Epsteinian Torts: Richard A. Epstein, *Cases and Materials on Torts*†

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Richard Epstein is one of the most influential legal thinkers of our time. Not long ago, a survey of the "most-cited legal scholars" ranked him number twelve, just behind Archibald Cox, Guido Calabresi, and Harry Kalven, Jr., and ahead of Lawrence Friedman, Henry Hart, and Cass Sunstein.[1] A recent retrospective of his work described him as a "world-class legal scholar and teacher."[2] Thus, it is not surprising that Epstein has produced a casebook on torts—now in its seventh edition—that lives up to this reputation. *Cases and Materials on Torts*[3] is a complex, challenging, and provocative casebook precisely because Epstein is a complex, challenging, and provocative scholar.

A fascinating aspect of Epstein's scholarly work is his exploration of the apparent tension between libertarian principles and utilitarian thought[4] —an exploration that comes alive in his casebook. To Epstein, these two competing principles often coalesce to yield a single "correct" answer to a problem. In other words, the answer that arises from a desire to protect a pre-determined set of individual rights—for example, private property rights, or the right of personal autonomy—often produces an outcome that is also beneficial to the overall com-

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1. Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 J. LEGAL STUD. 409, 424 (2000); *see also* Leonard J. Long, *Introduction to Conference on Law and Philosophy: The Works of Richard A. Epstein*, 19 QUINNIPIAC L. REV. 655, 655–56 (2000) (summarizing Epstein's contributions to legal scholarship).

2. Long, *supra* note 1, at 656.

3. RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS (7th ed. 2000) [hereinafter CASES AND MATERIALS ON TORTS].

4. *See, e.g.*, RICHARD A. EPSTEIN, PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD (1998) [hereinafter FREE SOCIETY].

mon good.[5] Some scholars have critiqued Epstein's work by suggesting that there is more disharmony than harmony in the relationship between the libertarian and utilitarian approaches.[6] Who has the better argument on the point, however, is not relevant for present purposes. What *is* relevant is that Epstein introduces, confronts, and explores the potential for tension between the two approaches throughout his casebook in a way that provokes thoughtful and interesting classroom discussion.

A second, and closely related, theme that Epstein explores in his casebook is the overwhelming importance of the older, historic common law cases to the study of torts. In fact, the book devotes almost seventy pages to the age-old debate over whether negligence or strict liability should govern unintentional harms. This historical approach reinforces Epstein's emphasis on the libertarian/utilitarian divide; indeed, the strict liability versus negligence debate roughly parallels the libertarian/utilitarian tension, with strict liability generally (although not necessarily) associated with the former and negligence generally (although not necessarily) associated with the latter.[7] This historical grounding also gives students a basis for understanding why negligence governs some unintentional harms while strict liability governs others, and provides them with the tools to challenge the current boundaries between the two theories. Finally, a more historical approach to tort law gives students some sense of the expansion and contraction of tort liability over time—an understanding that puts "tort reform" in context.

A casebook author faces a difficult task: presenting the material in its fullest complexity, while at the same time developing some basic, and hopefully interesting and thought-provoking, themes that tie the material together. *Cases and Materials on Torts* finds this delicate balance through the twin themes of the libertarian/utilitarian tension and the importance of the historic common law. Thus, the casebook is ideal for classroom teachers who find these themes interesting and important lenses through which to view the subject of torts.

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5. *See id.* at 9–39.

6. *See, e.g.*, Larry Alexander & Maimon Schwarzschild, *The Uncertain Relationship Between Libertarianism and Utilitarianism*, 19 QUINNIPIAC L. REV. 657 (2000) (noting doubts about Epstein's goal of reconciling libertarian and utilitarian approaches); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 346 (1990) (describing Epstein's "marriage of utilitarianism and libertarianism" as "an uneasy one"); Jerry L. Mashaw, *Against First Principles*, 31 SAN DIEGO L. REV. 211, 214 (1994) (describing the "[l]ibertarian-utilitarian difficulties" in Epstein's work).

7. *See* CASES AND MATERIALS ON TORTS, *supra* note 3, at 144–48.

I. THE LIBERTARIANISM V. UTILITARIANISM TENSION

Throughout his scholarly work, Epstein challenges the age-old assumption that libertarian and utilitarian principles must, by definition, clash.[8] He admits that the relationship between the two is often "vexed" and "[u]neasy,"[9] and rightly so, for the relationship is a difficult one.

