

# TORT THEORY AND THE RESTATEMENT, IN RETROSPECT

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## ABSTRACT

This is my third paper on the *Restatement (Third) of Torts*. In my first paper, *The Theory of Tort Doctrine and the Restatement (Third) of Torts*, I offered a positive economic theory of the tort doctrine that had been presented in the *Restatement (Third) of Torts: General Principles*, and also an optimistic vision of how positive theoretical analysis could be integrated with the Restatement project. In my second paper, *The Economics of the Restatement and of the Common Law*, I set out the utilitarian-economic theory of how the common law litigation process could generate optimal (efficient, wealth-maximizing) rules and compared that process to the process by which the Restatement identifies and articulates rules. In this paper, I am looking back and assessing the connection between positive tort theory and the Restatement. My general argument is that positive tort theory has been successful in explaining the grounds for the common law of torts, and at the same time it remains an underutilized and underexploited resource for the Restatement project.

KEYWORDS: Common law, Restatement, negligence, positive tort theory, economics of torts

JOURNAL OF ECONOMIC LITERATURE (JEL) CLASSIFICATIONS: K00, K13, K15

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## I. INTRODUCTION

This is my third paper on the *Restatement (Third) of Torts*. In my first paper, *The Theory of Tort Doctrine and the Restatement (Third) of Torts*,<sup>1</sup> I offered a positive economic theory of the tort doctrine that had been presented in the *Restatement (Third) of Torts: General Principles*, and also an optimistic vision of how positive theoretical analysis could be integrated with the Restatement project. My second paper, *The Economics of the Restatement and of the Common Law*,<sup>2</sup> had a darker tone. I set out the utilitarian-economic theory of how the common law litigation process could generate optimal (efficient, wealth-maximizing) rules, and compared that process to the process by which the Restatement identifies and articulates rules.<sup>3</sup> The question I considered is the following: if Holmesian bad men,<sup>4</sup> self-interested and calculating, were working within the common law system as judges and lawyers, under what conditions would the common law manage to develop wealth-maximizing rules, and could those same conditions be observed or replicated in the Restatement process? I concluded that the Restatement process did not have the protective features—the checks and balances—of the common law process, and that therefore the presence of self-interested actors – appearing, for example, in the form of Reporters who gave preference to their own visions of what the law should say over what the law actually says—could have a greater distortive impact than is possible in the common law process. I felt unhappy to deliver such a gloomy message to a conference that included Restatement Reporters, but I still stand behind the message. In this paper I am looking back and assessing the connection between positive tort theory and the Restatement. My general argument is that positive tort theory has been successful in explaining the grounds for the common law of torts, and at the same time it remains an underutilized and underexploited resource for the Restatement project.

My argument develops in three parts. In Part II, I provide an overview of positive tort theory, from its beginning with Oliver Holmes's discussion

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1. See generally Keith N. Hylton, *The Theory of Tort Doctrine and the Restatement of Torts*, 54 VAND. L. REV. 1413 (2001).

2. See generally Keith N. Hylton, *The Economics of the Restatement and of the Common Law*, 79 BROOK. L. REV. 595 (2014).

3. *Id.* at 597–98, 602–03.

4. As Oliver Holmes stated in *The Path of the Law*:

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience

Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897)

of torts in *The Common Law* to the present day.<sup>5</sup> Positive tort theory is utilitarian, as is tort law itself, and is expressed in the modern literature mostly in the form of economics. The directly applicable work to a project such as the Restatement is the portion of positive tort theory that is heavily doctrinal, though still drawing on economic arguments. Behind this layer of doctrinal positive theory scholarship there is a more technical body of literature consisting of mathematical models of the incentive effects of tort law. There is also a body of empirical scholarship related to the economic analysis literature. I also contrast positive tort theory and deontological tort theory. With its rich body of theoretical, doctrinal, mathematical, and statistical research, modern positive tort theory has reached the stage where it can be called a scientific literature. A project such as the Restatement would appear to be an ideal forum in which to present the implications of some of this literature, contributed to by judges such as Richard A. Posner and Guido Calabresi, to the greater legal audience. Of course, this would be an enormous task, and perhaps it would be too much to ask of the Restatement process. But the reluctance to date of the Restatement of Torts to incorporate this literature leads to a product that is in some respects stunted in its reach—almost as if a team of physics professors had written a textbook stating nearly all of the propositions of the science, a great achievement in itself, while leaving out, in the commentary, any references to the theoretical and experimental literature beyond the speculative arguments of Aristotle.<sup>6</sup>

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5. *See generally* OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (Dover Publ'ns 1991) (1881).

6. The analogy is not perfect one might argue, and I have conceded that point to some degree by using the qualifier “almost.” One might say that in the case of the hypothesized “Physics Restatement,” it is the work of earlier physicists that would be reported, so it would be strange not to discuss the research of those physicists, while in the case of the Torts Restatement, it is the work of judges that it is being reported, not the work of earlier torts theorists. There are two responses to this argument. First, tort law has at times incorporated the work of earlier torts theorists, as observed, for example, in the case of the Hand Formula articulated by Judge Learned Hand in *United States v. Carroll Towing*, 159 F.2d 169, 173 (2d Cir. 1947). Second, suppose tort law had never incorporated the work of torts theorists—that is, that the judges had been perfectly denied access to the academic literature on torts. Even in this case, the analogy has some force. In the case of the physics hypothetical, the earlier physicists have discovered physical laws operating in the background and those laws could certainly be reported as positive science without mentioning the discoverers. More importantly, the laws of physics are often resolutions of natural puzzles, of strange observations that set physicists on the task of making sense of them. General relativity resulted from Einstein’s curiosity about the strangeness of the orbit of Mercury. In the same sense, the common law consists of resolutions of conflicting principles. The soundness of these resolutions is not always obvious; many of the resolutions are themselves puzzles. Tort theorists must work to discover the underlying bases for those resolutions to understand the soundness or lack of soundness of those resolutions.

Part III of my argument applies modern positive tort theory to the law. I take a broad-brushed approach, looking at tort doctrine from a bird's eye viewpoint. The major components of tort law can be broken down into four categories: (1) trespass-based torts, (2) negligence, (3) *Rylands* strict liability and nuisance, and (4) specific intent torts such as assault and intentional infliction of emotional distress.<sup>7</sup> I explain, using positive tort theory, why this four-part categorization exists, and how it relates to fundamental utilitarian concerns, such as the burden of gaining consent and the nature of externalities associated with activities. I also examine different versions of positive tort theory, and some specific applications. The general point is to show that modern positive tort theory explains the broad contours of tort doctrine as well as specific doctrinal rules.

Part IV addresses the normative question whether positive tort theory should be incorporated into the Restatement project and the positive question whether positive tort theory has actually influenced the Restatement. The normative question has a rather simple answer: that it is desirable to know and to disseminate the utilitarian grounds that account for and explain tort doctrine. Given this rather straightforward proposition, it seems to follow that the Restatement is rather well placed to carry out this task of discovery and dissemination. Another normative argument in favor of positive tort theory's greater incorporation in the Restatement process is that it will help avoid instances where a Reporter who fails to understand, or chooses to ignore, the utilitarian basis for a specific existing rule, substitutes a new rule that is different from the common law rule. Although this may seem to be a distant concern at first glance, given that the purpose of the Restatement is to set forth the rules that exist in the common law, it is not a remote contingency. I briefly discuss the example of Francis Bohlen and the First Restatement, in which he invented a new rule on liability for mutual combat that differs from both the majority and minority rules then existing in the common law.<sup>8</sup> The utilitarian case for Bohlen's rule is doubtful; it is more likely that the common law judges had reached sounder conclusions.<sup>9</sup> However, the example sits as an enduring illustration of the danger that arises when a Reporter does not attempt thoroughly to understand the utilitarian basis for common law rules before embarking on an effort to improve upon them.

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7. See generally Keith N. Hylton, *A Missing Markets Theory of Tort Law*, 90 NW. U. L. REV. 977 (1996) (providing a framework for reconciling the tension between tort doctrine and economic theory).

