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## PERSONAL INVIOABILITY AND “PRIVATE LAW”

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In “Tort Law in a Liberal State,” Arthur Ripstein outlines a distinctive and powerful conception of the law of torts. That conception—articulated more fully in several recent, elegant articles<sup>2</sup>—sketches a division of labor between public and private law. That division, in turn, draws on a theme of John Rawls’s theory of justice. Political “society,” Ripstein explains, “has a responsibility to provide citizens with adequate rights and opportunities; each citizen, in turn, is responsible for what he or she makes of his or her own life in light of those resources and opportunities.”<sup>3</sup> Within this public framework “private law is the form of interaction through which a plurality of separate persons can each take up this special responsibility for their own lives, setting and pursuing their own conceptions of the good in a way consistent with the freedom of others to do the same.”<sup>4</sup> Public law, in turn, has its own distinctive concerns, but the presence of political authority—of the kind of authoritative, public point of view that Rousseau famously labeled the “general will”—is a precondition of private right. Without an authoritative public point of view, private rights could not even be articulated, much less be enforced. “Entering what Kant calls a ‘civil condition’ . . . is a public [transaction] that makes [private] transactions enforceable.”<sup>5</sup> The specification and enforcement of private rights itself presupposes

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<sup>1</sup>William T. Dalessi Professor of Law and Professor of Philosophy, University of Southern California. I am indebted to Arthur Ripstein for a number of illuminating email exchanges on the subject of his paper and tort law more generally, to Scott Altman for illuminating discussions of the law of property, to Ben Zipursky for astute comments on the penultimate version of the paper, and to Erin Garvey for research assistance. I am especially grateful to Cathy Sharkey for undertaking the thankless task of organizing the conference. This is a corrected version of a paper published at JOURNAL OF TORT LAW: Vol. 1: Iss. 2, Article 4 (2006)

<sup>2</sup>See *Private Order and Public Justice: Kant and Rawls* forthcoming, University of Virginia Law Review [henceforth cited as “Private Order and Public Justice”] and *Beyond the Harm Principle*, forthcoming, Philosophy and Public Affairs [henceforth cited as “Beyond the Harm Principle”].

<sup>3</sup>Private Order and Public Justice, at 2.

<sup>4</sup>*Id.*

<sup>5</sup>*Id.*, at 25, at 3 and *passim*. The general idea that Ripstein is deploying here is an idea which distinguishes Kant’s social contract argument for the necessity of political authority from Locke’s. Kant famously argued that men could be forced to leave the state of nature and join with other men in political society because justice could not be established in the absence of political authority. The problem is not merely that it would be difficult to enforce rights when disputes arose over them (as Locke thought) but that rights could not even be articulated in the absence of political authority. Every right must be part of a *system of rights* and a system of rights can only be articulated by a political authority (e.g., a

a public sphere.

Stated this abstractly, Professor Ripstein’s conception is at once familiar and illuminating *and* perplexing and unpersuasive. Familiar, because it matches the standard shorthand description of the distinction between private law and public law. Public law is concerned with the relations between citizens and state, and in diverse ways: with the constitution of the citizenry into a collective body; with the specification of the powers that they have as such a body; and with the safeguarding of citizens against arbitrary government action, to name just three. Private law constitutes a framework for interactions among citizens themselves—individually and as members of firms and associations—and secures every citizen’s person and property against injury and violation at the hands of other citizens. Illuminating, because Ripstein divides tort into two classes of wrongs. Some tortious wrongs are based on “harms” whereas others are based on “harmless trespasses.”<sup>6</sup> This distinction between torts like trespass to land and torts like negligence in the law of accidents is important and often overlooked. Trespass to land does not require the infliction of an injury, merely the violation of a right whereas liability for negligence in the tort law of accidents does require that harm—physical harm, in point of fact—be done.

It comes as a surprise to first-year law students, but it is hoary old doctrine that I can commit a trespass to your land even if I do not harm you, and do, in fact, benefit you. If I innocently and reasonably mistake the boundary lines between our properties and proceed to top, trim and clean your trees of bagworms without your permission—suppose I reasonably believe that I am on my own land—I am nonetheless liable to you in trespass.<sup>7</sup> The facts that I acted reasonably and that my actions inured to your benefit, both objectively and (almost certainly) subjectively, are simply irrelevant. The same idea of trespass extends to cover at least some contacts with persons. If, after diagnosing you with a diseased right ear, I receive your permission to operate on that ear and then discover—after I have anesthetized you—that you have a “far more serious” condition in your left ear, and proceed to benefit you by remedying that condition, I am still liable for battery because I did not have your permission to operate on your

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legislature). *Id.*, at 17 (“The only rights that we can have are those that are consistent with others having the same rights in a system of equal freedom through equal rights.”). For similar reasons, a *claim* of right can only be vindicated by a political—or, if you prefer, judicial—institution (e.g. a court). In part, this is because even when the content of rights is clear private enforcement of a right does not provide the right kind of vindication of that right: Private enforcement “is inconsistent with justice because it is ultimately the rule of the stronger.” *Id.*, at 18, n. omitted. And in part, enforcement of rights by public institutions is required because—in many cases—“public institutions of justice” are “required to fix the precise contours of private right. In such cases, the role of the legal system is to provide a common answer to disputes about private right, rather than to declare an antecedent answer.” *Id.*, at 21.

<sup>6</sup>Beyond the Harm Principle at 2. “Harmless trespasses” are presented as a problem for the harm principle associated, famously, with John Stuart Mill’s ON LIBERTY and the tradition of thought that it has inspired.

<sup>7</sup>*Longenecker v. Zimmerman*, 175 Kan. 719, 267 P.2d 543 (1954).

left ear.<sup>8</sup>

Conversely, liability in negligence, nuisance, defamation, fraud and many other torts either always or typically requires injury. Even in California—where intruding into someone else’s “personal space” is sometimes thought to be a popularly recognized wrong—there is no legal liability for *accidentally* crossing the boundary line of someone else’s property and “trespassing” into their “space.”<sup>9</sup> This distinction between harm-based and rights-based claims is fundamental to the law of torts, and it is overlooked by instrumentalist theories which see only the maximization of wealth or welfare at work. Indeed, the only fault in this classification of tortious wrongs is its mistaken denial of a third kind of claim—namely, strict liability “wrongs.” These are cases where reparation is required neither because the defendant violated a right (e.g., entered the plaintiff’s land without permission thereby trespassing) nor because the defendant behaved unreasonably in inflicting the injury (e.g., imposed a risk that should not have been imposed) but because it is only permissible for the defendant to injure the plaintiff if the defendant makes reparation for any such harm done.<sup>10</sup>

But if Professor Ripstein’s framework is both familiar and illuminating it is also perplexing and unpersuasive. Ripstein writes as if he believes that there must not just be “private” law in the sense of a law of “mine and thine” but also as if that private law must take a very particular and traditional form:

On Kant’s analysis, private wrongdoing is always a matter of one person being subject to the choice of another. If I deprive you of means that are rightfully yours—perhaps I carelessly bump you, and injure your body, or damage your property—I have interfered with your right to be the one who determines how your means will be used, your right to continue having the means that you have. . . . You have every right to complain—to me and about me—if I [wrongly harm you]. In wronging you, I upset our respective independence from each other; the limits on our choice are no longer reciprocal, but subject to my unilateral choice. Your remedy against me is supposed to give you back what you were entitled to all along. . . . Your right of enforcement against me is a right to make me restore you to the position you [would have been in] if I had never wronged you. Your right survives my wrong in the form of a remedy; the remedy serves to undo the

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<sup>8</sup>Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905).

<sup>9</sup>See e.g., Randall v. Shelton, 293 S.W.2d 559 (Ky. 1956); Margosian v. United States Airlines, Inc. 127 F.Supp. 464 (E.D.N.Y. 1955).

<sup>10</sup>See Gregory C. Keating, *Property Right and Tortious Wrong in Vincent v. Lake Erie*, ISSUES IN LEGAL SCHOLARSHIP, Symposium on “Vincent v. Lake Erie Transportation Co. and the Doctrine of Necessity,” Article 6 (2005). Professor Ripstein treats *Vincent* as an instance of “trespassory” liability. This will not work because Lake Erie’s liability is triggered not by its violation of Vincent’s right to exclude (its entry without permission) but by its infliction of injury. Harm is the touchstone of liability in *Vincent* whereas the harmless violation of a right triggers liability in trespass.

unilateral aspect of my deed.<sup>11</sup>

This invites a particular and strong view of just what the establishment of a realm of equal freedom among persons in civil society requires in the way of institutions of civil liability. As far as the relations of democratic citizens to one another are concerned, “freedom in accordance with universal laws” requires—or so it seems—both private rights and the remedial structure of corrective justice in tort.<sup>12</sup> Call this “private law.”<sup>13</sup> The displacement of “private law” so understood by either enterprise liability with its emphasis on systemic risk engendered by large scale social activities and its commitment to a principle of commutative (not corrective) justice, or by direct regulation of conduct and state compensation for harm done, appears incompatible with justice among equal and independent democratic citizens. For these alternatives appear to replace “private law” with “public law”—justice between the parties with the pursuit either of social justice or of public ends (e.g., accident prevention and loss-dispersion).

