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Strict Liability Wrongs

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*Gregory C. Keating**

I. Introduction

American tort scholarship is split between two competing conceptions of tort liability. One conception is economic; the other, for lack of a better word, is moral.[1] The economic conception models tort law on the market. It conceives of liability rules as prices, of torts—especially accidents—as costs, and it understands tort law as an institution that addresses a pervasive form of market failure. Torts take place mostly among strangers. They are involuntary transactions among parties who do not have bargaining or market relations with one another. The costs that torts inflict are therefore externalities. The role of liability rules is to correct externalities by forcing injurers to take their costs into account and adjust their behavior accordingly. The larger role of the law of torts is to take both the costs of accidents and the costs of their prevention into account, so that victims and injurers alike are induced to minimize the combined costs of accidents and their prevention, thereby maximizing wealth.[2]

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[1] The word "moral" is not ideal. The economic conception embodies a morality of sorts, namely, the morality of putting resources to their highest use. This morality of minimizing waste and maximizing wealth can itself be understood as the best way to promote human welfare. See Louis Kaplow and Steven Shavell, *Fairness versus Welfare* (Cambridge, MA: Harvard University Press, 2002). To the extent that the economic conception warrants the label "non-moral" it does so because it recasts the apparently moral judgments of tort law as purely instrumental judgments of rational prudence. For example, it recasts "reasonable care" as rational care. Reasonableness is intrinsically moral. Rationality is not. See Gregory C. Keating, "Reasonableness and Rationality in Negligence Theory," 48 *Stan. L. Rev.* 311 (1996). For its part, the "moral" conception earns that label by taking the moral concepts at the heart of tort law—reasonableness, right, wrong, obligation, duty, breach, harm, responsibility, corrective justice and so on—at face value and seeking to account for tort law in those (moral) terms.

[2] "Aside from the requirements of justice, I take it as axiomatic that the principal function of accident law is to reduce the sum of the costs of accidents and their prevention." Guido Calabresi, *The Costs of Accidents* (New Haven, CT: Yale University Press, 1970), 26. Calabresi's nod to questions of justice is often omitted by economic theorists of tort, but his criterion is widely accepted as "axiomatic."

Whatever its faults, the economic conception nurtures a habitat in which strict liability is at home. To be sure, from an economic point of view, strict liability is by no means necessarily superior to negligence. By virtue of the Hand Formula's apparent embrace of cost-benefit analysis, negligence liability has the immediate attraction of placing economic thinking at the center of accident law. But strict liability has an equally powerful and immediate attraction: by building the costs of accidents into liability rules, it makes liability rules conform more closely to market prices. And by making injurers bear the costs of all the accidents attributable to their activities—not just the accidents that should have been avoided—strict liability induces injurers not only to exercise efficient care, but also to undertake their activities at efficient levels. Whereas negligence liability modeled on an economic reading of the Hand Formula replicates the cost-benefit thinking that is the hallmark of market rationality, strict liability replicates the price system itself. Economic analysis thus makes a home for both of the major forms of tort liability.

The moral conception, curiously, fares worse on this score. Prominent moral theorists conceive of strict liability as a kind of "pay as you go" form of liability.[3] "Paying as you go" is not a matter of making reparation for harm wrongly done; it is merely a matter of bearing the costs of your activities. Paying as you go for the harm that you do is, therefore, a matter of mimicking the market and putting resources—including other people's lives and property—to their highest uses. Strict liability is the price system in liability form. So conceived, strict liability is *not* a matter of duty, breach, right, wrong, responsibility, and obligation. If torts is a law of wrongs, strict liability, so conceived, is a foreigner in its midst. Agents who inflict efficient injury on others—who pay the proper price for the injuries that they inflict and walk away richer—do no wrong. On the contrary, they do the right thing.

Moral theorists of torts are generally committed to the idea that torts are wrongs. Moral conceptions of torts, therefore, take it as fixed that there are no justified torts. When we label conduct tortious, we are saying that the conduct is unjustified and, in that sense, wrong. Strict liability is a familiar form of liability in tort. One might, therefore, expect moral theorists to resist the economic appropriation of strict liability on the ground that it treats tortious conduct as justified conduct, and to offer an alternative account. Instead, moral theorists have tended to embrace the idea that strict liability as generally understood does not involve wronging. Moved by this perception moral theorists have sought either to fit the round peg of strict liability into the square hole of negligence liability, or to expel strict liability from the law of torts,[4] Jules

[3] Arthur Ripstein has used this expression at the Toronto workshop.

[4] This is hardly the only view of strict liability taken by moral theorists. Ernest Weinrib, for example, takes the view that strict liability is rejected by the law of torts, and rightly so, because it is incompatible with the equal freedom of the parties. He writes "Under strict liability, the plaintiff's person and property are a sacrosanct domain of autonomy, within which the plaintiff is entitled to freedom from interference by anyone else. But strict liability protects the plaintiff's rights without allowing room for an intelligible conception of the defendant's duty. A duty must be operative at the time of the act that the duty is supposed to govern. Under strict liability, however, the actor's duty not to do the harm-causing act need not appear until the moment of

Coleman illustrates the first approach when he characterizes strict liability as the imposition of a duty to harm, full stop. This conceptualization of strict liability makes it a variation of negligence liability. Negligence liability imposes a duty not to harm through the failure to exercise due care.[5] John Goldberg and Ben Zipursky illustrate the strategy of expulsion when they write:

> We must acknowledge that our insistence that tort law is a law of wrongs puts us in a difficult spot when it comes to explaining the presence of common law strict liability for abnormally dangerous activities. After all . . . the rationale that seems to prevail in this domain is that liability should attach to activities that are not wrongful in and of themselves, and without regard to whether they are undertaken in a wrongful (i.e., careless) manner. How does liability imposed in these terms fit within a law that is supposed to be all about defining wrongs and providing victims of wrongs with recourse? The short answer is that it does not.[6]

This admirably candid answer encapsulates the predicament of most contemporary moral theorists of tort. Strict liability is an embarrassment to their theories.

