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**Autonomy, Liability, and Efficiency:
Wealth Maximization in Tort Law**

by

ANDREW MARX

**A dissertation submitted to the Graduate Faculty in Philosophy
in partial fulfillment of the requirements for the degree of
Doctor of Philosophy, The City University of New York**

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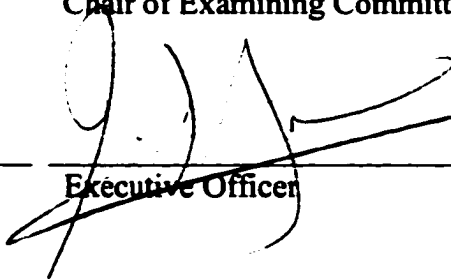
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Abstract**Autonomy, Liability, and Efficiency:
Wealth Maximization in Tort Law****by****Andrew Marx****Adviser: Professor Bernard Baumrin**

Legal theorists such as Richard Epstein have opposed the use of negligence rules in accidental tort law, maintaining that they unjustly allow accident victims to bear uncompensated losses. Individual autonomy, on his view, extends over a zone of property interests, such that the legal system ought to protect individual rights to the integrity of such interests. This aspect of liberalism is understood by Epstein and others to call for a strict liability rule. Richard Posner's economic standard of fault, and its underlying norm of wealth maximization, have been criticized as antithetical to liberal values, insofar as it allows for property rights to be abrogated for the sake of economic efficiency.

We will consider efforts made by proponents of the economic approach to tort law to reconcile the use of efficient tort rules with this liberal concern. At each turn, Posner has attempted to reconcile his efficiency norm with core liberal values. These efforts have in turn received severe criticism, primarily from Jules Coleman and Ronald

Dworkin. These debates have been waged since the earlier arguments found in the second chapter, to more modern ones which we will consider in chapter three. Those latter efforts are ultimately grounded in a appeal to rational choice. I argue in both chapters that they are unsatisfactory.

Despite these failures, I believe that at least some applications of efficient tort rules can be reconciled with a liberal concern for individual autonomy, even when such tort rules may appear to condone an outright uncompensated deprivation. This is the goal of this essay, and it constitutes the ultimate goal of the fourth and final chapter. In order to do advance this argument, I will draw upon a literature that offers a theoretical basis for liability for intentional right infringements, which invokes a norm of “respect for persons.”

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Without my parents and brother, it would not have been possible to attend graduate school in New York City. They supported my wish to return here to pursue doctoral study. Becoming self-sufficient in this city as a graduate student is difficult, but their generosity allowed me to reach this goal.

I could not have come this far without Kira, my loving wife, who has supported me in every conceivable way in the face of this seemingly insurmountable challenge. Her encouragement reinforced my dedication to this project. Accordingly, this dissertation is dedicated to her.

Preface

My interest in writing on the topic of this essay originates in Richard Epstein's 1973 essay "A theory of strict liability" in *The Journal of Legal Studies*, and Richard Posner's accompanying rejoinder. I was surprised to learn that two eminent libertarian legal thinkers could diverge so widely on issues of tort liability. Epstein was of the view that individual autonomy, a core value of libertarianism, is antithetical to common law rules that would allocate liability for accidental injuries on the basis of cost-benefit analyses. Richard Posner, among others, accepts libertarian principles to the extent that they endorse free markets, which benefit society by efficiently allocating society's resources.

Society's resources are allocated most efficiently, we might say, when they are distributed to those parties that value them most highly. As it happens, the legal system may help to promote efficiency, by framing legal rules that encourage cost-effective precautions against accidental harm and discourage cost-ineffective ones. Such an undertaking may result in tort rules that exempt an injurer from liability when he could only have prevented the harm at an even greater cost to himself. In practice, courts would assign rights to parties, such as the right to pose risks of accidental injury to others without incurring the risk of liability for those injuries, to parties that would value such rights highly enough to purchase them, but could not do so on account of transaction costs that prevent such efficient exchanges. Posner has been the most outspoken proponent of this so-called economic approach to tort law.

This approach was illustrated by the economist Ronald Coase with a scenario involving a railroad company whose trains drive by a farm, and sometimes emit sparks

that ignite the crops growing near the track. Posner would point out that if the cost to the railroad of taking adequate precautions against such damage is greater than the cost of the crop damage that can be expected over the long run, then the railroad's right to emit sparks is more highly valued than the farm owner's right to be protected from fire damage. An efficient tort rule might not impose liability on the railroad under these circumstances, insofar as the threat of liability would not induce it to take an adequate precaution against harm. If the precaution is cheaper than the expected value of the crop damage over the long run, on the other hand, then threatening the railroad with liability for the fire damage it causes would induce it to take precautions that would minimize the overall economic loss over the long run.

Epstein, however, understood this approach as threatening to curtail individual rights in order to promote social welfare. He draws upon scenarios that would invoke robust intuitions about liability. One of these involves a ship captain who moored his vessel to a dock, against the dock owner's wishes, in order to protect a ship and its contents from a severe storm. As a result of the storm, the ship impacted upon the dock and damaged it. Yet, Epstein maintains, no one seriously doubts that the captain's 'trespass' was both justified and cost-effective. Nevertheless, he holds that the captain's infringement of the dock owner's property rights gives rise to a duty to tender compensation. To support this, he argues that that the protection of property rights is essential to safeguarding autonomy.

So we have an apparent tension between efficiency and a libertarian conception of individual autonomy. We shall see that Richard Posner has made numerous attempts over the course of decades to ease this tension and reconcile these values. While his

efforts were unsatisfactory, I believe that reconciliation can be achieved. My view is that when the cost to potential injurers of ascertaining the risks they impose upon others is so high that incurring it would defeat the purpose of the projects they pursue in creating risks, it is permissible for the legal system to consider their interests in autonomy as well. This allows the legal system to balance the economic interests of injurers and victims, insofar as there can be no avoiding harm to the autonomy interests of at least one party. I will develop this view in the final chapter.

Although this debate arose between the libertarians Epstein and Posner, this issue should be of interest to students of other strains of political thought. Indeed, I will argue in Chapter Three that efficient tort rules can be accommodated within a political framework that is decidedly non-libertarian.

My interest in the subject of tort liability grew after I began to consider an argument made by Coase. He maintained that while we might protect an individual from harm by assigning to him rights against a potential injurer, the legal system would harm that potential injurer by enforcing those rights. Assigning a right to the potential injurer to cause such harm would tend to minimize harm in the long run, Coase maintained, if he values that right more highly than his would be victim values the right to be free from harm. Epstein's 1973 essay was in large part an attack on this point of view. His challenge was to show that we need not conceive of harm as involving the sort of reciprocity that Coase recognized. While Epstein's arguments seemed intuitively plausible, his line of thought left many issues unresolved. The most important of these was the putative connection between harms and resulting claims to liability. Ultimately, Epstein did not have a satisfactory justification for assigning liability for harms caused

without fault, even where doing so seemed intuitively plausible. I thought that I could make an important contribution to the literature on the moral foundation of tort liability by strengthening his approach, while attempting to show that it can accommodate a limited use of economic criteria of tort liability.

This work might be considered interdisciplinary. Epstein and Posner are legal scholars by training, and part-time philosophers in practice. Only a handful of academic philosophers have seriously addressed their views at length. The most prominent of these are Jules Coleman and Ronald Dworkin, who feature prominently in Chapters Two and Three. Addressing these views requires engagement with a number of legal doctrines and concepts. These debates are also informed by the contributions of economists, such as Coase, who laid the groundwork for the economic approach to tort law endorsed by Posner. Ultimately, however, this is a work of normative ethics. We are concerned with defining certain rights, and the consequences of their infringement. That such issues can be informed by legal and economic thinking confirms my view that philosophy is best understood as continuous with other disciplines.

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Chapter One

Consider a crowded city street at the height of rush hour. Where numerous pedestrians converge, accidents are inevitable. Each of these strangers runs a risk of becoming the victim of a fellow stranger's misadventure. Each stranger also risks causing injury to another. On a crowded city street, one pedestrian may inadvertently trip another, step on his foot, tear his clothing, or break his antique watch. Do strangers owe compensation for these accidental harms?

These pedestrians face risks they accepted neither implicitly nor explicitly. Does one who imposes such risks have a duty to rectify the resulting injuries? The ensuing discussion is an effort to identify those conditions where such duties obtain. I am concerned, then, with issues of corrective justice. Matters of corrective justice involve the restoration of wrongful losses. Distributive justice, by contrast, is concerned with the fairness of patterns of holdings and potential changes to such patterns. Retributive justice differs from both of these, as it takes up matters of the status and treatment of wrongdoers.

Our earliest known articulation of the concept of corrective justice comes from Aristotle.¹ He too distinguished it readily from distributive justice. The "rectifying kind" of justice, Aristotle states, is not concerned with the character of the parties to a dispute. Judges carry out corrective justice when they restore an equilibrium upset by wrongdoing in either voluntary or involuntary transactions. Such equilibrium is restored when wrongful gains and losses are both nullified.

Many principles of tort law can be understood as principles of corrective justice addressing "involuntary" transactions.² They determine when one who causes or allows

an injury is liable for the cost of that injury. Modern tort principles clearly avail themselves of categories and distinctions not used by Aristotle. Transactions may be involuntary for the wrongdoer as well as for the victim. Aristotle did not account for this possibility. Tort law is primarily concerned with restoring wrongful losses; it is largely concerned with the nullification of wrongful gains only to the extent that such nullification will result from the restoration of losses.

Tort law has expanded upon the original concept of corrective justice, as Aristotle had little of substance to say about what constitutes a wrongful loss. Contrary to what some recent commentators suggest, Aristotle says nothing that would suggest a preference for a rule of liability incorporating specific criteria of wrongful conduct.³

We are concerned here with formulating normative principles for allocating the costs of accidental injuries. The prevailing common law rule of accidental tort liability is a negligence or fault rule. This rule generally holds that a party responsible for an injury to another need not bear its cost unless he is shown to have been at fault. A party is at fault when he breaches a duty to conduct himself in a careful manner or to reduce certain risks connected with his conduct, and that breach results in an injury. This is to say that when a party accidentally injures another, but did not fail to satisfy any obligation of due care and did not conduct himself in a manner that posed unreasonable risks, then the injured party must bear the cost of the accident.

This negligence or fault rule largely replaced the older strict liability rule. Strict liability rules hold that an injurer must bear the costs of injuries caused by its actions regardless of fault. Under this rule, tort liability is imposed on a party when its conduct infringes the rights of another party by harming a legally protected interest. In the

modern era, the rule of strict liability has a somewhat limited application. That rule still controls when injuries arise from inherently dangerous activities, and sometimes when injuries are caused by commercial products. Aside from a few areas of tort law still covered by strict liability, the negligence rule dominates the realm of accidental torts.

In order to narrow the scope of the ensuing discussion, we can distinguish corrective and retributive justice.⁴ Retributive justice principles are concerned with the just administration of punishment. Jules Coleman notes that a tort principle might be defended on grounds of retributive justice.⁵ A fault-based liability rule, specifically, imposes liability for wrongdoing, i.e., harm caused as a result of faulty conduct. As Coleman points out, however, we would be hard-pressed to explain, in terms of retributive principles, any rule that requires injurers to compensate victims fully for the injuries they cause. Retributive justice is primarily concerned with the imposition of harm on a wrongdoer. At best, it should be indifferent between harms that transfer entitlements from the wrongdoer to the victim, harms that transfer entitlements from the wrongdoer to a third party, and harms that simply destroy the entitlement. Retributive concerns do not explain the moral significance of the first alternative. Moreover, we would expect a principle of retributive justice to apportion punishment commensurate to the magnitude of the wrongdoing it seeks to address, as opposed to the extent of the reparations needed to restore the victim to his previous *status quo*.⁶

Focusing squarely on the issues of corrective justice, philosophers and legal theorists have debated the choice of liability rule, often by appealing solely to theories of rights, justice, and culpable agency. However, the issue of the proper choice of liability rule has also received considerable attention by economists. While economists are not

primarily concerned with issues of justice and dessert, they have evaluated liability rules on the basis of criteria of economic efficiency. They seek to determine what liability rule will result in an efficient allocation of resources.

This line of inquiry reached a breakthrough with the advent of the Coase theorem.⁷ Ronald Coase demonstrated that when certain conditions of perfect competition obtain, the initial allocation of rights among parties in society, and thus the choice of liability rule, is arbitrary from the point of view of efficiency.⁸ This means that however rights and resources are distributed throughout society, they will move to their most valuable use through voluntary market exchange. Such an efficient allocation will occur, however, only if prohibitive transaction costs do not prevent wealth increasing exchanges.

When the costs of transacting are high enough to make such transactions inefficient, however, the choice of liability rule may well determine whether resources are distributed efficiently. Some economically minded legal thinkers, most notably Richard Posner, have argued that liability rules should be selected so as to allocate resources efficiently. Economic efficiency is of considerable value to society, and such a value could be obtained without the intervention of the state but for market failure resulting from high transaction costs. Courts, therefore, may play the role of “market mimickers”, allocating rights as they would have been allocated among rational parties transacting under conditions of perfect competition. This is the consideration underlying the so-called economic approach to tort law.

Posner’s economic approach to issues of liability has led him to select a fault rule that allocates liability on the basis of the Kaldor-Hicks efficiency criterion. This criterion

will be discussed thoroughly later on. For now, it should suffice to say that under this criterion, an allocation of a resource to A instead of B is efficient if A could in principle adequately compensate B for the resource and still have improved his level of welfare. This liability rule, then, allows for the transfer of a right to the party that most highly values it.

Posner actually maintains that a great deal of common tort law already employs efficiency criteria in adjudication.⁹ That judgment represents the positive or descriptive aspect of law and economics. The theory has a normative side as well, and it is the normative claims of law and economics that are central to the debate discussed below. Posner is an ardent defender of the normative claims of the economic approach to law. He defends the judiciary's use of liability rules that foster the goal of wealth maximization, and he has argued for the revision of rules that do not foster this goal.

Overview of this Essay

Despite the common law's near abandonment of strict liability, that rule still enjoys some vigorous support from some theorists. Richard Epstein has argued against negligence rules, maintaining that they unjustly allow accident victims to bear uncompensated losses. He proceeds from a liberal point of view that requires the protection of autonomy, and that injuries to entitlements infringe rights. Individual autonomy, on this view, extends over a zone of property interests, such that the legal system ought to protect individual rights to the integrity of such interests. This duty warrants the imposition of liability upon those who breach this zone of protection.¹⁰ This aspect of liberalism is understood by Epstein and others to call for a strict liability rule. Posner's economic standard of fault, and its underlying norm of wealth maximization,

has been criticized as antithetical to liberal values, insofar as it allows for property rights to be abrogated for the sake of economic efficiency. George Fletcher, for instance, has objected to the notion of allocating liability on the basis of a cost benefit analysis, as it simply allows for personal sacrifices to be imposed for the benefit of others.

Just as an individual cannot be expected to suffer criminal sanctions for the sake of the common good, he cannot fairly be expected to suffer other deprivations in the name of a utilitarian calculus. His life, bodily integrity, reputation, privacy, liberty and property – are all interests that might claim insulation from deprivations.¹¹

In the subsequent two chapters we will consider efforts made by proponents of the economic approach to tort law to reconcile the use of efficient tort rules with this liberal concern. In Chapter Two, we consider two classic lines of argument raised respectively by Posner and Ronald Coase, who each try to defend the approach by arguing that harms that could not be prevented efficiently do not constitute salient right infringements. For Coase, this is because a potential reciprocity of harm is always posed when “victims” and “injurers” interact. Posner maintained, at an early stage of his thought on the economic approach to tort law, that the sphere of protection to be afforded to individuals only ought to extend as far as efficiency criteria will warrant. I will attempt to show that each of these two lines of argument fail.

At each turn, Posner has expended considerable effort attempting to reconcile his efficiency norm with core liberal values. These efforts have in turn received severe criticism, primarily from Jules Coleman and Ronald Dworkin.¹² After reviewing these debates, we will see that their responses have met with varying degree of success. These debates have been waged since the earlier arguments found in the second chapter, to more modern ones which we will consider in Chapter Three. There, we will review more

recent efforts, undertaken primarily by Posner, to achieve a reconciliation. These efforts are ultimately grounded in a appeal to rational choice. The basic argument is that rational, self-interested parties would strongly tend to assent to a wealth-maximizing tort regime, such that we can recognize a near hypothetical consensus in favor of such a regime. I will argue there that this approach is also ultimately unsatisfactory.

Despite the shortcomings of the defenses of the economic approach to tort law in the literature, I believe that at least some applications of efficient tort rules can be reconciled with a liberal concern for individual autonomy, even when such tort rules may appear to condone an outright uncompensated deprivation. This is the goal of this essay, and it constitutes the ultimate goal of the fourth and final chapter. In order to advance this argument, I will draw upon a literature that offers a theoretical basis for liability for intentional right infringements, which invokes a norm of “respect for persons.” We must understand this value as foundational in tort law in order to account for liability judgments in “necessity” cases, it will be argued. The Kantian norm of respect for persons is widely invoked throughout countless moral inquiries. Charles Fried, for instance, argues that our legal system’s judgments about rights and permissible conduct rest on this value of respect for persons. Wrong actions are those that fail to afford such respect.

What we may not do to each other, the things which are wrong, are precisely those forms of personal interaction which deny to our victim the status of a freely choosing, rationally valuing, specially efficacious person, the special status of moral personality.¹³

The basic argument is that withholding compensation for injuries, even if they were inflicted permissibly, denies respect to victims as autonomous bearers of ends. Compensation effectively restores a victim to the “indifference curve” on which he lay

before being harmed, thereby restoring to the victim his project or replacing it with one of equal value to him.¹⁴ I will then argue that this basis actually supports a strong *prima facie* case for absolute liability for accidental torts. However, I shall argue that the *prima facie* case may be rebutted when the cost to a would-be injurer of ascertaining the risk he imposes is prohibitive. Under such circumstances, we will find, imposing liability on an injurer comprises an affront upon his autonomy that is on a moral par with the affront we find in an uncompensated harm. Once we recognize such moral parity, we will no longer have a reason to privilege the interests of the accident victim, and so it thereby becomes permissible to weigh the competing interests of injurers and victims in determining the allocation of liability. This opens the door for criteria of economic efficiency in a way that does not offend a liberal concern for liberty and autonomy. This argument will of course be developed in detail.

A Preliminary Consideration: Insurance

Before proceeding, it behooves us to address one preliminary issue: the relevance of insurance schemes to the selection of liability principles. Jeremy Waldron concedes that a corrective justice principle may fairly impose liability on a careless injurer so as to shift a loss from a victim to the injurer, provided that the scenario is framed such that no one except for these two parties may bear the loss in question.¹⁵ However, there is typically no good reason to frame the scenario as such, and that the result of such a framing may well conflict with our sense of distributive justice and the indefensibility of massive, undeserved losses. From the point of view of corrective justice, where the potential losses of the injurer and victim are considered in isolation, an injurer has no valid objection against his bearing liability for losses he imposed. He simply bears the

consequences of the risk he imposed on another. Given that he imposed the risk, “[he] can hardly complain that the materialization of one of its own contingencies is unfair.”¹⁶ In effect, the injurer is made to face the same unfavorable outcome of the very same lottery to which he subjected the victim.

If a victim is subjected to a negative lottery by injurer and loses, then, Waldron acknowledges, we can move to a fairer outcome by shifting the loss back to the careless injurer, thereby subjecting him to the same lottery he imposed. Such a position is entirely consistent with the principle of corrective justice. The problem, Waldron maintains, lies in the assumption that the rectification of losses must preserve the negative lottery initiated by the injurer, with its schedule of risks, gains, and losses, and simply decide whether one loser should be substituted for another. Alternative lotteries, wherein the worst outcomes are more moderate, might be more desirable on grounds of distributive justice. A scheme where accidental losses are covered by social insurance, supported at least in part by risk imposers, constitutes such an alternative.¹⁷ Under such a lottery scheme, players are subjected to more certain but significantly smaller losses in the form of compulsory insurance premium payments. Such a scheme is one of justified risk sharing, wherein parties engaging in similarly risky activity are made to share risks, such that one unfortunate party among numerous similarly careless ones will not bear alone the entire weight of the materialized risk. As a matter of distributive justice, according to Waldron, the losses stemming from careless conduct should not be borne disproportionately by those careless parties who are less fortunate than those others whose risky conduct happens never to bring about injury.

The only basis for preferring the principle of corrective justice over a broader scheme of risk sharing, Waldron maintains, invokes a concept of desert. Under this approach, the corrective justice principle is retained on the ground that injurers ought to face the same schedule of risks they impose. Yet, to defend the principle of corrective justice on such grounds is to tamper with it in a fundamental way.¹⁸ Corrective justice becomes a principle designed in part to impose heavy losses on parties. Retribution, however, is expressly rejected by Coleman and others as a goal of corrective justice. Once retributive concerns are set aside, then, we are free to consider alternative means of rectification pursuant to distributive concerns.

Waldron's argument is that corrective justice offends important concerns of distributive justice. On his analysis, corrective justice narrows the class of risk imposers in an unjustifiable way, ignoring the broader context of risk imposition and thereby foregoing the opportunity to spread losses among risk imposing agents. Compulsory no-fault insurance, on the other hand, pays heed to this broader context. However, corrective justice upsets distributive justice only if the latter does indeed require systematic loss spreading. Such loss spreading carries some appeal in contexts like the one Waldron considers, that of careless driving. In this sort of context, a vast number of potential victims are also potential injurers, and many among this vast multitude are likely to impose comparable levels of risk under similar circumstances. The circumstances surrounding the risks imposed by drivers may lend themselves nicely to Waldron's treatment of loss rectification. However, in most other contexts, and arguably in the context of driving itself, parties engage in varied levels of activity and impose varied

levels of risks, such that compulsory loss spreading raises its own set of distributive justice issues.

It seems fairly common of those arguing against “strict” (in a broad sense) liability to oversimplify the “landscape of risk”, so as to represent the creation of risk as a cooperative venture, where all parties involved make roughly equal contributions to the level of background risk. I shall argue in Chapter Three that much of Posner’s defense of wealth maximizing tort rules rests on that very assumption, and is thereby vulnerable to the same line of criticism.

To require of a party some form of compulsory insurance where his contribution to this insurance pool is disproportionately greater than his contribution to the level of background risk is to compel that party to subsidize the risky conduct of others. Yet, such forced subsidization might be questionable from the point of view of distributive justice.

A voluntary insurance system, on the other hand, may be a welcome means of spreading risk among parties. However, a plausible objection to any effort to select to select an appropriate rule of liability is that the issue is idle, insofar as liability may be discharged by way of an insurance scheme. Since both the injurer and the victim are likely to be insured, the costs generated by their risky conduct are effectively allocated to third parties, the insuring firms. The choice among negligence and strict liability rules, it is argued, will not affect the allocation of costs in any manner, let alone a more just or efficient manner.

Such an argument is not persuasive, however. If a rule of strict liability is enforced, and potential injurers are insured against potential strict liability claims, then

the cost of insurance premiums will reflect the likelihood of liability. Such a likelihood would certainly be greater than that under a fault-based system. If a fault-based rule is enforced, then premiums will be lower for would-be injurers, since the range of potential liability claims is smaller, and injurers would have a greater incentive to minimize risks to others. So potential injurers will incur greater costs within a strict liability system. Moreover, insurance costs for would-be accident victims will be lower under a strict liability regime, insofar as the injurer's liability will on more occasions obviate the victim's need to recover from the insurer.

The Law of Negligence

Having put the matter of insurance to rest, we can move toward a more detailed introduction to the concept of wealth maximizing tort principles. In order to debate the justification of the use of wealth maximization criteria in the adjudication of liability for accidents, it is necessary to outline some of the main common law doctrines of tort liability. I will briefly survey some of the other major areas of tort law that purport to protect the security of entitlements. A number of arguments in the debates in Chapters Two and Three will draw upon aspects of these areas of tort law, which are traditionally distinguished from the law of negligence. As the common law principles of negligence liability are explained here, we will discuss economic approaches to the formulation of liability rules, and explain the relevance of the concept of wealth maximization to them.

The protection of private property from interference by other agents is a primary concern of American tort law. Liability for such interference is generally grounded in trespass, nuisance, and negligence law. The law of trespass is understood as protecting the interests of owners in the peaceful possession and sound physical condition of their

property or person against intentional invasion. Nuisance law protects the interests of owners in the use of property.¹⁹

Where direct interference with peaceful possession and sound physical condition is unintentional, i.e., accidental, an action must be brought under a negligence suit. Negligence law holds that a defendant owes a duty to exercise reasonable care taken by the ordinarily prudent and careful person against risk to those who lie within the foreseeable scope of the risks imposed by the defendant in the course of his activities. A person can be liable for injuries he caused accidentally only when he fails to satisfy this duty. We will discuss this rule in much greater depth shortly. A defendant is *prima facie* liable in negligence when it (1) breaches a duty of care, thereby (2) “proximately” causing harm to the plaintiff (3) resulting in a loss. Since we will be focusing extensively on this first element, we will discuss it last. The third element does not warrant any attention here, as the problems of liability we will discuss assume that losses have been inflicted. We will discuss the notion of causation, and then that of breach of duty.

Causation, as a matter of brute fact, is not sufficient for liability for harm resulting from conduct performed in breach of duty that causes an accident. The injury in question must be within the scope of the duty that is breached. Careful driving is required because the avoidance of vehicular collisions is sought. Collisions, therefore, can be proximately caused by careless driving. Yet, careless conduct that brings about an injury may not be its proximate cause. Suppose that A is carrying an aggressive pit bull in a sturdy, secure portable cage down the street. B is driving at a reckless speed on a wet road. Due to his increased speed, he splashes an inordinate amount of water onto the sidewalk just as A walks by. A slips in the newly formed puddle on the sidewalk and drops the portable

cage. The force of the impact breaks the lock on the cage door, and the frightened dog escapes from the cage and bites C, another pedestrian. B's recklessness caused injury to C, and B breached his duty to drive carefully. Yet, the particular injury to C could not have been contemplated as a foreseeable consequence of reckless driving, and so the injury is said to be outside of the scope of B's duty. B is not liable to C, then, because the requirement of proximate cause was not satisfied.

A classic statement of the doctrine of proximate cause is found in the case of *Palsgraf v. Long Island Railroad Co.* (1928).²⁰ There, a man running to board the defendant railroad company's train was about to fall, and one of the defendant's employees attempted to push him aboard the train from behind. In so doing, he dislodged a package from the passenger's arms. The package contained fireworks, which exploded when they fell. The shock of the explosion caused some scales at the other end of the platform to hit the plaintiff. It was not disputed that, although the defendant's employee may have been negligent toward the package-carrying passenger in pushing him, his conduct did not involve any foreseeable risk of harm to the plaintiff, who was standing far away. The issue was whether, given the fact that the defendant had been negligent toward someone, this negligence was enough to give rise to liability to the plaintiff, injured by fluke. Judge Cardozo found that the defendant was not liable.

The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. Nothing in this situation gave notice that the fallen package had in it the potency of peril to persons thus removed ... The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another.²¹

Furthermore, generally speaking, “...a wrong is defined in terms of the natural or probable, at least when unintentional.” Since the defendant’s conduct did not involve an unreasonable risk of harm to the plaintiff, and the damage to her was not foreseeable, the fact that the conduct was unjustifiably risky to someone else is irrelevant. “Proof of negligence in the air, so to speak, will not do.”²² In defining the scope of proximate cause, then foreseeability factors into the determination of liability for negligence.

The early common law of accidental torts was dominated by the rule of strict liability, which allocated liability to an injurer on the basis of a finding that he caused the injury. It was not required for a plaintiff to establish further that the defendant was at fault in causing such harm. “The simple question was, who is the tangible cause of the plaintiff’s injury; not, could such person have avoided the injury by the exercise of powers within his control.”²³ This is not to say that the concept of negligence was absent from this area of law. Rather, the absence of negligence could be invoked as a defense against strict liability. Generally, very little, short of a complete absence of negligence, pleaded and proven by the defendant, could block his liability once a plaintiff had shown that the defendant injured him.²⁴

The rise of negligence rules has been attributed to a pivotal mid-nineteenth century case, *Brown v. Kendall* (1850).²⁵ That case arose after the defendant accidentally struck and injured the plaintiff with a stick while trying to separate two fighting dogs. The tort doctrine in that jurisdiction would require a plaintiff to establish that the defendant caused his injuries in order to establish a *prima facie* case for liability. The defendant could rebut that *prima facie* case by establishing that while he caused the injury, it was an “inevitable accident” in virtue of the fact that he neither knew nor could

have been expected to know that the plaintiff that close enough to him to be struck by the stick. Negligence, or the lack thereof, then, was treated as an issue that could be raised as a defense against a plaintiff's claim.

When the case eventually reached the Massachusetts State Supreme Court, Chief Justice Shaw rendered a decision that essentially shifted the role of negligence in the analysis of liability. Justice Shaw decreed the exercise of ordinary care should not be an element to be established by a defendant as an argument for excusing liability. Rather, negligence should be an element of the plaintiff's *prima facie* case, i.e., the plaintiff has the burden of establishing negligence, and the defendant need only address the issue of negligence if the plaintiff meets this burden. As other jurisdictions ratified this change in the analysis of liability, George Fletcher maintains, the test of ordinary prudent care ceased to be a standard for judging ignorance as an excusing factor, and "became a rationale for determining when individuals could knowingly and voluntarily create risks without responsibility for the harm they might cause."²⁶ He further maintains that courts have become ready to deem risks as justified on the basis of utilitarian reasoning that balances the costs of a defendant's risk creating conduct against its benefits.²⁷

The BPL Formula

That the risks in question must be reasonably foreseeable does not entail that conduct is *prima facie* negligent in case the likelihood of a given harm passes some legal threshold of "foreseeability." Likelihood is just one factor bearing on whether conduct is negligent. The likelihood of an injury weights its severity, to determine the degree of risk an activity poses. That degree of risk in turn is balanced against the magnitude of the burden necessary to mitigate that risk. In the case of *U.S. v. Carroll Towing* (1947), a

docked barge broke free of its moorings and drifted about, eventually colliding with another docked vessel and damaging it. The barge had been left completely unattended, but it was believed that an attendant aboard the ship could have prevented the collision. Judge Learned Hand had to decide whether the barge owner owed a duty to use an attendant to insure that the barge did not break free of its moorings and damage other ships, i.e., whether the use of an attendant was a cost-justified precaution.²⁸ He defined negligence or breach of duty of reasonable care as the failure to take cost justified precautions. A precaution is cost justified, he explained, if its cost is less than the expected damage stemming from the failure to take it. This judgment was presented as the *BPL* formula. Where *B* stands for the cost of taking the precaution in question, *P* stands for the probability of damage occurring if the precaution is not taken, and *L* stands for the cost of that damage, the defendant is negligent if $B < PL$. Hand's opinion presented one of the earliest formulations of an economic standard of fault. While Hand's standard contains a number of ambiguities, it reflects a key idea of Posner's economic approach, that it is unreasonable to impose inefficient burdens on potential injurers. The law should not require one to prevent loss to another by bearing an even greater economic loss.

This quantitative approach to negligence reflects the general view that the standard of due care should be largely impersonal and objective. Standards of due care do not account for differences among individuals in temperament, intelligence, and knowledge. They presume an ordinary capacity to avoid harm. Moreover, the standards only pertain to "external phenomena", "manifest acts and omissions." Negligence motivated by malice or bad faith is treated no differently than "innocent" negligence.²⁹

The standards are to apply equally to different persons in relevantly similar circumstances. This means, Oliver Wendell Holmes maintained, that there is an ideal of prudent behavior that applies uniformly to all persons. Since liability in negligence results from conduct that fails to conform to “fixed and uniform standards of external conduct”, it is incumbent upon the courts to formulate increasingly definite standards.

[T]he featureless generality, that the defendant was bound to use such care as a prudent man would do under the circumstances, ought to be continually giving place to the specific one, that he was bound to use this or that precaution under these or those circumstances.³⁰

Richard Posner speculates that Hand’s formulation of the negligence standard was in use before Hand’s famous opinion was rendered, and that the cost-benefit analysis guided by the **BPL** formula was not proffered there as a novelty. Rather, it was simply the earliest explicit statement of a standard that was already applied implicitly and systematically.³¹ He further theorizes that this rule reflects a more fundamental purpose of the negligence system: to promulgate rules that tend to induce parties to take cost-justified, or efficient, precautions. Imposing liability on parties who injure others after failing to take cost-justified precaution thereby discourages them from imposing a greater expected cost on society than they themselves would incur in taking the precaution.³² Likewise, there is no reason to encourage parties to “squander” resources by bearing a greater expense in reducing risks that would carry an even smaller expected cost. Yet, a rule of liability that requires precautions more extensive than those that are cost-justified will not induce parties to take them when their liability would be equivalent to the value of the damage they cause. In that case, it would be cheaper in the long run for parties to decline to take the precaution and satisfy liability judgments made against them when they arise.

Precautions are cost justified when they are lower than the magnitude of the accidental loss in question, multiplied by the probability of its occurrence as a result of the activity from which the accident resulted.³³ Multiplying the actual loss by its *ex ante* probability yields the expected cost of the putatively negligent conduct. This expected cost, the actual cost discounted by its probability, is weighed against the burden of preventing that loss. From a risk-neutral actuarial point of view, one should be indifferent between a loss that will occur with certainty and a loss of twice the magnitude that has only a 50% likelihood of occurring. Hand maintains that the failure to take precautions whose costs exceed the expected cost of failing to take them are not negligent. One is not obligated to incur an even greater loss in order to prevent a given expected loss.

Posner aims further to account for the related notions of foreseeability and proximate cause within the **BPL** model as functions of probability. Highly improbable accidents, he maintains are not foreseeable, and do not fall within the scope of risk to which a duty of care applies.³⁴ Suppose there are two potential accidents, A_1 and A_2 , that a defendant might cause when failing to take precaution B . The probabilities of A_1 and A_2 occurring when B is not undertaken are P_1 and P_2 , respectively. The respective injuries are L_1 and L_2 . The defendant is negligent if he does not undertake B when B is less than the product of P_1 and L_1 ($P_1 * L_1$). Suppose $B < P_1 * L_1$, but only A_2 occurs and $B > P_2 * L_2$. In that case, the defendant would not have proximately caused A_2 , as A_2 did not fall within the scope of the negligence.³⁵

Although this analysis employs a balancing of costs and benefits that have been referred to in terms of utility, it is not a utilitarian analysis. Utility, measured in terms of

pleasure or satisfaction, is not the basis of comparison. There are no grounds for identifying marginal costs with utility levels, insofar as the same marginal cost in dollars for two parties (e.g., a millionaire and a pauper) may yield widely different levels of disutility for each. Rather than aiming at a utility-maximizing allocation of entitlements, then, the application of the Hand formula aims at an efficient allocation. We may define an efficient allocation for our purposes here as one that maximizes the aggregate worth of the holdings of the relevant parties.

Another Approach to Efficiency in the Law

Guido Calabresi was also largely concerned with the efficiency of accident law, and recognized two independent goals of tort law: justice and the reduction of the cost of accidents. The first goal has proven to be elusive, he maintains, to the extent that it is difficult to spell out the conditions under which justice would be secured. We might be in a better position to secure justice in tort law by assessing efforts to pursue the second goal, that of reducing accident costs, and then see whether there are grounds for holding them to be unjust.³⁶

The reduction of accident costs, according to Calabresi, can be achieved in three distinct ways.³⁷ Primary accident cost reduction aims to reduce the “number and severity” of accidents, either by enjoining activities that are expected to give rise to accidents or by making such activities more expensive to those who perform them. Secondary accident cost reduction aims to mitigate the costs to society of bearing accidental losses. By spreading losses throughout society, or shifting them to parties that can most easily bear them, economic dislocation may be minimized. Tertiary accident

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cost reduction, finally, aims to minimize the administrative costs of pursuing primary and secondary cost reduction.