Ripstein’s summary of Kant’s conception of private law is admirably compact and accurate. But the larger claims that Kantian justice requires “private law” and that idea of “private law” captures the essence of our law of torts are less persuasive. Prescriptively, the nerve of the problem is that Ripstein’s idea of “private law” is an uncompromisingly formal one. It takes the shape of a private lawsuit—the calling of a wrongdoer to account by a victim of her wrongdoing—to be the essence of “private law.” By insisting this rigidly on the importance of a particular legal form, Ripstein’s theory of “private law” risks rule-fetishism on an institution wide scale. His theory risks mistaking the inviolability of private law for the inviolability of persons, thereby subverting Kant instead of perfecting him. Interpretively, the nerve of the problem is that Kant’s philosophy of private law is not itself a philosophy of tort law, and it was penned long before the emergence of our modern law of torts. Kant—as George Fletcher reminded us at the conference—never wrote a word on the law of torts. His philosophy of private law is centered around the law of property. This is a perilous path through which to approach our law of torts because it invites the pre-modern view of Tort as a body of law which enforces substantive rights created elsewhere. By hewing so closely to the structure of private law as Kant conceived it, Ripstein’s theory risks embracing an essentially remedial and so antiquated conception of tort law.

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<sup>11</sup>Beyond the Harm Principle, at 17 n. citation omitted.

<sup>12</sup>Id., at 16-18. “Freedom in accordance with universal laws” is at least the most famous catch phrase of Kant’s political philosophy and perhaps its master principle. It is quoted by Ripstein in Beyond the Harm Principle at 18.

<sup>13</sup>Following ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW* (1995), to which Ripstein’s conception is deeply indebted. It is tempting to believe that the signature claim of “private law” theorists is that corrective justice is, in Jules Coleman’s words the “overarching ambition or purpose” of tort law. (JULES COLEMAN *RISKS AND WRONGS*, 395 [1992]). But this may be too strong. The somewhat different idea of “civil recourse” proposed by Benjamin Zipursky also appears to be a “private law” idea. See e.g., Benjamin Zipursky, *Civil Recourse, Not Corrective Justice*, 91 *GEORGETOWN L. J.* 695 (2003).

The particular idea of “private law” with which Ripstein is working is identified with the elegant theorizing of his senior colleague Ernest Weinrib.<sup>14</sup> Some of Professor Weinrib’s more famous characterizations of “private law” are cause for concern. Private law, Weinrib writes, is like love. It has and needs no further justification: “the only thing to be said is that the purpose of private law is to be private law.”<sup>15</sup> Now the analogy of law to love is not the clearest of comparisons<sup>16</sup>, but one plausible way of reading it is as an assertion that *private law itself is of intrinsic value*. That idea risks replacing the commitment to the inviolability of persons that gives Kant’s moral and political philosophy its power and beauty with a commitment to the inviolability of a particular institutional form. But “private law” has a claim to be the incarnation of Kantian justice only insofar as it expresses the inviolability of persons that lies at the center of Kant’s philosophy. To embrace “private law” on the ground that this particular institutional form is of independent and intrinsic value is to repudiate the moral insight that justice is of value because and insofar as it expresses the inviolability of persons.

To lean as heavily as Professor Ripstein does on the particulars of Kant’s understanding of private law is to miss the heart of our law of torts. Our law of torts comes into existence not only *with* the rejection of the remedial conception of the field but *by* the rejection of this remedial conception. Tort law emerges as one of the three pillars of private law late in Western legal history and it does so only when it is conceptualized around freestanding principles of civil liability which define rights and duties independently of any other body of law. Modern negligence law is constituted late in the nineteenth century when negligence ceases to be recognized simply as an element of other causes of action, and comes to be recognized as a cause of action in its own right.<sup>17</sup> Modern strict liability emerges at roughly the same time, when

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<sup>14</sup>It is important to understand that Ripstein is not endorsing a libertarian idea of “private law” of the sort found in the writings of Robert Nozick and Richard Epstein. That libertarian idea takes political authority to be fundamentally private, arising out of natural rights (to property) and private agreements (actual contracts). This idea of a realm beyond the reach of public power—of a political order where legitimate power is exercised solely by private right and private agreement—is emphatically not Ripstein’s. For Ripstein, even “private law” must be justified from a “public” point of view. Legitimate political authority must be justifiable to everyone and so must be justified from a point of view that everyone could adopt. The idea of reasonable agreement among equals expressed by Rousseau’s “general will,” Kant’s hypothetical original contract, and Rawls’ “original position” is fundamental. This commitment involves a complete rejection of the libertarian idea of political authority as a form of private authority, rooted in private property and private agreement.

ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW*, at 5 (1995).

<sup>16</sup>For commentary and criticism, see John Gardner, *The Purity and Priority of Private Law*, 46 U. TORONTO L. J. 459 (1996). Gardner argues that there are three ideas entangled here: That the value of law is non-instrumental, that it does not derive from any “extrinsic end,” and that its motivational grasp on us is not transparent.

<sup>17</sup>See Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1256-81 (2001). Prior to the late nineteenth century torts is an essentially remedial category and “negligence” is the culpable state of

liability without fault is recognized as a standing alternative to liability based on fault.<sup>18</sup> The essentially remedial conception of tort law implied by Kant’s property-centered philosophy of private law is a distant ancestor of our self-consciously substantive law of torts.

The general unease bred by Ripstein’s derivation of his account of tort law from a philosophy of property law prefigures two important interpretive defects in the theory. First, Professor Ripstein’s rendering of tort law into domains of “trespassory” and “harm-based” *wrongs* both eclipses the important distinction between wrongs which are fault-based and those for which liability is strict and misrepresents the morally unobjectionable character of the conduct subject to strict liability. Second, the line between private and public forms of law in American legal culture is more permeable than Ripstein’s account of tort law as “private law” allows and the relation between “private” and “public” law is more harmonious than his conception supposes. “Public law” often perfects the ends of “private law.”

The nerve of Ripstein’s moral mischaracterization of the conduct subject to liability in tort is this: His division of the law of torts between harm-based wrongs and harmless trespasses implies that liability for harm done is imposed on an actor because of wrongful conduct. But the kind of risk impositions that give rise to liability in tort need not be wrongful. Building a reservoir in mining country may subject you to liability for harm done by the escape of water from your reservoir, but building a reservoir on your own property is hardly *wrong in itself*. That claim struck the English Courts that decided the celebrated case of *Rylands v. Fletcher* as “absurd”<sup>19</sup>—and rightly so. A reservoir, carefully constructed and operated, is a perfectly reasonable use of one’s own land. Storing large quantities of water on one’s own property is not,

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mind associated with particular torts. “As late as the beginning of the twentieth century, Sir John Salmond was still portraying negligence as a mental element in a number of separate torts on his view, but not as a separate tort.” *Id.*, at 1261. Modern tort law emerges when negligence is recast as an independent tort. Holmes is the great figure in this development. *Id.*, at 1257 (“Holmes great breakthrough, the innovation that allowed him to treat torts as a ‘proper subject’ after all, was his decision to organize tort law around the principle of liability for negligence. That principle gave torts a conceptual and doctrinal center, and implicitly designated its distinctive substantive domain as accidental injuries.) For Holmes, “[t]ort was . . . an autonomous body of substantive law” grounded on a general duty not to inflict avoidable harm. *Id.*, at 1272-73. Our tort law is the child of this conceptual revolution. To espouse an essentially remedial conception of tort is to condemn oneself to interpretive irrelevance.

<sup>18</sup>Clare Dalton’s unfortunately unpublished manuscript “Losing History:: Tort Liability in the Nineteenth Century and the Case of *Rylands v. Fletcher*” (ms. 1987) is the best account of the emergence of strict liability as a general principle of liability competitive with fault liability. The basic idea is developed in ROBERT E. KEETON ET AL, *TORT AND ACCIDENT LAW*, Chapter 7 (4<sup>th</sup> ed. 2004) and in Chapter 7 of *Robert E. Keeton et al., Teacher’s Manual to Accompany Tort and Accident Law* (4<sup>th</sup> ed. 2004).

<sup>19</sup>*Nichols v. Marsland* LR 2 Ex. D 1 (1876) (“But it seems to us absurd to hold that the making or keeping [of] a reservoir is a wrongful act in itself.”).

to be sure, without risk. There is a chance that the reservoir will collapse and that the ensuing flood will wreak havoc, and that is just what happened in *Rylands*. But the risks posed by a reservoir are not so great that it is negligence simply to store water in such quantity.

More importantly, risk imposition is not wrong *in itself*. There can be no productive economic activity without risk. Unless we are prepared, absurdly, to condemn productive economic activity *tout court*, we must be prepared to regard *reasonable* risk as justified, even if it is capable of wreaking great harm. But because even reasonable risk can do massive harm, the question of legal and moral responsibility for harm reasonably risked must be faced. Our law of torts comes to grip reasonable risk in part by recognizing a class of cases where the wrong lies not in the unreasonableness of the defendant's conduct but in unreasonableness of the defendant's failure to make reparation for harm arising out of risk reasonably imposed. Any interpretively adequate theory of tort law must therefore make space for "unreasonable harm" as well as for "unreasonable risk"—for strict liability wrongs as well as for fault-based ones.