These responses should give us pause. Strict liability is an important form of tort liability and perhaps especially so in the past half-century. Few opinions, if any, are more important to twentieth century tort law than Roger Traynor's dissent in *Escola v Coca Cola Bottling Co of Fresno*.[7] Traynor's brief for the imposition of strict liability on defective products is the chestnut from which §402A of the Second Restatement—and, indeed, the might oak of modern products liability law itself—grew. Yet contemporary moral theorists of tort are, at best, uncomfortable with the strict theory of responsibility that it espouses. There is, moreover, an irony here. One of the principal—and persuasive—arguments that moral theorists of tort have made *for* their view and *against* the economic view is that only a moral conception can make sense of the central, intrinsically moral, concepts of tort law, concepts such as duty, breach, right, wrong, obligation, responsibility, and justice. Broadly speaking, the moral theorists of torts have tasked their economic counterparts with being unable to explain the law of torts from the internal point of view of the lawyer or citizen concerned with the law of torts as a guide to action. From the internal point of view of these actors, the law of torts is a law of obligations. When it comes to strict liability, however, most moral theorists find themselves either confessing that they cannot make sense of it as a form of tortious wrong or shoehorning it into the mold of negligence liability. Any account of tort law that specifies the constitutive features of tortious wrongs in a way that

injury. Only retrospectively through the fortuity of harm does it then turn out that defendant's act was a wrong." Ernest Weinrib, *The Idea of Private Law* (Oxford: Oxford University Press, 1995), 179. Professor Weinrib's view deserves more attention than I can give it here, but I believe that its force, such as it is, depends on understanding strict liability in the essentially causal terms that Richard Epstein proposes. See, e.g., Richard Epstein, "A Theory of Strict Liability," 2 *Journal of Legal Studies* 151 (1973). Epstein's conception does not, in my view, track our law of torts.

[5] See note 24, and accompanying text.

[6] John C.P. Goldberg and Benjamin C. Zipursky, *Torts* (Oxford: Oxford University Press, 2010), 267.

[7] 150 P.2d 436 (1944).

cannot acknowledge—or properly characterize—strict liability in tort is, for that reason alone, seriously defective as an account of tort law from within its practice.

To be sure, this interpretive failure of the dominant moral conceptions of tort does not loom so large at the moment. There is much less strict liability in the law of torts than there was thirty-five years ago. In the late 1970s, strict products liability was both strict and on the rise; the idea of enterprise liability was deeply rooted in the legal academy and expanding into the law of automobile accidents; the environmental movement seemed poised to expand both common law and statutory strict liabilities; and negligence liability appeared to be in retreat throughout the law of torts.[8] Now, however, enterprise liability is on the wane, and the twenty-first century surprise has been the "unexpected persistence of negligence liability."[9] Yet even if tort reform has put strict enterprise liability on the defensive, it is a mistake to assert that strict liability is a part of the law of torts in name only, as Goldberg and Zipursky do.[10] For one thing, enterprise liability figures prominently in the history of tort law. Just as negligence liability only appeared to be dying during most of the twentieth century, it is probably the case that strict liability only appears to be dying now. Some unforeseen historical turn may well induce its revival.

More importantly, perhaps, two basic forms of strict liability are too deeply embedded in our law of torts to be purged entirely from the field. One form of strict liability is harm-based. The other form is based on an impermissible interference with an autonomy right. The first, harm-based, form is found in corners of accident law and in nuisance law. The second, autonomy rights-based, form is found mostly in intentional wrongs to the person or to property. Different meanings of the slippery terms "fault" and "strict" are relevant in these two contexts. Harm-based strict liabilities are strict in that they are imposed on *justified* conduct. Rights-based strict liabilities are strict in that they are imposed on *innocent* conduct, conduct that—from a moral point of view—we would be inclined to *excuse*. Moral theorists of tort need to come to grips with both of these forms. To distinguish their views from the economic view—and to register the fact that torts *always* involve unjustified conduct—moral theorists need to explain why strict liability torts are wrongs. My aim in this chapter is to do just that.

[8] See G. Edward White, *Tort Law in America* (New York: Oxford University Press, 1980), 168–72 (describing the triumph of enterprise liability in early products liability law).

[9] G. Edward White, "The Unexpected Persistence of Negligence, 1980–2000," 54 *Vand. L. Rev.* 1337 (2001), 1344–6. It would be unwise, however, to dismiss entirely the continued presence of enterprise liability. It is hard to see the tobacco litigation of the 1990s, for instance, as the expression of anything but enterprise liability ideas.

[10] Goldberg and Zipursky write, for instance, that "[a]lthough by convention, strict liability for abnormally dangerous activities clearly is part of what lawyers define as 'tort law,' strictly speaking it does not belong in this department"; Goldberg and Zipursky, *Torts* (note 5) at 267.

I shall argue that strict liability torts are wrongs because they involve violations of rights and that they delineate two distinctive domains of wrongful conduct. One domain—the territory of "harm-based" strict liabilities—involves the distinctive wrong of harming-without-repairing. The other domain—the territory of "sovereignty torts"—involves the distinctive wrong of violating fundamental powers of control over one's own person and property. These two forms of strict liability are unified by the fact that they defend autonomy. Physical harm is an assault on one of the basic conditions of human agency. And sovereignty torts involve the violation of core autonomy rights.

II. Harm-Based Strict Liability

Harm-based strict liability is illustrated most clearly, perhaps, by the modern American law of intentional nuisance when it distinguishes between unreasonable conduct and unreasonable harm—and imposes liability for the infliction of unreasonable harm. Unreasonable conduct is conduct that inflicts injury unjustifiably. Negligent conduct, or faulty conduct, is unreasonable conduct: it exposes others to a risk of harm that ought not to have been imposed. By contrast, unreasonable harm is harm that should not go unrepaired by the party responsible for its infliction, even though that harm issued from conduct that was beyond reproach. Unreasonable harm is harm for which an actor is strictly liable. Nuisance law imposes liability for the infliction of unreasonable harm when, as in the famous case of *Boomer v Atlantic Cement*, it holds that damages should be paid for an unreasonable interference with plaintiffs' rights to the reasonable use of their property, even though the conduct responsible for that interference is justified and ought to be continued. By revising the normal remedy for the wrong of nuisance in New York—from an injunction as a matter of right to damages as a matter of right and injunctive relief only on a showing of unreasonable conduct—*Boomer* revises the underlying right. Reasonable conduct resulting in unreasonable interference with another's use and enjoyment of land is wrong only if the party inflicting the interference fails to make reparation for the harm that he or she does. Reparation transforms unreasonable harm into reasonable harm and fairly reconciles competing, equal rights to the use and enjoyment of land. Before *Boomer*—when injunctive relief was available as a matter of right when plaintiff could show that defendant's activity unreasonably interfered with plaintiff's right to the reasonable use and enjoyment of its land—the primary duty in this corner of nuisance law was a duty to do no harm, full stop. After *Boomer*—when money damages, and only money damages are available as a matter of right—the primary duty in this corner of the law is now a duty not to inflict reasonable harm without repairing that harm. Other entrenched instantiations of this primary duty include: private necessity cases such as *Vincent v Lake Erie*; liability for abnormally dangerous activities;

liability for manufacturing defects in products liability law; and the liability of masters for the torts committed by their servants within the scope of their employment.

The obligation imposed by all of these doctrines is an obligation not to harm without repairing even if, there is no fault in the infliction of the harm itself. The reciprocal right is a right to have any physical harm done to you undone by the party responsible for its infliction. All of these harm-based liabilities are strict in that they impose liability on *conduct that is not wrong*. Stated affirmatively, these strict liabilities impose liability on conduct that is justified, on inflictions of harm that are reasonable. These liabilities do not condemn the infliction of harm, per se. They condemn harming without repairing. Their target is not unreasonable conduct, but unreasonable harm. Negligence liability, of course, predicates liability on conduct that is unjustified, on conduct that is unreasonable—because it does not show due regard for the property and physical integrity of those that it harms.