Calabresi argued that primary and secondary accident cost reduction might be achieved most effectively by allocating liability to the party that is able to avoid the accident most cheaply. Generally, this aim can be achieved through the application of a strict liability rule, as enterprises that cause accidents tend to be in the best position to avoid them.³⁸ In defending a negligence rule, on the other hand, Posner points out that even if enterprises tend to be at such an advantage, a strict liability rule will remove any incentive a potential victim might have to take the cheapest accident prevention method whenever it does happen to be available to him and not the prospective injurer.³⁹

The Coase Theorem

When such inefficiencies arise, there may be little reason to expect they will remain even when the same liability rule remains in force. Ronald Coase argued that within a perfectly competitive economic system, the initial allocation of rights is arbitrary from the point of view of efficiency.⁴⁰ No matter how personal, property, and contract rights are initially allocated, they will eventually wind up in the hands of those who value them most. That transactions are carried out within a framework of a perfectly competitive market guarantees that the result of the series of transactions will be an efficient distribution. The distribution will be efficient, that is, Pareto efficient, insofar as no further redistribution can make one party better off without making another party worse off. We need not worry about an inefficient distribution of rights so long as rights can be bought and sold.

This is illustrated in the following scenario. Railroad, Inc. is a freight rail company that ships cargo via a railway that runs adjacent to a tract of farmland owned and cultivated by Mr. Farmer. As it happens, from time to time Railroad's trains emit sparks that ignite some of Farmer's crops lying in proximity to the tracks. This does not happen often, but when it does, a portion of Farmer's crops is severely damaged, and Farmer suffers a significant economic loss.

Let us suppose that property rights have been previously allocated such that Farmer enjoys a right against outsiders to noninterference with his crop production. Now, since Railroad and Farmer happen to exist within a perfectly free market, Railroad can buy this right from Farmer if they can agree on a selling price. Can they agree? That all depends on the interests of each party that are at stake, and on what each party can expect to gain by acquiring or retaining the right. During each cargo run, the train frequently emits sparks, and there is a five percent chance that sparks will fly as the train passes alongside Farmer's land and ignite some of the crops. If the sparks do ignite, it can be expected that there will be \$2,000 in damage to the crops. The expected damage, therefore, to the crops on each cargo run is \$100. Railroad will therefore expect to pay Farmer an average of \$100 per trip, unless it decides not to risk infringing Farmer's right in the first place. Ceasing operations is not a costless option, however. Suspending the freight operation carries opportunity costs, in the form of income from the operation that is forgone.

Railroad is concerned with the bottom line, and it will gladly cease infringing property rights if there is a way to do so that is cheaper than continuing to violate them. Suppose then that there are spark guards that can be attached to the trains to prevent

further crop fires. If the cost of using these spark guards on a given trip is less than the expected liability incurred in the course of that trip, then Railroad will utilize them in order to reduce its operating costs. If the cost exceeds the expected liability, then Railroad will continue to emit sparks and occasionally cause crop damage.⁴¹ Effectively, Railroad will purchase from Farmer the right to emit sparks. Railroad will be better off, having cut its operating costs, and Farmer will be no worse off, its losses having been fully compensated.⁴²

If the right to emit sparks is instead initially allocated to Railroad, Farmer must make an economic choice. If the cost per freight trip to Farmer of buying and installing spark guards for Railroad is less than the expected cost of crop damage per trip, then it is in Farmer's economic interest to offer Railroad some sum of money no less than the cost of using spark guards and no more than the expected cost of crop damage. It will be in Railroad's economic interest to accept this offer, and so Farmer will effectively purchase the right initially allocated to Railroad. Relative to that initial allocation, both Railroad and Farmer will be better off. If the cost of the spark guard exceeds the expected crop damage, then Railroad will continue to emit sparks and occasionally impose such costs. Farmer and Railroad will not be able to strike a mutually advantageous deal, and so the right will remain in the hands of Railroad. Since such transfers will occur among rational, consenting parties under ideal market conditions, Coase argues, an efficient allocation of rights will obtain no matter how those rights are initially allocated.

Entitlements

Under this approach, property rights may be understood as tripartite relations. Every right held by y implies a duty, D_{xyz} , a duty person x has to person y to do z. To

say that person x has a duty to person y to do z is to say that y has a right that x do z. We will speak of rights in terms of their correlative duties for the sake of simplicity. The third variable in this tripartite relation, z, the action that x has a duty to y to perform, often has as its value either a specific course of conduct or abstention from a specific course of conduct. This is typically how a relevant object of duty is identified in a negligence claim. In a claim arising from a slip and fall accident occurring in a store, the plaintiff might allege that the storeowner failed to correct a slippery hazard. Failure to take this course of action is what comprises a breach of duty against the accident victim.

Ownership is sometimes understood as an “interest in exclusive possession free from interferences by physical intrusions of others or things set in motion by them.”⁴³ We understand ownership here, however, as an entitlement, consisting of a bundle of rights, and some bundles are less complete than others. For instance, X might possess an easement on Y’s neighboring property, such that X has limited rights to travel through it. That Y does not have an unlimited right to exclude others from his land does not entail that no longer owns it. But X could be said to own a property right in Y’s land. Moreover, the law holds that if Z must trespass on Y’s property to avoid serious danger, then he may do so, and Y does not have the privilege of expelling Z he would enjoy under less dire circumstances.

These sorts of rights might be voluntarily reallocated. While the law may prohibit or refuse to enforce the alienation or transfer of certain rights, we can still discuss how such reallocations can be analyzed. In theory, given the absence of legal prohibitions and market failure, any right may be bargained away, insofar as the privilege of voluntary transfer is generally understood to stem from ownership. Neighborliness

may also lead to the gratuitous transfer of rights. Given the appropriate authority, rights can also be taken. Before transfer occurs, we can say that B owns a certain right. This right is the correlative of duty D_{abc} , i.e., A's duty to B to take course of conduct C. As the owner of the right, B has the privilege of enforcing the duty D_{abc} (in a legal fashion, of course), transferring it, or forsaking it. However, under this analysis, forsaking a right amounts to transferring that right. For B, in surrendering his right, thereby excusing a from doing c, makes a the owner of that right. Thereafter, D_{abc} belongs to A.

In terms of entitlements as transferable bundles of tripartite relations, then, we can say that if Railroad has a duty to Farmer to prevent its trains from emitting sparks and risking damage to Farmer's crops, then Railroad might desire to purchase Farmer's right if doing so would be cost effective. D_{rfs} (Railroad's duty to Farmer to refrain from emitting sparks) then would belong to Railroad. This means that Railroad now has the privilege of emitting sparks.

Coase demonstrated that the level of a firm's externality-producing activity is not determined by any initial allocation of rights. Instead, it is determined by the extent to which the externality-producer's marginal profit exceeds the neighbor's marginal damage. The externality generating activity will proceed at the level where the benefit of a subsequent marginal increase in activity no longer exceeds the marginal damage to the neighbor, for that is the point at which bargaining between the firm and neighbor will stop. That point represents an efficient distribution of productive resources, where they are put to their most productive use.⁴⁴

Concepts of Efficiency

It now behooves us to explain this notion of efficiency Coase so heavily drew upon. While classical utilitarianism has lost much of its appeal in the face of devastating criticisms, the concept of utility still thrives within the field of welfare economics. Welfare economists use utility functions as indices of well-being, within limits recognized in light of the problem of interpersonal comparisons of welfare faced by classical utilitarianism. The notion of utility maximization has been supplanted by those of Pareto superiority and Pareto optimality.⁴⁵ These related notions are used to inform us about how general welfare is affected to the extent possible given that cardinal utility functions are often difficult to ascertain, and interpersonal comparisons of utility are highly problematic.⁴⁶ A social state X is Pareto superior to state Y if one individual is better off in X than in Y and no one is worse off. A social state Z is Pareto optimal if no other state is Pareto superior to it.⁴⁷

A party may be understood to be have been made better or worse off by reference to “indifference curves.” Suppose that an individual A is affected by a change from state X to state Y only insofar as his “consumption bundle” K, a collection of given quantities of preference-satisfying things, held in state X was replaced in state Y by a different bundle, L. A is considered to be indifferent between K and L if he does not prefer one to the other. K and L, then, lie on the same indifference curve for A. Any move along the same indifference curve brought about by the move from X to Y leaves A neither better off nor worse off. An individual is likely to have a number of indifference curves. Suppose then that a move from state X to state W or state Z would replace A’s consumption bundle K with M or N, respectively. If A is indifferent between M and N, but prefers either to K, then a move from X to either W or Z makes A better off by

shifting A to a “higher” indifference curve. Such a move thereby constitutes a Pareto improvement as long as no one is made worse off. A would be made worse off by a change from state X if K were replaced by a bundle he prefers less, such that he is shifted to a lower indifference curve.⁴⁸

In the final chapter we will speak of compensation as an act that restores a party to his “*status quo* indifference curve.” When individual B brings about a state of affairs V that shifts A to a lower indifference curve by replacing bundle K, which he held in the status quo state of affairs X, with bundle J, B is understood to have made A worse off. It may well be the case that bundle K cannot be restored to A. If, however, B can provide A with bundle L, which lies on the same indifference curve as K, then A’s position can be improved, such that he would be indifferent between his improved state and the *status quo* he enjoyed in state X. While his original consumption bundle would not be restored, A would be restored to his *status quo* indifference curve.

Information about Pareto superior and Pareto optimal states offers no guidance with regard to tradeoffs. We can make Pareto improvements when there are no losers, but every move to a state where some party is made better off at the expense of the disutility of another party is a Pareto inferior move. The notion of Pareto efficiency does not provide us with the tools to evaluate a move as a superior one even when the gains of some parties greatly outweigh the losses of others. No allocation of accident liability, then, could be considered efficient by these criteria.

Kaldor-Hicks efficiency, often referred to as Potential Pareto efficiency, is the variant of Pareto efficiency that may be invoked in order to describe moves that involve losses as efficient. Kaldor-Hicks superiority might be understood as a sort of potential

Pareto superiority.⁴⁹ A distribution X is Kaldor-Hicks superior to distribution Y if the party who benefits from X over Y benefits to such an extent that he could theoretically compensate the party that loses as a result of the choice, such that the outcome after compensation is Pareto superior to Y.

One of the conditions for an ideal free market is the costlessness of transactions. Transactions are costless when every resource expended in the course of bargaining is a transfer from one party to another. Coase notes that to assume the costlessness of transactions, however, is unrealistic.⁵⁰ In reality, transactions often involve costs to the parties, and when this is the case, the initial allocation of rights may lead to an inefficient outcome. This will be the case when a Pareto superior move is blocked by prohibitive transaction costs.

In order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on. These operations are often extremely costly, sufficiently costly to prevent many transactions that would be carried out in a world in which the pricing system worked without cost.⁵¹

A transaction cost is prohibitive when it renders a transaction cost-ineffective for a party. Prohibitive transaction costs may deter otherwise efficient transactions, including those involving the transfer of vested rights. Transaction costs, therefore, make the initial distribution of rights relevant to efficiency.

One arrangement of rights may bring about a greater value of production than any other. But unless this is the arrangement of rights established by the legal system, the costs of reaching the same result by altering and combining rights through the market may be so great that this optimal arrangement of rights, and the greater value of production which it would bring, may never be achieved.⁵²

In the Railroad scenario, transpiring under more realistic circumstances, the transaction costs of the transfers of rights described above might be prohibitive. Despite the Pareto superiority of the result of a costless transfer of the right to emit sparks from Railroad to Farmer, such a transfer would not occur if the cost of obtaining information about the cause of the crop fires and the party responsible necessary for completing the transaction are so high that they would render Farmer's purchase cost ineffective. It is on the basis of such inefficiencies that transaction costs threaten to bring about that Coase maintains that efficient allocations of resources might be achieved more effectively by government regulation.⁵³

Wealth Maximization in Tort Law

This is where Richard Posner enters the scene. He argues that the courts ought to act as "market mimickers", allocating rights as they would have been allocated within a market framework in which transaction costs are negligible.⁵⁴ He has argued that judges should assign legal rights so as to produce a Kaldor-Hicks efficient outcome.⁵⁵ Doing so promotes the socially desirable goal of wealth maximization. To better insure a more efficient allocation of resources, Posner offers a principle for assigning entitlements under such unfavorable market conditions. This "Assignment Principle" holds that a court should award a right to the party that would have purchased it but for prohibitive transaction costs.⁵⁶ The principle, then, allocates rights as the market would have, given only negligible transaction costs. If, for example, under the Assignment Principle, a right to emit sparks would be allocated to Railroad pursuant to a Kaldor-Hicks efficiency analysis, then Railroad would not be liable for the damage caused to Farmer's crops, as Railroad had the right to impose the risk in the first place.

The implementation of the Assignment Principle will produce Kaldor-Hicks efficient moves, insofar as the party that values a right most highly would be able to compensate his competitor while still enjoying a net benefit.⁵⁷ Allocations may be efficient in this sense, despite their Pareto inefficiency. When a party loses a right to his competitor, the transaction represents a Pareto inefficient move. It represents a Kaldor-Hicks efficient move just in case the winning party *could* have compensated the loser.

Posner understands the Assignment Principle as the rule by which courts may pursue the norm of maximization of wealth, for such maximization is what Posner maintains should be the aim of common law rules. Wealth maximization is not itself an efficiency criterion. Rather, the total wealth of different social states are indices which allow them to be ranked by an efficiency criterion.⁵⁸ The Kaldor-Hicks criterion can be employed to rank such states on the basis of their wealth content.

The Assignment Principle, in apportioning liability on the basis of Kaldor-Hicks efficiency, tends to increase the aggregate wealth of parties by creating a system of incentives that encourages only efficient precautions and discourages inefficient ones. Where the economic burden of a precaution against an injury is greater than the expected value of that injury (its actual value weighted by its likelihood), then it would be more efficient for the would-be injurer to compensate the would-be victim for the risk he imposes than to take that precaution. That transaction would also be efficient from the point of view of the would-be victim, who receives compensation in an amount greater than or equal the expected value of the injury. The Kaldor-Hicks analysis, then, serves to weigh expected harms and burdens of precautions so as to identify efficient allocations of rights that rational parties could hypothetically secure through voluntary transactions.

In the case of Farmer and Railroad, then, a court employing a negligence rule pursuant to the Assignment Principle would allocate the right to emit sparks to Railroad, if the cheapest precaution against the risk of crop damage (the spark guards) is cost-ineffective, and would not force it to compensate Farmer. It is Kaldor-Hicks efficient to allocate the right to Railroad if the cost of the prophylactic measure exceeds the expected cost to Farmer of the freight activity, since the savings Railroad would enjoy by not taking the measure could be used to fully compensate farmer for crop damage over the long run. If the precaution is cost-effective, on the other hand, then Farmer could compensate Railroad for the cost of the spark guards with a part of the additional income he would gain from his spared crops, and so it would be Kaldor-Hicks efficient to allocate to Farmer the right to be protected from sparks, and a liability award in the event that Railroad damages his crops.⁵⁹

Wealth Maximizing Liability Rules

Wealth maximizing tort rules are most commonly conceived as pure negligence rules employing economic standards of fault and due care. For this reason, strict liability rules are often understood as purely antithetical to wealth maximizing tort rules. This is not necessarily the case, however, as strict liability rules that incorporate certain affirmative defenses to liability may prove to be efficient as well. We should briefly consider some of the defenses against liability caused by negligence recognized by the common law, then, insofar as they may bear on the efficiency of liability rules that incorporate them. The three most important defenses are contributory negligence, comparative negligence, and assumption of risk. Contributory negligence may be found where a plaintiff's conduct plays a causal role in the injury in question and falls below the

legal standard of care a potential plaintiff is expected to satisfy for his own protection.⁶⁰ Where the defense is recognized, such negligence serves to completely bar a plaintiff's recovery. The first application of the doctrine of contributory negligence is cited in the case of *Butterfield v. Forrester* (1809).⁶¹ There, the defendant had blocked part of a road with a pole, which the plaintiff eventually struck while riding his horse rapidly at twilight. The court found that the plaintiff would have seen the obstruction and avoided it had he been riding at a reasonable speed and looking out with reasonable care. Consequently, his recovery was barred by contributory negligence.

Many jurisdictions have come to regard the contributory negligence rule as too harsh, as it completely denies recovery for negligently caused harms even when a defendant's negligence played the major causal role in the plaintiff's injury. For this reason the defense has been supplanted in many jurisdictions by a defense that mitigates a defendant's liability when the plaintiff is negligent, but does not shoulder the plaintiff with the entire burden of his loss for even the smallest role his negligence may have played. Under a comparative negligence rule, liability may be apportioned among the plaintiff and defendant, on the basis of the share of fault each party bore.⁶²

A defense of assumption of risk may assert that a plaintiff had in fact consented to face the risk posed by the defendant's negligence. Alternatively, it may assert that the plaintiff was aware of such a risk and voluntarily encountered it.⁶³ This defense differs from contributory and comparative negligence insofar as it does not allege that the plaintiff, in assuming the risk, conducted oneself in an unreasonable manner. Where the defense is successful, and the plaintiff is declared not negligent, it allows that the

defendant did not breach a duty of care to the plaintiff, even if, all other things being equal, the defendant generally owed such a duty.⁶⁴

An assumption of risk may be express or implied. Acceptance of and consent to a risk may be inferred where a plaintiff freely and voluntarily enters into a situation “where the negligence of the defendant is obvious”, and thereby “undertake[s] to look for himself and relieve the defendant of the duty.”⁶⁵ In the case of *Murphy v. Steeplechase Amusement Co.* (1929), an injury occurred aboard a ride called the “Flopper” at the Coney Island amusement park.⁶⁶ Judge Cardozo denied that the defendant should be liable for the injury resultant from an otherwise negligent operation of the ride, as the plaintiff clearly assumed the risk of injury.

One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary... The plaintiff was not seeking a retreat for meditation. Visitors were tumbling about the belt to the merriment of onlookers when he made his choice to join them. He took the chance of a like fate, with whatever damage to his body might ensue from such a fall. The timorous may stay at home.⁶⁷

Whether such defenses are incorporated into a wealth maximizing tort regime bears strongly on the issue of what basic liability rule, negligence or strict liability, may be employed. The use of the Kaldor-Hicks criterion and the Assignment Principle to allocate entitlements, Jules Coleman maintains, treats the potential recipients as though they were bidders in an auction.⁶⁸ A key difference lies in the fact that the winning bid need not be paid. The mere willingness and ability to place the highest bid will secure it.⁶⁹ Another crucial difference is that the losing bidder may actually be worse off once the winner is awarded the entitlement, for that entitlement may have belonged to the loser but for the market failure that warranted the auction. Such a loss makes the allocation Pareto inefficient, but the transaction would be Pareto efficient if the winner of the

auction actually paid his winning bid to the loser. The end-states where the loser is compensated and where the loser is not compensated are both Pareto optimal. Yet, Coleman points out, only the state where the loser is compensated is Pareto superior to the original state where the loser had held the entitlement.⁷⁰ The choice between an auction system without payment and a system with payment represents a choice between making a Kaldor-Hicks efficient move and a move that is both Kaldor-Hicks efficient and Pareto superior. He maintains Posner's principle selects the first option, thereby reflecting the judgment that losers need not be compensated, even when an entitlement is reallocated from the loser to the winner.

The wealth maximization norm may indeed permit the allocation of entitlements as though they purchased at auction. It does not require this, however. Although Posner supports the economic negligence rule, it must be noted that simple negligence is by no means the only system that may be implemented in order to induce optimal precautions. Under a unilateral care model, where only the injurer is in a position to take precautions to reduce the expected damages stemming from his conduct, strict liability is also efficient.⁷¹ Under a bilateral care model, where the victim can take precautions as well, both rules are still optimal, but only if the defense of contributory negligence is allowed. Under negligence or strict liability, without that defense, a suboptimal result obtains when the cheapest precaution is one available to the victim but not taken. A contributory negligence rule induces the victim to take his cheapest precaution if it is cheaper than the precautions available to the injurer, lest he be shouldered with the full cost of the accident.⁷² The comparative negligence rule, defined basically as one that apportions

fractional liability among the injurer and victim when they both take suboptimal precautions, is also efficient.⁷³

Applied to negligence law, the Kaldor-Hicks criterion reflects a modification of Hand's original negligence formula. Posner notes that the application of the Hand formula does not produce an optimal result when the defendant can undertake a cost justified precaution, but the plaintiff could have taken an even cheaper precaution that would have prevented the loss. Where a defendant would be found negligent, having failed to take a cost justified precaution, the plaintiff has no incentive to take that cheaper precaution. The aggregate holdings of the plaintiff and defendant would be higher if the plaintiff, and not the defendant, were to take the cheapest available precaution. In such cases, "[t]he efficient solution is to make the plaintiff liable by refusing to allow him to recover damages from the defendant."⁷⁴ This is the basis of an economic standard of contributory negligence. A plaintiff is negligent when the cost of the precaution it could take is lower than the expected harm as well as the defendant's cheapest precaution.

A comparative negligence rule, on the other hand, which would reduce the amount of the defendant's liability by the extent of the plaintiff's contribution to the accident is not an efficient standard, since it does not allocate incentives to avoid accident costs as cheaply as possible in some cases.⁷⁵ One means of calculating degrees of comparative negligence is to compare the net expected savings the plaintiff would enjoy by taking the precaution it has available to the defendant's net expected savings. Suppose that the defendant's conduct creates a 20% chance of a \$1000 loss. If the defendant could have taken a cost justified precaution of \$150 to avoid a \$200 expected loss for the plaintiff, and the plaintiff could have taken a cost justified precaution of \$175,

a comparative negligence analysis might conclude that the plaintiff was two thirds responsible for the loss. A \$150 precaution here yields a \$50 net expected savings (\$200-\$150), while a \$175 precaution yields \$25 in net expected savings. The defendant, therefore, was twice as negligent as the plaintiff.

Under this comparative negligence rule, two thirds of the liability should be allocated to the defendant, and the remaining third to the plaintiff, and so the defendant's liability would be \$666.66. Since the expected liability of \$133.33 (20% of \$666.66) is lower than the cost of the defendant's precautionary measure, the measure will not be taken. The plaintiff's own expected net costs would be only \$66.66 (20% of \$333.33, the difference between the \$1000 loss and the compensation it receives from the defendant) if it does not take the \$175 precaution, and so it will not be taken. An expected aggregate cost of \$200 will accrue, then, rather than a cost of \$150 that would accrue if the liability rule in force provided to incentive required to insure that the cheapest available precaution was taken.

Litigation Costs

It might seem, then, that as strong a case can be made for a strict liability rule with a defense of economic contributory negligence as for a pure economic negligence rule. Although Posner acknowledges this, he still tends to favor the latter. One reason for this preference is litigation costs. Certainly, another aspect of liability rules, the cost of litigation that accrues under each of them, is also relevant to the application of a wealth maximization norm. Clearly, the costs to society of the phenomenon of litigation will affect its overall level of wealth. Savings won by lowering litigation costs can be invested elsewhere and thereby tend to increase society's wealth. The marginal increases

in litigation costs stemming from a choice of liability rule, then, might be thought to bear on the goal of wealth maximization. It has been argued that litigation under a negligence rule will be more expensive for both parties, as a plaintiff must incur the costs of obtaining evidence of fault, and a defendant may incur costs in countering this evidence. The legal system incurs greater costs in running each trial, moreover, as more complicated litigation tends to last longer.⁷⁶ Yet, while individual trials may tend to be more lengthy and expensive under a negligence regime, the relative simplicity of litigation under a strict liability rule might prove to encourage a greater volume of litigation.⁷⁷ The cost comparison will be complicated further by the fact that strict liability rules may incorporate elements of negligence rules. The defense of contributory negligence may serve to complicate litigation, thereby making trials more expensive, while tending to discourage tort litigation in the first place. Without further inquiry regarding whether the costs of administering more trials offsets the savings inuring from simpler trials, we cannot favor negligence or strict liability as tending to further social wealth maximization by lowering litigation costs.

Utilitarianism and Wealth Maximization Distinguished

The principle of utility has often been equated with normative principles of economic efficiency.⁷⁸ Posner attributes this identification to the fact that economists use the term 'utility' to denote welfare, and the fact that some earlier distinguished utilitarians, including Bentham, Edgeworth, and Mill, were also economists. As we near the conclusion of this introductory chapter, we must be clear that wealth maximization and Utilitarianism are distinct norms. Despite some superficial similarities, utilitarianism and normative economics are fundamentally different. Posner is careful to distinguish

the norm of wealth maximization from the principle of utility.⁷⁹ At an early point, Posner distinguished the two and argued that the former provides a more solid foundational ethical principle. He believes that these differences might be best illuminated by the criticisms to which only the former succumbs. The version of utilitarianism he contrasts with wealth maximization is the one articulated by Sidgwick, who held that the moral worth of an action, practice, institution, or law is to be measured by the degree to which it promotes happiness, or “the surplus of pleasure over pain” among society’s members.⁸⁰

The goal of maximizing the level happiness of a group requires a method of determining the effect of a decision or policy on happiness.⁸¹ The known methods of measuring such effects, such as the ordinal utility functions used in Pareto efficiency studies, do so by satisfying criteria that represent significant departures from utilitarianism. One might maintain, on the other hand, that Pareto efficiency is wedded to utilitarianism insofar as the free market approach that calls for welfare improvement through voluntary exchange obviates the need for any measurement of utility levels. The assumption that markets maximize utility, however, begs two crucial questions.⁸² It is never known under the free market approach whether the initial distribution of goods provided for an optimal market-driven redistribution. A different initial distribution might have led to a different subsequent transaction schedule, thereby producing an even greater level of utility. The free market approach also makes the unfounded assumption that an alternative mechanism of resource allocation would fail to raise total utility to levels that the market can reach.

Normative principles of efficiency, on the other hand, do not face such problems of measurement. Paretian criteria easily avoid such difficulties insofar as they do not

take account of levels of welfare in any sense. They are only concerned with marginal changes in welfare, and they do not call for any sort of interpersonal comparison of marginal changes. A marginal decrease in welfare is the sole criterion for Pareto inefficiency. Alternatively, the Kaldor-Hicks principle invokes hypothetical changes in levels of wealth, a considerably more tenable index of efficiency. When the norm of wealth maximization is applied to allocate resources in *hypothetical* markets, the measurement of value does pose a problem. Posner maintains, however, that the measurement and comparison of economic value in hypothetical markets is tenable insofar as there is a “background of market transactions that can be referred to for help in estimating the values” associated with involuntary transactions.⁸³

Sidgwickian Utilitarianism, in calling for the greatest surplus of happiness over suffering, may be indifferent between the status quo and population increases where the surplus for each individual is reduced to marginal levels, but aggregate happiness is increased.⁸⁴ The maximization of total happiness, then, may well amount to a significant reduction in the average level of happiness. Such indifference to the individual is also revealed by the theory’s implications for rights. While rights might be useful devices for promoting utility, we would have to acknowledge that if “happiness can be increased by treating people more like sheep, then rights are out the window.”⁸⁵ Rights might be readily jettisoned under this doctrine when social welfare calls for the sacrifice of an individual’s interests.

Normative efficiency principles do not bear such “morally monstrous” implications. A Paretian principle may block all but voluntary transactions. Posner argued in an early attempt to defend the wealth maximization norm that economic

efficiency, as the virtue of free market systems that foster improvements in welfare and innovation, may instead serve as a foundation for such a framework of rights, rather than circumventing the framework as utilitarianism would. “Wealth is positively correlated, although implicitly so, with utility, but the pursuit of wealth, based as it is on the model of the voluntary market transaction, involves greater respect for individual choice than classical utilitarianism.”⁸⁶

Kaldor-Hicks efficiency cannot be considered as an index of utility, insofar as the application of the Kaldor-Hicks criterion can produce instances of the Scitovsky paradox.⁸⁷ That is, there are instances where the relation of Kaldor-Hicks superiority is symmetric. Outcome A can be superior to B, while B can be superior to A. Since outcomes A and B can be superior to each other, we have no grounds for saying that one state has more utility than the other on the basis of the Kaldor-Hicks criterion. The Kaldor-Hicks criterion can steer clear of this difficulty only if it is used to compare distributions of wealth as opposed to individual utility functions.

Utilitarianism and the economic norm of wealth maximization share a concern with the promotion of social welfare. Both norms seek to maximize value in society as an aggregation of the value spread throughout society, and both norms allow local reductions in value that will result in a greater aggregate. However, the economic norm recognizes value in a way that is quite alien to the utilitarian. The economic concept of value hinges not upon the marginal level of happiness one may derive from an object. It derives instead from what one is willing to pay for a given object.⁸⁸ Typically, a willingness to pay for an object reflects an expectation of increased utility resulting from the acquisition. Value seems to imply utility, then, but the converse relation does not

hold. Utility does not imply value, for one is not always in a position to acquire objects that augment happiness. “The individual who would like very much to have some good but is unwilling or unable to pay anything for it – perhaps because he is destitute – does not value the good in the sense in which I am using the term value.”⁸⁹ The wealth of society, then, is the “aggregate satisfaction of those preferences (the only ones that have ethical weight in a system of wealth maximization) that are backed up by money, that is, that are registered in a market.”⁹⁰

Quasi-Contractual Torts

Since the Assignment Principle allocates liability pursuant to an analysis of potential compensation, it might be understood, then, as prescribing that accidental tort cases be resolved by determining how the parties would have agreed to allocate its costs of an accident before the fact. A hypothetical contract is thereby supposed. If we consider Posner’s approach in this way, we might assign rights and obligations to parties as they would have assumed them voluntarily by entering into a rational, mutually beneficial contract. Yet, some accidental tort cases arise in contexts where agreements that are more than merely hypothetical are involved. It is for this reason that I wish to avoid discussion of product liability issues in the discussion of tort liability that follows. Those are matters of liability that arise from injuries to a victim stemming from the use of products placed in the “stream of commerce” by a producer. Product liability is often of interest to strict liability theorists, as it is one of the few pockets of accidental tort law still governed by strict liability. These matters can be separated from those where strangers are involved in an accident, insofar as different forms of analysis can be brought to bear on accident and product liability cases, respectively. Coleman has argued

that the “Contract” model of allocating risk and liability is clearly appropriate for product liability cases, whereas it is not at all obvious that it lends itself to the formulation of principles of general tort law.⁹¹

The Contract model of tort law is an account that explains tort law principles as rules for filling gaps in inchoate contracts. Tort principles, under this model, assume a contract between disputing parties, and create clauses that would resolve the dispute, as the parties would have selected them during negotiation in the absence of whatever constraints prevented the formation of a clear and complete contract in the first place. Such a model is welcome for the resolution of actual contract disputes, Coleman maintains. It is desirable that disputes that arising from vague or incomplete contracts be resolved by determining how rational, self-interested parties would have jointly clarified or extended their contracts. Such an approach will bring about an efficient resolution to the dispute. It can also be thought of as facilitating a reasonable extension of voluntary commitments, rather than as imposing an involuntary transaction.

Within our legal framework, product liability matters fall under the purview of tort law, rather than contract law. Yet, the Contract model “lends itself well to the analysis of product liability issues, where the disputing parties, producers and consumers, already stand to one another in an actual contractual relationship.”⁹² The coverage of the contract as ratified does not extend to the circumstances from which the dispute arose, but the Contract model directs the court to consider how contracting parties would have completed their agreement in the absence of the prohibitive costs of transacting, in time and resources, that would be expended in formulating a more extensive contract. The producers and the consumers of a given product stand to one another in a contractual

relationship, however tenuous, in virtue of the sale of the product. A sales contract might not clearly allocate the risk of loss stemming from the use of the product. The formulation of such terms would likely require extensive investigation of potential risks associated with the use of the product, the completion of which might make the entire transaction prohibitively expensive. With the benefit of hindsight, however, a court might be a better position to allocate such risks as the contracting parties would have.

Product liability issues surely do not exhaust the scope of tort law, and we can be skeptical that the rest of tort of law should be handled with this sort of analysis.⁹³ Rather than simply extending the contractual framework in which the relevant parties already find themselves, the application of the contract model to automobile accidents and other incidents involving virtual strangers imposes a contractual framework upon them where none previously existed. It should suffice to say for now that the argument in support of the use of the Contract model in product liability cases gives us no reason to apply it to the whole of tort law.⁹⁴

It is for this reason that we are excluding issues and examples associated with product liability. Those matters employ criteria that have not yet been shown to be applicable to generic accident cases. By introducing cases, principles and intuitions tied to product liability, we are in danger of begging important questions, or making matters ever more confusing.

This concludes our introduction to the wealth maximization norm and its putative application to accidental tort law. It is now time to turn to arguments raised in support of it. In the next chapter, we will consider two lines of argument that aim to reconcile the Assignment Principle with a regard for the primacy of individual autonomy.

¹ Aristotle, *Nicomachean Ethics*, trans. Martin Oswald (New York: Bobbs-Merrill, 1962), Book V, ch. 4, sec. 1131b, line 25.

² The term “tort” is derived from the Norman word for a “wrong.” It is defined more narrowly than that linguistic antecedent, generally referring only to civil, as opposed to criminal, wrongs arising outside of contractual contexts. George E. White, *Tort Law in America: An Intellectual History* (New York: Oxford 1980), xi.

³ Richard Posner. “The concept of corrective justice in recent theories of tort law,” *Journal of Legal Studies* 10 (1981): 187-206. While Posner recognizes that different criteria for wrongful conduct may well be consistent with Aristotle’s norm, he contends that other authors have merely appropriated the term “corrective justice” to couch their respective theories of liability. See, e.g., Richard Epstein, “Causation and corrective justice: a reply to two critics,” *Journal of Legal Studies* 8 (1979): 477, 496, Jules Coleman, “Justice and the argument for no-fault,” *Social Theory and Practice* 3 (1975): 161, 171-178. At any rate, these interpretations of Aristotle’s concept of corrective justice are widely divergent, and there is no definitive account of Aristotle’s criterion of wrongfulness. Therefore, we will treat the notion of wrongfulness as schematic until the next chapter. Indeed, Jules Coleman has since conceded that the principle of corrective justice lacks substance without an underlying normative theory. See Jules Coleman, *Risks and Wrongs* (New York: Cambridge, 1992), 329-332.

⁴ Some important reasons for distinguishing between corrective justice and distributive justice will be discussed in Chapter Three, pages 120-123.

⁵ Coleman, *Risks and Wrongs*, 234

⁶ *Ibid.*, 235.

⁷ Summary definitions of a number of concepts and principles can be found in the Appendix on page 191.

⁸ Ronald Coase, “The problem of social cost,” *Journal of Law and Economics* 3 (1960): 1-44.

⁹ William Landes and Richard Posner, *The Economic Structure of Tort Law* (Cambridge: Harvard University Press 1987).

¹⁰ Richard Epstein, “A theory of strict liability,” *Journal of Legal Studies* 2 (1973): 151-204.

¹¹ George Fletcher, “Fairness and utility in tort theory” *Harvard Law Review* 85 (1972): 568.

¹² See Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard 1985), chapters 12 and 13, Jules Coleman, "Efficiency, Auction, and Exchange," in *Markets, Morals and the Law* (New York: Cambridge, 1988).

¹³ Charles Fried, *Right and Wrong* (Cambridge: Harvard 1978), 28.

¹⁴ We will explain the notion of an indifference curve carefully on pages 26-27.

¹⁵ Jeremy Waldron, "Moments of Carelessness and Massive Loss," in *Philosophical Foundations of Tort Law*, ed. David Owen (New York: Oxford, 1995), 396-97.

¹⁶ *Ibid.*, 405.

¹⁷ *Ibid.*, 406.

¹⁸ *Ibid.*, 406.