The stark opposition Professor Ripstein draws between "private" and public law as mechanisms for addressing accidental injury is also misleading, but here the false impression is created not by what his conception asserts, not by what it omits. Within the general domain of accidental and intentional interference with the person and property of others—within the general domain of tort—private and public law are not opposing conceptual frameworks; they are intricately interwoven and related institutional mechanisms. Their pure forms may occupy opposite ends of a continuum, but the law of accidents that we actually have intermingles public and private strands in a way which belies their opposition. The complexity of modern social life often outruns the law-articulating and rights-coordinating capacities of private law. When this happens, "public law" institutions are called upon and they come more to fulfill the promises of private law than to displace private purposes with public ends.

For all its philosophical subtlety, Ripstein's use of Rawls is likewise unpersuasive. The principles and commitments of Rawls' philosophy are compatible both with embrace of "private law" and with its rejection and replacement by "public law" approaches to accidental injury. Unsurprisingly, a theory which leaves open the choice between capitalism and (market) socialism, does not bind us to one and only one way of ordering our direct interactions with one another in civil society. Or so I shall argue.

## A. INTERPRETING TORT LAW

### 1. *Harm-Based Wrongs*

Ripstein's division of the law of torts into realms of "trespassory" and "harm-based" wrongs eclipses the distinction between negligence and strict liability and misrepresents the moral character of much of the conduct subject to strict liability. Strict liability in cases like



*Rylands* and *Boomer* is “harm-based”—*Rylands* is liable because the water escaping from his reservoir harmed Fletcher and liability in nuisance requires harmful interference with plaintiff’s use and enjoyment of land—but the strict liability of these cases differs from negligence liability. Negligence liability criticizes conduct. Responsibility to repair harm done is predicated on the imposition of a risk—or, in intentional nuisance, on the deliberate infliction of a harm—which should not have been imposed (or inflicted). Strict liability, by contrast, criticizes only the failure to make reparation for harm done.

Under negligence liability, if it is wrong to separate fighting dogs by lifting a stick over your shoulder without taking care not to injure anyone behind you, then you are liable to the man whose eye you injure for that injury. If it is not wrong to separate fighting dogs in this way, then you are not liable for any injury you inflict. Under negligence liability, if it is wrong not to screen your cricket field so that stray balls cannot strike neighbors gardening in their own front yards, then you are liable to them for the harm done by a stray cricket ball escaping from your stadium. If it is not wrong to forego the screening in question, you are not liable. In nuisance, if it is wrong to situate your hogs directly in front of your neighbor’s property, your conduct may be enjoined. If that conduct is not wrong but still interferes with your neighbor’s reasonable use and enjoyment of its property, you will be liable in damages for the harm you do, but your conduct will not be enjoined. Faulty conduct is the touchstone of fault liability.

For Ripstein, *Rylands* and other “pockets of strict liability” are “cases [that] can be thought of as adopting conclusive presumptions of negligence when injuries ensue from such activities.”<sup>20</sup> This might mean that the very construction of a reservoir—*Rylands*’ choice of “activity”, in economic parlance—was itself negligent. But this interpretation of the case is explicitly rejected by Baron Bramwell’s opinion<sup>21</sup> and is condemned in *Nichols* as “absurd.” *Rylands v. Fletcher* is a foundational case for the law of torts because it endorses the principle that people can be held responsible for harms which flow from their agency—period.

[T]he case of *Rylands v. Fletcher* establishes that [an owner of a reservoir] must be held liable [when harm to another is] occasioned by the *act of the party without more*—as where a man accumulates water on his own land, but, owing to the peculiar nature or condition of the soil, the water escapes and does damage to his neighbour. . . .<sup>22</sup>

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<sup>20</sup>ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW*, at 70 (1999). See note 59, *infra* (contrasting conceptions of strict liability that assimilate it to negligence to those that do not).

<sup>21</sup>“The nuisance is not in the reservoir but in the water escaping . . . [T]he act was lawful, the mischievous consequence is a wrong.” Baron Bramwell, *Fletcher v. Rylands*, 3 H. & C. 774 (Exch. 1865).

<sup>22</sup>*Nichols v. Marsland* LR, 2 Ex. D 1, 1876) (emphasis mine). *Nichols* goes on to rule that not all (escapes of water from artificial accumulations thereof can be attributed to the agency of the person responsible for creating the accumulation. Liability can be defeated by “showing that the escape of the water was owing to vis major, or, as it is termed in the law books, the “act of God.” This is a version of

*Wrongful* agency is simply not a precondition of liability under *Rylands*. Harmful agency is.

So it would be a mistake to claim that the construction of a reservoir on one's own property is in and of itself wrongful. If it were, an injunction would be the appropriate remedy. But I also suspect that Professor Ripstein does not regard Fletcher's construction of the reservoir as in itself wrong. His thought is more that *Rylands* and other strict liability cases involve something akin to *res ipsa loquitur*, a circumstance where the very happening of the accident vouches for faulty conduct on the defendant's part. The fly in the ointment here is that *Rylands* conduct was not faulty. His contractor may well have been at fault for the collapse of the reservoir and the consequent flooding of Fletcher's mine, but *Rylands* exercised due care in his choice of contractor, so the contractor's fault is not imputed to him. Because *Rylands* conduct was not faulty—he was well within his rights in constructing a reservoir on his property and he went about his task with sufficient care—the liability imposed on him is “strict” and strict liability is not a species of fault liability. Liability without fault is the alternative *opposing* fault liability, not a variant on fault liability.

Whereas negligence liability criticizes conduct, strict liability criticizes merely the failure to make reparation for harm done. The gravamen of its complaint is that it is unreasonable for the defendant to cast the cost of its activity onto the plaintiff, for *Rylands* to cast the cost of his reservoir onto Fletcher. *Rylands* reaps the benefits and *Rylands* must bear the burden. Defendant's liability for damages in modern American nuisance law is strict in the same way. Here, *Boomer*—refracted through the lens of the RESTATEMENT (SECOND) OF TORTS—is the canonical case.<sup>23</sup> With the violation of plaintiff's right to the reasonable use and enjoyment of its

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the familiar but important point that strict liability is not *absolute* liability.

<sup>23</sup>*Boomer v. Atlantic Cement Co.*, 309 N.Y.S.2d 32, 257 N.E.2d 870 (N.Y. 1970). RESTATEMENT (SECOND) OF TORTS §§ 826, 829A (1979). This version of the law of nuisance also appears in the First Restatement and case law influenced by it, if not as prominently. See e.g., *Wheat v. Freeman Coal Mining Corp.*, 23 Ill. App.3d 14, 18 (1974) (“At the outset, it should be emphasized that this was not a suit for an injunction restraining defendant's activities. In such cases, a stronger showing will be required of plaintiffs with regard to the unreasonableness of defendant's activities. . .”) (citing to RESTATEMENT OF THE LAW OF TORTS § 822).

The reading of *Boomer* that I offer here is contestable. Space does not permit me to explore fully the interpretive issues raised by reading *Boomer* in this way. Briefly: *Boomer* is also often cited for the proposition that an injunction will not issue even in cases of “irreparable injury” which would ordinarily require an injunction, if the issuance of the injunction would cause “undue hardship” to the defendant. “Undue hardship” may then be understood as an economic limit on the pursuit of corrective justice. This is the idea to which Professor Weinrib objects. See note 24, *infra*. For a brief, acute discussion of *Boomer* and “undue hardship” see DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES, 405-410 (3<sup>rd</sup> ed. 2002). Laycock's interpretation of *Boomer* has much in common with the interpretation that I offer here. He notes, for example, that “the harm to the plaintiff is an unavoidable side effect of an otherwise legitimate use of defendant's property.” (Id., at 407). This is another way of noting that the conduct giving rise to the nuisance in *Boomer* was reasonable and unobjectionable. Implicitly, my reading of *Boomer* puts more weight on the reasonableness of defendant's conduct as a ground for refusing to issue

land established, the court faces a choice of remedy: Injunction or damages? Plaintiff is denied an injunction on the ground that defendant's activity—its cement plant—is a reasonable and legitimate one, carefully conducted. Plaintiff is denied an injunction because the defendant's *conduct* is reasonable. Plaintiff is awarded damages because the reasonableness of defendant's conduct does not make the defendant's infliction of *injury* upon the plaintiff reasonable. Defendant reaps the benefits of the cement plant and must therefore pay for the harm—the interference with others' reasonable use and enjoyment of their land—that its reasonably conducted activity wreaks.

Indeed, modern American nuisance law cannot be properly explained without distinguishing between fault-based and strict liability.<sup>24</sup> Unlike traditional nuisance law, modern American nuisance law does not award an injunction as a matter of right. It awards money damages as a matter of right and an injunction only upon a showing that the defendant's conduct is unreasonable. Nuisances which arise out of legitimate activities, reasonably conducted—cement plants whose pollution cannot be charged to their failure to take reasonable measures to control pollution—are liable in money damages for substantial interference with

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an injunction whereas Laycock's reading puts more weight on the point that "the hardship must be disproportionate to any benefit plaintiff will derive from the injunction." (*Id.*, at 405).