8. See Hylton, *supra* note 2, at 605-12.

9. See *id.*

The related positive question is whether positive tort theory has actually influenced the Restatement. It seems at first obvious that the answer should be no. Restatement Reporters are tasked with discovering and articulating the common law rules of torts, not with exploring the academic theoretical literature. It probably would seem to be a dereliction of duty to most Reporters to spend significant time discussing the theoretical literature. Of course, this is unfortunate because there is always room to discuss the literature in the commentary. But the answer to the positive question is a bit more complicated than what appears at first glance. First, there are judges, such as Posner and Calabresi, who have been influenced by – and indeed contributed to – positive tort theory. Their opinions are likely to incorporate this theory. Second, some previous Restatement Reporters have either been influenced by positive tort theory or have been utilitarian thinkers on their own accord. Their work must necessarily influence that of later Restatement Reporters. Third, the common law of torts is itself utilitarian. It is built up through utilitarian tradeoffs on specific questions of liability.<sup>10</sup>

## II. OVERVIEW OF TORT THEORY

The philosopher Alfred North Whitehead said that “[t]he safest general characterization of the European philosophical tradition is that it consists of a series of footnotes to Plato.”<sup>11</sup> Similarly, it would not be unsafe to characterize tort theory since 1881 as a series of footnotes to Holmes. Most of the footnotes, or the most prominent ones, extend the framework that Holmes set out, and some of the footnotes take issue with Holmes.<sup>12</sup> However, just about everything worth reading in tort theory builds on or is a reaction to Holmes’s chapters on tort law in his book, *The Common Law*, published in 1881.<sup>13</sup>

The framework Holmes set out is utilitarian and positivist.<sup>14</sup> Holmes reminds us at many points that the law conforms to what is expedient or convenient. He engages in utilitarian balancing, as reflected in the following passage:

A man need not, it is true, do this or that act,—the term *act* implies a choice,—but he must act somehow. Furthermore, the public generally

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10. See, e.g., WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 15 (4th ed. 1971).

11. ALFRED NORTH WHITEHEAD, *PROCESS AND REALITY* 39 (David Ray Griffin & Donald W. Sherburne eds., corrected ed. 1979).

12. See, e.g., Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 31 (1972).

13. See HOLMES, *supra* note 5, at 77–163.

14. For an insightful discussion, see generally Patrick J. Kelley, *A Critical Analysis of Holmes’s Theory of Torts*, 61 WASH. U.L.Q. 681 (1983).

profits by individual activity. As action cannot be avoided, and tends to the public good, there is obviously no policy in throwing the hazard of what is at once desirable and inevitable upon the actor. The state might conceivably make itself a mutual insurance company against accidents, and distribute the burden of its citizens' mishaps among all its members. There might be a pension for paralytics, and state aid for those who suffered in person or estate from tempest or wild beasts. As between individuals it might adopt the mutual insurance principle *pro tanto*, and divide damages when both were in fault, as in the *rusticum judicium* of the admiralty, or it might throw all loss upon the actor irrespective of fault. The state does none of these things, however, and the prevailing view is that its cumbrous and expensive machinery ought not to be set in motion unless some clear benefit is to be derived from disturbing the *status quo*.<sup>15</sup>

Holmes's application of utilitarianism, I will concede, is not open and obvious in his chapters on tort law. It is, however, open and obvious in his discussion of criminal law, which precedes his chapters on tort law. The conclusion that Holmes was utilitarian in his analysis of tort law follows from the character of his treatment of tort law, which should be read in light of his very obvious application of utilitarian theory in his preceding discussion of criminal law.

I should take this opportunity to apologize to Posner, whom I dismissed too hastily in my review of his interpretation of Holmes in my *Theory of Tort Doctrine* article. I quoted Posner's statement that "Holmes left unclear what he conceived the dominant purpose of the fault system to be, if it was not to compensate."<sup>16</sup> I referred to Posner's statement as "nonsense,"<sup>17</sup> because I thought it was all too obvious that Holmes's utilitarianism, and his references to expediency and convenience, implied that he thought that the fault system minimized the costs of accidents, or more precisely the sum of the costs of accidents and accident avoidance.<sup>18</sup> Obviously, Holmes never used this specific cost minimization formulation. However, I thought it was implied, and still think it is implied, by his framework. I was surprised to see Posner professing not to know what Holmes thought the dominant purpose of tort law to be. I even wondered if Posner, in a self-interested manner, had sought to minimize the reach of

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15. HOLMES, *supra* note 5, at 95–96.

16. Posner, *supra* note 12, at 31.

17. See Hylton, *supra* note 1, at 1415.

18. See generally JOHN STUART MILL, UTILITARIANISM (George Sher ed., Hackett Publ'g Co. 2001) (1863) (using the word "expediency" often to mean the same thing as utility maximization). Utility maximization in the torts context is equivalent to minimizing the sum of accident and accident avoidance costs. Holmes was certainly familiar with the utilitarian literature.

Holmes's work to claim a greater prominence to the novelty of his own thesis on tort law.

I now think I was not entirely fair to Posner—though I was not unfair, too. Posner, in retrospect, could fairly say that Holmes did not state clearly what objective he thought tort law was accomplishing. I think cost minimization is a fair inference from Holmes, based on modern thinking armed by economic analysis. But to be fair to Posner, Holmes does not explicitly say that the goal of tort law is to minimize the sum of accident and accident-avoidance costs. The underlying issue, of course, is how much credit to give to an original thinker when the intellectual capital used to address a certain topic develops substantially over a long period of years. Should one read between the lines and assume that the original thinker's arguments should be understood more broadly to have encapsulated the modern or updated versions of his arguments? This is not a problem in the sciences, where the questions tend to be narrower and framed so that they can be tested against the evidence. But it is a problem in law and philosophy, or political philosophy generally, where the most remembered authors have tended to test the reader and push him to think more deeply about a problem. Rare among works written for a law audience, Holmes's book has this quality.<sup>19</sup> I lean in favor of giving the original thinker a broad reading.

To return to my overview of tort theory, it is clear that Holmes had an immediate impact on scholars who thought deeply about tort law. One scholar immediately impacted was Frederick Pollock. Pollock's *The Law of Torts*, 4th edition,<sup>20</sup> begins with a long letter to Holmes. The analysis throughout the book reflects the foresight-based analysis of Holmes's treatment of negligence and extends it by applying it directly to several cases where he examines the predicted probability of an accident as a positive theoretical account of foreseeability doctrine.

After Pollock, Henry Terry, in 1915,<sup>21</sup> extended Holmes's treatment of tort law by expanding from a foresight-based analysis to a more general reasonableness framework that incorporated consideration of the utility of the conduct causing harm – which implies consideration of the cost of forbearance from the conduct. Terry's formulation was adopted in the First

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19. The question of how broadly to read Holmes is a simplified version of the larger Straussian reading controversy. See, e.g., George Klosko, *The "Straussian" Interpretation of Plato's Republic*, 7 HIST. POL. THOUGHT 275, 275–93 (1986).

20. See generally SIR FREDERICK POLLOCK, *THE LAW OF TORTS* (London, Stevens & Sons, Ltd. 4th ed. 1895).

21. See generally Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40, 42–43 (1915).

Restatement.<sup>22</sup> Since the First Restatement Reporter was Francis Bohlen, it follows that Holmes had some influence, though indirectly, on Bohlen as well.<sup>23</sup>

It is fair to say that it would not be until Calabresi's *The Costs of Accidents* (1970) that a comprehensive utilitarian theory of tort law would be presented again.<sup>24</sup> In the period after Holmes and before Calabresi, torts theorists attempted, here and there, to apply and marginally extend the theory initially set out by Holmes. Calabresi, by contrast, took what might be called a "systems approach" to tort law.<sup>25</sup> He did not start with the concept of foreseeability and reasonableness. He looked at the entire tort system and asked whether fault liability, or some version of no-fault liability, or strict liability should be the norm instead. Calabresi posited that the objective of tort liability is to minimize the sum of accidents costs, accident-avoidance costs, and administrative costs. As I have noted elsewhere, Calabresi adopted the *operational efficiency* norm as his standard for assessing tort law.<sup>26</sup> In broad terms, he concluded against both no-fault and the fault system as default regimes. His analysis favored strict liability based on what would come to be known as the "cheapest cost avoider" principle.<sup>27</sup> Calabresi's approach would have required a radical restructuring of tort law, so naturally it was not taken up as a practical system by torts scholars, who are mostly interested in narrow practical questions about tort doctrine.

Very soon after Calabresi, Posner introduced, in 1973, the next theoretical upheaval in tort theory,<sup>28</sup> though he was clearly influenced by Calabresi.<sup>29</sup> Posner returned to Holmes's focus on the reasonableness

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22. See Kelley, *supra* note 14, at 736.

23. Though the influence was quite indirect. See Patrick J. Kelley, *The First Restatement of Torts: Reform by Descriptive Theory*, 32 S. ILL. U. L.J. 93, 108–12 (2007).

24. Nine years before the publication of Calabresi's *Costs of Accidents*, see generally GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970) [hereinafter CALABRESI, *THE COST OF ACCIDENTS*], he published an article on tort law that presented many of his economic arguments favoring strict liability, see generally Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961) [hereinafter Calabresi, *Law of Torts*] (showing a level of sophistication in economics that had not been seen before in the torts literature).

