ESSAY

An Economic Analysis of Aquilian Liability

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I. INTRODUCTION

Alfenus Varus, a Roman jurist of the first century B.C., was presented with the following factual scenario in reference to a question of liability:

> Mules were pulling two loaded carts up the ascent to the Capitoline hill. The front cart had tilted back, and the muleteers lifted it up so that the mules could pull it easily; the front cart began to go back, and when the muleteers who were between the two carts moved out from between, the front cart struck the rear one, which then moved backward and ran over somebody's slave boy. The boy's owner asked whom he should sue.[1]

Alfenus responded that, under the *lex Aquilia*, the law depended on the circumstances.[2] In the first instance, if it were found that the muleteers moved willingly, they could be held liable because "a man does damage

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1. DIG. 9.2.52.2 (Alfenus, Digest 2), *reprinted in* BRUCE W. FRIER, CASEBOOK ON THE ROMAN LAW OF DELICT 76 (Bruce W. Frier trans., 1989).

2. *Id.*

no less when of his own accord he lets go of what he is holding up, and it then strikes someone."[3] On the other hand, "if the mules backed up because they shied at something, and the muleteers abandoned the cart from fear they would be crushed, the men cannot be sued, but the owner of the mules can be."[4] Neither party, however, would be liable if the mules simply could not hold the weight of the cart or, likewise, if they slipped.[5] Given the various possible schemes of liability and the risks to the parties involved, an observer is left wondering what effects these types of rules had on behavior and whether the legal rules were adopted with a deliberate eye to such effects.

The assignment of rights in property or contract law, according to Ronald Coase, is independent of efficiency: the party attaching more value to a right will bargain to obtain it, allowing the right to settle at its most efficient point regardless of its initial allocation.[6] But the Coase Theorem is somewhat limited in tort, where the nature of the "transaction" or accident is involuntary and the costs of bargaining for a right can be so high as to render them prohibitive. Therefore, an alternative school of economic theory was created to explain the function of tort laws and other situations where this necessary "market failure" occurs.[7] In tort, the choice between strict liability and negligence is not a choice that is "compelled by behavioral effects and realities," but rather "cultural influences, attitudes towards wealth distribution, or even intentional attempts to affect activity levels,"[8] as well as notions of justice. As a result of the inherent uncertainty surrounding the assignment of liability, affected parties to a given incident will take precautions and act to keep their costs to a minimum.[9] The legal rule chosen will determine the extent of caution the parties will take and the level of social efficiency such a rule achieves.[10]

Economic analysis has been compared to a protagonist who rides into the world of law "encountering one after another almost all of the

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3. *Id.*
4. *Id.* at 76-77.
5. *Id.* at 77.
6. This is assuming no transaction costs and that both parties are willing to engage in bargaining. *See generally* R.H. COASE, THE FIRM, THE MARKET AND THE LAW 95-156 (1990).
7. *See* Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 499-500 (1961); *see also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 167 (6th ed. 2003). *See generally* Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CAL. L. REV. 1 (1985).
8. *See* Saul Levmore, *Rethinking Comparative Law: Variety and Uniformity in Ancient and Modern Tort Law*, 61 TUL. L. REV. 234, 238-39 (1986).
9. *See* Cooter, *supra* note 7, at 3.
10. *See* POSNER, *supra* note 7, at 167.

ambiguous villains of legal thought, from the fire-spewing choo-choo dragon to the multiheaded ogre who imprisons fair Efficiency in his castle keep for stupid and selfish reasons."[11] Roman law has been characterized as "a duck as it swims, bobs and dives in the water: it hides itself at times, but is never quite lost, always coming up again alive."[12] It is fair to say that both Roman law scholars and law and economics scholars are a playful lot, and yet it is remarkable that their paths have not crossed more often—the Roman duck has indeed eluded the economic sword. This oversight largely has to do with the divergence between the common law and the civil law. While Roman law has seen significant attention from civilian legal scholars,[13] law and economics scholars, who have primarily focused on the common law, have largely ignored the civilian and Roman law traditions.[14] However, the Roman Republican legal system under the jurists is more properly compared to the common law and is similarly receptive to an economic analysis.[15]

Roman delictum under the Twelve Tables, the first important piece of legislation in the early Republic, was primarily concerned with the customary and religious law of the ancient world, in which liability was assigned on an almost purely punitive basis and predominantly focused on private vengeance as a remedy.[16] Under the *lex Aquilia*, on the other hand, there was law which, while still punitive to a degree, moved toward a more compensatory nature.[17] This was the product of both advancement in Roman legal thinking and, indirectly, a desire for pragmatism and efficiency in the law. The casuistic character of Aquilian liability was also infinitely more flexible than the Twelve Tables, allowing for formerly unrecognized causes of action to proceed and

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11. Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 452 (1974) (citation omitted) (describing Richard Posner's *Economic Analysis of Law*).

12. *See* JUSTINIAN, THE DIGEST OF ROMAN LAW: THEFT, RAPINE, DAMAGE, AND INSULT 8 (Betty Radice ed., C.F. Kolbert trans., Penguin Books 1979) (534).

13. *See, e.g.*, REINHARD ZIMMERMAN, ROMAN LAW, CONTEMPORARY LAW, EUROPEAN LAW: THE CIVILIAN TRADITION TODAY (2001); M.H. Hoeflich, *Roman Law in American Legal Culture*, 66 TUL. L. REV. 1723 (1992).

14. *But see, e.g.*, Richard A. Epstein, *The Modern Uses of Ancient Law*, 48 S.C. L. REV. 243, 243 (1996) (noting that there is a connection between law and economics and ancient law).

15. *See* Richard A. Epstein, *The Classical Legal Tradition*, 73 CORNELL L. REV. 292, 295 (1988) (arguing that the Roman casuistry converges with the common law).

16. REINHARD ZIMMERMAN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 914 (1990). The term "delict" is used in many legal systems, most notably Scotland, to denote what Anglo-American law calls a tort—a noncriminal legal wrong which arises from a contract, whether from an implicit or explicit agreement. *See* JUSTINIAN, *supra* note 12, at 64.

17. ZIMMERMAN, *supra* note 16, at 913.

wealth distribution to be maintained.[18] As the Roman concept of remedies changed, so too did its concept of liability—the rigid penalties and strict liability that pervaded the ancient law yielded to a more modern use of private law as a tool to induce parties to take greater precautions and, where such precautions failed, to award compensation.[19] This evolution was predictable.[20] Forces outside the control of lawmakers will always effect efficient rules to minimize social costs.[21] This was exactly what happened during the tumultuous period of the Roman Republic and led to the development of Aquilian liability.

This Essay will proceed along the lines of a typical economic analysis—it will examine Roman delictum as it evolved from the time of the Twelve Tables through the passage and subsequent interpretation of the *lex Aquilia*, drawing conclusions about the nature and structure of the rules based on their economic implications. It is hoped that these observations will be of interest to both law and economics scholars, legal historians, and classicists alike. The Roman jurists were academic in their approach and, even though they often eschewed efficiency in favor of their own ideas of justice, the evolution of their conceptions of the law toward a more practical and systematic understanding comports with the theory that the law will mature to its most efficient point over time.[22]

Part II will briefly explain the legal history of the Roman Republic around the time of the passage of the *lex Aquilia*, focusing on the operation of the Republican legal system in both a statutory and jurisprudential context. This Part will also describe the elements of delict as described by the jurists interpreting the *lex Aquilia*, including damages (*damnum*), fault (*iniuria*), and causation (*datum*), and place them in the proper frame for an economic analysis.

Part III will briefly outline the fundamental principles of classical law and economics to be used in the analysis, focusing on the choice between strict liability and negligence as a basis for liability. While negligence induces an efficient level of precaution in most tort cases, strict liability can be a more efficient rule where information costs are high or where only one party needs to be controlled. These principles, when applied to the juristic interpretations of the *lex Aquilia*, will illuminate the discussion in Part IV, which examines the economic

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18. *See* JUSTINIAN, *supra* note 12, at 60-61.

19. *See* ZIMMERMAN, *supra* note 16, at 914.

20. *See* Lewis A. Kornhauser, *An Economic Analysis of Law*, 16 MATERALI PER UNA STORIA DELLA CULTURA GIURIDICA 239 (1986).

21. *Id.* at 244.

22. *See id.*

implications of the various juristic interpretations and their choice of liability rule, explaining the economic theory underlying each of the rules spawned by the casuistry. Ultimately, it will become clear that the advancement from retribution to compensation was the catalyst that allowed the law of private delictual liability to evolve to a more flexible and adroit state.