<sup>24</sup>The analysis of nuisance law in ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW*, at 190-96 (1995) is instructive in this respect. Weinrib, like Ripstein, refuses to grant strict liability the status of a competing principle of liability in tort. Consequently, he is able to explain the traditional nuisance *regime* with its remedy of injunction as a matter of right, but not the modern repudiation of this rule in *Boomer* and the RESTATEMENT SECOND. For Weinrib, an injunction restores to plaintiff her right to the reasonable use and enjoyment of her property—thereby undoing defendant's wrong—whereas money damages do not. Weinrib objects to the modern repudiation of injunctive relief as a mandatory remedy for nuisance on the ground that this refusal to restore to the plaintiff the right that has been violated sacrifices individual right to the general good. "[N]o considerations of community advantage or wealth maximization can justify the court's compelling plaintiff to accept monetary damages in lieu of the exercise of the violated right." (at 195) This begs the question. Nuisance law reconciles competing rights to the reasonable use and enjoyment of real property. The question, therefore, is how to reconcile those competing rights when defendant's legitimate use of its own property interferes with plaintiffs reciprocal right to the legitimate use of its property. Modern nuisance law asserts that enjoining *reasonable* nuisances works an injustice to the property right of the party so enjoined, by depriving that party of too much in the way of the reasonable use of his land. This argument can be underpinned by appeals to community advantage, but it does not require such an appeal. Direct appeal to the equities between the parties also supports the modern regime. Injunctions are denied and damages awarded when the hardship inflicted on the defendant by an injunction will be disproportionate to the benefit that injunction confers on the plaintiff. See Laycock, *supra* note 23. Money damages therefore reconcile the competing property rights of the parties more fairly than an injunction does, even though they fail to vindicate plaintiff's right as fully as an injunction does.

their neighbors' rights to the reasonable use and enjoyment of land.<sup>25</sup> This liability is strict: It attaches to conduct which is not culpable. But modern nuisance law also awards injunctions. It does so, however, only when defendant's *conduct*—defendant's use of its land—is unreasonable. Locating your hogs “directly in front of the plaintiff's residence[] is an unreasonable and unwarranted use” of your property and it will be enjoined.<sup>26</sup> This liability is fault-based because it is predicated on wrongful conduct.

More is at stake here than the correct interpretation of liability in *Rylands* and *Boomer*. The deeper stake here is the moral character of risk and pollution. A morally salient fact about risk and pollution—perhaps even *the* morally salient fact—is that risk and pollution are not *wrong in themselves*. Risk unreasonably imposed and pollution unreasonably emitted are wrong, but reasonable risk and reasonable pollution are the morally innocent but harmful byproducts of valuable activity. Strict liability is a philosophically important form of liability because it registers this fact and responds to it appropriately, both by declining to infer wrongful conduct from the fact of injury and by recognizing that the knowing infliction of injury on others may by itself trigger a duty of repair. Conversely, Professor Ripstein's inclination to infer fault from harm and his identification of harm with wrong are misguided because they cast aspersions of wrongdoing on innocent acts and activities.

To characterize any actionable nuisance as wrong in the very same way that negligent conduct is wrong is to miss the moral significance of the fact that all nuisances have a “pig in the parlor” quality. Defendant's activity is a harm to plaintiff's activity. When nuisances are at issue, right as well as harm is reciprocal—both parties are entitled to the reasonable use and enjoyment of their property—and conflicts between rights to reasonable use can and do arise even when the conduct of the defendant is reasonable. *Boomer's* cement plant and *Del Webb's* feed lot are legal wrongs only because they are incompatible with their neighbors reasonable use and enjoyment of their own residential properties. When nuisances arise out of reasonable conduct, modern nuisance law concludes that *both* parties rights of reasonable use and enjoyment must give some ground and so awards money damages instead of an injunction. Enjoining the defendant's activity would be unreasonably one-sided; plaintiff's right to reasonable use and enjoyment would be unfairly preferred to defendant's.

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<sup>25</sup>*Boomer supra* note 23. In the famous case of *Spur Industries v. Del Webb Development Co.*, 494 P.2d 700 (Ariz., 1972) plaintiffs were permitted to enjoin defendant's nuisance only on condition that the compensate defendant for the cost of relocating its business. This “purchased injunction” remedy is widely taken to have vindicated the insights of Guido Calabresi and Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral* 85 HARV. L. REV. 1089 (1972) which presented an analysis of nuisance law with the remedy of a “purchased injunction” as the empty cell in a table of remedies for nuisance. We cannot go into the details here, except to note that this unorthodox remedy may sometimes be the most just reconciliation of competing reasonable—but incompatible—uses of land.

<sup>26</sup>*O'Cain v. O'Cain* 473 S.E.2d 460, 467 (S. C. Ct. App., 1996).

Risk and pollution share this morally innocent quality with reasonable nuisances. In themselves, risk and pollution are objectionable only because of the harm that they wreak. A moral theory of tort which insists that only those harms which arise out of wrongful conduct are actionable in tort fails *as an interpretation of tort law* because it overlooks the important legal category of harm-based liability predicated *not* on morally objectionable conduct, but on the moral wrongness of thrusting the costs of your activity onto others. But it also fails more broadly—and more disturbingly—because it takes an overly righteous view of risk and pollution, treating the existence of serious risk and substantial pollution as proof of conduct wrong in itself. Such a moral theory misses what may well be the most morally important fact about risk and pollution—that they are *not* wrong in themselves. Ironically, instead of overthrowing the economic analysis of tort and accident law, an overly righteous account of risk, pollution and harm increases the relative attractiveness of an economic analysis. Whatever its other faults may be, economic analysis has no difficulty in recognizing the legitimacy of the activities governed by the law of tort and nuisance.

## 2. “Public” and “Private” Law

“Tort Law in a Liberal State’s” insistence on the autonomy and inviolability of private law is belied by our own legal institutions. “Public” law institutions often arise to complement or complete “private” law ones. In these cases there is no displacement of private purposes by public ones. The purposes pursued are largely unchanged while the institutional forms through which those purposes are pursued are radically transformed. The “public law” of zoning not only addresses many of the same problems as the “private law(s)” of nuisance and covenants, it also arises largely out of the perceived limitations of nuisance and private agreement as institutional mechanisms for regulating conflicting uses of land. The same is true of the “public law” of environmental regulation. Comprehensive environmental regulation has displaced the common law of nuisance because administrative regulation has been perceived to be superior to private law as a institutional mechanism for addressing harmful fallout from valuable and legitimate activities

Nuisance law proved to be an ineffective means of regulating pollution. Perhaps most important, nuisance law posed the substantive question in a way that precluded rational planning. Cement plants have to go somewhere, but if the question is whether this plant is hurting this plaintiff, the answer will always be yes. Nuisance law was not well suited to ask whether a plant was in the least objectionable place or using the best possible technology to clean up.

With the substantive question misstated, remedies worked badly. Shutting down industry was too draconian. Permanent damages left industry with no further incentive to clean up once the judgment was paid. Repeated suits for temporary damages were burdensome to courts and litigants, and generally produced small judgments not worth pursuing.

The result is that nuisance law has been largely displaced by regulation.<sup>27</sup>

The nerve of the matter is this: In an ever more populated and intricate world, the underlying rights and obligations of landowners become increasingly complex and increasingly multilateral. As this phenomenon progresses, the bipolar form of the private lawsuit grows less and less adequate as an institutional mechanism for articulating and coordinating “private” property rights. More comprehensive institutions are needed. Zoning law—a statutory scheme born of an embryonic administrative state—displaces the common law of covenants and nuisance, but it comes not to shatter and destroy these “private law” schemes but to *complete and perfect* them. The same is true of environmental law. Common law ideas can be—and are—worked pure by abandoning common law forms in favor of statutory and administrative ones. Once such a recasting takes place, the statutory law can and often does react back upon and reshape the common law from which it sprang. The “public law” of zoning, for example, reacts back on the “private law” of nuisance, reshaping its “private law” determinations of what is and is not a nuisance.<sup>28</sup>

Perfection of “private law” by “public law” is hardly peculiar to the law of nuisance. Nonfault administrative schemes addressing accidental injury—“public law” solutions to problems of unintentional physical injury—arise naturally and perhaps “inevitably” out of the “private law” of individual tort actions. When the “private” tort law of accidental injury confronts stable and recurring patterns of accidental harm, the “public” law of administrative schemes and mass adjudication follows quickly in its wake, if not by legislative enactment then by judicial pronouncement.<sup>29</sup> Threads of moral argument tie these “private” and “public” regimes together as much as the practical demands of coping with recurring risks do. The theory of enterprise liability that flowers in “public,” nonfault administrative schemes expresses a moral conception of responsibility for harm done rooted in the “private” law of torts but stunted by its

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LE AYCOCK, *supra* note 23, at 407-08. Note that the modern nuisance law regime criticized by Professor Weinrib is an attempt to remedy these defects in nuisance law whereas the traditional regime favored by Weinrib exacerbates the very same defects. An injunction in *Boomer* would have conferred on every affected homeowner the power to shut down a \$45 million cement plant whose harmful fallout could not be reduced further by present technology and which had to go somewhere, thereby enabling a single unreasonable homeowner to scuttle the enterprise entirely or to appropriate an outrageous share of the enterprise’s value to herself by threatening to do so. In these circumstances, an “injunction allocates the power to be unreasonable between bilateral monopolists.” *Id.*, at 409.