25. Calabresi, *The Cost of Accidents*, *supra* note 24, at 16.

26. Keith N. Hylton, *Information Costs and the Civil Justice System*, 24 AM. L. & ECON. REV. 407, 408 (2023).

27. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1112 n.43 (1972).

28. Posner, *supra* note 12.

29. For a thoughtful review of Judge Posner's torts scholarship, see generally Saul Levmore, *Richard Posner, the Decline of the Common Law, and the Negligence Principle*, 86 U. CHI. L.

standard and presented an explicitly economic understanding of the function of tort doctrine.<sup>30</sup> According to Posner, the objective of tort doctrine is to minimize the sum of accidents and accident avoidance costs—a standard I have referred to as *doctrinal efficiency*.<sup>31</sup> Using this principle, Posner examined virtually all of the important doctrines in the law of torts and found them consistent with this objective. His analysis was scientific in nature from the start because it proposed a falsifiable theory and tested it against the outcomes of cases. However, Posner took the scientization goal further by teaming up with William Landes to write several articles presenting a mathematically sophisticated treatment of the incentive effects of tort doctrine.<sup>32</sup>

Steven Shavell has been instrumental in the scientization of tort theory.<sup>33</sup> Here I must offer my second apology. In my *Theory of Tort Doctrine* article, I said the following:

The tools provided by legal doctrine are blunt. We should not expect them to bring about a “first-best” outcome in which every actor has hit the optimal investment level on every margin. For this reason the mathematical models currently employed in much of the law and economics literature are often of only marginal relevance to tort doctrine, at least once we hit a sufficient level of detail. The question of relevance is whether the rule components (strict liability, negligence, intent, and so on) provided in the doctrine have been put together in a way that minimizes the sum of accident and accident-avoidance costs relative to some alternative configuration of the rule components. In general (and as I will argue below), this appears to be true. And as a general rule, mathematical models may be helpful but are by no means necessary in evaluating this question.<sup>34</sup>

For this reason, I did not discuss the work of Shavell. My second apology therefore goes to Shavell. The mathematical modeling in economic analysis of tort law provides a crucial formalization and verification of many of the arguments and lays the groundwork for empirical investigations. I have contributed to this portion of the literature myself—indeed, my first contributions to the tort literature came in the

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REV. 1137 (2019). For a thoughtful but quite negative review, see generally Richard W. Wright, *Hand, Posner, and the Myth of the ‘Hand Formula,’* 4 THEORETICAL INQUIRIES L. 145 (2003).

30. Posner, *supra* note 12, at 30–33.

31. See Hylton, *supra* note 1, at 1415.

32. See generally WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987); William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851 (1980).

33. See generally STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW (1987) (outlining the law governing liability for accidents).

34. Hylton, *supra* note 1, at 1419–20.

form of mathematical models.<sup>35</sup> Mathematical modeling provides the most rigorous form of argumentation available for a theory. The mathematical models ensure, greater than in any other way possible, a defensible connection between premises and conclusions. Models constrain the analyst from leaping to unsupportable conclusions and reveal considerations and counter-considerations that the analyst would have been unlikely to see without their aid. They dress counterarguments in the same garb as arguments, so the analyst is prevented from dismissing counterarguments based on his own inherent tendency to present the counterarguments to his thesis in a weak form – in shabby dress, as it were—the better to dismiss them. Although often seductive to law students, the entirely verbal arguments that are provided in other lines of tort speculation, such as the variants of corrective justice theory, do not subject themselves to the same intellectual constraints, and, for this reason, sometimes present counterarguments as strawmen, and mask or obscure loose and spurious connections between their assumptions and their conclusions.

The modeling of ideas points to one important feature of the utilitarian-economic framework: the framework can exist independently of its original creators. It becomes a set of tools that have their own utility, and the user need not go back and consult the originators to apply the tools. In economics, for example, the contributions of Paul Samuelson exist in usable models and conceptual tools, and there is no need for the modern economists to go back and read the original Samuelson to use the conceptual tools. That is, I believe, the nature of scientific progress. Engineers, for example, do not feel the need to go back to Isaac Newton's *Principia*<sup>36</sup> to figure out how to use the tools of Newtonian mechanics. It is a paradox that the most productive conceptual frameworks exist in a usable fashion, and are built upon, to the point that users tend to forget about the originators. However, the less productive frameworks are ever in thrall to their originators. Marxists, for example, are forced to go back to the original Marx.

Utilitarian analysis, and its modern form as economic analysis of law, exists as a diverse set of methods, quite independently of the original

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35. See, e.g., Keith N. Hylton, *The Influence of Litigation Costs on Deterrence Under Strict Liability and Under Negligence*, 10 INT'L REV. L. & ECON. 161 (1990) (examining the influence of litigation costs on deterrence under strict liability and under negligence).

36. See generally ISAAC NEWTON, *NEWTON'S PRINCIPIA: THE MATHEMATICAL PRINCIPLES OF NATURAL PHILOSOPHY* (Andrew Motte trans., 1848) (laying out the foundation for the laws of planetary motion).

creators.<sup>37</sup> Calabresi set out a technical, normative framework for analyzing tort law. Although Calabresi did not use mathematics in the *Costs of Accidents*, one could easily see how many of his arguments could be reduced to models.<sup>38</sup> Before teaming up with Landes, Posner set out a less-technical framework that was positive in nature. Posner's framework took the law as it is and attempted to use economic analysis to explain and make sense of it. These basic frameworks have been developed much further, and of course there is no need now for the modern analyst to even refer to Calabresi or to Posner. Indeed, it is a sign of how little someone knows of modern economic analysis of law when they refer to it as a Calabresian or Posnerian analysis. It would be nearly as strange as seeing a modern economist refer to an analysis of consumer welfare, outside of the historical context, as a Samuelsonian analysis.<sup>39</sup>

Among modern utilitarian methodologists in tort law, Mark Grady has made important contributions in the area of positive economic analysis of law, especially on the question of causation in tort law.<sup>40</sup> I have worked on several problems in tort law, one of which is the development of an economic framework that explains areas of strict liability, such as nuisance law and the law of ultrahazardous activities.<sup>41</sup> In 2016, I published a textbook, *Tort Law: A Modern Perspective*,<sup>42</sup> that applies economic reasoning to pretty much all of the important doctrines in tort law. I view my book as providing the most comprehensive functional account of tort law to date.

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37. For a sampling of the work of tort theorists who apply economic analysis, see generally Mark A. Geistfeld, *Fault Lines in the Positive Economic Analysis of Tort Law*, in RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS 149 (Jennifer Arlen ed., Edward Elgar Publ'g 2013); Murat C. Mungan & Yonathan A. Arbel, *Regulating Information with Bayesian Audiences*, U. ALA. J. LEGAL STUD. RSCH. PAPER NO. 3452662 (Sept. 12, 2019) (forthcoming) (manuscript).

38. See generally CALABRESI, *THE COST OF ACCIDENTS*, *supra* note 24. However, at least one prominent economist took up the challenge. See generally Peter Diamond, *Single Activity Accidents*, 3 J. LEGAL STUD. 107 (1974).

39. For an example of the Samuelsonian analysis, see generally Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387 (1954).

40. See generally Mark F. Grady, *A New Positive. Economic Theory of Negligence*, 92 YALE L.J. 799 (1983) [hereinafter Grady, *A New Positive*]; Mark F. Grady, *Proximate Cause and the Law of Negligence*, 69 IOWA L. REV. 363 (1984) [hereinafter Grady, *Proximate Cause*]. For a mathematical formalization of part of Grady's causation theory, see generally Marcel Kahan, *Causation and Incentives to Take Care Under the Negligence Rule*, 18 J. LEGAL STUD. 427 (1989).

41. See Hylton, *supra* note 7, at 977–79.

42. See generally KEITH N. HYLTON, *TORT LAW: A MODERN PERSPECTIVE* (2016) (explaining the cases and legal doctrines commonly found in casebooks using modern ideas about public policy, economics, and philosophy).

Returning to Calabresi and Posner, their contributions did much to breathe life into tort theory. There was not much in the form of serious conceptual analysis of tort law between the publication of Holmes's book and Calabresi's book—except for the formulations of negligence offered by Terry in his article,<sup>43</sup> and then by Judge Learned Hand in *Carroll Towing*.<sup>44</sup> Calabresi and Posner touched off a revolution in theoretical analyses of tort law – and more generally a golden age of legal scholarship. Not everyone in the legal academy is either trained in economics or interested in doing economic analysis (or even writing in utilitarian terms), so it is natural to expect that some scholars would feel a need to attempt to offer competing conceptual frameworks. Probably the first legal academic to take up the challenge of offering a non-consequentialist theoretical approach to tort law was Richard Epstein in his paper *A Theory of Strict Liability* (1973).<sup>45</sup> Epstein relied largely on Kantian arguments to suggest that the foundation of tort liability is strict,<sup>46</sup> because the law protects personal autonomy above all. Later, Charles Fried entered the competition with his books *An Anatomy of Values* (1970) and *Right and Wrong* (1978).<sup>47</sup> Fried drew on Kant and Rawls to offer a hybrid framework of categorical rules and utilitarian arguments,<sup>48</sup> suggesting that negligence is the foundation of tort

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43. See Terry, *supra* note 21.