II. BACKGROUND

No system of law, particularly Roman law, can be understood without some basic knowledge of the legal history of the society for whose use that law was developed and whose relationships it was meant to govern.[23] Thus, a very basic discussion of the structure of Roman government, law-making processes, and the sources of law is necessary before proceeding to a discussion of the substance of the law.

A. Roman Republican Government

The early period of the Roman Republic is traditionally described in terms of the economic and political struggle between the two orders or classes of individuals who made up the small city-state of Rome: the Patricians (*gentes*) and the Plebeians (*plebs*).[24] Even though the aristocracy retained the majority of the power in the hands of the fewest people, the structure of government acknowledged the plebeian element and, ultimately, their laws.[25]

The Roman Praetorship was an inferior magistracy, created in 367 B.C. to deal with matters of private law (*ius civile*).[26] The Praetor's powers were twofold: his general function extended over the procedures and remedies of the law and his particular function involved the day-to-day control over private litigation.[27] An Urban Praetor (*praetor urbanus*) who had jurisdiction over cases between two citizens would set forth a statement of policy, or Edict, at the beginning of his term of office.[28] The Edict stated how he intended to fulfill his duties during his year of

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23. *See* JUSTINIAN, *supra* note 12, at 9.

24. *See* BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 3 (A.M. Honoré & J. Raz eds., 1962).

25. *See* M. CARY & H.H. SCULLARD, A HISTORY OF ROME DOWN TO THE REIGN OF CONSTANTINE 62 (3d ed. 1975). The Struggle of the Orders raged for the greater part of the early Republic, culminating in the passage of the *lex Hortensia*, which gave equal binding effect to the plebeian laws. *Id.*

26. *See* NICHOLAS, *supra* note 24, at 4.

27. *See* JUSTINIAN, *supra* note 12, at 13-14.

28. *See id.* The Foreign Praetor (*prator peregrinus*) handled cases in which at least one party was a noncitizen. *See* NICHOLAS, *supra* note 24, at 4.

service and created new ways for remedies to be dispensed.[29] While modern lawyers typically view the law as conferring rights, the Roman Praetors viewed it as specifying remedies for specific wrongs; as such, the Roman system resembled the ossified common law writ and was much more rigid than the equitable remedies allowed today.[30] However, just as equitable remedies were developed at common law to allow legal redress to evolve, so too did the Roman Praetors have the ability to alter the procedures and remedies in the law, "granting a new right of action where none existed before, or by extending an existing right to cover new circumstances."[31]

The Praetor's particular function was to grant remedies to litigants in individual cases, either directly by his Edict or by a specialized pleading known as a "formula."[32] Litigation proceeded before a lay arbitrator (*iudex*), who would follow the Praetor's formula in dispensing with the action and granting a remedy.[33] The parties who appeared before an *iudex* were generally represented by advocates, men skilled more in rhetoric than in the law, who presented the facts of a given case.[34] While the arbitrator was the judge of fact and law, his decisions were guided by the commentaries of jurists, men who were knowledgeable in matters of the law and whose legal interpretations are the focus of this Essay.[35] Decisions of the *iudex* were binding on the parties but served no binding precedential value in the body of Roman law.[36]

The power to make a law (*lex*) resided in three separate bodies: the *comitia centuriata*, the *comitia tributa*, and, eventually, the *concilium plebis*.[37] The former two bodies were composed of the entire citizenry, but the power to make law in the *concilium plebis* was vested solely in the plebeian order, where *plebiscita* rather than *leges* were drafted. While *plebiscita* initially lacked the force of a *lex*, they were ultimately placed on equal footing with the passage of the *lex Hortensia* in 287 B.C., which marked the end to the Struggle of the Orders, according to traditional

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29. *See* JUSTINIAN, *supra* note 12, at 13-14.

30. *See id.*

31. *See id.* at 14.

32. *See* NICHOLAS, *supra* note 24, at 24. The *lex Aebutia*, generally dated around the second century B.C., was the first *lex* to introduce the flexible "formulary" system of claims, under which a Praetor could allow causes of action previously unrecognized. *See* OLGA TELLEGEN-COUPERUS, A SHORT HISTORY OF ROMAN LAW 53 (1993).

33. *See* NICHOLAS, *supra* note 24, at 24. The parties stipulated to the arbitrator, who was chosen from an official list of well-to-do laymen. *Id.*

34. *See id.*

35. *See* JUSTINIAN, *supra* note 12, at 22.

36. *See* NICHOLAS, *supra* note 24, at 24.

37. *See id.* at 5.

interpretations of Republican history.[38] The *lex Aquilia* was one of the first *plebiscita* to be passed after they were finally given the force of law, indicating a desire among the *plebs* for reform in the law of private wrongs.[39]

A body of statutes cannot operate effectively in isolation.[40] Flexibility through the interpretation of factual variations is necessary to allow the law to have general applicability.[41] The Roman *leges* and edicts were no different: standing alone, they were bald statements of the law and required interpretation to make any sense in a factual context.[42] Thus, men with the requisite expertise and experience, called jurists, were entrusted with the responsibility to expound the law in the same way that judges do in a common law system, though their opinions were not precedential to the same extent.[43] Roman jurists resembled both practicing lawyers and academics, building up a compendium of legal literature, teaching the law, and extensively influencing the practice of law.[44] The Roman jurists were the central characters of Roman law: it is through their interpretations that the Roman law began to take shape.[45] The jurists studied the law in a "disciplined and rational fashion" and elevated legal understanding to the erudite position it still occupies today.[46]

B. The Lex Aquilia

The earliest methods used to ascertain liability were very strict.[47] Voluntariness and state of mind of the actor were, for the most part, ignored—"if you hurt somebody, you pay."[48] As such, the early stages of criminal law and tort law were closely intertwined and even where restitution was due a victim, the satisfaction the law provided was largely based on *shadenfreude*—as Grotius put it, "the pain of an enemy is a

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38. ZIMMERMAN, *supra* note 16, at 955.
39. *Id.*
40. *See* JUSTINIAN, *supra* note 12, at 21.
41. *Id.*
42. *Id.* at 22.
43. *Id.*; *see also* NICHOLAS, *supra* note 24, at 25, 28.
44. *See generally id.* at 29 (noting that the jurists advised Praetors, the *iudex*, and private individuals).
45. *Id.*
46. *See* BRUCE W. FRIER, THE RISE OF THE ROMAN JURISTS: STUDIES IN CICERO'S *PRO CAECINA* 272 (1985).
47. *See* FRANCESO PARISI, LIABILITY FOR NEGLIGENCE AND JUDICIAL DISCRETION 51 (2d ed. 1992).
48. *Id.*

healing remedy to a wounded spirit."[49] Arguably, under the law of the Twelve Tables, the same was true.[50] The result of such a narrow view was a system of strict liability that yielded harsh results, particularly where an injurer was not entirely at fault for an injury that he may nevertheless have caused. But eventually the *purely* punitive remedial devices for wrongs gave way to a system based more on compensation—the victim of a wrong was encouraged to redeem his right to vengeance and accept a measure of compensatory damages, at first in the form of cattle but eventually in a sum of money.[51] The sum of money, however, was fixed by the State—the amount of damage caused was used as a point of reference, and the amount set by the State could, in many cases, be doubled, tripled, or quadrupled, depending on the egregiousness of the act, to better restore a plaintiff to his rightful position.[52] It must be noted that the Romans never fully abandoned the penal element of remedies and, as a result, the line between criminal and tort liability was blurred.[53] Nevertheless, once the objective became pecuniary compensation, the move toward a fault-based system was inevitable.

The *lex Aquilia* (*lex*) was a *plebiscite* of 286 B.C., the provisions of which encompassed the law of liability with regard to movable property, such as slaves, animals, and other chattels.[54] Oliver Wendell Holmes noted that, while the old law of the Twelve Tables limited the right to compensation to the noxal surrender of that which caused the harm (such as an animal or a slave), the Aquilian law removed the overriding element of vengeance which pervaded the early Roman law of liability and enlarged the sphere of compensation for bodily injuries.[55] The law of the Twelve Tables was also limited procedurally—any cause of action had to fit neatly into the specific categories defined by the Twelve Tables; the *lex Aquilia*, on the other hand, was significantly more flexible and functioned as a catch-all category under which one could bring an action in *damnum iniuria datum*, literally "damage given without right."[56] In addition to an extension of liability, the *lex* allowed for a more flexible assessment of damages to be awarded to the victim of a wrong and

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49. *Id.* at 53.
50. *See* ZIMMERMAN, *supra* note 16, at 914.
51. *Id.*
52. *Id.*
53. *Id.* at 913; *see also* F.H. LAWSON & BASIL MARKESINIS, TORTIOUS LIABILITY FOR UNINTENTIONAL HARM IN THE COMMON LAW AND THE CIVIL LAW 1 (1982).
54. This date is speculative. *See* LAWSON & MARKESINIS, *supra* note 53, at 5.
55. *See* OLIVER WENDELL HOLMES, THE COMMON LAW 10-11 (Mark DeWolfe Howe ed., Belknap Press 1963) (1881).
56. *See* PARISI, *supra* note 47, at 58.

increased the total amount that could be awarded in a given case.[57] The actual substance of the *lex Aquilia* was divided into three sections, of which the first and the third are important to the law of delict.