<sup>28</sup>See e.g., *Little Joseph Realty, Inc. v. Town of Babylon*, 41 N.Y. 2d 738, 363 N.E. 2d 1163 (1977) (usage of land contrary to zoning ordinance must be enjoined as private nuisance; determination by zoning law prohibits independent evaluation of reasonableness by the common law of nuisance).

<sup>29</sup>Samuel Isaacharoff and John Fabian Witt, *The Inevitability of Aggregate Settlement*, 57 VAND. L.REV. 1571 (2004).

procedural and institutional limitations.<sup>30</sup> And here, too, when the “public” law of regulation enters a field, it reacts back upon the “private” law of torts. The doctrine of statutory negligence in the “private law” of torts, for example, makes use of “public law” statutes to help establish claims of negligence. Doctrines of preemption and public immunity reshape the private law of torts by coordinating tort’s “private” law with diverse bodies of “public” law.

There is, indeed, reason to believe that the “private” law of tort is often incomplete or inadequate and that “public law” schemes repair and complete the “private” law of torts. Nonfault administrative schemes are one case in point; risks which result in irreparable injury are another—and perhaps an even better—case in point. Adequate protection against irreparable injury cannot be provided by *any* system of reparation. This is true for the obvious reason that reparation cannot rectify harm that is beyond repair. But it also true for the less obvious reason that a system of reparation secures protection against harm in part by imposing a price on the doing of harm. The prospect of having to pay for harm wrongly inflicted is an incentive to avoid its infliction. When compensation is foregone because the harm done is so grievous as to be beyond repair, the protective power of a system of reparation is greatly diminished. The “private” law of torts is thus incomplete. The most grievous of the harms against which it protects us—premature death—is beyond its poor power of reparation and poorly guarded by its power of deterrence. The direct regulation of risks of devastating injury by “public” law thus perfects a fundamental aim of the “private” law of torts.<sup>31</sup>

### 3. Rawls: Kantian Constructivism and the Choice of Legal Form

Ripstein’s claim that Rawls’ political philosophy lends support to an idea of “private law” is inherently conjectural for the simple reason that Rawls never wrote on private law. The guiding thought behind Ripstein’s claim appears to be that private law protects persons’ “external means”—which “means” appear to be the physical integrity of the person and the property over which she exercises dominion—and that persons of the sort that Rawls is concerned with must conceive of themselves as having such means and having them protected.<sup>32</sup>

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<sup>30</sup>See Gregory C. Keating, *Rawlsian Fairness and Regime Choice in the Law of Accidents*, 72 *FORDHAM L. REV.* 1857-1898-1903 (2004). I also make this point in § B, *infra*.

<sup>31</sup>See generally, Gregory C. Keating, *Pricelessness and Life: An Essay for Guido Calabresi*, 64 *MARYLAND L. REV.* 159, esp. at 178-80 (2005).

<sup>32</sup>“You have two kinds of means that you can use for setting your own purposes: your own bodily powers and whatever property you have.” “Tort Law in a Liberal State” at 11. Compare pp. 9 & 12 of *Private Order and Public Justice*, which discuss economic competition and injury to economic interests, respectively. This strikes me as an accurate reading of Kant, but not as an accurate reading of the law of torts. A reader who did not know the law would think that there was never any recovery in tort for any form of intangible injury—economic, emotional, or dignitary. But our law of torts is far more complex than this: There is a general rule that there is no duty to exercise reasonable care with respect to economic interests, but one of the cases that Ripstein himself cites (*Barber Lines*) takes pains to list *nine*

Free and equal persons need “external means,” and they therefore enter the original position with a particular conception both of themselves and of certain means as constitutive of their external freedom. Ripstein writes:

[P]arties in the original position could never begin to consider alternatives unless those questions [of what their “moral powers will be” and “what set of goods will govern their decision”] were set by the conception of persons as free and equal, each with a special responsibility for his or her own life. A system of private law works up and reconciles these presuppositions of the original position in the thesis that citizens are able to take up that special responsibility, using their ‘all purpose means’ to set and pursue their own conceptions of the good, either independently or cooperatively, as they see fit. . . . So I am not attributing a ‘pre-institutional’ theory of private law to Rawls . . . but rather a theory of the institutional place of private law: it resolves private disputes between free and equal persons in a way that is consistent with their freedom and equality . . . <sup>33</sup>

This kind of claim seems right to me. It is fully consistent with the spirit of Rawls’ political philosophy to say that the *role* of private law is to secure certain important institutional conditions which enable free and equal persons to realize their diverse ends and aspirations in interaction with one another in civil society, singly and cooperatively.

In speaking of the *role* of private law in this way, however, we are speaking very abstractly about an institution which occupies a particular political space—the space where persons pursue their ends and aspirations in interaction with other members of civil society. This does not commit us to the particular institutional form that goes by the name of “private law”—to corrective justice in tort instead of to direct regulation of risk and collective provision of compensation for injury suffered, any more than American law’s commitment to the maxim “for every right, there must be a remedy” commits American law to the inviolability of “private law” as Ripstein conceives it. It is commonplace for American State Constitutions to contain a “remedy clause” embodying the precept that every right requires a remedy. The Oregon State

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exceptions to this rule. More importantly, there is an entire domain of intentional tort law—encompassing “business torts” such as fraud, intentional interference with business relations, unfair competition—which is concerned *solely* with economic interests. On the flip side of the coin, the remark also leaves the impression that dignitary and emotional interests are never and should never be protected by the law of torts. But they are—by the privacy torts, by intentional infliction of emotional distress, by defamation and by assault and, in some cases, against ordinary negligence. The “means” that tort law protects are in fact both more complex and more extensive than Ripstein’s account of them suggests. The extreme character of the claim that tort law should not extend its protections beyond the confines of physical security and property is illustrated by the fact that even Robert Nozick, who professes a thoroughgoing libertarian commitment to property as paramount, is more solicitous of emotional interests. See R. NOZICK, *Prohibition, Compensation and Risk*, ANARCHY STATE AND UTOPIA, 54-87 (1974). Note particularly the discussion of “fear” at 65-71.

<sup>33</sup>Private Order and Public Justice at 7, n.16.



Constitution is a case in point:

. . . every man shall have remedy by due course of law for injury done him in his person, property or reputation.<sup>34</sup>

Such clauses express the spirit of Ripstein’s commitment to private law as a law guaranteeing redress for wrongs done by and among private citizens. And this is indeed a constitutive principle of our law: This “guarantee of legal remedy for injury”—the Oregon Supreme Court tells us—“is what we mean properly, when we speak of the protection of law.”<sup>35</sup>

Clauses like Oregon’s remedy clause are important (if rarely litigated) and they do constrain legislative reform of the common law. The *Smothers* court, for example, held that Oregon’s abolition of the tort claim before the court violated state constitution’s “remedy clause.” But “remedy clauses” do not preclude the displacement of common law claims by administrative schemes.<sup>36</sup> What they require is that the common law only be displaced by a scheme which can itself be counted a reasonable way of discharging the role of private law, a reasonable way of protecting the interests that “private law” protects. There is no obvious reason to attribute to Rawls the view that only an institution which takes the form of “private law”—with “private law’s” distinctive commitments to bipolar adjudication and corrective justice in tort—can secure the rights and liberties of free and equal persons against each other. Rawls’s theory of justice is more plausibly read as leaving open the choice between “private law” as its proponents conceive it, and the replacement of large swaths of “private law” by an administrative scheme along the lines of the New Zealand Accident Compensation Act.

The correct claim about private law insofar as some such institution is assumed in the original position seems to me to be a claim about *the role* of private law and *not* a claim about the precise institutional *form* that private law must take. There must be an institution which fixes the framework of rights and duties governing the interactions of persons in civil society with one another, and institutions must secure persons’ liberty and security with respect to one another. The form and content of any institution governing the relations among persons in civil society must, however, be constructed by asking what arrangements free and equal citizens themselves might reasonably accept. Justified principles of political morality are principles which issue from an appropriate procedure of construction. They are principles that might be the object of reasonable agreement among free and equal persons in a properly defined “original position.”

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<sup>34</sup>This is Article 1, Section 10 of the Oregon Constitution. Its interpretation is the subject of *Smothers v. Gresham Transfer, Inc.* 332 Or. 83, 23 P.3d 333 (2001), which held a statute barring certain tort claims unconstitutional under this provision. See generally, John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005).

<sup>35</sup>332 Or. 99,23 P.3d 343 (quoting 1 Blackstone *Commentaries on the Law s of England* 56).

<sup>36</sup>New York Central Railroad Co. v. White, 243 U.S. 188, 37 S. Ct. 247 (1917).