44. See *United States v. Carroll Towing*, 159 F.2d 169, 173 (2d Cir. 1947).

45. See generally Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973). At roughly the same time, George Fletcher published his moralistic argument favoring the reciprocity norm. See generally George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972) (setting up a contrast between the norm of reasonableness and the norm of reciprocity, the former being utilitarian and the latter deontological). However, the deontological basis for Fletcher's norm of reciprocity is never made clear. For a detailed and wounding critique of Fletcher, see Richard A. Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205, 215–17 (1973).

46. Epstein does not explicitly rely on Immanuel Kant, but his focus on autonomy as the basis for tort law finds its closest foundation in the work of Kant. See generally Epstein, *supra* note 45. On Kant and autonomy, see generally MARK D. WHITE, *KANTIAN ETHICS AND ECONOMICS: AUTONOMY, DIGNITY, AND CHARACTER* (2011).

47. See generally CHARLES FRIED, *AN ANATOMY OF VALUES: PROBLEMS OF PERSONAL AND SOCIAL* (1970) (discussing moral choices, relationships, and human emotions); CHARLES FRIED, *RIGHT AND WRONG* (1978) (investigating a complex structure of morality, the demands such morality places on individuals, and the behavioral consequences of the system of right and wrong).

48. Given the liberality with which some deontological scholars have taken advantage of utilitarian arguments, as in the case of Fried, it remains open to the aspiring deontologist to borrow even more heavily from the utilitarian-economic literature to recast that literature in largely moralistic terms. Posner showed precisely how such a stratagem could be implemented. See generally Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187 (1981). It would be difficult for such a deontological scholar to connect his arguments to the scientific literature in the peer-review journals. But that loss might

liability. The works of Epstein and Fried are extremely sophisticated and highly personal in the senses that they (1) reach conflicting conclusions about the “ground-norm” of tort law and (2) have not been followed by efforts to build upon their frameworks by later scholars. Indeed, the most notable feature of the non-consequentialist, or deontological, line of scholarship is the splintering of analyses into highly personal approaches: for every deontological scholar, there is a specific deontological theory. No deontological torts scholar carries on the work of his predecessors. Soon after Epstein and Fried, Weinrib offered his own theoretically sophisticated deontological approach, drawing heavily on Kant.<sup>49</sup> As time has passed, however, the level of theoretical sophistication of deontological scholarship has declined, while the effort of such scholars to speak directly to the case law has increased. But there is a danger in this trend of the scholarship becoming descriptive and journalistic in nature. As Holmes noted, the law is full of the language of morals.<sup>50</sup> It is not difficult work for a modern deontologist to find language in court opinions that seems to support a moralistic approach. But as the level of theoretical sophistication declines, there is a danger of the scholarship simply repeating what is said in the court opinions. At this stage, the “fit” would seem to be perfect, but the “theory” is perfectly vacuous.

The decline in deontological scholarship has troubling implications for tort theory in general.<sup>51</sup> Consequentialist scholarship on torts, by contrast, continues in the form of law and economics and in empirical legal studies.<sup>52</sup> One could argue that the groundbreaking deontological scholarship on torts

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be compensated for by the adulation of the large audience in the law schools for deontological argumentation. I view this as an open arbitrage opportunity for new deontological torts scholars.

49. See generally Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 L. & PHIL. 37 (1983). Not all deontological theorists relied on Kant alone. Some have built their arguments on Aristotle. See generally Posner, *supra* note 48. For a discussion of the consistency (or lack of consistency) of much of the theory work with actual tort doctrine, see generally Mark F. Grady, *Legal Evolution and Precedent*, in 3 JAHRBUCH FÜR RECHT UND ETHIK [ANN. REV. L. ETHICS] 147 (1995).

50. See Holmes, *supra* note 4, at 459.

51. For an excellent overview of tort theory reaching similar conclusions, see generally Mark F. Grady, *The Positive Economic Theory of Tort Law*, in OXFORD RESEARCH ENCYCLOPEDIA OF ECONOMICS AND FINANCE (Oxford U. Press 2019).

52. For a sample of the empirical investigations in tort law, see generally Henry S. Farber & Michelle J. White, *Medical Malpractice: An Empirical Examination of the Litigation Process*, 22 RAND J. ECON. 199 (1991); Toshiaki Iizuka, *Does Higher Malpractice Pressure Deter Medical Errors?*, 56 J. L. & ECON. 161 (2013); Joanna Shepherd, *Uncovering the Silent Victims of the American Medical Liability System*, 67 VAND. L. REV. 151 (2014); David A. Hyman et al., *Do Defendants Pay What Juries Award? Post-Verdict Haircuts in Texas Medical Malpractice Cases, 1988-2003*, 4 J. EMPIRICAL LEGAL STUD. 3 (2007); Jonathan Klick & John MacDonald, *Deterrence and Liability for Intentional Torts*, 63 INT’L REV. L. & ECON. 1 (2020).

has been done, and there is no need today to continue it. But that argument would be false. Tort law generates numerous questions that present themselves for some theoretical explanation or justification.<sup>53</sup> The available work should never run out. Few deontological theorists have attempted to explain or justify the longstanding tort doctrine negating a general duty to rescue.<sup>54</sup> The problem with the retreat from deontological scholarship is that it may disable or blind many tort scholars – specifically, those who feel some allergy to economic reasoning – from exploring theory in general. Richard Epstein began as a deontological scholar before becoming the most thoroughgoing utilitarian. Gary Schwartz, the first *Restatement (Third)* Reporter before his untimely death, leaned toward the consequentialist school, but was fully conversant in both utilitarian and

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53. Here I should address a matter of exclusion. I have not discussed perspective-based scholarship on tort law, such as feminist legal theory or critical race theory. I think it is important to distinguish theories from perspectives. Lawyers, and consequently many law professors, use the term theory, in a small-t sense, to refer to any thesis or argument – such as a lawyer’s “theory of the case.” But academic inquiry has traditionally given the term theory a much more restricted circulation. Economic theory or philosophy or even Kantian theory refer to systems of conceptual tools used to analyze problems. One ordinarily attempts to learn these tools to apply the relevant theory. The theory exists independently of its application field and can be tested independently. A perspective, by contrast, is a particular viewpoint operating within an application field. A critical race theory of torts, for example, takes its application field, torts, and adopts a race conscious perspective on every rule within the field. Much of the education in law schools has shifted from instruction in theories (in the big-t sense) and methodologies to instruction in perspectives. The significant theories that have been applied in legal analysis are economic theory and philosophical theory, both with rich traditions going back centuries. Much, if not all, of the modern legal literature not coming from the economic or philosophical schools offers perspectives. This is not to denigrate perspectives, of course; a perspective can offer important truths about the legal system. For a feminist perspective on torts, see generally Martha Chamallas, *Feminist Legal Theory and Tort Law*, in RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE (Cynthia Bowman & Robin West eds., Elgar Press 2019). Similarly, a recent offshoot of deontological theory, under the label “civil recourse,” is much closer to a perspective than a methodology. See generally John C.P. Goldberg & Benjamin C. Zipursky, *Civil Recourse Revisited*, 39 FLA. ST. UNIV. L. REV. 341 (2011).

54. Ernie Weinrib has generously corrected my original statement that there were no such theorists by bringing to my attention some deontological authors who have justified the common law on rescue. One example is Peter Benson, *Misfeasance as an Organizing Normative Idea in Private Law*, 60 UNIV. TORONTO L.J. 731 (2010). Benson’s article, in my view, does offer a justification. But it does not claim to be a deontological argument. The author disclaims any reliance on deontological or utilitarian theory. See *id.* at 734. Another author I should note is Arthur Ripstein, *Three Duties to Rescue: Moral, Civil, and Criminal*, 19 L. & PHIL. 751 (2000). Ripstein is a well-known deontological scholar. However, his article draws on a mixture of utilitarian and Kantian ideas, mostly reflected in the work of Rawls. His thesis appears to be that once one has participated in support of social institutions that maintain or provide aid to the less fortunate, there is no continuing duty to aid others that tort law should enforce. This is a rather narrow and halting defense of the common law.

deontological methods of argument.<sup>55</sup> As the general level of theoretical interest declines, torts scholarship is likely to decline in quality as well. The field of academic inquiry in torts is at risk of entering another quiet period such as that before the publication of Calabresi's *Costs of Accidents*. This is additionally troubling because of the historical centrality of tort theory to legal theory in general. John H. Wigmore said that tort law deals with legal rights in their most general form.<sup>56</sup> I do not think it is an accident that torts theorists, first Holmes, then Calabresi and Posner, touched off the most significant revolutions in legal scholarship generally.

