binding Arbitration," *Washington University Law Quarterly* 74 (1996): 680.

31. See Larry Ribstein, "Choosing Law by Contract," *Journal of Corporate Law* 18 (1993): 245–300.

32. Priest.

33. In game theory, those winner-take-all scenarios are extreme forms of what is known as the "prisoners' dilemma."

34. See generally Marc Galanter, "Speculations on the Limits of Legal Change," *Law & Society Review* 9 (1974): 95–151.

35. William A. Landes and Richard A. Posner, "Adjudication as a Private Good," *Journal of Legal Studies* 8 (1979): 235–84.

36. Michael I. Krauss, "Regulation vs. Markets in Development of Standards," *Southern California Interdisciplinary Law Journal* 3 (1994): 781–808.

37. Bryan Caplan, "The Present and Potential of Alternative Dispute Resolution," *Regulation* 2 (1994): 21.

38. Michael I. Krauss, "Tort Law and Private Ordering," *St. Louis University Law Journal* 35 (1991): 623–55.

39. U.S. Arbitration Act, 43 Stat. 883 (1925). Current version codified at 9 U.S.C. §§1–208 (1994).

40. The act came to be known as the Federal Arbitration Act following Congress's deletion in 1947 of a section naming the statute the U.S. Arbitration Act.

41. *Southland v. Keating*, 104 S. Ct. 852 (1984) (7–Eleven franchisees sued franchiser Southland in state court, alleging Southland had violated disclosure requirements of California Franchise Investment Law. Southland sought to compel arbitration, as provided in franchise agreement. The California Supreme Court held that California law required claims to be brought in court, and therefore refused to order arbitration. Held, Federal Arbitration Act preempts California law).

42. *Allied–Bruce Terminix v. Dobson*, 115 S. Ct. 834 (1995).

43. *Doctors' Associates v. Casarotto*, 116 S. Ct. 1652 (1996).

44. There are sound, liberty-based reasons not to enforce stringent "hidden" clauses, written in very small print, on long contracts that the merchant does not expect the consumer to read. One should not be held to obligations to which one has not consented. The context of the agreement may make it clear that no real opportunity to take notice of (and therefore consent to) the stringent, hidden clauses was ever given.

45. *Doctors' Associates v. Casarotto*, 901 P.2d 596, 597–98.

46. *United States v. Lopez* 115 S. Ct. 1624 (1995).

47. See, for example, *Columbus Anesthesia Group v. Kutzner*, 459 S.E.2d 422 (Ga. Ct. App. 1995).

48. See Jane Massey Draper, "Validity and Construction of Agreement between Attorney and Client to Arbitrate Disputes Arising between Them," *American Law Reporter 5th* 26 (1995): 107; and Supreme Court of Ohio Disciplinary Opinion 96–9, December 6, 1996 (Westlaw file "OH Adv. Op. 96–9").

49. There is virtual unanimity that those contracts are not enforceable by specific performance. That is not to say they should be null and void. Perhaps the "purchaser" of X's heart should be able to sue X for monetary damages if, for example, following X's "breach" the purchaser had to wait in the hospital for a donor heart, losing income while waiting.

50. For example, the right to vote and the right to bear arms are inalienable constitutional rights. But the right to a jury trial may be waived.

51. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029–30 (1992).

52. See, for example, Ludwig von Mises, *Socialism: An Economic and Sociological Analysis*, 2d ed., trans. J. Kahane (Indianapolis: Liberty Classics, 1932).

53. For a good discussion of this question, see Richard Arneson, "Commodification and Commercial Surrogacy," *Philosophy & Public Affairs* 21 (1992): 132–64.

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