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INTERPRETATIONS OF CALABRESI*

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Judge Calabresi's Monsanto Lecture[1] prompts this brief reflection on his superb integration of so many tort innovations under the rubric of "splitting rules." As a graduate of the Wisconsin Law School, I am pleased to see this jurisdiction's worthy doctrine of comparative negligence[2] playing so large a role in the splitting processes. I am certainly no expert in tort law, and this Comment borrows its form from a narrative jurisprudence:[3] a legal narrative like Judge Calabresi's, or even a law-related testimonial of life experiences, is interpreted by a (would-be) jurisprude for his or her own purposes. Whether the interpretation adds to an understanding of the narrative or of law in general, is for the reader to judge, of course.

A backdrop to Judge Calabresi's narrative, which is necessary for my purposes, is that we live in a liberal democracy,[4] rather than a welfare state or

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* This article was based on an earlier version of Calabresi's New Directions in Tort Law, now co-authored by Jeffrey O. Cooper.

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1. Guido Calabresi & Jeffrey O. Cooper, *New Directions in Tort Law*, 30 VAL. U. L. REV. 859 (1996).

2. John J. Kircher, *Wisconsin's Modified, Modified Comparative Negligence Law*, WIS. BAR BULL., Feb. 1996, at 18 (stating that the first general comparative negligence statute was enacted in Wisconsin in 1931, and amended in 1971 and 1995). *See* Calabresi & Cooper, *supra* note 1, at 873.

3. *See* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) (and sources cited therein). Narrativity offers a powerful antidote to a legal formalism. *See infra* note 20 and accompanying text.

4. *See* Paul Brietzke, *The "Seamy Underside" of Constitutional Law*, 8 LOY. L.A. INT'L & COMP. L.J. 1, 25-30, 44-46 (1985) [hereinafter *Seamy*]. In the United States, liberal democracy was pushed to its furthest extremes. *Id.* at 44. A political stability was deemed so important yet so difficult to achieve that it was purchased at the price of an extremely weak federal State. *Id.* This amounted to a storing up of trouble for the future, a trouble which Reconstruction and the New Deal only partially ameliorated. *Id.* A weak State made a broad judicial review necessary for dealing with the many disputes that inevitably arose and, from Dred Scott v. Sandford, 60 U.S. (19 How) 393 (1857) to the Court's "switch in time" in 1937, judicial review was used (sporadically) to keep the federal State underdeveloped. *Seamy*, *supra*, at 44. The Constitution having thus become solidified during this heyday of liberal democracy, subsequent re-interpretations have been tortuous and conducive to intricate and arduous lawmaking processes. *Id.* at 44-45. A massive but very narrow strengthening of the national security State occurred in response to the Cold War, but federal and state-level States—and the formalism and proceduralism of our constitutional law—otherwise remained too weak to undertake meaningful welfare functions, for individuals as opposed to corporations. *Id.* at 45-46; *see infra* notes 5, 26. This leaves many Americans with the comforting image of living in a liberal democracy. *Seamy*, *supra*, at 45.

a social democracy properly defined.[5] New Deal reforms, which seemed radical to many at the time and to some today, now offer only modest measures of "welfare" to compensate for debilitating injuries of various sorts. These welfare measures seem particularly ungenerous when we compare them to the measures offered by developed European (welfare or social democratic) states, where tort recoveries are correspondingly lower. In any event, there is no legal right to welfare measures in the United States; *Goldberg v. Kelly*[6] was a turning point when our history failed to turn, toward a broad theory of legal and/or political entitlement that is characteristic of social democracy or welfare statism. Nevertheless and apart from Social Security, key New Deal reforms seem to be safe politically—at least for the time being. But a *relatively* more generous Great Society package of Medicare, Medicaid, and other species of "welfare" is likely to be gutted soon, beyond recognition and meaningful legal challenge. All of this is to say that debilitating injury will be adequately compensated, if at all, by the tort systems of the various states—an assertion as true today as it was at the founding of the Republic. Under the intense individualism that captured, and largely still captures, American imaginations, there is no sharing of the losses or gains from the things we get ourselves into, except as

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5. *See* THE FONTANA DICTIONARY OF MODERN THOUGHT 579, 672-73 (Alan Bullock & Oliver Stallybrass eds., 1977) ("social democracy" entry by Leopold Labedz and "welfare state" entry by Donald Watt); RAYMOND WILLIAMS, KEYWORDS 281 (1976) ("welfare" entry); *Seamy, supra* note 4, at 50 (citations omitted):