III. Right-Based Strict Liability

Autonomy-right based strict liabilities impose liability not on justified inflictions of *harm*, but on boundary crossings that may *both* do no harm and be entirely free of fault.[11] This form of strict liability is epitomized by the torts of conversion and trespass and by some batteries. Here, the wrong is the violation of a right that assigns a power of control over some physical object or, in the case of battery, control over some subject. The law's specification of these powers of control gives rise to a form of strict liability predicted on the voluntary, but impermissible, violation of that right. If you enter my land or appropriate my pen without my permission, you have violated my right of exclusive control over these objects, even if your entry is entirely reasonable and justified. The wrong consists in the failure to respect the right. Fault is simply irrelevant. If you enter my property under an entirely reasonable and innocent misapprehension of where the boundary between my property and yours lies, you trespass. You need not even know that you have entered my property without my permission, much less intend the wrong of entering my property without permission. You need intend no wrong and you need do no harm other than the harm of violating my right of control over my person or my property. Indeed, you may benefit me—say, by trimming, topping, and cleaning my trees of bagworms.[12] So, too, you may trespass if you are innocently and reasonably mistaken about which building you have permission to use as a set for your movie,[13] or if you are simply mistaken about the scope of the permission that I have given you.[14] And you may convert my chattel simply by

[11] Two useful terms for these torts are "sovereignty-based" and "trespassory." The former calls attention to the connection between these torts and autonomy. The latter calls attention to the fact that these torts involve the impermissible crossing of boundaries, not the infliction of injury.

[12] *Longenecker v Zimmerman*, 175 Kan. 719, 267 P.2d 543 (1954).

[13] *Bigelow v RKO Radio Pictures*, 327 U.S. 251, 66 S. Ct. 574, 90 L. Ed. 652 (1946).

[14] *Cleveland Park Club v Perry*, 165 A.2d 485, 488 (Mun.App.D.C.1960).

exercising dominion over it in a way which is "in denial of or inconsistent with [my] rights therein." You do not need to intend to deny my rights, or even know that you are.[15] Liability for battery may, likewise, be predicated on innocent intentional touchings,[16] and even on touchings that benefit those who are touched without their consent.[17]

There are two lessons here. One is that intentional torts do not *categorically* represent a more egregious form of fault than negligent torts. Paradigmatic intentional wrongs, to be sure, do have this character. They *are* governed by the aim of inflicting harm on the victim in violation of her rights. The wrongdoing involved is worse than negligent wrongdoing. Negligence involves only objectively insufficient regard for the victim. Paradigmatic intentional wrongs involve both intended harm and knowing disregard of the victim's rights. They express "contempt for [the victim], often more unbearable than the harm itself."[18] The law of intentional torts, however, is not restricted to wrongs whose commission entails the expression of an intense and objectionable disregard for the rights of their victims. Batteries, trespasses, and conversions can all be committed without intending either the wrongs or the harms involved. The intent need reach only as far as the *action* which impermissibly crosses a protected boundary and no further. This is because the rights in question are autonomy rights. They are rights to exclusive control over one's person and one's property, real and moveable. Liability for violation of a right of exclusive control is strict for the simple reason that the right itself would be fatally compromised by tolerating all reasonable (or justified) boundary crossings without regard to whether consent was given to those crossings.[19] Those who hold the relevant rights are entitled to forbid even reasonable boundary crossings, and they are presumptively wronged whenever their boundaries are crossed without their permission by the intentional actions of others. The rights in question thus give rise to stringent "duties to succeed" on the part of others.[20] In this class of cases, the strictness of liability in tort is a reflex of rights of control.

[15] *Zaslow v Kroenert*, 29 Cal. 2d 541, 176 P.2d 1 (1946).

[16] E.g., *Vosburg v Putney*, 80 Wis. 523, 50 N.W. 403 (1891); *White v University of Idaho*, 118 Idaho 400, 797 P.2d 108 (1990).

[17] E.g., *Mohr v Williams*, 95 Minn. 261, 104 N.W. 12 (1905). The touching exceeded the scope of the consent given.

[18] Jean-Jacques Rousseau, *The Social Contract and the Discourses* (trans. G.D.H. Cole, New York: Dutton, 1979), 82. The quotation is from the *Discourse on the Origin of Inequality*. I have altered the translation slightly.

[19] "…[S]trict liability for trespass—to the person or to property—is morally demanded. With respect to battery, for instance, we surely cannot adopt the view that people are at liberty to touch each other without consent, as long as that touching be not angry, hostile, unordinary or even unreasonable. Why should one have to put up with being intentionally touched just because that form of touching is ordinary or thought reasonable by a judge, for instance? As Cardozo…said, 'Every human being of adult years and sound mind has a right to determine what shall be done with his own body.'" Allan Beever, "The Form of Liability in the Torts of Trespass," 40 *Comm. L. World Rev.* 378 (2011), 392 (citing *Schloendorff v Society of New York Hospital*, 211 N.Y. 125,105 N.E. 92, 93 (1914)).

[20] The concept of "duties to succeed" is developed in John Gardner, "Obligations and Outcomes in the Law of Torts," in Peter Cane and John Gardner (eds.), *Relating to Responsibility: Essays in Honour of Tony Honoré on his 80th Birthday* (Oxford: Hart Publishing, 2001).

The difficult normative questions raised by these torts are mostly questions of responsibility. Why, exactly, is it permissible to hold someone accountable for innocent conduct that they could not have been reasonably expected to avoid? For the moment, I want to defer consideration of this question and comment on the relation of these torts to what moral theorists of torts call conduct-based wrongs. In cases where liability is strict and sovereignty-based, the wrong committed is conduct-based *in only the most attenuated sense of the term*. In negligence—the canonical example of a conduct-based wrong—liability *is* predicated on the wrongfulness of the defendant's conduct; the wrongfulness of the conduct (the breach of duty) does the work and triggers liability. In "sovereignty" or "trespassory" torts, it is the violation of the plaintiff's right that does the work and triggers liability. The "duty" is a duty not to violate the right, and any intentional action that violates the right is therefore wrongful. Viewed in isolation from the right, the conduct may be innocent and even justified. The defendant doctor in *Mohr v Williams*, for example, benefited the plaintiff by curing her disease.[21] The wrongs committed in cases like *Mohr* are wrongs only because they violate rights. They do harm and express disrespect only insofar as they disregard important autonomy rights.

