

# Civil Recourse Theory’s Reductionism

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## INTRODUCTION<sup>1</sup>

When I was preparing for this panel, I was tempted to begin with something that Fritz Kessler, an old contracts teacher at Yale, might have said on this occasion:<sup>2</sup> “Ben, John—wonderful, wonderful, but you couldn’t be wronger!” Nevertheless, I cannot really do that now that they have said such nice things about *Desiano*<sup>3</sup>—and correctly so. I would like to begin with a brief story about *Desiano* that I had not planned to say. When our panel first began deliberating, the other two judges on the panel were prepared to come out the opposite way from me. I argued with them that, for most of the reasons given by Ben, tort law required that we come out the way we did. The other judges on the panel warned me that the Supreme Court would reverse us 9–0. I told them, “I don’t give a blank.” I added, “I think I can still tell them more about torts than any of them except possibly Ruth Bader Ginsburg and Clarence Thomas, the two members of that Court who know something about torts.” (Justice Breyer is a great judge but another Justice used to call him the Commissioner because he comes out of administrative law, which has a rather different point of view.) “Still,” I went on, “I think I can convince them that they cannot reverse us without doing harm to torts in a way that they may not

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1. This is a slightly revised version of remarks I made at the AALS Torts & Compensation Systems panel on Twenty-First Century Tort Law. I am especially grateful to Michael Rustad for editing my remarks and providing appropriate footnotes, and to my assistant, Susan Lucibelli, and my law clerk, Justin Collings, for their incredible help in getting this article ready for publication.

2. Friedrich Kessler, one of the grand theorists of contract law, taught at Yale Law School first from 1935–1938 and again from 1947–1970. His classic article, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943), has a continuing vitality in contract law scholarship; see also John K. McNulty, *A Student’s Tribute to Fritz Kessler*, 104 YALE L.J. 2133 (1995).

3. *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85 (2d Cir. 2006).

fully appreciate.” And so, it happened, and *Desiano* is having a good effect on later Supreme Court discussions of preemption as well.

### I. POINTS OF AGREEMENT WITH CIVIL RECOURSE

But even apart from that, there are some things, I hate to say it, that I agree with John and Ben about. But there are things with which I do disagree seriously. In their 2010 *Texas Law Review* article, Goldberg and Zipursky blame accident law for creating the gravitational pull away from individual justice accounts of tort law.<sup>4</sup> They contend that the fundamental dichotomy in American tort law is private wrongs versus the “allocation of accidentally caused losses.”<sup>5</sup> First, I agree with them that tort law is not just about accident law and that tort law is much broader than accident law and covers a variety of different things.<sup>6</sup> If one only looks at accident law, one does not understand torts.<sup>7</sup> I also agree that, at any given moment,

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4. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 929 (2010) [hereinafter *Torts as Wrongs*]; see also John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 747 (2001); John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625 (2002).

5. *Torts as Wrongs*, *supra* note 4, at 919.

6. Torts is not unidimensional, nor is accident law only about the allocation of loss. See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 26 (1970) [hereinafter *THE COSTS OF ACCIDENTS*] (acknowledging the need to consider individual views of what seems just and not economic considerations only); see generally Guido Calabresi, *The Complexity of Torts—The Case of Punitive Damages*, in *EXPLORING TORT LAW* (M. Stuart Madden ed., 2005) [hereinafter *The Complexity of Torts*] (arguing that torts is not one dimensional but fulfills multiple functions as evidenced by punitive damages’ role in (1) enforcing social norms through the use of private attorneys general, (2) fulfilling a deterrent role by punitive damages’ multiplier role, (3) the Tragic Choice function as reflected in the *Ford Pinto* products liability case, (4) enabling recovery of generally nonrecoverable compensatory damages, and (5) permitting the righting of public wrongs); cf. Guido Calabresi, *Neologisms Revisited*, 64 MD. L. REV. 736, 743 (2005) (explaining four functions of tort law as I saw them to be when I wrote *The Costs of Accidents*: “(1) the reduction of the sum of accident costs and of safety costs; (2) distributional equity; (3) achieving most effectively the desired degree of interpersonal and intertemporal spreading; and, (4) the minimization of the administrative costs of achieving (1), (2), and (3)”); John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364 (2005) (arguing that *The Cost of Accidents* was about primary cost reduction rather than the norms of responsibility).

7. The law of torts performs multiple functions in society, and that explains in large part diverse perspectives in law and legal scholarship.

Which of these approaches is law and legal scholarship? I believe that each of them has much to be said for it. Indeed, I have myself done studies which, I think, partake significantly of every one of them. It is also not impossible to engage in complex mixtures of them, and the insights of each can be of considerable help in filling out the gaps in—the criticisms that can appropriately be made of—all of them. Nevertheless, they each do represent widely differing ways of viewing laws, legislatures, courts, legal scholarship, and the role these should play in society and in the making of society’s rules.

one of the things that one does as a judge, as a decider of the particular case, is something that is not that different from civil recourse.<sup>8</sup> That is, in the individual case as a judge, one looks to whether an individual has been injured by a wrong in a way that requires recourse. That's one of the things that judges do in individual cases. I further think, however, that, in any given case, torts is also about giving someone compensation from somewhere, somehow, because that someone "deserves" compensation, that is, has a corrective justice right to it. The Colemanial approach has something to it in an individual case as well, but that doesn't mean that there isn't also a civil recourse side to what is going on.<sup>9</sup> I will come back to what, if anything, that civil recourse side means later in this Article.

## II. CRITIQUE OF CIVIL RECOURSE THEORY

### A. How Does Something Become a Civil Wrong?

What I don't think either the Colemanians or the Goldzurskies at all explain adequately is how or why something becomes a civil wrong.<sup>10</sup> How or why does something become a legal wrong that requires civil recourse? In fact, there is nothing original about this comment; I had written this down, and then I found Barbara Fried's article which says "[t]he literature either is silent on what makes an act wrongful in the first place or suggests criteria that seem indistinguishable from some version of cost/benefit analysis."<sup>11</sup> That is, in some of their own writings when they try to say why something should be a civil wrong, John and Ben suggest reasons that look much like sophisticated Posnerian, that is, Calabresian, law and economics, plus compensation et al. reasons. Now, I do not want to be too harsh about this. After all, Aristotle told us that there is corrective justice, but *he* did not tell us what it was.<sup>12</sup> Moreover, Blackstone told us things very like what the Goldzurskies are saying, but even *he* did not tell us what those wrongs were.<sup>13</sup> So

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Guido Calabresi, *An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*, 55 STAN. L. REV. 2113, 2151 (2003).

8. "Generally speaking, courts are unlikely to be reductionist. Judges derive law from many sources. The problem arises from the ever-increasing incursions by federal courts into the tort process, and is worsened when the incursion is by the Supreme Court." *The Complexity of Torts*, *supra* note 6, at 333 (criticizing the U.S. Supreme Court's reduction of the multiple functions of punitive damages to the single factor of retributory justice).

9. See generally JULES L. COLEMAN, RISKS AND WRONGS (1992); Jules Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421 (1982) (explaining corrective justice theory of tort law).