Indeed, Ripstein and Rawls bear significantly different relations to Kant. The formalism of Kant's philosophy of law comes to the fore in Ripstein's "idea of private law;" the form of the private lawsuit is the key to the content of private law.<sup>37</sup> The constructivism that permeates Kant's moral and political philosophy is at the center of Rawls'<sup>38</sup> political philosophy. The principles of justice proposed in *A THEORY OF JUSTICE* are the most reasonable principles of justice for the basic structure of a society of free and equal persons because they are the principles that free and equal persons themselves would choose if they were to choose under appropriate conditions. By extension, just principles and institutions of "private law" are ones that might be reasonably agreed to by the parties to the original position after they have chosen the two principles of justice and a constitution which answers to the demands of those principles. From a Rawlsian perspective, a conception of "private law" "worked up from the presuppositions of the original position"<sup>39</sup>—but fashioned without being run through the filter of the original position—is not a properly constructed conception of private law..

Just what principles and institutions of private law the parties to the original position would choose—what arrangements they would make to secure the rights and liberties of citizens vis à vis one another—is a question that Rawls does not answer. What *A THEORY OF JUSTICE* does do, however, is to locate the stage at which the selection of institutions of private law would take place within its four-stage sequence of ideal theory construction. The principles and institutions of private law would be chosen at the legislative stage of the deliberation of the

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<sup>37</sup>See Arthur Ripstein, *Too Much Invested to Quit*, 20 *ECONOMICS AND PHILOSOPHY* 185, 186 (2004) (asserting that economic theories do not "seem able to explain the most fundamental features of tort law such as its binary mode of adjudication, that is, the way in which it focuses exclusively on how things stand between injurer and victim.") Here, Ripstein is following the important work of his senior colleague, Ernest Weinrib. See ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW* 56-83 (1995) (stating, for example, that "the basic feature of private law" is that "a particular plaintiff sues a particular defendant."); Martin Stone, *The Idea of Private Law*, 9 *CANADIAN JOURNAL OF LAW AND JURISPRUDENCE* 235 (1996). For discussion of Kant's formalism as a cornerstone of his political philosophy see Jeremy Waldron, *Kant's Theory of the State*, in *TOWARD PERPETUAL PEACE AND OTHER WRITINGS ON POLITICS, PEACE AND HISTORY, IMMANUEL KANT* (Pauline Kleingeld, ed. 2006); Jeremy Waldron, *Kant's Legal Positivism*, 109 *HARVARD L. REV.* 1556 (1996).

<sup>38</sup>See e.g., JOHN RAWLS, *POLITICAL LIBERALISM*, at 89-129 (rev. ed. 1996) ("Political Constructivism"); JOHN RAWLS, *LECTURES ON THE HISTORY OF MORAL PHILOSOPHY*, at 235-52 (Barbara Herman, ed., 2002) ("Moral Constructivism"). Kant's constructivism stands in substantial tension with his formalism, a point driven home by Jeremy Waldron's perceptive study of Kant's legal philosophy. See Waldron, *Kant's Theory of the State* at 186-87 (arguing that Kant's commitment to the idea that justified laws are laws that could be the object of an ideal agreement among free and equal citizens does not impose a significant limit on the content of positive law); Waldron, *Kant's Legal Positivism*, both *supra* note 37.

<sup>39</sup>Ripstein, *Private Order and Public Justice*, quoted more fully *supra* note 33.

parties to the original position.<sup>40</sup> At this stage, the choices of the parties are constrained by the prior choices of the two principles of justice and of a Constitution enshrining the equal basic liberties as constitutional law. That Constitution recognizes “the right to hold and to have the exclusive use of personal property” and “the liberty and integrity (physical and psychological) of the person” as Constitutional rights.<sup>41</sup> Indirectly, these rights may bear on the law of torts. The basic role of the law of torts that we have is to protect liberty and integrity of the person, albeit not against the state but among citizens in their interactions with one another. In diverse ways, the general tort law of negligence, and particular torts such as battery, invasion of privacy and intentional infliction of emotional distress protect the physical and psychological integrity of the person. And “personal property” is among the property protected by the torts of trespass, nuisance and conversion.

The question before us, however, is just how constrained the choice of private law institutions is by these rights. And the beginning of an answer to that question lies in observing that the right to own personal property should not be taken to be extraordinarily strong:

Having exclusive control over some personal property and protected domicile are conditions of individual independence. But this does not mean that rights to particular things are themselves basic (or fundamental) rights. On any liberal conception, government can regulate and proscribe uses of property (e.g., my use of my homestead for commercial purposes), and even appropriate property by eminent domain procedures if necessary for the public good (so long as fair compensation is made). This introduces an element of historical contingency into property: Rights of property, as legally specified, must be revisable by law to meet changing conditions for the sake of efficiency, public safety or convenience, or some other social value. Rights of property are not in these regards fundamental: They can be regulated and revised for reasons other than protecting and maintaining basic rights and liberties.<sup>42</sup>

The general upshot of this is that institutions performing the role of private law must secure the independence of citizens vis `a vis one another. The more particular upshot is that these institutions must be suitably protective of personal property and of the physical and psychological integrity of the person.

The proposition that “each person possesses an inviolability founded on justice that even

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<sup>40</sup> JOHN RAWLS, *A THEORY OF JUSTICE*, 174-75 (rev. ed. 1999). The four stages are the stage at which the principles of justice themselves are selected; the constitutional convention at which a constitution is chosen; the legislative stage, where ordinary laws are chosen; and the judicial stage where law is applied to particular cases.

<sup>41</sup> JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT*, 114, 44 (2001).

<sup>42</sup> Samuel Freeman, *Illiberal Libertarians: Why Libertarianism is Not a Liberal View* 30 *PHIL & PUBLIC AFFAIRS*, 105 (2002).

the welfare of society as a whole cannot override” is the cornerstone of Rawls’ Kantianism. The inviolability of persons cannot be squared with any *purely* instrumental conception of tort law as a mechanism for maximizing wealth, minimizing the social costs of accidents or dispersing losses in the way which minimizes the economic dislocation caused by accidental harm.<sup>43</sup> Serious injury to some is not “made right by a greater good shared by others.”<sup>44</sup> Principles of justice which prevent the sacrifice of the fundamental interests of some for the greater good of others must trump policies which pursue the general welfare. This is as true of the “private” law of torts as it is of any field of “public” law.<sup>45</sup> This requirement that the inviolability of persons be respected is not, however, the only demand that justice makes on the design of tort and accident law. Justice is concerned with reciprocity as well as with inviolability. It insists not only that the inviolability of persons be guaranteed, but also that the terms on which people expose one another to risks of serious harm be fair. Risk and the harm that it begets are the byproducts of mutually beneficial social activities. Persons whose lives and interests count equally have reason to complain when risks are not imposed on fair terms, and when the benefits and burdens of risk are not fairly distributed.

The demands of justice thus place important constraints on the design of the institutions of tort and accident law. For example, when significant risks of devastating injury are at issue the policy of minimizing the combined costs of accidents and their prevention must yield to principles of precaution more protective of human life.<sup>46</sup> These constraints, however, hardly seem sufficient to compel the choice of “private law”—traditional tort negligence law complete with a principle of corrective justice—over, say, the “public law” of a New Zealand plan. Systems such as the New Zealand accident law scheme do not institutionalize the principle of corrective justice; they bifurcate protection against wrongs and compensation for loss suffered, assigning the former to direct regulation and the latter to administrative compensation. This is not to say—as corrective justice theorists are wont to say<sup>47</sup>—that “public law” schemes for addressing problems of accidental harm are predicated on instrumental policies alone. “Public law” approaches to accidental injury find their fullest flowering in the theory of enterprise

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‡ JOHN RAWLS, *A THEORY OF JUSTICE*, 1 (1971). Professor Ripstein likewise rejects instrumentalism. By virtue of his commitment to formalism, however, Professor Ripstein’s objections to instrumentalism seem to me to go beyond those voiced by Rawls’s. See *e.g.*, Ripstein, “Tort Law in a Liberal State,” 1-7.

‡ JOHN RAWLS, *A THEORY OF JUSTICE*, 1-2 (1971)

<sup>43</sup>For an example of a principle of justice operating in this way to limit the application of policies of accident-prevention and loss-distribution see the discussion of the *Bushey* case, *infra* note 53.

<sup>46</sup>See Keating, *Pricelessness and Life*, *supra* note 31 (arguing that more than cost-justified precaution is required when significant risks of death or devastating injury are at issue, and exploring how the norms of “feasible” and “safe” precaution realize this requirement).

<sup>47</sup>See *e.g.*, ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 36-37 (1995).

liability. Enterprise liability is justified in part by policies of accident-prevention and loss-spreading, but it is also justified by “the *benefit principle* of commutative justice that accidental losses should be borne according to the degree to which people benefit from an enterprise or activity.”<sup>48</sup> It thus expresses a principle of fairness, a principle which takes priority over the policies of accident prevention and loss-spreading when that principle and those policies compete.<sup>49</sup> What enterprise liability—with its commitment to commutative justice—does *not* express, is an ideal of corrective justice. “Private law” is the institutional embodiment of the corrective justice idea that wrongdoing gives rise to a duty of repair personal to the wrongdoer.