Derek Parfit's distinction among belief-relative, evidence-relative, and fact-relative standpoints may help to isolate the limited sense in which the conduct at issue is wrong.[22] Innocent batteries, trespasses, and conversions are wrongs relative to the facts (what is actually the case) because they violate rights that their victims actually possess. They are not wrongs relative to the beliefs of the persons who commit them because the persons who commit them believe themselves to be acting with due regard for everyone's rights. Nor are innocent batteries, trespasses, and conversions wrongs relative to the evidence available to those who commit them. These tortfeasors *reasonably* believe that they have consent, are on their own property, or own the chattel in question. Negligence wrongs, by contrast, are generally wrong relative to the evidence. Those who commit them should have known that they were not exercising reasonable care. We are most at fault (most blameworthy) when we commit wrongs that we believe to be wrong, and least at fault when we commit wrongs that, in fact, are wrongs, even though we did not believe them to be wrongs and should not, in fact, have determined that they were wrongs on the evidence available to us. The paradox of strict liability in intentional torts surprises us by showing that a class of wrongs that we thought consisted exclusively of belief-relative wrongs—and thus of wrongs involving the highest degree of fault in Parfit's pecking order—in fact includes prominent examples of wrongs that are merely fact-relative wrongs.

Liability without fault in the standard negligence sense—that is, liability in circumstances where the wrongdoer's conduct is not wrong relative to the reasonable appraisal of the relevant evidence—raises difficult questions of responsibility. "Ought" implies "can" and responsibility that is relative only to the facts as they

[21] *Mohr v Williams*, 95 Minn. 261, 104 N.W. 12 (1905).

[22] Derek Parfit, *On What Matters* (New York: Oxford University Press, 2011), 150–3.

are—and not to the evidence as it appears to be—is therefore troubling. For our purposes, however, the important point is that trespassory wrongs are a well-established and robust domain of tort law. Contrary to conventional wisdom, trespassory wrongs need not be conduct-based wrongs in anything but the most attenuated and misleading sense. The only respect in which the conduct involved in a trespassory tort must be wrong is that it violates a right. Canonical conduct-based wrongs, as corrective justice and civil recourse theorists conceive them, are wrongs where the wrongdoers' conduct evinces a failure to appraise the pertinent evidence in an objectively justifiable way and act accordingly. Conversely, some canonical trespassory wrongs are strict liability wrongs in the sense that they impose liability on morally blameless conduct. These intentional torts are, therefore, important counter-examples to both the claim that tort is a law of fault-based wrongs and to the claim that tort is a law of conduct-based wrongs. These wrongs, moreover, are deeply entrenched in our law. We can live without these wrongs only if we are prepared to compromise the autonomy rights that they defend.

Harm-based strict liabilities of the sort found in intentional nuisance law, abnormally dangerous activity law, and some parts of products liability law are different. These strict liabilities embody a more robust form of wrongfulness. These are liabilities where the wrongfulness of the defendant's conduct lies in harming-without-repairing. The distinctive character and morality of these strict liabilities is also obscured by contemporary tort theory, with its preference for fault liability and its insistence that tort is a domain of conduct-based wrongs. Indeed, contemporary moral theorists of tort show either the inclination to expel these torts from the law of torts proper or to absorb them into the architecture of negligence wrongs. Goldberg and Zipursky exhibit the first inclination, claiming that it is merely a matter of convention that we call this kind of liability a tort. When harm issues from an abnormally dangerous activity, and strict liability is imposed on the party engaging in that activity, neither the activity in which the injurer is engaged nor their conduct in inflicting the injury are wrong.[23] Tort, properly understood, is a law of wrongs. Harm-based strict liabilities do not involve wrongs and are therefore not really torts. Jules Coleman assimilates this form of strict liability to negligence, by casting the duty involved as a duty to do no harm, full stop.[24] Neither Goldberg and Zipursky's expulsion of harm-based strict liability from tort law proper nor Coleman's absorption of such liability into negligence does justice to this form of liability. The wrong involved is a conditional one, and its morality is a matter of both commutative and corrective justice.

[23] See notes 5 & 7 and accompanying text.

[24] Jules Coleman, "Facts, Fictions, and the Grounds of Law," in Campbell (ed.), *Law and Social Justice* (Cambridge, MA: MIT Press, 2005), 329; see also Coleman, *Practice of Principle* (New York: Oxford University Press, 2001), 35, n. 19 ("The concept of a duty in tort law is central both to strict and fault liability. In strict liability, the generic form of the duty is a 'duty not to harm someone,' while in fault, the generic form of a duty is a 'duty not to harm someone negligently or carelessly'.").

A. Strict liability as a conditional wrong

Harm-based strict liabilities occupy a space that negligence liability tends to eclipse. In negligence, the obligation to repair arises from the infliction of harm that should have been avoided. In strict liability, the obligation to repair arises from the infliction of harm that should *not* have been avoided, but which should be borne by the party responsible for its infliction. In the circumstances where they govern, harm-based strict liabilities assert that it is wrong for an actor to do harm without stepping forward and making good the harm done. The primary duty that harm-based strict liability institutes is *not* a duty not to harm; it is a duty to harm only through reasonable, justified conduct, and to make reparation for any harm done even though due care has been exercised. Failing to make reparation evinces insufficient regard for the rights of the person harmed, even though the conduct responsible for inflicting that harm is beyond reproach.

A conduct-based wrong is one where a right is violated when an agent fails to conform her conduct to the standard required by the law. Fault liability is a canonical illustration; it predicates responsibility for physical injury on the judgment that the defendant failed to conform her conduct to the standard of reasonable care.[25] Conduct-based wrongs express what I shall call *primary* criticism of conduct.[26] The law lodges its criticism against the infliction of harm in the first instance on the ground that the conduct responsible for the harm was wrong. The harm, therefore, should never have occurred. Strict liability, by contrast, predicates responsibility on the judgment that the conduct at issue was justified (or reasonable) *in inflicting injury*, but *unjustified (or unreasonable) in failing to repair the injury done*. This is *secondary* criticism of conduct. The law lodges its criticism against harming-justifiably-without-repairing. This kind of strict liability identifies a *conditional wrong*. It circumscribes a domain within which the infliction of harm is justifiable, but only on two conditions: (1) the conduct inflicting injury is justified or reasonable; and (2) reparation is made for physical harm done by that reasonable conduct.

Conditional privilege in the law of private necessity—the doctrine of *Vincent v Lake Erie*[27]—illustrates the distinction between primary and secondary criticisms of conduct. The defendant ship owner's conduct in lashing its ship to, and damaging, the plaintiff's dock was reasonable, not unreasonable—right, not wrong. Counting the interests of the two parties as equal, the dock owner's rights in its property must yield to avoid greater harm to the ship owner. The defendant was therefore privileged to use

[25] The fundamental question in negligence law is whether conduct falls below "a standard established by the law for the protection of others against unreasonable harm." Negligence law fixes that standard by the *conduct* of a "reasonable person in the circumstances." Restatement (Second) of Torts § 283 (1975); see also, e.g., *Ladd v County of San Mateo*, 12 Cal. 4th 913, 917, 911 P.2d 496 (1996).

