



# Theoretical Perspectives on Torts

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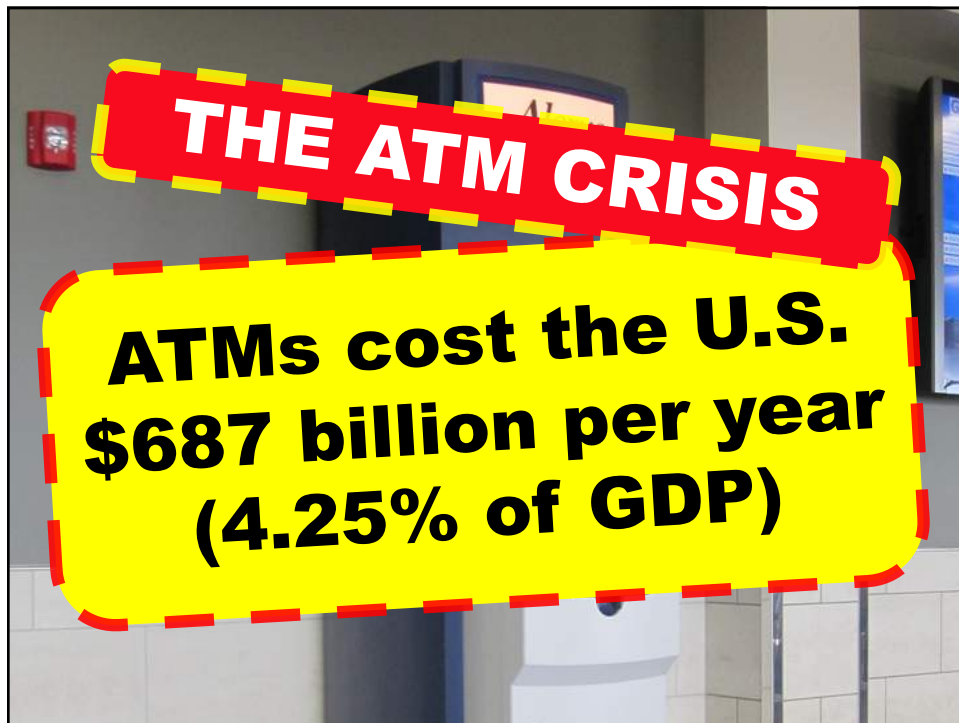


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## Some Theoretical/Scholarly Perspectives

1. Feminist
2. Law and economics
3. Law and society

## Feminist Perspective

- Leslie Bender
  - A Lawyer's Primer on Feminist Theory and Tort, 38 J. of L. Educ. 3 (1988)
  - *(We read part of this earlier in the semester.)*

## Law and Economics Perspective

- Ronald Coase
  - *You've read about him in today's reading.*
- Richard Posner
  - *Federal circuit judge (7th) and law professor (Chicago).*
- Guido Calabresi
  - *Federal circuit judge (2d) and law professor (Yale)*
- Many others ...

## **Guido Calabresi's Efficiency Goal**

The minimization of the costs of accidents, the costs of avoidance, and the costs of administration (including error costs).

## **Guido Calabresi's Athens and Sparta**

**Athens:** People pay for their own accidents.  
\$400 for car (\$200 price + \$200 insurance)  
\$250 to not buy car (bus fare, etc.)

**Sparta:** Accidents paid for from general fund.  
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Inefficient

\$250 to not buy car (bus fare, etc.)

→ You will buy the car.

## Guido Calabresi's Athens and Sparta

Therefore (according to this analysis), the courts ought to choose the rule that makes people responsible for their own accidents, as this rule leads to an efficient result.



## Guido Calabresi's Athens and Sparta

The main idea here is that there is wisdom in getting the proper alignment of incentives. In particular, putting the burden of liability on the party who is in the position to avoid the accidents at the least cost.

efficient results

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*Note: There's a lot more interesting stuff that Guido Calabresi wrote about than what we've set out here ...*

## Law and society perspective with economic awareness:

- Robert C. Ellickson
  - *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*,  
38 Stan. L. Rev. 623 (1986)

## The Coase Theorem:

- Key concepts:
  - Externalities
  - Transaction costs
- Theorem: If transaction costs are zero—that is, if all mutually beneficial bargains get made—then any setting of legal rights leads to an efficient outcome.
- Observation: Which rule you pick might make one party or the other better off, but the result will be efficient either way.