¹⁹ Fowler Harper and James Fleming, *The Law of Torts* (Boston: Little, Brown, 1956), vol. 1, sec. 1.1. We will discuss these areas of law in Chapter Two, pages 58-59 and 70-73.

²⁰ 248 N.Y. 339 (1928).

²¹ 248 N.Y. 339, 340 (1928).

²² 248 N.Y. 339, 349 (1928).

²³ Harper and Fleming, *The Law of Torts*, sec. 14.1.

²⁴ Harper and Fleming, *The Law of Torts*, sec. 12.2.

²⁵ 60 Mass. 292 (1850).

²⁶ George Fletcher, "Fairness and utility in tort theory," *Harvard Law Review* 85 (1972): 563.

²⁷ *Ibid.*, citing Henry Terry, "Negligence," *Harvard Law Review* 40 (1915).

²⁸ *U.S. v. Carroll Towing*, 159 F.2d 169 (2d. Cir. 1947).

²⁹ Oliver W. Holmes, *The Common Law* (Boston: Little, Brown 1963), 87-89.

³⁰ *Ibid.*, 89.

³¹ Richard Posner, "A theory of negligence" *Journal of Legal Studies* 1 (1972): 32. Posner drew that conclusion in this essay, on the basis of his survey of 1528 American appellate court opinions rendered between 1875 and 1905.

³² *Ibid.*, 33

³³ Richard Posner, *Economic Analysis of Law: 4th Edition*, (Boston: Little, Brown, 1992), 69.

³⁴ Posner, "A theory of negligence", 42.

³⁵ In chapter four, where I undertake a defense of a limited use of a negligence standard, I will argue that foreseeability, as a negligence condition for accident liability, should not be understood as a mere function of the likelihood and gravity of harm. Rather, it ought to be weighed against the cost of ascertaining such harm.

³⁶ Guido Calabresi, *The Cost of Accidents* (New Haven: Yale University Press, 1970), 24-26.

³⁷ *Ibid.*, 26-28.

³⁸ Guido Calabresi and D. Hirschoff, "Toward a test for strict liability in torts", *Yale Law Journal* 81 (1972): 1060-64.

³⁹ Richard Posner, "Strict liability – a comment," *Journal of Legal Studies* 2 (1973): 205.

⁴⁰ Ronald Coase, "The problem of social cost," *Journal of Law and Economics* 3 (1960): 1-44.

⁴¹ We assume here that Railroad's shipping enterprise would still be profitable whether or not it incurs the expense of using spark guards.

⁴² In saying that Farmer will be no worse off, we assume that Farmer would otherwise be indifferent if asked to choose between retaining the crops having their market value in cash.

⁴³ Harper and Fleming, *The Law of Torts* sec. 1.1.

⁴⁴ Coleman, "Efficiency, auction, and exchange", 70. So a change in the rule of liability will not lead to a conversion in the use of resources if the resources had been previously put to their most valuable use. However, as Harold Demsetz ("When Does the Rule of Liability Matter?" *Journal of Legal Studies* 1 (1972):13) points out, a change in the rule of liability can bring about a change in the value of property. After Farmer and Railroad transact, the resources of each party will be deployed in the same way no matter how the right to emit sparks is allocated. However, the allocation of this right will affect the value

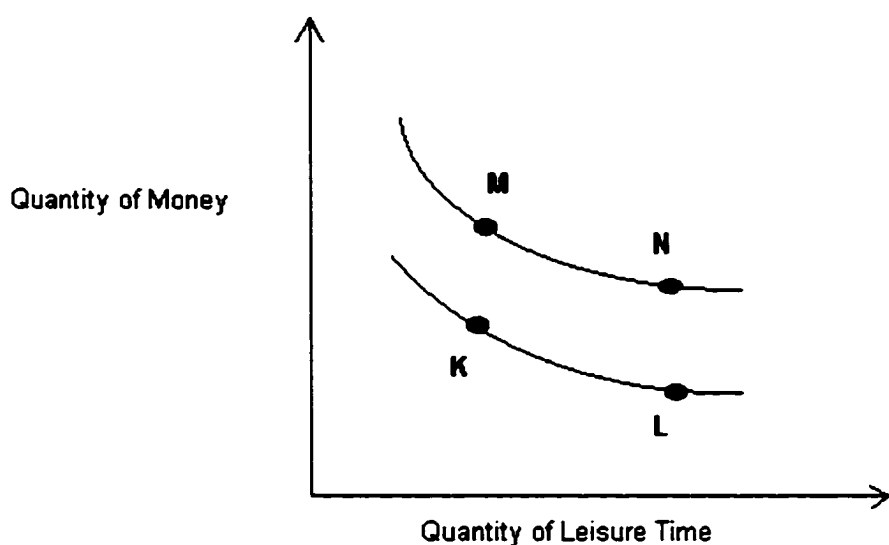
of Farmer's land and the value of Railroad's freight concern. The value of the farmland will be higher if the right is allocated to Farmer, no matter whether marginal crop production (MCP) is more valuable than the marginal freight rail activity (MRA). If the MCP is more valuable, then the farmland will be more valuable in virtue of its greater crop yield. If the MRA is more valuable, then the farmland will be more valuable in virtue of the payments from Railroad the owner will receive. Likewise, the value of the freight enterprise will be higher if the right is allocated to Railroad, no matter whether marginal crop production is more valuable than the marginal freight rail activity. If the MCP is more valuable, then the freight enterprise will be more valuable in virtue of the payments from Farmer the owner will receive. If the MRA is more valuable, then the freight enterprise will be more valuable in virtue of the increased freight activity it can undertake without the risk of incurring liability. Given a rule of liability that would firmly allocate the right to emit sparks and the absence of all but negligible transaction costs, we should expect an adjustment in the values of the properties related to the interaction. The Coase theorem, then, does not show that parties involved in a costly interaction are unaffected by the choice of a liability rule. It only shows that the way in which they deploy their resources will be unaffected.

⁴⁵ See Vilfred Pareto, *Manuel D'Economie Politique*, 2d ed. (1927), excerpted in *Utility Theory: A Book of Readings*, ed. by Alfred Page, (New York: Wiley, 1968), 168-181, 375-383.

⁴⁶ Cardinal utility function is an assignment of numerical values to an agent's preferences that has two numerical properties. First, it possesses the expected utility property, i.e., the agent's preferences can be represented so that the expected utility of a lottery is the sum of the utilities of the prizes weighted by the probabilities of winning them. Second, the expected utility function that represents the agent's preferences is unique up to a positive affine or linear transformation. If a function U represents an agent's preferences and has the expected utility property, then so will all and only positive affine transformations of U . Daniel Hausman and Michael McPherson. *Economic Analysis and Moral Philosophy*, (New York: Cambridge University Press, 1996), 30-33.

⁴⁷ Hausman and McPherson, *Economic Analysis and Moral Philosophy*, 87-90.

⁴⁸ *Ibid.*, 90-91. The figure below illustrates the concept of the indifference curve.



This graph depicts “upper” and “lower” indifference curves for a certain individual A. Points K, L, M, and N, representing consumption bundles, are indicated on the curves. In this illustration, we suppose that each bundle represents a combination of given quantities of money and leisure time. Bundles at higher positions on the graph contain greater amounts of money; bundles further to the right on the graph contain greater amounts of leisure time. Bundle N, for instance, contains more money and more leisure time than bundle K. Bundle M contains more money but less leisure time than bundle L. Yet, the position of bundle M on a higher indifference curve than bundle L indicates that A would prefer to substitute M for L. For A, then increase in money would more than offset the loss of leisure time. On the other hand, A is indifferent to substituting N for M. The gain in leisure time resulting from that shift would offset the loss of money, but A ultimately prefers N no more and no less than M.

⁴⁹ This efficiency concept was introduced more or less independently by Nicholas Kaldor and John Hicks. See Nicholas Kaldor, “Welfare propositions of economics and interpersonal comparisons of utility,” *Economic Journal* 49 (1939): 549, “A note on tariffs and the terms of trade,” *Economica* 7 (1940): 377; John R. Hicks, “Foundations of welfare economics,” *Economic Journal* 49 (1939): 696.

⁵⁰ Calabresi, *The Cost of Accidents*, 27.

⁵¹ Calabresi, *The Cost of Accidents*, 27.

⁵² Coase, “The problem of social cost”, 28.

⁵³ Coase, “The problem of social cost”, 23.

⁵⁴ Richard Posner, *The Economics of Justice* (Cambridge: Harvard, 1985), 62.

⁵⁵ See Richard Posner, *The Economics of Justice* (Cambridge: Harvard, 1985), Chapter 3.

⁵⁶ Coleman, "Efficiency, auction, and exchange", 83.

⁵⁷ Coleman, "Efficiency, auction, and exchange" 86.

⁵⁸ Jules Coleman, "Efficiency, utility, and wealth maximization" in *Markets, Morals and the Law* (New York: Cambridge, 1988), 111.

⁵⁹ The situation becomes more complicated when more than one party is threatened by Railroad. Suppose there are two farmers, Farmer₁ and Farmer₂, who own adjacent plots both adjacent to the railway. Suppose there is a contributory negligence rule (see next section) that shields Railroad from liability when a farmer's precaution (the protective fence) is cheaper than railroad's precaution. If the individual cost of erecting each fence is each greater than the cost of spark guards, then the contributory negligence rule would not be relevant. Suppose, however, that Farmer₁ and Farmer₂'s fences each cost \$90, and the cost of spark guards is \$100. Suppose further that the expected harm to each farmer is \$110. Now if we understand negligence as a relation to a single party, then we would conclude that each farmer would be contributorily negligent if they failed to erect fences, since their precautions are each cheaper than Railroad's. This is clearly an inefficient principle of liability, since \$180 would be spent to prevent damage that could have been prevented at a cost of \$100. In order to achieve efficiency, the court would not weigh the cost of Railroad's precaution against the expected harm to each farmer in turn. Rather, the cost should be weighed against the total expected harm in the absence of the precaution. So Railroad's burden would weighed against \$200, the total expected crop damage to Farmer₁ and Farmer₂ (we assume that the levels of expected harm to them are independent). One way of explaining why it is more efficient to allocate the burden of precaution to the Railroad is to compare burdens and harms as ratios. Railroad would be negligent, and neither Farmer₁ nor Farmer₂ would be contributorily negligent, because the ratio of Railroad's precaution to expected harm without the precaution (100:200) is smaller than either farmer's (90:100).

⁶⁰ William Prosser and W. Keeton, *Prosser and Keeton on the Law of Torts* (St. Paul: West Pub. Co., 1984), sec. 65.

⁶¹ *Butterfield v. Forrester*, 11 East 60, 103 Eng. Rep. 926 (1809); cited in Richard Epstein, *Cases and Materials on Torts* 5th Ed (Boston: Little, Brown, 1990), 279.

⁶² Prosser and Keeton, *Prosser and Keeton on the Law of Torts*, sec. 67.

⁶³ *Ibid*, sec. 68.

⁶⁴ *Ibid*, sec. 68.

⁶⁵ *Ibid.*, sec. 68.

⁶⁶ *Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479 (1929).

⁶⁷ 250 NY 479, 483 (1929).

⁶⁸ Coleman, "Efficiency, auction, and exchange", 86.

⁶⁹ *Ibid.*, 87.

⁷⁰ *Ibid.*, 87-89.

⁷¹ Thomas Miceli, *Economics of the Law* (New York: Oxford, 1997), 19.

⁷² *Ibid.*, 19.

⁷³ *Ibid.*, 19-20.

⁷⁴ Posner, *Economic Analysis of Law*, 70.

⁷⁵ *Ibid.*, 70.

⁷⁶ Coleman, *Risks and Wrongs*, 248; Steven Shavell, *Economic Analysis of Accident Law* (Cambridge: Harvard, 1987), 73-104; Calabresi, *The Costs of Accidents*, 286-7.

⁷⁷ Coleman, *Risks and Wrongs*, 48-9.

⁷⁸ See Fletcher, "Fairness and utility in tort theory", David Owen, "Philosophical foundations of fault in tort law," in *Philosophical Foundations of Tort Law*, ed. David Owen (New York: Oxford, 1995), 201-228.

⁷⁹ Posner *The Economics of Justice*, 48.

⁸⁰ Henry Sidgwick *The Methods of Ethics* 7th Ed. (London: Macmillan 1963). [This edition was originally published in 1907.]

⁸¹ Posner, *The Economics of Justice*, 54.

⁸² *Ibid.*, 55.

⁸³ *Ibid.*, 79.

⁸⁴ *Ibid.*, 54.

⁸⁵ *Ibid.*, 56.

⁸⁶ *Ibid.*, 66.

⁸⁷ Coleman, "Efficiency, utility, and wealth maximization", 111; T. Scitovsky, "A note on welfare propositions in economics" *Review of Economic Studies* 9 (1941): 77-88 .

⁸⁸ Posner, *The Economics of Justice*, 60.

⁸⁹ *Ibid.*, 61.

⁹⁰ Value is not to be equated with price. Within a market framework, the price of a good is its value to the marginal purchaser. Since intramarginal purchasers would be willing to pay more than its price, a good's value to them may be higher than its market price. Posner, *The Economics of Justice*, 61.

⁹¹ Coleman, *Risks and Wrongs*, 418-19.

⁹² *Ibid.*, 419.

⁹³ *Ibid.*, 419.

⁹⁴ *Ibid.*, 187.

Chapter Two

In the previous introductory chapter we reviewed the concept of wealth maximizing tort rules. We refer to the normative principle for the efficient allocation of tort losses as the Assignment Principle. It holds that rights, and liability, may be allocated by courts on the basis of how they would be allocated by a market but for prohibitive transaction costs.¹ A basic objection to this principle is that it unjustly threatens individual liberty and autonomy for the sake of a social welfare.² In this chapter we will consider the debates arising from two lines of argument raised in response to this objection in order to support the Assignment Principle. They represent the classic challenges from the economic approach against the view that respect for individual inviolability is antithetical to liability rules that employ efficiency criteria to permit some harms to go uncompensated. The first line of argument comes from Ronald Coase, who posited a sort of reciprocity of harm that purports to confound an intuitive understanding of injurers and victims. The second comes from Richard Posner, who maintained that we have no fine-grained understanding of the content of individual rights without recourse to a cost-benefit analysis. After reviewing the ensuing debates, we will see that both approaches were ultimately unsuccessful.

Coase and Reciprocity

As the issue of whether wealth-maximizing tort rules offend individual integrity is of primary concern here, we must recognize that any argument in the affirmative, asserting that any tort rule that condones one party's violation of another's sphere of autonomy is unjust, must be able to clearly discern an injurer and a victim. This may

seem simple enough, but Ronald Coase introduced a line of argument in order to show that no such inquiry is that simple.

Ronald Coase's argument in support of cost-benefit analysis in tort law, is essentially grounded in a notion of reciprocity. Whereas Coase asserted, as discussed in the previous chapter, that when certain market conditions obtain, the question of how rights should be allocated is arbitrary from the point of view of efficiency, he also makes the strong claim that efficiency is the only tangible criterion for allocating accidental losses. In a seminal piece, 'The Problem of Social Cost', he asserted that

[t]he traditional approach has tended to obscure the nature of the choice that has to be made. The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would be to inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm.³

Since we are always posed with this dilemma, the argument goes, the notion of unidirectional causation of harm is problematic. On his view, we lack a coherent notion of causation that allows us to identify one party solely as an injurer, and not also as a potential victim, and to identify the victim as solely that and not also a potential injurer, as a right infringer.

Coase did not present his argument with the intention of formulating a theorem that would motivate a vast body of literature in law and economics. Rather, his aim was to address an approach to dealing with externalities defended by the welfare economist A.C. Pigou.⁴ Pigou sought to explain how externalities ought to be internalized, i.e., how the inefficiencies resulting from the external effects of productive activity could be eliminated. To eliminate such inefficiencies, Pigou maintained, a tax system would levy

heavily against profits stemming from externality-heavy activity, thereby insuring that production levels did not rise above an inefficient level.

Pigou concludes that externalities should be internalized by forcing the parties that create them, and cause damage to neighbors, to bear the cost of that damage. This conclusion rests on the premise that the producer of a negative externality causes harm to the neighbor that suffers a loss in virtue of the externality.⁵ It is the phenomena of such natural, nonreciprocal causal relations that make it possible to identify an injurer and a victim. Without such readily identifiable relations, it becomes easier to see either party as a generator of externalities. Coase, as well as many of the adherents of the economic approach to law, do not recognize such nonreciprocal causal relations.⁶

There are diverging interpretations of this “reciprocity” problem within the literature on causation and tort law.⁷ Under a purely economic interpretation, supported by the fact that Coase was deeply concerned with the efficient allocation of resources, issues of causation are understood as irrelevant to the determination of the efficient allocation of entitlements among disputing parties. There is also an interpretation that bears moral significance, attributed to commentators such as Richard Epstein.⁸ It attributes to Coase a sort of skepticism about causality. This is a skepticism about the plausibility of identifying one party as the causal agent in an interaction of two parties. On any plausible account of causation, the interpretation goes, we can understand any interaction as jointly caused. Guido Calabresi shares this skepticism about the role of causation in determinations of liability, dismissing “cause” as a weasel word whose application is wholly irrelevant to a fair and efficient system of accident law.⁹ Therefore, rather than simply being irrelevant from the point of view of efficiency, causality will not help us to

allocate responsibility among parties, as all parties may be understood to be causally responsible.

On Coase's view, all accidents involving two parties are jointly caused. If a supposed 'injurer' is made to compensate his 'victim', we can always point to some activity of the victim that made the injury possible. We might understand a 'victim' as having causally contributed to an accident by placing himself in harm's way. It is in virtue of this causal role that the injurer is made to bear a loss when he is forced to tender compensation, and is thereby harmed by the 'victim', on this view. It is on this basis that, for Coase, the potential for harm in any interaction is always understood as reciprocal.

For an example, let us return to the case of *Farmer v. Railroad*. Suppose it would be more efficient to allocate the right to emit sparks to Railroad, as the cost of reducing the risk would exceed the expected harm. One might still find that a harm is nonetheless perpetrated by Railroad when its activity results in the burning of Farmer's crops. The doctrine of reciprocity tells us, however, that Farmer harms Railroad when Farmer successfully deters Railroad's activity in virtue of its right to collect compensation. The harm here consists in the imposition of costs upon Railroad in the form of either the expense of prophylactic measures or the loss of economic returns from the activity. Farmer imposes losses on Railroad by using its property in a way that is incompatible with Railroad's use of its own property, thereby playing a significant causal role and sharing responsibility for the injury.

If this line of argument is successful, then it confounds the liberal position that rejects liability rules permitting losses from injuries to go uncompensated for the sake of

social utility. If in fact a court's only choice is that of how to distribute losses among parties, such that one party or another is harmed, and it cannot simply discern a single harm and rectify it, then the court has no choice but to allow some harms to go uncompensated.

Epstein's Strict Liability Theory

The classic response to Coase's argument comes from Richard Epstein, who has maintained that the distribution of rights informs our judgments of causal responsibility in a way that confounds Coasean reciprocity. He further maintains that, in considering how we attribute causal responsibility, we should recognize a strict liability regime for accidental torts as the most just. He maintains that the negligence standard in general, and Judge Hand's interpretation of that standard in particular, which represents an early form of the Assignment Principle, are unjust.¹⁰ The use of the Hand formula, as discussed in Chapter One, excuses an agent from harms to person or property otherwise tortious when the costs to the agent of the harm are outweighed by the expected benefits.¹¹ It will be helpful to introduce Epstein's argument for strict liability, in order to demonstrate the significance of the notion of causal responsibility he invokes.

The Hand formula is not applied in every area of tort law. Where the taking or destruction of property is deliberate, rules approximating strict liability are more likely to be applied. Such rules, Epstein maintains, determine a more just allocation of losses than does the Hand formula. He uses the case of *Vincent v. Lake Erie Transportation Co.* (1910) to illustrate this point.¹² There, the defendant ship captain ordered his ship to remain moored to a dock, in order to protect it from an impending storm, despite the plaintiff dock owner's refusal to permit the ship to stay. The ship did remain moored, and

the heavy wind and tides caused the ship to impact upon the dock repeatedly, causing \$500 in damage to the dock owner's property. The defendant's conduct was entirely reasonable, the court acknowledged, insofar as his decision minimized the expected aggregate damage to the ship and dock. Nevertheless, the defendant was ordered to compensate the plaintiff for the damage to the dock.

Clearly, the Hand formula cannot account for the imposition of liability in the *Vincent* case, as the relevant numbers clearly favored the defendant. The magnitude of the expected harm to the plaintiff was small in comparison to the substantial burden the defendant would have borne had he complied with the defendant's request to leave. Epstein maintains, on the other hand, that the *Vincent* decision can be grounded in a principle requiring agents to bear responsibility for the costs they impose as though they were their own. If the defendant owned the dock as well as the ship, it would have made the same decision under the same circumstances. It would keep its ship moored in order to minimize its losses from the storm. Yet, unless the company carried insurance, it would be expected to bear the costs of its decision and use its own resources to repair the dock. The company could not claim that it should be relieved of these costs because it acted reasonably. It is just as unreasonable, Epstein maintains, to allow an agent to relieve itself of damage costs by acting so as to externalize such losses.

The action in tort in effect enables the injured party to require the defendant to treat the loss he has inflicted on another as though it were his own. If the Transportation Company must bear all those costs when it damages its own property, then it should bear those costs when it damages the property of another. The necessity may justify the decision to cause the damage, but it cannot justify a refusal to make compensation for the damage so caused.¹³

The *Vincent* decision was not the outcome of a negligence suit. The action was brought in trespass, a tort that carries a different standard of liability. A successful trespass suit requires an intentional injury to persons, land or chattel 'immediately and directly caused by the forcible act of another.'¹⁴ An injury is found to be intentional when the trespasser intentionally commits an invasion. A trespasser need not know that another's interest is being or will be affected when he intentionally performs an act that interferes with peaceful possession or sound physical condition of that interest. That he acted under the erroneous belief, for instance, that he himself owned the violated property does not make his conduct toward that property unintentional. Further, it does not matter that the trespasser was careful in attempting to ascertain any such mistake. An injury is found to be direct when no intervening force is involved. Moreover, the harm caused must be direct. A trespasser might directly invade another's property, for instance, by casting water on it. On the other hand, a charge that a defendant constructed a spout, with the result being a flow of water onto the plaintiff's land, could not sustain a trespass suit.¹⁵ Such harm to the plaintiff would be considered indirect. Under older forms of common law pleading, a successful action could only be brought on "case." Case as a cause of action evolved into modern nuisance law,¹⁶ which will be discussed further below.

When a plaintiff establishes these elements of an action in trespass, he has established a *prima facie* case for the trespasser's absolute liability for the value of any real damage. Alternatively, the trespasser could be liable for "nominal damages", whereby he would owe the plaintiff a nominal sum even when no tangible damage was inflicted in the act of trespass, in order to vindicate the interests of the plaintiff that were violated.

The case for liability is *prima facie* in the sense that it can be rebutted if the defendant can successfully invoke one of several defenses to trespass actions recognized by the common law of trespass.

Of particular concern here is the defense of private necessity. An intruder has the privilege of trespassing upon another's property just in case doing so is reasonably necessary to prevent grave injury to the defendant or his property and the trespass does not threaten equal or greater damage to others.¹⁷ This defense allows a defendant to escape liability for nominal damages. However, the trespasser is properly held liable for any damage actually caused. Because this defense does not completely preclude liability, the privilege to trespass upon land or chattel out of necessity is understood as incomplete.¹⁸ It is nonetheless a privilege insofar as a property owner loses the privilege of resisting an invasion when it is performed out of necessity.¹⁹ Under circumstances similar to those of the *Vincent* case, the defendant dock owner in the case of *Ploof v. Putnam* (1908) was held liable for damage the plaintiff ship owner suffered when the dock owner unmoored the ship, which then ran aground during a storm.²⁰ The plaintiff docked on the defendant's property without permission in order to protect his ship from that storm, which posed a serious threat to the ship and its crew. If it had not been necessary for the plaintiff to dock with or without permission, the dock owner's privilege of resisting invasion would have entitled him to cast off the vessel without incurring liability for any resulting damage. Because the plaintiff trespassed out of necessity, the defendant lost that privilege. Yet the loss of the privilege would not have affected the defendant's right to recover any damage to the dock caused by the ship, had it remained moored.

This treatment of necessity as a defense illustrates a distinction recognized by philosophers such as Joel Feinberg and Judith Jarvis Thomson. Thomson introduced the distinction between rights infringements and rights violations. When we infringe upon a person's right, "we violate his right if and only if we do not merely infringe it, but more, are acting wrongly, unjustly, in doing so."²¹ Mere infringements are possible unless we find that every infringement is wrong or unjust. Joel Feinberg, however, maintains that there are infringements that, far from being unjust, are clearly permissible. The most plausible candidates for such permissible infringements are certain intrusions upon property entitlements. One such candidate is presented in his "backpacker" scenario:

Suppose that you are on a backpacking trip in the high mountain country when an unanticipated blizzard strikes the area with such ferocity that your life is imperiled. Fortunately, you stumble onto an unoccupied cabin, locked and boarded up for the winter, clearly somebody else's private property. You smash in a window, enter, and huddle in a corner for three days until the storm abates. During this period you help yourself to your unknown benefactor's food supply and burn his wooden furniture to keep warm. Surely you are justified in doing all these things, and yet you have infringed the clear rights of another person.²²

Under William Frankena's view, following W.D. Ross, such property rights might be understood as *prima facie* rights. Such rights are defeasible when they conflict with overriding moral considerations.²³ When exigent circumstances permit action that is contrary to a right, that right has no bearing on the permissibility of the action. However, Feinberg maintains that we should not understand the cabin owner's property rights as mere *prima facie* rights, insofar as we may recognize duties stemming from the breach of the cabin.

We would not think it inappropriate to express our gratitude to the homeowner after the fact, and our regrets for the damage we have inflicted on his property. More importantly, almost everyone would agree that you owe *compensation* to the homeowner for the depletion of his larder, the

breaking of his window, and the destruction of his furniture. One owes compensation here for the same reason one must repay a debt or return what one has borrowed.²⁴

That the assignment of liability for injuries is one way in which an owner's interest in his property can be protected outside of the outright prohibition of interference demonstrates the relevance of a distinction articulated by Guido Calabresi and Douglas Melamed.²⁵ They distinguished property rules from liability rules. A property rule proscribes the removal of an entitlement by any means but a "voluntary transaction in which the value of the entitlement is agreed upon by the seller."²⁶ When the legal system allocates entitlements guarded by property rules, it does not determine the value of the entitlement. Valuation is expected to be the result of bargaining between the holder of the entitlement and the party seeking to acquire it. On the other hand, the legal system does assign a value to an entitlement when it is to be protected by a liability rule.²⁷ A liability rule permits a party to disrupt an entitlement or remove it from its holder, but it requires that the party pay the holder the assigned value.²⁸

Strictly speaking, then, liability rules govern the allocations of losses. A judgment imposing liability for an action need not reflect a judgment about the justification of that action. This aspect should not be overlooked, lest the theory be understood as strictly a theory of justifiable action. The imposition of liability on an injurer need not reflect the judgment that the conduct in question was unjustified. Rather, such an imposition is consistent with the view that even parties who take the most reasonable course of action may not be excused from bearing the cost of such conduct.²⁹

While injunctions might protect individual autonomy more fully, their complete enforcement might come at too high a cost. Under conditions of uncertainty, where many

potential harms are unforeseeable, a comprehensive scheme of property rules that enjoined any conduct that posed a credible threat to rights would sharply curtail the liberty of other agents. Rather than impose this cost, the legal system should choose to enforce liability rules under such circumstances, in order to fully safeguard individual autonomy.³⁰

Liability rules, then, would protect individuals against right infringements wrought by intentional trespasses, such as that committed in the *Vincent* case. But Epstein further maintains that the principle underlying the decision in that case, that a defendant must bear the costs of damage inflicted upon others as though it were self-inflicted damage, applies not only when the harm caused was expected with near certainty, but also when the defendant creates a mere risk of harm that results in an injury. The creation of a risk of injury that is less than 100% is not distinguishable in principle from an act that is certain to result in injury. It is just to treat injuries resulting from conduct that only posed a mere risk of harm as though the injurer chose to bear a risk to his own interests.³¹ Even if the risk of the injury is considered reasonable under a criterion of negligence, the creation of the risk allows the injurer to externalize a cost accruing from his own conduct that he would be responsible for if the damaged interest were his own. That the injury was expected with less than certainty before the fact does nothing to mitigate the injurer's responsibility to internalize the costs he imposes.³²

Causation

An agent illicitly externalizes costs, then, when its conduct causes damage to others. In response to Coase's argument from reciprocity, Epstein maintains that we can understand the meaning of causal claims and apply them in order to vindicate our

common sense notions of responsibility for harm. As Posner explains, Epstein maintains that the meaning of causal claims is understood in light of paradigmatic examples such as the proposition 'A hit B': the differentiation of A and B into subject and object linked by a transitive verb shows that A is the cause of the injury and not B.³³ Instances of causality can be sorted into 'paradigms', the recognition of which comprises our understanding of causal relationships among agents that guide our ascription of responsibility..

This informal account of causation reflects the treatment of the concept throughout much of the common law.³⁴ Courts have wrestled with the issue of how activity may be recognized as playing a significant causal role in an injury, as a matter of brute fact and not as a simple ascription of a legal responsibility. The common law does not clearly articulate any doctrine putting forth the necessary and sufficient conditions for the causal role of negligence that has withstood scrutiny. Tests of causation have been employed by courts with reasonable success, however. The 'but for' or '*sine qua non*' test holds that a defendant's conduct is a cause of the event in question if the event would not have occurred but for the conduct, and that the conduct is not a cause if the event would have occurred without the conduct's occurrence.³⁵ This test has yielded satisfactory, uncontroversial results in many cases, but a difficulty arises when it comes to events that are in a sense 'overcaused.' If A shoots B, who has already been fatally poisoned by C, then A's action fails the 'but for' test of causation, despite the impression that the shooting 'played so important a part in producing the result that responsibility should be imposed upon it.'³⁶

In light of this difficulty, a broader test for causation has gained wide acceptance in the common law. The 'substantial factor' rule holds that a defendant's conduct is the

cause of an event if it was a material element and a substantial factor in bringing it about, where such significance is a matter of fact to be settled by a jury or the designated finder of fact at trial. The acceptance of this rule reflects the view that the notion of ‘substantial factor’ is ‘sufficiently intelligible to furnish an adequate guide in instructions to the jury, and it is neither possible nor desirable to reduce it to any lower terms.’³⁷ Rather than reflecting any sort of conceptual analysis of causation, this ‘test’ simply brings the causal intuitions of the finder of fact to bear on an event.

Epstein maintains that the account of causation underlying his theory of strict liability is not intended as a broad scientific or philosophical account. The level of generality he sought is decidedly low, insofar as he found that it would suffice to invoke a certain paradigm, that of ‘invasion of person or property.’ The account simply equates such forceful invasion with the causing of harm.³⁸ This is certainly not a philosophically illuminating account of causation; it simply helps us to bring our intuitions to bear in recognizing actionable right infringements.

Whereas Coase’s argument for reciprocity rests on a supposed difficulty with discerning nonreciprocal causal relations, Epstein showed that we do in fact identify such relations all the time, and doing so does not require a deep philosophical or scientific account of causality. Coase would indeed have a case for reciprocity if such a deep account was needed, but it is in fact sufficient that we can use our intuitive grasp of ‘causal paradigms’ to recognize instances of nonreciprocal causality. When A hits B’s face with his fist, our grasp of the causal paradigm of hitting, for instance, allows us to discern A’s causal influence on B. On the other hand, we have no causal paradigm that would redeem the claim that B hit A’s fist with his face. There is also no widely shared

paradigm to redeem the claim that B's enjoining A from hitting him caused A's fist to not hit him.

In addition to the paradigm of force, there are other causal paradigms that give rise to responsibility for harm. Harm brought by compulsion or inducing fright certainly implicates responsibility, Epstein maintains.³⁹ Of particular interest here, however, is the paradigm of "dangerous conditions." A paradigmatic instance of causal responsibility for an injury obtains when one, rather than directly exerting force against another, creates a dangerous condition that is a substantial factor in that injury.⁴⁰ We would be ready to ascribe causal responsibility for an accident wherein someone slipped on a banana peel to the person who dropped it there. It is true, however, that we might not be able to make sense of the notion of a "dangerous" condition without some account of the extent of probability of the risks they pose, so as to distinguish those conditions from "innocuous" ones that underlie an injury. Yet, Epstein maintains that although the notion of a dangerous condition may be heavily value-laden, considerations of reasonableness that bear on the issue of whether a condition was dangerous do not warrant the use of a negligence rule. There may be circumstances where the creation of a dangerous condition was completely reasonable, under a cost-benefit analysis, but that would not diminish the responsibility of the person who created the condition for injuries it causes.⁴¹

Coleman has criticized Epstein's early effort to ground liability in causation on the grounds that it does not distinguish between wrongful losses and other losses.⁴² That the harm in question amounted to right infringement is critical, but Epstein did not initially acknowledge this. A party may impose losses on another in a way that fits the causation paradigm without acting wrongfully, and one is only to compensate for wrongful losses.

If this were not the case, then we would find that an employer ought to compensate the employee he fires for good cause. Likewise, a business owner would have to compensate the competitor he managed to drive out of business by keeping prices low through more efficient operation. On the other hand, if the employer breached a binding employment agreement with his employee, or if he discriminated against him in a wrongful way, then the harm he caused his employee could well be wrongful and actionable. If the business owner's success could be attributed to a breach of fair trade practices, then the competitor's loss might be compensable. The causation paradigm alone does not allow for these distinctions.

Since his earlier article, however, Epstein has recognized that causation does not suffice to make a loss wrongful and actionable. He now recognizes the necessity for a criterion of wrongfulness for determining when losses must be compensated, such that a loss caused by another, does not necessarily constitute an actionable harm. He did so later, however, when he acknowledged that liability requires an invasion of a right.⁴³ When Epstein first presented his causation paradigm in his earlier article, he did not distinguish between losses caused by others and rights violations. Now, it is an action that causes injury to an individual, under the earlier causal paradigm, in a way that violates the rights of that individual that constitutes a harm for which the injurer owes compensation.

Thus, Epstein's claim that parties must internalize the losses they create rests on his theory of property rights. He makes this justification explicit upon explaining that injuries to property are takings with only partial restoration. "[I]f A cannot take B's property, it follows that he cannot take it, break it, and return the pieces. .What difference

can it make therefore if destruction takes place without the taking?⁴⁴ The destruction of property, whether intentional or unintentional, on Epstein's view, cannot be distinguished from the tort of conversion, i.e., a deliberate taking, that falls within the ambit of strict liability.⁴⁵

Epstein then, is suggesting that we conceive of injuries to entitlements as private takings.⁴⁶ Private takings are treated by the law most commonly as either conversions or trespasses to chattel. Although it deals with interference with peaceful possession and sound physical condition, conversion is distinguished from trespass law. Conversion has been defined as the "unlawful and wrongful exercise of dominion, ownership or control over the property of another to the exclusion of the same rights by the owner, either permanently or for an indefinite time."⁴⁷ The concept applies to interferences with a plaintiff's rights to a chattel so severe as to warrant a forced sale of the chattel to the interfering party. A plaintiff who successfully sues for conversion may force the defendant to buy the chattel he appropriated. Generally, conversion cases do not differ from trespass to chattel cases in principle. Both require intentional, as opposed to negligent interference, with property interests. They only differ in the manner and degree to which possession is compromised. For our purposes here, then, we may understand conversion to be a special case of trespass, where the interference in question is severe enough to warrant a more drastic remedy.