### III. TORT THEORY IN APPLICATION

In this part, I will discuss tort theory in application, and specifically positive tort theory. To the extent that tort theory can be useful to a project such as the Restatement, it is most likely to be in the form of positive theory, that is, theory that explains the tort doctrine. Normative tort theory—that is, theory that attempts to set out an optimal tort system—is not so clearly useful for a project such as the Restatement. For example, if a normative tort theory contribution concluded that negligence law should be scrapped and replaced by strict liability, such a conclusion might be educational to some degree to writers of the Restatement, but it would not provide a theoretical justification for the rules that actually exist in the law. In this connection, I should make two exceptions: one is the case of a “proof through irony,” where the author’s normative conclusion is so clearly infeasible to the intelligent reader that it actually supports complementary hypotheses, and the other is the case where the author’s comprehensive analysis, when read in a fair light, tends to support a justificatory rather than iconoclastic conclusion on the law. In both these exceptional cases, the ostensibly normative work could provide a theoretical justification for existing rules, but it would put a heavy burden on readers to tease that argument out. A positive theory, on the other hand, which provides an explanation for the rules that actually exist, could immediately help Restatement writers see deeper connections between various legal doctrines and to reach a better understanding of the grounds on which existing doctrines may be justifiable.

It should not be necessary to go further than this in recommending positive tort theory. However, it is possible to go further. It is desirable

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55. This was evident to anyone who listened to him speak and in his scholarship as well. See, e.g., Gary T. Schwartz, *Economics, Wealth Distribution, and Justice*, 1979 WIS. L. REV. 799 (1979).

56. 1 JOHN H. WIGMORE, *SELECT CASES ON THE LAW OF TORTS*, at vii (1912).

that Restatement Reporters examine and discuss the grounds for tort law rules so that those rules can be presented as something more than phrases to memorize and to use in court against opponents. If the sole purpose of the Restatement is to issue phrases for lawyers to use in court against opponents, then the social utility of the entire project becomes to some degree contestable. I think all would concede that this is not the purpose of the Restatement. It is further desirable that the Restatement suggest a basis for preferring the rules that exist over any given set of alternatives; and where such a position seems unlikely after serious study of the utilitarian grounds for the existing rule or rules, suggest a reason for preferring an alternative. None of this should prevent the Restatement from accomplishing its primary task, which is to provide a positive statement of the law.

The positive theory of tort law begins with some simple assumptions or components of the framework. The *first* is that the actions that tort is concerned with can be very simply divided into two categories: *activity* and *care*.<sup>57</sup> By activity, I mean the frequency, or the amount per unit of time, that an actor does something. So, for example, the activity of driving would be measured by the frequency with which an actor drives (twice per day) or the amount the actor drives within a unit of time (five miles per day). By care, I mean the degree to which an actor regulates his conduct while engaged in the activity, to reduce the likelihood of an injury. For example, a driver can "take care" by moderating his speed, or keeping his eyes on the road ahead of him as he drives. One can think of tort liability as affecting both activity and care levels. Tort liability affects, for example, the amount of driving an actor does and the degree of care that an actor takes while engaged in the activity of driving.

The *second* basic component of the positive theory model is the concept of *externality*, specifically external harm or cost and external benefit. An external cost is a harm imposed on someone other than the actor resulting from his level of activity or his level of care. For example, if the actor drives frequently, he may occasionally cause car accidents that impose harm on others. Those harms on others are external costs associated with the actor's driving activity. There may be external benefits from driving too. For example, if the actor's presence on the road makes it more likely that the roads are safer, because highwaymen are less likely to take advantage of people if the roads are busy, or that someone who is stranded gets contacted by the police, then there is a benefit to others

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57. For an economic analysis of the distinction between care and activity levels and appropriate liability rules, see generally Steven Shavell, *Strict Liability versus Negligence*, 9 J. LEGAL STUD. 1 (1980).

resulting from the actor's driving activity. Similarly, if the actor fails to take care (for example, does not watch the road continuously), he may get into an accident, and the harm to the other party is an external cost associated with the actor's care level. So important is the concept of externality that it would not be an exaggeration to say that tort law is the law of externalities.

The *third* component is the incorporation of statistical generalizations. Some activities tend to have high external costs. For example, the activity of blasting tends to have a high risk of imposing harm on others, and therefore high external costs. Some activities tend to have high external benefits; for example, the activity of operating a water supply system, an electricity grid, or a natural gas pipeline system supports an infrastructure that enables a relatively high standard of living. Tort law recognizes these statistical generalities. Indeed, tort law incorporates statistical generalities in many of its features. For example, the foreseeability requirement in negligence doctrine incorporates statistical presumptions that an individual who fails to take care under certain conditions will foresee the possible harm to a potential tort victim. The law, except in unusual cases such as children too young to even understand the likely consequences of their actions, does not seek to determine the individual's actual state of mind. The reasonable person standard applies a mostly objective test to the tortfeasor. Similarly, the intent test of battery incorporates the statistical presumption that an individual who takes an action that is "substantially certain" to cause a harmful physical contact intended to cause the resulting harm without requiring the court to determine the actual state of mind of the tortfeasor.

*Fourth*, externalities are prevalent. They are not unusual features of the social environment; most activities throw off either external costs, or external benefits, or both. As Holmes put it, "the public generally profits by individual activity."<sup>58</sup> The creation of businesses or voluntary organizations tends to benefit even people who are not directly involved in the businesses or organizations. For example, production facilities may cause air or water pollution, but they also increase economic activity and thereby increase employment opportunities for people who supply and economically interact with the business. Railroads generate accidents, but they also provide a transportation infrastructure that benefits the entire economy.<sup>59</sup>

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58. HOLMES, *supra* note 5, at 95.

59. See, e.g., Hylton, *supra* note 7, at 991. Some of the early tort cases were explicit about the external benefits of technology such as railroads. See *Lexington & Ohio R.R. v. Applegate*, 38 Ky. (8 Dana) 289, 309 (1839) (stating that "railroads and locomotive steam cars—the

When the external costs of an activity exceed its external benefits, it will tend to be pursued to a degree that is socially excessive—excessive in the sense that society’s total wealth (or utility) could be increased by curtailing the activity. To see this, consider the activity of driving. Suppose, to simplify, there are no external benefits from driving. When a driver decides to drive, he would compare his private benefit to his private cost and keep driving until the private cost is just equal to the private benefit on the margin. But if there are external costs created by his driving, then he fails to take such costs into account in deciding how much to drive, because those costs fall on others. By ignoring the external costs created by his driving, he chooses to drive excessively – at a level such that society would be better off if he curtailed the activity. He should compare the *social cost* of his driving to his private benefit (there being no external benefits), and if he did so, he would curtail the activity. The law can “correct” this problem of excessive activity by making the driver strictly liable for harms resulting from his driving. Under strict liability, the driver would be required to pay damages no matter how careful he was, and therefore he will tend to take the external costs of his activity into account every time he considers driving.

*Fifth*, activities can be divided into two types: those with *high transaction costs*, and those with *low transaction costs*. Transaction costs are the costs of negotiating, bargaining, and discussion between (or among) potential injurers and potential victims of accidents. Translated into legalistic terms, “transaction costs” refers to the joint *burden of gaining consent*. Although the term “transaction costs” may seem foreign to torts specialists, the notion that tort law responds to or varies with the burden of seeking or gaining consent is intuitive. Liability for trespass is strict—that is, without regard to fault—primarily because the burden of gaining consent to an entry upon land is generally low.

Return to the activity of driving. It is a setting where transaction costs tend to be high. The cost to an actor of negotiating with a potential accident victim over the level of care or the level of activity is often prohibitive. A

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offspring, as they will also be the parents, of progressive improvement—should not, in themselves, be considered as nuisances, although, in ages that are gone, they might have been so held, because they would have been comparatively useless, and, therefore, more mischievous”).

We must have factories, machinery, dams, canals and railroads. They are demanded by our civilization. If I have any of these upon my lands, and they are not so a nuisance and are not managed as to become such, I am not responsible for any damage they accidentally and unavoidably do my neighbor. He receives his compensation for such damage by the general good, in which he shares, and the right which he has to place the same things upon his lands.