The first section of the *lex Aquilia* provided that "if anyone wrongfully . . . slays a male or female slave belonging to another person, or a four-footed . . . animal, let him be condemned to pay the owner as much money as the maximum the property was worth in the year (previous to the slaying)."[58] The word "wrongfully," as used in the text of the statute, is the translation of the Latin word *iniuria*, originally meaning "without legal right."[59] Under juristic influence, however, *iniuria* came to mean wrongfulness, a definition that included a previously nonexistent element of intent and thus narrowed the range of actions that gave rise to Aquilian liability.[60] *Iniuria* was later divided into two categories, one which focused on unintentional harms (*culpa*, meaning fault) and the other on intentional wrongs (*dolus*, meaning malice).[61] The *lex Aquilia* improved upon earlier laws with the innovation of equating destructive conduct with the notion of *damnum* (damage) as opposed to the aforementioned notion of vengeance-cum-surrender.[62] Because *damnum* was viewed as relatively objective but not fixed, a departure from the Twelve Tables, this chapter of the *lex Aquilia* called for damages to be determined by the highest market value in the previous year.[63] Under both this section and the third section, the amount of payment to the plaintiff doubled if the defendant denied liability, a provision that indicated a remnant desire to punish and that operated to induce settlement and keep litigation costs down.[64]

The third section of the *lex Aquilia* was similar in its mandate but applied more broadly to any movable property (*res se moventes*), an innovative subject.[65] Ulpian states that the third section covered: "other property, apart from a slain slave and herd animal, if anyone causes loss to another by wrongfully . . . burning, breaking, or rending."[66] Movable property was not covered in the earlier law of liability because the remedy of surrender would not have supported it.

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57. *Id.*
58. *See* DIG. 9.2.2 (Gaius, Provincial Edict 7), *reprinted in* FRIER, *supra* note 1, at 4.
59. *Id.* at 30.
60. *Id.*
61. *See id.*
62. *See* PARISI, *supra* note 47, at 59.
63. *Id.*
64. *See* LAWSON & MARKESINIS, *supra* note 53, at 4-5.
65. *See* ZIMMERMAN, *supra* note 16, at 958.
66. *See* DIG. 9.2.27.5 (Ulpian, Edict 18), *reprinted in* FRIER, *supra* note 1, at 6.

1. Damage: *Damnum*

Just as modern tort liability requires that damage be sustained, a plaintiff who brought a claim under the *lex* needed to prove that he had suffered a measurable loss. This loss was originally measured only by the loss directly associated with the injury (*aestimatio vulneris*), but in time came to include the plaintiff's "interest" (*interesse*) in the defendant's act not having occurred, which allowed the plaintiff to be restored to his rightful position.[67] Once *interesse* became the measure, it was only a small step to allow the plaintiff to collect indirect or circumstantial losses (*damnum emergens*) and even the lost profits associated with the damage (*lucrum cessans*), provided they were not too speculative and the defendant's act still caused the loss.[68]

Although the measure of damages under the *lex* had advanced considerably from the days of the Twelve Tables, some punitive elements remained. If a defendant denied the charges in court and was subsequently found to be at fault, he was ordered, under both sections of the *lex*, to pay double damages.[69] Even though the purpose and effect of double payment was vestigially penal, it makes much more sense when viewed from an economist's perspective—double damages for a denial of liability induces defendants to tell the truth and seeks to limit the cost of litigation.[70]

The scope of allowable damages under the *lex Aquilia* was far beyond anything awarded under the Twelve Tables—under the *lex*, damages served to protect property rights and maintain levels of wealth distribution rather than to strictly punish. Moreover, some of these remedial elements have proved to be "permanent conquests of delictual liability," specifically the concepts of *lucrum cessans* and *damnum emergens*.[71] Given the newly flexible nature of awarding damages, it was merely a matter of time before the jurists were forced to determine how to implement the discretionary remedies in a way that would actually influence the behavior of the parties subject to the rules. Indeed, it would not make sense to have a system of variable market-based remedies coupled with a simple yea-or-nay determination of fault.

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67. *See* FRIER, *supra* note 46, at 55.
68. *See id.*
69. *See* ZIMMERMAN, *supra* note 16, at 974.
70. *See id.*
71. *Id.* at 972.

2. Fault: *Iniuria* and *Culpa*

Iniuria has been called "[o]ne of the most impressive achievements of the Roman legal mind" and its basic form can be found in most legal systems of the Western world.[72] An action could be brought on the *lex* itself only if the injury at issue was caused by direct contact between the wrongdoer and the victim—this was limited to cases of trespass and reflected a desire on the part of the Romans to punish only clear and indisputable instances of malicious infliction of property loss.[73] However, like the common law, in which general rules are created and left to the courts to interpret, the rule of the *lex Aquilia* was inherently vague, and most of its usefulness came in the form of juristic interpretation.[74]

The original concept of *iniuria* resembled a system of strict liability, which is not entirely surprising given that all earlier legal schemes, including criminal punishment, contained notions of liability that were completely independent from any element of intention or fault.[75] However, in an effort to clarify what *iniuria* meant and to alleviate the harsh results in which such a strict rule resulted, particularly in the face of a market-based damage regime, the jurists began to require that a defendant act with a specific frame of mind, either fault (*culpa*) or malice (*dolus*).[76] This more nuanced approach to *iniuria* allowed for greater flexibility in decision-making—those wrongdoers able to explain why they simply could not have avoided causing harm were henceforth exonerated. The shift from general to specific types of wrongful conduct grew out of the move from fixed to ad hoc damage determinations and crystallized a fundamental principle in the law: It is "the culpability of the tortfeasor, not the injury that is occasioned by his action, [which] binds him to compensation."[77]

The difference between *culpa* and *dolus* was described well by the jurist Paul in the context of the duty of a tree-trimmer dropping branches from a tree:

> If a tree-trimmer threw down a branch from a tree and killed a passing slave—so too for a man on scaffolding—he is clearly liable if it falls on public land and he did not call out so that the accident to him could be avoided. But . . . [it is] also said that if this occurred on private land, there

72. *See* LAWSON & MARKESINIS, *supra* note 53, at 19.
73. *See id.*
74. *See* FRIER, *supra* note 46, at 30.
75. *See* PARISI, *supra* note 47, at 59-60.
76. *See* FRIER, *supra* note 46, at 40.
77. *See* PARISI, *supra* note 47, at 61 (citations omitted).

> could be an action for *culpa*; for it is *culpa* not to have foreseen what a careful person could have foreseen or to have called out only when the danger could not be avoided. According to this reasoning, there is not much difference between a path over public or private land, since paths quite commonly run through private land. But if there was no path, he ought to be liable only for (an act of) *dolus*, that he not aim at someone whom he sees passing; (a standard of) *culpa* should not be required of him, since he could not foretell whether someone would pass through this place.[78]

An action in *dolus* could only be brought if there was a willful element to the wrongdoer's actions, just as in the law of intentional torts, and it was necessarily viewed from a more subjective standpoint—the actor's state of mind must be determinable and punishable.[79] However, *dolus* and *culpa* were not mutually exclusive: one who was liable for *dolus* was necessarily *culpa*.[80] *Culpa*, standing alone, can rightly be compared to today's law of negligence—indeed, *neglegentia* was the most common form of *culpa*—and it was probably viewed by the jurists from an objective standpoint, asking whether the actor behaved in accordance with the performance generally expected of Romans. Thus, an actor's liability turned on whether his choice of behavior could rightly be considered to have been unreasonable. Though the jurists made an initial foray into objectivity, there was an overriding subjectivity in their analysis as well.[81] The fact that madmen and children escaped liability under the *lex* indicates that, at the very least, individualized circumstances were a factor in determining *culpa*.[82]