Libertarianism starts with a pre-defined set of individual rights, and then seeks to vindicate those rights when confronted with a legal problem. The "correct" answer to the problem is determined by identifying which party invaded the other party's rights. An overly simplified example of this approach is the following: One has a right to drive down the highway without being hit by another car. If Car A is driving down the highway, and Car B rear-ends it, then Car B is the wrongdoer because it invaded Car A's rights.

The outcome in a libertarian approach is determined by how, and by whom, the rights are defined.[10] Epstein defines his set of rights as the "libertarian quartet."[11] Under Epstein's account, the law must first "prevent collision between people" by recognizing the right of personal autonomy.[12] The law then must "find some way to assign rights in external things to individuals," i.e., to define and recognize property rights.[13] Next, the law must, through the vehicle of tort law, protect the rights of personal autonomy and property from invasion, and finally, it must "facilitate gains from trade by allowing the transfer and redefinition of rights" through contract law.[14] In his early work in tort law, Epstein grappled with the question of how to identify the "rights invader" and "rights invadee" through an analysis of causation.[15]

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8. For an explanation of the libertarian/utilitarian divide, see Lea Brilmayer, *Lonely Libertarian: One Man's View of Antidiscrimination Law*, 31 SAN DIEGO L. REV. 105, 109 (1994).

9. Richard A. Epstein, *The Uneasy Marriage of Utilitarian and Libertarian Thought*, 19 QUINNIPIAC L. REV. 783 (2000) [hereinafter *Uneasy Marriage*]; FREE SOCIETY, *supra* note 4, at 9–15 (discussing the tension).

10. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 297, 299, 301 (1986). For his part, Dworkin has put forward his own theory of tort law, which stresses an "abstractly egalitarian theory of distributive justice." Stephen R. Perry, *Cost-Benefit Analysis and the Negligence Standard*, 54 VAND. L. REV. 893, 895 (2001). While Epstein does not formally introduce the concept of distributive justice, he does trace the rise of compensation theories in tort law. *See, e.g.*, CASES AND MATERIALS ON TORTS, *supra* note 3, at xxxiii.

11. *Uneasy Marriage*, *supra* note 9, at 786–87.

12. *Id.* at 786.

13. *Id.*

14. *Id.*

15. *See, e.g.*, Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

By contrast, utilitarianism confronts a legal problem not by seeking to identify the "invader" and "invadee," but rather by asking, what result would best further social utility?[16] Thus, utilitarianism is a consequentialist approach—that is, in confronting a legal problem, it looks at the consequences of legal rules. Again, the key is to define what social objective consequentialists seek to maximize—for example, utility, happiness, or wealth.[17]

Utilitarians and other consequentialists[18] do not approach a problem with a pre-defined set of rights to be vindicated, but rather put all the parties' behavior on the table for examination. As stated by Ronald Coase:

> The question is commonly thought of as one in which *A* inflicts harm on *B* and what has to be decided is: how should we restrain *A*? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to *B* would inflict harm on *A*. The real question that has to be decided is: should *A* be allowed to harm *B* or should *B* be allowed to harm *A*?[19]

Coase illustrates his fundamental insight of "reciprocal causation" with the case of the confectioner who produces noise and vibrations that disturb his neighbor, a doctor. The question is not who has the predetermined "right" to go about his work, but rather, which activity does society want to favor? According to Coase, "[t]he problem posed by this case was essentially whether it was worth while, as a result of restricting the methods of production which [sic] could be used by the confectioner, to secure more doctoring at the cost of a reduced supply of confectionary products."[20] All things considered, utilitarians define the "correct" answer as the one maximizes social utility.[21]

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16. *See* FREE SOCIETY, *supra* note 4, at 13.

17. *Id.* However, Epstein has noted that "[t]he choice of happiness, utility, or wealth raises important controversies within the consequentialist school, but these divisions pale in comparison to the starker opposition with" rights-based theories such as libertarianism. *Id.*

18. Unfortunately, the term "utilitarianism," which refers to maximizing social utility, is often mistakenly used to mean "consequentialism"; properly used, the former is a subset of the latter. *See id.*; *see also Uneasy Marriage*, *supra* note 9, at 784. On the other hand, utilitarianism is often confused with the law and economics movement, which seeks to maximize wealth, not social utility. *See* POSNER, *supra* note 6, at 391. The confusion between wealth maximization and utility maximization led Richard Posner to avowedly disclaim any association with utilitarianism. *Id.* ("Wealth maximization is an ethic of productivity and social cooperation—to have a claim on society's goods and services[,] you must be able to offer something that other people value—while utilitarianism is a hedonistic, unsocial ethic . . . .").