Losee v. Buchanan, 51 N.Y. 476, 484–85 (1873).

given driver cannot, in most cases, identify in advance, before driving, who the other party will be to an accident that he gets into. On the other hand, consider the case of an individual, person A, walking near the boundary of the property of person B, while B is standing in his vicinity. If A wants to step onto B's property, he can seek permission from B, unless there is an emergency which requires immediate entry. In the trespass case, the cost of transacting is low. In the special case of land entry where the cost of transacting (gaining consent) is high, courts have developed the necessity doctrine.<sup>60</sup>

Tort law theory owes a debt to Ronald Coase for introducing the concept of transaction costs and noting the implications of such costs for law.<sup>61</sup> Coase argued that in a world with zero transaction costs, there would be no injuries or accidents for which the law's intervention would be socially beneficial. In a zero-transaction cost world, A would enter B's property only after gaining the consent of B. If A's entry provides no immediate benefit to B, B will consent to the entry only if A compensates him for whatever injury results or might result from the entry. Hence, there would be no problem of activities being pursued to a socially excessive degree. Coase realized, of course, that the real world is not one of zero transaction costs, and he offered insights on how the law responds to the presence of positive transaction costs.

*Sixth*, mental states can be divided into two categories: general intent and specific intent. General intent means that the actor intended merely to engage in the conduct he was engaged in. Specific intent means that the actor intended to harm the victim.<sup>62</sup> Trespass and negligence law involve general intent torts. Assault and intentional infliction of emotional distress are specific intent torts. A requirement of proof of specific intent makes it more difficult, generally, to hold an actor liable. The reason is that proving specific intent requires proving a set of facts, and actions, such that harm was so likely to result from the tortfeasor's actions that it would be appropriate to impute an intention to harm to the tortfeasor. This is a higher burden than proving that the likelihood of harm was foreseeable or merely plausible.

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60. See, e.g., Keith N. Hylton, *The Economics of Necessity*, 41 J. LEGAL STUD. 269 (2012) (discussing the necessity doctrine).

61. See generally Ronald Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960) (outlining the actions of business firms that have harmful effects on others).

62. One of the best discussions of the distinction between general and specific intent appears in Judge Learned Hand's *Alcoa* opinion. See *United States v. Aluminum Co. of America*, 148 F.2d 416, 429–32 (2d Cir. 1945).

Putting these six basic elements together, we can map tort doctrine into the functional categories shown in Table 1.<sup>63</sup> Start with Category 4, where the external costs are not greater than the external benefits of the activity, and the costs of transacting are high. Driving is an example of an activity that falls into this category. Unlike the activity of blasting, driving is not an activity that tends to throw off greater costs to other individuals than associated benefits. Moreover, the transaction costs associated with driving – the cost of drivers negotiating in advance over how careful each would be – is very high. The law does not try to suppress driving by adopting strict liability. Instead, tort law “regulates” driving by adopting the negligence rule. Of course, the same may be said of walking as an activity. Walking does not externalize greater costs than benefits. Any accidental injury caused by the activity of walking will generally be governed by the negligence rule.

Within the negligence test, there are components which conform easily to economic reasoning. The negligence test itself, as described by Judge Hand in *Carroll Towing*, as a default rule compares the expected harm avoidable by taking care to the burden of taking care, which has a straightforward cost-minimization rationale.<sup>64</sup> Finding negligence requires a finding of a duty to take care, breach of that duty, and causation. In each of these compartments of the negligence test, economic reasoning provides a full account of the doctrines that courts have developed. For example, in *Eckert v. Long Island R.R.*,<sup>65</sup> the court held that a rescuer does not have a duty to take ordinary care for his own safety, he can be held responsible for contributory negligence only for conduct that is reckless. Rescue is an activity that generates external benefits (saving lives) in excess of its externalized costs. Thus, tort doctrine carves out the activity of rescue and subsidizes it, in effect, by exempting the rescuer from some of the legal burdens generally imposed. This is consistent with the economically based predictions of Table 1.<sup>66</sup>

Now go to Category 3 in Table 1. Here the externalized costs exceed externalized benefits, and the costs of negotiation are high. I have already mentioned the activity of blasting as an example that falls in this category. The law imposes strict liability under the doctrine of *Rylands v. Fletcher*.<sup>67</sup>

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63. See *infra* Table 1; see also Hylton, *supra* note 7, at 993.

64. Richard A. Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. LEGAL STUD. 399 (1973).

65. 43 N.Y. 502 (1871).

66. On rescue and subsidization through law, see Keith N. Hylton, *Duty in Tort Law: An Economic Approach*, 75 FORDHAM L. REV. 1501, 1514–16 (2006). On causation and negligence incentives, see generally Grady, *Proximate Cause*, *supra* note 40.

67. L.R. 3 HL 330 (1868).

Strict liability curtails the blaster's activity, pushing it closer to the socially ideal level. But suppose the actor is engaged in an activity that might harm others but also externalizes benefits too. One such example is the activity of water supply. In *Rickards v. Lothian*,<sup>68</sup> the court, recognizing the social benefits from the defendant's activity, exempted it from the *Rylands* strict liability rule. Thus, if a dangerous activity externalizes substantial benefits, courts will shift it to Category 4, and apply negligence doctrine to the activity.

Next, go to Category 2, where transaction costs are low, and the activities generally externalize greater benefits than costs. The activities in this category are expressive, or involve action tightly commingled with expression. The legal standard essentially requires proof of specific intent to hold the defendant liable. Assault requires proof of conduct that would lead the reasonable person to believe that he was in immediate danger of physical injury.<sup>69</sup> Intentional infliction of emotional distress requires proof of outrageous speech intended to produce emotional distress.<sup>70</sup> Both torts require proof of evidence suggesting a mental state that goes beyond mere negligence.

Finally, Category 1 includes trespass and battery, conduct falling under the ancient writ of trespass *vi et armis*. The general intent standard applies.<sup>71</sup> The actor need only intend to do what he was doing, intend to carry out the physical acts he carries out, nothing more—that is, no requirement that the actor intend to harm or to do good. Transaction costs are generally low—the actor could easily have sought permission from the potentially affected individual or individuals before acting. The courts apply strict liability and will enjoin the conduct if possible. Because of the availability of the injunction, the remedial law in this category has been described, by Calabresi and Melamed,<sup>72</sup> as a *property rule*. The imposition of an injunction ensures that the actor cannot trespass against the property or physical safety of the potentially affected individual without getting the consent of that individual. The justification for strict liability is to

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68. AC 263 (PC) (1913).

69. See, e.g., *Allen v. Hannaford*, 244 P. 700 (Wash. 1926); *Beach v. Hancock*, 27 N.H. 223 (1853).

70. See generally *Wilkinson v. Downton*, 2 QB 57 (1897).

71. For an in-depth discussion of intent tests and related considerations in tort law, see generally Kenneth W. Simons, *A Restatement (Third) of Intentional Torts?*, 48 ARIZ. L. REV. 1061 (2006).

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

internalize costs.<sup>73</sup> Cost internalization ensures that the actor will in the end bear the costs he imposes on the affected individual or individuals. Bearing the costs will discourage the actor from acting unless the gain from his acting exceeds the costs. If the actor is well intentioned, aiming to do good, having to bear the costs gives him the incentive to be sure that he is actually benefitting the affected individual before acting. If the actor is not well intentioned, having to bear the costs discourages his action unless his gain is greater than the cost and he is willing to compensate the affected individual.

TABLE 1: Map of Torts<sup>74</sup>

	External costs exceed external benefits	External costs less than external benefits
Transaction Costs (Burden of Consent) Low	Category 1 Intentional Torts Trespass liability Injunctive relief	Category 2 Specific Intent Torts Assault Intentional Infliction of Emotional Distress
Transaction Costs (Burden of Consent) High	Category 3 Nuisance <i>Rylands</i> strict liability	Category 4 Negligence

73. See generally Keith N. Hylton, *2009 Monsanto Lecture - Intent in Tort Law*, 44 VAL. U. L. REV. 1217 (2010).

74. Table 1 provides a skeletal view of tort doctrine. It can be filled out easily; pieces of flesh, in the form of specific tort law resolutions within each category, can be added to it until you have constructed the entire common law of torts. A Restatement project could be built around Table 1, putting functional considerations first.