10. See generally John C.P. Goldberg & Benjamin C. Zipursky, *Civil Recourse Revisited*, 39 FLA. ST. U. L. REV. 341 (2011); *Torts as Wrongs*, *supra* note 4.

11. Barbara H. Fried, *The Limits of a Nonconsequentialist Approach to Torts*, 18 LEGAL THEORY 231, 231 (2012).

12. See Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403, 403 (1992) (noting that Aristotle coined the term "corrective justice").

13. Sir William Blackstone published *Commentaries on the Laws of England* from 1765–1769. Volume III of the Commentaries, entitled *Private Wrongs*, covers the tort law of the mid-eighteenth century. See John H. Langbein, *Introduction to Book III*, in 3 WILLIAM BLACKSTONE, COMMENTARIES iii (photo. reprint 1979) (describing private wrongs that prefigure intentional torts); see also John C.P. Goldberg, *The Constitutional Status of Tort*

they are all in good company; Coleman is in good company, and John and Ben are in good company as well.

*B. Civil Recourse Theory's Circularity*

In a macro or fundamental sense, much of what John and Ben say is circular. Let me just take a couple of steps back on that. I still teach torts. I've taught it since 1959. It is the one course I have taught every year since and continue to teach from 8:30 to 10:00 every morning when I am not in New York judging. I begin the first class by asking: "What is a tort?" That is: "What is a civil wrong that gives rise to recourse to a particular person?" That's the first question I ask. And I get a variety of answers from my students like, "Well, there has to be an injury," and then I say something about trespass. Or, "There has to be this," and then I ask them why recovery is not given in situations that look very similar to that. I go through many of these things and ask again: "What is it that gives rise to recourse?" I end the first class by saying that this is a serious subject. I tell my students that in contracts they will be asking what a contract is throughout the whole term. Here, we will go on and read cases and hopefully at the end of the term they will get some idea as to why we sometimes do and sometimes do not give recovery. Why do we say there is a duty sometimes (and I am traditional enough to begin with the four classic elements and what they mean: duty, breach, causation, and damages) and not at other times?<sup>14</sup> This is the fundamental question for tort law. And it is not just

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*Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 560 (2005) ("With certain heresies excised, the *Commentaries* provided the basic text for late-colonial and early-American legal education and practice. American jurists were thus quite familiar with the principle that government owes its citizens laws and institutions for declaring and vindicating basic rights, including the right to a law for the redress of wrongs.").

14. *Compare* Harless v. Boyle-Midway Div., 594 F.2d 1051 (5th Cir. 1979) (holding manufacturer liable for death of teenager from sniffing PAM, a non-stick spray used in cooking, because manufacturer was aware of a large number of prior similar deaths and injuries), Spruill v. Boyle-Midway, Inc., 308 F.2d 79 (4th Cir. 1962) (finding it to be foreseeable that an unwarned mother would use highly toxic furniture polish and an infant would drink it and be poisoned), Bigbee v. Pac. Tel. & Tel. Co., 665 P.2d 947 (Cal. 1983) (holding that the telephone company owed a duty to a customer in locating the telephone booth too close to a busy Los Angeles street where plaintiff was struck by a drunk driver), Easton v. Strassburger, 199 Cal. Rptr. 383 (Cal. Ct. App. 1984) (recognizing that real estate brokers have an affirmative duty to inspect homes that they sell and must disclose all material facts affecting property values), Ollison v. Weinberg Racing Ass'n, 688 P.2d 847 (Or. Ct. App. 1984) (imposing dram shop liability on racetrack that celebrated fan appreciation night by selling beer at its concession stand for less than half the usual price), and Ueland v. Reynolds Metals Co., 691 P.2d 190 (Wash. 1984) (recognizing a child's cause of action for negligent loss of parental consortium), with *THC Holdings Corp. v. Tishman*, Nos. 93 Civ. 5393 (KMW), 95 Civ. 4422, 1998 U.S. Dist. LEXIS 8538, 1998 WL 305639 (S.D.N.Y. June 9, 1998) (holding no special relationship existed between investment bank and corporate client giving rise to tort-based duty independent of parties' contractual obligations), *Holdampf v. A.C. & S., Inc.*, 840 N.E.2d 115 (N.Y. 2005) (holding that the Port Authority of New York and New Jersey owed no duty of care to the wife of an employee exposed to asbestos while laundering her husband's clothing), *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055 (N.Y. 2001) (holding that a manufacturer of firearms owed no duty

theorists like Posner and Calabresi who ask questions of a sort different from the ones that John and Ben ask; it is lawmakers, including high courts, which seek to give reasons for why there should be a civil wrong in some circumstances and not in others.<sup>15</sup>

Let's look at *Holmes v. Mather*,<sup>16</sup> going back to old chestnuts, the case that established fault as a requirement for recovery even where there was a direct hit injury.<sup>17</sup> Actually, it didn't; it was all in dicta. In *Holmes*, the defendant's servants were driving a team of horses in double harness on a public highway. The servants lost control of the team and they injured a pedestrian using a public street.<sup>18</sup> Baron Bramwell, in deciding this case against the plaintiff, faced the argument, "Why should the innocent plaintiff suffer rather than the defendant who chose to exercise his horses on a public street?" To which Baron Bramwell answered, "For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid."<sup>19</sup>

Neither of these arguments really gets one very far because the plaintiff also chose to go out on the street. Or, she could have gone on the street but chosen to wear iron-plated underwear and not been injured even if struck by the horses. And, what is the convenience of mankind? Baron Bramwell, a pupil of Ricardo,<sup>20</sup> was

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to persons harmed by their misuse), *Purdy v. Pub. Adm'r*, 526 N.E.2d 4, 7 (N.Y. 1988) (noting that "common law in the State of New York does not impose a duty to control the conduct of third persons to prevent them from causing injury to others . . . . This is so . . . even where 'as a practical matter' defendant could have exercised such control"), *Becker v. Schwartz*, 386 N.E.2d 807 (N.Y. 1978) (declining to recognize an action for wrongful life), and *Yania v. Bigan*, 155 A.2d 343 (Pa. 1959) (holding that the defendant was not liable for encouraging another to jump into a pit and then refusing to help him escape drowning).

15. As the New York Court of Appeals states: "It is well established that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff." *Pulka v. Edelman*, 358 N.E.2d 1019 (N.Y. 1976). The New York Court of Appeals, the highest court of New York, offers tort teaching lessons as to when something is or is not a duty. It is "the responsibility of courts, in fixing the orbit of duty, 'to limit the legal consequences of wrongs to a controllable degree' and to protect against crushing exposure to liability." *Strauss v. Belle Realty Co.*, 482 N.E.2d 34, 36 (N.Y. 1985) (citations omitted).

16. [1875] 10 L.R. Exch. 261 (Eng.).

17. In England the requirement of fault in cases of direct injury to plaintiffs by defendants is generally dated to Baron Bramwell's opinion in *Holmes*, 10 L.R. Exch. 261. In many of the states of the United States the requirement was imposed earlier. The opinion most frequently cited is that of Chief Justice Lemuel Shaw in *Brown v. Kendall*, 60 Mass. (6 Cush.) 292 (1850).