19. Ronald Coase, *The Problem with Social Cost*, 3 J.L. & ECON. 1, 2 (1960).

20. *Id.* Coase leaves the task of answering this and similar questions to others. *See, e.g.*, Pierre Schlag, *An Appreciative Comment on Coase's* The Problem of Social Cost*: A View From the Left*, 1986 WIS. L. REV. 919, 935 (1986) (noting that "Coase did not dispense legal prescriptions"); George L. Priest, *Gossiping About Ideas*, 93 YALE L.J. 1625, 1635 (1984) ("Coase's mes-

The conflict between libertarianism and utilitarianism is plain. In their purest forms, the former ignores consequences, and the latter suggests that only consequences matter. Additionally, libertarianism stresses the rights of individuals; utilitarianism stresses the collective good. [22] Although Epstein recognizes this potential for conflict, he suggests that, in practice, often the two approaches converge. In other words, the two approaches come up with the same "correct" answer—that is, the outcome that is protective of rights also happens to yield the best social outcomes.[23] Our society protects certain rights from invasion not simply because we favor rights in the abstract, but also because over the long term we have found that those rights serve the overall common good.

Although Epstein's critics commend him for his "touchin[g] optimism," they express doubts that the two approaches are reconcilable.[24] For his part, Epstein has remained committed to his mission to demonstrate, on a case-by-case basis, that the "forces that link individual liberty to the common good are far stronger than those that seemingly drive them apart."[25]

It is thus not surprising that Epstein has chosen to explore the potential for tension (and possible reconciliation) between these two

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sage is ultimately nihilistic. After presenting repeated examples in which attempts to correct market failures only further reduce social welfare, Coase concludes that 'economics provides no guide whatever to social policy.'"). *But see* POSNER, *supra* note 6, at 369 n.14 (while Coase is skeptical whether economics has much to contribute to human knowledge outside the domain of explicit markets, he "thinks lawyers . . . will borrow the parts of economic theory that are useful . . . .").

21. *See, e.g.*, Steven Hetcher, *Non-Utilitarian Negligence Norms and the Reasonable Person Standard*, 54 VAND. L. REV. 863, 867 (2001) ("The utilitarian thinks tort law should be used as an instrument to promote social welfare because social welfare alone is what is ultimately worth promoting").

22. *See* FREE SOCIETY, *supra* note 4, at 11; POSNER, *supra* note 6, at 346. As George Fletcher has described the conflict: "The courts face the choice. Should they surrender the individual to the demands of maximizing utility? Or should they continue to protect individual interests in the face of community needs?" George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 573 (1972).

23. According to Epstein, his basic thesis is that:

> [N]atural law thinking developed an acute and sound appreciation of the basic rights that any utilitarian would, on reflection, want to adopt in his society. . . . The first step in the reconciliation of the two traditions is to focus on some of their major battlegrounds and show how utilitarian principle, broadly conceived, supports—even dictates—many of the categorical conclusions that natural law thinkers took for granted.

FREE SOCIETY, *supra* note 4, at 15. *See also* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 5 (1985) [hereinafter TAKINGS] ("libertarian and utilitarian justifications of individual rights[,] . . . properly understood[,] . . . tend to converge in most important cases").

24. *See* Alexander & Schwarzschild, *supra* note 6, at 657, 662; *see also supra* note 6.

25. FREE SOCIETY, *supra* note 4, at 9.

approaches in his casebook. The casebook begins with one of the most celebrated and criticized cases in tort history: *Vosburg v. Putney*.[26] In *Vosburg*, fourteen-year-old Andrew Vosburg and eleven-year-old George Putney were pupils in a school in Waukesha, Wisconsin.[27] One day, George decided to get Andrew's attention by kicking him under the desk on his shin. Soon after the incident, Andrew became seriously ill and underwent two operations.[28] Eventually, he lost all use of the limb.

Vosburg raises a number of challenging questions to explore on the first day of first-year torts. Should George be held accountable for the unexpected damage that resulted from a seemingly innocuous kick in the shin?[29] To state a cause of action for an intentional tort, does the tortfeasor need to intend to inflict the damage, or is the intention to do the "wrongful act" sufficient to establish liability? Was the kick "wrongful" because it happened after school "had been called to order by the teacher"?[30] Did the doctor who gave Andrew "anodynes to quiet the pain"[31] commit malpractice that exacerbated his injuries? What about the fact that Andrew had suffered an injury "just above the knee" in a coasting accident a month-and-a-half before the incident in the schoolhouse?[32] Does it make a difference that Andrew and George were classmates—accustomed to getting one another's attention by kicking—rather than strangers on the street?