Just as the Anglo-American definition of the duty of care and negligence can at times be hard to understand and cases on those theories inconsistently resolved, the Romans had a difficult time with the concept of *culpa*, as revealed by the jurists' various casuistic interpretations.[83] One commentator has suggested that there are three possible ways that the jurists could have interpreted *culpa*: first, it could have been viewed primarily as a negligence standard; second, it could express notions of causation and foreseeability; and third, it could refer simply to the concepts of fault or blame.[84] How the jurists came to view *culpa*

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78. *See* DIG. 9.2.31 (Paul, Sabinus 10), *reprinted in* FRIER, *supra* note 1, at 31.
79. *See* FRIER, *supra* note 46, at 40.
80. *See* ZIMMERMAN, *supra* note 16, at 1027.
81. *See* LAWSON & MARKESINIS, *supra* note 53, at 26-27.
82. *See id.* at 27.
83. *See* FRIER, *supra* note 1, at 30; *see also infra* Part III.
84. *See* J. Travis Laster, *The Role of the Victim's Conduct in Assessing Fault Under the Lex Aquilia: Insights into the Analytical Methods of Roman Jurists*, 25 ANGLO-AM. L. REV. 188, 197-98 (1996).

determined which acts they deemed wrongful and which acts they deemed both wrongful and worthy of punishment. Indeed, while an objective negligence standard predominated actions of Aquilian liability, it cannot be said that jurists abandoned strict liability or subjectivity completely, particularly in cases of egregious behavior or evidentiary uncertainty.[85] Just as the evolution of Roman remedial theory, from a general aim of vindictive justice to the more refined notion of compensation, was fundamental to the eventual formulation of the more tractable concept of fault in the Roman law, so too did this evolution yield the first blossom of a theory of causation.[86]

3. Causation: *Datum*

As a final component of both modern and Aquilian liability, the defendant's action must also have *caused* the harm inflicted upon the plaintiff. But there is little evidence to suggest that the Romans operated on any particular theory of causation—cases of remote causation presented difficult questions because the Roman concepts of action, fault, and damage were so tightly linked to foreseeability.[87] Thus, the Roman jurists never directly addressed the concept of proximate causation, except to the extent that *lucrum cessans* and *damnum emergens* were awarded. Nevertheless, their hypothetical cases always seem to fall well within the purview of what modern causation jurisprudence would attribute to a wrongdoer.[88]

The salient point regarding causation is that the jurists limited their analysis by strictly circumscribing the duty of care owed and confining Aquilian liability mostly to positive acts involving blatant misconduct.[89] Professor Bruce Frier has argued that this is because the original scope of actions on the *lex* itself required direct causation, while actions *in factum*, a later development, encompassed indirect causation as well.[90] An action would proceed under the *lex* if the harm was caused by (1) direct physical contact to (2) owned property resulting in (3) actual

85. *See id.* at 188-89. Were *culpa* an objective, as opposed to subjective, standard, many of the problems of proof associated with an actor's frame of mind would have been avoided. *Id.* at 198.

86. *See* PARISI, *supra* note 47, at 66 (noting that the primitive law's focus on punishment of civil wrongs corresponds to the "childhood" stage of the law).

87. *See* LAWSON & MARKESINIS, *supra* note 53, at 30.

88. *See* FRIER, *supra* note 46, at 72.

89. *See id.*

90. *See* Bruce W. Frier, *Prototypical Causation in Roman Law*, 34 LOY. L. REV. 485, 489 (1989). Actions *in factum* were provided where a no cause of action directly under the *lex* existed, allowing for more flexible methods of redress that were similar to equitable remedies. *See* FRIER, *supra* note 46, at 3.

damage.[91] Anything less, and the cause of action might have been *in factum*.[92] These three criteria describe what Professor Frier calls an "arc of action," running from the physical act to the alteration of property to the plaintiff's legal relationship with the property.[93] But, Professor Frier continues, this "arc" is incomplete because it fails to consider a defendant's state of mind (*iniuria*).[94] The eventual blurring between *in factum* actions and actions on the *lex* began with the evolution of *iniuria* into distinct concepts of fault and resulted, for the first time, in the emergence of causation as a distinct legal concept.[95] For this reason, both the Roman and modern conceptions of fault contain an element of foreseeability.

Liability, damage, and causation are truly linked together—when one evolves, the others must follow for an internal and logical consistency to remain. Part IV will analyze the preferences exhibited by the jurists in interpreting the *lex Aquilia* and the effects that the various interpretations of the statutory text had, both ex ante and ex post, on the parties to an accident. In most instances this Essay will provide an excerpt of the extant juristic text, an explanation of its importance, and an analysis of its place in law and economic theory, emphasizing the extent to which a given rule expresses a pragmatic consideration and the extent to which it expresses a more justice-oriented consideration. However, to contextualize this analysis for readers unfamiliar with the tort theories of law and economics, Part III will outline one leading theory of the law and economics of Anglo-American tort law.

III. CLASSICAL LAW AND ECONOMICS AND ANGLO-AMERICAN TORT LAW

Traditional law and economics has been home to divergent schools of thought regarding the merits of public control, generally in the form of regulations or common law rules, over liability assignment among the actors in a given society.[96] One theory, which has been referred to as the "model of cooperation," has its roots in Ronald Coase's seminal work, "The Problem of Social Cost."[97] The so-called "Coase Theorem," which states that the assignment of liability is independent of the ultimate

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91. Frier, *supra* note 90, at 492.
92. *Id.*
93. *Id.* at 498.
94. *Id.*
95. *See id.* at 499.
96. FOUNDATIONS OF THE ECONOMIC APPROACH TO LAW 41 (Avery Wiener Katz ed. 1998).
97. *See generally* Coase, *supra* note 6, at 95-156.

allocation of resources, functions well under an assumption of low transaction costs and voluntary transactions, and is most helpful in the areas of contract and property law.[98] Coase claims that it does not matter to whom a court assigns liability because the parties will simply bargain around the court order.[99] But where harm is unexpected, as in tort, the costs of both ex ante and ex post bargaining between the parties to an accident can be prohibitive, and Coase's theorem does not function as well. Ex ante bargaining may well be impossible, given the uncertain and involuntary nature of tortious conduct.[100] As for ex post bargaining, the transaction costs may be prohibitive as a result of ill will between the parties or a sense of entitlement that affects the willingness of the right-holder to engage in bargaining.[101]

Under an alternative economic theory of tort law, then-Professor Guido Calabresi argued that the law governing torts should be viewed as a regulatory regime used to control externalities and costs imposed on third parties—the goal is to force the "enterprise" or individual who causes a harm to bear its costs in the same vein as a Pigouvian tax.[102] Calabresi's theory, which generally calls for the parties to an accident to completely internalize, or bear, their costs in the face of high transaction costs, was extended by Professor Robert Cooter, who posited that social efficiency is maximized when both parties are taking an efficient level of precaution to avoid the potential harm.[103] The question with which this Essay will be concerned is: Which system of tort liability will induce the parties to an accident to take a greater level of precaution and result in greater efficiency—no liability, strict liability, or negligence?

A system of negligence with contributory or comparative fault gives both parties to an accident the incentive to take an efficient level of precaution, and they can be said, according to Robert Cooter, to be taking "double responsibility at the margins."[104] Professor Cooter argued that when individuals take double responsibility, each party to an accident "sweeps all of the values affected by his actions into his calculus of self-interest, so that self-interest compels him to balance all the costs and

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98. *See id.* at 104, 114-15.

99. *See id.* at 104. This is the traditional characterization of the Theorem, though Coase himself claims that assuming no transaction costs is unrealistic. *See id.*

100. *See* Robert Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1, 19 (1982).

101. *See id.* at 15-20.

102. *See* Calabresi, *supra* note 7, at 500-01. *See generally* A.C. PIGOU, THE ECONOMICS OF WELFARE (4th ed. 1932). The basic premise is that a tax may be assessed to enterprises engaged in harmful activities as a disincentive to continue those activities. *Id.*

103. *See* Cooter, *supra* note 7, at 3.

104. *Id.* at 4.

benefits of his actions."[105] The incentives of private individuals are considered socially efficient when all of their costs and benefits have been internalized.[106] But there is an inherent tension between efficiency and justice—that is, when a victim is compensated, that victim may externalize his or her costs in reliance upon that compensation.[107] This, Professor Cooter pointed out, is the "paradox of compensation"—if an injurer may cause harm with impunity, that harm is externalized by the injurer; if a victim might be compensated by the injurer, harm is externalized by the victim.[108] A system of strict liability, which holds injurers liable in all scenarios, allows for victims to externalize their costs, while a rule of negligence forces both the injurer and the victim to internalize their costs—the injurer will satisfy the legal standard to avoid liability, while the victim will take an efficient level of precaution because he would bear the residual liability or otherwise be barred from recovering.[109] To vindicate both justice and efficiency, a court or legislature must set the legal standard at its most efficient point, which this Essay will call x^* throughout this Part.