The antecedent commitments that the parties to the original position bring to protecting the physical integrity, psychological integrity and personal property of persons would appear to require—in some form—both the legal prohibition of certain kinds of harmful or rights-violating conduct and the provision of compensation for injury inflicted by such conduct. But there is no obvious reason why *ex ante* protection against harm and *ex post* repair of harm must be realized by fusing the two values together in the specific way that corrective justice and private law fuse them. On the face of it, free and equal persons deliberating in the legislative stage are at liberty to conclude that it is more appropriate to attribute accidents to the activities that engender them than it is to attribute accidents to the particular individuals whose actions cause them, and so to prefer enterprise liability with its principle of commutative justice to private law with its principle of corrective justice. On the face of it, free and equal persons are at liberty to conclude that accidental injury is cost of social life in general and so to abolish tort accident law in the form that we know it and to replace that law with a New Zealand style administrative scheme. If a system of “private law” giving wide scope to the principle of corrective justice should indeed be chosen in the legislative stage, the case that it should be chosen is in need of more development than it has yet received.

The openness of Rawls’ theory with respect to the institutions protecting the physical integrity, property and urgent intangible interests of persons should not surprise us. The theory, after all, leaves open the choice between market socialism and property-owning democracy. So long as it respects the right to personal private property, a form of market socialism is consistent with Rawls’ two principles of justice and with the Constitution of his just society. It therefore seems decidedly odd to suppose that his theory forecloses alternatives to traditional private tort law, absent some argument that any alternative institution *must* disrespect private property or must fail to respect the liberty and integrity of the person.<sup>50</sup> On its face, however, Rawls’

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<sup>48</sup> OEL FEINBERG, *Sua Culpa. DOING AND DESERVING*, 187, 221 (1970) (emphasis in original). See also Gregory C. Keating, *Rawlsian Fairness and Regime Choice in the Law of Accidents*, 72 *FORDHAM L. REV.* 1890-1908 (2004)

<sup>49</sup> See *infra*, note 53.

<sup>50</sup> *Ives v. South Buffalo Railway Co.*, 201 N.Y. 271, 94 N.E. 431 (1911) (holding the 1910 New York Workmen’s Compensation Act unconstitutional as a deprivation of property without due process of law) is the kind of case that Rawls presumably intends to undercut when he explains that his theory of

substantive insistence on institutions that both express the inviolability of persons and articulate fair terms of cooperation among them, does not commit us to “private law” institutions. Other institutional forms may protect the liberty and integrity of persons and their property from injury and invasion at each others’ hands. Other institutions may do a better job of enabling free and equal citizens to pursue their diverse ends, individually and collectively.

Indeed, a respectable argument can be constructed that some form of enterprise liability vindicates the independence and equality of citizens more adequately than a private law constructed around the conception of corrective justice does. In the remaining pages of this paper, I shall explain why this is the case. I shall not attempt to show that the parties to the Original Position would finally choose enterprise liability, merely to sketch the direct moral case that enterprise liability reconciles the competing claims of victims and injurers more fairly than “private law” does. In the course of my argument I shall also try to show why enterprise liability should be understood to reject “private law” in pursuit of more perfect protection of the liberty and integrity of persons

## **B. “PUBLIC” ACCIDENT LAW AS A MORE PERFECT PROTECTION OF THE LIBERTY AND INTEGRITY OF PERSONS**

My argument starts with a different rendering of Rawls’ relevance to tort. Instead of turning back to Kant and conceiving of tort as a matter of “external means,” I shall start by supposing that the law of torts—and the law of accidents more generally—protects two competing preconditions of effective rational agency, namely, liberty (or the freedom to put others at risk) and security (or freedom from risk).<sup>51</sup> Because these preconditions of effective rational agency compete—risk endangers security and the restrictions that promote security limit liberty—the general task of the law of accidents is to reconcile the competing claims of liberty and security on terms that are fair among persons, and which provide favorable circumstances for people who hold diverse and incommensurable final ends to pursue those ends.<sup>52</sup> “Private law” and enterprise liability represent competing institutional arrangements for addressing risk and so for reconciling the competing claims of liberty and security. “Private law” as Professor Ripstein

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justice does not require a “wider” right of private property.

<sup>51</sup>This formulation overlooks intentional torts. I cannot comment on that oversight here.

<sup>52</sup>Professor Ripstein conceptualized tort in very similar terms in earlier writing on the subject. See Arthur Ripstein & Jules Coleman, *Mischief and Misfortune*, 41 McGill L. J. 91, 97 (1995) (In both fault and strict liability “liberty and security interests, which everyone can be supposed to share, determine the occasions for liability.”) ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY AND LAW* 7 (1999) (“The root idea is that reasonable terms of interaction provide a like liberty for all compatible with protecting a fundamental interest in security.”). Thinking of tort in these terms extends Rawls’ idea of “primary goods” and his objective conception of interpersonal comparison to tort law, as Ripstein himself has noted. *Mischief & Misfortune* at 97.

and others understand embraces fault liability; an individualistic conception of responsibility; and the corrective justice principle that the person responsible for the wrongful infliction of an injury bears the responsibility for redressing that injury. Enterprise liability differs on all three of these metrics: it tends to strict liability; it expresses a collective conception of responsibility because it sees institutional agency as the primary source of risk in the modern world; and it expresses the commutative principle that those who benefit from the imposition of an enterprise's characteristic risks should bear responsibility redressing the injuries that are the inevitable price of those risks.<sup>53</sup>

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<sup>53</sup>Enterprise liability also rests importantly on instrumental policies of accident-prevention and loss-distribution. These rationales have been developed powerfully by legal economists, including Judge Calabresi. In my view, the commutative principle of justice which also underpins enterprise liability should take priority over these instrumental rationales when they conflict. The priority of that principle expresses the inviolability of persons and prevents the sacrifice of their interests to some aspect of the general good. Subject to this constraint, the invocation of these policies is otherwise unobjectionable. The classic case law embrace of fairness over efficiency in the application of an enterprise liability doctrine is Henry Friendly's opinion in *Ira S. Bushey & Sons v. United States*, 398 F. 2d 167 171 (1968) ("A policy analysis thus is not sufficient to justify this proposed expansion of vicarious liability. This is not surprising since respondeat superior, even within its traditional limits, rests not so much on policy grounds consistent with the governing principles of tort law as in a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities.") Lest anyone doubt that Friendly understands the vicarious liability of masters for the torts of their servants to be a form of enterprise liability, he explicitly links the "scope of employment" test to the "out of and in the course of employment" test in workers' compensation law. *Id.*, at 171-72.

In earlier writing, Professor Ripstein has embraced the precept that individual actors should bear the harmful costs of their activities. See Ripstein & Coleman, *supra* note 52, at -94 (referring to "the claim that each person should bear the costs of her activities as the principle of fairness" and endorsing that principle); RIPSTEIN, *supra* note 52, at 54 (explaining that his theory "gives expression . . . to the idea that people should bear the costs of their activities."). In these writings, Professor Ripstein took this precept of nonfault liability to support fault liability, because he thought it impossible to attribute harm to either acts or activities without the use of a fault criterion. For reasons I explain briefly in note 63 *infra*, I think that this claim is mistaken and that the precept that actors should bear the harmful costs of their activities is the precept of nonfault liability it is usually taken to be.

The identification of enterprise liability with fairness is very common in case rhetoric and legal commentary. James A. Henderson, *Judicial Reliance on Public Policy: An Empirical Analysis of Product Liability Decisions*, 59 GEO WASH. L. REV. 1570, 1597 ("[m]easured by what judges say in their published opinions . . . fairness norms, not efficiency norms, [predominate]," and their predominance increases when they conflict with efficiency rationales). The connection between enterprise liability and commutative justice is surprisingly rare, but it is explicitly made by Joel Feinberg, *supra* note 48. In substance, the principle is invoked as a basis of strict liability by ROBERT E. KEETON, *VENTURING TO DO JUSTICE* 158-62 (1969), by ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA*, 80 (1974) ("A society . . . must decide how the costs [of productive activities with harmful fallouts such as airline travel] are to be allocated. It can let them fall where they happen to fall . . . Or it can try to spread the cost throughout the society. Or it can place it on those who benefit from the activity: in our example airports, airlines, and

In an important sense, the idea that we might choose once and for all between fault and nonfault forms of liability—and between corrective and commutative justice—is a flight of fancy. The principle that people should be held liable only for the harms that they wrongly inflict on others and the principle that agents should bear the harmful costs of their activities are competing precepts of what we might call common-sense legal morality. Any adequate normative theory of responsibility for preventing and redressing wrongs and harms must make some place for both principles, as our law of accidents itself has.<sup>54</sup> Even so, it may be a useful flight of fancy: It will help us get clear about the merits and demerits of these competing conceptions of responsibility in a highly general way.