As the law does not make a principled distinction between trespass and conversion, Epstein also groups the two together. Further, as explained above, Epstein understands injurious trespasses as just a particular kind of taking. That such takings constitute right infringements follows from an intuitive understanding of ownership,

which Epstein defines 'in terms of inviolability that in turn suggests absolute protection from all invasion.'⁴⁸ At the very least then, he would maintain then that ownership of a thing entails at the very least a right that it not be taken away.

Wealth Maximizing Strict Liability Rules

Posner, who advocates the Assignment Principle, acknowledges this. It is critical to note that his wealth maximization norms need not endorse a pure negligence rule, where victims are strictly liable for their losses if the injurers were not at fault. As pointed out in Chapter One, while the goals of economic efficiency and wealth maximization can be satisfied by an economic standard of negligence, Posner acknowledges that they can also be satisfied by a strict liability rule accompanied by an economic standard of contributory negligence. Such a scheme will allocate incentives to take efficient precautions. Where potential injurers are to be held strictly liable for the losses they cause, they have an incentive to take precautions when they are cheaper than the expected harm their conduct poses. When they are not cheaper, the efficient outcome is reached when they decline to take precautions and compensate their victims in those instances where the risky conduct causes injury. Yet, the availability of a cost justified precaution to the victim is an opportunity for him to reduce the social cost of the injurer's conduct. A contributory negligence rule, which bars recovery still permitted under strict liability, provides the victim with the incentive to seize that opportunity.

The wealth maximization norm and the Assignment Principle could be reconciled with a strict liability regime so long as such a regime can allow for a contributory negligence rule, where a plaintiff's negligence is determined on the basis of a cost-benefit analysis. We should find, however, that Epstein's theory of strict liability cannot

accommodate such a rule. An economic standard of negligence would recognize as fault on the part of the plaintiff negligence that would amount to contributory negligence by omission that could not be understood as conduct that amounts to a causal role in the accident. Without such a causal role for the victim, the injurer would still bear strict liability for the harm.

Under the wealth maximizing strict liability with contributory negligence rule, a defendant that injured a plaintiff can avoid liability by showing that the plaintiff failed to take a cost-justified precaution against the accident. Returning to the Farmer/Railroad scenario, let us suppose that the only cost-justified precaution against the railroad causing the crops to ignite is the erection of wooden fence upon Farmer's property. It happens that it would be considerably cheaper for Farmer to carry out this prophylactic measure than Railroad. Under a strict liability with contributory negligence rule, the Farmer could not recover from Railroad for crop damage caused by spark emissions if Farmer failed to take this measure. In barring recovery by Farmer on account of that omission, the rule makes it incumbent upon him, unless he wishes to risk greater costs, to incur expenses so as to prevent the would-be injurer from causing harm. Rather than preventing Railroad from externalizing costs to Farmer by inducing him to erect the fence, however, the contributory negligence element simply allows Railroad to externalize the costs of its operations in a different way. By conducting its operations without compensating Farmer under a regime of strict liability with contributory negligence, then, Railroad externalizes costs to Farmer disjunctively. Railroad uses Farmer's property to bear the risks it created, or it induces Farmer to bear costs to reduce those very risks. It follows from the position that if an agent's activity would infringe the right of another, such that he should bear

financial responsibility for the harm caused, then one should bear responsibility for inducing the other party to incur expenses in order to prevent that harm.

Nuisance and Cost-Benefit Analysis

We see, then, that Epstein's tort theory is antithetical to both the Assignment Principle and Coase's reciprocity, which would serve as its moral underpinning. Yet, despite Epstein's understanding of accidental torts as private takings and the principles of trespass law to which he appealed, it is evident that the considerations motivating Coase's reciprocity argument underlie considerable portions of the common law of torts. Indeed, Coase cites numerous nuisance cases that reflect a strong commitment to allocating entitlements strictly on the basis of a balancing of the costs and benefits imposed by incompatible activities. Accordingly, he quotes with approval Prosser on Torts, saying that a person may

make use of his own property or conduct his own affairs at the expense of some harm to his neighbors. He may operate a factory whose noise and smoke cause some discomfort to others, so long as he keeps within reasonable bounds. It is only when his conduct is unreasonable, in light of its utility and the harm which results, that it becomes a nuisance. The world must have factories, smelters, oil refineries, noisy machinery and blasting, even at the expense of some inconvenience to those in the vicinity and the plaintiff may be required to accept some not unreasonable discomfort for the general good.⁴⁹

Coase then proceeds to generalize this judgment about discomfort levels raised by conflicting uses of resources, maintaining that the legal system should always deal with actions that cause harm by balancing that harm against the losses to be expected if the action is prevented. The paradigmatic nuisance cases he invokes tend to reflect this principle. A private nuisance is an activity that interferes with the use and enjoyment of real property, but not necessarily with the possession or security of it. Such stronger

interference constitutes trespass. An activity can be a nuisance as long as it upsets one's right to a reasonable level of enjoyment of property, which could range from the comfort of freedom from a loud barking dog on neighboring land, to freedom from physical interference with the land caused by vibrations or blasting.⁵⁰ That an activity interferes with one's use and enjoyment of land is a necessary condition for a successful nuisance suit. It is not sufficient, however, insofar as a court will consider whether the activity was reasonable. The common law recognizes a defendant's privilege of making reasonable use of her own property to further her own interests as no less important than the plaintiff's same right.⁵¹ Rather than curtailing a defendant's conduct at the first sign that it interferes with the plaintiff's use and enjoyment, a court may expect that plaintiff to endure some inconvenience. Which party must give way for the other's use and enjoyment of their respective entitlement is determined by a comparison of their conflicting interests. It is common for courts to weigh the gravity of the harm or interference suffered by the plaintiff against the utility of the defendant's conduct. Where the latter outweighs the former, the nuisance may be found to be reasonable, and the plaintiff's suit will fail.

Epstein argues that many typical nuisance cases are poor illustrations of causal reciprocity, as the putative harms involved in nuisance cases tend to fall short of satisfying any causal paradigm.⁵² His causal paradigms recognize physical invasions of protected interests that can be understood as takings, and many nuisance activities may not belong to that category. As one's property rights may not extend so far as to entail that neighbors have a duty to refrain from performing annoying activities, that activity need not give rise to *prima facie* claims of strict liability. Epstein maintains that "for legal

purposes the question of causation can be resolved only after there is an acceptance of some initial distribution of rights.’⁶³ Therefore, he contends, Coase’s putative reciprocity seems evident in tort cases only when it is assumed that there has been no such distribution. In many nuisance cases, this assumption obtains.

Coase’s position that we ought to employ the sort of cost-benefit analysis underlying nuisance law more generally assumes that trespasses and takings are not distinguishable in any relevant way from the paradigmatic nuisance cases that motivated Coase’s approach. In fact, trespass and takings, the categories containing those accidental harms that satisfy one of Epstein’s causal paradigms, are distinguishable from the category of nuisance. Trespass and takings disputes implicate rights that are clearly defined and allocated *ex ante* in ways that the entitlements disputed under nuisance cases do not.

Epstein concedes, then, that the paradigmatic nuisance case confounds our ability to bring causal paradigms to bear in recognizing right infringements, insofar as we are unable to discern the relevant right as part of the bundle of rights that comprises one’s entitlement. In the case of the noisy factory to which Coase alluded, for example, we simply don’t have any reasonably robust intuitions or legal principles to support a judgment that a right to be free from bother by moderate, intermittent levels of noise is entailed by ownership, insofar as the right to ‘quiet enjoyment’ does not necessarily entail a duty of silence borne by neighbors. For lack of any such judgment, the allocation of rights to generate or be free of noise, on the basis of cost-benefit analysis, does not offend any prior notions about an initial allocation of rights.

Yet, this gives us no reason to abandon the robust intuition that at least some acts of trespass and conversion can be understood to constitute real interference with entitlements. This intuition is vindicated in many cases by the judgments we make about how one ought to respect another's supposed entitlement, even when interfering with it is justifiable. For example, conversions committed from necessity, or for moral reasons that override the owner's interest in exclusive sovereignty over his property, do not require the consent of the owner. They do, however, require the solicitation of consent, where possible. Although the defendant's decision in *Vincent* to refuse to leave the dock was justified, he was morally obligated to try seek the consent of the plaintiff. The protection from trespass and conversion warranted by this weaker sort of property rule, then, requires effort by one who justifiably interferes with an entitlement to secure consent, and requires consent for all other interferences. To the extent that we recognize such minor duties, we recognize a clear prior allocation of rights.

In paradigmatic cases of trespass and conversion, we recognize that while necessity may give an intruder a right of way to interfere with another's entitlement, that right of way is not absolute. It still entails certain obligations to respect an entitlement in the course of interfering with it, as described in the previous paragraph. On the other hand, no such obligations come into play in the paradigmatic nuisance suit. There, whatever other prior notions about the homeowner's rights we might have, we simply do not see the factory owner as obligated to at least try to negotiate consent to the nuisance-generating activity before commencing it.

Railroad's Rights?

We can envision circumstances wherein one's entitlement would not extend this far. Although Epstein's theory of strict liability holds that injuries to property, such as that caused by Railroad's sparks as they land on Farmer's crops, generally warrant full compensation, it might be objected that we cannot know whether any right was infringed without knowing whose activity was carried on first. If Railroad had been operating its freight operation over the rail line for a period before the farmer bought the land and planted crops, for example, then we might hold that he has a right to continue doing so. Without arguing for this position, which purports to confound the argument for strict liability, I would maintain that it is plausible. However, there is nothing about a theory of rights that allows for one to possess certain rights to use a neighbor's property in certain limited ways that is problematic for a strict liability theory. It could be argued that since Railroad was engaged in its operations, and had been frequently sending sparks over onto the (then unoccupied) parcel of land adjacent to the tracks, for a period, and Farmer was aware of this when he purchased the parcel, then Farmer effectively waived his right to be free of sparks. If the law were to grant the right to Railroad to continue to exercise its privilege to emit sparks, then we could expect the costs of such activity and risks to be reflected in the price of the parcel Farmer purchased. If railroads retain their right to emit sparks when adjacent land is purchased, then that land should be cheaper than otherwise similar land that is more safely situated. Having knowingly enjoyed such a discount, we could understand Farmer to have waived his right to be free from spark emissions.

Even under these circumstances, we should note, there is still nothing resembling Coasean reciprocity. When Railroad may rightly be understood to own the right to emit sparks, we should not consider Farmer as being harmed. Generally, we do not conceive

of injuries caused by conduct that one has an absolute privilege to engage in as harms. We should reasonably expect Farmer to protect his crops, negotiate with Railroad to get it to do so, or scale back his crops, or simply live with the risk. We would treat damage to his crops as a result of a mere risk of doing business, or something he should have taken affirmative steps to prevent. This being the case, we would not conclude that the history of the use of the relevant lands warrants the use of cost-benefit analysis to determine the allocation of losses.

It might be argued further that this account of right infringements is question-begging, insofar as it simply lays down assumptions specifying those actions which constitute interference with entitlements. I maintain that we are not begging any questions, insofar as we need not expect an account of right infringements to serve as a comprehensive theory of rights. While a comprehensive theory of justice might indeed underwrite a radical redistribution of rights, we recognize that under any rights allocation, there are entitlements that may be interfered with. Such interference constitutes an infringement of a right. The rights intuitions we draw upon may be informed and perhaps even supplanted by a comprehensive theory of rights, but to the extent that we have a clear conception about how rights are allocated, we can recognize instances where they are infringed. But if this account of right infringements is correct, we can conclude that the brute fact that accidents and injuries are always jointly caused does not support Coase's allegation that harm is always potentially reciprocal.

When are rights infringed?

Stephen Perry, however, has suggested that we cannot recognize paradigmatic cases of such interference or infringement without invoking judgments of reasonableness.

If he is correct, then Epstein's effort to ground a theory of strict liability in a theory of rights would fail, as the matter of whether one party accidentally infringed another's right might be reduced to the issue of whether the party acted negligently in causing harm. Perry considers "a clear instance of the central paradigm of force", wherein one drives into and damages a parked car.⁵⁴ While the scenario seemingly involves an active injurer who takes something from a passive victim by physical force, Perry points out that such a description does not settle the issue of causal responsibility. After all, the car might have been parked right in the middle of a road, at a point on a stretch of curved road. Supposing that, under such circumstances, the driver of the other vehicle would not have been able to avoid the collision, even if he had been driving at a "safe" speed, we might recognize the individual who parked the car as the one who caused the accident.

Perry anticipates that Epstein would make the same assessment, and would do so by invoking another one of his causal paradigms, that of "dangerous conditions." Recall that this paradigm allows us to attribute causal responsibility to a party that creates a dangerous condition that was a substantial factor in bringing about the injury in question, even when that party was otherwise passive. Moreover, this paradigm can be understood to supercede the "force" paradigm in many instances. This is to say that when one party exerts forceful influence upon another, as in the example above, the creation of a dangerous condition is, causally speaking, prior. Therefore, the individual who parked the car in a precarious spot, and not the driver, is the causally responsible party.

In many cases, the issue of whether the "passive" victim or the "active" injurer was causally responsible for an accident depends on whether the relevant conditions created by the victim may be characterized as dangerous. Yet, once room for such interpretation

is made, Epstein's purported objective determination of causal responsibility becomes laden with normative judgments. Such normative judgments may easily bear on the whether the conduct that gave rise to a given causal condition was reasonable. If such an inquiry is warranted in the course of ascribing causal responsibility, then the use of alternative causal paradigms that might supercede that of force will actually confound Epstein's case for strict liability. Perry concludes, then, that Epstein's account of causation has a certain irreducible normative element, such that we are liable to recognize causal responsibility under his view "at least sometimes on the fact that one person's activity has imposed a certain level of unacceptable risk on another person."⁵⁵

In fact, Epstein had already largely conceded these points without having to renounce his argument for strict liability. He has recognized that a plaintiff can share causal responsibility for an accident in a way that will confound our ability to recognize the defendant as having infringed a right of the plaintiff in injuring him. Such a shared causal role might be found when the plaintiff induces the defendant to harm him, to assume the risk of injury, or to cause the injury through negligence in a way that satisfies one of Epstein's paradigms.⁵⁶ However, we can still maintain that a *prima facie* case for strict liability is established when it is shown that a defendant actively interfered with a plaintiff's entitlement. That a plaintiff shares responsibility for his injury simply raises the possibility of introducing his negligence as a defense against strict liability.

Under what conditions can a plaintiff be understood to share responsibility for his injury? It is consistent with the account of right infringements presented above that a 'victim' temporarily forfeits part of the entitlement he possessed when he uses it unreasonably. For example, the driver in Perry's example, who parks his car in the middle

of winding road, might be understood to have forfeited his right against other drivers that they not strike his car, in virtue of his having placed his vehicle "in harm's way." At that point, the reasonableness of the defendant's driving might be raised, but the negligence of the plaintiff remains the threshold issue.

Not all joint causal responsibility can be explained away as involving contributory negligence. The clearest example may be that of a head-on automobile collision. When A and B so collide, we may find that A hit B and B hit A, such that there is a reciprocal imposition of harm. Yet, if the collision occurred as a result of A driving in the wrong lane, heading into traffic moving in the opposite direction, we would recognize A as responsible for the damage. Thus, causation is not a sufficient condition for responsibility, as both parties here played a causal role. Rather, responsibility is allocated among the parties playing a causal role on the basis of a perceived breach of duty. As B did nothing out of the ordinary while driving, he is not responsible for the accident. On the other hand, assuming that drivers have a duty to refrain from imposing extraordinarily severe risks on others, A drove recklessly, thereby breaching his duty of reasonable care. This is in fact the only ground on which to allocate responsibility to A, given that the causal paradigms invoked by Epstein offer little guidance here. That a negligence standard would be applied to both the injurer and victim in such a case would not really confound Epstein's view, so long as there are cases where the party's causal roles are not roughly symmetrical in this way.

We can recognize a number of instances, then, where the potential for causal responsibility for harm is not reciprocal, and reject Coase's putative justification of the use of cost-benefit analysis in such instances. In so doing, we recognize that one party's

conduct would clearly interfere with the other's entitlement, whereas imposing liability would not constitute a harm.

Posner on Rights and Wealth Maximization

If the allocation of liability does not pose a problem of a reciprocal nature, then it might be argued alternatively that uncompensated transfers that would be endorsed by the Assignment Principle do not violate entitlements. Perhaps some injuries to property need not give rise to liability, insofar as the bundle of rights that comprises the entitlement does not include a right against the particular harm that raises the issue of liability. The precise scope of the bundle, moreover, might be fixed pursuant to wealth maximizing norms. Indeed, Posner has contended that the wealth maximization norm is needed to lend content to the schematic allocation of rights.⁵⁷

Posner maintains that once the infringement of a right, along with the causation of harm, is accepted as a necessary condition for liability, it becomes an open question whether a given harm constitutes an infringement. He finds that Epstein begs an important question in assuming that rights are broad enough to make negligence liability rules unjust. They are broad in this sense to the extent that rights to one's body and property "embraces unavoidable accidents and accidents in which the victim is also at fault."⁵⁸ On the other hand, Posner maintains, we may well understand rights to one's property and person narrowly enough to understand injuries caused without fault not to infringe upon any right of the victim. On such an understanding, it does not follow from the assertion that one's entitlement should enjoy the protection of a property rule under one state of affairs, such as one involving a malicious invasion, that it should enjoy the protection of a liability rule under a different state of affairs, such as one where the risk of

an unavoidable accident is posed. If the content of entitlements is defined by the wealth maximization norm, then economic fault rules are entirely compatible with the notion of 'inviolable' property rights, as the only rights in place would be those that safeguard against inefficient transactions.

This approach presupposes that the wealth maximization norm can serve as the basis for the initial allocation of entitlements throughout a society. For the legal system to hold that the scope of individual entitlements should in principle be defined by an efficient allocation of rights, it would have to take the maximization of social wealth as a guiding principle. Indeed, that assumption was Posner's original thesis on wealth maximization. He defended wealth maximization on the grounds that it could serve as a foundation for a framework of rights.⁵⁹ We shall see, however, that Posner's arguments for that thesis encountered strong opposition, and that even he eventually conceded that the norm would have to be supported on other grounds.

Posner's earlier arguments in support of wealth maximization norms invoked an appeal to their usefulness as a foundational principle. A framework of rights, he maintained, will insure that most transactions are voluntary, and parties will enter into voluntary transactions where they each see the opportunity to increase their own level of wealth. The norm of wealth maximization, further, can actually underwrite a comprehensive framework of values. It can supply a theoretical basis for many virtues and duties of piety commonly recognized and well regarded in our society. A norm of utility maximization, on the other hand, would not distinguish between a man who is willing to pay \$10,000 for a necklace and a man "who is willing to suffer an equivalent nonpecuniary disutility" to obtain it.⁶⁰ It follows from this norm that the loss each party

endures constitutes an equivalent net drop in social welfare. It does not follow, however, from the norm of wealth maximization, for that norm can regard his sacrifice as a more worthy one. His sacrifice was one made possible by the productive activity of the creator of the transferred wealth. Such productive activity was presumably more valuable than the income it produced, since someone saw fit to part with that wealth to commission the activity. The buyer of the necklace, of course, subsequently confers a benefit on the seller. A mere experience of disutility, by contrast, confers no direct benefit on other parties.

Insofar as productive activity increases levels of wealth, a norm of wealth maximization will foster those virtues conducive to such activity. '[T]he wealth maximization principle encourages and rewards the traditional 'Calvinist' or 'Protestant' virtues and capacities associated with economic progress.'⁶¹ Conventional pieties such as the fulfillment of promises can also be grounded in the norm of wealth maximization, insofar as a framework wherein promises may be relied upon facilitates productive cooperation.⁶²

The wealth maximization norm can also serve as a foundation for a framework of rights, Posner maintains. Rights facilitate voluntary, wealth-increasing exchanges, but we may have to understand entitlements as limited when they would otherwise conflict, or when high transaction costs would hinder their transfer or protection. We should also find, Posner maintained, that the pursuit of wealth maximization requires an allocation of rights that generally accords with our notions of a just distribution. Slavery, for instance, is antithetical to wealth maximization to the extent that the right to one's own labor is bound to be more valuable to the laborer. If these rights were allocated differently, we

might expect them to be reallocated by the market such that the 'just' distribution is restored. Market activity carries transaction costs, however, and so wealth may be maximized by allocating such rights initially to their most valued uses.

If there are positive transaction costs, the wealth maximization principle requires the initial vesting of rights in those who are likely to value them most, so as to minimize transaction costs. If assigned randomly to strangers, these rights would generally be repurchased. [but] the costs of the rectifying transaction can be avoided if the right is assigned at the outset to the user who values it the most.⁶³

It is on this basis, then, that Posner would have us conceive of entitlements as containing an optimal bundle of rights. Ownership of a tract of land for example, may constitute an entitlement consisting of rights against intentional trespass. It would not be inefficient to assign such a right to the land owner, even when the benefit to a neighbor who wishes to enter the land exceeds the cost to the owner. The neighbor could bargain with the owner and purchase the privilege to enter the land, and both parties would benefit as a result of the transaction. However, the entitlement might not consist of the right against accidental intrusion, where the precaution that might be taken against such a misadventure is costlier than the expected harm to the owner.

Coleman and Dworkin on the Foundational Status of the Wealth Maximization Norm

Whether Posner's challenge to the moral necessity of strict liability succeeds depends, then, on whether the wealth maximization norm can be accepted as the normative basis for a framework of rights. However, Jules Coleman and Ronald Dworkin have advanced two lines of argument against this account of the role of the wealth maximization norm. The first critiques the view that wealth is a good that society ought to maximize directly. The second challenges the view that the rules promoting wealth as a social good could generate a morally acceptable framework of rights. While

the first line of argument seems to have fallen short, we will see that at least one variation of the second line of argument successfully confounds Posner's effort to establish the wealth maximization norm as a foundational principle.

In advancing the first line of argument, Dworkin had contended that wealth is not a component of social value. To illustrate the absence of any value gained by society by means of a wealth increasing transfer, he presents the case of Derek and Amartya.⁶⁴ Derek possesses a book, which he would sell for two dollars and Amartya would buy for three dollars. A forced transfer of the book to Amartya would increase society's wealth, for Amartya values the book more highly than Derek. A norm of wealth maximization would validate such a taking, Dworkin maintains. However, since such a result is unacceptable, we must conclude that the mere increase in society's wealth is of no moral value.

In response, Posner has pointed out that such a forced transfer is unnecessary, as we could expect the transfer the requires Derek's consent to be facilitated by the market, given Dworkin's conditions. The objection fails, then, to explain why the wealth maximization norm would direct us to replace the market with a wealth-maximizing tyrant. Derek and Amartya could strike a deal for the book at some price between two and three dollars, thereby increasing the wealth of both parties. The wealth maximization norm should prefer this sort of arrangement.

Bruce Johnsen also argues that the wealth maximization norm would not endorse the forced transfer in Dworkin's example. The creation of wealth, he points out, depends not only on transfers of objects of value, but also on the production of those objects. When involuntary transfers are allowed, he argues, productive capacities may come to be

allocated differently and less efficiently than in a system where transfers are mediated by the market.⁶⁵ One can conclude that involuntary transfers increase wealth only if one examines allocations and reallocations over the short run. Over the long run, we could expect individuals to come to anticipate involuntary transfers of their holdings and perhaps transfer their resources to uses that make such transfers less likely. The total wealth in such a state could very well be less than in a state where such intentional takings that move resources into the hands that value them more are permitted. For example, Derek might not buy any books, since they are relatively durable goods that others could seize and consume. Instead, he might spend his two dollars on ice cream. Although the ice cream is his next strongest preference after a book, he only values it at one dollar (this is more valuable to him than any other use of his two dollars, we may suppose). He would value the ice cream more than the book, however, if he knows his book might be taken from him. Derek consumes ice cream quickly, on the other hand, and then there is nothing left to be taken. So his wealth would be diminished, unless his property in general can be better safeguarded, as he will choose to spend his money on ice cream instead of books. We could also expect Derek's wealth to decrease, when those who do not value books as much as he does stop buying them. He will have to buy them himself, unless he can cheaply force the publisher to print free copies for him, and each copy might cost more when fewer are printed, if economies of scale tend to lower the cost of books that are mass produced.⁶⁶

It is precisely because the transaction is coerced that we cannot conclude from the Derek-Amartya example, as Dworkin would have us, that increases in wealth are not to be valued. We may concede that the transfer of the book is illicit, such that a change

from the state where Derek possesses the book to the state where Amartya has it is a turn for the worse. However, as Daniel Farber points out, the transaction bears other morally relevant aspects aside from the resulting wealth increase, which Dworkin has not controlled for.⁶⁷ We might say that the transfer of the book from Derek to Amartya constitutes a morally bad change in spite of the increase in wealth it brought about, because the affront to Derek's autonomy and property rights offsets that gain. If so, then we have no basis in claiming that the wealth increase is morally irrelevant. At best, then, Dworkin's example shows that wealth cannot be understood as the sole bearer of intrinsic value, for if it were, then we would have to regard the transfer of the book as a moral improvement. Since we don't, we reject the antecedent.

Indeed, Posner contends that Dworkin unduly construes him as holding out wealth as something of intrinsic value. On the contrary, Posner understands wealth to be an instrumental good, which bears no intrinsic moral worth. Posner recognizes other goods such as happiness, welfare, and liberty, which bear intrinsic moral worth. He maintains, though, that the application of the wealth maximization norm will yield an 'ethically attractive combination' of these goods.⁶⁸

As an instrumental good, wealth tends to increase welfare, and transfers of wealth that are more substantial than the negligible wealth increase involved in Dworkin's example may make a substantial contribution to social welfare. Dworkin would be hard-pressed to ignore the expected gain in social utility that would accompany the transfer of a good from its owner who valued it marginally to another party that would have paid \$1,000 for it.⁶⁹ Yet, a state that prohibits involuntary takings would not confound wealth

maximization in this context, insofar as such transfers can generally be expected to occur consensually, as discussed above.

Coleman maintains, however, that this instrumental approach is inconsistent in a manner that makes his argument circular.⁷⁰ On the one hand, the wealth maximization norm purports to promote values such as liberty rights that have independent, intrinsic worth. On the other hand, the norm purports to serve as a foundation for such liberties. Posner, he maintains, would have us derive principles safeguarding values of intrinsic worth from a norm that safeguards instrumentalist goods. Given that the wealth maximization norm purports to recognize rights as bearing independent, intrinsic worth, it cannot account for the inherent conflict involved in the incremental curtailing of rights that the norm may call for.

This sort of objection begs the question against Posner, however, insofar as his position is that the wealth maximization norm purports to define the precise scope of rights. If we understand the content of entitlement as a function of cost-benefit analysis, then it makes little sense to say that entitlements are ‘curtailed’ when, for instance, duties of compensation are allocated on the basis of such an analysis. For, example, the entitlement of the land owner could be understood to include a right against intentional trespass, but no right against nonnegligent accidental intrusions. In that case, the landowner’s entitlement would not be curtailed when the defendant is cleared of liability for the intrusion, for lack of any right having been infringed in the first place.

Another criticism of the instrumentalist argument raised by Coleman is similar to one advanced by Dworkin. It comprises a challenge to the premise that the application of the wealth maximization norm will achieve an optimal combination of a plurality of

intrinsic goods.⁷¹ Dworkin contends that wealth maximization is unlikely to promote social welfare to an extent greater than that of other principles of adjudication, which aim more directly at promoting the goods wealth maximization purports to promote indirectly.

Posner maintains that this objection cannot succeed without explaining how the alternative Dworkin proposes will weigh the values it seeks to promote independently. In fact, he is extremely skeptical of the notion of assigning such weights, which is necessary if conflicting interests reflecting different values, e.g., one's freedom as opposed to another's profit, are to be commensurable. The application of the wealth maximization norm, on the other hand, allows for 'automatic trade-offs' on the basis of the revealed, wealth-backed preferences of potential buyers and sellers, as such parties may reach voluntary agreements on the basis of the subjective weights they assign to the various values their actions would promote.⁷² The promotion of wealth by the legal system, then, serves to promote a plurality of values while placing a higher value on those that are actively sought in the market.

Whether or not wealth can be understood as an object of instrumental value, there remains the issue of whether the wealth maximization norm is a satisfactory basis for an allocation of rights. This brings us to the second line of argument against Posner. Coleman and Dworkin have argued that the wealth maximization norm is not a satisfactory basis, insofar as the value of rights inevitably depends on a system of prices. They have advanced several different lines of argument, exploiting different aspects of the norm's dependence on prices, which have met with varying degrees of success. Since the wealth maximization norm rests on weighing potential improvements in wealth, it

depends on a system of prices for the measurement of increases in wealth that accrue from the allocation and reallocation of entitlements. Even the nonpecuniary income of a given individual, such as the extra leisure time one may enjoy as a result of selecting one job over another, can be assigned a monetary value in light of the value of the opportunity cost the individual chose to bear in making the selection.

In the absence of material scarcity, goods would not have to be priced, since prices only serve to allocate scarce resources. However, in the absence of prices, Coleman maintains, the notion of wealth maximization becomes problematic, as there are no longer prices to be aggregated. He concludes that the fact that wealth maximization is impossible in the absence of material scarcity commits the proponent of wealth maximization to the perverse conclusion that society should not eliminate material scarcity if presented with the opportunity to do so.⁷³ It could be argued further that any norm that prefers scarcity to abundance cannot serve as a justifiable foundation for rights. This argument fails on two grounds, however. We can understand the proponent of wealth maximization as valuing wealth in response to the problem of scarcity, the very phenomena that makes prices so useful in a functioning economy. There is no reason why he should not be happy to abandon that concern, should the eradication of scarcity become possible. Moreover, if prices disappear as a result of material abundance, we need not conclude, as Coleman suggests we should, that wealth disappears. Intuitively, we recognize a society with an abundance of goods as extraordinarily wealthy. That such a society may not use prices is not a paradox. The society with no material scarcity can assign any astronomical price to any good, to provide grist for the wealth calculation mill,

however pointless this exercise might be. So the resources of the society without material scarcity can be regarded as vast wealth, as opposed to no wealth whatsoever.

Pressing a different line of attack, Coleman maintains that the wealth maximization norm's dependence on prices makes the norm problematic insofar as the prices factored into the wealth maximization calculus are in turn affected by the rules formulated on the basis of actual calculations.⁷⁴ For example, a change in a liability rule might result from a cost benefit analysis that takes into account the values of the entitlements at stake. However, the change in liability rules may well affect the values of those entitlements. This objection fails as well, to the extent that it assumes that such marginal changes in value cannot be accounted for. In theory, changes in prices that can be anticipated to result from a rule change can be factored into a cost benefit analysis. Certainly, property value reductions resulting from rule changes can be understood as a reduction in wealth to be factored into the analysis.

The case against the wealth maximization norm as a foundational principle on the grounds of its dependence on prices, however, has been more damaging when it has focused on the problem of an initial allocation of entitlements. Dworkin, first of all, has pointed to a circularity stemming from wealth effects.⁷⁵ Wealth effects occur when consumer demands are affected by changes in income, which are in turn reduced by price increases. Since incomes and prices are determined by how rights are initially allocated, the initial allocation of rights determines how they should be ultimately allocated by the wealth maximization norm. Dworkin illustrates this claim with an example involving Agatha, a writer of mysteries who would prefer to do gardening work. Whether she will ever be free to pursue her preferred occupation depends on whether she initially owns her

own labor. Suppose George, as her master, owns her labor. In that case, she will remain a slave, since she would have to write stories to earn her freedom. If, on the other hand, she initially owns her labor, she will pursue gardening, and George will not be able to purchase her labor. Dworkin concludes that since the allocation of rights by the wealth maximization norm depends on a contingent prior distribution, that norm is not a plausible basis for rights.

Posner, on the other hand, contended that Agatha would eventually come to own her labor, regardless of whether it is allocated to her or she acquires it from its initial recipient. Agatha would come to acquire freedom so long as ownership of her own labor makes her more productive. It is not difficult to see that the benefits of autonomy and more direct control over her work product may generate greater incentives for productivity. If her output as a slave is worth \$1 million to George, but that as free woman she could produce \$1.2 million worth of stories, then 'presumably she could produce detective stories worth \$1 million in less time and have time left over for gardening. If so, she could and would buy her freedom.'⁷⁶ With the increased earnings from gardening, she could pay George slightly more than \$1 million. Presumably, George would accept this tender, as it exceeds the expected value of retaining Agatha as a slave. Since Agatha could buy her way out of slavery, the wealth maximization norm would call for making her free at the outset, thereby minimizing transaction costs.

Coleman presses Dworkin's line of argument further by maintaining that the wealth maximization norm can have no bearing on an initial assignment of entitlements.⁷⁷ The prices of entitlements that serve as indicators of the distribution and size of wealth cannot be set unless we know how those entitlements are allocated. This is to say, then,

that we do not know whether Agatha's freedom has a value in the state of affairs where she is a slave that would allow us to say social wealth would be increased if her freedom were to be granted. Accordingly, Guido Calabresi maintains that what constitutes wealth to begin with depends on how what might be valued is initially distributed, arguing that '[w]ealth in any society depends on tastes, on what people want, on what they value. But what they value depends on what they have to begin with.'⁷⁸ This means that the wealth maximization norm fails as a foundational principle that can underwrite our framework of property rights, for we would have to brand any distribution of rights as arbitrary, having stemmed from an arbitrary initial allocation.

We can conclude then, that Posner's argument does not confound Epstein's case for strict liability. He has not shown that entitlements should be limited in a way that rules out rights against accidental harms that could not have been prevented efficiently. Unless the content of entitlements can be derived from the wealth maximization norm, we have no reason at this point to hold that ownership does not entail rights against accidental, nonnegligent harm.

This concludes our discussion of the earliest efforts by proponents of efficient tort rules to reconcile such rules with concerns for individual liberty and autonomy. In addressing these efforts, an argument based on those notions in support of strict liability has emerged. In our final chapter, we will consider some difficulties with strict liability theory. We shall see that, despite the arguments in support of the Assignment Principle considered in the chapter, Posner still recognizes a tension between it and autonomy concerns. We will consider his more recent arguments intended to resolve that tension in the next chapter.

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- ¹ Chapter One, pages 29-30.
- ² Chapter One, pages 5-6.
- ³ Ronald Coase, "The problem of social cost," *Journal of Law and Economics* 3 (1960): 2.
- ⁴ Jules Coleman, "Efficiency, Auction, and Exchange," in *Markets, Morals and the Law* (New York: Cambridge, 1988), 76; see A.C. Pigou, *The Economics of Welfare* 4th Ed. (London: Macmillan, 1962).
- ⁵ Coleman, "Efficiency, auction, and exchange", 79.
- ⁶ *Ibid.*, 80.
- ⁷ Michael Moore "Causation and Responsibility," *Social Philosophy and Policy* 16 (1999): 3.
- ⁸ Richard Epstein, "A theory of strict liability," *Journal of Legal Studies* 2 (1973): 151-204.
- ⁹ Guido Calabresi, *The Cost of Accidents* (New Haven: Yale University Press, 1970), 6-7, n.8.
- ¹⁰ Epstein, "A theory of strict liability."
- ¹¹ See Chapter One, pages 16-17.
- ¹² *Vincent v. Lake Erie Transportation Co.* 109 Minn. 456, 124 N.W. 221 (1910).
- ¹³ Epstein, "A theory of strict liability", 158.
- ¹⁴ Fowler Harper and James Fleming, *The Law of Torts* (Boston: Little, Brown, 1956), vol. 1, sec. 1.3(9).
- ¹⁵ William Prosser and W. Keeton, *Prosser and Keeton on the Law of Torts* (St. Paul: West Pub. Co., 1984), sec. 90.
- ¹⁶ Harper and Fleming, *The Law of Torts*, sec. 1.3.
- ¹⁷ Harper and Fleming, *The Law of Torts*, sec. 1.22; *Restatement of the Law of Torts* (St. Paul, American Law Institute, 1998), sec. 197.
- ¹⁸ Harper and Fleming, *The Law of Torts*, sec. 2.43.
- ¹⁹ Harper and Fleming, *The Law of Torts*, sec. 1.22.