[26] I owe this term to Lewis Sargentich. Robert Keeton's contrast between "fault" and "conditional fault" also describes the distinction drawn in the text. See Robert E. Keeton, "Conditional Fault in the Law of Torts," 72 *Harv. L. Rev.* 401 (1959).

[27] *Vincent v Lake Erie Transp. Co.*, 109 Minn. 456, 124 N.W. 221 (1910).

the dock to save its ship from destruction at the hands of the storm, even if using the dock involved damaging the dock. The defendant's privilege[28] to trespass was *not* conditioned on doing no harm to the dock, a requirement that would have been impossible to meet in the circumstances. The defendant's privilege was conditioned on making reparation for any harm done to the dock, *even though that harm was done rightly and not wrongly*. The wrong in *Vincent* lay not in the defendant's doing damage to the dock, but in the defendant's wrongful (or unreasonable) failure to step forward and volunteer in the aftermath of the storm to make good the damage done the dock. In refusing to repair the dock, the ship owner was not reasonably inflicting lesser harm to avoid greater harm; he was simply benefitting himself by harming another. The infliction of harm was therefore justified; the failure to repair was not. Put differently, *Vincent*'s strict liability is liability for unreasonable harm, not liability for unreasonable conduct. In *Vincent*, making reparation for the harm done by docking prevents the injustice of shifting the cost of the ship's salvation from the ship owner, who profits from it, onto the dock owner, who does not. The imposition of liability on the ship owner, for failing to make such reparation, rights the wrong of shifting the cost of the ship's salvation onto the dock owner, whose property was the instrument of that salvation. The wrong in strict liability is thus "harming justifiably but unjustifiably failing to repair the harm justifiably done."[29] Generalizing from *Vincent*, we can say that the wrong involved in harm-based strict liabilities is both akin to the wrong in restitution and subtly different. In restitution cases, the basic wrong consists of retaining a benefit whose retention unjustly enriches its recipient at the expense of the party conferring the benefit. In harm-based strict liabilities the basic wrong consists *of benefitting from the reasonable infliction of harm on another.* This wrong has two aspects. On the one hand, the victim is *harmed*—a means which is supposed to be subject to their discretionary control is damaged and their capacity to exercise their will effectively is thereby impaired. On the other hand, *unless reparation is made the victim is left in an impaired condition simply so that her injurer may benefit*—the

[28] Taxonomically, this is a complicated matter. In Hohfeldian terms, the ship's privilege to enter is a right: the ship is entitled to enter, and the dock owner is under a duty not to resist. See Francis H. Bohlen, "Incomplete Privilege to Inflict Intentional Invasions of Interests in of Property and Personality," 39 *Harv. L. Rev.* 307 (1926). This privilege is also a power in Hohfeld's terms, because it enables the ship owner to alter its relations with the dock owner without the dock owner's permission, as long as the ship enters the dock owner's property for certain purposes (to save its own property), and conducts itself in certain ways (only does what is necessary to save its own property). Along with Robert E. Keeton, "Conditional Fault in the Law of Torts," 72 *Harv. L. Rev.* 401 (1959), Bohlen's article is a classic statement of the idea of strict liability I am developing in this chapter. Similar positions have also been reached by others. See, e.g., Howard Klepper, "Torts of Necessity: A Moral Theory of Compensation," 9 *L. & Phil.* 223, 239 (1990) ("The need to compensate in the necessity cases is best explained by the wrongfulness of knowingly benefitting oneself by transferring a loss to another, however reasonably, and then letting the loss lie with one's unwitting benefactor. Such a transfer of the loss or risk is wrongful in that it does not allow the innocent party to freely choose the risks she is willing to undertake.").

[29] *Vincent* is thus a clear counter-example to the claims of some prominent tort scholars that strict liability involves a duty not to do harm, full stop. Jules Coleman and John Gardner hold views of this kind. See note 22; see also Gardner, "Obligations and Outcomes in the Law of Torts" (note 18) at 111.

injurer benefits through harming the victim. The role of reparation is to undo that wrong by erasing the harm. When reparation is made the injurer no longer benefits through harming the victim. The flip side of this coin is that the victim is no longer *forced* to suffer harm merely so that the injurer may benefit. Structurally, harm-based strict liability in tort resembles eminent domain in public law. Eminent domain law holds that it is permissible for the government to take property for public use only if the government pays just compensation to those whose property it takes. This is a two-part criterion. First, the taking must be justified; that is, it must be for a public use. Second, compensation must be paid for the property taken. Strict liability in tort has a parallel structure.[30] In negligence, the defendant's primary conduct determines liability, and it does so only when that conduct is wrongful. In strict liability, the defendant's conduct triggers liability when the defendant's failure to step forward and repair the harm faultlessly inflicted is wrongful. Strict liability asserts that the costs of necessary or justified harms should be borne by those who benefit from their infliction, and not by those whose misfortune it is to find themselves in the path of someone else's pursuit of his or her own benefit, however reasonable that pursuit may be.

Harm-based strict liability thus involves both fairness or justice, and wrong or rights violation. To say that it is unfair for an injurer to thrust the cost of its activities onto a victim is not the same as saying that the victim's right is violated by so doing. It may, for example, be unfair for me to rebuild my house and block the passage of air through your chimney. The loss to you may be great and the gain to me may be trivial. Unless you have a right to that passage, however, what I have done is not a legal wrong.[31] Strict liability is thus justified both by the principle of fairness that those who benefit from inflicting harm on others should also shoulder the cost of that harm *and* by the further claim that the harm done is the invasion of a right so that failure to make reparation for harm done would be a wrong. Strict liability asserts that an injurer subject to a regime of strict liability does wrong when the injurer fails to step forward and repair harm rightly inflicted, and it makes this assertion because leaving the cost of the harm on the victim who suffers it shows insufficient respect for the victim's rights—rights of property in the case of both nuisance and the conditional privilege of private necessity.

Vincent is once again illustrative. Not only would it be unfair for the ship owner to shift the cost of saving its ship off onto the dock owner, but it would also violate the dock owner's property rights. The dock owner's right to exclude the ship must yield

[30] This "private eminent domain" conception of strict liability may make its first appearance in American tort theory in the writings (some famous and some obscure) of Oliver Wendell Holmes. These writings are cited and discussed in Thomas C. Grey, "Accidental Torts," 54 *Vand. L. Rev.* 1225 (2001), 1275–81, and at greater length in his unpublished manuscript, *Holmes on Torts* (on file with author). Two other classic statements are Francis Bohlen, "Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality," 39 *Harv. L. Rev.* 307 (1926) and Robert E. Keeton, "Conditional Fault in the Law of Torts," 72 *Harv. L. Rev.* 401 (1959).