The case also presents a wonderful window into the libertarian/utilitarian debate. In deciding who should win, the libertarian would take Andrew's right of personal autonomy, that is, his right of "self-ownership," as a given.[33] According to Epstein, tort law protects the right of personal autonomy from invasion "by prohibiting the use of force or deception to compromise that autonomy."[34] Therefore, since Andrew's right of personal autonomy was invaded by George through a kick to the shin, George should be liable.

The utilitarian would approach the case much differently. Andrew has no predefined right to be free from kicks, nor does George have a predefined right to kick. The question is: Which activity do we

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26. 50 N.W. 403 (Wis. 1891) (appearing in CASES AND MATERIALS ON TORTS, *supra* note 3, at 4). For a discussion of the case and its role in American tort doctrine, see Zigurds L. Zile, Vosburg v. Putney: *A Centennial Story*, 1992 WIS. L. REV. 877 (1992).

27. CASES AND MATERIALS ON TORTS, *supra* note 3, at 4.

28. *Id.* at 5.

29. *See id.* at 524 (formally introducing the concept of the eggshell plaintiff rule).

30. *Id.* at 6.

31. *Id.* at 4.

32. *Id.* at 5.

33. FREE SOCIETY, *supra* note 4, at 24.

34. *Uneasy Marriage*, *supra* note 9, at 786.

as a society want to encourage or discourage? Moreover, what sorts of incentives do we want to create for future Georges and Andrews? If Andrew prevails, all future Georges will have to take extra care to sit up straight in their seats and refrain from seemingly innocent play; the classroom and the playground will become a hotbed of litigation activity. Alternatively, if George prevails, all future Andrews will have to take extra care in segregating themselves from others in their classes. Perhaps they will have to stay home from school, or be required to wear a "shin guard."[35]

In Epstein's world, the two approaches might converge in a single answer: Andrew could prevail because he is entitled to be free from kicks *or* because it maximizes social utility to require George to keep his kicks to himself. On the other hand, the approaches might diverge if making Andrew wear a shin guard would maximize overall social utility.[36] Certainly, first-year torts students will not be able to come up with a definitive answer on the questions posed. Indeed, scholars have not. The point is that through penetrating and provocative explanatory notes, this casebook requires students to ask these questions.

The libertarian/utilitarian debate appears more consciously and

use by another . . . seems an anomaly. . . . [T]he rights of one man in the use of his property cannot be limited by the wrongs of another."[39]

Enter Justice Holmes, the utilitarian,[40] in an opinion styled a "partial concurr[ence]": "I should say that although . . . [LeRoy Fibre] had a right to put [its] flax where [it] liked upon [its] own land, the liability of the railroad for a fire was absolutely conditioned upon the stacks being at a reasonably safe distance from the train . . . ."[41] In other words, LeRoy Fibre did not have a right to put its flax anywhere it desired on its property. Instead, the question, according to Holmes, was "whether the plaintiff's flax was so near to the track as to be in danger from even a prudently managed engine."[42]

Again, there may be a single right answer: many social benefits accrue from a regime that would permit a landowner to use his land in any way he sees fit as long as he does not interfere with the rights of others.[43] Alternatively, the answers may conflict: the landowner may have to designate part of his land as a "spark zone" and pile only rocks there.[44] The question is whether the scale is weighted to protect a predefined set of entitlements, or whether all activity is placed on the table for scrutiny.

This libertarian/utilitarian tension runs throughout the casebook. For example, does Bessie Stone have a right to "wal[k] through the gate in front of her house" without being struck by a cricket ball hit out of the nearby cricket grounds, or should she simply stay indoors on game days?[45] Does an accident victim's right of personal autonomy include the right not to wear a seatbelt, or may his recovery be reduced for his failure to buckle up?[46] Do the Hammontrees need

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39. CASES AND MATERIALS ON TORTS, *supra* note 3, at 322–23.

40. For a recent examination of Justice Holmes' utilitarianism, see ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES (2000).

41. CASES AND MATERIALS ON TORTS, *supra* note 3, at 323 (quoting Holmes, J., partially concurring).

42. *Id.* For a law and economics analysis of *LeRoy Fibre*, see RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 36–39, 164 (5th ed. 1998) (using a hypothetical looselv based on the facts of *LeRoy Fibre*). *See also* Mark F. Grady, *Common Law Control of Strategic Behavior: Railroad Sparks and The Farmer*, 17 J. LEGAL STUD. 15 (1988) (criticizing the result in *LeRoy Fibre*).