²⁰ *Ploof v. Putnam*, 81 Vt. 471 (1908).

²¹ Judith J. Thomson, "Self-defense and rights," *Lindley Lecture*, (Lawrence: University of Kansas Press, 1978).

²² Joel Feinberg, "Voluntary euthanasia and the inalienable right to life" in *Rights, Justice, and the Bounds of Liberty* (Princeton: Princeton University Press, 1980), 230.

²³ William, Frankena "Natural and inalienable rights" *Philosophical Review* 64 (1955).

²⁴ Feinberg, "Voluntary euthanasia and the inalienable right to life", 230.

²⁵ Guido Calabresi and Douglas Melamed, "Property rules, liability rules, and alienability: one view of the cathedral," *Harvard Law Review* 85 (1972): 1089-1199.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ Alienability rules are not of particular concern here, and so we will leave them out of this discussion.

²⁹ It should also be noted that we will not be concerned precisely with the problem of selecting criteria for determining when an infringement is permissible. It is sufficient to note that there are uncontroversial examples of permissible conduct that interferes with property rights, such as the backpacker's breach and the defendant's conduct in the case of *Vincent v. Lake Erie Transportation Co.*. The real focus of our attention will be why liability is warranted, given that a permissible infringement has taken place. This is not to deny the importance of the issue of how permissible and impermissible infringements are to be distinguished. But since our primary purpose is to assess liability for accidental injuries, the question of the infringement's permissibility in tough cases may lie beyond the scope of our discussion.

³⁰ Richard Epstein, "Causation and corrective justice: a reply to two critics," *Journal of Legal Studies* 8 (1979): 501.

³¹ Richard Epstein, "A theory of strict liability," 159.

³² Consider, then, these two claims:

(1) If X performs an action that she knows will harm Y, then she is under a duty to compensate Y for the harm.

(2) If X performs an action that she knows will impose a risk of harm on Y, then she is under a duty to compensate Y for the harm if her action causes Y to be harmed.

David McCarthy affirms Epstein's contention in maintaining that there are no grounds upon which to accept (1) and reject (2). David McCarthy "Liability and Risk" *Philosophy and Public Affairs* 25 (1996).

- ³³ Richard Posner, "Epstein's tort theory: a critique" *Journal of Legal Studies* 8 (1979): 459.
- ³⁴ In order for a breach of duty to proximately cause an injury, it is necessary that the activity conducted in breach of a duty cause the injury "in fact."
- ³⁵ Prosser and Keeton, *Prosser and Keeton on the Law of Torts*, sec. 41.
- ³⁶ *Ibid.*, sec. 41.
- ³⁷ *Ibid.*, sec. 41.
- ³⁸ Epstein, "Causation and corrective justice: a reply to two critics," 479.
- ³⁹ Epstein "A theory of strict liability," 172-77.
- ⁴⁰ *Ibid.*, 177.
- ⁴¹ *Ibid.*, 186-87.
- ⁴² Jules Coleman, "Corrective justice and wrongful gain," *Journal of Legal Studies* 11 (1982): 421-40.
- ⁴³ Richard Epstein, "Nuisance law: corrective justice and its utilitarian constraints," *Journal of Legal Studies* 8 (1979): 49-102.
- ⁴⁴ Richard Epstein, "Private Property and Public Domain" in Pennock, J. and Chapman, J. (eds.) *Ethics, Economics, and the Law: NOMOS XXIV* (New York: New York University Press, 1982), 48-82.
- ⁴⁵ Richard Epstein, *Takings* (Cambridge: Harvard, 1985), 37-9.
- ⁴⁶ Private takings can be contrasted with public takings, or the exercise of the government's power of to take property for the public good.
- ⁴⁷ *Pugh v. Hassell*, 206 Okl. 290, 291 (1952)
- ⁴⁸ Epstein, "Causation and corrective justice: a reply to two critics," 500.
- ⁴⁹ Coase, "The problem of social cost," 31-32, citing William Prosser, *The Law of Torts* 2d ed. (St. Paul: West Publishing, 1955), 398-399, 412.

⁵⁰ Prosser and Keeton, *Prosser and Keeton on the Law of Torts*, sec. 90.

⁵¹ *Ibid.*, sec. 90.

⁵² Epstein, 'Nuisance law: corrective justice and its utilitarian constraints,' 57.

⁵³ *Ibid.*, 58.

⁵⁴ Stephen Perry, 'Libertarianism, entitlement, and responsibility' *Philosophy and Public Affairs* 26(1997): 381.

⁵⁵ *Ibid.*, 381.

⁵⁶ Epstein, 'Defenses and subsequent pleas in a system of strict liability' *Journal of Legal Studies* 3 (1974): 165-215.

⁵⁷ Richard Posner, 'Wealth Maximization and Tort Law: A Philosophical Inquiry' in *Philosophical Foundations of Tort Law*, ed. David Owen (New York: Oxford, 1995), 108.

⁵⁸ Posner, 'Epstein's tort theory: a critique,' 457, 467.

⁵⁹ Richard Posner, *The Economics of Justice* (Cambridge: Harvard, 1985), Chapter 3.

⁶⁰ *Ibid.*, 66.

⁶¹ *Ibid.*, 68.

⁶² *Ibid.*, 70.

⁶³ *Ibid.*, 71.

⁶⁴ Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard 1985), 242-244.

⁶⁵ Bruce Johnsen, 'Wealth is value,' *Journal of Legal Studies* 15 (1986): 280-282.

⁶⁶ The publishing industry would enjoy an economy of scale if production methods that lower the average cost of production become cost-effective when the volume of output is sufficiently high.

⁶⁷ Daniel Farber, 'Economic efficiency and the ex ante perspective' in *The Jurisprudential Foundations of Corporate and Commercial Law*, ed. by J. Kraus and S. Walt (New York: Cambridge, 2001), 65.

⁶⁸ Richard Posner, "The ethical and political basis of the efficiency norm in common law adjudication," *Hofstra Law Review* 8 (1980): 487.

⁶⁹ Posner, *The Economics of Justice*, 108.

⁷⁰ Jules Coleman "Efficiency, utility, and, wealth maximization," in *Markets, Morals and the Law* (New York: Cambridge, 1988), 114-115.

⁷¹ *Ibid.*

⁷² Posner, *The Economics of Justice*, 112.

⁷³ Coleman, "Efficiency, utility, and, wealth maximization," 109.

⁷⁴ *Ibid.*, 110.

⁷⁵ Ronald Dworkin, "Is wealth a value?" *Journal of Legal Studies* 9 (1980): 209-210.

⁷⁶ Posner, *The Economics of Justice*, 110.

⁷⁷ Coleman, "Efficiency, utility, and, wealth maximization," 109.

⁷⁸ Guido Calabresi, "The new economic analysis of law: scholarship, sophistry, or self-indulgence?" *Proceedings of the British Academy* 68 (1981): 85, 94.

Chapter Three

We now turn to our discussion of Posner's more recent approach to reconciling the Assignment Principle, which holds that the legal system should allocate liability pursuant to the Kaldor-Hicks Efficiency criterion, with individual autonomy. His argument has evolved somewhat since its inception, but it has retained an essential point: that the Assignment Principle would gain the consent of rational, self-interested parties.¹ This rational choice argument has in turn met with a new battery of criticism by Coleman and Dworkin. A number of these criticisms, as I hope to show, can be answered. On the other hand, Dworkin presented an argument that actually reveals a fatal shortcoming in the rational choice approach. It is on the basis of this difficulty that we will ultimately conclude that Posner has failed to defend the use of the Assignment Principle against the view that it unduly impinges upon individual autonomy.

Overview

Since the debates with Coleman and Dworkin over the acceptability of the wealth maximization norm as a foundation for rights, discussed in the previous chapter, Posner has adopted a somewhat weaker justificatory approach to wealth maximization. He has repudiated the goal of establishing an ethical foundation for the wealth maximization norm and has recently argued that the norm may be based solely on "pragmatic" concerns. This change in approach stems in large part from his recognition of the vulnerability of the wealth maximization norm as a foundational principle to the objections raised by Coleman and Dworkin, citing the norm's dependence on prices.² He concedes that the distribution of property rights dictated by the norm is determined by levels of supply and demand, which in turn are determined by prior allocations of rights. Rather than tracking

some measure of social welfare, wealth maximizing policies will more readily track existing, and perhaps arbitrary, distributions.³

In light of these difficulties, Posner's effort to defend the wealth maximization norm as a foundation for individual and economic rights could not be sustained. Therefore, Posner's contention that the content of entitlements might be defined by a Kaldor-Hicks efficient allocation of duties is mistaken. However, rather than abandoning support for the wealth maximization norm, Posner has adopted an altogether different strategy in arguing for its application in tort law.

Posner's more recent approach is grounded in consent. He argues that the legal system can impute a certain choice to individuals, a choice of liability rules made 'under uncertainty from which is inferred consent to a social institution.'⁴ In this case, the institution is that body which applies the Assignment Principle in accidental tort law. As he acknowledges, this approach is similar to Rawls's famous theory of justice, wherein principles of justice are thought to be grounded in rational choice made under conditions of radical uncertainty.⁵ In Rawls's model, each self-interested party in a hypothetical pre-social setting, called the 'Original Position', standing behind a 'veil of ignorance', whereby she temporarily foregoes all knowledge of her capabilities, assets, and position in society, would choose principles of justice best suited to guarantee herself a satisfactory life. In virtue of this ignorance, however, parties will select principles that tend to establish political and economic equality. It is this veil of ignorance, Rawls maintains, that guarantees that the principles will be chosen fairly.⁶

Posner, in contrast to Rawls, calls for hypothetical social choice 'under conditions of natural ignorance rather than under the artificial ignorance of the original position.'⁷

He rejects the latter as unsatisfactory “not only because of the well-known difficulties of describing the preference functions of people in the original position but also because the original-position approach opens the door to the claims of the nonproductive.”⁸ Posner essentially rejects the veil of ignorance on the basis of libertarian inclinations, which favor tolerance of economic inequalities, whereas Rawls’s “difference principle” would work to narrow such inequalities. We shall see, however, that considerations of distributive justice will tend to have very little bearing on the choice of liability rules for parties in a hypothetical social choice situation.

This approach differs from his earlier one, discussed in the previous chapter, in a way that makes it immune to the sort of objection raised against that earlier approach. The argument that the wealth maximization norm could be used to define the scope of entitlements was unsuccessful because it had to assume an ultimately arbitrary initial allocation of rights. A consent-based approach, on the other hand, need not presuppose that the demands of efficiency impose sharp limits on what rights are entailed by ownership. Rather, it can be understood to conceive of parties as generally waiving protection by liability rules for nonnegligent injuries. The earlier “foundational approach” holds that individuals, with entitlements that are limited to begin with, would not have even *prima facie* claims to protection against such injuries.

A Historical Approach to Rawlsian Tort Theory

It will be useful to contrast Posner’s approach with an earlier Rawlsian tort theory. Construed as an argument about hypothetical rational choice, Posner’s Rawlsian argument seems to be a variation of a defense of negligence rules presented by George Fletcher, who invoked a notion of reciprocity in support of his argument against a general

application of strict liability rules. This notion of reciprocity is distinct from the Coasean notion discussed earlier. While Fletcher argues against the use of cost benefit analysis in accidental tort law, he maintains that negligence rules may be established on considerations of fairness.

Fletcher identifies two paradigms under which accidental tort issues have been analyzed within the common law: the paradigm of reciprocity and the paradigm of reasonableness.⁹ While both paradigms have been utilized in this area of law, Fletcher recognized the former as gaining more influence. Within the paradigm of reciprocity, liability is imposed on victims when they impose extraordinary or unreciprocated risks on others parties. According to the paradigm, an injured party has a right to recover“for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant.cases of nonliability are those of reciprocal risks, namely those in which the victim and defendant subject each other to the same degree of risk!”¹⁰ The nature of the risk imposed on the victim, in comparison with those imposed by the victim, is the relevant consideration under this paradigm; the social disutility the risk poses and the utility accruing from the risk-creating activity are not relevant. The paradigm of reasonableness, on the other hand, is decidedly instrumentalist. The use of this paradigm reflects a commitment to apportion risk and liability on the basis of social welfare concerns. The reasonableness of conduct is determined on the basis of cost-benefit analysis.

The paradigm of reciprocity holds that we may be expected to bear, without indemnification, those risks we all impose reciprocally on each other. If we all drive, we must suffer the costs of ordinary driving. The paradigm of reasonableness, on the other hand, holds that victims must absorb the costs of reasonable risks, for these risks maximize the

composite utility of the group, even though they may not be mutually created background risks.¹¹

The paradigm of reasonableness is unacceptable on moral grounds, Fletcher maintains, as it allows for personal deprivations for the purpose of promoting social welfare.¹² Socially useful activities that impinge upon the integrity of a person's body or property are not entirely impermissible, Fletcher concedes, insofar as the cost of deprivations can be shifted back to the injurer, in the form of liability, in order to restore the victim to his former state.

Under Fletcher's approach, however, the rejection of the paradigm of reasonableness, the use of an index of social welfare to allocate liability, does not commit one to a strict liability rule. He finds that under the paradigm of reciprocity, negligence and strict liability rules can both be established. Risks that are distinctly nonreciprocal, as analyzed "relative to the background of innocuous risks in the community", warrant strict liability.¹³ Strict liability rules, in fact, govern cases where the community did not reciprocate the risks involved. Among those risks that are understood to be unreciprocated are those posed by ultrahazardous activities. Negligence rules, on the other hand, govern those activities "in which the participants all normally create and expose themselves to the same order of risk."¹⁴ Rather than standing as competing rules of liability, then, the two rules "appear to be complementary expressions of the same rule of liability."¹⁵ Indeed, he maintains that the paradigm of reciprocity provides a more elegant and comprehensive account of existing common law tort doctrines.

Therefore, although Fletcher rejects social welfare as a criterion for allocating liability, and, by implication, purely economic criteria of fault, Fletcher by no means rejects negligence rules. Instead, he believes that such rules can be grounded wholly on

consideration of fairness. Fairness allows injuries to go uncompensated when the injurer's conduct is found to be have been free of fault. Conduct is free of fault when the risks it created were reciprocated by those similarly engaged in the activity. In arguing for such a treatment of nonnegligent injuries, Fletcher invokes a variation on Rawls' principles of justice as fairness. Whereas Rawls' first principle of justice, the Principle of Equal Liberty, held that "[E]ach person participating in a practice, or affected by it, has an equal right to the most extensive liberty with a like liberty for all"¹⁶, Fletcher holds that "we all have the right to a maximum amount of security compatible with a like security for everyone else."¹⁷ Granting this level of security, he maintains, involves protecting interests by imposing liability rules only when disproportionately large risks are involved.

The notion of "security" invoked by Fletcher extends not only to the security of the assets of passive individuals from interference by active agents, but also to the security of the projects of those active agents. Affording too much security to those in the former category would result in reduced security for those in the latter category. However, as Coleman points out, it is not clear how "security" interests should be defined such that a given risk can be understood as extraordinary or disproportionate.¹⁸ The issue, then, is whether we can justifiably treat any large number of expected harms as equivalent. The paradigm of reciprocity, if it is ever to allow for uncompensated harms, must recognize risks as roughly equivalent, and thus reciprocal, more readily than can be reasonably expected. Coleman finds this problematic, insofar as very few risks are reciprocal, i.e., very few risks of the same kind and degree are mutually imposed.¹⁹ A more useful criterion for the nonreciprocity of a risk, he maintains, is its expected harm. Risks might more readily be found to be roughly equivalent if they are assessed in terms of the

magnitude of harm they cause, balanced by the likelihood of their occurrence, just as they assessed under the application of Judge Hand's **BPL** formula, which we discussed in the first chapter.²⁰ This allows us to equate risks of different magnitudes when their respective probabilities allows us to weigh those magnitudes, such that the expected harms are equal. The adoption of such a criterion does not commit one to allocating rights on the basis of social welfare, insofar as nothing has been said about balancing such risks against the costs and benefits pertaining to the imposition of such risks and the related precautions that might be taken against them. Yet, to ignore the benefits of the risky conduct, and the costs of precautions, is to ignore the interests in security borne by risk-imposers.

Once potential harms are weighted by probabilities, such that they become commensurable with the potential costs borne by injurers, the comparison of risks contemplated by Fletcher begins to more closely resemble that contemplated by Posner. Having quantifiable values, expected harms of different varieties can be compared. Yet, we have no grounds for treating more severe yet less probable harms as more extraordinary than less severe, more probable ones. From an actuarial point of view, such expected harms may be equivalent.

It is not clear, though, how Fletcher's Rawlsian security principle would operate once risks come to be compared solely on the basis of expected harms. For Posner, however, the methodology of social choice becomes clear once risks are assessed in this way. We want to reduce the magnitude of expected loss we will face over the long run. On the other hand, loss comes not only in the form of damage to our assets, but also in the form of expensive precautions that would be undertaken to prevent such damage.

People will foresee long-term gains, then, if they agree to rules that prescribe only cost-effective precautions.

At this point, however, it might seem as though Posner is diverging radically from Fletcher's Rawlsian approach. Their definitions of risks aside, Posner and Fletcher might also be understood as differing in their objectives, insofar as Fletcher understands rational assent to principles of tort law as guided by objective principles of fairness, while Posner accepts his principle on the basis of assent by individual welfare maximizers. However, the difference lies squarely in how much knowledge we have in the original position. As discussed above, Posner denies that fairness requires that we be ignorant of our personal circumstances in the original position, since that veil of ignorance is based on a preference for a tendency toward equality, which he rejects.

Background of Posner's Argument

With this comparative overview of Posner's social choice approach in hand, we should clarify its position within his more recent tort theory, before further developing the argument. As discussed earlier, Posner's shift in approach stems from his repudiation of ethical theory as a foundation for a system of values. He rejects wealth maximization as a foundational principle of normative jurisprudence, and now even concedes that the norm could not adequately resolve all of the issues of tort law. He concedes that the wealth maximization norm is not derivable from any comprehensive moral theory, and that the good the norm seeks to promote has no intrinsic worth.²¹ However, Posner maintains, the criticisms that tend to undermine ethical theory's support of the norm only reflect the general shortcomings of ethical theory. He now recognizes ethical theory as relevant to wealth maximization only to the extent that a demonstration of the norm's

compatibility with our society's more influential moral traditions is useful. He has recast some of his other earlier arguments in order to show that the major ethical traditions do not conflict with the wealth maximization norm.²² Posner's newer position, then, is that pragmatic concerns may carry the day and justify the norm's use by common law courts as long as the norm does not offend any deeply held moral doctrines.

Posner's change in approach from the one discussed in the previous chapter to the pragmatic one to be discussed below did involve an intermediate step. Posner's first shift in approach did not constitute any sort of rejection of ethical theory as a foundation for legal rules. Rather, it simply represented a shift in foundations, with the goal of justifying wealth maximizing rules by drawing upon elements of established ethical theories. At that point, he maintained that it could be understood as a sort of constrained utilitarianism that obviates the problem of interpersonal utility comparisons. Yet, he also contended that wealth maximization might also be seen as a plausible extension of Kantian principles of autonomy. He considered the norm, then, as a hybrid of utilitarianism and this other largely incompatible tradition in moral philosophy.²³ This respect for autonomy weighs in where markets facilitate improvements in social welfare, and so resources may be put to efficient use where they are protected by a framework of rights.

Posner did not retain this new foundational approach, however. We see that he now maintains that ethical theory has never been an effective means of altering entrenched moral beliefs and values. "All systematic moral theories stub their toes on the immovability of bedrock moral beliefs by argument",²⁴ he contends, for every theoretical moral doctrine has implications that will conflict with incorrigible moral intuitions.

Rather than attributing this problem to our persistent failure to discover the correct moral theory that we may someday articulate, Posner accepts Alasdair MacIntyre's explanation, that our widely held "framework" of moral beliefs is better understood as a patchwork, a conglomeration of elements of older, irreconcilable moral traditions.²⁵ Kantian ethical theory and utilitarianism, for example, may to some extent be compatible, as a wealth maximization norm may bear perfectly consistent implications of each theory. Yet one might propose an extension of the norm on the basis of utilitarian considerations, only to find it to be antithetical to Kantian values. So long as such resulting conflicts among a plurality of entrenched ethical theories persist, no ethical theory can be completely satisfactory.²⁶

In light of this obstacle, Posner suggests, we should turn our attention away from the search for an overarching theoretical justification of the wealth maximization norm. On the other hand, we do have certain incorrigible moral beliefs that would lead us to reject any norm that conflicted with those beliefs or their implications. It should suffice, then, to show that the wealth maximization norm does not conflict with such beliefs.

We need not think of the norm of wealth maximization as one that borrows here from Bentham and Mill, there from Kant and Hayek, in an attempt to strike a compromise between rival comprehensive ethical doctrines. We can think of it rather in Rawls's sense of an "overlapping consensus." People who subscribe to different comprehensive doctrines may nevertheless be brought to agree upon a political principle, such as wealth maximization, to govern a particular field of social interactions. So an egalitarian, a Millian liberal, an economic libertarian, and an aficionado of Aristotelian corrective justice might all be brought to agree that something like our present system of tort law, plausibly conceived as wealth-maximizing in its basic orientation, is the appropriate system for regulating most accidents.²⁷

Here, Posner is not maintaining that Rawls's principles of justice would endorse a wealth maximization norm. Rather, the phenomenon of overlapping consensus merely

reflects the compatibility of the wealth maximization norm with prevailing moral theories. This approach to defending wealth maximization is pragmatic insofar as it does not seek to derive from established moral theory an account of wealth as a value. Rather, it appeals to the desirable aspects of societal wealth as a good, even if it is not the only social good.²⁸ That the norm appeals to nothing deeper than such inherent desirability is made clear by Posner when he challenges John Broome's claim that any method of evaluation (including the Kaldor-Hicks criterion) 'needs to be founded on a theory of value.'²⁹ To say that 'evaluation' requires a theory of 'value', Posner maintains, is just a misleading equivocation, or a play on words.³⁰ The related concepts of cost-benefit analysis, Kaldor-Hicks efficiency, and wealth maximization may be founded on 'nothing deeper or more rigorous than a showing that it has consequences that we like.' In the context of tort law, these desirable consequences are the expected marginal increase in wealth nearly every individual can expect over the long run, on Posner's view, in comparison with a tort regime that does not employ efficient liability rules.

Posner and the Consensual Basis of Wealth Maximization

Since we are concerned with the supposed threat that wealth maximizing tort rules pose to individual autonomy, we turn to Posner's attempt to reconcile the wealth maximization with Kantian moral theory, made in an effort to address that concern. Posner acknowledges that the Kantian moral judgment that one should not treat another as a mere object may well underwrite the doctrine that '[w]e do not permit degrading invasions of individual autonomy merely on a judgment that, on balance, the invasion would make a net addition to social wealth [which is too] deeply entrenched in our society at present for wealth maximization to be given a free rein.'³¹ He further acknowledges an

apparent tension between wealth maximizing tort rules and Kantian prescriptions of respect for persons, insofar as the former entail an analysis that “appears to treat potential accident victims merely as obstacles to the ends of potential injurers.”³² Yet, he maintains, this apparent tension is simply that, as a closer analysis reveals that wealth maximizing rules require of all potential injurers and potential victims “due consideration for the plans, goals, choices, etc. of the other.”³³ The Assignment Principle would secure the consent of its participants insofar as it would promote their individual ends more effectively than any alternative liability rule. Since the principle garners near unanimous consent, it cannot be said to subordinate victims to a status as means to the ends of the injurers.³⁴

It is in virtue of this presumed superiority of wealth maximizing tort rules as a mechanism for promoting individual ends that Posner also maintains that the results this system achieves will approximate Pareto optimality.³⁵ That is to say that most, if not all, individuals, will enjoy increased levels of welfare in the long run under a regime of wealth maximizing rules. Losses incurred by injured parties in the short run are in fact compensated for by savings accrued in the long run.

The arguments for the compatibility of wealth maximization norms with Kantian and Paretian principles presented by Posner in his later work are in fact summary statements of his earlier arguments for those norms, referred to above, which were originally intended to ground wealth maximization norms in prevalent ethical theories such as Kantianism and utilitarianism. His change in approach, best described as a shift in emphasis from justification to reconciliation, leaves intact the centrality of these earlier arguments for his position. His new approach, therefore, is also vulnerable to objections raised against those arguments.

From the point of view of a principle of consent, Pareto superior moves and Pareto optimal states are morally acceptable. Rational parties would consent to Pareto superior moves, and moves from Pareto optimal states would be unacceptable insofar as one rational party would withhold consent to such a move. It is less clear how a Kaldor-Hicks efficient move can be considered consensual, for such a move may leave one party worse off. Posner maintains, however, that even losers consent to Kaldor-Hicks efficient transactions. When a party is fully compensated for a loss, and the compensating party benefited from the loss-producing activity, the full transaction comprises a Pareto superior move. In such a case, the party has received what Posner calls *ex post* compensation.³⁶ This is the most easily recognized and best understood form of compensation, but he maintains that it is not the only kind of consent-generating compensation. Parties who, pursuant to the Assignment Principle, suffer losses during Kaldor-Hicks efficient transactions are compensated *ex ante*, and so, Posner argues, they may be regarded as having consented to the loss.³⁷ His position is that the Kaldor-Hicks criterion satisfies the Pareto Superiority criterion provided there is a sufficient probability that an individual will benefit in the long run from such projects, though he may lose out in the short run.

Posner recognizes such *ex ante* compensation under conditions where we may infer the consent of rational parties to an institutional framework that will generate savings for each of them in the long run, even if it may occasionally result in short run losses.³⁸ This approach is supposed to explain how we might understand an injured driver to have “consented to, or waived any objection, to not being compensated for his injury,” where such compensation would not be forthcoming under a negligence rule.³⁹ In the

case of a tort framework for automobile accidents, for example, he expects that drivers would not prefer a system of liability that calls for all accidental losses to be compensated for *ex post*. This is grounded on the assumption that a negligence rule provides for a more efficient system of accidental loss allocation. In the more efficient system, the sum of liability and accident insurance costs will be lower. Non-drivers might also benefit under such a regime, despite the risks they face as pedestrians, if a wealth-maximizing tort regime lowers the cost of services they enjoy, such as taxi transport or home delivery.

Rational parties, in the face of uncertainty regarding the outcomes of the risks they impose and face, would select those rules that provide the best prospect of savings in the long run. Individuals may be understood as having consented to wealth maximizing rules, the basic argument being that individuals would consent to rules that reduce the cost of conducting their lives in the long run. This general interest in wealth maximizing rules, in Posner's view, provides a basis for them in consent, and thereby promotes society's interest in protecting individual autonomy. Within this approach, *ex ante* compensation actually need not purport to constitute consent to losses incurred in Kaldor-Hicks efficient transactions. Rather, compensation, in the form of expected long-run savings, justifies the Assignment Principle as an object of rational consent. *Ex ante* compensation, then, makes Kaldor-Hicks efficient transactions consensual because the Assignment principle satisfies the Pareto efficiency criterion. If it satisfies this criterion, it satisfies what Posner calls the Pareto Principle, 'which is that a change (including a change brought about by an accident or an intentional act) is good if it makes at least one person better off and no one worse off.'⁴⁰ In a sense, then, the use of the Kaldor-Hicks efficiency criterion is understood to be justified by Pareto efficiency. It would not do to

say the Kaldor-Hicks criteria could justify it, as this would be question-begging. After all, hypothetical compensation could not be used to justify hypothetical compensation.

Criticisms of the Ex Ante Compensation approach

There have been three major lines of objection to Posner's rational choice approach. We will present and consider each of them in turn. The first line of objection, raised by both Coleman and Dworkin, challenges the claim that consent of any form can be recognized in the context Posner considers. In the second, Coleman challenges the assumption that wealth, as opposed to some other value, would be the primary concern of parties offered a choice of tort principles. I shall argue that both of these lines of objection are ill founded. In the third objection, Dworkin argues against Posner's position that a satisfactory level of consent to the Assignment Principle can be expected, even if it is not unanimous. Dworkin's argument, as I hope to show, reveals a serious difficulty with Posner's approach.

The Plausibility of Consent

Coleman contends that neither *ex ante* nor *ex post* compensation is constitutive of consent. If *ex post* compensation were so constitutive, then it would be impossible to say that an injured party did not consent to suffering a loss for which he was later compensated.⁴¹ The same consideration would bear on *ex ante* compensation. Along the same lines, Dworkin has attacked the view that savings can be understood as a form of compensation.⁴² He considers an instance of *ex ante* compensation, wherein the owner of a parcel of land suffers a loss after a local factory relocates to another region, in the form of diminished property value. In introducing the example to illustrate *ex ante* compensation, Posner maintained that the loss in question would have been compensated,

insofar as “the probability that the plant would move was discounted in the purchase price [the owner] paid.”⁴³ However, as Dworkin points out, the claim that losses have been compensated *ex ante* begs an important question. It assumes that when the price of a given piece of property is discounted in virtue of a risk, e.g., a chance that the local factory which employs most of local residents will move, thereby reducing local property values, that “it has been established and understood by the parties that the buyer must bear the loss.”⁴⁴ Likewise, Coleman maintains, risk-based discounts give us no reason to find that one who accepts a discount consents to a loss ensuing from the risk. A party that purchases a home in a crime-ridden neighborhood at a price that reflects the insecurity of private property, Coleman argues, does not consent to the criminal infliction of damage to the home.⁴⁵

Even if this point confounds our ability to recognize *ex ante* compensation and, consequently, consent to the loss-creating move in this scenario, it actually has little bearing on the case for recognizing such compensation in the context of the application of liability rules. If anything, it demonstrates that Posner chose an inappropriate scenario to illustrate his approach. First of all, strictly speaking, it is not the harm that creates a loss that is being consented to within this choice model; the parties in Posner’s variant of the original position are instead consenting to a liability rule that might deny compensation for their loss. Therefore, while Dworkin maintains that we would have to be able to impute to the landowner an understanding that he would bear the loss when the factory relocation lowers the value of his property, it is exactly the expectation of a burden of loss that the selection of a liability rule is expected to carry. Therefore, we should find that, under Posner’s approach, consent is imputed to parties on the basis of their choice to

accept periodic losses, on the basis of the gains that will offset them over the long run. This is different from imputing consent to parties solely on the basis of the fact that they have been compensated.

Consent to wealth maximizing rules obtains, according to Posner, in an implied or hypothetical form, just as it does in the context of contract disputes, where a court might impute consent to a more precise interpretation of an ambiguous clause of a contract on the basis of what would have been in the party's interest at the time that contract was formed.⁴⁶ Yet, Dworkin maintains, rather than judging the party to have failed to overtly express his actual consent, the court in such contexts finds a sort of 'counterfactual consent, which is not really consent at all.'⁴⁷ Even if we can recognize consent that is not made expressly, e.g., in cases where we infer implied consent from action, inaction, or silence, there are no logical grounds for ascribing consent to a party on the basis of the proposition that he would have given his consent, if it were elicited. After all, although I might be willing to allow my friend to borrow my car if he were to simply ask, that by no means entails that I consented to his borrowing my car when he does not ask. I would quite understandably feel violated if he were to do such a thing, merely because he assumed I permitted the transaction, given the fact that I would have permitted it when given the chance.

Accordingly, Coleman maintains that, in virtue of the absence of any real consent, any attempt to invoke consent as a justification for the Assignment Principle will fail. He acknowledged, however, that an argument might be formulated that does not invoke consent at all. Without attributing the argument to Posner, he recognized that the following line of argument would at least be more plausible:

Risk-neutral, rational persons facing economic choice under uncertainty would choose to pursue wealth through Kaldor-Hicks institutions. If individuals had chosen to pursue wealth through Kaldor-Hicks [efficient] moves, then their losses would be justified because they freely risked them, not because they consented to them.⁴⁸

Coleman is mistaken, however, in suggesting that Posner did not contemplate this sort of approach. The discussion presented above should clearly indicate that the line of argument just quoted is what Posner had contemplated. The only plausible objection along these lines at this point, then, is that Posner simply conflated consent with hypothetical rational choice. Whether such a move is justified, however, is an issue that does not even need to be addressed before it can be established that institutions promoting Kaldor-Hicks efficiency would be chosen under the conditions outlined by Coleman. Therefore, we will turn to Coleman's next line of objection.

Wealth as an Object of Rational Choice

While Coleman finds the hypothetical rational choice argument to be more plausible than the *ex ante* compensation argument,⁴⁹ he rejects it, insofar as it actually rests on the assumption that wealth would be regarded as an instrumental good of primary importance to parties in their hypothetical decision process. To make that assumption, Coleman maintains, is to beg the question of whether wealth would be the index of utility that rational parties would promote.⁵⁰ Posner, Coleman maintains, has not explained why a rational party should prefer wealth maximizing principles to Rawlsian or utilitarian ones. If he were to provide such an explanation, it would have to show that wealth is an object to be preferred over happiness, Rawls' primary goods,⁵¹ or any other plausible object of rational choice.

A Rawlsian Response?

Coleman is suggesting, then, that parties choosing tort principles under uncertainty may well choose principles that tend to promote Rawlsian values instead of simply wealth. In attempting to address such a difficulty, Daniel Farber has proposed that wealth maximizing principles could be selected by parties to a social contract, provided only that they be accompanied by other principles of justice, such as Rawls' principle of equal liberty and the difference principle, which would supercede them.⁵² He argues that once guarantees of basic rights and opportunities are in place, parties in a Rawlsian original position might well look to see how legal rules might be tailored to promote economic efficiency, and adopt a third principle of fairness:

In some defined category of cases, when a court is faced with a problem that cannot be resolved by Rawls' two principles and which has not been settled by the legislature, the court should decide the case by applying the rule of law that is most economically efficient in terms of its effects on similar future transactions.⁵³

While Coleman might well agree that some exercise of cost-benefit analysis could be acceptable when its application is restricted to those areas where it would not conflict with other values, it is not clear whether such restrictions would allow for the adoption of wealth maximizing tort rules. It should be noted that Farber was trying to carve out an area of law that could be exempted from Rawls's egalitarian principles within Rawls's own Social Contract framework, but he understood this area as comprising commercial law, or elements thereof. While some elements of commercial law may be regulated by forward looking legal rules geared toward encouraging efficiency without offending any other political values, efficient liability rules in accidental tort law may raise issues of fairness from the point of view of Rawls's contract theory. The issue comes down to whether tort rules that spare injurers from liability on the basis of an efficiency analysis made pursuant

to the Assignment Principle would curtail basic liberties assigned by the Principle of Equal Liberty. Rawls's discussion does not seem to provide an answer here.

What is clear, however, is that we cannot be satisfied with a principle such as Farber's which takes third place in a lexical ordering of principles of justice,⁵⁴ for purposes of establishing a Rawlsian basis for the Assignment Principle in tort law. Instead, we need a theoretical basis for recognizing that affording the maximal amount of liberty compatible with a like amount of liberty for all others does not require tort rules that allocate liability more strictly than wealth maximizing ones. Otherwise, the Principle of Equal Liberty would trump the Assignment Principle.⁵⁵ Posner does offer a way of accounting for how the Principle of Equal Liberty is compatible with the Assignment Principle. In reference to the autonomy of potential victims that is supposedly threatened by the Assignment Principle, Posner points out that

[o]ne could equally well assume that people have a right not to be hampered in their activities by being made liable for accidents that they could not have prevented at reasonable cost. No liability denies the autonomy of the victim; strict liability, the autonomy of the injurer. To differentiate the two when neither is at fault is no simple task.⁵⁶

We will have a bit to say in response to this point in the next chapter, but it will suffice to say for now that if the choice of liability rule stands to affect the autonomy of both injurers and victims, then it is not clear whether a liability rule can curtail autonomy in an unacceptable way under Rawls's principle. Therefore, Coleman has not shown satisfactorily that the choice to treat wealth as a good to be maximized in the original position is antithetical to the maximization of liberty. However, this does not address the concern of Rawls and other contract theorists for a distribution of wealth that tends toward equality.