18. Because servants were driving the team, the injury was not, in fact, "direct." "The dictum provides some reason to believe that *Bramwell* considered highway collisions to be exceptional in requiring fault, and hence strict liability still to be the general rule." Ken Oliphant, *Rylands v Fletcher and the Emergence of Enterprise Liability in the Common Law*, in *EUROPEAN TORT LAW 2004*, at 81, 106 (Helmut Koziol & Barbara C. Steininger eds., 2004) (discussing the dicta in *Holmes v. Mather*).

19. *Holmes*, 10 L.R. Exch. at 267.

20. "David Ricardo (1772–1823), a student of James Mill, is a pivotal figure in the history of economic thought" and was a leading utilitarian. MARK PERLMAN & CHARLES R. MCCANN JR., *THE PILLARS OF ECONOMIC UNDERSTANDING: IDEAS AND TRADITIONS* 263–64

referring to a particular utilitarian theory at the time. The deeper question is: Which choices were more important? Which choices were more feasible?<sup>21</sup>

*C. What Civil Recourse Theory Does Not Explain*

Nevertheless, we do not have to go back too far to see how courts ask questions different from those asked by the civil recourse theorists. It is not strange that the New York Court of Appeals should have talked as it did in *Lauer v. City of New York*.<sup>22</sup> The New York Court of Appeals in that great decision on duty said that the question of duty is a question that is retained by the highest court of the state and must be decided based on a series of factors that have little to do with a *particular* person's right to civil recourse. The factors the court speaks of are deterrence, spreading, and economic effects. I have my students read *Lauer* and then kind of laugh when they say: "It looks like Calabresi's *Costs of Accidents*; it looks like the things that *you* wrote should be looked at." In other words, the court in *Lauer* seemingly held that the question of duty must be decided based on factors that have little—perhaps too little—to do with civil recourse.

The question of what establishes a wrong is something civil recourse theorists do not deal with adequately. Nevertheless, I do think that civil recourse theorists do have an insight into something that is missing in the discussion of justice, if justice is viewed solely as the reduction of the sum of accident and safety costs and things of that sort. And I will come back to it. But I also think that what they do does not explain an awful lot of cases. Conversely, I think I can (in my broad view of torts) explain pretty much all of the cases they discuss in their *Texas Law Review* article and all the other civil recourse articles as well.<sup>23</sup> For example, I have a very good explanation for the whole issue of emotional damages. To me, it is still the only explanation that makes sense of that difficult area.<sup>24</sup> But then, that is often how I see the world—from a Guido-centered point of view.

There are any number of things in the law of torts that may strike one as strange. Why is it that in New York there is a duty to everyone who is foreseeable when

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(1998) (discussing David Ricardo's utilitarianism as "steeped in the Utilitarianism of Bentham and James Mill").

21. Chris Goodrich, a sometime law student, recalls some of the lessons of the *Holmes v. Mather* tort story:

Guido quoted his all-time favorite case, in which England's Baron Bramwell, rather like his contemporary Holmes, found against a pedestrian struck by a carriage. "For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid. . . . Wake up, you shouldn't be asleep yet!" . . . Guido played the class as if it were speed chess, responding instantly to each student's comment and calling just as quickly on someone else.

CHRIS GOODRICH, ANARCHY AND ELEGANCE: CONFESSIONS OF A JOURNALIST AT YALE LAW SCHOOL 78–79 (1991).

22. 733 N.E.2d 184 (N.Y. 2000).

23. See *Torts as Wrongs*, *supra* note 4.

24. For a preliminary description of that explanation, see GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM (1985).

there is a product defect and there is not a duty to everyone that is foreseeable when there is negligence? That is very odd, and I do not think that civil recourers say much about that.

Another example: I am injured by a taxicab and seventy percent of the taxicabs in town are owned by Goldberg and thirty percent by Coldberg. I sue Goldberg and say, "I was hit by a taxicab and I can show more probably than not that it was yours. I can do this because you own seventy percent of the cabs." I am thrown out of court. Such a case never gets to a jury. And it isn't just the existence of statistics or the chance of error that dooms the case. I am hit by a taxicab, which has a sign on it identifying the owner. All of the taxicabs in town are owned by Goldberg or Coldberg. The issue is, did the sign have a G or C on it? We do a test to see how often at the appropriate distance and speed I can correctly distinguish a C from a G. If I can do this correctly seventy percent of the time, I will invariably get to a jury and presumably win.

In each case, I have been injured and I can show more probably than not that the defendant caused the injury. The difference between the cases is, of course, easy to explain from an economic point of view. Charging a company that has seventy percent of the cabs one hundred percent of the time is wrong, while doing it in the statistical identification case comes out right.<sup>25</sup> It does not come out right in any given case (*pace* civil recourers), but in terms of allocation of costs it comes out right over time.

Yet another example: Why, if I have a right to recourse when I have been injured by you, is there no liability where there is no causal tendency? You are speeding. Because you are speeding, your car happens to be under a tree that, falling, hits the car; I am injured in the car. In this classic case, there is no recovery, and yet you injured me by your wrong. There is no question about this result in ordinary accident law.<sup>26</sup> Now, civil recourers might say, "Oh, well, that is just a very unusual situation in accident law; it is just an odd quirk."

But remember, we are talking about torts, not just accident law. And if we move to fraud, this odd case becomes a fundamental part of the law. That is, to recover, one needs to show loss causation as well as transaction causation.<sup>27</sup> A plaintiff in a securities fraud case cannot satisfy loss causation without evidence of an economically relevant causal connection between a defendant's misrepresentation

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25. See generally Charles Nesson, *Agent Orange Meets the Blue Bus: Factfinding at the Frontier of Knowledge*, 66 B.U. L. REV. 521 (1986) (discussing the problem of probabilistic proof).

26. See *Berry v. Sugar Notch Borough*, 43 A. 240 (Pa. 1899).

27. See, e.g., *Moore v. PaineWebber, Inc.*, 189 F.3d 165, 173 (2d Cir. 1999) (Calabresi, J., concurring) (explaining the distinction between loss causation and transaction causation); see also *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374, 380 (2d Cir. 1974) (stating that a plaintiff in a securities fraud case had to prove "loss causation—that the misrepresentations or omissions caused the economic harm—and transaction causation—that the violations in question caused the appellant to engage in the transaction in question"). But see *Bastian v. Petren Res. Corp.*, 892 F.2d 680, 685 (7th Cir. 1990) (Posner, J.) ("'Loss causation' is an exotic name—perhaps an unhappy one . . . for the standard rule of tort law that the plaintiff must allege and prove that, but for the defendant's wrongdoing, the plaintiff would not have incurred the harm of which he complains." (citation omitted)).

and the economic loss suffered by the plaintiff. There must be a causal tendency. For example, but for the defendant's misrepresentation that this was a good neighborhood, I would not have bought a house—I would have spent my money on wine, women, and song. Nevertheless, if the house is later destroyed by a hurricane, which hit good and bad neighborhoods alike, there is no economically relevant, causal connection between the defendant's misrepresentation and the economic loss I have suffered. There is no loss causation, and I do not recover. There is no recovery because there is no economic nexus between the defendant's fraud and the plaintiff's loss.<sup>28</sup> In terms of civil recourse, such cases do not fit well, but, in terms of broader notions of economic allocation, they make a lot of sense.