To understand how Cooter's theoretical system operates on the behavior of the parties to an accident, some graphics and notation are necessary.[110] The probability of an accident (p) decreases when the level of care (x) by the potential injurer increases.[111] When an accident occurs, it causes harm such as medical expenses, lost income, and damage to property. These cumulative harms are grouped together as accident costs (A) which, this Essay shall assume, are constant for this hypothetical accident.[112] Thus, the expected harm from an accident can be represented as $p(x)A$, shown in Figure 1 as a downward sloping curve with lower expected accident costs as greater levels of care are taken.[113] The greater the x, the lower the expected probability of an accident and, thus, the lower expected cost of the accident. Taking precaution costs time, money, and convenience—considering these precaution costs together, this Essay assumes that for each unit of either time, money, or effort, it

105. *Id.* at 3.
106. *See id.*
107. *See id.* at 4.
108. *Id.*
109. *Id.* at 3.
110. This Part adopts Professor Cooter and Professor Ulen's economic model of an accident. *See* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 310-30 (4th ed. 2004); *see also* Kornhauser, *supra* note 20, at 237 (describing a similar model).
111. *See* COOTER & ULEN, *supra* note 110, at 321.
112. *See id.*
113. *See id.*

costs an actor $\$w$ per unit of precaution.[114] Therefore, wx equals the total cost of taking precaution; its graph in Figure 1 slopes upward to represent the greater costs of greater precaution.[115] The total social cost (SC) of an accident is the sum of the costs of precaution and the costs of expected harm, represented by $SC = wx + p(x)A$ and graphed in Figure 1 as the vertical addition of the two other cost graphs.[116]

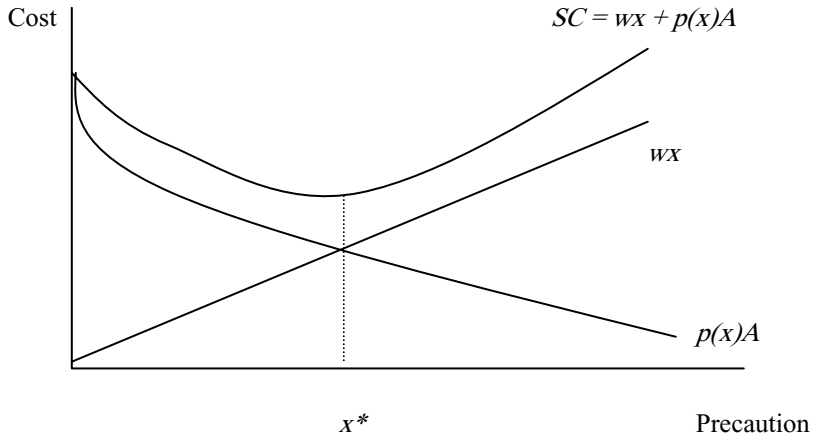

Figure 1
The Social Costs of Accidents[117]

The value of x is set at the level of precaution that minimizes the social costs of an accident and is thus the efficient level of precaution, represented here as x^*.[118] Depending on the rule of liability selected, the costs expected to be borne by each party will fluctuate.

Assume it is a case unilateral in nature; that is, a case where only the actions of the injurer will affect the probability of an accident. This would likely correlate to a system of either no liability or simple strict liability.[119] Under a system of no liability, a rational potential injurer will take no precaution, and the total costs of the accident, $p(x)A$, will be absorbed entirely by the victim.[120] Normatively speaking, this type of

114. *See id.*
115. *See id.*
116. *See id.*
117. *See id.*
118. *Id.* at 323.
119. *See id.*
120. *Id.*

liability rule is undesirable because the costs are borne entirely by those without control over the frequency of accidents. Under this rule, potential injurers have no incentive to take any sort of precaution because they will not be liable under any circumstances, and they therefore will externalize their costs.[121] Under a system of strict liability where precaution is unilateral, the potential injurers would bear all of the costs of the accident, $wx + p(x)A$, no matter what their levels of precaution.[122] Therefore, a rational actor would take the level of precaution that minimized his total costs, forcing him to internalize those costs, represented in Figure 1 as point x^*. For both of the above scenarios, the reverse would be true if only the victim were taking precautions. Where the rule is no liability for the injurer, the victim would be induced to take efficient precautions so as to prevent injury, the costs of which he alone will bear (internalize); where the rule is strict liability, the victim would take no precaution because, no matter what happens to him, he will be compensated (externalize).[123]

One problem with cases of unilateral precaution is that they are not realistic; rational actors on both sides of a harm will generally take some measure of precaution, no matter how inefficient, out of the sheer desire to avoid that harm. Cases of bilateral precaution must account for precautions taken by both parties to an accident and make the analysis more complex.[124] But having to consider the actions of both parties does not mean that the paradox of inefficiency is resolved—that paradox is created by the rules of no liability and strict liability and not by a failure to take the actions of both parties to an accident into account.[125] Under no liability and strict liability, there are incentives for one or the other of the parties to an accident to take efficient precaution, but not both.[126] Only by changing to a rule that operates on both parties can the asymmetrical incentives to precaution created by strict and no liability rules be cured.

Of the various types of liability rules that may be employed to create bilateral precaution, it is generally thought[127] that a rule of

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121. *Id.*; *see also* Calabresi, *supra* note 7, at 500-01.
122. *See* COOTER & ULEN, *supra* note 110, at 323.
123. *See id.* at 321.
124. *See id.* at 325.
125. *See id.*
126. *See id.* at 332.
127. Some scholars argue that strict liability is the more, or at least equally, efficient rule. *See, e.g.*, POSNER, *supra* note 7; Steven Shavell, *Strict Liability versus Negligence*, 9 J. LEGAL STUD. 1 (1980) (arguing that the choice between strict liability and negligence amounts to a choice between the lesser of two evils); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973) (preferring a rule of strict liability); Mario J. Rizzo, *Law Amid Flux:*

negligence with a defense of contributory or comparative negligence will produce the most efficient result—the parties' respective costs will be internalized to the greatest extent because they will both be forced into a requisite level of precaution based on the level of care ascribed to each by the rules of negligence (to the injurer) and contributory or comparative negligence (to the victim).[128] The reason for this is simple—the assignment of liability by a court will change (and be uncertain) depending on which party was able to manifest a reasonable level of care, and, as a result, both parties to an accident will have an incentive to take the reasonable and efficient level of care.[129] In short, both parties must internalize their costs in an attempt to avoid liability.[130] Figure 2 represents the injurer's level of precaution and the costs of an accident under a system of negligence. In such a system, x^* represents the court-imposed standard of care—the level of precaution which a reasonable actor must take to avoid liability.[131] If the care of the potential injurer falls below x^* ($wx + p(x)A$), he will bear both the costs of the accident and the costs of precaution; if the injurer's level of care equals or is greater than x^* (wx only), the victim will bear the accident costs while the injurer will absorb only the costs of his precaution.[132] Thus, both the injurer and the victim will have an incentive to take the efficient precautionary measures dictated by x^*, provided the court sets x^* at the *lowest possible point* on the total social-cost curve. If the legal standard were set higher, the costs of taking precaution would, in many cases, exceed what a rational actor would deem necessary given the probability of an accident.

The Economics of Negligence and Strict Liability in Tort, 9 J. LEGAL STUD. 291 (1980) (arguing that a system of strict liability is the proper choice where information costs are high).

128. *See* COOTER & ULEN, *supra* note 110, at 310-20.

129. *See id.* at 328.

130. *See id.* at 326-27.

131. *See id.*

132. *See id.* at 326-28.