Even if the disposition of wealth is considered to be the primary object of norms of social choice, it might be argued further that even rational, risk-neutral parties given a choice of liability rules might not choose to maximize social wealth. Instead, their choices might be informed by distributive concerns, such as a more equitable allocation of wealth. Economic equality, along with political equality, is one value that individuals might seek to maximize, and so this objection falls within the scope of Coleman's objection. Such preferences would not prevent rational parties from selecting wealth maximizing tort principles, however, if such principles were not antithetical to an equitable distribution of wealth. It is for this reason that we need to consider whether wealth maximizing tort principles contribute to economic inequality in an unacceptable manner. Strictly speaking, we are concerned with corrective justice, and not distributive justice. However, distributive issues come in the back door, as it were, once it is proposed that a principle of corrective justice can be justified on the basis of collective rational choice.

Posner does not dispute that wealth maximizing policies may well increase the gap between the richest and poorest members of society. Wealth maximization can compound economic inequalities to the extent that its allocation of entitlements depends largely on existing allocations, and those with larger holdings will tend to value disputed entitlements more highly and thereby be more likely to win them. On the other hand, he finds substantial evidence that wealth maximizing policies and rules raise income levels, i.e., the average or median level of individual wealth. The standard of living of the poorest members of society continually improves as a result of markets guided by wealth

maximizing norms. These results are morally significant, as opposed to bare differences in wealth among individuals, which he dismisses as 'morally arbitrary.'⁵⁷

While Rawls might not have stated the point as bluntly, his own principle of distributive justice, in perhaps the most influential account of distributive justice within liberal democratic societies, also shares this concern with absolute levels of wealth and welfare. His 'Difference Principle' holds that social and economic inequalities are permissible only when they are to the benefit of the members of the least advantaged group in society.⁵⁸ Such a principle permits a widening of inequality between two parties when it maximally improves the level of welfare of the less well-off party.

If bare inequalities are not questionable from the point of view of justice, are they still problematic from a more pragmatic point of view? It might be argued that they foster political and social instability. The basic argument is that the framework of social cooperation cannot sustain itself when a large segment of society comes to believe that the high welfare levels of others come at their expense. If the members of society with the least wealth perceive such a significant disparity between them and the opposite end of the spectrum, they may be spurred to tear down that framework.

Posner points out that a society's average wealth serves as a more reliable predictor of stability than does its degree of equality of wealth.⁵⁹ That is, an increase in the average level of wealth will provide for stability more reliably than a move toward equality. The intuitive argument for that thesis is that wealthier societies will be able to invest more in those institutions that contribute to social and political stability. Institutions with more resources can better afford to uphold norms of civility and due process, and they can better provide for their own security. On the other hand, a move

toward greater equality that reduces aggregate social wealth may thereby weaken those institutions that contribute to stability. With empirical support from studies measuring the political stability and levels and distributions of wealth in numerous countries, Posner concludes that average income is a statistically significant factor in a country's political stability (as measured by frequency of coups, extraconstitutional transfers of power, etc.).⁶⁰ Studies found that income levels were positively correlated with political stability, yet there was no correlation between equality of income and stability.

There is also little reason to believe that the prospects of gaping inequalities of wealth, even if they are a concern, will be exacerbated to any significant degree by the Assignment Principle. Insofar as large tort law judgments are infrequent, it is unlikely that they could systematically transfer wealth from one group to another, even if wealth maximizing tort judgments do favor the rich. Yet, there is good reason to expect that the Assignment Principle need not systematically favor the wealthy, despite the fact that they can offer more for a given disputed good. The amount of wealth one possesses, Posner points out, is only one factor in willingness to pay.⁶¹ Given a sufficiently strong preference for a given good, a less wealthy person might outbid the wealthy party, when matching that bid would pose sufficiently high opportunity costs.⁶²

The considerations just discussed were raised mainly in the context of debates over the merits of the use of wealth-maximizing cost-benefit analysis as a tool of public policy in general. However, the defense of the Assignment Principle, strictly speaking, need not carry implications for policy beyond those of tort law. As we will see below, even if sound principles of distributive justice rule out wealth maximization in the

broadest capacity, wealth maximizing tort principles can still be defended when they are understood as couched within a larger institutional framework.

Institutional Competence

In the previous chapter, we considered the argument that duties of corrective justice require compensation when ownership is interfered with. Since transfers of holdings carried out in the name of distributive justice typically go uncompensated, it might be argued that the practice of distributive justice violates corrective justice. Yet, to the extent that we are willing to allow systematic transfers of entitlements, we recognize that there are some values in a liberal political order that may supercede the interest in autonomy that is threatened when entitlements suffer from interference at the hands of other parties. Indeed, insofar as redistributive principles may call for a removal of entitlements that principles of corrective justice would protect, the former may be understood as taking priority over the latter in a liberal order. That is not to say, however, that redistributive principles should supplant the principles of the common law of torts. The common tort law framework, executing corrective justice, may serve to protect the existing scheme of entitlements, while that scheme is subject to change by institutions executing redistributive principles. In effect, then, we have one institution autonomously promoting some liberal values, such as individual sovereignty, while the distribution of entitlements it establishes or preserves may be modified by other institutions, which serve to promote values such as the maintenance of a level of economic sufficiency or equality deemed necessary for the proper functioning of a democratic society.

Given that the tort decisions reached autonomously by courts are subject to modification, we might ask why this autonomy should be preserved. That is, we might ask why distributive principles should not be overriding in common law adjudication, and why such adjudication should lend such strong credence to a set of values that may subsequently be given far less priority. The reason is that even if redistributive goals have a place in the institutional framework of the law, it is not clear that they have a place within the institutions of corrective justice. Such goals might not be pursued in that context, even if we concede that distributive principles may well serve to alter the presumed allocation of entitlements corrective justice seeks to enforce. While the demands of distributive justice may be overriding, they would be undesirable as a ground of tort liability. The redistribution of entitlements through the allocation of liability and risk would be an uneven method at best. If a society adopts redistributive principles, it ought to implement them in ways that benefit members of entitled groups uniformly. A *redistributive* principle of liability would reallocate resources as a result of contingencies, such as destructive accidents, that society happens to have an interest in preventing. Such a principle would disproportionately benefit those members of entitled groups who happen to be involved in such contingencies.

Consider, then, wealthy individuals who drive through impoverished communities and occasionally cause harmful accidents. Policies supporting the redistribution of wealth from rich parties to poor ones might favor tort rules that hold richer parties to a higher standard of care or impose upon them a measure of damages exceeding the extent of the harm they caused, in order to insure that more resources are transferred from rich injurers to the poor victims over the long run. Yet, only a select few of the members of

this poor community will benefit from such transfers, and fewer resources among wealthier parties will be available for redistribution in the future.

That venues of tort adjudication are not the ideal instruments of broad redistributive goals is reinforced by an argument presented by Louis Kaplow and Steven Shavell. They showed that any redistributive goal society might pursue will be better served by an income tax system than by common law adjudication.⁶³ They drew upon a theory of optimal taxation to show that while income taxes may distort an otherwise more efficient allocation of resources, redistribution conducted within an adjudicatory framework is likely to produce more distortions. A society with redistributive goals would be better served by a combination of common law rules that promote efficiency and a tax system that may directly address issues of a just distribution of wealth. To illustrate, suppose that an inefficient liability rule is employed, and it lowers the per capita net income of the parties covered by the rule by \$200. That is, the average marginal cost of avoiding liability under this rule is \$200. Under the efficient liability rule, this \$200 would be saved. This represents an additional \$200 per capita that can be redistributed when the tax rate is slightly increased. If the tax rate is increased by the exact amount that, on average, will offset the savings wrought by a move to more efficient liability rule, then parties are no worse off when their income is lost to taxation instead of being spent on inefficient precautions. Society, therefore, enjoys a per capita net increase in wealth. If the tax revenue were distributed to the class of potential accident victims, they would each thereby be made better off. By hypothesis, the \$200 exceeds the average expected marginal cost of accidents, lest that cost be efficient after all.

This is one reason why we ought to look to social institutions other than the courts to achieve redistributive goals more competently. From a pragmatic point of view, then, different and sometimes competing liberal values, such as autonomy and equality, may be pursued more effectively by different parts of a larger institutional framework.

Considerations of institutional competence, then, would inform rational parties, who might otherwise value economic equity, that such equity need not bear on their choice of tort principle. In general, parties involved in the sort of collective rational choice posited by Posner would not be inclined to select other values besides wealth as the object of maximization if there are other aspects of a broader institutional framework that can promote those values more effectively than courts.

Utilitarianism

Having addressed the case for promoting Rawlsian values instead of wealth, we will briefly consider Coleman's other stated alternative. As discussed above, Coleman suggested that utility maximization might become the object of maximization by collective social choice just as readily as wealth.⁶⁴ Leaving aside the objections to classic forms of utilitarianism that were presented in Chapter One, there is another serious issue that concerns even the most limited application of the principle of utility. This is the problem of making interpersonal comparisons of utility. It is this problem that is mainly responsible for pushing the discipline of welfare economics to abandon all pretense of utilitarian thinking and adopt a Paretian criterion for welfare.⁶⁵ There have been some interesting holdouts, most notably John Harsanyi, who has argued that we can indeed commensurate individual utility functions by drawing upon a faculty of 'extended sympathy.'⁶⁶ This and other putative means of drawing interpersonal comparisons of

utility have received significant attention. The outcomes of these debates, however, point to the conclusion that there is no objective basis for making such comparisons.⁶⁷ Without such a basis, wealth seems to be a vastly more plausible object of maximization than utility.

Posner's rational choice argument for wealth maximization, then, passes muster so far. We have seen that objections to the idea of invoking wealth as an object of rational choice by parties seeking to promote their own welfare in an "original position" setting fall short of the mark. We may conclude that parties who would in fact stand to benefit financially over the long run from efficient liability rules would consent to their adoption. We may also concede for the sake of argument that universal consent would confer legitimacy on a tort regime that employs the Assignment Principle. Yet, for reasons to be discussed below, we will have to consider whether Posner's argument stands when even a hypothetical consensus is implausible.

Dworkin's Objection

In raising his own objection against Posner, Dworkin has focused on the issue of whether "counterfactual consensus" to wealth maximizing tort rules under conditions of uncertainty outlined by Posner is plausible. Again, Posner's position is that individuals would have chosen wealth maximizing rules because, without knowing whether they will cause accidental injuries in the future or become the victims of such injuries, they can expect savings in the long run by choosing rules that allocate liability efficiently. Clearly, though, it would be in the interest of a party that was just injured to choose a strict liability rule, even if it is inefficient. A further point working in Dworkin's favor is that those parties that are aware of their disproportionately low levels of risk creation

would not benefit under a wealth maximizing tort liability regime, as their expected losses from injuries caused without fault would exceed their expected savings measured in personal liability avoided under such a regime. Dworkin maintains that Posner presupposes ignorance of such recent history, yet such a selection of the conditions of ignorance "must be wholly arbitrary."⁶⁸

This reflects the underlying problem, which Dworkin does not specify, that rational choice or consent based arguments for the Assignment Principle may have to presuppose that the risks each individual poses must be roughly equivalent to those risks that individual faces. If equalities are extreme enough, then we might expect some parties to lose out in the long run under a wealth-maximizing tort regime. In that case, it would not be in their interest to assent to the Assignment Principle. Whereas, in the case of driving, for example, some parties who face risks as pedestrians do not drive at all, drive very rarely, or exercise an extremely high level of care while driving stand to risk very little under liability judgments if a strict liability rule is chosen, it may very well not be in their interest to select a wealth maximizing rule, despite the financial benefits they might reap by virtue of others being able to drive inexpensively. It will be against their interest to choose such rules if the losses they can expect to shoulder under a liability rule that denies them compensation outweigh their savings under such a rule in the long run.

Indeed, in the case of automobile drivers, we encounter diverse, and sometimes unique levels of human competence and perception, as well as considerable differences among the vehicles they drive that bear on the levels of risk their driving imposes. Taking these facts about drivers and vehicles into account, as well as variables such as the time and distance different individuals drive during a specified period, we can find

that real reciprocity of risk imposition does not obtain. Of course, insurers cannot make the sort of fine-grained distinctions among the individual drivers that complete information would permit, for the high cost of information leads them to make only a few distinctions among drivers on the basis of statistically significant and readily ascertainable characteristics. Information costs justify the insurer's exclusion of other relevant facts. After all, acquiring costly information might lead drivers to pay more for insurance in the long run. Yet, Posner has no reason to exclude such information, where such exclusion is necessary if the common law is to determine that drivers indeed impose reciprocal risks upon one another.

In fact, Posner does not presuppose this ignorance about relative levels of risk imposition. Indeed, he recognizes that levels of risk creation are far from uniform throughout society. He acknowledges that "[s]ome people who are more prone to be injured than to injure will be worse off [*ex ante*], since negligence favors injurers relative to strict liability, and some who are more prone to injure than to be injured will be better off."⁶⁹ Those individuals who would be better off with a strict liability regime, or are simply risk averse, can improve their prospects over the long run by purchasing insurance.

The "losers" will lose little, though—a matter of slightly higher insurance premiums. And both the "winners" and the vast majority of drivers who are neither disproportionately likely to injure than to be injured nor vice versa will be better off. Complete unanimity will be unattainable, but near unanimity can be presumed and the few losers will hardly be degraded, their autonomy wrecked, or their rights destroyed by having to pay a few dollars a month more in automobile insurance premiums.⁷⁰

The "losers" under a wealth maximizing tort liability regime would not protest too vehemently, for even if they were to withhold consent, insurance would spread their

expected losses over the long run into tolerably small sums. Insurance, therefore, complements the Assignment Principle's near-satisfaction of the Pareto Principle by dulling dissatisfaction at the margin. Yet, it must be conceded that there are those who would prefer a strict liability rule over a liability regime guided by the Assignment Principle, and would only consent to minimizing their losses in the long run by accepting full or nearly full compensation for actual injuries and avoid paying insurance premiums. An insurance scheme is not expected to allow the Assignment Principle to win a consensus or satisfy the Pareto Principle. It can only hope to make the shortfall more acceptable from a moral point of view.

When parties are not widely ignorant about the conditions Dworkin outlines, and are aware of the levels of risk they will encounter as well as those they will create, consent to wealth maximizing rules, solicited at any given time, would not be unanimous, and thus the adoption of such rules would never satisfy the Pareto Principle. However, Posner maintains that absolute unanimity is not necessary, and that only a "fanatic" would strictly enforce the Pareto criterion. Nearly unanimous consent should be satisfactory.⁷¹

Dworkin in turn objects to this non-fanatical Paretianism, which, in his words, holds that "a political (including a judicial decision) is justified if it will make the vast bulk of people better off and only a relatively few worse off."⁷² The use of Pareto efficiency, recognized as a criterion for improvements in welfare free of the conceptual and moral difficulties with utilitarianism, here devolves into a utilitarian standard in virtue of the seemingly small concession regarding unanimity. He maintains that when we make such accommodations for disutility, we move inexorably toward utilitarian

decision making, inasmuch as we would eventually face issues where disutility to a minority must be weighed against the sum of benefits to the majority.

Dworkin seems to be overstating the significance of abandoning the Paretian requirement of unanimous consent. Surely, the judgment that a liability regime comes as close to satisfying the Pareto criterion as can reasonably be expected will accompany the judgment that the gains won under such a regime outweigh its losses. Yet, Dworkin is incorrect in maintaining that accepting a norm on the basis of its nearly complete satisfaction of the Pareto criterion as a commitment to utilitarian reasoning, given that acceptance of the norm gives no indication of how gains and losses are compared. For instance, a certain non-utilitarian principle might hold that harms that fail to meet a given threshold of severity are not morally significant, while those that pass the threshold may not be justified on the basis of any concomitant gains. Yet such a principle seems to be consistent with Posner's non-fanatical Paretianism.

At best, however, this non-fanatical Paretian approach only manages to ease the tension between the Assignment Principle and autonomy. Posner's argument must be that the residual tension is an acceptable price to pay for a liability regime that is in the best interest of the overwhelming majority over the long run. The difficulty, however, is that we really have no argument supporting the conclusion that this shortfall is of an acceptable magnitude, by a utilitarian or any other standard. Even if it is plausible to suppose that a majority of individuals would benefit economically over the long-run by the Assignment Principle, we have no assurance that it would benefit the overwhelming majority. It is for this reason that the rational choice argument is ultimately unpersuasive. It has not been demonstrated to warrant even a near-consensus, even if all parties choose

principles under conditions of natural ignorance accept wealth as the object of maximizing choice.

Dworkin's own Rational Choice Approach

Despite Dworkin's criticisms of Posner's rational choice argument, he actually proposes a variation of the argument as a possible basis for the Assignment Principle. What makes this proposal ironic from the point of view of Posner's approach is that it actually represents a shift back towards Rawls's veil of ignorance, away from Posner's 'natural ignorance.' Dworkin suggested, surprisingly, that wealth maximizing tort principles might be established on grounds of fairness by way of an appeal to a principle that he calls 'beta', which holds that

People should take responsibility for such costs of accidents if such costs would be assigned to them by legislation in an ideal community in which everyone acted and voted with a sense of justice and with mutual and equal concern and respect, based on information that is also easily, publicly, and reliably available to the actor.⁷³

This variation on Posner's model of consent reflects a move back toward the veil of ignorance, insofar as the resulting ignorance is what enables parties in an original position to assent to principles that reflect 'equal concern and respect.' This principle, he argues, may ground wealth maximizing principles in fairness, to the extent that parties in the specified community would, out of a concern for justice and respect, confer upon one another long-run savings. Dworkin, then, allows for the possibility that wealth maximizing rules may be morally acceptable in virtue of a more thoroughly Rawlsian justification.

This tentative approach to justifying wealth maximizing rules, despite the sort of departure it takes from Posner's argument from interest, still shares one of its key

assumptions. They both presuppose uniform levels of risk creation. As discussed, in all but perhaps a number of cases, that assumption is unrealistic. That problem seriously undermines Posner's case for wealth maximization, where the collective choice of rules is motivated by individual self-interest. Yet, the same problem rears its head when it comes to rule formation under the ideal conditions framed by Dworkin. There, the exercise of mutual and equal concern and respect should lead parties to recognize that since many of the risks imposed by some members of society on others are not reciprocated to any comparable degree, the adoption of wealth maximizing liability rules may fail to confer long-term savings on those who face risks but do not impose comparable risks on others. Where some parties gain over the long run at the expense of the cautious, we might conclude that the sort of equality held out by Dworkin as an ideal has not been achieved.

Conclusion

Since Posner's rational choice argument, as well as its variants considered above, does not succeed, we lack any sort of hypothetical consent that could plausibly serve to reconcile the assignment principle with the Kantian moral tradition. Despite Posner's retreat from a stronger position, that wealth maximization norms might be derived from Kantian norms emphasizing the value of autonomy, to a weaker one that would explain away an apparent tension between the norms, we find an insufficient basis for recognizing any form of hypothetical consent that would weaken the claims of autonomy against a wealth-maximizing tort regime.

This concludes our discussion of Posner's rational choice approach to justifying the Assignment Principle. Despite the fact that it can withstand the major criticism wrought by Coleman that wealth may not be the primary object of rational choice, it falls

to Dworkin's criticism and related concerns about the distribution of risk-imposing practices throughout society. In the next chapter, however, I will propose an alternative approach to justifying wealth maximizing tort rules that can avoid this objection.

¹ The classic statement of the rational choice argument appears in Richard Posner, "The ethical and political basis of the efficiency norm in common law adjudication," *Hofstra Law Review* 8 (1980): 487. The revised version appears in Chapter 4 of Richard Posner, *The Economics of Justice* (Cambridge: Harvard, 1985).

² See Chapter Two, pages 87-91.

³ Richard Posner, "Wealth Maximization and Tort Law: A Philosophical Inquiry" in *Philosophical Foundations of Tort Law*, ed. David Owen (New York: Oxford, 1995).

⁴ Posner, *The Economics of Justice*, 99.

⁵ Posner, *The Economics of Justice*, 99; see John Rawls, *A Theory of Justice* (Cambridge: Harvard 1971).

⁶ Posner also credits the economist John Harsanyi as an early proponent of the "original position." Harsanyi sought to employ it to ground a principle of average utility, rather than Rawls' difference principle. See John Harsanyi, "Cardinal utility in welfare economics and in the theory of risk-taking" *Journal of Political Economy* 61 (1953): 434, and John Harsanyi, "Morality and the theory of rational behavior", *Social Research* 44 (1977): 623.

⁷ Posner, *The Economics of Justice*, 100-01.

⁸ Posner, *The Economics of Justice*, 100.

⁹ George Fletcher, "Fairness and utility in tort theory" *Harvard Law Review* 85 (1972): 537-573.

¹⁰ *Ibid.*, 542.

¹¹ *Ibid.*, 543.

¹² *Ibid.*, 568.

¹³ *Ibid.*, 549.

¹⁴ *Ibid.*, 548.

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- ¹⁵ *Ibid.*, 556.
- ¹⁶ John Rawls, "Justice as fairness" *Philosophical Review* 67 (1958): 164-165.
- ¹⁷ Fletcher "Fairness and utility in tort theory", 550.
- ¹⁸ Jules Coleman *Risks and Wrongs* (New York: Cambridge 1992), 266.
- ¹⁹ *Ibid.*, 254.
- ²⁰ According to the BPL formula, an injurer was not negligent if the cost of the burden of precaution (B) exceeded the expected cost of harm posed in the absence of the precaution. The expected cost is the product the probability of the harm in question occurring in the absence of the precaution (P) and the cost of the harm when it occurs (L).
- ²¹ Posner, "Wealth Maximization and Tort Law: A Philosophical Inquiry", 101.
- ²² *Ibid.*, 99-100.
- ²³ *The Economics of Justice*, 66.
- ²⁴ *Ibid.*, 102.
- ²⁵ *Ibid.*, 103; see Alasdair MacIntyre, *After Virtue*, 2nd Edition (Notre Dame: University of Notre Dame Press, 1984).
- ²⁶ For further extended arguments by Posner attacking the viability of ethical theory as a tool for the evaluation of legal doctrines, see part one of Richard Posner, *The Problematics of Moral and Legal Theory* (Cambridge: Harvard, 1999).
- ²⁷ Richard Posner, *Overcoming Law* (Cambridge: Harvard, 1996), 404.
- ²⁸ See Richard Posner, *Frontiers of Legal Theory* (Cambridge: Harvard, 2001).
- ²⁹ John Broome, "Cost-benefit analysis and population" *Journal of Legal Studies* 29 (2000): 953, 954.
- ³⁰ Posner, *Frontiers of Legal Theory*, 133.
- ³¹ Posner, *The Problems of Jurisprudence*, 380.
- ³² Posner, "Wealth Maximization and Tort Law: A Philosophical Inquiry", 110.
- ³³ *Ibid.*, 110.

³⁴ *Ibid.*, 110.

³⁵ Posner, "Wealth Maximization and Tort Law: A Philosophical Inquiry", 104.

³⁶ *Ibid.*, 94.

³⁷ *Ibid.*, 94.

³⁸ *Ibid.* 99.

³⁹ *Ibid.*, 95.

⁴⁰ *Ibid.*, 104.

⁴¹ Coleman, "Efficiency, utility, and wealth maximization," 119.

⁴² Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard 1985), 276-77.

⁴³ Posner, *The Economics of Justice*, 94.

⁴⁴ Dworkin, *A Matter of Principle*, 277.

⁴⁵ It should be made clear that the *ex ante* compensation contemplated by Posner consists in savings enjoyed in the long run as a result of a more efficient liability rule. The examples presented by Coleman and Dworkin might suggest that *ex ante* compensation might take a more concrete form as discounts on specific entitlements. That Posner was not contemplating such discounts does not undermine Coleman and Dworkin's point, as they were merely invoking an actual discount to show that the benefit it carries is not a sufficient condition for consent. There remains the issue of whether we might look for such discounts as another kind of *ex ante* compensation that Posner merely overlooked. It might be argued that *ex ante* compensation is obtained when the risk of injury faced by the injured party in question accounted for in a discount that party enjoyed, insofar as a known risk of a good's loss tends to reduce the good's offer price. The losing party is in fact no worse off, then, as he should be indifferent between the degree of loss and difference in price he would have paid without the discount. It would seem, however, that this analysis will be inapplicable in many of the circumstances under which negligence claims arise. The information costs associated with assessing risks and adjusting prices accordingly may typically prevent the legal system from drawing a reasonable inference about the precise scope of property acquired in a transaction. It is precisely this sort of complication, however, that undermines Posner's appeal to *ex ante* compensation. His justification of the tort law system appeals to the need to correct market failure, and we need courts to secure efficient outcomes because transaction costs often make it difficult for the market to do so in situations where externalities are produced. By hypothesis, transaction costs that preclude voluntary exchange are present. So it is far from clear that parties will be able to obtain property at a price properly

discounted in light of potential costs the potential owner might incur. Transaction costs such as the cost of determining the likelihood that a given accident will occur and the cost of determining the extent of damage that might occur in the event of an accident are as likely to confound our efforts to discount prices properly as they are to frustrate the efficient allocation of rights that Coase contemplated.

⁴⁶ Posner, *The Economics of Justice*, 96.

⁴⁷ Dworkin, *A Matter of Principle*, 278.

⁴⁸ 'Efficiency, utility, and wealth maximization', 121.

⁴⁹ *Ibid.*, 121.

⁵⁰ *Ibid.*, 122.

⁵¹ In John Rawls, *Political Liberalism* (New York: Columbia, 1993), 277-78, Rawls identifies five primary goods essential to the fulfillment of any rational plan of life:

(A) Basic rights and liberties;

(B) freedom of movement and free choice of occupation against a background of diverse opportunities;

(C) powers and prerogatives of offices and positions of responsibility in the political and economic institutions of the basic structure;

(D) income and wealth; and

(E) the social bases of self-respect.

⁵² Daniel Farber 'Economic efficiency and the ex ante perspective' *The Jurisprudential Foundations of Corporate and Commercial Law*, ed. J. Kraus and S. Walt (New York: Cambridge, 2000), 67-70.

⁵³ *Ibid.*, 69. Like the Assignment Principle, Farber's principle is forward looking in the sense that it would provide an incentive to parties to allocate their resources efficiently.

⁵⁴ In addition to the two principles of justice, there is a 'lexical ordering' principle that prioritizes the first principle. Rawls, *A Theory of Justice*, 60-61. The principle of equal liberty always takes priority over the difference principle. The difference principle, therefore, is not to be applied unless the liberty principle is fully satisfied or does not apply. In other words, basic political and civil rights cannot be limited for the sake of creating additional economic advantages. Rawls' justification for this serial ordering of the two principles of justice is that parties in the original position would not agree to exchange any basic liberties for increased economic well-being.

⁵⁵ The Principle of Equal Liberty was discussed on page 102.

⁵⁶ Posner, *The Economics of Justice*, 98-99.

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- ⁵⁷ Posner, *Frontiers of Legal Theory*, 102.
- ⁵⁸ Rawls, *A Theory of Justice*, 75.
- ⁵⁹ Posner, *Frontiers of Legal Theory*, 108.
- ⁶⁰ *Ibid.*, 116.
- ⁶¹ Posner, *The Problems of Jurisprudence*, 380.
- ⁶² Less wealthy parties may also be able to depend on the altruism of third parties that can increase their bidding power.
- ⁶³ Louis Kaplow and Steven Shavell, "Why the legal system is less efficient than the income tax in redistributing income," *Journal of Legal Studies* 23 (1994): 667-681.
- ⁶⁴ Pages 114-116.
- ⁶⁵ Daniel Hausman and Michael McPherson. *Economic Analysis and Moral Philosophy*, (New York: Cambridge University Press, 1996), 87.
- ⁶⁶ John Harsanyi, "Cardinal welfare, individualistic ethics, and interpersonal comparisons of utility," *Journal of Political Economy* 63 (1955): 309-321.
- ⁶⁷ Alfred Mackay, "Extendend sympathy and interpersonal utility comparisons," *Journal of Philosophy* 83 (1986): 305-322; Daniel Hausman, "The impossibility of interpersonal utility comparisons," *Mind* 104 (1995): 473-490.
- ⁶⁸ Dworkin, *A Matter of Principle*, 280
- ⁶⁹ Posner, *Problems of Jurisprudence*, 390.
- ⁷⁰ *Ibid.*, 390.
- ⁷¹ Posner, *The Economics of Justice*, 97; In Posner, "Wealth Maximization and Tort Law: A Philosophical Inquiry", 105-106, he states "If unanimity is a morally attractive criterion for social action, near unanimity should be attractive too, even if less so."
- ⁷² Dworkin, *A Matter of Principle*, 282.
- ⁷³ *Ibid.*, 286.

Chapter Four

In this concluding chapter I shall present a case for the use of the Assignment Principle, which calls for an allocation of liability on the basis of a wealth-maximizing cost-benefit analysis, that avoids the objections raised against arguments considered in the previous chapters. In order to make the case for the Assignment Principle in a way that reconciles it with the concern for the preservation of autonomy against the demands of a social welfare calculus, however, we first need to develop a plausible theoretical basis for defending such autonomy with liability rules. I will show first that Richard Epstein, in presenting the theory of liability discussed in Chapter Two, has failed to do this. His approach can be salvaged, however, by an approach that invokes certain obligations entailed by the Kantian norm of respect for persons. This approach has previously been used to justify the imposition of liability for justified intentional injuries, but I shall argue that the grounds of tort liability in this context imply a *prima facie* case for the imposition of strict liability for accidental torts. Once this approach is articulated, however, I intend to show that the very regard for individual autonomy underlying the *prima facie* case for a strict liability regime does, when certain conditions obtain, allow us to balance the interests of parties to an accident in order to determine who should bear liability for the accidental loss. Briefly, these conditions involve the presence of information costs that renders the creation of losses involuntary. I will argue that when such conditions obtain, we can properly understand the interaction among parties to an accident to pose reciprocal threats to autonomy. After presenting this argument, I will argue that we may use the Kaldor-Hicks efficiency criterion as a standard of reasonable care in such a negligence rule. When applied under the conditions that allow for the use

of a negligence rule, I shall argue, the use of the criterion is no longer vulnerable to the objections raised against it in Chapter Three.

The Trouble with Epstein's Theory of Strict Liability

In Chapter Two we defended Epstein's theory of strict liability against an early argument of Posner's, which holds that accidental injuries that could not be prevented efficiently need not be understood as right infringements. Even if that objection fails, and we can recognize many of such accidental harms as right infringements, there still remains the issue of whether such infringements necessarily warrant compensation. That issue must be resolved before we can determine whether accidental tort law should fall under a strict liability regime. Despite Epstein's effort to address Coase's claims about the reciprocal nature of harm, we still have to consider the next crucial stage in his argument, which attempts to address that very issue. That stage involves establishing a claim to liability for harm caused.

What we established in Chapter Two against the objections of Coase is that we can draw upon a theory of rights to show how we recognize a single party among a pair involved in an accident as bearing sole causal responsibility for the harm. Yet, we will see below that this account only gets us that far. We can draw upon our understanding of rights to identify the causation of harm that is a necessary condition for liability. We have yet to see, however, how such an account of causation allows us to ground a duty of compensation. If Epstein's argument for strict liability is to succeed, then, we need a further argument to establish that an injury that interferes with an entitlement also satisfies the sufficient conditions for strict liability.

Since strict liability stems from injuries to entitlements, under Epstein's view, he seeks to explain how *prima facie* claims in strict liability stem from the moral significance of ownership. He defines ownership 'In terms of inviolability that in turn suggests absolute protection from all invasion.'⁴ Further, the grounds of liability lie in the same basis as that of injunctive relief provided for the protection of persons and property: the importance of protecting the autonomy and inviolability of persons and property.² The only difference between an injunction and a liability rule, in Epstein's view, is that the former protects rights 'before any violation occurs or is threatened', while the latter addresses those rights after they have been violated. He further maintains that since injunctions are granted without a finding of fault on the part of a potential violator, so too should allocations of liability. In the case of injunctions, Epstein holds that

the rights of the plaintiff are not limited to cases where the defendant acts with malice or negligence. So long as the threat to the plaintiff's property exists, it can be repelled. If strict liability affords the proper basis for injunctions against a threatened taking of property, then it governs when the lesser remedy, damages, is sought when no harm can be prevented.³

However, since Epstein means to draw upon the suitability of an injunction in order to support the conclusion that causation is sufficient for liability, we find a serious difficulty at this stage of Epstein's argument. If property and liability rules are both morally grounded in the very same kind of concern for the protection of autonomy, then we are hard-pressed to account for liability for harm resulting from conduct that should not be enjoined by a property rule. For an example, we can return to the *Vincent* case, discussed in the second chapter, where the defendant acted permissibly in mooring its ship to the dock without the consent of the plaintiff. Not only was that a permissible action, it would have been wrong for the plaintiff to take measures to prevent it. Even if

doing so were possible under the circumstances, granting an injunction to the plaintiff against the defendant would have been unjust. Without going so far as to say that the plaintiff forfeited his property rights to the dock, we can say that as injunctive relief would be unjust, the plaintiff did not have an inviolable property right. For lack of such an inviolable right, we are unable to explain how the permissible infringement of the plaintiff's right can ground liability. Under Epstein's account, then, we should find that the defendant should not be liable for the damage to the dock if it did not have a duty to refrain from mooring its ship there in the first place.

It seems, then, that further argument is needed to ground liability for harms resulting from permissible conduct. In fact, the relation between the infringement of rights and duties of compensation has simply been taken for granted by many commentators, such as Judith Jarvis Thomson and Joel Feinberg. Thomson, for instance, maintains that a starving person may permissibly break into another's freezer to take a steak, although this constitutes an infringement of the owner's rights.⁴ Despite the permissibility of the infringement, the owner of the freezer has been 'wronged', and is entitled to reparations from the infringing party.