There are situations where the causal-tendency or loss-causation requirement does not apply. These are usually contractual—but may be statutory—situations. The classic is the insurance contract. I lie about my health to an insurance company, and, if I had not lied, the company would not have sold me the insurance. A car then hits me. My injuries have nothing to do with what I lied to the insurer about. But I lose nevertheless. In this case, loss causation is not necessary; transaction causation is enough. There are, I believe, good economic reasons for this exception to the usual loss-causation requirement, and they have nothing to do with civil recourse.

I could go on to many other examples, which I do not think, even at a microlevel, are explained by civil recourse theory. My main point, however, remains the same: civil recourse does not explain the underlying reason why something is or is not a wrong.

#### *D. Civil Recourse and Products Liability*

I have one side point, which I want to make because my view of products liability is often misstated, as I believe it is in John and Ben's article on products liability responding to Polinsky and Shavell.<sup>29</sup> When I say, "put strict liability on the best decision maker in products liability," I am not saying, "put liability on the injurer."<sup>30</sup> As often as not, the best decision maker is the victim.<sup>31</sup> I believe one

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28. "Loss causation connects the defendant's misrepresentation or omission and the plaintiff's economic loss. . . . The mere purchase of a security at an inflated price does not by itself prove loss causation." Randy C. Joshi, Catherine F. Madrid & Lee-Anne V. Mulholland, *Causation Issues and Expert Testimony*, in LITIGATION SERVICES HANDBOOK: THE ROLE OF THE FINANCIAL EXPERT 3•10 (Roman L. Weil, Daniel G. Lentz & David P. Hoffman eds., 5th ed. 2012). Cf. "Loss causation requires the plaintiff show that the alleged misrepresentations or omissions resulted in the claimed losses to the plaintiff—a foreseeability or a proximate cause requirement." ALAN R. PALMITER, SECURITIES REGULATION: EXAMPLES AND EXPLANATIONS 375 (2008) (emphasis in original).

29. See John C.P. Goldberg & Benjamin C. Zipursky, *The Easy Case for Products Liability Law: A Response to Professors Polinsky and Shavell*, 123 HARV. L. REV. 1919, 1943 (2010).

30. "[M]anufacturers are not absolute insurers of their products. Strict liability will not impose legal responsibility simply because a product causes harm. A product must be defective as marketed if liability is to attach, and 'defective' must mean something more than a condition causing physical injury." *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 879 (Alaska 1979) (footnotes omitted). The burden is placed on the manufacturer when the

does not understand current products liability law unless one understands that frequently it is the “first party” who is the “least cost avoider/best decider.”<sup>32</sup>

In this respect, moreover, I believe that the whole interplay of doctrines like assumption of risk, warning, and definition of a design defect represents a different approach from that raised by the question of whether any given product is too dangerous.<sup>33</sup> The approach to product defect based on the reasonableness or dangerousness of the product was adopted by the American Law Institute in the *Restatement (Third)*.<sup>34</sup> As I see it, both approaches, both complex calculi, are there in the law of products liability and reflect the way courts actually decide these cases.<sup>35</sup> Thus, the issue is not just whether a product is defective or reasonably safe.

victims were powerless to protect themselves.

As Chief Justice Traynor of the California Supreme Court explained: “The reasons justifying strict liability emphasize that there is something wrong, if not in the manufacturer’s manner of production, at least in his product . . . A bottling company is liable for the injury caused by a decomposing mouse found in its bottle. It is not liable for whatever harm results to the consumer’s teeth from the sugar in its beverage. A knife manufacturer is not liable when the user cuts himself with one of its knives. When the injury is in no way attributable to a defect there is no basis for strict liability.”

*Id.* at 879 (alternation in original) (quoting Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 366–67 (1965)).

31. “Where an injury is caused by a risk or a misuse of the product which was not reasonably foreseeable to the manufacturer and supplier, they are not liable.” *Smith ex rel. Smith v. Bryco Arms*, 33 P.3d 638, 645 (N.M. Ct. App. 2001) (holding that the manufacturer was not liable for a company’s unauthorized modifications to a handgun’s design). Civil recourse theory’s inordinate emphasis on the bilateral relationship between plaintiff and defendant does not explain why courts sometimes place the burden on the defendant manufacturer and sometimes on the injured plaintiff. *See generally* Guido Calabresi & Jon T. Hirschoff, *Towards a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972) (explaining that courts consider factors such as the victim’s knowledge of the risk and whether the plaintiff could have avoided the injury; that is, which party was in the best position to avoid the accident risk (was the least cost avoider/best decider), the manufacturer or the injured plaintiff). This question draws its answer from doctrines like assumption of risk and those defining product defect. *See generally* THE COSTS OF ACCIDENTS, *supra* note 6 (developing theory that the sum of accident and safety costs may be minimized by placing liability on the “least cost avoider”).

32. Thus, courts regularly instruct juries on whether a plaintiff’s misuse of the product was reasonably foreseeable or not in causing the plaintiff’s damages.

33. *Cf. Show v. Ford Motor Co.*, 659 F.3d 584, 587 (7th Cir. 2011) (“This formulation of the risk-utility test is an ‘integrated’ test . . . . Under this formulation, consumer expectations are included within the scope of the broader risk-utility test. In addition, the test refines the consumer-expectation factor by specifically allowing for advertising and marketing messages to be used to assess consumer expectations.” (quoting *Mikolajczyk v. Ford Motor Co.*, 901 N.E.2d 329, 352 (Ill. 2008))).

34. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 2(b) (1998) (defining a product as “defective in design if the foreseeable risks of harm could have been reduced by a reasonable alternative design is based on the common-sense notion that liability for harm caused by product designs should attach only when harm is reasonably preventable”).

35.

When Jon Hirschoff and I set out to write *Toward A Test for Strict Liability in Torts*, we had, I think, several objectives in mind. The first was to point out

Rather, courts also consider whether a product is defective when sold for a particular use, thereby considering user conduct and expected user conduct, both of which may turn on how the product was marketed or advertised.<sup>36</sup>

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the fundamental difference between cost-benefit based tests for liability (such as the Learned Hand Fault test) and tests (such as the one we called the Strict Liability test) in which the decisionmaker eschewed cost-benefit judgments. Second, we wished to point out that the recent move to strict liability in torts could not be explained predominantly on wealth distribution or spreading grounds, as was commonly stated, but was likely to stem from dissatisfaction with the meager accomplishments of fault type tests in reducing the sum of accident and safety costs.

Third, we wanted to emphasize the importance of practical over theoretical issues in determining which approach to tort liability ought to predominate. In particular, we wanted to explore the effect that (a) the level of generality at which a liability rule worked best, (b) the existence of insurance, and (c) the presence of third party victims, would have on whether fault or strict liability tests were likely to be most effective in achieving optimal degrees of safety. Fourth, we hoped to give courts some guidance in product liability cases by helping them see how strict product liability fit with older examples of non-fault liability (such as extra hazardous activity liability and assumption of risk), and how they might approach the question of whom to hold strictly liable. Finally, we wished to indicate the relationships and tensions between those goals which focused on yielding an optimal degree of safety and other goals . . . .

Fred R. Shapiro, *The Most-Cited Articles from the Yale Law Journal*, 100 YALE L.J. 1449, 1501 (1991) (commentary by Guido Calabresi).