> "Social democracy". . . refers to the constitutional goals of Western states dedicated to a genuine socio-economic equalization through gradual reforms that retain as much of liberal democracy as possible. A "welfare state". . . is a cradle-to-grave caring for the public, even at the sacrifice of much individual choice. It describes the projected outcome of the search for stability by [now largely former] communist-party states *and* the constitutional path of those Western states where liberalism was never firmly rooted or where there is a willingness to trade more of the tenets of liberalism for more of the advantages of the strong state.
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> . . . [S]ocial democracy tends to emphasize affluence while welfare statism prefers communitarian values, and the particular policies of particular European governments will reflect a "balance" or "tradeoff" between these goals that is impossible under weak states in the U.S.

See also MICHAEL OAKESHOTT, MORALITY AND POLITICS IN MODERN EUROPE: THE [1958] HARVARD LECTURES 24 (Shirley Letwin ed., 1993) (there is a "morality of collectivism," which is opposed to the "morality of individuality" and concerns those otherwise-alienated individuals who lack the power to respond to opportunities and make a position for themselves).

6. 397 U.S. 254, 255 (1970) (holding that New York could not terminate public assistance benefits without notice and an opportunity to be heard). The Court rejected a narrow proceduralism and the conventional distinction between privileges and rights, and applied the broad entitlement terminology of Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964). *See Goldberg*, 397 U.S. at 262 n.8. Widely thought to be a radical innovation at the time, *Goldberg* quickly fell into disuse by a Court which drifted in more conservative directions. The absence of a broad theory of entitlement from our law arguably leaves disappointed people constantly claiming their specific "entitlements" in a bewildering variety of circumstances.

specifically provided for in the *private* law of tort, contract or property.[7]

Against this backdrop, the "politics" of Judge Calabresi's narrative seem momentous indeed: a vanguard of tort law is moving us, perhaps with "all deliberate speed,"[8] from a risk-bearing society to a risk-sharing society.[9] This trend seems to contradict an individualistic, liberal democratic sense of ourselves, by transforming state courts into rather limited welfare agencies which lack a legislative mandate. Under the new splitting rules ably analyzed by Judge Calabresi, these courts are forcing defendants to bear part of the costs of an increasing number of injuries. Most of these costs used to be borne solely by plaintiffs, who were barred from tort recoveries by the nineteenth-century "liberal" doctrines of contributory negligence, a narrowly-conceived causation, the last clear chance, assumption of risk, etc.[10] Some co-defendants are even forced to share this liability with each other, under doctrines of a "statistical causation," rather than maintaining their "liberal" autonomy—and the potentially greater responsibility that such an autonomy entails—under the older rules of a joint and several liability.[11]

An analogous narrative might be constructed for contracts law, out of selective manipulations of the rules of offer and acceptance, the consideration doctrine, the excuses for non-performance of a condition, a quasi-contractual liability, etc.[12] When compared to Judge Calabresi's tort narrative, such a

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7. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1713-21 (1976). Some might argue that rules relating to racial or gender discrimination play redistributive roles akin to those of a social democracy or welfare statism. *See supra* note 5. *See also* JULIUS STONE, HUMAN LAW AND HUMAN JUSTICE 88 (1965) (stating that an extreme individual free will was transplanted to the U.S. through the common law rights of Englishmen: freedom of contract, property, and testamentary disposition, and no liability without fault).

8. Brown v. Board of Educ. (Brown II), 349 U.S. 294, 301 (1955) (Justice Frankfurter's imprecise remedial standard that is widely regarded as having slowed the pace of school desegregation, an imprecision Frankfurter thought necessary to achieve unanimity on the Court). The judicial tort reformers described by Judge Calabresi must sometimes feel a similar need to be less than explicit and precise about what they are doing.

9. *See infra* note 31 and accompanying text.

10. *See generally* Calabresi & Cooper, *supra* note 1, at 869, 871-73, 875-78; William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489, 503 (1995) (stating that American legal analysis "concentrates, not on the routine cases that, in terms of sheer quantity, make up the overwhelming bulk of cases . . . , but rather on the exceptional cases that re-define the law.").

11. *See generally* Calabresi & Cooper, *supra* note 1, at 881-83.