[31] *Bryant v Lefever*, 4 C.P.D. 172 (1878–79).

to the dire emergency—the "necessity"—in which the ship found itself.[32] But there is no reason why the dock owner's right to the integrity of his property should also be extinguished. Saving the ship requires damaging the dock, but it does not require that the cost of saving the ship be shifted onto the owner of the dock instead of being borne by the ship owner who profits from doing that damage. Harm-based strict liabilities thus define a particular class of *conditional wrongs* where the law lodges its criticism against a defendant's secondary failure to repair, not against a defendant's primary, injury inflicting conduct.[33]

B. Correcting corrective justice theory

Corrective-justice theory and civil recourse theory both conceive of tort as a domain of conduct-based wrongs.[34] This insistence on wrongful *primary conduct* as essential to tort law prevents corrective-justice theory and civil recourse theory from giving an adequate account of strict liability in tort.[35] Strict liability is *not* predicated on the assertion that the defendant should have behaved differently and not harmed the plaintiff.[36] Strict liability, moreover, is common enough that we can reasonably insist that an adequate theory of tort should be able to explain and justify its existence as an alternative to negligence. Contemporary moral theories of tort flunk this test. Jules Coleman's sophisticated and powerful version of corrective-justice theory, for example, fails to give an adequate account of strict liability for two reasons. First, Coleman conceives of substantial portions of strict liability as lying outside the core of tort that corrective justice succeeds in explaining. He notes that corrective-justice theory "does not explain" various features of tort law, "for example, vicarious liability or perhaps product liability."[37] Coleman also excludes products liability from the core of tort and tentatively suggests that it should be understood not in terms of corrective

[32] "The situation was one in which the ordinary rules regulating property rights were suspended by forces beyond human control . . . " *Vincent* (note 25), 124 N.W. at 221.

[33] It is possible to construe the concept of a conduct-based wrong in a way which obliterates the distinction between primary and secondary criticism of conduct. Asserting, say, that any conduct which violates a right is wrongful conduct obliterates the distinction. Some tort scholars, including, perhaps, Ernest Weinrib and Arthur Ripstein, may hew to such a conception. See Ernest Weinrib, *The Idea of Private Law* (Oxford: Oxford University Press, 1995). The fundamental reason to reject this understanding of "conduct-based wrong" is that obliterating the distinction between primary and secondary criticism of conduct impairs our ability to understand strict liability in tort. We want categories which enable comprehension instead of frustrating it.

[34] For corrective justice theory, see Jules Coleman, "The Practice of Corrective Justice," in David G. Owen (ed.), *Philosophical Foundations of Tort Law* (Oxford: Oxford University Press, 1995), 56–7 and Weinrib, *The Idea of Private Law* (note 31) at 140–2, 197–8. For civil recourse theory, see Goldberg and Zipursky (notes 5 & 7).

[35] This is ironic, because strict liability "duties" are the only primary duties that might be plausibly described as corrective; they involve obligations not to harm without repairing.

[36] The identification of tort with conduct-based wrongs is not particular to Coleman or Goldberg and Zipursky. Ernest Weinrib holds the same kind of view, a fact vividly illustrated by his criticisms of strict liability as a norm of conduct that condemns "any penetration of the plaintiff's space." Ernest Weinrib, *The Idea of Private Law* (note 31) at 177.

[37] Coleman, *Practice of Principle* (note 22) at 36.

justice, but in terms of rational bargaining.[38] Both the concession and the exclusion are troubling. A theory of tort that can explain its domains of strict liability is interpretively superior to a theory that cannot. Coleman's theory is vulnerable precisely because it cannot. The absorption of product liability into tort, moreover, is the most important development in twentieth-century tort law. An adequate theory of tort ought to be able to account for that development.

Second, Coleman's account of the nature of strict liability goes wrong because it models strict liability on negligence. According to Coleman, negligence liability imposes a duty to exercise reasonable care to avoid inflicting physical harm on others and strict liability imposes a duty not to inflict physical harm full stop. This turns harm-based strict liability upside down. Harm-based strict liability applies to harms that should not have been avoided. It does not criticize the infliction of harm; it criticizes the failure to repair harm reasonably inflicted. Harm-based strict liability asserts that the costs of justified harms should be borne by those who benefit from their infliction, not by those whose misfortune it was to find themselves in the path of a justified imposition of harm.

Recall, too, that a theory of strict liability in tort must make room for trespassory, or sovereignty-based, strict liabilities. The wrong committed in a sovereignty-based tort is conduct-based in only the most attenuated sense of the term. It is the violation of the plaintiff's right that does the work and triggers liability. The duty is a duty not to violate the right, and conduct that violates the right is wrongful only because it violates the right. The conduct may be otherwise blameless, reasonable, and even beneficial. Sovereignty-based torts, moreover, are clear counterexamples to Coleman's particular thesis that tort is a law of wrongful losses. Trespassory torts may be committed without inflicting wrongful loss because the rights at issue are powers of control, not protections against harm. The distinguishing features of both harm-based and autonomy right-based strict liabilities are obscured and distorted by calling strict liability torts "conduct-based wrongs." Strict liability wrongs are based not on wrongful conduct in the normal sense of that term, but on either secondary failings of conduct—on conditional, not primary fault[39]—or on violating certain powers of control.

C. The morality of strict liability: Corrective and commutative justice

So far, this chapter has distinguished harm-based strict liability wrongs from negligence-based ones by asserting that strict liability wrongs involve justified conduct inflicting harm, whereas negligent torts do not. And it has argued that strict liability wrongs involve both a wrong, that is, the violation of a right, and unfairness in failing to bear the cost of repairing harm reasonably inflicted. But the chapter has not said just what the legal wrong is or when it occurs. The wrong, in brief, lies in failing to

[38] Coleman, *Risks and Wrongs* (Oxford: Oxford University Press, 2002), 417–29.
[39] See Keeton, "Conditional Fault in the Law of Torts" (note 24).

repair the harm when the actor's responsibility for that harm becomes clear, and the obligation to repair is part of the primary norm governing the conduct in question. To put the matter in corrective justice terms: the wrongful interaction is the interaction that takes place when the injurer fails to step forward and repair harm for which the injurer is all things considered responsible because the harm may fairly be charged to the injurer's activity.[40] The moral wrong involved in harm-based strict liabilities lies in *benefitting from the reasonable infliction of harm on another in violation of her right and at her expense*. The legal wrong is committed when a reasonable injurer would have recognized and acted upon its responsibility to repair. The lawsuit therefore enforces a preexisting duty of repair just as a negligence suit does, albeit a different pre-existing duty of repair.