43. *See* FREE SOCIETY, *supra* note 4, at 25-31.

44. If this regime is chosen, further questions arise. For example, how large should the spark zone be? The jury below thought one hundred feet. *See* CASES AND MATERIALS ON TORTS, *supra* note 3, at 322.

45. *See id.* at 138–48 (presenting Stone v. Bolton, 1 K.B. 201 (C.A. 1950) and Bolton v. Stone, 1951 A.C. 850 (appeal taken from C.A.)).

46. *See* CASES AND MATERIALS ON TORTS, *supra* note 3, at 325–31 (discussing the seatbelt defense).

to build barricades to protect their bicycle store from cars that veer off the road, or should Mr. Jenner cease driving?[47]

The tension between the two approaches is, of course, somewhat overstated by the above analysis. The future "losers" will not necessarily take the precaution—they might simply take the risk and pay the judgment if the risk occurs. However, the overstatement serves a useful purpose, namely, to illustrate for students in plain terms that one's foundational approach to tort law can lead judges, juries, and commentators to different answers to the same legal problems. In other words, Epstein designs the casebook to replicate an oral argument in which the libertarian argues from one podium and the utilitarian from the other. The students are left free to decide who has the better argument—or to decide that they both are right for different reasons.

The libertarian/utilitarian tension is simply not explored to the same degree in other casebooks. For example, the latest edition of Franklin and Rabin's *Tort Law and Alternatives: Cases and Materials* cites *Vosburg* only as a note case, and then only with regard to the intention element and the eggshell plaintiff rule.[48] *Vosburg* is a principal case in Henderson, Pearson and Siliciano's *The Torts Process*, but the casebook does not raise the libertarian/utilitarian tension in the notes.[49] Neither of these books cites *LeRoy Fibre*. Additionally, *The Torts Process* does not cite *Hammontree*, *Stone*, or the seatbelt cases, and while *Tort Law and Alternatives* cites all three, it does not raise the libertarian/utilitarian tension in the notes.[50]

Of course, *Tort Law and Alternatives* and *The Torts Process* develop other themes in the place of the libertarian/utilitarian divide. For example, both books examine the torts litigation process in much more depth.[51] Although *Cases and Materials on Torts* does include a section on "Judge and Jury," which examines the roles to be played by

47. *See id.* at 148 (presenting Hammontree v. Jenner, 97 Cal. Rptr. 739 (1971)).

48. MARC A. FRANKLIN & ROBERT L. RABIN, TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 868 (7th ed. 2001). Franklin & Rabin's treatment of *Vosburg* appears to reflect the authors' overall view of the diminishing importance of intentional torts. *See id.*

49. *See* JAMES A. HENDERSON ET AL., THE TORTS PROCESS 14–17 (5th ed. 1999).

50. *See* FRANKLIN & RABIN, *supra* note 48, at 3 (using *Hammontree* as the introductory case in the casebook), 46 (citing *Stone* for the standard of care formulation in negligence), 410 (citing *Stone* in the context of another case), and 458–59 (briefly mentioning the seatbelt cases). I have chosen to compare Epstein's casebook to *Tort Law and Alternatives* and *The Torts Process* because they are used by my colleagues Pierre Schlag and Emily Calhoun, respectively.

51. For example, TORT LAW AND ALTERNATIVES devotes a fair amount of time in the first chapter to introducing students to the litigation process. *See* FRANKLIN & RABIN, *supra* note 48, at 9. THE TORTS PROCESS stresses the litigation process throughout the casebook. *See* HENDERSON ET AL., *supra* note 49.

both institutions,[52] for the most part Epstein leaves it to the classroom teacher to fill in the procedural gaps for students. In addition, while both *Cases and Materials on Torts* and *The Torts Process* start with intentional torts and *Vosburg, Tort Law and Alternatives* introduces students to the complexities of tort law through *Hammontree v. Jenner*, a case in which the plaintiffs argue that strict liability should govern car accidents.[53] Thus, *Tort Law and Alternatives* exposes students from day one to the concept of competing liability regimes, a theme that runs throughout the book.[54]

In the end, *Cases and Materials on Torts*—like other torts casebooks—seeks to explore the twists and turns of the law. It is the perfect option for those who are interested in exploring these twists and turns through the libertarian/utilitarian tension.