12. *See, e.g.*, Davis v. Jacoby, 34 P.2d 1026 (Ca. 1934) (arguably manipulating the rules of offer and acceptance, in ways which probably overcompensate the injuries suffered by friends who abandoned their livelihood and traveled to manage finances and health care for the "half-crazy" deceased); Angel v. Murray, 322 A.2d 630 (R.I. 1974) (relaxing the requirement of consideration for the modification of a contract, where some additional compensation is "fair and equitable in the circumstances"); Wortman v. Jessen, 159 N.W.2d 564 (Neb. 1968) (strict compliance with express

contracts narrative would be much less coherent and explicitly directed toward a splitting of liability. However, the function of splitting appears rather more clearly through such relatively new contracts doctrines as the obligation to show good faith, unconscionability, section 90 liability, unilateral mistake, an expanded duty to disclose which operates to relax a *caveat emptor*, and the impracticability of performance.[13] Ever in the avant-garde, California has even come up with a comparative bad faith standard that neatly tracks the splitting functions of comparative negligence.[14] Some of the ideas and policies underlying these doctrines are very old, medieval even. They have been revived only now to serve as counterweights to a nineteenth century (liberal, *laissez faire*, winner-take-all) freedom of contract, under which you could keep everything you can get by simply "bargaining" for it. Perhaps an even more tenuous narrative could be created for property law, so that we can imagine a slow but far from glacial shift occurring throughout private law.

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conditions excused because seller got more or less what he bargained for, and buyer would otherwise bear too great an injury); United States v. Algernon Blair, Inc., 479 F.2d 638 (4th Cir. 1973) (holding that a subcontractor can recover on *quantum meruit* basis for part performance, even though a breach of contract suit is not possible).

13. *See, e.g.*, Williams v. Walker-Williams Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (consumer's liability limited to sums already paid under an unconscionable installment credit contract); Weaver v. American Oil Co., 276 N.E.2d 144 (Ind. 1971) (reallocating tort-style risks, where the contract allocating them was unconscionable—presented on a "take it or leave it basis" to a gas station owner of "poor education"); Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267 (Wis. 1965) (reimbursing plaintiff, under Restatement of Contracts, § 90, for some but not all of his injuries resulting from the collapse of franchise negotiations prior to an agreement); Elsinore Union Elem. Sch. Dist. v. Kastorff, 353 P.2d 713 (Cal. 1960) (splitting the difference between a contractor who made *two* unilateral mistakes and a landowner who made none); Stambovsky v. Ackley, 572 N.Y.S.2d 672 (N.Y. App. Div. 1991) (requiring seller to disclose that house is apparently infested with poltergeists, by court's finding of an awkward "equitable" exception to *caveat emptor*); Groseth Int'l v. Tenneco, Inc., 410 N.W.2d 159 (S.D. 1987) (discussing doctrines of frustration and impracticability, and allowing a trial on, e.g., whether plaintiff is entitled to a "fair share" of the proceeds from a merger which resulted in termination of the plaintiff's franchise); CASES, PROBLEMS AND MATERIALS ON CONTRACTS 945 (Thomas Crandall & Douglas Whaley eds., 2d ed. 1993):

> Concepts of good faith, cooperation, and prevention are closely related. . . . [T]he court may find a material breach of an implied promise (covenant): (a) not to prevent the other party from performing; (b) to cooperate in ensuring performance is achieved; or (c) to act in good faith. . . . The boundaries of the duty of good faith, etc., are generally defined by the parties' intent and reasonable expectations . . . . See, e.g., Cross & Cross Properties, Ltd. v. Everett Allied Co., 886 F.2d 497 (2d Cir. 1989).

Id.

California has led other jurisdictions in granting remedies revolving around good faith. *Id.*

14. *See* California Casualty Ins. Co. v. Superior Ct., 218 Cal. Rptr. 817 (Cal. Ct. App. 1985); Mary Ann Galante, *Court OK's Comparative Bad Faith as a Defense*, NAT'L L.J., Nov. 4, 1985, at 10. *But see* Johnson v. Farm Bureau Mut. Ins., 533 N.W.2d 203 (Iowa 1995) (refusal to follow this comparative bad faith standard).