If you have no such right [to compensation], why would I have to compensate you later for [breaking into the freezer]? And surely I do have to compensate you. The fact that compensation is owing shows (and it seems to me, shows conclusively) that I did something you had a right that I not do.⁵

Duties of compensation have an intuitive moral appeal to some, but such appeals might be bolstered by a more theoretical approach. Such an approach might address some misgivings raised by opponents of liability for permissible infringements. While Thomson maintains that liability can result from the permissible infringement of rights,

Phillip Montague challenges the putative arguments for this claim.⁶ In Thomson's example, a right infringement is inferred from the judgment that compensation is owed to the victim. This follows from what Montague calls the "first reparation thesis", which holds generally that if A caused a loss to B for which he has a duty to compensate, then A has infringed a right of B in causing the loss. Montague considers the thesis to be uncontroversial. Whether a rights violation gives rise to a duty to compensate, however, depends not on the truth of the thesis, but on its converse. That conditional claim, dubbed the "second reparation thesis", is not clearly applicable to the freezer case if there is no account of how the owner's right was infringed.⁷

The absence of such an account is one reason why Montague finds the 'Reparations argument' for compensation for permissible takings to be highly problematic. The argument holds that the putative infringer owes the freezer owner compensation in virtue of having *wronged* him.⁸ The infringer wrongs the owner by breaking into the freezer, despite having acted permissibly in so doing. This approach seems to rest on the hitherto undefended second reparation thesis, and thus begs the question. The argument is also problematic insofar as it is unclear how a permissible act can *wrong* another.⁹

The Reparations argument is not the only one that might be proffered in support of a duty to compensate for a permissible taking. The 'Moral Residue' argument holds that when overriding reasons justify the infringement of a right, the overridden consideration leaves residual obligations. There is a moral loose end in the transaction, as it were. Compensation is understood to serve to clean this moral residue. This argument fails as well, Montague maintains, as it does not explain why compensation is the gesture necessary for wiping away the residue. He suggests that if an agent does have an

obligation to tidy up after leaving moral residue, he might well satisfy it by simply explaining to the owner his reasons for acting.¹⁰

The 'Qualified Right' argument holds that one's right that another person not take his property is actually a complex right that requires that the property not be taken *unless* compensation is tendered. Under this approach, where $C_{A,Bx}$ stands for 'A has a claim against B that x ', q stands for 'B compensates A' and p denotes the event on which the claim to compensation is based, a claim to compensation, $C_{A,Bq}$, is only entailed by the conjunction of a conditional claim, $C_{A,B(p \rightarrow q)}$, and p . Thomson has argued that we will be committed to unacceptable consequences by positing such entailment relations.¹¹ It happens that if that entailment holds, then we can derive $C_{A,Bq}$ from the conjunction of $C_{A,B-p}$, and p . The problem with this is that we can derive $C_{A,Bq}$ regardless of what q denotes. If $[C_{A,B(p \rightarrow q)}] \& p$ entails ' $C_{A,Bq}$ ', then literally any claim by A against B follows when p occurs, as we can replace 'B compensates A' with any event we choose without altering the logical structure of the argument.¹² Clearly, then, this schematism is unsatisfactory. Even if this difficulty with the notion of qualified rights could be addressed, the notion does not help us to resolve the problem that concerned Montague. This is because the duty to compensate under this approach cannot presuppose a rights infringement in any way, insofar as the account holds that no right was ever infringed if compensation is tendered.¹³

Finally, Montague considers the 'Distributive Justice' argument, which holds that the property owner is owed compensation in virtue of an unjust loss. Although the taking was permissible, it results in an unjust distribution of benefits and burdens.¹⁴ We might understand the just distribution as one where parties who played no role in the emergency

that prompted the taking are not worse off after the fact. The only sense in which the redistribution constitutes an injustice is that the loss incurred by the owner is undeserved; it is not clear how else the loss might be characterized as unjust, given that the taking was permissible under the circumstances. Montague would concede that the loss suffered by the owner is undeserved, but he maintains that we still have no reason to call the undeserved loss a wrongful one. The mere claim that unjust redistributions require compensation is question begging, as that is the very claim that needs to be established by argument.

Coleman's Schema of Liability

Montague thusly rejects duties of compensation arising from permissible conduct, despite his acceptance of duties of compensation for rights infringements.¹⁵ These positions are compatible, he would maintain, insofar as the notion of a permissible infringement is unintelligible. We might address the puzzle about rights and compensation presented by Montague with the help of an alternative model. Under Jules Coleman's account of rights, a framework of rights constitutes what he calls a 'transaction structure', within which rights are 'conceptual markers designating certain legitimate interests or liberties as warranting a privileged status.'¹⁶ Such rights give rise to claims, but the specific content of a given claim is not an analytic consequence of the right from which it stems. Rather, the content is specified by property and liability rules, such that the rule applied defines the content of the claim-generating right.¹⁷

The specific schedule of property and liability rules to be enforced depends, under this account, on foundational moral judgments regarding the interests that ought to be protected by an institutional framework of rights. Some rights might receive the

protection of property rules, others of liability rules, and still others of both. In a case where A is enjoined from entering B's land, B's rights against trespass by A might well be protected only by a property rule. If A can enter B's land despite the injunction, no liability may accrue, given the lack of tangible damage. Criminal charges may result, but those are not within the ambit of the liability rules contemplated by Coleman, which are concerned with compensation. If B's right against A's trespass were only protected by a liability rule, then B would have no enforceable claim against A to refrain from trespassing, but he would have a claim to compensation for the cost of the trespass. We might, however, expect B's right against trespass to be protected by both an enforceable claim against trespass and a right to compensation should a trespass occur.

Insofar as a liability rule may be in force unaccompanied by a corresponding property rule, a claim to compensation resting on liability rules need not presuppose a breach of duty to refrain from the injurious conduct.¹⁸ Within a framework that protects a given right with a liability rule but not a property rule, a right is fully respected when compensation is tendered for the loss stemming from the encroachment. In that case, 'tendering recompense is all that is required to respect the right and to exhaust the claims it entails.'¹⁹

A number of considerations might bear on the choice of how a given right might be protected. When considerable interests in individual autonomy are deemed to be overriding, a given right would be more properly guarded by a property rule, such that the right bearer's consent is required for transactions involving his protected interest. While compensation might restore an individual's utility level to the same *status quo* indifference curve he occupied before his protected interest was encroached upon, he

may wind up occupying a different point on that indifference curve than before.²⁰ An individual's involuntary displacement along his indifference curve may well constitute a violation of his autonomy. Where interests in autonomy are not decisive, or where high transaction costs make it difficult for individuals to observe a given property rule, a liability rule might be more appropriate.²¹ Still, this transaction structure theory of rights is largely schematic without an account of the external considerations that determine how particular interests ought to be protected.

Within the framework of 'claim' rights Montague presupposes, having a right to X against A means that A has a duty to refrain from interfering with X. In the case where A's interference with X is morally permissible, explaining within that framework how A could violate a right becomes highly problematic. If no right is infringed, then it also becomes unclear how a claim to compensation for the interference could be grounded. Coleman's theory, on the other hand, provides a way of conceiving rights and their ensuing claims that sidesteps this puzzle altogether. As a conceptual marker, a right defines a set of interests that warrant protection. It neither defines the specific claims that bind other agents nor outlines the specific conditions for respecting the right, as other moral considerations will bear on their formulation. B's right to X against A is not defined as a claim that A refrain from interfering with X; it is simply defined as an interest that warrants legal protection against A. That is to say that there are to be rules that lay down conditions for A's transacting with B in ways that effect B's status vis a vis X. Hence, if B has a right to enjoyment of his property free of trespass, and that right is protected by a liability rule, we can say that A infringes B's right when he trespasses on B's property, as he thereby triggers a duty of liability to A. We might say that B's right is

violated when A triggers a duty and then fails to satisfy it by tendering compensation. If the right against trespass is protected by a property rule, then the trespass alone constitutes a violation, as a condition for transacting with B has already been flouted. A wronging, then, can consist in a breach of duty entailed by a property rule, or it could be an act that simply triggers a liability rule in affecting an entitlement.

Coleman understands liability in corrective justice, i.e., liability for wrongful losses, as having two distinct, alternative bases.²² Wrongful losses can arise from two kinds of conduct: the commission of wrongdoing and the commission of wrongs. We shall see that these categories are by no means mutually exclusive, but they are conceptually distinct in several ways. Wrongdoing is morally impermissible action, whereas a wrong is an action that is contrary to a right. Certainly, there are many impermissible rights violations, actions that constitute both wrongdoings and wrongs. Yet, as we have seen, there can be permissible infringements of rights. Such infringements can give rise to wrongful losses despite an absence of wrongdoing, insofar as the victim is “wronged.”²³ One might jump to the conclusion that wrongdoing, then, is simply impermissible wronging, but Coleman maintains that many instances of wrongdoing need not involve any wronging, insofar as there is a distinction between rights and legitimate interests.²⁴ An individual has a legitimate interest in a successful career, for instance, but this interest is not a right. If a person were unsuccessful in his chosen business enterprise because he lost customers and opportunities as a result of fair competition, it would be reasonable to say that his legitimate interests were harmed; yet the harm “does not give rise to a claim in justice to repair.”²⁵ On the other hand, if a failing entrepreneur had in fact fallen victim to the unjust practices of a competitor, then his

legitimate interests were harmed impermissibly, and his losses are therefore wrongful ones.

Within Coleman's conception of corrective justice, there are potential grounds for establishing either fault-based (negligence) rules or no-fault (strict liability) rules. The rule on which liability for a given wrongful loss is grounded depends on whether the loss is treated as a wrongdoing or a wrong. The category to which a given loss belongs cannot be determined without a more extensive normative theory to lend content to Coleman's admittedly schematic account of wrongful losses. Within the schema, it may appear that wrongs call for strict liability, while wrongdoing calls for fault-based liability, but this apparent correspondence is indeed illusory.

It might be thought that strict liability would cover the accidental destruction or taking of property, given that such results constitute the disruption of entitlements. Such an uncompensated disruption, with or without fault, might be understood as an action contrary to a right. Yet, if we accept Coleman's theory of rights, discussed above, we do not know whether a disruption of an entitlement implicates a right to compensation unless we know that a liability rule should protect that entitlement.²⁶ A general principle of strict liability for accidental harms follows from Coleman's account of corrective justice only if it follows, from the normative theory we ratify, that all entitlements ought to be protected by liability rules. Indeed, one might propose a normative theory holding that liability rules should be invoked to protect a disrupted entitlement only when the injurer was at fault. Under that theory, a victim could not be wronged in the absence of fault on the part of the injurer. Likewise, rules allocating liability on the basis of wrongdoing may be closer in form to strict liability rules than fault rules, depending on

the content of the underlying normative theory. A theory that construes fault much more broadly than modern negligence theory does might equate causation with responsibility.

Despite the ambiguities surrounding liability rules that persist so long as we proceed without an underlying normative theory, Coleman asserts that duties of compensation can arise from strict liability for actions contrary to rights. It is on this basis that he agrees with the holding in the *Vincent* case, and is thereby committed to holding that the entitlement of the plaintiff dock owner warrants the protection of a liability rule.²⁷ Such rules could be warranted, however, only on the basis of a deeper normative argument that Coleman does not provide.

Respect for Persons as a Basis of Liability

We need such an argument if we are to maintain plausibly that even permissible infringements give rise to duties of compensation. As discussed above, Montague has pointed out an apparent tension found within this notion. Although Coleman maintains that liability rules are warranted when compensation is required in order for a right to be fully respected, we still have not seen why rights must ever be respected in this way when they were *justifiably* infringed. It is for this reason that we must now consider deeper normative accounts of liability. Ernest Weinrib maintains that corrective justice, as a schematic principle, provides no firm guidance regarding which injuries warrant compensation, and that this schema can be filled by Kant's imperative that one treat others only as ends in themselves.²⁸ A number of recent legal thinkers have proffered theories of liability that appeal to the Kantian notions of autonomy and respect for persons. However, as I shall attempt to show, the only way to render the theory coherently is to allow for its application as basis for a general strict liability rule.

Howard Klepper advances a Kantian theory of compensation in order to provide a moral justification for the allocation of liability in the “necessity cases,” such as *Vincent*.²⁹ What is distinctive about such cases, Klepper notes, is that they call for liability, despite an uncontroversial lack of wrongdoing on the part of the injurer. They involve injuries resulting from an “unforeseeable necessity to take or damage the property of another in order to avoid a much greater harm to [the injurer]. His actions are seen as entirely justified and reasonable, and yet most people’s intuitions, and the law, agree that the innocent injured party is entitled to be compensated for the loss.”³⁰ Such a finding of liability could not rest on considerations of utility or efficiency.

To explain why liability is properly imposed under such circumstances, Klepper invokes what he calls the “weak wrongful loss” principle.³¹ It holds that compensation is required for losses resulting from an injurer’s knowing transfer of a risk to the victim. That the imposition of the risk was fully justifiable, as it was in *Vincent*, is irrelevant. That is because the injurer who imposed a risk wrongfully transfers a loss. The wrongfulness of the loss stems from the “subsequent refusal to accept financial responsibility for an injury to an innocent party that the actor caused for his own benefit.”³²

Thus, in *Vincent*, the defendant may be held liable for the damage he caused, because he should take responsibility for harm accruing from his intentional imposition of risks. This judgment rests upon a perceived obligation to respect other persons “as free choosers of the risks they are willing to take toward their own ends.”³³ To impose an involuntary risk, and then maintain that the subject of the risk may bear the resulting loss is to fail to respect the victim’s freedom to choose his own risks and ends.

Accordingly, Loren Lomasky interprets Kant's famous dictum as proscribing one from requiring another to "renounce his own ends" and making him an "adjunct" in one's own projects.³⁴ He further maintains that compensation for harms is a gesture signifying respect for the victim as an autonomous agent, whose ends may not be subordinated to those of others.³⁵ Otherwise, one's autonomy is curtailed when one's entitlement is harmed. It is this interpretation of the categorical imperative that I am here adopting. However, in invoking Kant's imperative, I do not intend to commit to this principle as a foundation of ethical theory. I merely accept the imperative as a robust moral intuition.

Klepper defended his putative basis of liability squarely in the context of intentional torts. Charles Fried, likewise, maintains that an agent's act that intentionally subordinates another person's status to that of a means to the agent's end violates the requirement of respect, but actions that do not rise to that level do not.

To lie or to do intentional grievous harm to the body of another represents a denial of the personal status of that other, a denial not necessarily implicit in allowing that harm to come about as a mere concomitant of our actions. If we use harming another as the means to our end, then we assert that another person may indeed be our means, while if we merely accept the risk that others will be harmed as we pursue our ends, and do not make that harm a part of our projects, then it is still possible to assert that those others are not reduced to the status of means in our system.³⁶

A plausible argument for liability for accidental torts based on the notion of respect for persons will have to address this last claim. To that end, we should first examine an ambiguity contained therein. The above claim may be interpreted as asserting that one is not denied respect solely in virtue of being subjected to a heightened risk stemming from another's conduct. The passage may also be consistent with the claim that one is not denied respect even when one is harmed as a result of such a risk. Very little in connection with tort liability hinges directly on Fried's claim under the first

interpretation. Whether the requirement of respect for persons requires an injurer to be held liable is of no consequence when no harm results from the imposition of a given risk.

It is not clear why conduct that merely imposes a risk but does not contemplate the injury lying within the scope of that risk as a goal does not ascribe to anyone a status as a means, unless accidental and intentional injuries are readily distinguishable in the way Fried contemplated. Posner, however, denies a clear and important distinction between them, as '[m]ost accidental injuries are intentional in the sense that the injurer knew that he could have reduced the probability of the accident by taking additional precautions.'²⁷

Risks, then, can be known, and one can intentionally inflict injuries even when one does not know whom one will injure or when one will do the injuring. Truly accidental injuries may be said to involve ignorance of the risks from which the injury resulted. To address such cases, we can invoke a second reason for treating liability for accidental injuries as a consequence of the duty of respect for persons. This is that the failure to compensate for injuries stemming from one's risky conduct is a denial of respect in and of itself, as Klepper maintains. While *ex ante* risk imposition may deny respect, then so too may an *ex post* decision to withhold compensation. If the matter of whether respect is afforded hinges on whether compensation for an injury was tendered, then it is not clear how the issue of whether that injury was intentional is relevant.

We still need to explain, however, how the tendering of compensation affords respect to the victim as an autonomous bearer of ends. After all, it might be argued that compensation for injuries will often fail to fully restore the victim's autonomy. Robert

Goodin argues that some governmental policies that create private losses simply may not be carried out even if the fullest possible compensation for those losses is offered. While there are losses brought about by government policies that can be entirely rectified by compensation, there are cases where any compensation that might be offered is “of the wrong kind.”³⁸ When compensation cannot provide a victim with “equivalent means for pursuing the same ends” but can only help them “to pursue some other ends in a way that leaves them subjectively as well off overall as they would have been had they not suffered the loss at all” then compensation does not fully offset a loss.³⁹

While this sort of “ends-displacing” compensation may be of a form such that the compensated party is indifferent between obtaining the compensation and recovering the lost good, it still may not fully offset that loss. This is because different points on an individual’s indifference curve may represent “distinct, subjectively defined categories.”⁴⁰ Imposing a loss and offering compensation of a form belonging to a distinct category violates a duty of respect owed to all. Ends-displacing compensation fails to respect individual choice as a key component of human dignity. Such compensation also violates autonomy insofar as it confounds individual choice. One cannot organize a coherent and unified life plan when others may continually adjust one’s holdings.⁴¹

Goodin’s critique of ‘governmental takings with compensation’ can easily be extended into private law, where ends-displacing compensation would likewise be understood as failing to rectify the loss stemming from tortious harm. In many tort cases, compensation for losses should be understood as ends-replacing. Even where a victim can use monetary compensation to replace a lost good with an identical one, opportunity costs will most likely prevent the victim from retaining the very same position on his

indifference curve. Time spent replacing his goods, even when compensated for, would be shifted from other uses.

This line of argument would justify a preference for property rules over liability rules in many contexts. As discussed above, where an autonomous individual's chosen ends cannot be protected by a liability rule, then a property rule that requires his consent for any ends-displacing transaction is more just. The enforcement of a property rule protecting the potential victim's ends from displacement would prompt the potential injurer whose activity threatens those ends to seek an *ex ante* agreement between them to allocate the risks of that activity. This allows the potential victim to retain his power to choose his ends. Yet, high transaction costs might preclude such an agreement, and in that instance only a liability rule could protect the victim's entitlement.

The enforcement of such a liability rule does, in a very important sense, restore the victim's status as an autonomous agent, or, in Lomasky's words, a 'project pursuer.'⁴² While the compensation tendered to the victim may only be ends-displacing, it still vindicates the agent's status as a bearer of ends that may not be subordinated to those of the injurer. Means-replacing compensation, it is conceded, might serve the victim's interest in autonomy more fully by restoring the status quo, yet ends-displacing compensation still achieves something. The next best thing to restoring a frustrated end is replacing it with one of equal value to the victim, and this may be the only option when circumstances prevent the legal system from preventing the original end.⁴³

This approach can help to account for how an injury to property can be tantamount to treating a person as a means. David Owen maintains that insofar as property is a necessary condition for freedom, i.e. as essential for exercising one's

autonomy interest “in being able to move about the world”, he argues, injuries to property constitute an affront to autonomy.⁴⁴ This is an inadequate account of such liability for harm to property. While this basic approach may serve as an adequate ground of liability for property damage, Owen’s version fails to account for the fact that the scope of property extends well beyond that which is necessary for the basic exercise of autonomy as “being able to move about the world.” If liability is to serve this purpose, we could not expect liability rules to protect most property, the possession of which is not a necessary condition for the agent’s further exercise of autonomy. Rather than being held in contemplation of such a further end, property can be possessed as an end in itself, such that the exercise of autonomy consists simply in continued possession.

Lomasky’s insight was that the person, as an object of respect as the bearer of ends, comprises not just a physical self, but also the projects in which he engages to secure his ends. The formulation of projects extends the self to holdings, the possession of which the agent can reasonably expect to be stable. The duty of respect for the person precludes the taking of a person’s property, in virtue of a person’s identification with that property. This approach assumes that ownership involves an extension of personhood, such that using a person’s property is tantamount to using the person. An allocation of property rights within a legal framework gives rise to expectations in individuals of stable and enduring control of external objects for purpose of the pursuit of individual goals and projects. Interference with the control of such objects frustrates those goals and projects. The agent that so interferes with another in pursuit of his own goals thereby subordinates the other’s ends to one’s own. In so doing, he treats the victim himself as a means.

This assumption should not be construed to hold that the notion of respect for persons could serve as the moral foundation for a system of private property. Waldron argued that the respect owed to the extended person and his expectations cannot be the foundation of a system of property rights.⁴⁵ Property rights must already have a place within a broader institutional framework. In the absence of such recognized entitlements, expectations of continued use are not sufficiently stable to amount to the sort of identification that allows for the extension of the person to objects.

This account of the duty to compensate for injuries to property, then, is not to be understood as an argument for a system of private property. Rather than grounding property rights in norms of autonomy and respect, this approach assumes that the legal system already recognizes an allocation of property rights. It is when such a system is upheld that individuals come to have legitimate expectations of the continued use of the objects recognized by that system as their property. Granted, no such expectations exist when no system of private property has already established an allocation of entitlements. But once we have a system of property rights, the notion of identification grounds a duty to compensate victims for infringements or violations of those rights that system recognizes.⁴⁶

In Chapter Three I argued that duties of compensation are distinct from duties of distributive justice, and that distributive concerns need not bear on corrective justice. However, it should be noted that the approach to grounding liability we are now considering lends itself to a coherent institutional framework wherein redistributive measures, such as the levying of income taxes, outside of the scope of corrective justice effectively transfer property rights away from owners. We can understand such measures

as not rising to the level of violating respect, since they take place within an institutional framework that defines the scope of expectations of continued enjoyment and control of property afforded to persons.

To summarize, then, when a victim is unintentionally injured as a result of the injurer's conduct, and even when the injurer knew of neither the presence nor the level of risk to which the victim was subjected, the injury was a means to the injurer's pursuit of his ends. Without being any sort of necessary concomitant to the conduct, the injury was the result of the conduct. To decline to attempt to restore the victim to that status he enjoyed prior to the injury is to fail to respect the ends of the victim, whose resources have been diverted or destroyed in furtherance of another's ends without his consent. It is this sort of intuition that might motivate the use of liability rules in those contexts where property rules are not appropriate, and it is the only reason that bears weight when an injurer had no knowledge of the risks his conduct imposed. It seems then that Klepper's argument has implications that he failed to consider. While he proffered the weak wrongful loss principle as an account of liability judgments in necessity cases, I maintain that it calls for a general strict liability rule. The absence of fault does not alter the decisive fact that one who withholds compensation for an injury fails to respect the victim.

Christopher Schroeder has raised misgivings about basing liability on a duty of respect for persons.⁴⁷ He acknowledges that the analysis of the responsibility to prevent harm to others "often begins with a principle of equality, namely that every human being is entitled to be treated with equal dignity and respect", and that an individual denies this entitlement to another by negligently imposing risks.⁴⁸ On the other hand, he maintains

that since liability would rest on a causal relation between the injurer's conduct and the victim's loss, assigning liability and ordering compensation pursuant to tort principles would draw distinctions among individuals in a way that is contrary to the duty to treat all with equal dignity and respect.⁴⁹ The framework of tort liability sorts potential defendants into those who cause injuries and those who do not, regardless of whether those in the latter category imposed the same level of risk as those in the former category. At the same time, the framework distinguishes between potential plaintiffs, those who have suffered losses at the hands of other agents, and those whose losses were not caused by human agents. These distinctions, based entirely on the "fortuity of causation", are made among individuals despite their equality in every morally relevant respect.

While Schroeder has not explained what sort of theory of liability might avoid this problem, it still behooves us to consider whether in fact allocating liability on the basis of causation denies equal respect to those who are unfortunate enough to cause losses and to those who have incurred losses but were unfortunate enough not to incur them at the hands of other agents. Beginning with the members of the second category, I would maintain their uncompensated losses do not reflect the denial of respect. To the extent that another agent did not cause one's losses, there is no sense in which the ends of the former were subordinated to those of the latter. The duty of equal respect does, on the other hand, require compensation to sufferers of agent-caused losses, so as to restore them to the same status as sufferers of non-agent-caused losses, which is that of agents who are fully respected as the pursuers of their own ends.

As for those in the first category, requiring compensation for losses serves to rectify an imbalance created by an injurer. Requiring an injurer to effect compensation

shifts his status from that of an exploiter to that of a respecter of ends. Where the conduct of a potential injurer does not actually result in an injury, compensation does not serve these goals, insofar as the ends of the would-be injurer have not been disrupted. Rather than denying equal respect to actual injurers, then, the duty of compensation simply denies them the right to deny equal respect to their victims. Indeed, taking this prong of Schroeder's criticism seriously would commit us to some problematic consequences. That a given good happens to have a current owner is unfortunate for another party who seeks to obtain the good, and consequently cannot secure that good without the consent of the owner. Insofar as he would thereby have to pay an asking price for that good, he is not in an equal position with the party who desires a good that happens to be unowned, and thus may be appropriated free of charge. Are we to say that the requirement that individuals pay for items that they want but which already happen to be owned denies them equal respect? Unless we can answer here in the affirmative, the use of actual causation of harm as a sufficient condition for requiring such compensation does not deny equal respect to members of the aforementioned groups. Even when one has not intentionally subordinated another to the status of an adjunct, the refusal to tender compensation is an acknowledgement that the projects of the victim are inferior to those of the injurer. Refusing to compensate for accidental harms amounts to this.

The elements of an underlying substantive normative theory offered here may be understood to provide content to Coleman's schematic theory of corrective justice. The autonomy principle articulated above generally affords to entitlement holders the protection of liability rules. As the violation of a liability rule constitutes a wrong, the principle calls for strict liability for harms to entitlements. Even if strict liability covers

such harms, negligence still may have a large role in tort law, insofar as not all harms are harms to entitlements. As discussed above, Coleman maintains that harm to legitimate interests (that do not qualify as rights) is actionable in corrective justice only on the basis of wrongdoing. In addition to the entrepreneur who suffers from unfair competition, there are a host of examples of victims of such harm. Individuals have a legitimate interest in (but not a right to) a good reputation, and restaurateurs have a legitimate interest in good reviews by critics. Slanderous stories and damning reviews are harming, but they do not give rise to claims in corrective justice unless their presentation is morally impermissible in some way, and the impermissibility does not rest on the mere fact that they were presented. Depending on the underlying normative theory we employ, what makes the presentation of an unfair review wrongful is the fact that it was done negligently or intentionally.

Such an account of large portions of tort law does not create any tension with the case for strict liability presented thus far. Those entitlements that are to be protected by strict liability are linked more closely to interests in autonomy than are the so-called legitimate interests discussed above. We would be hard-pressed to account for how interference with those legitimate interests constitutes means-treatment, given that they are not afforded by our legal framework with the same level of stability in expectations.

We should now briefly return to the difficulty with Epstein's theory of liability we raised, as well as Montague's misgivings about duties of compensation for permissible infringements. Our new account of liability supports the case for strict liability, without defending no-fault liability for accidental harms as a sort of analytic consequence of principles endorsing no-fault injunctions against the creation of risk. Further, this

account of liability lends substance to some of the arguments in support of such duties that Montague addressed. Admittedly, without a more fundamental basis for the duty to compensate, we would be hard pressed to explain the link between a permissible disruption of an entitlement and compensation. In the case of the Reparations Argument, we can cash out the notion of a wrongful loss by reference to the idea of respect for persons. As discussed, taking property without compensation wrongs the owner by subordinating the owner's ends to one's own. As for the Moral Residue argument, we may describe the proverbial residue as the diminution of the agent's status. By restoring the agent's ends or at least his position on his original indifference curve, compensation restores his status as an end. This account fills the gap in the Moral Residue argument noted by Montague, who suggested that a simple explanation, rather than compensation, might satisfy any residual obligations left over from a permissible infringement.

Respect for Persons and Wealth Maximizing Liability Rules

So far, the case for a strict liability rule presented here seems to be irreconcilable with a negligence rule that would excuse injurers from liability when it is determined that they could not have prevented the injury by taking cost-justified precautions. However, if the argument for strict liability proffered above is to be understood as a critique of wealth maximization norms as a basis for accidental tort law, it must also be applicable to a wealth maximizing 'strict liability with contributory negligence' rule. In the first chapter we established that such a liability rule might be optimal, such that we might be indifferent between that rule and a pure negligence rule. Clearly, the injurer strict liability element of the rule accords with the principle that uncompensated injuries

impinge upon the victim's status as an autonomous agent. I shall argue that the contributory negligence element does so as well.

Suppose that Farmer sues Railroad for the damage to the crops caused by the train's sparks. If possible, Railroad would assert that Farmer was contributorily negligent for having failed to take a cost-justified precaution against such damage since Farmer did not take the cheapest precaution available to either party: erecting a fence that would block flying sparks. If Farmer cannot claim compensation under strict liability if he failed to take a cost justified precaution against the injury, then he has a strong incentive to take such a precaution. In doing so, however, Farmer effectively diverts some of his own resources to subsidize Railroad's operation when he takes measures to prevent Railroad from inflicting damage. In virtue of the opportunity cost borne as a result of his expenditure, Farmer must compromise some project of his own. His goals, then, are subordinated to Railroad's. In allowing Farmer to undertake an expense in order to prevent damage caused by Railroad's own enterprise, Railroad allows for the subordination of Farmer's ends to its own, thereby treating Farmer as a means. By conducting its operations without compensating Farmer under a regime of strict liability with contributory negligence, then, Railroad treats Farmer as a means disjunctively: Railroad uses Farmer's property to bear the risks it created, or it induces Farmer to bear costs to reduce those very risks.

A strict liability rule that requires would-be plaintiffs to take reasonable precautions against their injuries, however, does not necessarily allow plaintiffs to be treated as means so long as it also requires that would-be injurers compensate them for taking the precautions. When potential victims take precautions and are then

compensated for the value of their expense, they are restored to their indifference curve in the same manner as they would be having been compensated for damage to their property. They are thereby respected as autonomous bearers of ends while the most efficient precautions against the potential loss of property are taken.

It could be argued then, that a strict liability with contributory negligence rule is acceptable within the view I am defending as long as contributory negligence on the part of the plaintiff does not completely bar liability. Rather, it would be fair to allow contributory negligence to limit a defendant's liability to that of the value of the cost-effective precaution the plaintiff failed to take. Compensation of that amount is full and fair, as long as a potential injurer is allowed to insist that the potential victim take the efficient precaution and accept tendered compensation for the cost of the precaution. He should be allowed to insist on this arrangement, if the plaintiff's interest in his entitlement may be protected only by a liability rule, and does not warrant the protection of a property rule. If the entitlement is protected against A by a property rule, then A cannot act so as to risk harming it, let alone require that the owner take the most efficient precaution against the expected harm. If, on the other hand, the potential injurer's interest in carrying out his enterprise outweighs the victim's interest in preventing the risk of harm, then the potential injurer is entitled to undertake the risky enterprise. Insofar as he is entitled to damage the plaintiff's property and then tender compensation, he is entitled to require the would-be plaintiff to take an efficient precaution and then tender compensation for that. If there is no reason to afford the potential plaintiff protection from the defendant's risky activity, and the harm it causes, other than *ex post* compensation, then there is no reason to grant that potential plaintiff the privilege of

refusing to take an efficient precaution for which he would be compensated, for, by hypothesis, the value of precaution is less than that of the expected harm. While it may be imprudent and unwarranted to force a potential victim to take a given efficient precaution, the privilege of refusing to take the precaution in question is denied to him insofar that he cannot recover from the injurer more than the value of that precaution in the event that his entitlement is injured.⁵⁰

If this sort of restricted contributory negligence rule were to be adopted, a court need not limit liability to the value of the most efficient precaution when an injury occurs and the precaution is not taken if the expected harm was not known or foreseen by the plaintiff, or if the effective use of the precaution was not foreseen by the plaintiff. After all, acquiring such foresight has its own costs, and those costs may be factored by a court into the very cost of taking the precaution.

The critical issue, now, is whether this strict liability with limited contributory negligence rule proffered here is acceptable within the theory of corrective justice I have defended which emphasizes respect for persons, is a wealth maximizing one. If it is, then the norm of respect for persons and the wealth maximization norm can be reconciled, as far as corrective justice for accidental harms is concerned. If not, then further argument is needed to show that some liability rule that the wealth maximization norm can endorse can be reconciled with the norm of respect for persons.

The strict liability with limited contributory negligence rule is not wealth maximizing, as there are circumstances where the rule fails to provide incentives to take efficient precautions. Consider the case where Railroad's passage alongside Farmer's land poses a 10% chance per trip of a crop fire that will result in damage to Farmer's crop

valued at \$1000. The expected crop damage is \$100 for each trip. Suppose now that the only efficient precaution available is the construction by Farmer of a fence on the edge of his land, and that the cost of this precaution per freight rail trip is \$95. The precaution is efficient because its cost is less than that of the expected damage. If Farmer fails to take it, he contributes negligence, and so under the strict liability with limited contributory negligence rule he is entitled to \$95 for each fire, rather than \$1000. His net loss then is \$905. This means, however, that his expected net loss from crop damage is 10% of \$905, or \$90.50. The cost of taking the precaution, however, exceeds this amount by \$4.50. Therefore, taking the precaution is inefficient from Farmer's point of view under this liability rule, as he would minimize his losses in the long run by foregoing the precaution, risking crop loss, and collecting limited damage awards.

As the strict liability with limited contributory negligence rule allows for such inefficiencies, it fails to satisfy the wealth maximization norm. This means that we must next consider whether either of those liability rules that do satisfy the wealth maximization norm, negligence and strict liability with contributory negligence, can be shown to satisfy the requirement of the norm of respect for persons.

Reciprocity and Autonomy

We now have a *prima facie* case for a strict liability rule for accidental torts, which does not allow for a defense that would make the rule compatible with the wealth maximization norm. We must now consider, however, whether there are circumstances under which the *prima facie* case can be rebutted. I propose that these circumstances obtain when the threat to autonomy posed when the issue of accidental liability is at hand

is of a reciprocal nature. David Owen earlier took such an approach, but I will attempt to show that it was inadequate, and propose a more satisfactory alternative.

In response to this approach to liability, based on a regard for respecting the status of victims as autonomous bearers of ends, it might be argued that the status of injurers must be considered and weighed equally. We turn then to David Owen's argument in support of fault rules. His argument appeals to a form of reciprocity that obtains between injurers and victims.⁵¹ In formulating a basis for a negligence rule, Owen invokes the Kantian notions of autonomy and equality. Agents have an interest in both of these goods. He understands autonomy as encompassing the ability to design and achieve goals.⁵² Principles of equality demarcate the limits of individual freedom where the goals of agents may be incompatible.⁵³ From principles safeguarding autonomy and equality are derived several 'principles of choice' that determine when harmful conduct is wrongful. Owen calls one such principle the 'choice-harm' principle. It holds that any choice may pose a threat to the freedom of other persons, and so principles of wrongfulness should not prefer security to action. People have an interest in acting so as to promote their ends, and they have 'security interests' in the retention of these things. From the standpoint of equality, neither of these interests enjoys priority.⁵⁴ '[O]ne person's interest in security from accidental harm (whether to property or bodily integrity) has no greater fundamental importance than another person's freedom of action to promote his chosen goals.'⁵⁵

In the case of intentionally inflicted harm, however, priority ought to be assigned to security interests, Owen maintains.⁵⁶ This is because intentional harms fall under the 'choice-end' principle, another one of Owen's 'principles of choice.' That principle holds

that an agent may not choose to harm others for the purpose of furthering her own interests, for each individual has a right to pursue her own interests “without undue interference from others.”⁵⁷

When an actor chooses to act for the very purpose of consuming property rights in goods that he knows are owned by, and hence in part define, another person, he thereby consumes and merges in part the will (and hence personhood) of the owner with his own. In this way, the actor joins together in a kind of joint venture with the victim, dragging the latter (in part) along through the universe for a time and purpose defined by the will of the actor and in violation of the victim’s selfhood. To achieve the separation, to undo the illicit link between the two, corrective justice and the law of torts requires the actor to return the taken property (or its monetary equivalent) to the victim, thereby restoring the victim’s taken will, and to retrieve unto himself the harm he willed upon the victim.⁵⁸

It is when a harm is not intentional but accidental, on Owen’s view, that there is no principled ground on which to prioritize the categories of interests outlined above, insofar as the injurer and victim each have significant interests in autonomy at stake.⁵⁹ The choice-end principle does not apply to those harms that do not involve a choice to interfere with the victim’s interests. The injurer and victim have, respectively, legitimate interests in action and security. Although accidental harms might arise from an intentional imposition of risk, they impose no such involuntary “taking”, for all conduct imposes risks, and it is of course necessary for securing one’s ends.