This account of the morality of harm-based strict liability wrongs means that strict liability is corrective in a fundamental way: it undoes interactions that involve one person who benefits herself by reasonably harming another person. In this sense, there is no logical incompatibility between strict liability and corrective justice. Quite the opposite in fact: strict liability in tort embodies corrective justice. However, it is equally important to see that strict liability also goes beyond corrective justice because it rests on a principle of fairness as well as on a conception of wrongdoing. To see this point, it helps to consider, very briefly, harm-based strict liability in full flower. Harm-based strict liabilities blossom most fully in enterprise liability, either within or beyond tort.[41] Enterprise liability applies to activities as opposed to individual actions. In the law of vicarious liability—its most important common law application—enterprise liability applies to firms, through the risks created by their employees in the course of pursuing the firm's business. In its most important administrative application, worker's compensation, enterprise liability applies to the activities of firms insofar as those activities occasion harm to their employees. In a nutshell, enterprise liability asserts that the costs of accidents should: (a) be imposed on the enterprises responsible for their infliction and (b) be dispersed among all those within the enterprise—that is, all those who benefit from risk impositions that result in enterprise related harm. Within tort, strict enterprise liability[42] is found primarily in vicarious liability, abnormally dangerous activity liability, and pockets of products liability. While it has surely retreated, it is a basic form of modern tort liability and it flourished throughout the

[40] Whether a particular harm may be fairly charged to an injurer's activity is often at the heart of strict liability litigation. See, e.g., *Ira S. Bushey & Sons, Inc. v United States*, 398 F.2d 167 (2nd Cir. 1968) (Friendly, J.).

[41] The fairness case for enterprise liability beyond tort is powerfully made in Jeremy Waldron, "*Moments of Carelessness and Massive Loss*," in David G. Owen (ed.), *Philosophical Foundations of Tort Law* (Oxford: Oxford University Press, 1995), 387.

[42] The proposition that the vicarious liability of a master for the torts of its servants is strict is a contestable one (see Weinrib, *The Idea of Private Law* (note 31) at 185–7). There is little doubt, however, that it is the dominant understanding of the doctrine in American law, even by those who are not proponents of strict liability. See, e.g., *Konradi v United States*, 919 F.2d 1207, 1210 (7th Cir. 1990) ("The liability an employer for torts committed by its employees—without any fault on his part—when they are acting within the scope of their employment, the liability that the law calls 'respondeat superior,' is a form of strict liability.").

twentieth century. The case for it is most commonly made on economic grounds, but the rhetoric of enterprise liability draws heavily on fairness.

The fairness case for enterprise liability is epitomized by saying that it distributes the costs of accidents across those who benefit from the underlying risks. This slogan can be unpacked into three components. The first of these is fairness to victims. It is unfair to concentrate the costs of characteristic risk on those who simply happen to suffer injury at the hands of such risk when those costs might be absorbed by those who impose the characteristic risk. Fairness prescribes proportionality of burden and benefit. Victims who are strangers to the enterprise derive no benefit from it; therefore, it is unfair to ask them to bear a substantial loss when that loss might be dispersed across those who participate in the enterprise and, therefore, do benefit from it. Victims who are themselves participants in an enterprise share in its benefits, but not in proportion to the detriment that they suffer when they are physically harmed by the enterprise. Here, enterprise liability is fairer than negligence. It disperses the costs of enterprise-related accidents and distributes them within the enterprise, so that each bears a proportionate share.

Second, enterprise liability is fair to injurers because it simply asks them to accept the costs of their choices. Those who create characteristic risks do so for their own advantage, fully expecting to reap the benefits that accrue from imposing those risks. If those who impose characteristic risks choose wisely—if they put others at risk only when they stand to gain more than those that they put in peril stand to lose—even under enterprise liability, they will normally benefit from the characteristic risks that they impose. If they do not, they have only their poor judgment to blame and society, as a whole, has reason to penalize their choices. Consider the facts of *Ira S. Bushey and Sons v United States*[43] where a drunken sailor, returning from shore leave, flooded the dry-dock in which his ship was berthed by spinning the wheels that controlled the dock's valves. In upholding the imposition of liability, Judge Friendly asserted, in a nutshell, that the Coast Guard lets its sailors loose on shore leave for its own benefit (as well as for its sailors) and it reaped the rewards of their shore leave. It, therefore, had to take the bitter with the sweet. If the costs of shore leave are greater than the benefits, the Coast Guard has reason to reconsider the practice, and society has reason to discourage it.

To be sure, if vicarious liability is ensconced in our legal system, enterprise liability is embattled and it has receded in our law, rightly or wrongly. The merits of enterprise liability, however, are not our concern. For our purposes, the point is that the idea of fairness at work in harm-based strict liabilities flowers in enterprise liability and that flowering sheds light on the idea itself. For our purposes, the lesson is that strict liability embodies commutative as well as corrective justice. Corrective justice is transaction centered; it is, as Aristotle said, "justice as rectification." Corrective justice is justice between parties to a wrong; it rights wrongs. Harm-based strict liabilities are

[43] *Bushey* (note 39), 398 F.2d at 167. Compare id. and *Taber v Maine*, 45 F.3d 598 (2d Cir. 1995) (Calabresi, J.).

corrective insofar as they undo wrongs whose essence lies in benefitting at the expense of another person by harming that other person. But harm-based strict liabilities are also commutative; they involve the proportional alignment of burden and benefit across a plurality of persons. Strict liability, in the sense relevant here, imposes a condition on conduct and thereby seeks not just to correct harm wrongly done, but to prescribe the proper alignment of burden and benefit as far as the activities that it governs are concerned.

Commutative justice is concerned with the proportional alignment of burdens and benefits. It is, for Aristotle, distinct from both corrective justice (which is concerned with the rectification of wrongs) and distributive justice (which distributes goods on the basis of status or virtue).[44] Commutative justice distributes in accordance with benefit. Enterprise liability is fundamentally commutative because it holds that accidental losses should be borne in accordance with the benefit that people derive from the enterprise or activity in question. Like corrective justice—and unlike distributive justice as Aristotle understands it—commutative justice is concerned with conduct, with what has been done, with who has suffered, and with who has gained. Unlike corrective justice, however, commutative justice does not just seek to right a wrong. It seeks to bring into existence a state of the world in which burdens and benefits are aligned. Harm-based strict liabilities attempt to do just that. They are primary conduct-governing norms of conduct only insofar as they prescribe that those who inflict harm reasonably on others must repair the harm that they reasonably inflict in order to align burden and benefit fairly.

In their most distinctive, if embattled, incarnation, strict liability wrongs are thus distinctive in two ways. First, they are conditional wrongs. The wrong involved is "harming without repairing." Second, they involve both corrective and commutative justice. They involve corrective justice because they right the wrong of harming another and thereby benefitting unjustly at that person's expense. They involve commutative justice because they seek to prescribe a social world in which the burdens and benefits of reasonable risk impositions are fairly distributed. The basic lesson of autonomy rights-based forms of strict liability reinforces the lessons of harm-based strict liabilities in an important way. The wrong in trespassory forms of strict liability lies only in the invasion of the right. The conduct involved may be otherwise entirely innocent, entirely justified, and even beneficial. Strict liabilities are not conduct-based wrongs in the sense that corrective justice and civil recourse theorists use that term.