What accounts for these kinds of changes? Judge Calabresi concludes that the splitting of liabilities in tort is based on "not merely fault, but a more complex and hybrid concept we call 'responsibility.'"[15] This apt term could also be used in contracts—as a supplement to the older "will" theory, which has a court merely tease out the parties' intentions—and it reflects judgments about where the judge and jury "would rather put the loss," regardless of fault on occasion.[16] While Judge Calabresi cannot go into much detail in his Lecture, many or most of these judgments presumably aim to *socialize*[17] the relevant risks and the compensation for them. This process is frequently trivialized as a search for the "deep pocket": the legal person best able to pay compensation, at least in part, and especially when this person can lay part of the costs of compensation off onto others in society. Insurance companies and large corporations with a "market power" are favorite deep pockets because they can pass on part of the costs of compensation in the form of higher insurance premiums (or hidden exemptions from coverage) and higher product prices.

This does not mean that the ability to pay will soon become a crass substitute for fault in tort or intention in contracts. Reality is more complex: real people (usually "plaintiffs") are suffering real injuries which many cannot bear in their entirety and alone, given the absence of meaningful welfare agencies that would soften the blow. (Cases about scalding cups of McDonald's coffee tell a very different, perhaps populist story about what we think of corporations and how they behave.)[18] This is no "creeping socialism," in the courts or the society from which jurors are drawn, and Judge Calabresi notes that evidence about what is happening "is hard to quantify, hard to verify, and hard to explain."[19] I would add that much of this splitting occurred while society was taking a significant political lurch to the Right, and while some or many of the relevant judges were appointed or elected as part of a state-level fallout from the Reagan Revolution. Presumably, none of us favor higher insurance premiums or product prices, yet some or many judges and jurors, who may inveigh against "welfare queens" in their private political capacity, will nonetheless split the difference in favor of plaintiffs they see in their official capacity.

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15. Calabresi & Cooper, *supra* note 1, at 870.

16. *Id.* at 871. *See id.* at 877 ("splitting is not too far away in at least some situations where neither side is at fault."); *id.* at 878 (in effect, this is "an expansion . . . of ultrahazardous or products liability . . .").

17. *See infra* note 31 and accompanying text.

18. A still-useful narrative about such attitudes is J. WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAWS OF THE UNITED STATES, 1780-1970 (1970).

19. Calabresi & Cooper, *supra* note 1, at 860 (discussing an alleged judicial retreat from "very strongly pro-plaintiff positions to positions more favorable to business and other classes of defendants").

What *seems* to be going on speaks well of the humanistic and humane sensibilities of judges and jurors. It is easy for individualistic Americans to oppose welfare in the abstract; ideologies have been pre-packaged for this purpose over the past two decades. But face-to-face encounters with the concrete reality of suffering in its diverse forms, and the belief that judge and jury are charged with fixing such problems somehow, sometimes cause ideology to be pushed aside in favor of more charitable or even visceral responses. Faced with so awkward a dilemma, we tend to split the difference. If law tries to justify these responses after the fact, the rules will likely be only a little more articulate and coherent than the responses themselves.[20] If we really believed in the efficacy of President Bush's "thousand points of light," none of this would be necessary.

The contributions of splitting to an overall "justice" are quite modest and dependent on the accident of an injured person being willing and able to identify one or more defendants capable of paying, and to then file a suit which elicits some sympathetic response. Perhaps needless to say, not all plaintiffs are competent, sympathetic, deserving, and poor; overcompensation is almost as likely as undercompensation, while many receive no compensation at all. Courts lack the funds and staff to deal with more than a fraction of the debilitating injuries that occur. Judges and some jurors are surely aware of all of this, yet the process seems to push on according to a relentless logic of its own. An analogy to the vexed question of abortion[21] is not too farfetched a means for exploring this logic.

Judges certainly could have abstained—from *Roe v. Wade*[22] or the splitting rules Judge Calabresi describes—until after the wheels of Congress or state legislatures turned, in very slow but possibly more certain, comprehensive, and democratically legitimate ways. (Such reforms might have resembled a workers' compensation, with assertions of entitlements and responsibility rather than of rights and fault.) However as John Maynard Keynes remarked, in the long run we are all dead: including the victims of unwanted children, backstreet abortionists, and other uncompensated injuries. Judges could not refrain from acting because they saw too much remediable but unremediated pain "out

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20. *See* Calabresi & Cooper, *supra* note 1, at 879, 880 (splitting rules make a "deeply seated" joint and several liability "muddy and problematic"). Uncertainty always proliferates when judges move in an ad hoc, case-by-case fashion, in *sub rosa* ways because judges are not supposed to "legislate."