36. See, e.g., *Castro v. QVC Network, Inc.*, 139 F.3d 114, 119 (2d Cir. 1998) (Calabresi, J.) (applying New York law and ruling that a jury should have been instructed on consumer expectations under warranty law in addition to the risk/utility instruction in strict products liability because a turkey pan with handles that were too small was widely advertised on television and created a consumer expectation: “The jury could have found that the roasting pan’s overall utility for cooking low-volume foods outweighed the risk of injury when cooking heavier foods, but that the product was nonetheless unsafe for the purpose for which it was marketed and sold—roasting a twenty-five pound turkey—and, as such, was defective under the consumer expectations test. That being so, the appellants were entitled to a separate breach of warranty charge.”).

In *Castro*,

the product was designed, marketed, and sold as a multiple-use product. The pan was originally manufactured and sold in France as an all-purpose cooking dish without handles. And at trial, the jury saw a videotape of a QVC representative demonstrating to the television audience that the pan, in addition to serving as a suitable roaster for a twenty-five pound turkey, could also be used to cook casseroles, cutlets, cookies, and other low-volume foods. The court charged the jury that “[a] product is defective if it is not reasonably safe[,] [t]hat is, if the product is so likely to be harmful to persons that a reasonable person who had actual knowledge of its potential for producing injury would conclude that it should not have been marketed in that condition.” And, so instructed, the jury presumably found that the pan, because it had many advantages in a variety of uses, did not fail the risk/utility test.

But it was also the case that the pan was advertised as suitable for a particular use—cooking a twenty-five pound turkey. Indeed, T-Fal added handles to the pan in order to fill QVC’s request for a roasting pan that it could

Sometimes courts adopt unfortunate or incomplete terms like “consumer expectations” or “assumption of risk” to justify a finding of defect *vel non*. But this occasional judicial sloppiness does not alter the fact that whether the plaintiff or defendant is better placed to decide between safety and harm remains a fundamental way (along with “product reasonableness”) in which these cases are decided.<sup>37</sup>

But whether one follows the *Restatement (Third)*'s or my more complex approach, the fact remains that civil recourse does not adequately deal with the core questions of products liability law. It does not consider the level of risk that defendant manufacturer and victim must bear.<sup>38</sup> And it does not explain, at either

use in its Thanksgiving promotion. The product was, therefore, sold as appropriately used for roasting a twenty-five pound turkey. And it was in that use that allegedly the product failed and injured the appellant.

*Id.* (alternations in original) (footnote omitted).

37. In the strict liability context, the term “defect” is “neither self-defining nor susceptible to a single definition applicable in all contexts.” *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 453 (Cal. 1978).

The varied purposes and the theoretical underpinnings of implied warranty and strict liability in tort have generated five main tests for product defectiveness: (1) the “deviation from the norm” test; (2) the “reasonable fitness for intended purpose” test; (3) the Restatement test; (4) the “risk/utility analysis” test; and (5) the recent test proposed by the California Supreme Court in *Barker v. Lull Engineering Co.* . . . .

*Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 880 (Alaska 1979) (footnotes omitted). The American Law Institute's section 402A of the *Restatement (Second) of Torts* adopted a “consumer-expectation” test in design cases:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if  
 (a) the seller is engaged in the business of selling such a product, and  
 (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. . . .

RESTATEMENT (SECOND) OF TORTS § 402A (1965). The *Restatement (Third) of Torts: Products Liability* has adopted a design-defect test which provides that a design defect occurs

when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1998); *see also id.* § 2 cmt. d (“Industry practice may also be relevant to whether the omission of an alternative design rendered the product not reasonably safe.”).

38.

Strict products liability evolved from two separate bases: implied warranty and strict liability in tort. . . . [S]everal policy considerations have been at work [in combining these concepts]. First, greater efficiency and justice [is] achieved by eliminating the necessity for plaintiffs to prove fault by manufacturers of defective products. Section [sic], frustration of consumer expectation [is] still . . . the underlying basis of recovery. Third, incidence of harm from unsafe products [is] reduced by imposing strict liability and thus providing an

the macro- or microlevel, how courts decide when it is the manufacturer or the victim who must bear the burden of a devastating products injury.<sup>39</sup> Civil recourse is limited by its focus on the relational interests between the manufacturer and victim, and hence does not consider tort law's heterogeneity and the complex set of reasons that leads to the placing of certain burdens, but only some such burdens, on manufacturers who put products on the market.<sup>40</sup>

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incentive to produce safer products. Fourth, risks [are] allocated and losses spread by requiring a manufacturing enterprise to accept responsibility in strict liability for harm attributable to a defect in its product. The concept of risk allocation [is] the primary policy rationale convincing courts to adopt strict products liability.

*Caterpillar*, 593 P.2d at 877 (footnotes omitted).

39. "The purpose of imposing such strict liability on the manufacturer and retailer is to insure [sic] that the cost of injuries resulting from *defective* products are borne by the manufacturers that put such products on the market rather than by the injured persons *who are powerless to protect themselves*." *Id.* at 878 (emphasis added) (quoting *Clary v. Fifth Ave. Chrysler Ctr., Inc.*, 454 P.2d 244, 248 (Alaska 1969)).

40. The New York Court of Appeals acknowledges that complex products liability cases often involve larger policy issues which go beyond the injured plaintiff and the manufacturer:

Today as never before the product in the hands of the consumer is often a most sophisticated and even mysterious article. . . . In today's world it is often only the manufacturer who can fairly be said to know and to understand when an article is suitably designed and safely made for its intended purpose. Once floated on the market, many articles in a very real practical sense defy detection of defect, except possibly in the hands of an expert after laborious and perhaps even destructive disassembly. . . .

Consideration of the economics of production and distribution point in the same direction. We take as a highly desirable objective the widest feasible availability of useful, nondefective products. We know that in many, if not most instances, today this calls for mass production, mass advertising, mass distribution. It is this mass system which makes possible the development and availability of the benefits which may flow from new inventions and new discoveries. Justice and equity would dictate the apportionment across the system of all related costs—of production, of distribution, of postdistribution liability. Obviously, if manufacturers are to be held for financial losses of nonusers, the economic burden will ultimately be passed on in part, if not in whole, to the purchasing users. But considerations of competitive disadvantage will delay or dilute automatic transferral of such added costs. Whatever the total cost it will then be borne by those in the system, the producer, the distributor and the consumer. Pressures will converge on the manufacturer, however, who alone has the practical opportunity, as well as a considerable incentive, to turn out useful, attractive, but safe products. To impose this economic burden on the manufacturer should encourage safety in design and production . . . .