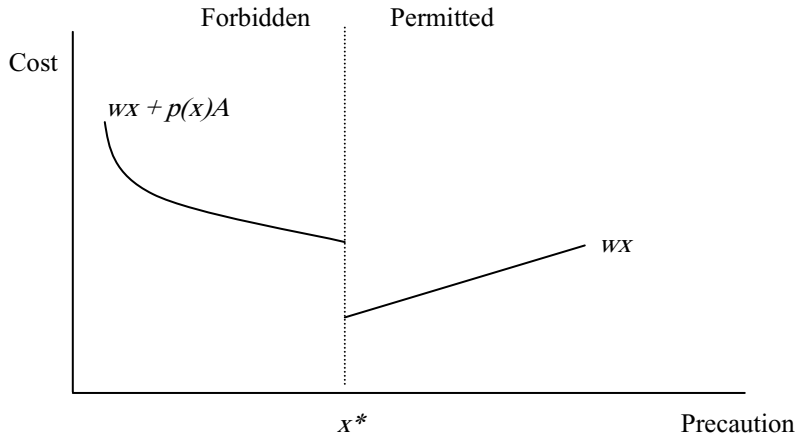

Figure 2
Injurer's Costs in a System of Negligence[133]

The defenses of contributory negligence and comparative negligence complicate matters slightly but do not practically change the efficiency of precaution taken by the parties under a simple negligence rule.[134] In essence, a defense of contributory negligence imposes a level of care on the victim as well as the injurer—if the victim was even partially responsible for the harm, a court will hold him liable in lieu of the injurer.[135] Contributory negligence, however, yields a harsh result for victims and with no improvement in terms of efficiency over a mixed-fault case of simple negligence. In a comparative negligence system, on the other hand, the assignment of liability where both the injurer and the victim contributed to the harm will be proportional to each party's causal contribution.[136] This rule helps mitigate the unpleasant backwash of a contributory negligence rule and changes the ultimate distribution of resources but, again, does not alter the efficiency of the incentives for each party to take precaution.[137] Contributory and comparative negligence *do*, however, affect efficiency with regard to the level of activity in which each party engages and causes the frequency with

133. *See id.* at 327.
134. *See id.* at 328-29.
135. *See id.*
136. *See id.*
137. *See id.* at 329.

which the potential parties to an accident will engage in risky behavior to fluctuate.[138]

Under a simple negligence rule, an injurer can meet the standard of care by simply taking precaution no matter how often he engages in certain behavior, setting brush fires for instance, without increasing expected liability.[139] So, in a case of unilateral precaution, a simple negligence rule allows a brush-burner to externalize the *marginal risk* of harm—the greater activity level will function to increase the probability of an accident.[140] Under a strict liability rule with unilateral precaution, however, a brush-burner will be induced to internalize his costs and reduce the number of occasions in which he is burning brush—he will internalize his costs by reducing his overall level of activity.[141] A dilemma arises when we move to a situation where bilateral precaution is required—it is generally impossible to control activity levels of two parties with only one rule.[142] Cooter proposes that an additional regulatory device is necessary to control the activity level of brush burners. Because a rule of negligence operates on the activity levels of the victims as well as the injurers, it is the better rule in most tort cases as they are, more or less, all cases where bilateral precaution is compelled.[143] Strict liability plus contributory negligence would arrive at the same result but would be inefficient in cases where the victim can influence the extent of damages. While rules of strict liability or negligence may not be compelled by societal conditions or "behavioral effects and realities,"[144] the choice is compelled by the nature of the accident to be regulated. Because the nature of most accidents commands a negligence rule, the law will inevitably gravitate toward that point.[145]

Knowledge of the economic effects of the various tort liability schemes can help considerably in deciding which rule is best in a given situation. But pure economic analysis fails to consider many notions of justice or fairness.[146] Advocates of the economic approach to law defend the nature of their work by claiming that their analysis, at the very least, limits the total ground that must be covered by fairness arguments in

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138. *See id.* at 332.
139. *See id.*
140. *Id.*
141. *Id.*
142. *Id.* at 333.
143. *Id.*
144. *See* Levmore, *supra* note 8, at 238.
145. *See* Kornhauser, *supra* note 20, at 238.
146. *See* Epstein, *supra* note 127, at 151-52.

deciding on a particular rule.[147] A rule of negligence, therefore, developed initially out of fairness concerns and was only later justified on economic grounds.[148] But, some say, the efficiency justifications are "intractable" because a rule of negligence requires a court to speculate about what might have happened in two alternate worlds and then to compare the outcomes.[149] Thus, the attack on a rule of negligence is based on its operational precision and requisite empirical determinations—the methods of testing the rule are inadequate.[150]

These empirical failings will become apparent in this Essay's analysis of the Roman law, both in the context of damage determinations and litigating issues of liability. The Romans were nevertheless able to strike a shrewd balance among efficiency and justice. The ability of the jurists to vindicate those concerns and to make fault-based liability work at its most effective level, even during its infancy, was extraordinary.

IV. AN ECONOMIC ANALYSIS OF AQUILIAN LIABILITY

The Roman jurists studied and manipulated the law in a "disciplined, rational fashion . . . deduc[ing] fundamental principles and concepts of law, and . . . appl[ying those] . . . principles and concepts in the coherent development of new legal rules and institutions."[151] The opinions penned by the jurists had a vast impact on the Roman *iudices* and Praetors and attributed to the rise in population at the end of the Republic and the judiciary's willingness to use the prefabricated legal principles of the jurists to decide cases in their bloated caseload.[152] As such, reliance on the opinions of the jurists became important for party litigants and *iudices* not so much for their "specific content" but more because of "the fact of the jurists' professional presence" and the "legal security" their presence entailed.[153] The jurists had indeed created a culture in which their knowledge of the operation of legal rules helped them to formulate, to a large extent, the principles upon which the legal history of the world is based.[154] It is their initial exposition of these principles with which this Part is concerned.

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147. *Id.* at 152.
148. *Id.* at 153; *see also* Cooter, *supra* note 7, at 4.
149. *See* Rizzo, *supra* note 127, at 292.
150. *See id.*
151. FRIER, *supra* note 46, at 272. The result of this effort was to alienate the general population from the law and affirmatively require professional assistance in asserting legal rights and enforcing obligations. *Id.*
152. *See id.* at 277.
153. *Id.* at 282.
154. *See id.* at 286-87.

This Part begins it discussion with *damnum* because its evolution from the purely punitive approach (under the ancient law and the law of the Twelve Tables) to a principle of compensation (under the *lex Aquilia*) was the impetus for the advancement of fault-based liability. Paul, a jurist under Alexander Severus (A.D. 222–235), expressed the principle of limiting damages to market value in a case involving the death of a "natural son," a slave boy who was the product of a sexual relationship between an owner and his woman slave.[155] While the sentimental value of the "natural son" makes his inherent value to the plaintiff greater than an "ordinary" slave boy, Paul quotes Sextus Pedius as saying that "the prices of property stem not from personal feelings or individual needs, but from general usage."[156] This rule makes sense because the subjective or sentimental value of property presents serious problems of proof at trial, particularly in the case of a "natural son," where, at the time, actual paternity would be impossible to determine.[157] Market value, however, clearly would not have made the plaintiff whole. Moreover, if an owner expected that damage caused by the death of his "natural son" would be greater than a court would award, he would be induced to take an inefficient amount of precaution (greater than he would with an ordinary slave).[158]

This case would thus be an area where a punitive measure of damages or loss-of-society damages in addition to market-price compensation might be necessary—wrongful death cases were often quasi-criminal, where punitive remedies are most at home.[159] If a master were confident that he would be able to receive damages on top of the market remedy, he would be induced to take lesser, and more efficient, precaution. While the rule is not entirely clear from the text, it is curious to note the absence of the qualifier "*iniuria*," indicating a preference for strict liability in this situation.[160] Thus, assuming this interpretation calls for strict liability and market-price damages only, administrative and litigation costs, in addition to the information costs associated with a

155. *See* DIG. 9.2.33 (Paul, Plautius 2), *reprinted in* FRIER, *supra* note 1, at 57.

156. *Id.*

157. Professors Cooter and Ulen note that evidentiary uncertainty induces injurers to take an excessive, and thus inefficient, level of precaution. *See* COOTER & ULEN, *supra* note 110, at 343-44.

158. *See* POSNER, *supra* note 7, at 69.

159. *Id.* at 218.

160. *See* DIG. 9.2.33 (Paul, Plautius 2), *reprinted in* FRIER, *supra* note 1, at 57. Professor Cooter makes it clear that the only time strict liability will be efficient in a case of bilateral precaution is when the victim has no control over the potential amount of damage, as in a case that calls for market damages. *See* Cooter, *supra* note 100, at 8.

paternity determination, would be at a minimum.[161] While the costs of the master's precaution would not be efficient, perhaps this is a trade-off that Sextus Pedius was willing to make.