21. *See* Paul Brietzke, *Public Policy: Contract, Abortion, and the CIA*, 18 VAL. U. L. REV. 741, 861-906 (1984) [hereinafter *Policy*].

22. 410 U.S. 113 (1973).

there"; modest gains in justice are gains nonetheless.[23] The history of legislative reforms prior to *Roe* or the splitting rules gave little cause for judicial confidence in this route, and legislative reforms occurring after (and partly because of) these judicial innovations have compounded the muddle in ways which tend to disadvantage the poor.[24] Judge Calabresi suggests why this is so for tort reforms: injured people are "usually absent from reform proposals in legislatures" because they "are not repeat players" and tend to "lose interest quickly" once their personal problems are resolved one way or another.[25] This is bound to skew the legislative process badly, at least under a special interest or "porkbarrel" model of politics.[26] In the face of such a political failure—the failure of a legislative "market" to account for the interests of those most directly affected—it is an arguably appropriate, and even a "democratic," judicial function actively to represent the interests of those who are unrepresented or inadequately represented elsewhere in the political process: people needing an abortion or a tort remedy, for example.

CONCLUSION

My interpretation of Judge Calabresi's narrative may well be overdrawn, and it likely contains some or many elements the Judge would not accept.[27] It

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23. *See* Brietzke, *Policy, supra* note 21, at 863-75 (*Roe* as "the Policy of the Second-Best"). *See also infra* note 28. Government cannot make people good; it can only require that they be just to each other, on pain of redress or punishment. OAKESHOTT, *supra* note 5, at 67. New activities create new opportunities for injury, and rules of conduct must be regularly updated to account for this. *Id. But see also* Calabresi & Cooper, *supra* note 1, at 881 ("the courts do not seem to have understood the full consequences of the shift from an all-or-nothing rule to a splitting rule"). The same might be said of the awkward "trimester" system in *Roe v. Wade*.

24. *Compare Policy, supra* note 21, at 875-95 (*Roe*'s "unwanted progeny" and the problems faced by young and/or poor women) *with* Calabresi & Cooper, *supra* note 1, at 860-64.

25. Calabresi & Cooper, *supra* note 1 at 864.

26. Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1359 (1988) (citations omitted):

> [S]pecial interest groups [repeat players like plaintiff's attorneys and defendants who are regularly sued] frequently obtain government help . . . . These . . . groups are relatively easy to organize because they are small and their members have much to gain . . . . [T]he public [including everyone needing an abortion or a tort remedy] finds it difficult to protect itself: members . . . have small, individual stakes in any piece of legislation, and the large numbers of people affected makes organization difficult [especially among the unorganized, and perhaps unorganizable, poor] . . . . Most legislation, then, will really involve some rip-off of the public, even if it purports to serve the public interest.

Id. Judge Calabresi's description of political processes is somewhat gentler and more polite. *See* Calabresi & Cooper, *supra* note 1, at 860-68. By way of contrast, judges *are* repeat players, listeners who acquire an expertise in risk allocation and compensation because the welfare agency that would otherwise develop this expertise does not exist.

27. Perhaps my interpretation is the kind of "science fiction thinking" that Judge Calabresi discusses. *See, e.g.*, Calabresi & Cooper, *supra* note 1 at 878-79.

It amounts to an application of the theory of second-best[28] because the "best"—adequate compensation for a variety of debilitating injuries—is not attainable in America for a variety of ideological, political, and doctrinal reasons. The awkwardness and imprecision of a second-best like splitting would be disdained by the neoclassical (neoconservative or Chicago) school of law and economics that exerts a significant influence on our judicial thinking. Bemused by the rather austere elegance of their Coase Theorem,[29] Chicagoans would likely follow Coase in requiring that law assign liability or non-liability clearly and in its entirety, rather than splitting it, so that the parties can more readily bargain out the consequences of their encounter. But Coase's key assumptions that the law is clear and that transaction costs are zero[30] are frequently forgotten during applications of his Theorem to the many real-world situations where legal uncertainty and transaction costs are high in fact. In the high transaction-cost situations Judge Calabresi describes, bargains between or among the parties seldom transpire. The "externalities" (the consequences of injuries) are thus seldom "internalized" (adequately compensated for), contrary to Coase's Nobel Prize-winning prediction.