*Codling v. Paglia*, 298 N.E.2d 622, 627–28 (N.Y. 1973). "The problem with strict liability of products has been one of limitation. No one wants absolute liability where all the article has to do is to cause injury. . . . Strict liability imposes what amounts to constructive knowledge of the condition of the product." *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033, 1036 (Or. 1974) (footnote omitted). Every products liability case requires the court to consider who had the better knowledge of a flaw and therefore was in the best position to avoid the

## III. TOWARD TORT LAW'S PLACE IN A LARGER LIABILITY SYSTEM

Well, what then is tort law? What leads courts in deciding individual tort cases to do some of those things that John and Ben talk about? First, I do not think that it is correct to think of tort law in contradistinction to contract and criminal law on the basis of civil recourse theory. To do so I think understates the significance of torts. That is, what distinguishes torts is that it is a subset of a broader area, the area of law governed by what I have called liability rules.<sup>41</sup> Contract law covers the area in which entitlements shift through negotiations between people. Criminal law and administrative law are areas where entitlements shift through the collective decision of the state. There is also, however, a different area where entitlements (what is mine and what is yours) shift by letting people pay (or take a chance of doing something that will cause them to pay) a collectively determined price. It is not contract because the "price" in this middle area is set by the state and not by the parties. It is not criminal law or administrative law for these areas of law determine collectively in what circumstances something is yours or something is mine. It occupies the vast middle ground between contract law and administrative and criminal law.

The more libertarian a society is, the more it uses contract law. The more collectivist a society is, the more it uses administrative and criminal law. A characteristic of our modern society that shows that it is ideologically socially democratic is that we use this middle ground where contract might work. And we use it when administrative and criminal law also might work. In other words, we choose the middle way when we could govern in other ways. We do it because we want to use the middle ground. Products liability is a good example of one area where both other approaches are available and feasible, but where we choose to use this middle ground.

Incidentally, the great Leon Lipson,<sup>42</sup> one of the most brilliant people I have known, said, when I described this middle ground to him: "If you look at who the great legal philosophers of the West were in the nineteenth century, they all came out of contracts. By contrast, if you look at who the great legal philosophers were in the so-called Socialist countries [whose law was his field], they all came out of criminal law. I wonder whether the next generation of philosophers in the West will

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product injury.

41. See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

42.

Professor Lipson specialized in the fields of space law and Soviet law. He coauthored for NASA the book-length Report on the Law of Outer Space, and also contributed an entry on the subject to the International Encyclopedia of Social Sciences. In later years he focused particularly on various aspects of Soviet law, especially the administration of justice, informal law and the rhetoric of Marxism-Leninism. Among his numerous publications were two coedited volumes: "Papers on Soviet Law" and "Law and the Social Sciences" with Yale Law School colleague Stanton Wheeler.

Obituary, *Leon Lipson*, YALE BULL. & CALENDAR (Sept. 30–Oct. 7, 1996), <http://www.yale.edu/opa/arc-ybc/ybc/v25.n6.obit.html>.

come out of torts and eminent domain, will come from these middle area subjects.<sup>43</sup>

I view torts in this way. I view it as an area whose principal characteristic is the use of collectively set prices. It is an area where, for some reason, we think it worthwhile to use a liability rule—but not through state payments, as is usually the case in eminent domain. We use it, rather, by giving individuals the right to receive that collectively set price from those who have taken their entitlements. That is, the liability rule is employed by giving individuals a right to civil recourse.

This means that for me the essence of torts would remain even if we got rid of torts as we know it and moved to a total New Zealand-style compensation system.<sup>44</sup> We then would not have the private, relational part of torts, but “torts” would still occupy the middle ground between contracts and criminal/administrative law as a way of dealing with the shifting of ownership and entitlements. As such, it would retain its key place within the whole structure of law. If you are interested in learning more about this, it is in a book that I never wrote. I wrote the little article, *One View of the Cathedral*,<sup>45</sup> that sets up the book; then I wrote my *Texas Law Review* article on *The Law of the Mixed Society*<sup>46</sup> in 1978, which took the next step in the project. I thought I was going to write a book about this but turned instead to another book, *Tragic Choices*.<sup>47</sup> As a result, the whole discussion of the place of torts in our legal system was never fully spelled out.

One point about this middle ground that torts occupies is especially worth making. It goes to the size of the collectively set price through which entitlements can be shifted. Scholars often assume that the liability-rule price—the collectively set price—should seek to mirror, to approximate, what the pure-market price would be. But this should only be so if the reason for using the middle ground is to try to come as close to a free-market result as is feasible in the circumstance. And that, as I just noted, may not be the object where the middle ground is used for social-democratic ideological reasons rather than for feasibility ones. Conversely, some think that the collectively set price must be such as to make the shift in entitlement as difficult as possible in order to deter undesirable conduct. In other words, these people seek to have the liability rule bring about a result that approaches the one that administrative and criminal law would seek to achieve. But this too is wrong. It only would be correct if the middle ground were being used because administrative

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43. Conversation with Leon Lipson, R. Luce Professor of Jurisprudence, Yale Law School, in New Haven, Ct.

44. See Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 555, 632 (1985) (“The New Zealand Royal Commission first proposed a broad-based financing mechanism. It envisioned a flat levy on all employers of one-percent of wages and salaries because ‘[a]ll industrial activity is interdependent and there should be a general pooling of all the risks of accidents to workers.’ As enacted, however, the legislation provided for both (1) ‘classifications and rates of levy’ that vary by occupation or industry, as well as (2) individual firm-level penalties and rebates. Both of these devices, at least in principle, could further Professor Calabresi’s cost internalization goals.” (footnotes omitted)).

45. Calabresi & Melamed, *supra* note 41.

46. Guido Calabresi, *Torts—The Law of the Mixed Society*, 56 TEX. L. REV. 519 (1978).

47. GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* (1978).

or criminal law was—for whatever reason—not feasible or too costly to employ in that area.

If instead the liability rule is being used because a middle ground is ideologically desired, if it is applied in order to further partially collective—social democratic—goals in the transfer of entitlements, then the collective price, the liability that must be borne, will be set at a level that furthers these goals. It may be that the society wishes entitlements to be transferred easily at below market prices, or it may be that the society wants them shifted only if the taker is willing to pay more than the market ordains. In fact, the liability rule, the collective price, can—and regularly does—reflect these collective values.<sup>48</sup> And the common existence of these nonmarket price-liability rules seems to me to underscore the importance of this middle area of the law. It signals, dramatically, torts's role in our legal system, totally apart from any possible civil recourse and corrective justice functions.

#### IV. THE ROLE OF CIVIL RECOURSE

What is there, then, to the civil recourse point of view? I think there is a fair amount. Once some people are given the right to recovery, for any number of reasons (like “this is a good way of reducing the sum of accident and safety costs,” “this is a good way of spreading accident costs,” or any of the things that the New York Court of Appeals talked about in *Lauer*<sup>49</sup> and in *Palka*<sup>50</sup>), then situations will have been created in which individuals in other cases are going to ask, “Why not me?” The economics may not be the same; the original reasons for plaintiff

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48. Obvious examples include areas of tort law in which less than full compensation is given for damage suffered (for instance, emotional damages) and areas of torts in which extra-compensatory damages are given, neither for multiplier nor for vengeance reasons. *See supra* note 6. But similar instances can be found in eminent domain. At one time in Italy, compensation for takings was set at “value in use” rather than at the usually much higher market value, thereby facilitating the shift of ownership away from traditional landowning classes. (I know this all too well as a descendant of “losers” in such transfers.)

Conversely, the fury that followed the use of eminent domain in *Kelo v. City of New London*, 545 U.S. 469 (2005) might have been avoided if the collective price set for the takings had been at two or three times the supposed market price.