### **Coase Theorem (various statements):**

- "If transaction costs are zero—if, in other words, any agreement that is in the mutual benefit of the parties concerned gets made—then any initial definition of property rights leads to an efficient outcome."  
— David D Friedman
- "If there are zero transaction costs, the efficient outcome will occur regardless of the choice of legal rule."  
— A. Mitchell Polinsky
- "When bargaining costs are zero, the initial assignment of legal entitlements does not affect the efficiency of the resulting allocation of resources." — Herbert Hovenkamp
- "the delimitation of rights is an essential prelude to market transactions; but the ultimate result (which maximizes the value of production) is independent of the legal decision."

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Let's try the theory  
out with strict  
liability for  
ultrahazardous  
activities ...



An example using a nuclear plant, meltdown  
risk, and strict liability.



Nuclear plant is worth \$100M/yr to utility to operate.



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[The nuclear plant operates.](#)



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The nuclear plant operates.  
It's worth it for the utility to buy insurance  
for \$50M/yr (or self insure at same rate).





Economically  
efficient!

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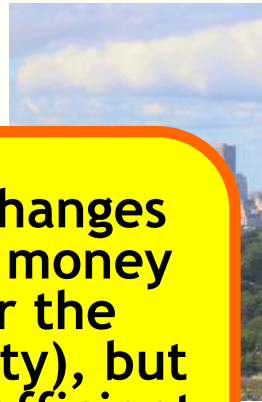
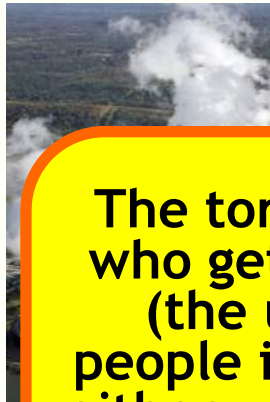


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*What if tort law does not require the nuclear plant to pay for accidents (no liability)?*  
 The nuclear plant operates.  
 The people in the city will buy insurance at \$50M/yr (or self insure at same rate).



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**The tort rule changes who gets more money (the utility or the people in the city), but either way the efficient result is reached: The plant operates.**

*\$50M/yr. (or sell insure at same rate).*



**CHANGE**

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What is the efficient result?



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The nuclear plant does not operate.  
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(or self insure at same rate) to get \$25M.



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The nuclear plant does not operate.

The people in the city will pay the utility between \$25M and \$50M to stop operating the plant.



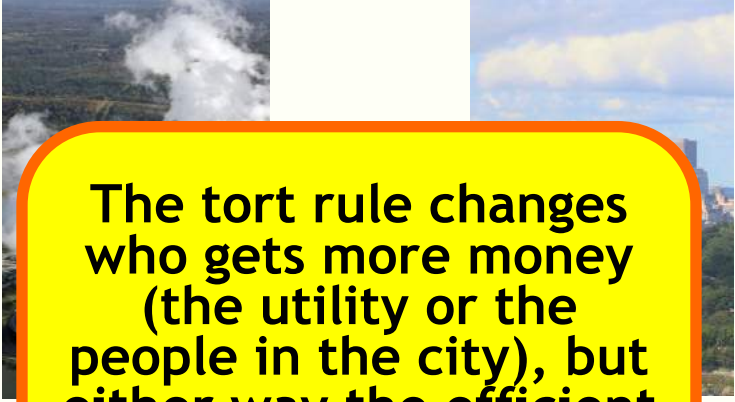
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**The tort rule changes who gets more money (the utility or the people in the city), but either way the efficient result is reached: The plant doesn't operate.**

The people in the city would have to pay \$100M to stop the utility from operating the plant.



**If this seems terrible, that people would have to pay someone to stop doing a thing that threatens them, then it means you care about something other than economic efficiency.**

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***Insight: Thinking of one party as the "victim" gets in the way of understanding what is most economically efficient.***

The peop  
operating the planet  
50M to stop