D. Defenses and limits

My principal concern in this chapter is with strict liability as the form of liability that attaches to defendants in strict liability cases. Strict liability regimes, of course, involve

[44] Aristotle, *Nicomachean Ethics*, bk. V, ch. 5. The appropriation of the term commutative justice to defend forms of nonfault liability is illustrated by Joel Feinberg, *Doing and Deserving* (Princeton, NJ: Princeton University Press, 1970), 221. It is a fair question whether this use of the term is faithful to Aristotle's usage.

defenses and limits on liability as well as basic forms of liability. Full consideration of these is beyond the scope of this chapter. A brief discussion of limits and defenses may nonetheless be useful. One of the great worries associated with strict liability is the worry that such liability has no limits. This, indeed, is the worry that Guido Calabresi and Jon Hirshchoff mention in the first paragraph of their seminal paper on strict liability, and it is inextricably bound up with the question of what defenses to strict liability should be recognized.[45]

Generally speaking, the boundaries of strict liability are fixed in two ways. When harm-based strict liabilities are at issue, the liability is normally liability for the characteristic risks of the activity. In *Escola*, for example, the risk that materializes is a characteristic risk of the defendant's activity. They chance that a particular Coke bottle will fail to conform to the manufacturer's own intentions for the product—and explode unexpectedly because the glass is flawed or the bottle is overpressurized—is a risk of manufacturing Coke bottles, a risk whose incidence is determined by the quality of the inputs Coke chooses and the care with which it manufactures, tests and markets the product. In many cases, to be sure, the identification and attribution of characteristic risk is difficult. The availability of strict liability as an alternative to fault liability often depends on whether non-fault criteria for charging accidents to activities can be devised. Practically important as this problem is, however, it is not one that we can address here. For our purposes, it will do to say that strict liability is liability for the characteristic risks of an activity and to point to the example of *Escola* to illustrate that idea. When rights-based liabilities are at issue, the limit of the liability is determined in the first instance by the character of the right. The proper scope of the power to exclude others from one's property determines the reach of the tort of trespass.

The arguments of this chapter contribute to thinking about the scope of strict liability in only two ways. With respect to harm-based activities, the relevant point is that strict liability is liability for harm that should not be avoided, yet which should be repaired because otherwise that party will benefit itself by imposing harm on others. When we consider the choice between strict liability and negligence, the question to which this point directs our attention is the question of whether the harms caused by an activity once reasonable care is exercised are harms that those who suffer them may plausibly assert should be borne by those who benefit from their infliction. If so, strict liability is a live alternative to negligence. An all things considered case for preferring strict liability over negligence, however, must rest on a broader set of considerations. The primary burden of this paper has been to try to show what the distinctive morality of strict liability is, not when strict liability is, all things considered, justified. With respect to autonomy rights-based strict liability, the lesson of this chapter is that strict liability is appropriate when the autonomy guarded by the right in question would be compromised by the recognition of the absence of fault as an excuse for failing to comply with the right.

[45] Guido Calabresi and Jon. T. Hirschoff, "Toward a Test for Strict Liability in Torts," 81 Yale L.J. 1055 (1972).

The ideas at work in strict liability may shed a bit more light on the defenses to strict liability. Prior to the adoption of comparative negligence, the defense of assumption of risk was commonly associated with strict liability, and rightly recognized as a kind of victim strict liability.[46] The connection between assumption of risk—properly applied—and strict liability is a strong one. Assumption of risk involves the assertion of the victim's agency, in the pursuit of the victim's purposes, with respect to harm. Physical harm (the form or harm with which tort law is preoccupied) is the impairment of (normal) physical agency. The assertion of agency with respect to harm can be transform a victim's relation to harm.

Consider an admittedly extreme example. High-altitude mountaineering (e.g., summiting K2) exposes its practitioners to a significant risk of long-term memory loss. For one person to put another in a hyperbaric chamber and simulate the low oxygen, low barometric pressure of the "death zone" above 26,000 feet would be an infliction of unacceptable risk. For even if the victim were acclimated to the conditions, the exposure to air that thin would put them at risk of significant memory loss—at risk of serious impairment. For someone who chooses to pursue high-altitude mountaineering matters are different. They incorporate the risk of serious harm (memory loss) into a larger narrative; they yoke exposure to that risk to the pursuit of a value they consider more important, and they encounter that risk in the course of exercising various capacities of agency very fully. To put it differently, they identify with the pursuit of a valuable end which can only be realized by encountering this particular risk of harm.

Both the exercise of agency and the exposure to harm involved in summiting K2 are extreme, but the same phenomenon occurs in less extreme cases to which we do apply the doctrine of assumption of risk. In our era, sports are the principal habitat of assumption of the risk and sports are activities whose distinctive values can often only be realized by encountering above-normal risks of harm. A skier confronting an expert slope wants to encounter the steepness, the iciness and the bumpiness that make it difficult to ski. The capacities that she wishes to exercise, the competence that she hopes to display, and the value that she seeks to realize can only be realized by encountering a heightened risk of falling and injuring herself. Her identification with that project transforms her relation to the harm she risks. Harm chosen in the pursuit of value is not harm imposed and suffered.

E. Embracing strict liability

Rights-based and harm-based forms of strict liability may both ebb and flow, but they are entrenched forms of tort liability. Trespass, battery, and conversion are neither going away nor on the path to becoming fault-based forms of liability. They are here to

[46] This is very clearly recognized and powerfully explained in economic terms in Guido Calabresi and Jon T. Hirschoff, "Toward a Test for Strict Liability in Torts," 81 *Yale L.J.* 1055 (1972).

stay, and they will stay strict; the rights that they protect require this strictness. Harm-based strict liabilities ebb and flow more dramatically, but they are not about to disappear from our law of torts altogether. Vicarious liability is ineradicable, and intentional nuisance is as entrenched as trespass or conversion. Harm-based strict liabilities are, therefore, likely to persist. Moral theories of tort must therefore make room for both sovereignty-based and harm-based strict liabilities and abandon the quixotic project of purging them from the law of torts. Making room for these two forms of strict liability requires accepting two ideas. The first is that one can commit a tortious wrong simply by violating an autonomy right—by interfering with someone's control over their self or their property in ways that that person has not authorized. The second is that there is a form of tortious wronging which consists of harming without repairing. The ship owner in *Vincent v Lake Erie* committed this very wrong. He was justified in lashing his ship to plaintiff's dock even though he was certain to do damage to the dock. He was justified in inflicting lesser harm on the dock to avoid greater harm to his ship. But he was not justified in failing to make reparation for the harm he had done. In failing to make reparation for the harm he had done, the ship owner was simply benefitting himself by harming someone else. By failing to repair the damage to the dock, the ship owner both denied and impaired the dock owner's autonomy. He denied that autonomy by depriving the dock owner of the power to choose the uses to which its resources would be put; he impaired it by leaving the dock owner's damaged. The ship owner was therefore privileged to inflict harm but obligated to repair the harm that he inflicted. He had a duty not to harm without repairing.