The default position in this scheme is Category 4. We begin in a regime where externalized costs and externalized benefits are roughly equal (or, equivalently, where externalized costs are reciprocal). In this default regime, the negligence rule operates. Then we imagine the introduction of an activity, such as blasting, where the externalized costs far exceed externalized benefits. The law changes to apply strict liability to this new activity that externalizes considerably more risk than benefit, creating Category 3. Then, within the activities thrown into this new strict liability category, an activity emerges that externalizes substantial benefits as well as costs. For this even newer activity, courts revert to the negligence rule since there is no net social utility gain in curtailing the activity. Within Category 4, an activity emerges, rescue, which externalizes considerably more benefits than costs. Courts provide a subsidy to this activity by requiring recklessness to apply the rule of contributory negligence to the rescuer.

When the law imposes strict liability on the blaster, it is not revealing a bias for the landowner over the blaster. The law takes as a natural default the regime where external costs are exchanged reciprocally among individuals (or external costs and external benefits are reciprocal). In this default regime of reciprocity in externalities, there is no need to use the law to either curtail or promote one activity relative to another. Liability is imposed only when an actor is negligent in his conduct and causes harm. When the blaster is introduced into this regime, the exchange of external costs is no longer reciprocal. The law responds to this disturbance from reciprocity by applying strict liability to the blaster to internalize the unusually high external costs generated by the blaster. If, however, the locality is one in which everyone is a blaster, each using the same number of dynamite sticks, the exchange in external costs would be reciprocal and there would be no need for strict liability—and the law conforms.

Landes and Posner also provide a positive theory of strict liability doctrine in their article, *The Positive Theory of Tort Law*. Their theory differs from mine in some particulars. Rather than focusing on the ratio of externalized costs to externalized benefits (or reciprocity in externalized costs) as a key factor in determining the choice of strict liability over negligence, they focus on the situation where the danger of harm can be reduced more efficiently by relocating the activity rather than taking care. I think there is some value in this approach, and it may apply to several cases. Indeed, in many cases both my approach and that of Landes and Posner will reach the same conclusion. Consider, for example, the question whether strict liability should be applied to the keeping of dangerous animals. Landes and Posner argue that it is hard to control a dangerous

animal (even a vicious dog), so the risk of injury can be reduced more efficiently by relocating the activity, an entirely plausible explanation of the strict liability rule that applies to the keeping of dangerous animals.<sup>75</sup> I argue, instead, that keeping a dangerous animal externalizes a risk of harm to the locality, in most cases, that is not reciprocal to the harms that others externalize in their activities, and there generally are no externalized benefits to the locality. I think my theory has an advantage over that of Landes and Posner because it explains more of the variations in the law on strict liability. For example, if the keeping of the animal externalizes a benefit, or is met by reciprocal externalization of risk in the locality, the courts may adopt the negligence standard rather than strict liability, as observed in the cases of predator control dogs,<sup>76</sup> zoos,<sup>77</sup> cattle in prairie states,<sup>78</sup> and wildlife parks.<sup>79</sup> In these cases, it remains difficult to control the wild animal, yet courts have shied away from applying strict liability.<sup>80</sup>

#### IV. TORT THEORY AND THE RESTATEMENT

In my *Theory of Tort Doctrine* paper, I presented an optimistic case for integrating positive tort theory with the Restatement process.<sup>81</sup> The strongest argument for such an integration is that it is desirable that a project such as the Restatement present the law, and to the best of its abilities, the grounds on which the law may be justified. The policies that explain the law sit underneath its surface like tectonic plates. A full understanding of the law should include an understanding of the policies that shape it as well. The policies that have helped form the law not only explain the current contours of the law, but how those contours are likely to change, or should be changed, in the future.

Another reason for supporting an integration of positive theory into the Restatement process is that it may help avoid the instances where Restatement Reporters have adopted rules that deviate from the common law, or very likely misinterpreted the common law in some important respect. One example of such a case is Francis Bohlen's treatment of the law on mutual combat.<sup>82</sup> There was a split between jurisdictions, with a

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75. See HYLTON, *supra* note 42, at 299–300.

76. *See id.*

77. *See id.*

78. *See generally* Garcia v. Sumrall, 121 P.2d 640 (Ariz. 1942); *see also* Oliver Wendell Holmes, Jr., *The Theory of Torts*, 7 AM. L. REV. 652, 653 (1873).

79. *See* HYLTON, *supra* note 42, at 299–300.

80. *See id.*

81. Hylton, *supra* note 1, at 1414.

82. For an illuminating discussion, see Kelley, *supra* note 23, at 98–100.

majority rule and a minority rule. Bohlen stated a new rule on liability for mutual combat that was inconsistent with both common law rules.<sup>83</sup> A close examination of both of the rules on mutual combat—the majority rule barring consent as a defense and the minority rule permitting consent as a defense under certain conditions—indicates that they are not as different as they seem at first glance and reflect common utilitarian policies.<sup>84</sup> If Bohlen had attempted to understand those policies first, he probably would have spared readers of the First Restatement the difficulty of reconciling an entirely novel rule, appearing for the first time in the Restatement, with the existing common law rules.<sup>85</sup>

I consider the normative case for integrating positive theory into the Restatement process relatively easy to make, perhaps because I am overly optimistic.<sup>86</sup> It is a wonder that the Restatement Reporters have been reluctant to undertake this integration so far. There is now a substantial body of positive tort theory, presenting both sweeping and surgical analyses of tort doctrine, in the numerous papers published by Posner, Landes and Posner, Grady, and myself. Related to this literature is a large technical body of papers setting out mathematical models by Shavell,<sup>87</sup> Polinsky,<sup>88</sup> Diamond,<sup>89</sup> Parisi,<sup>90</sup> Garoupa,<sup>91</sup> Dari-Mattiacci,<sup>92</sup> Dharmapala,<sup>93</sup> Mungan,<sup>94</sup>

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83. See Hylton, *supra* note 2, at 605–12.

84. See *id.*

85. For an example of a judge grappling with Bohlen's rule in the mutual combat context, see generally *Hudson v. Craft*, 204 P.2d 1 (Cal. 1949). For a discussion of the common law on mutual combat and the First Restatement, see Hylton, *supra* note 2, at 605–12.

86. One ground for optimism is that tort law, as a topic of academic interest in law schools, has made great progress compared to its status 150 years ago. In 1870, Oliver Wendell Holmes, reviewing a book on torts, said that it was “not a proper subject for a lawbook.” See Warren A. Seavey, *Principles of Torts*, 56 HARV. L. REV. 72, 72 (1942). No torts scholar would say that about torts today. Perhaps torts scholars in the near future will look back on this period and wonder why relatively few torts scholars viewed the subject as proper for theoretical analysis.

87. See Shavell, *supra* note 57 and accompanying text.

88. See generally A. Mitchell Polinsky, *Strict Liability vs. Negligence in a Market Setting*, in *ECONOMICS AND LIABILITY FOR ENVIRONMENTAL PROBLEMS* (Kathleen Sergerson, ed., Burlington: Ashgate Publ'g Co. 2002) (analyzing strict liability and negligence in a market setting).

89. See Diamond, *supra* note 38 and accompanying text.

90. See generally Francesco Parisi, *The Genesis of Liability in Ancient Law*, 3 AM. L. & ECON. REV. 82 (2001) (outlining the emergence and evolution of punitive and compensatory remedies in ancient law).

91. See generally Giuseppe Dari-Mattiacci & Nuno M. Garoupa, *Least Cost Avoidance: The Tragedy of Common Safety*, 25 J.L. ECON. & ORG. 235 (2007) (arguing that the least cost avoider approach in tort is not necessarily the optimal way to attain least cost avoidance when accidents can be avoided by either of two parties).

92. See *id.*

and many others. A superior version of a tort law Restatement would incorporate this literature. And there are numerous methods by which the Restatement could incorporate the positive theory literature. One is by discussing it directly in the commentary to the main provisions of the text. Alternatively, the Restatement could engage in a negative Socratic dialogue in the commentary in which the Reporters grapple with the social desirability of opposing potential rules.

Of course, one reason for reluctance to incorporate the positive theory literature is that there may be a belief on the part of Restatement Reporters that incorporating such literature might detract from the seeming law-relevance of the project. There may be a fear that readers of the Restatement, coming across numerous citations to academic literature, may perceive the project as overly academic and perhaps not entirely faithful to the case law. I do not know if such a perception exists, but if it does, it might explain some of the reluctance to discuss, even in the comments or footnotes, the enormous positive theory literature. If this perception exists, it would be unfortunate, because it would deny to non-academics an easy source from which they can become aware of the theoretical contributions bearing directly on the torts questions that courts confront.

The more difficult question is the positive one: whether the Restatement already incorporates the utilitarian theory set out in this paper. I am sure that most Restatement Reporters probably would say that they do not consult tort theory, that they consult the case law. The job of the Reporter is to state the law, and it might suggest a certain dereliction of responsibility to spend time consulting the theoretical literature when there is so much reading of the case law to be done. The Reporter must defend his or her work in front of lawyers and judges and may feel reluctant to refer to the work of theorists. Such a perception would be unfortunate, but it would be at the same time understandable. Of course, one of the reasons this would be unfortunate is that the positive tort theorists go through great pains to relate their arguments directly to the case law and cite numerous cases to support their functionalist arguments about the doctrine.