49. *Lauer v. City of New York*, 733 N.E.2d 184 (N.Y. 2000).

50. *Palka v. Servicemaster Mgmt. Servs. Corp.*, 634 N.E.2d 189, 193 (N.Y. 1994) (“Courts traditionally and as part of the common-law process fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability.”); *see also* *Hamilton v. Beretta U.S.A. Corp.*, 222 F.3d 36, 42 (2d Cir. 2000) (“New York’s highest court expressly reserved a delicate balancing test for itself and for courts generally to apply, explaining that ‘[t]he common law of torts is, at its foundation, a means of apportioning risks and allocating the burden of loss,’ and that in addition to the moral and logical components of its analysis, a court must set the compass of a duty so that the social consequences of wrongs and exposure to liability are limited to a controllable degree.” (quoting *Waters v. New York City Hous. Auth.*, 505 N.E.2d 922, 923 (N.Y. 1987))).

recovery may not be there. But people will see the situations as similar and assert “in justice” a right to recover because of what the defendants did to them.

Recovery for negligent torts, even when they were indirect, was available in the common-law action on the case, because that was a good way of deterring accidents and promoting safety. A liability rule was used and operated through private recourse. Instead, in the action in trespass (which incidentally is the one that John and Ben rely on most for their theory), no recovery was given if the injury was indirect. Trespass gave recovery regardless of fault, so long as the injury was direct. It did so for corrective justice reasons, I guess, because “[i]f a man suffers damage [directly], it is right that he be recompensed.”<sup>51</sup> But the action in trespass was not interested in deterrence. Why not? If the defendant was faultless, why deter? And if the defendant had acted intentionally, tort deterrence was not needed. The defendant who had done something criminally wrong was hanged.

There was, therefore, no precedent giving recovery to plaintiffs who were injured intentionally and indirectly. But this seemed unjust to such victims. “If recovery is given to victims of indirect, negligent wrongs, it surely should be given to me, a victim of an indirect, intentional wrong,” the victim in such a case would say. “I have been wronged by you—even more than those injured by negligence. I must have a right to recover.”

It was this situation that gave rise to *Scott v. Shepherd*,<sup>52</sup> one of the classic cases in the law of torts. In *Scott v. Shepherd*, the lighted-squib case, someone seemingly did something that was an intentional tort that injured the plaintiff indirectly. Ripstein recounts the facts of *Scott v. Shepherd*: “Shepherd threw a burning squib into the market stall of Yates, from which Willis, to protect himself and Yates’s goods, threw it into the stall of Ryall, who immediately tossed it away from himself. The squib finally exploded in Scott’s stall, costing him his eye.”<sup>53</sup>

This situation, not surprisingly, led the court in *Scott v. Shepherd* to give recovery. Did it do so because the existence of recovery for indirect, negligent harms had changed what people believed corrective justice required? Did it do so because a civil recourse right to recover had come to be? Whatever. By then, the underlying reasons for the old rules mattered less than their seeming injustice—and the law changed accordingly.

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51. The Case of the Thorns, Y.B. 6 Edw. 4, fol. 7, Mich., pl. 18 (1466) (Eng.), reprinted in C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 195, 196 (1949).

52. *Scott v. Shepherd*, (1773) 96 Eng. Rep. 525 (K.B.) (comparing trespass and actions on the case). In their evolution, the action of *trespass* remained as the remedy for intentional wrongs, and *action on the case* was extended to include injuries which were not intended but were merely negligently inflicted. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 7 (4th ed. 1971); see also MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 89 (1977) (“Since the action for trespass was limited to direct injuries, so this argument goes, there could be no independent action for negligence until the strict liability—negligence distinction between trespass and case was obliterated.”).

53. ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW 114 (1999) (telling the tort story of *Scott v. Shepherd*). For my view of this case and its significance to the relationship between economic and philosophical theories of torts, see Guido Calabresi, *Toward a Unified Theory of Torts*, J. TORT L., Oct. 2007, at 1, 3–8.

The New York case that John cited in his presentation has a similar explanation.<sup>54</sup> If there is recovery in all sorts of other situations that *seem* similar, why not here? And by the way, that way of thinking affects judges in making the ordinary case-by-case decisions far more than broad economic theory. That is why, when I have a case like *Desiano*,<sup>55</sup> I am much more likely to talk about torts in a civil recourse way, or corrective justice way, than to talk about deeper underlying reasons for liability. I talk expectations rather than economics.

I should add that this notion of how individual expectations have been affected by legal rules—how values and tastes have been created, sometimes accidentally, as a result of some deeper, broader economic notions—was what was missing from my book, *The Costs of Accidents*,<sup>56</sup> and from many of my original articles. We did not talk about tastes and value creation then. But we do talk about them now. Even in my earlier writings, I did discuss “other justice concerns.” This was my way of saying there were things—like, it turns out, value shaping—that I had probably missed, that I had left out.<sup>57</sup>

The particular value that civil recourse theory focuses on is one of these values. It happens to be a value that is peculiarly American. Whether it is a good value or a bad value, I don't know. Ben speaks of this in his *Texas Law Review* article where he notes that he is not speaking of vengeance.<sup>58</sup> Perhaps; I have my doubts. Nevertheless, it is a peculiarly American value.

It has been said that, when the earliest colonists first landed in this country, they immediately began to sue each other. Barbara Aronstein Black, the great historian of the early colonies,<sup>59</sup> said as much to me. “Don't tread on me” and “Don't infringe on my rights” both reflect deeply held American values.<sup>60</sup>

54. *Lauer*, 733 N.E.2d at 186–89 (ruling that the medical examiner, who learned of exonerating evidence that would have cleared the father, owed no duty to a father charged with homicide in the death of his infant son).

55. *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85 (2d Cir. 2006).

56. *THE COSTS OF ACCIDENTS*, *supra* note 6.

57. *See id.* at 26 (“Apart from the requirements of justice, I take it as axiomatic that the principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents.”); *see also* ALISON CLARKE & PAUL KOHLER, *PROPERTY LAW: COMMENTARY AND MATERIALS* 226 (2005) (“Finally, by *other justice considerations*, Calabresi and Melamed are referring to criteria that have neither an economic or distributional rational but are based on notions of fairness and morality such as making those who cause the nuisance liable even where this achieves no distributional preference and is not economically efficient.”).

58. *See* Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 *TEX. L. REV.* 105, 107 (2005) (“[P]unitive damages law within state tort law today is not entirely about the plaintiff's right to be punitive; it is also about the need to punish a defendant whose conduct requires deterrence and retribution, according to the state.”); *see also* Benjamin C. Zipursky, *Substantive Standing, Civil Recourse, and Corrective Justice*, 39 *FLA. ST. U. L. REV.* 299, 300–01 (2011) (“[C]ivil recourse theory is fundamentally distinct both from corrective justice theories and from vengeance-based theories.”).

59. *See, e.g.*, Barbara A. Black, *The Constitution of Empire: The Case for the Colonists*, 124 *U. PA. L. REV.* 1157 (1976); Barbara Aronstein Black, *Massachusetts and the Judges: Judicial Independence in Perspective*, 3 *LAW & HIST. REV.* 101 (1985).