In so imperfect a real world, the splitting of liability may regularly offer the least-worst solution, not only from the standpoint of compensation, but also by offering incentives for everyone to be careful, and even by promoting a *relative* legal certainty.[31] Judge Calabresi closes his Lecture by calling for "a

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28. *See* Brietzke, *Policy, supra* note 21, at 863-75 (analyzing *Roe v. Wade* as a "second-best policy" under the theory of the second best); *id.* at 875 n.423:

> [P]ublic policy need not approximate the ideal results attainable under a favored theory, where theoretical assumptions do not accurately describe the real world. The best e.g. of a theory of the second best is the economics concept of a workable competition. *See* J. BAIN, INDUSTRIAL ORGANIZATION 13-15, 464-67 (2d ed. 1968); J. KOCH, INDUSTRIAL ORGANIZATION AND PRICES 53, 314, 322, 347 (1974); R. MILLER, INTERMEDIATE MICROECONOMICS 445-56 (1978); F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 22-25 (1970) . . . .

29. Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

30. *Id.* Coase does not define transaction costs and treats them ambiguously. *See id.* But there is a growing consensus that they are basically costs of information. *See* Carl J. Dahlman, *The Problem of Externality*, 22 J.L. & ECON. 141 (1979). If all information is free (if transaction costs are zero), everything then becomes foreseeable because the requisite information is in place. Most accidents will thus not occur, at least when the (greatly-reduced) costs of avoiding them are less than the costs of compensating for their consequences. This is a wildly improbable, if wonderful world, where investigation, negotiation, litigation, and other means of dealing with information are also free.

31. *See, e.g.*, Werner Z. Hirsch, *Reducing Law's Uncertainty and Complexity*, 21 UCLA L. REV. 1233 (1974). Citing McKean, Hirsch argues for a risk-*sharing* in the real world: "If producers are liable for failures and damages, then individuals may lack incentives to use the goods properly [may succumb to a 'moral hazard']. . . . While, if buyers face all liability, then producers may not have the proper incentives." *Id.* at 1235. (Chicagoans would argue that competition with other producers generates the "proper incentives," regardless of liability.) Hirsch then quotes

lot more hard analysis and hard data"[32] about such matters, and by asking a series of tough, relevant questions. The jury is obviously still out on these questions but, in the meantime, Judge Calabresi offers us much food for thought.

McKean:

> [A]s with property rights assignments in general, different [including split] liability assignments would often bring about significant differences in resource use because of differential transaction costs. It is important to know more about the variation of transaction costs under alternative institutions and about the implications for wealth distribution and resource allocation of different right or liability assignments.

Id., quoting McKean, *Products Liability: Implications of Some Changing Property Rights*, 84 Q.J. ECON. 611, 625-26 (1970); *See* Calabresi & Cooper, *supra* note 1, at 883. A splitting (sharing) of liability and compensation must often have the effect of reducing the injured party's transaction (litigation) costs, and thus of redistributing wealth in her favor—in the form of a smaller but more certain compensation. By way of contrast, neoclassical (or Chicago School) economists favor a risk-*bearing* (not a split-liability) regime based on insurance or a "self-insurance." But many cannot afford to self-insure—to bear the injury unaided—or to buy insurance against rare and hard-to-predict contingencies. Also, insurance is simply unavailable in the many circumstances where the (transaction) costs of pooling the relevant risks exceed the benefits of doing so for a private insurance company. These "market failures," of insurance or self-insurance not performing the functions we want them to perform—compensating injuries adequately—arguably requires some *socializing* of the risk and the attendant compensation. Such a policy precept echoes a European-style welfare economics (and perhaps a "Yale School" of law and economics), where attention is paid to wealth distribution, as well as to an efficiency in the allocation of resources. *See* OAKESHOTT, *supra* note 5, at 108-09 (welfare economics attempts a partial removal of wealth distribution from the realm of individual choice, as did the French Revolution—*"égalité sans mensange* and *égalité des faits"*); A.C. PIGOU, THE ECONOMICS OF WELFARE (1932); HANS VAN DEN DOEL, DEMOCRACY AND WELFARE ECONOMICS (1979).

32. Calabresi & Cooper, *supra* note 1, at 884.