II. HISTORY MATTERS

Another distinctive feature of *Cases and Materials on Torts* is its historical approach to the study of torts. Most torts casebooks, of course, attempt to familiarize students with the common law method. After all, torts is fundamentally a common law subject. What sets *Cases and Materials on Torts* apart is the fact that it retains the older, historic common law cases that have been jettisoned by other casebooks.

Epstein inherited this approach when he joined and later took over the casebook from Harry Kalven and Charles Gregory.[55] He likely would have embraced the approach, however, even if he had started from scratch. Indeed, the approach nicely reinforces his focus on the libertarian/utilitarian divide.

For example, Epstein provides students with an in-depth examination of the age-old debate over whether negligence or strict liability should govern cases of unintentional injury. In the nearly seventy pages devoted to the subject, *Cases and Materials on Torts* introduces students to cases spanning five centuries, from *The Thorns Case*,[56] *Weaver v. Ward*,[57] *Scott v. Shepherd*,[58] *Brown v. Kendall*,[59] the *Rylands*

52. CASES AND MATERIALS ON TORTS, *supra* note 3, at 265–80.

53. FRANKLIN & RABIN, *supra* note 49, at 3.

54. I thank my colleague Pierre Schlag for this insight.

55. *See* RICHARD A. EPSTEIN, CHARLES O. GREGORY, & HARRY KALVEN, JR., CASES AND MATERIALS ON TORTS, xxv (4th ed. 1983) (reprinting the preface to the 3d edition).

56. Y.B. 6 Edw. 4, fol. 7, Mich., pl. 18 (1466) (cited in CASES AND MATERIALS ON TORTS, *supra* note 3, at 86).

57. 80 Eng. Rep. 284 (K.B. 1616) (cited in CASES AND MATERIALS ON TORTS, *supra* note 3, at 92).

58. 96 Eng. Rep. 525 (K.B. 1773) (cited in CASES AND MATERIALS ON TORTS, *supra* note 3, at 98).

cases,[60] *Brown v. Collins*,[61] and *Powell v. Fall*,[62] to the more modern fare of *Hammontree v. Jenner*[63] and the *Stone v. Bolton*[64] opinions. The strict liability versus negligence debate roughly parallels the debate between the libertarian and utilitarian approaches discussed above, with strict liability generally (although not necessarily) associated with the former and negligence generally (although not necessarily) associated with the latter.[65] The historical materials also reinforce Epstein's scholarly proposition that libertarian and utilitarian approaches may converge. For example, one advantage of a strict liability regime is that it is based on a relatively straightforward "you hit, you pay" rule and avoids the case-by-case nature of the negligence determination. Thus, the administrative simplicity of strict liability has its utilitarian benefits.[66]

The historical approach has many additional benefits as well. First, extensive treatment of the negligence versus strict liability debate provides students with a critical understanding of the advantages and disadvantages of each regime. Should defendants be required to internalize all the costs of their conduct or should they bear only those costs associated with their failure to abide by an external standard of care?[67] Does the administrative simplicity of strict liability's "you hit, you pay" regime outweigh the benefits gained by fewer lawsuits overall under a negligence regime?[68] Epstein challenges students to consider these questions throughout the explanatory notes. By contrast, given that there is no question that negligence won the battle,[69] many

59. 60 Mass. 292 (1850) (cited in CASES AND MATERIALS ON TORTS, *supra* note 3, at 106).

60. *See* Fletcher v. Rylands, L.R. 1 Ex. 265 (1866); Rylands v. Fletcher, L.R. 3 E. & I. App. 330 (H.L. 1868) (cited in CASES AND MATERIALS ON TORTS, *supra* note 3, at 111, 114, 116).

61. 53 N.H. 442 (1873) (cited in CASES AND MATERIALS ON TORTS, *supra* note 3, at 123).

62. 5 Q.B.D. 597 (1880) (cited in CASES AND MATERIALS ON TORTS, *supra* note 3, at 127).

63. 97 Cal. Rptr. 739 (1971) (cited in CASES AND MATERIALS ON TORTS, *supra* note 3, at 148).

64. 1 K.B. 201 (C.A. 1950) (cited in CASES AND MATERIALS ON TORTS, *supra* note 3, at 138).

65. *See* CASES AND MATERIALS ON TORTS, *supra* note 3, at 144–48.