Paul continued that, in addition to market-value compensation, "we shall be held to have lost what we either could gain or were forced to pay out."[162] These additional damages refer, respectively, to *lucrum cessans* (could gain) and *damnum emergens* (forced to pay out).[163] The justification underlying the expectation interest of *lucrum cessans* was the need to put the victim in as good a position as he would have occupied "but for" the accident. For the Roman jurists, this concept must have raised suspicion due to its speculative nature—the subjective determination involved in expectation interests likely presented sticky factual disputes and problems of proof. Thus, for example, a fisherman whose nets were destroyed may collect the value of the nets, but not the value of the fish he was unable to catch before he could replace the nets.[164] A rule allowing for the value of the fish to be collected would induce a potential injurer to take excessive precaution regardless of the legal standard, which here would presumably be negligence (*iniuria*).[165] Moreover, the fisherman would be tempted to overestimate the number of fish he caught on a regular basis and potentially increase litigation costs by putting facts in dispute.[166]

Consequential damages, *damnum emergens*, were closely linked to notions of foreseeability and scope of liability. The jurists seemed to allow *damnum emergens* only when the measure was well within the scope of what Anglo-American law would consider proximate cause.[167] For instance, Ulpian wrote of a slave who was wrongfully injured, but whose value was not lowered.[168] While the Aquilian action for the injury would fail (i.e., there was no direct damage), a master would nevertheless be allowed to recoup medical expenses.[169] It would hardly make sense for these expenses to go uncompensated—not only is this measure of damage required to make the plaintiff whole but it is also necessary to deter intentional, and potentially malicious, conduct. This delict, while

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161. *See* COOTER & ULEN, *supra* note 110, at 343-44.
162. *See* DIG. 9.2.33 (Paul, Plautius 2), *reprinted in* FRIER, *supra* note 1, at 57.
163. *See* FRIER, *supra* note 1, at 55.
164. *See* ZIMMERMAN, *supra* note 16, at 972.
165. *See* COOTER & ULEN, *supra* note 110, at 341.
166. *See id.* at 342-43.
167. *See* LAWSON & MARKESINIS, *supra* note 53, at 30.
168. *See* DIG. 9.2.27.17 (Ulpian, Edict 18), *reprinted in* FRIER, *supra* note 1, at 59.
169. *Id.* This would be allowed under an action for "outrage," which is an action arising out of a dignitary harm. *See* FRIER, *supra* note 1, at 177.

lacking in actual damage, would involve a coercive transfer of wealth, as opposed to the accidental *delicta* that result from conflicting but legitimate activities.[170] This conduct is inherently inefficient because it bypasses the market and induces society to take a greater level of precaution than is socially efficient.[171] Awarding consequential damages, therefore, would have been necessary to induce efficient precaution. Because the problems of proof are not as evident here as with *lucrum cessans* and the medical expenses can more easily be measured, the jurists, as in American courts, seemed more inclined to award *damnum emergens*.

The line between expectation damages and consequential damages is based on which party is in the better position to prevent the harm. For example, it would behoove a fisherman who realizes that the destruction of his nets will cost him profits to invest in back-up nets—the victim in this situation would have an inkling, ex ante, that the harm would be greater than the value of the property and would therefore be induced to take measures himself to prevent the loss. He is in the better position to prevent harm. Under *damnum emergens*, on the other hand, the victim has very little control over the ultimate measure of damages, and it is more just to place the burden of compensating the harm on the party who causes it.

The punitive nature of damages survived most overtly in a double-damages provision that allowed for a plaintiff to "obtain . . . [one's] property and a penalty in those cases where . . . [one] sue[s] for double against a person who denies liability."[172] While punitive damages were usually awarded in cases where the defendant's conduct causing the accident was willful, wanton, or malicious, here they were awarded as an incentive to settle and to prevent the defendant from lying in court.[173] Accordingly, this provision would have reduced the considerable costs of litigation and administration of cases brought under a law which dealt with matters that were almost all obviously wrongful.[174] A defendant would most likely have conceded guilt after performing an ad hoc balancing of his probability of prevailing with the expected costs of having to both litigate the matter of liability and potentially pay double.[175]

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170. *Cf.* COASE, *supra* note 6, at 95-156 (dealing primarily with conflicting uses).

171. *See* POSNER, *supra* note 7, at 205.

172. *See* DIG. 4.6, 9 (Gaius, Institutes 4), *reprinted in* FRIER, *supra* note 1, at 24.

173. *See* ZIMMERMAN, *supra* note 16, at 974.

174. *See id.*

175. *See* Frier, *supra* note 90, at 507. The Romans probably viewed the double payment as the presumptive award and that a defendant could escape it by simply admitting fault at the outset. *Id.*

The effect on the adjudication of the claim after the defendant admitted fault was recorded by Ulpian, who stated that "the *iudex* is appointed not to decide the issue (of liability), but to evaluate the loss; for there is no room for deciding (the issue of liability) against persons who admit liability."[176] However, Paul noted that once a defendant admits fault, the plaintiff would have been tempted to "evaluate[] the claim at an amount that . . . [was] (excessively) high."[177] Thus, the costs of adjudication were not entirely removed from the equation, but only substantially reduced—if a plaintiff wished to present a laundry list of losses, including *lucrum cessans* and *damnum emergens*, in an attempt to punish the defendant himself, those costs might not have been so reduced after all.

Ancient societies were dominated by the "antiquated and static" system of strict liability, partially because it was conducive to the concept of retributive justice, but also because of very real problems of proof, similar to the problems seen with the damages cases.[178] The fact that the Romans moved from the archaic system of private wrongs under the Twelve Tables to one of *iniuria* under the *lex Aquilia* may give some indication about the relative costs and availability of information at that time in the Republic. Indeed, the third and second centuries B.C. were such a time, for they marked the end of the Struggle of the Orders and the rise of plebeian participation in government, and they were a time of great reform to the legal system and the rise of legal intellectualism.[179] The legal norms laid down by the jurists, particularly in the area of private wrongs, could henceforth be applied across many factual disputes.[180] The abstract legal concepts developed by the jurists were inspired by the sheer size to which the Republic had grown—no longer would the autonomous and locally inspired legal systems common in the Greek city-states be adequate.[181] Thus, the combination of society's desire to compensate, the new and comparatively streamlined courts, advanced legal procedure, and the uniform legal principles enunciated by the professional jurists in a time of intellectual flowering enabled these new and flexible conceptions of fault and justice to evolve and allowed for a more sharpened ability to examine the respective responsibilities of the parties.

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176. *See* DIG. 9.2.25.2 (Ulpian, Edict 18), *reprinted in* FRIER, *supra* note 1, at 25.
177. *See id.*
178. *See* POSNER, *supra* note 7, at 256; Rizzo, *supra* note 127, at 311.
179. *See* TELLEGEN-COUPERUS, *supra* note 32, at 38-39.
180. *See* FRIER, *supra* note 46, at 276.
181. *See* TELLEGEN-COUPERUS, *supra* note 32, at 62.

Actions which were considered *iniuria* were quite common in cases of deliberate killing or injuring because they were inherently, and objectively, wrongful.[182] For instance, injury that was directly and intentionally inflicted, such as the intentional slaying or wounding of a slave, was considered actionable in Aquilian liability as *iniuria*, provided *damnum* was done.[183] Thus, a simple rule of *iniuria*, at least in the law of private wrongs, was limited in that every killing or injury was punished by virtue of its occurrence, and there was no room for exculpatory explanation.

For the change from strict liability to a fault-based standard to be truly effective and consistent with the market-based remedies which the *lex* offered, a more detailed and refined description of what it means to be *iniuria* was necessary. *Culpa* was inherently an objective concept, but in some cases it was more subjective than *iniuria* alone—while *iniuria* involved simple wrongfulness, a concept so broad that it encompassed the entirety of what modern law splits into criminal law, intentional tort, and negligence, *culpa* allowed for more individualized determinations of fault. Paul stated, "if a person sets fire to his stubble or thorns in order to burn them up, and the fire escapes more widely and by spreading damages another's grain or vines," then the correct inquiry would be into "lack of skill or carelessness."[184] If the fire was set on a windy day, he would be "guilty of *culpa*"; but if a sudden burst of wind caused the fire to spread, then he would have been free of *culpa*.[185] This interpretation of *culpa* does not seem to accord with modern conceptions of negligence—that is, it would be negligence whether the wind was persistent or whether it was simply a gust under Anglo-American conceptions of fault. The setting of brushfires would probably fall under a strict liability rule, just as American tort law holds blasters or manufacturers engaged in destructive or dangerous activities strictly liable.[186] Part of the reason modern law uses such a rule is because of the difficulties in proving causation and fault. Indeed, a rule of simple strict liability would have induced the injurer in this case to take efficient precaution against spreading and has the additional effect of reducing the injurer's level of activity—he will burn less brush.[187] But because simple strict liability would not induce efficient precaution,[188] a defense of contributory or