But even if Restatement Reporters are reluctant to cite or to refer to theoretical justifications, has utilitarian theory still managed to influence the Restatement? Perhaps utilitarian theory has influenced the Restatement

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93. See generally Dhammika Dharmapala & Nuno Garoupa, *Penalty Enhancement for Hate Crimes: An Economic Analysis*, 6 AM. L. & ECON. REV. 185 (2004) (developing an economic analysis of penalty enhancements for bias-motivated or hate crimes).

94. See generally Murat C. Mungan, *Justifications, Excuses, and Affirmative Defenses*, 36 J.L. ECON. & ORG. 343 (2020) (explaining how affirmative defenses generate social benefits in the form of avoided unnecessary punishment).

already. Some judges have adopted utilitarian theory, and their opinions have influenced the Restatement. One example is Judge Hand's opinion in *Carroll Towing*, now codified by the *Restatement (Third): Liability for Physical and Emotional Harm*, in section 3.<sup>95</sup> Another example is Judge Posner's opinion in *Indiana Harbor*,<sup>96</sup> which appears to have influenced the provision in the *Restatement (Third)* on strict liability, written by Gary Schwartz,<sup>97</sup> who himself was clearly influenced by utilitarian theory generally. Francis Bohlen, in the First Restatement, adopted Terry's utilitarian formulation of negligence. Prosser, Reporter for the Second Restatement, was clearly influenced by utilitarian theory. Thus, even though the Third Restatement appears to be reluctant to discuss the positive tort theory literature, that literature has undoubtedly had some influence on the Restatement.

At some level the "positive question" whether utilitarian tort theory actually has an impact on Restatement Reporters today may be a red herring. As I argued laboriously in my *Economics of the Restatement* article, tort doctrine itself is utilitarian, and the process by which the doctrine is created generates utilitarian rules.<sup>98</sup> The ground-norm of tort law is the reasonable person test, understood to call for a balancing of competing interests. Judges decide cases by balancing competing interests—certainly not through the application of Kantian categorical imperatives. This process generates a set of legal doctrines that reflect utilitarian, welfare-maximizing, tradeoffs. As Coase noted in his article, *The Problem of Social Cost*, the resulting common law doctrine probably does a better job of establishing an optimal regulatory framework than economists, working in the abstract on the problems generating tort lawsuits, would be able to devise on their own.<sup>99</sup>

It follows that Restatement Reporters are working on a product of utilitarianism. If Reporters are objective and fair in reading the case law, they are unlikely to produce a work that depreciates the value of the common law. Of course, the aforementioned example of Bohlen on mutual combat<sup>100</sup> shows that a Reporter who is zealous about inserting his own particular theory about the law can have a negative impact on the common law. However, cases such as the example of Bohlen are likely to be rare.

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95. See Hylton, *supra* note 2, at 614–18.

96. See generally *Indiana Harbor Belt R.R. Co. v. American Cyanamid Co.*, 916 F.2d 1174 (7th Cir. 1990).

97. See Hylton, *supra* note 2, at 614–18.

98. See *id.* at 601.

99. See Coase, *supra* note 61 and accompanying text.

100. See *supra* notes 90–93 and accompanying text.

Bohlen had published an article during his time as Reporter for the First Restatement attacking the majority rule on mutual combat<sup>101</sup> and misstating the minority rule.<sup>102</sup> He did not argue explicitly for the misstated minority rule, but his very thorough attack on the majority rule clearly suggested that he believed the (misstated) minority rule to be superior. He later asserted the misstated minority rule in the First Restatement as the common law rule on battery liability for mutual combat.<sup>103</sup> Cases such as this reveal the leeway Restatement Reporters have to adopt rules that do not represent the common law. However, it should be unusual that a Reporter has the gumption to create a new legal doctrine and persuade the American Law Institute to adopt it in a Restatement.<sup>104</sup>

It remains the case, still, that a Reporter who takes seriously the examination of the utilitarian bases of existing common law rules is likely to produce a better Restatement product by avoiding the commission of errors such as Bohlen's. The reason is that such a Reporter, once being introduced to the rules and observing how courts have made sensible utilitarian tradeoffs among alternatives, would probably feel less certain about asserting his own discordant theories about ideal common law rules. Such a Reporter might reason that the judges, confronting live issues and hearing, in at least some of the cases, the most earnestly put and diligently researched arguments on opposing sides, and sometimes discussing those arguments in a court opinion, could be presumed to have made a sensible tradeoff of competing interests. This is not to say that all judges are infallible. However, judges are likely to issue opinions that reflect optimal utilitarian rules – and a Restatement Reporter who isolates such a rule should be a bit reluctant to substitute in its place his own vision of an ideal rule. The Reporter, not having examined the same tradeoff questions with the same level of intensity as the judges, could easily conjure up a new rule, as did Bohlen, which is on utilitarian grounds inferior to the existing common law rule or rules. On this score, the Restatement Reporter who has shown the most appropriate humility is Prosser.<sup>105</sup> His Second

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101. See generally Francis H. Bohlen, *Consent as Affecting Civil Liability for Breaches of the Peace*, 24 COLUM. L. REV. 819 (1924).

102. See Hylton, *supra* note 2, at 605–12.

103. See, e.g., Kelley, *supra* note 23, at 99–100.

104. See *id.* at 100 (providing an account of how Bohlen accomplished this seemingly impressive feat).

105. But Prosser was not perfect. Priest criticized Prosser for distorting the evidence supporting his claim that a strict liability standard had developed in the case law on products liability. See George Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 514 (1985) (“Prosser’s appendix supported his claim of an explosion in the law toward strict liability by the citation of

Restatement is for this reason superior to the other Restatements, though the work of James Henderson and Aaron Tverski on products liability is an important advance that greatly improves on Prosser's Restatement Section 402A.<sup>106</sup>

There is another reason, already mentioned, that a Reporter who seriously examines the utilitarian basis for common law rules is likely to produce a better Restatement product than one who does not. It is desirable to know the grounds and the best justifications for common law rules. The judges often stop short of providing those grounds in their opinions. They often do not have the time to engage in such explorations in their opinions, or they may have relied on earlier decisions without thinking through the bases for those earlier decisions, or they may feel that such explorations are inappropriate for a judicial opinion. Of course, there are exceptions such as Judge Posner, who always discussed the utilitarian grounds for his decisions, and related law, in every one of his opinions. But judges like Posner are rare. Unlike judges, Restatement Reporters do have time to think through the utilitarian bases for common law rules, and to discuss those grounds in their published work for the American Law Institute. If they were to do so, they would enhance the social value of the Restatement project.

## V. CONCLUSION

Holmes and Wigmore both spoke of the generality of tort law, suggesting that it formed the foundation of the common law's regulatory capacity.<sup>107</sup> Holmes went further, noting that a theory that justified the doctrines of tort law would also serve as the basis for justifications of all areas of the common law.<sup>108</sup> Both would be keenly interested in, and probably a bit surprised by, the level of scientific sophistication of the tort

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forty cases. A rereading of these cases today suggests either that what Prosser meant by strict liability is vastly different from the regime that has evolved or that Prosser's discovery of a trend in the case law was largely his own creation."). Sadly, it seems that it is not extremely unusual for a Restatement Reporter to misstate some portion of the common law of torts to fit his own visions of what the law should look like. For a discussion of some prominent instances, see Hylton, *supra* note 2, at 605–18.

106. RESTATEMENT (THIRD) OF TORTS § 402A (AM. L. INST. 1998) (James A. Henderson, Jr. & Aaron D. Twerski, Reporters).

107. On Wigmore, see 1 JOHN H. WIGMORE, *supra* note 56, at vii. On Holmes, see HOLMES, *supra* note 5, at 72.

108. See HOLMES, *supra* note 5, at 71 ("The object of the next two Lectures is to discover whether there is any common ground at the bottom of all liability in tort, and if so, what that ground is. Supposing the attempt to succeed, it will reveal the general principle of civil liability at common law.").

theory literature, both normative and positive. The tort theory literature includes doctrinal, mathematical, and empirical research into the probable effects of tort law. The question I have addressed in this paper is whether the Restatement of tort law should make a greater effort to incorporate the tort theory literature, especially the positive literature. The simple reason for giving an affirmative answer to this question is that it is desirable that the justificatory grounds for tort doctrine be discussed and disseminated beyond academic circles. Doing so would improve the Restatement.