60. “Even before the Declaration of Independence . . . [,] Virginia's Culpeper Minute

From this attitude two strands derive. One is America's great concern with individual constitutional rights and liberties. The other sounds like a right to redress or even vengeance. I believe the latter helps explain why the United States is one of the few developed countries left that still has the death penalty.<sup>61</sup> I think we have capital punishment not for deterrence or for justice reasons but for the families of the person who has been killed who all too often say, "It is my right to get closure, to have the person who injured my family pay." Both strands are part of a very American attitude.

It is not surprising that when the Supreme Court looks at punitive damages, as my former law clerk, Tom Colby, pointed out, the Court looks at this tort remedy entirely from the vengeance point of view.<sup>62</sup> The Court has seemingly said that vengeance is the purpose of punitive damages, and hence that such damages must be limited by due-process constraints.<sup>63</sup> In fact, the Court's single-minded way of looking at punitive damages causes it to miss many other important and economics-based functions that extracompensatory damages perform in our legal system.<sup>64</sup> The great Judge Posner laid out some such economic reasons for punitive damages in an opinion for the court.<sup>65</sup> And, in *Ciraolo*, the great Judge Calabresi stated more modestly in a concurring opinion (concurring in his own opinion because he did not want to make it a holding) that punitive damages play multiple functions and should not be reduced to just one role.<sup>66</sup>

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Men (1775) had flags displaying such slogans as 'Liberty or Death' and 'Don't Tread on Me.'" HENRY CONSERVA, NATIONAL SLOGANS FROM AROUND THE WORLD 51 (2006) (emphasis in original).

61. See generally Robert Badinter, *Preface—Moving Towards Universal Abolition of the Death Penalty*, in THE DEATH PENALTY: BEYOND ABOLITION 7, 7–11 (2004) (describing the use of the death penalty in America despite strong abolition efforts worldwide).

62. See Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 637–38 (2003); cf. Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1198 (1931) (describing punitive damages as the functional equivalent of an "orderly, legal retaliation . . . to be preferred to a private vengeance which will disturb the peace of the community").

63. See, e.g., *Philip Morris USA v. Williams*, 549 U.S. 346, 352–55 (2007) (explaining retribution rationale for punitive damages in reversing punitive damages based in part on harming nonparties); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416–18 (2003) (reversing \$145 million in punitive damages where compensatory damages comprised only \$1 million).

64. See generally *The Complexity of Torts*, *supra* note 6 (criticizing the U.S. Supreme Court's reductionism in reducing punitive damages' multiple functions to one thing: retributory punishment).

65. See *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003) (upholding a \$186,000 punitive damages award where there were only \$5,000 in compensatory damages based upon economic considerations such as the net worth of the defendant and defendant's ability to pay).

66. See *Ciraolo v. City of New York*, 216 F.3d 236, 244–45 (2d Cir. 2000) (Calabresi, J., concurring) ("Many years ago, in an influential article that was in part responsible for his receipt of the Nobel Memorial Prize in economics, Professor Becker pointed out that charging a thief the cost of what he had stolen would not adequately deter theft unless the thief was caught every time. Since thieves will not always be caught, they must be penalized by more than the cost of the items stolen on the occasions on which they *are* caught. This

## CONCLUSION

I conclude that there must be something important to Americans in the notion of giving individual redress to those who feel wronged. Does this value, however, have to be recognized primarily in torts? And is it enough to justify the whole structure of torts?

What would we do if we decided that it was better to handle the other things torts does by moving to a New Zealand-style system of compensation?<sup>67</sup> Would we lose something fundamental by eliminating the direct victim/injurer relationship? How important is this relationship, given the almost universal existence of insurance? I have my doubts.

But if it is fundamental, there are, in fact, other torts-related ways of giving people the feeling of individual redress, such as noninsurable tort fines based upon the injurer's wealth. Scandinavian countries have already experimented with these.<sup>68</sup> And the right to individual redress might also be vindicated in areas of the law other than the one we currently call torts. It can be recognized in contracts and in criminal law as well. (In the latter, for example, this can be done by letting victims participate in the criminal adjudication and sentencing process.) To the extent that this is a separate value that we wish to preserve, there may be other ways of handling it other than through tort law. As a result, should we find our existing law of torts too cumbersome or inefficient and move to a system like New Zealand's, I expect we would explore and develop these alternatives.

On the other hand, the beauty of the common law, which the Supreme Court completely misunderstands when it reduces punitive damages to one function, is that the common law seeks to achieve any number of very different goals at the same time. The common law of torts, occasionally at the microlevel, does what John and Ben say it is *there to do*. Torts also does what Coleman says it does—

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'multiplier' is essential to render theft unprofitable and properly to deter it. . . . More recently, scholars have recognized that punitive damages can serve the same function in tort law. . . . Although widely accepted by economists and acknowledged by some courts, the multiplier function of punitive damages has nonetheless been applied haphazardly at best. One reason this is so is that the twin goals of deterrence and retribution are often conflated, rather than recognized as analytically distinct objectives. The term 'punitive damages' itself contributes greatly to the confusion. For *punitive* damages, the term traditionally used for damages beyond what is needed to compensate the individual plaintiff, improperly emphasizes the retributive function of such extracompensatory damages at the expense of their multiplier-deterrent function. It also fails totally to explain the not unusual use of such damages in situations in which the injurer, though liable, was not intentionally or wantonly wrongful. A more appropriate name for extracompensatory damages assessed in order to avoid underdeterrence might be 'socially compensatory damages.' For, while traditional compensatory damages are assessed to make the individual victim whole, socially compensatory damages are, in a sense, designed to make society whole by seeking to ensure that all of the costs of harmful acts are placed on the liable actor." (emphasis in original) (footnote omitted) (citations omitted)).

67. See *supra* note 44.

68. "In Finland, for example, as in other Scandinavian countries, the fines for speeding are imposed based on a person's earnings and net wealth . . ." KATHERINE VAN WORMER & FRED H. BESTHORN, HUMAN BEHAVIOR AND THE SOCIAL ENVIRONMENT, MACRO LEVEL: GROUPS, COMMUNITIES, AND ORGANIZATIONS 178 (2d ed. 2011).

again, at the microlevel, and on occasion. Torts, however, can also be explained in terms of values that are readily recognized as economic-efficiency values but with definitions of costs that are anything but simple, Posnerian ones.

As a result, to look at torts only as John and Ben do is reductionist. Their approach doesn't explain changes in rights that sometimes give rise to civil recourse and deny it in other situations. To look at torts solely from Coleman's perspective of corrective justice is reductionist and does not explain changes in what is compensatory justice, in what are justified expectations, and in how they come about. To look at torts only as the minimizing of the sum of safety costs and injury costs is reductionist because it does not explain what, at any given moment, we believe to be costs and the relational ways in which we may define costs. It does not explain why individuals may demand recourse today in particular situations when nonrecourse would be cheaper. It does not explain these things, despite what the New York Court of Appeals says is its job—the job of determining duty primarily in economic terms.

Torts is lovely because it includes all of these, but—as I've suggested—so do contracts and criminal law. What makes torts different is that it does all this by letting the *collectivity* set the price: set what the appropriate (civil) recourse is, set what must be paid to allow entitlements to shift. It is that, more than anything else, that makes torts different from contracts or criminal law!