182. *See* ZIMMERMAN, *supra* note 16, at 999.
183. *See* PARISI, *supra* note 47, at 58-59.
184. *See* DIG. 9.2.30.3 (Paul, Edict 22), *reprinted in* FRIER, *supra* note 1, at 44.
185. *Id.*
186. *See* W. PROSSER & W. KEETON, THE LAW OF TORTS 552 (5th ed. 1984).
187. *See* COOTER & ULEN, *supra* note 110, at 323, 332.
188. *See* Cooter, *supra* note 100, at 8.

comparative negligence or a rule of simple negligence would be necessary to induce both parties to efficient levels of precaution.[189] A simple negligence rule, as opposed to strict liability plus contributory negligence, would induce the same level of precaution, but would have the added effect of increasing the activity level of the defendant—the brush-burner would burn more shrubs and externalize the marginal risk of harm caused by the additional burning on his neighbor.[190]

The jurists recognized a defense akin to contributory negligence and based such a principle on the fact that a plaintiff's own culpable action cancelled out the culpability of the defendant.[191] Ulpian noted that if a slave were killed by a javelin, no Aquilian action would lie unless that slave had exhibited a lack of care by crossing through a field reserved for throwing javelins.[192] An exculpatory defense induces a victim to take a greater level of precaution and internalize his costs. But this is a case in which a master will be liable for the contribution of his slave. Would the precaution by the slave be imputed to the master or would a case involving a slain slave turn into one of unilateral precaution? If this situation was to be considered one of unilateral precaution, a rule of strict liability would function just as well, if not better, than a negligence rule because there would be no need for "double responsibility at the margin."[193] But if there is, in fact, an imputed duty to take precaution (as in respondeat superior), both fairness and efficiency require that negligence or, at the very least, strict liability with a defense of contributory negligence be the rule because there would be a need for an incentive for the master to keep watch over his slave.[194] Indeed, what is seen in this rule is a presumption of strict liability with a defense of contributory negligence—the efficient outcome.

The variability in damages led the Roman jurists to conceive new concepts of assigning fault to square the *lex* with the ideas of justice and intuitive efficiency. Another consequence of this rational maneuvering was the bifurcation of liability into actual principles of causation.[195] Returning to the case of the muleteers and the accident on the Capitoline Hill, recall that Alfenus provided three possible assignments of liability

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189. *See* COOTER & ULEN, *supra* note 110, at 323.

190. *See id. But cf.* COASE, *supra* note 6, at 170 (arguing that the party who values the right more would simply bargain for it).

191. *See* DIG. 9.2.9.4 (Ulpian, Edict 18), *reprinted in* FRIER, *supra* note 1, at 91.

192. *Id.*

193. *See* COOTER & ULEN, *supra* note 110, at 323-25.

194. *See* Richard A. Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205, 211 (1973).

195. *See* Frier, *supra* note 90, at 516.

depending on what the evidence showed. First, if the muleteers moved on their own, they would be liable; second, if the mules backed up because of alarm and the muleteers moved out of fear, the owner of the mules would be liable; and third, if the cart were merely overloaded or the mules slipped, no one would be liable.[196]

Beginning with the first scenario, which calls for an action on the *lex* itself, the liability is based on what is considered "cause in fact"—but for the movement of the muleteers, the cart would not have rolled backwards and the slave would not have been killed. Moreover, it would have been reasonably foreseeable that the failure to hold up the cart would result in an injury of some kind and, in addition, their movement was not cut off by an intervening act. Therefore, their action would have fallen within the limits of proximate causation. Alfenus essentially presumes *iniuria* in this first case, and it is tempting to say that this is a case of strict liability, except that he instead focused on principles of causation. This shift was probably based upon a "perceptibly deeper legal and social understanding" of liability, and it is clear that Alfenus understood that the true question here is whether this is a situation in which he would be comfortable assigning liability.[197] The reason Alfenus begins with this case, though, is because it is easy—the "arc of action" is complete and all of the elements of the Aquilian delict are present.[198] But the possibility of compensation would have been tenuous with the muleteers as the defendants and the master of the dead slave would probably not have been interested in bringing a suit against such defendants because the costs of litigation and enforcement would offset the minimal recovery.

Moving to the second scenario, which would most likely not have fallen under Aquilian liability but rather under the action of *pauperies*, which allowed for a claim of strict liability for damage done by four-footed animals, the owner of a domesticated animal would be held strictly liable for damage caused by his animal's erratic behavior.[199] While this cause of action was incorporated into the Praetor's Edict, it was first established under the Twelve Tables, which meant that the measure of damages was to be punitive and called for the owner to surrender the beast.[200] This makes sense because the information costs involved in determining liability under *iniuria* would have been

196. DIG. 9.5.52.2 (Alfenus, Digest 2), *reprinted in* FRIER, *supra* note 1, at 76.
197. *See* Frier, *supra* note 90, at 516.
198. *See id.* at 498.
199. *See* FRIER, *supra* note 46, at 137.
200. *See id.*

prohibitive, a situation that would be a prime candidate for strict liability and noxal surrender. Nevertheless, if the action of the animals could be attributed to the owner or a third party, an Aquilian action could have been brought.[201] When a strict liability rule still induces the efficient level of precaution, it is preferred because it keeps litigation and administration costs down—costs which would have been quite high and forced an *iudex* to litigate the matter of the mule owner's negligence, the spontaneity of the mules' action,[202] or the muleteers' contribution. Because the mule owner was probably the deep-pocketed defendant, a plaintiff would have been best off in this case by bringing an action in *pauperies* because of the lower proof threshold.

Finally, the third scenario presents us with a difficult rule to swallow. Alfenus refused to assign liability to either the mule owner or the muleteers where the overloading of the cart caused the accident.[203] This rule begs the question: Who loaded the cart? If the mule-owner or muleteers loaded the cart, the assignment of liability would have been simple. Alfenus' choice of rule, therefore, is inexplicable. But, assuming neither the muleteers nor the mule owners loaded the cart, holding either of these parties liable under a negligence rule for the slave's death would neither induce efficient precaution nor be fair.[204] This is a reverse case of unilateral precaution in which it is the *victim*, not the injurer, who must be induced to take precaution.[205] Thus, a no liability rule gives the victim an incentive to "internalize the marginal costs and benefits of precaution" which results in the victim taking the desired, efficient level of precaution.[206] This type of rule would be common in a case which modern tort law would simply call an unavoidable accident. There is no clear fault (*iniuria*) and no foreseeability.[207] What is left is a rule that is efficient but unabashedly unjust.

V. CONCLUSION

The Romans were the first to view the law scientifically—they perceived the world through the lens of the law, which was "every bit as orderly as the concepts used by . . . mathematicians and physicists for

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201. DIG. 9.5.52.2 (Alfenus, Digest 2), *reprinted in* FRIER, *supra* note 1, at 76.

202. *See* ZIMMERMAN, *supra* note 16, at 1102-03. *Pauperies* applied when an animal could be said to have acted against its nature (*contra naturam*). *Id.* at 1104.

203. DIG. 9.2.52.2 (Alfenus, Digest 2), *reprinted in* FRIER, *supra* note 1, at 77.

204. *See* COOTER & ULEN, *supra* note 110, at 326-28.

205. *See id.* at 323.

206. *Id.*

207. *See* Frier, *supra* note 90, at 498.

their particular observations."[208] And like scientists, the Roman jurists abstracted from the raw material of the law a new system of rules and principles: complex and at the same time practical, simple, and flexible.[209] In a similar manner, economic doctrine provides methodology for predicting the effects of legal sanctions on behavior: people respond to sanctions or rules in the same way they respond to higher prices in the market—the greater the sanction, the less individuals will desire to engage in the sanctioned activity.[210] While primitive law and delictual liability under the Twelve Tables concentrated on the administration of the highest form of penalty, vengeance, it eventually focused more on restoring victims to their rightful position.

Once the Romans were able to alter their perception of the law as a means to exact vengeance, what emerged was a more precise and justice-oriented remedial aim. Social forces took control of the legal system and pushed it toward a more culturally sound operation.[211] Under the influence of the jurists, this modernized conception was instrumental in the development of a mixed system of liability, in which the concepts of fault and causation became distinct. Accompanying this transformative period of delictual liability was the gradual but inevitable migration toward efficiency and pragmatism. Although efficiency was neither a conscious element of the jurists' calculus nor the bottom line of many of their rules, it often naturally accompanied their desire to rule sensibly and justly.

208. *See* JUSTINIAN, *supra* note 12, at 7.
209. *See* NICHOLAS, *supra* note 24, at 1-2.
210. *See* COOTER & ULEN, *supra* note 110, at 310-30.
211. *See* Kornhauser, *supra* note 20, at 244.