66. *See* Alexander & Schwarzschild, *supra* note 6, at 658 (suggesting that "[i]f Epstein is a utilitarian, . . . [h]e is a rule utilitarian," which the authors define as a philosophy in which "social utility is to be maximized through rules, principally the common-law and constitutional rules that Epstein once championed on libertarian grounds.").

67. *See* CASES AND MATERIALS ON TORTS, *supra* note 3, at 151–52.

68. *Id.* at 152.

69. *See* CASES AND MATERIALS ON TORTS, *supra* note 3, at 153 (suggesting that "negligence principles occupy an important—many would say dominant—role in the law governing unintentional harms").

casebooks tend to cut right to the negligence victory, and present strict liability almost as an afterthought.[70]

In his scholarly work, Epstein has put forth the case for strict liability.[71] Nevertheless, he admits the choice between the two regimes is "difficult"—hence the decades of debate.[72] The casebook's historical look at those debates gives students a starting point for understanding how and why particular subjects are covered by negligence today, while others are governed by strict liability. Without knowledge of this background, the choice appears arbitrary.[73] The approach also encourages students to challenge the current boundary lines between negligence and strict liability and to imagine a different universe in which strict liability won out. For example, what would the world look like if slip-and-fall cases were governed by strict liability?

Second, the casebook's historical approach is important because it gives students some perspective on the expansion and contraction of tort liability over time. Notably, tort law as a discrete area of legal study "came strikingly late in American legal history"—the late 19th century.[74] Thus, the casebook's historical approach gives students a sense of tort law's relatively modest beginnings.

For example, the product liability section starts with an 1842 case, *Winterbottom v. Wright*.[75] In *Winterbottom*, the defendant contracted with the postmaster to supply and maintain coaches for mail delivery. Meanwhile, one Atkinson contracted with the postmaster to supply horses and drivers for the coaches. The plaintiff, an employee of Atkinson, was injured when the coach he was driving broke down due to a latent defect. The court held that the plaintiff could not sue the defendant because there was no privity of contract between them. "Unless we confine the operation of such contracts as this to the parties who entered into them," the court wrote, "the most absurd and outrageous consequences, . . . would ensue."[76]

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70. *See, e.g.*, HENDERSON, ET AL., *supra* note 49, at 163-70 (describing the historic common law).

71. *See* Epstein, *supra* note 15.

72. CASES AND MATERIALS ON TORTS, *supra* note 3, at 151.

73. The strict liability/negligence materials also track the libertarian/utilitarian debate discussed above. One advantage of a strict liability regime is that it is based on a relatively straightforward "you hit, you pay" rule and avoids the case-by-case nature of the negligence determination. Thus, the administrative simplicity of strict liability has its utilitarian benefits.

74. G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 3 (1980).

75. 152 Eng. Rep. 402 (1842) (presented in CASES AND MATERIALS ON TORTS, *supra* note 3, at 719).

76. *Id.* at 720.

The casebook then traces the demise of the privity requirement through the common law process: from "rule" (as stated in *Winterbottom*), to "rule limited by exceptions" (as explored in *Huset v. J.I. Case Threshing Machine Co.*[77]), to "exceptions swallow rule" (*MacPherson v. Buick Motor Co.*[78]). By the time students read Justice Traynor's concurrence in *Escola v. Coca Cola Bottling Co. of Fresno*,[79] which embraces the strict liability nature of product warranty while rejecting its privity limitations, they have some sense of how far the law has come. Indeed, as Justice Traynor concludes, "public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market," including to all members of the distribution chain.[80]

This historical approach is helpful in putting the current debate over tort reform in perspective. "Tort reform," as scholars often use that term in contemporary debate, denotes a contraction of tort liability.[81] It is difficult to evaluate such a contraction if one's frame of reference starts with the modern state of the law. Relatedly, the current debate over tort reform appears to presume that there is a point *to go back to* on the tort expansion continuum. Without a historical perspective, it is difficult to decide where that point might be or whether the current point is a preferable one.

The historical approach also gives meaning in the torts context to the adage "the more things change, the more they stay the same." Indeed, the same debates over the limits of tort liability that occurred years ago continue apace today. For example, the drafters of the *Restatement of Torts (Third) of Products Liability* opted to preserve the position of the *Escola* concurrence,[82] which subjects nonmanufacturing sellers of products, e.g., retailers and distributors, to liability "even when [they] do not themselves render the products defective and regardless of whether they are in a position to prevent de-

77. 120 F. 865 (8th Cir. 1903) (presented in CASES AND MATERIALS ON TORTS, *supra* note 3, at 721).