While potential victims [of accidental harms] no doubt have autonomy interests in the security of their properties and their bodies, the actor has an equally significant autonomy interest in being able to move about the world, inevitably risking harm to other persons.⁶⁰

An accidental injurer, Owen maintains, has a legitimate interest in autonomy that stands to be compromised if he is saddled with liability for the harm, just as the victim’s autonomy interests would be harmed by an uncompensated injury. Since harm to legitimate autonomy interests is inevitable, the competing interests of the parties may be

weighed against each other, such that liability may be allocated in order to minimize such harm. Considerations of utility then, may determine which of the competing interests should ultimately receive protection.⁶¹

When an accidental harm stems from a risk imposed by the injurer, the ‘choice-blame’ principle, applies.⁶² This principle holds that ‘persons are at fault for choosing without good reason to harm others or exposing them to a risk of harm.’⁶³ Under this principle, an injurer is at fault when he knowingly imposes risks threatening security interests that are more valuable than the injurer’s interest in the risk-imposing conduct. Where the risk-imposing conduct is more valuable, on Owen’s view, the injurer acts without fault.⁶⁴

Posner advanced a similar autonomy-based argument. We introduced it in the previous chapter, in connection with the issue of whether the Assignment Principle was antithetical to Rawls’s Principle of Equal Liberty.⁶⁵ Posner contended that Epstein’s autonomy-based argument for strict liability assumes an allocation of rights and responsibilities that may be antithetical to a broader conception of autonomy. While the discussion of *ex ante* compensation assumed that accident victims had moral claims to some form of compensation, it ignores the interests in autonomy borne by those who pose risks of accidents. Accordingly, he maintains ‘one could equally well assume that people have a right not to be hampered in the activities by being made liable for accidents that they could not have prevented at reasonable cost.’⁶⁶ So when an accident occurs that is not the fault of either party, we face the choice of denying the autonomy of the injurer or denying the autonomy of the victim. On this view, the Assignment Principle gives due consideration to the autonomy interests of both injurers and victims. We said then in

Chapter Three that it may be plausible to maintain, on those grounds, that the Assignment Principle is consistent with the principle of justice holding that each member of society should be afforded the maximal amount of liberty compatible with a like amount for others. However, we must now consider more carefully whether these interests in autonomy warrant equal moral consideration.

These arguments by Owen and Posner posit a sort of reciprocity among the parties to an accident. As each party looks to shoulder the other with liability for the injury, Owen and Posner would maintain, each threatens to harm the other's autonomy. This reciprocal threat to autonomy can be distinguished from the claims about reciprocity I attributed to Coase in Chapter Two. Coase's reciprocity consists in the reciprocal potential for the imposition of costs. The argument we encounter here attaches equal moral significance to such costs.

Owen notes the objection that while the choice-harm and choice-blame principles might permit the imposition of certain risks, they do not rule out a duty to compensate for harms arising from those risks.⁶⁷ This objection fails, he maintains, because liability for faultless conduct threatens the autonomy of the injurer. "Creating mere risks to the interests of others is an inherent and unavoidable consequence of every action, for every action entails harm to others⁶⁸; liability threatens the agent's interest in action, upon which his successful coping with the world depends.

To begin addressing this approach, we might return to our response to Schroeder's objections to autonomy-preserving liability rules.⁶⁹ In response to the position that such rules fail to confer equal respect upon actual injurers and non-injurious risk creators, I argued that we frequently encounter parties in positions of inequality, where the duty of

respect for persons simply requires that one pay for what one will take or has already taken. If this were not required, our intuitive regard for voluntary exchange would be completely confounded. Likewise, it is unclear under Owen's account, and, for that matter, Posner's argument, why a requirement that one take financial responsibility for the externalities generated by one's own conduct comprises an affront to autonomy. To start, we might consider the case where the conduct that poses risks to a potential victim is only possible with the potential victim's consent. In that case, the agent might well secure consent by paying for it. If the fact that he had to make a pecuniary sacrifice to enhance his range of freedom means that an unjustifiable violation of autonomy has been committed, then it follows that a vast range of activities no longer require negotiated consent.

Thus far I have pressed the position that imposing liability upon an injurer does not comprise an affront to his autonomy. Moving freely about the world is understood to involve paying for the resources belonging to others that one consumes. If the legal system curtails the autonomy of defendants whenever it enforces duties of compensation stemming from liability judgments, then it is difficult to understand how we can recognize a person as essentially free while expecting him, under at least some circumstances, to bear the cost of his projects. While the backpacker, for instance, is free to invade the cabin to protect himself from the storm, we are hard-pressed to explain why he is less free, or why his autonomy is curtailed when he is made to pay the value of the damage he caused.

Owen maintains that an injurer chooses to accept liability for an injury he intentionally inflicted. In so injuring a victim, the injurer "thereby consumes and merges

in part the will [of the victim] with his own.'⁷⁰ By choosing to create such an illicit merger, Owen holds, the injurer may be understood as having chosen to harm himself, having chosen to make himself part of this 'unified superperson.'⁷¹ If this approach does nothing other than to couch our intuition in a concept that is no more illuminating, we might explain the injurer's choice to bear liability in a different way. In deliberately taking something from its owner, one chooses to create a loss. Having chosen to make the loss, one is duty-bound to internalize it, while the victim is not. The victim does not treat the injurer as a means by forcing him to internalize the loss he chose to create.

Forcing an agent to internalize a loss he created does not curtail his autonomy if he chose to create the loss. We regard an injurer as having consented to the risk of liability in virtue of his creating a loss, resulting from a risk that was within the scope of his choice. Having chosen the loss, and subsequently withholding compensation from the victim, he treats the victim as a means to his own ends. The victim, on the other hand, does not impinge upon the injurer's autonomy simply by forcing him to take responsibility for his choice.

At this point, one might maintain that scenarios like these involve intentional conduct that is not found in accidental tort cases, and that the situation is different when liability is imposed for injuries caused unintentionally. Whatever the exigency of the backpacker's circumstances, he freely chose to enter the cabin, and chose to create the resulting costs. On the other hand, one who causes harm by causing an improbable accident is likely to not have contemplated such harm. By imposing liability for such accidents, the argument would conclude, the legal system curtails autonomy for imposing costs for losses that the injurer did not choose to create.

While the injurer may not have intended to create losses, he chose to create risks from which the losses resulted. In many instances, those losses were, however improbable, discerned by the injurer as a potential result of such risk. In some cases, however, potential injuries are not even foreseen by the would-be injurer. We might understand liability imposed under such circumstances impinging upon an injurer's autonomy by shifting a loss to him, when he did not choose to create that loss any more than did the victim. Taking from the injurer to restore the victim to his *status quo* indifference curve, then, treats the injurer as a means to the victim's ends, as the victim is made to insure the victim against losses he could not avoid creating.

It might seem then, as though there is a sort of symmetry among the parties in question here, as neither one consents to the loss that promotes or restores the ends of the other. However, there is an important sense in which a party that inadvertently causes harm chooses to cause it. While a party might not choose to impose a known risk on a potential victim, that party might choose to act without ascertaining the risk. Forcing an injurer to bear the loss he created does not impinge upon his autonomy if he had the capacity to foresee, ascertain and then make a choice about the risk, but simply chose not to exercise this capacity. If one freely chooses to treat others as means by knowingly imposing risks on others, one does the same when they act in willful ignorance of the risks they might be generating. We expect of agents to make reasonable efforts to ascertain risks, in order to avoid nonconsensual losses. Failure to make such effort denies equal respect to others. One would violate basic duties of respect by choosing to overlook risks to others, as one could externalize costs by setting oneself to become selectively ignorant of risks. One has a basic positive duty, then, to ascertain risks.

We should say, then, that an injurer does not choose to subordinate a victim by imposing risks on him only when the injurer had taken *adequate* measures to determine that the activity he engaged in that gave rise to the injury did not pose a risk. Sometimes however, an injurer might have imposed risks despite his having taken such measures. It is the creation of these risks that we may regard as not chosen.

It will not be clear why these risks in particular are not chosen until we understand what we mean by ‘adequate’, as used in the preceding paragraph. The issue is what affirmative measures an agent should be expected to take to ascertain the risk he creates, such that he did not choose to create the risk for having failed to take measures beyond that point. I maintain that the extent of the duty to take affirmative measures can be determined by a cost-benefit analysis. The creation of the risk in question is not within the scope of one’s choice when the cost of exercising the capacity to ascertain that risk exceeds the marginal benefit to the agent of the risk-generating activity. We say this because the agent could not make a meaningful about imposing risk without forsaking his own ends.

For an illustration, let us return once again to the Farmer-Railroad scenario. Suppose that it would cost Railroad \$100 to ascertain that its freight operation poses a risk of burning Farmer’s crop (the probability of harm posed by the risk does not matter). Such an expense might accrue in the course of extensive testing. Railroad might test its trains to see whether they emit sparks that could reach crops as close to the railway tracks as Farmer’s, and so on.⁷² If the Railroad’s expected marginal gain from this freight operation (excluding these information costs) is less than \$100, and it were to commit itself to discovering risks it poses, then its enterprise would be prohibitively costly. If

Railroad were made to incur these information costs, its autonomy would be curtailed, for it could only pursue its projects at a net loss.

So long as the information costs associated with a given risk are less than the marginal gain won by the activity that gives rise to the risk, we can understand that risk, and the harm that results when the risk materializes, as within the scope of the injurer's choice. We might say that the injurer would have been in a position to make a conscious choice, had he incurred reasonable epistemic costs to ascertain the potential consequences of his conduct.

When an injurer does not satisfy this economic standard of foreseeability, i.e., the cost of ascertaining the risk posed from that activity outweighs the cost of forbearing should the risk be discovered, the injurer should be found to not have borne a duty to ascertain the risk. When he was neither aware of the risk nor under a duty to become aware of it, imposing liability for his infringement caused by his conduct infringes upon his autonomy. Since what we are proposing here is an economic standard of reasonable foresight, I will refer to it as the 'Economic Foresight' model.

It is important to note that the kinds of risks that were unforeseeable before an accident occurred may well become foreseeable thereafter. Once risks and expected harms are better quantified as a result of the litigation process, or as a result of a growing history of accidental losses, the cost of ascertaining the future risk from the continuation of the accident-causing conduct may be expected to drop considerably. This means that the *Assignment Principle* may determine the allocation of liability in the first of a series of similar accidents caused by a single injurer, while the rest may require a stricter rule of liability. As more accidents occur, as they would over time if Railroad were to continue

to emit sparks while passing by Farmer's land, the parties will accumulate more information about relevant risks.

Imposing strict liability on an injurer for unforeseeable harms, on the grounds that the injurer could have taken measures to ascertain the risk, subordinates the injurer to a status as a means to the victim's ends, insofar as requiring a potential injurer to expend resources in excess of the expected benefit to him, solely for the purpose of exercising a capacity for choice, subordinates the injurer's ends to those of the victims. So when an injurer is forced to bear liability for the unforeseeable harm he caused, his autonomy is infringed just as the victim's would be if liability were to be withheld. Under either alternative, one party's ends are subordinated to those of the other. Therefore, when the injury in question is unforeseeable in the sense outlined above, a sort of reciprocity among the parties obtains. The potential for each party to impinge upon the autonomy of the other is reciprocal. We recognize such reciprocity in virtue of the fact that the very value the law is understood to protect here with a general strict liability rule, respect for persons as autonomous bearers of ends, is threatened by its enforcement.

What's So Special About Epistemic Costs?

Thus far we have argued that shouldering a potential injurer with the burden of taking unreasonably extensive measures to ascertain the risks posed to others by his conduct curtails his autonomy. When this is the case, then, a reciprocal threat to autonomy between the injurer and victim obtains. Even if this account is accepted, it might be argued that there is no reason to restrict our recognition of such reciprocity to the class of cases where epistemic costs are prohibitive. Why treat the sort of epistemic cost discussed above as something that if prohibitively high, curtails the autonomy of the

injurer, while not treating any other sort of risk-reducing precautionary measure similarly? The reason is that epistemic costs bear on the capacity to exercise choice about imposing risks on others during the course of one's activity, while other precautionary costs do not. If an injury was not foreseeable under the Economic Foresight model, then liability curtails the injurer's autonomy, as the loss he created does not curtail his autonomy.

Reciprocity Allows for Cost-Benefit Analysis

In light of this reciprocity, then, there are conditions under which the prima facie case for strict liability may be overridden. The argument for strict liability presented in Chapter Two assumed a context wherein the interaction between a victim and injurer constituted a nonreciprocal subordination of status. The argument raised earlier against the use of cost-benefit analysis to allocate liability rested on the premise that such an analysis illicitly treats the competing interests of the injurer and the victim as being on a moral par. However, when the interests of the injurer come to be on a moral par with that of the victim, that argument loses its teeth. The interests of the victim can no longer be treated as privileged, and so our reasons for objecting to the use of cost-benefit analysis no longer bear much weight.

For further illustration, let us return to Dworkin's scenario, involving Derek and Amartya, which we discussed in Chapter Two.⁷³ Dworkin maintained that the involuntary transfer of a book owned by Derek from him to Amartya would be wealth-increasing by virtue of the fact that Amartya values it more highly, but that the transfer would be an unjust one demonstrates that wealth is not a component of social value. Although we successfully addressed this objection in Chapter Two, we still recognize

that forced transfers may be illicit, despite their potentially wealth-increasing result. That Derek and not Amartya owned the book entails that Derek's interests in the book are overriding. Yet, we might consider a variation on the scenario wherein there is no such overriding interest. If Ronald is a third party who, instead of Derek, owns the book, and will decide to give it to either Amartya or Derek, then no one's privileged interests are harmed when he makes the decision and gives away the book. So there is nothing unjust about transferring the book to the party that values it more, unlike in Dworkin's original scenario.

What we have done so far is to identify a category of cases where we may recognize a sort of symmetry among the parties. The symmetry is not quite like that of the Derek-Amartya-Ronald example. In the latter, no one's autonomy is curtailed when the book is allocated to either Derek or Amartya in a way that subordinates one to the ends of the other, or to those of anyone else. On the other hand, the allocation of liability in cases that satisfy the Economic Foresight model may curtail the autonomy of either party. With such symmetry of privileged interests, we must look to some sort of other competing interest to determine the allocation of liability. Once this reciprocity is recognized, the sort of balancing of interests, or cost benefit analysis we invoke should not be understood as a means of weighing the competing interests in autonomy. There does not seem to be any plausible account of how two potential infringements to autonomy might be compared when we are simply considering how a pecuniary loss will be allocated. Rather, the point is that once each of the two parties stand to be violated by the determination of liability, concerns about autonomy may be put to the side.

That liability may impinge upon an injurer's autonomy under these circumstances does not entail that it is unjust to impose it. Again, we only find under these circumstances that interests in autonomy borne by each party and threatened by the allocation of liability are on a moral par. Since the autonomy interests of one party cannot determine how liability should be allocated, as they would when the Economic Foresight model is not satisfied. When the model is satisfied, however, then we may look to what might be understood as secondary criteria for determining the allocation of liability. A court would be free, then, to apply the Assignment Principle.

We might conclude that courts could apply the Assignment Principle under the circumstances outlined above, insofar as it is not problematic from the point of view of a concern for autonomy. There can be no plausible autonomy-based objection at this point, insofar as we find that autonomy is compromised in some way no matter how liability is allocated. The Assignment Principle is acceptable here, as it is the instrument of wealth maximization in tort adjudication, which may be pursued when no threat to autonomy is posed, or, as in this case, threats to autonomy are unavoidable. To see why the maximization of wealth is a plausible goal for common law tort adjudication, and the most plausible goal at that, we need only recall some important conclusions established in the third chapter. It was Coleman who originally raised the objection that members of society, presented with the opportunity to choose those goods that should be main objects of pursuit by the legal system, might decline to select wealth as one of them.⁷⁴ We demonstrated there, however, that the alternatives to wealth are either implausible goals or best secured by institutional mechanisms other than adjudication.

Accidental tort law, then, can accommodate the Assignment Principle in a manner that is not antithetical to autonomy, when it is incorporated into a general strict liability regime. It might function in a manner similar to the classic negligence rule, which was transformed by decisions in cases such as *Brown v. Kendall* (1850) into its modern form.⁷⁵ In its classic form, the negligence rule functioned as an affirmative defense to strict liability, whereby a defendant could avoid liability by demonstrating that he was not negligent in causing injury. Under the Economic Foresight approach, a defendant could avoid strict liability by showing that no efficient precautions could be taken to reduce the risk of injury, after first demonstrating that ascertaining that risk would be prohibitively costly, such that the sort of reciprocity between injurer and victim discussed above obtains.

Optimal Incentives under the Economic Foresight Model

At this point we must consider an important objection to the approach I am defending. It might be argued that, when limited in application pursuant to the restrictions we have discussed, the use of the Assignment Principle is permissible only under those circumstances when the very goal of the principle, to create incentives for taking efficient precautions against accidental harm, cannot be achieved. When the exercise of foresight is costly, the threat of liability for failing to take cost-justified precautions against injuring others will not induce would-be injurers to take them. After all, agents will not respond to risks they have not apprehended. If the Assignment Principle does not serve to generate incentives to take precautions against harm, then it will not promote the goal of wealth-maximization.

The strict liability rule, warranted when the Economic Foresight model is not satisfied, is clearly sub-optimal in certain respects. When the injury in question was foreseeable under the Economic Foresight model, and the Assignment Principle is not applicable, then the defendant may not invoke a defense of contributory negligence. Recall that a strict liability rule will not be optimal unless it is accompanied by a contributory negligence rule that bars recovery when the cheapest efficient precaution was available to the victim. Even when the model is satisfied, however, it may seem that the goal of promoting optimal precautionary incentives cannot be achieved by a given liability rule.

In addressing this objection, we must first concede that under conditions where the risks are unknown, it is absurd to suppose that parties could determine the optimal level of resources to devote to ascertaining risks and then to mitigating them. However, the Assignment Principle, applied pursuant to the Economic Foresight model, does retain some incentives to safeguard against loss in a way that tends toward efficiency.

Individuals may speculate that they can reduce the risk of liability by taking measures to determine the scope of the risks to others they would create. This approach also creates incentives for potential victims to take affirmative measures to ascertain risks inadvertently imposed upon them. These parties can retain their right under strict liability to compensation for harm done to them by discovering risks they face and publicizing them to their authors. Once a would-be injurer ascertains a risk in this way, he will take precautions against causing harm, in order to reduce his expected liability.

The threat of strict liability to potential injurers for harm they might inadvertently cause, and the threat of uncompensated harms to potential victims, encourage the

discovery of risks that might give rise such injuries. However, we have not yet explained how the use of the Assignment Principle itself will tend to promote efficiency. A negligence rule utilizing an economic standard of fault will not tend to encourage potential injurers to take optimal precautions against the risks they create when that rule is applied only under circumstances where those parties are unaware of those risks. That much should be conceded. However, liability rules employing efficiency criteria might tend to encourage efficient precautions when they allow for a defense of contributory negligence as a bar to liability. When such a defense is allowed, and a victim is found to have failed to take a cost-justified precaution against the harm he suffered, he will not be compensated for his loss.

Such a rule will tend to encourage would be victims to take optimal precautions against accidental loss, at least under some circumstances, even when the relevant epistemic costs satisfy the Economic Foresight model. Suppose that many different freight rail companies each only very infrequently send a freight train on the line adjacent to Farmer's property. With many companies doing this, Farmer might witness a considerable volume of rail traffic, and will thereby be likely to suffer crop damage caused by sparks emitted by some of the trains. He may thereby come to be in position where he is aware of the risk Railroad's train poses, while Railroad would not be. If a cost-justified precaution were available to him, it would be incumbent upon him to take it, lest he forfeit his right to recover damages.

Efficiency will be promoted when the liability rule implementing the Assignment Principle is a negligence rule incorporating contributory negligence as a defense. When it does, potential victims will have some incentive to take at least limited precautions.

Under a strict liability with contributory negligence rule, a potential victim would have little incentive to hedge underdetermined risks by taking some precautions against being harmed, for, barring contributory negligence, he can recover fully from the injurer unless it turns out he negligently failed to prevent the injury. If the potential victim will not be compensated for harms not negligently caused, he will know that is less likely that harm caused to him will be compensated, and so he will be more proactive in protecting his entitlements.

Conclusion

Transaction costs were earlier understood by Posner and Coase to justify the allocation of liability on the basis of efficiency criteria. Recognizing one party's right to injure another without compensation was thought to be permissible when the party could have bargained with his victim for that right, but prohibitive transaction costs prevented him from doing so. Under the Economic Foresight model I have presented here, some of these transaction costs come to bear a real moral significance. Whereas Coase's Reciprocity thesis strikes many as being implausible, we are now able to draw upon a moral theory of liability that enables to recognize a form of reciprocity among parties when the potential losses faced by an injurer and a victim stand on a moral par.

We now have a means of reconciling the use of wealth maximizing tort rules with the general duty to respect individual autonomy. This approach differs significantly from each of those considered in earlier chapters. Insofar as we have employed a different strategy here, we can avoid the pitfalls those approaches faced. In Chapter Two we discussed the classic defenses of wealth maximizing tort rules, Coase's reciprocity argument and Posner's earlier contention that rights should be defined by efficiency

considered. These defenses asserted that we have no grounds on which to maintain that entitlements give rise to any claims to liability other than those would have been bargained for *ex ante* but for transaction costs. While these approaches were shown to be inadequate, our own reciprocity approach eschews the position that *prima facie* claims to liability may be rebutted on the basis of economic efficiency. Rather, it holds efficiency criteria may be employed only when a certain threshold is reached, such that the autonomy interests underlying such *prima facie* claims are also threatened by enforcing liability judgments.

Posner's contractarian arguments for wealth maximizing tort rules, discussed in Chapter Three, were shown to be inadequate as well. The sort of hypothetical assent to an efficient tort regime, understood to be a necessary condition for its legitimacy, could not be supported by an assessment of what liability rule risk-neutral parties would select under conditions of uncertainty. Our approach avoids this difficulty, insofar as it does not purport to impute to parties consent, hypothetical or otherwise, to bear the costs of uncompensated harms. It recognizes that such a harm may indeed impinge upon the autonomy of an accident victim, but it also recognizes that compensation may be withheld when the autonomy of the injurer is threatened as well. With this account in hand, we need not seek recourse in a hypothetical rational choice account that must, on Posner's own admission, settle for something less than a hypothetical consensus for a wealth maximizing tort regime. Rather than finding a way to impute consent to those that are made worse off by the application of efficient tort rules, our reciprocity approach specifies conditions under which we do not have to look for consent in order to satisfy the demands of autonomy.

So while the historical approaches we considered in Chapters Two and Three were shown to be unsatisfactory, hopefully I have demonstrated here that a partial reconciliation can be achieved. The demands of respect for individual autonomy warrant a liability rule that generally does not allow for the allocation of responsibility for accidental harms on the basis of a cost-benefit analysis. However, as we have seen, an appeal to the values underlying this liability rule allows us to identify a category of cases where the Assignment Principle may be accommodated. The principle may be utilized in those instances where the legal system cannot act to protect autonomy without violating it in another manner. When a court recognizes such conflicting interests in autonomy, it is free to apply wealth maximizing liability rules, which would otherwise threaten autonomy in an unacceptable manner by sacrificing an individual's legitimate expectations for the sake of promoting social welfare.

Despite Posner's efforts to distinguish his wealth maximization norm from utilitarianism and disavow the latter,⁷⁶ he never succeeded in defending his position against the classic response to utilitarianism that asserts the inviolability of the individual in the face of welfare-maximizing measures. The tension between norms prescribing respect for autonomy, and the social welfare calculus employed by the Assignment Principle was seen to be strong in those cases where accidental torts could be likened to private takings of property, as discussed in Chapter Two.⁷⁷ Even where this tension is strongest however, we have outlined circumstances where the Assignment Principle may determine the allocation of accidental losses.

¹ Richard Epstein "Causation and corrective justice: a reply to two critics," *Journal of Legal Studies* 8 (1979): 500.

² *Ibid.*, 501.

³ Richard Epstein, *Takings* (Cambridge: Harvard, 1985), 39.

⁴ Judith J. Thomson, "Self-defense and rights," *Lindley Lecture*, (Lawrence: University of Kansas Press, 1978), 10.

⁵ *Ibid.*, 10.

⁶ Phillip Montague, "When rights are permissibly infringed," *Philosophical Studies* 53 (1988): 347-366.

⁷ *Ibid.*, 349.

⁸ *Ibid.*, 349.

⁹ *Ibid.*, 350.

¹⁰ *Ibid.*, 349.

¹¹ Judith J. Thomson "Rights and Compensation," in *Rights, Restitution and Risk* (Cambridge: Harvard, 1986), 72-73.

¹² Montague, "When rights are permissibly infringed," 350. The argument assumes that $C_{A,B}p$ entails $C_{A,B}q$ if p entails q . Since $\neg p$ entails $p \rightarrow q$, $C_{A,B}\neg p$ entails $C_{A,B}(p \rightarrow q)$.

¹³ Montague, "When rights are permissibly infringed," 351.

¹⁴ *Ibid.*, 350.

¹⁵ *Ibid.*, 352-53.

¹⁶ Jules Coleman, "Rethinking the theory of legal rights," *Markets, Morals, and the Law* (New York: Cambridge, 1988), 35-36.

¹⁷ Guido Calabresi and Douglas Melamed, "Property rules, liability rules, and alienability: one view of the cathedral," *Harvard Law Review* 85 (1972): 1089-1199.

¹⁸ Coleman, "Rethinking the theory of legal rights," 48.

¹⁹ *Ibid.*, 48.

²⁰ See the discussion of *status quo* indifference curves in Chapter One, pages 26-27.

²¹ *Ibid.*, 244.

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- ²² Coleman, *Risks and Wrongs*, 329-332.
- ²³ *Ibid.*, 331.
- ²⁴ *Ibid.*, 331.
- ²⁵ *Ibid.*, 331.
- ²⁶ *Ibid.*, 340. Coleman maintains that the kind of right at stake in a given situation depends on the transaction rule applied to the entitlement, which depends on the underlying normative theory.
- ²⁷ *Ibid.*, 372.
- ²⁸ Ernest Weinrib, "Toward a moral theory of negligence law," *Law and Philosophy* 2 (1983): 37-62.
- ²⁹ Howard Klepper, "Torts of necessity: a moral theory of compensation," *Law and Philosophy* 9 (1990): 223.
- ³⁰ *Ibid.*, 223.
- ³¹ *Ibid.*, 227.
- ³² *Ibid.*, 228.
- ³³ *Ibid.*, 229.
- ³⁴ Loren Lomasky, *Persons, Rights, and the Moral Community* (New York: Oxford 1990), 54.
- ³⁵ *Ibid.*, 146. He brings this insight to bear on the backpacker scenario to support his argument for compensation in Loren Lomasky, "Compensation and the bounds of rights," in *Compensatory Justice*, ed. John Chapman (New York: New York University Press 1991), 35-37.
- ³⁶ *Ibid.*
- ³⁷ Richard Posner, *Economic Analysis of Law: 4th Edition*, (Boston: Little Brown, 1992), 119.
- ³⁸ Robert Goodin, "Theories of compensation," in *Liability and responsibility : Essays in Law and Morals*, ed. R.G. Frey and Christopher W. Morris (New York: Cambridge 1991), 274.

³⁹ *Ibid.*, 277.

⁴⁰ *Ibid.*, 276.

⁴¹ *Ibid.*, 279.

⁴² Lomasky, *Persons, Rights, and the Moral Community*, 145.

⁴³ Lomasky adds on page 145 that while the awarding of compensation may fail to fully rectify a loss, it conveys respect for the victim's status as a project pursuer, as that compensation can further other projects the victim was pursuing or may yet pursue.

⁴⁴ David Owen, "Philosophical foundations of fault in tort law," in *Philosophical Foundations of Tort Law*, ed. David Owen (New York: Oxford, 1995), 218.

⁴⁵ Jeremy Waldron, *The Right to Private Property* (New York: Oxford, 1988).

⁴⁶ We recognize that once we leave this system, it becomes an open question what counts as property, as well as what rights and responsibilities are entailed by claims of ownership. However, there are certain limits to how a property regime can be altered. One of these limits was spelled out in Chapter Two: the delimitation of property rights on the basis of efficiency criteria is unacceptable, insofar as it rests on an arbitrary initial allocation of rights, and thusly, a dependence on an arbitrary system of prices.

⁴⁷ Christopher H. Schroeder "Causation, compensation, and moral responsibility" *Philosophical Foundations of Tort Law*, ed. David Owen (New York: Oxford, 1995), 360. Although they were directed at theories that we are also attacking, such as David Owen's, which will be further discussed below, they would also apply to the broader account of respect for persons I am proffering.

⁴⁸ *Ibid.*, 360.

⁴⁹ *Ibid.*, 360-361. This point would have equal force in the contexts of negligence and strict liability.

⁵⁰ Why does the defendant owe the plaintiff anything when the plaintiff refused to take an efficient precaution? It might be argued that tendering compensation in the amount of the value of the precaution after an accidental injury no longer serves its purpose. This partial compensation serves to afford respect to the victim as an end, as that was the value of respecting the plaintiff before the fact.

⁵¹ Owen, "Philosophical foundations of fault in tort law."

⁵² *Ibid.*, 202-203.

⁵³ *Ibid.*, 206.

⁵⁴ *Ibid.*, 208-209.

⁵⁵ *Ibid.*, 219.

⁵⁶ *Ibid.*, 218.

⁵⁷ *Ibid.*, 207.

⁵⁸ *Ibid.*, 221.

⁵⁹ *Ibid.*, 218.

⁶⁰ *Ibid.*, 218.

⁶¹ *Ibid.*, 225-226.

⁶² *Ibid.*, 225.

⁶³ *Ibid.*, 208.

⁶⁴ Owen does not commit to any criteria for determining the relative values of competing interests, however.

⁶⁵ See Chapter Three, page 116.

⁶⁶ Posner, *The Economics of Justice*, 98-99.

⁶⁷ Owen, 'Philosophical foundations of fault in tort law', 226.

⁶⁸ *Ibid.*, 226.

⁶⁹ See page 156.

⁷⁰ *Ibid.*, 221.

⁷¹ *Ibid.*, 226.

⁷² For simplicity's sake, we assume here that Railroad is making a lone cargo run along this line.

⁷³ See Chapter Two, page 83.

⁷⁴ Jules Coleman, "Efficiency, utility, and wealth maximization," in *Markets, Morals, and the Law* (New York: Cambridge, 1988), 122; see Chapter Three, pages 114-115.

⁷⁵ *Brown v. Kendall* 60 Mass. 292 (1850). See Chapter One, page 15-16.

⁷⁶ See Chapter One, pages 37-41.

⁷⁷ See Chapter Two, especially pages 66-68.

Appendix: A Brief Guide to Major Concepts, Rules, and Principles Discussed in this Work

Assignment Principle—A principle aimed at guiding liability decisions in accidental tort cases, so as to promote the goal of wealth maximization. It holds that a court should award rights to those that would have purchased them but for prohibitive transaction costs. Under this principle, rights and claims to liability would be assigned retroactively to those that would have valued them most highly. Such allocations would be made on the basis of Kaldor-Hicks efficiency analyses. See Chapter One, pages 29-30.

BPL Formula—An economic formula used to determine whether a given precaution against some risk is cost-effective. The formula represents an early economic interpretation of negligence, formulated by Judge Learned Hand. A court using the formula holds that an injurer was not negligent if the cost of the burden of precaution (B) exceeded the expected cost of harm posed in the absence of the precaution. The expected cost is the product the probability of the harm in question occurring in the absence of the precaution (P) and the cost of the harm when it occurs (L). Accordingly, an injurer is negligent only if $B < P * L$. See Chapter One, pages 16-17.

Coase's Reciprocity Model—an approach inspired by the economist Ronald Coase, which treats all externalities as posing a reciprocal threat of harm. It holds that either the party generating an externality harms a 'victim', or the victim harms the party by forcing him to cease producing it or bear its cost. On this model, then, rules protecting property interests cannot completely prevent or rectify harm; they can only hope to minimize it. Coase advocates minimizing it by allocating rights to the party the values them most highly. See Chapter Two, pages 52-56.

Coase Theorem—A thesis advanced by the Economist Ronald Coase, holding that the initial allocation of rights is arbitrary from the point of view of efficiency, when the cost of transacting for rights is negligible. On his view, we should expect rights to be transferred to those parties that value them most highly. See Chapter One, page 4.

Comparative Negligence - A rule allowing for an affirmative defense to liability, holding that an injurer's liability for an accidental harm may be mitigated if the victim was found to have been negligent in playing a causal role in the accident or negligently failed to prevent it. The injurer's liability would be mitigated in proportion to the extent of the victim's share of the negligence. See Chapter One, page 32.

Contributory Negligence Rule—A rule allowing for an affirmative defense to liability, holding that an injurer may escape liability for an accidental harm if the victim was found to have been negligent in playing a causal role in the accident or negligently failed to prevent it. See Chapter One, page 32.

Economic Contributory Negligence Rule - A rule allowing for an affirmative defense to liability, holding that an injurer may escape liability if the cheapest precaution against

injury was one available to the victim. This rule may be conjoined with negligence or strict liability rules. See Chapter One, pages 34-35.

Economic Foresight Model—A new approach introduced and defended in Chapter Four. It holds that the harm caused by an agent's risky conduct was within the scope of his choice when he could have ascertained that risk by reasonable means. Means are reasonable when their cost to the agent is less than the net gain to the agent of his risk-generating activity. Once it is determined that a given harm was not within the scope of the agent's choice, we may recognize that the agent's autonomy is compromised if liability for that harm is enforced. See Chapter Four, pages 171-173.

Economic Negligence Rule—A liability rule employing economic criteria to determine fault or assess the reasonableness of precautions available to an injurer. The rule generally holds that cost-ineffective precautions are unreasonable. See Chapter One, pages 18-20.

Kaldor-Hicks Superiority—Also known as "potential Pareto Superiority." The state of affairs Y is Kaldor-Hicks Superior to the state of affairs X if the change from X to Y makes at least one person better off, and those who benefit do so to a degree that they could compensate those who are made worse off, thereby making Y Pareto Superior to X. See Chapter One, page 28.

Negligence Rule—The liability rule that dominates most of contemporary American accidental tort law. It holds that an injurer is liable for a harm he caused only if he was at fault, i.e., he failed to take reasonable precautions against the harm. Negligence rules are also known as "fault rules." See Chapter One, page 2.

Pareto Efficiency—A criterion of economic efficiency, which recognizes increased efficiency whenever a change makes at least one person better off and no one worse off. See Chapter One, pages 26-27.

Pareto Optimality—The state of affairs Z is Pareto Optimal if no alternative state of affairs that is Pareto Superior to Z can be brought about. See Chapter One, page 26.

Pareto Principle—A moral principle that endorses actions or rules on the basis of Pareto efficiency. An action or rule is acceptable if it makes at least one person better off and no one worse off. On this basis, Kaldor-Hicks efficient tort rules are thought by Posner to be acceptable insofar as they make everyone (or nearly everyone) better off in the long run. See Chapter Three, pages 110-111.

Pareto Superiority—The state of affairs Y is Pareto Superior to the state of affairs X if the change from X to Y makes at least one person better off and no one worse off. See Chapter One, page 26.

Strict Liability—A liability rule that predates negligence and still governs certain categories of accidental tort cases. It assigns liability for harm on the basis of causation,

regardless of whether the injurer was at fault, or conducted himself reasonably when accidentally causing harm. Strict liability rules may allow for affirmative defenses, such as contributory or comparative negligence. See Chapter One, pages 2-3.

Wealth Maximization Norm—A norm which generally holds that rules should be formulated, or rights and claims should be allocated, so as to maximize economic efficiency or productivity, and consequently, to maximize society's aggregate wealth. Changes that are Kaldor-Hicks or Pareto improvements are understood to be wealth maximizing. In the context of tort law, the wealth maximization norm endorses rules that promote free, wealth-increasing exchange, and incentivize efficient precautions against accidental harm. The norm is incompatible with liability rules that would lead parties to take inefficient precautions against accidental harms. See Chapter One, 29-31.

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