78. 111 N.E. 1050 (N.Y. 1916) (presented in CASES AND MATERIALS ON TORTS, *supra* note 3, at 722).

79. 150 P.2d 436 (Cal. 1944) (Traynor, J., concurring) (presented in CASES AND MATERIALS ON TORTS, *supra* note 3, at 729).

80. *Id.* at 730–31.

81. *See* George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1587-90 (1987) (observing that, in common parlance, "tort reform" is seen as a contraction of liability). *See also* George L. Priest, *The Inevitability of Tort Reform*, 26 VAL. U.L. REV. 701 (1992).

82. The California Supreme Court, with Justice Traynor writing for the court, adopted the position of the concurrence in *Vandermark v. Ford Motor Co.*, 391 P.2d 168, 171–72 (Cal. 1964) (presented in CASES AND MATERIALS ON TORTS, *supra* note 3, at 765–66).

fects from occurring."[83] But several jurisdictions have modified this rule as part of legislative tort reform measures, insulating non-manufacturing sellers from liability under certain circumstances.[84] Thus, an important window into the current debate over tort reform measures is the historical "fork in the road" where the common law first embraced the form of liability.

The historical approach is not without potential pitfalls for the classroom teacher. The challenge is to present the history without sacrificing the present-day debates. While Epstein presents the history in an interesting and often entertaining way, he could do more to tie the past with the present more explicitly in the explanatory notes. Certainly, the history is interesting for its own sake, but the impact of the history is maximized for students when it is compared to the present. *Cases and Materials on Torts* leaves much of this comparison-drawing task to the classroom teacher.

A related point is that the historical material takes time to teach. While Epstein has successfully updated the materials in the seventh edition to include some of the most significant modern torts controversies, for example, the breast implant, lead paint, and tobacco litigations,[85] it takes awhile to get there. Indeed, it is possible to get through the first semester of torts without reaching any of these modern controversies. Certainly, it is difficult to reach the chapters with a more "modern" tone—for example, those on damages, insurance,[86] and alternatives to the tort system[87]—in just one semester.

Finally, there are challenges from the students' perspective. The older common law cases are harder for students to read and understand, even with Epstein's helpful explanatory notes. Also, the historical approach to the subject matter runs the risk of having a student in some future litigation base his motion to dismiss plaintiff's product liability claim on lack of privity, citing *Winterbottom v. Wright*. In other words, the professor has to reiterate what the text of the casebook already makes clear, namely, that some cases are cited for their

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83. RESTATEMENT OF TORTS (THIRD) OF PRODUCTS LIABILITY §1 cmt. e, § 2 cmt. o (1998).

84. *See* RESTATEMENT OF TORTS (THIRD) OF PRODUCTS LIABILITY §1 cmt. e and annotations.

85. *See, e.g.*, CASES AND MATERIALS ON TORTS, *supra* note 3, at 822–27 (covering the breast implant litigation), 1248–49 (covering the tobacco litigation), 471–79 (covering the lead paint litigation).

86. In particular, Epstein could explore current debates more expressly in the insurance chapter. *See id.* at 927–59. The seventh edition introduces students to the basic mechanics of insurance, but does very little to tie insurance to tort liability in a more general or theoretical sense.

87. *See id.* at 851–926 (damages), 927–59 (insurance), 961–1026 (no-fault systems).

historical import, rather than as an accurate reflection of contemporary law.[88] Of course, the more general question—and it is a utilitarian one—is whether the benefits of the historical approach outweigh the costs. I believe they do.[89]

III. CONCLUSION

Torts, like all legal subjects, is complex and often contradictory. *Cases and Materials on Torts* takes those complexities and explores them through the twin themes of the "libertarian/utilitarian tension" and "history matters." For classroom teachers who find these themes interesting, valuable, and thought-provoking, *Cases and Materials on Torts* is an ideal choice.

88. *See, e.g., id.* at 85 (chapter entitled "Strict Liability and Negligence: Historic and Analytical Foundations").

89. A final mode of comparison among the torts casebooks is "heft." *See* Richard B. Collins, *Cases Versus Theory*, 21 SEATTLE U. L. REV. 853, 857 (1998) (reviewing WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW: CASES AND MATERIALS (10th ed. 1977)). Epstein's *Cases and Materials on Torts* is about average on this score, weighing in at 3.75 pounds. *Compare* FRANKLIN & RABIN, *supra* note 48 (weighing in at 4.75 pounds) *and* HENDERSON, ET AL., *supra* note 49 (weighing in at 2.75 pounds).