The gist of the objection to “private law” and corrective justice that the following pages make out is, in important part, simple and familiar. The fundamental reason why persons in the legislative stage of the Original Position might reasonably choose to reject “private law”—in whole or in part—in favor of “enterprise liability” is that “private law” negligence liability exposes both their liberty and their security to an unappealing lottery. Jeremy Waldron illustrates that lottery with a by now well-known tale of woe:

Two drivers, named Fate and Fortune, were on a city street one morning in their automobiles. Both were driving at or near the speed limit, Fortune a little ahead of Fate. As they passed through a shopping district, each took his eyes off the road, turning his head for a moment to look at the bargains advertised in a storefront window. (The last day of a sale was proclaimed, with 25 per cent off the price of a pair of men’s shoes.) In Fortune’s case, this momentary distraction passed without event. The road was straight, the traffic in front of him was proceeding smoothly, and after a few seconds he returned his eyes to his driving and completed his journey without incident. Fate, however, was not so fortunate. Distracted by the bargain advertised in the shoe store, he failed to notice that the traffic ahead of him had slowed down. His car ploughed into a motorcycle ridden by a Mr. Hurt. Hurt was flung from the motorcycle and gravely injured. His back was broken so badly that he would spend the rest of his life in a wheelchair. Fate stopped immediately of course to summon help, and when the police arrived he readily admitted

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ultimately the air passenger. Th[is], if feasible, seems fairest.”); and by Francis Bohlen in a remarkable footnote in Bohlen, *The Rule in Rylands v. Fletcher*, 59 U. PENN L. REV. 429, n. 40 (1911). .

<sup>54</sup>See JOHN RAWLS, *A THEORY OF JUSTICE* 267-73 (rev. ed. 1999) (agreeing with John Stuart Mill that the precepts of common-sense justice conflict, that they must be ordered by some higher principle, and that principle must give some weight to the contending precepts). Like the common-sense precepts of justice, the common-sense precepts of legal morality conflict with one another (precepts of fault with precepts of strict liability) and must be ordered by some more general conception—such as the idea that the law of accidents must reconcile the competing claims of liberty and security on fair and favorable terms. We can, of course, abolish tort liability in some domain such as the domain of automobile accidents, or wholesale as in New Zealand, and replace it with enterprise liability. But even in these cases fault ideas are likely to emerge beneath the surface. We may, for instance, use faulty driving as an factor in determining insurance rates under a no-fault automobile scheme.



that he had been driving carelessly.

When Hurt recovered consciousness in [the] hospital, the first thing he did was instruct his lawyers to sue Fate for negligence. Considering the extent of his injury, the sum he sought was quite modest—\$5 million dollars . . . But modest or not, it was sufficient to bankrupt Mr. Fate . . .<sup>55</sup>

The lottery to which “private law” subjects us puts our liberty at risk of devastating liability and our security at risk of devastating loss. Enterprise liability exchanges modest insurance premiums and more certain compensation for these perils. On its face, that is a fairer and more favorable reconciliation of the competing claims of liberty and security.<sup>56</sup> We have reasons of fairness—not just reasons of policy—to think the commutative justice of enterprise liability preferable to the corrective justice of “private law.” In a very important way, the commutative justice of “enterprise liability” perfects the corrective justice of “private law.”

### *1. Liberty and Security as Preconditions of Effective Agency*

Rawls’ theory of justice supposes that we are each equal, independent persons, self-governing agents with purposes to pursue and lives to lead. We each have the capacity to lead our lives in accordance with some conception of their point, and a deep interest in living under institutions that enable us to do so. This frames the general problem of accidental harm at each other’s hands in a distinctive way: To make our lives answer to our aspirations for them, we need a substantial measure of security—of freedom from accidental injury and death at the hands of others. Our need for security, however, is only half the story. We also need a substantial measure of liberty—of freedom to put others at risk of physical harm in pursuit of our own ends—if we are to pursue projects and make our lives answer to our aspirations for them. When we act we put others at peril, even if only very slightly and even when we act with appropriate caution. If we cannot put others at peril—cannot endanger their security—we cannot act and so cannot pursue our ends and lead our lives. Maximal security extinguishes liberty and maximal

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<sup>55</sup>Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 387 (David G. Owen ed., 1995). While this is an artificial example, it illustrates a very real phenomenon. A 1970 U.S. Department of Transportation study reported: “In Washington, D.C. a ‘good’ driver viz. One without an accident within the preceding five years commits on average, in five minutes of driving, at least nine errors of different kinds.” U.S. Department of Transportation: Automobile Insurance and Compensation Study 1970 pp. 177-8, quoted in TONY HONORE, RESPONSIBILITY AND FAULT, 36-7 (1999).

<sup>56</sup>Waldron himself invokes Rawlsian reasoning in arguing in favor of enterprise liability and against fault liability. See *id.*, at 408 (explaining that “if there was ever a case for maximin” choosing no-fault over negligence liability for automobile accidents “is it.” “If people opt for the liability lottery, drivers face a non-trivial chance of complete ruin if they lose—all for the hope of a gain which consists simply of not losing anything if they win. . . For the sake of saving at most a few hundred dollars, drivers would be exposed to a potential loss of millions.”)

liberty extinguishes security. Yet substantial measures of both liberty and security are essential if we are to have the chance to make our lives answer to our aspirations for them. This is the dilemma at the heart of accident law.

Put differently, freedom of action and security are preconditions of effective human agency.<sup>57</sup> They are, therefore, conditions on whose importance people with diverging ideals and preferences can agree. Their importance does not depend on affirming any *particular* preferences, on holding any particular set of ends and aspirations. Their importance depends on *having* ends and aspirations, and on having a fundamental interest in being able to realize those ends and aspirations over the course of a normal life span. Freedom and security are essential conditions for the pursuit of most of the ends human beings do hold, especially when we think of pursuing ends over the course of a lifetime. Some measure of security is essential because risks of physical harm materialize into physical harm, and even when physical harm does not end in premature death, it can profoundly disrupt the pursuit of people's aims and aspirations. Serious physical injury can render the realization of some ends impossible and severely impede the pursuit of others. Conversely, freedom of action is *prima facie* enabling of the pursuit of one's ends, whatever they are. Being forbidden to act at all—because the risk of physical injury to others is too great—would cripple the pursuit of almost any end. Being forbidden to act in certain ways—because those ways endanger other people too much—tends to impede the pursuit of at least some ends.

When the law of accidents licenses the imposition of a risk, it enhances the freedom of some and imperils the security of others. Those who impose the risk are set free to pursue ends and activities that they value, and their pursuit exposes others to risks of physical harm. When the law of accidents forbids the imposition of some risk, it does the reverse—it curbs the freedom of prospective injurers and enhances the security of potential victims. Risk impositions thus pit the liberty of injurers against the security of victims and the law of accidents sets the terms on which these competing freedoms are reconciled. The task of the tort law of accidents is to reconcile liberty and security on terms that are both favorable and fair. Favorable terms enable people to pursue their aims and aspirations over the course of complete lives; fair terms reconcile the competing claims of liberty and security in ways that even those they burden cannot reasonably reject.

Speaking at a high level of generality, then, the reasonableness of various risk impositions thus turns on the way that they reconcile the competing claims of liberty and security. Risk

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<sup>57</sup>In the parlance of the interpersonal comparison literature, these are generally described as “objective” criteria of interpersonal comparison, in contradistinction to “subjective” ones. “Subjective” criteria of interpersonal comparison evaluate “the level of well-being enjoyed by a person in given material circumstances or the importance for that person of a given benefit or sacrifice . . . solely from the point of that person's tastes and interests.” Scanlon, *Preference and Urgency*, 656. Objective criteria appraise burdens and benefits in terms that are “the best available standard of justification . . . mutually acceptable to persons whose [aims, ends and] preferences diverge.” *Id.* at 668.

impositions are reasonable when the freedom to impose a risk is more valuable than the foregone security that is the price of that risk imposition. They are unreasonable when the security lost is more valuable than the freedom of action gained. When we make the judgments about the reasonableness of particular risks and precautions, as we do within negligence law, we need to make these abstract categories more concrete.<sup>58</sup> When we are concerned with the choice between fault liability as “private law” theorists conceive it and enterprise liability, the relatively abstract account of the interests at stake in terms of “liberty” and “security” seems sufficient. This choice is a highly general one, and it is natural to think about it in highly general terms. Getting a grip on this question requires not that we make the categories of liberty and security more concrete, but that we characterize these two competing liability regimes.

## 2. *Enterprise and Fault Liability*

Enterprise liability and traditional negligence liability embody rival principles of responsibility for harm done. Enterprise liability is a particular form of strict liability and the essential distinction between fault and nonfault liability (on my view<sup>59</sup>) is that fault liability criticizes conduct, whereas strict liability criticizes merely the failure to make reparation for harm done. The imposition of negligence liability on a defendant condemns the defendant’s conduct as wrongful. Negligent conduct is unreasonable conduct, insufficiently careful conduct. Strict liability, by contrast, does not condemn the conduct responsible for the infliction of injury. It condemns—calls unreasonable—only the failure to compensate for the infliction of injury. The injury-inflicting conduct subject to strict liability is not itself wrong. It is tortious only when injury is inflicted and reparation is not made for the harm thereby done. The wrong is harming

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<sup>58</sup>For discussion of how the common law of negligence proceeds in this regard, see Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, - (1996); CHARLES FRIED, AN ANATOMY OF VALUES, 191-93 (1970).

<sup>59</sup>Although the division of the law of accidents between realms of negligence and realms of strict liability is a longstanding one, how best to understand the difference between these competing principles of responsibility remains a contested matter among tort scholars. There are, for example, scholars who see strict liability as essentially a surrogate kind of negligence liability, and scholars who see it as a distinct and competitive form of liability. Richard Posner may be the preeminent example of the first view and Professor Ripstein himself is another. See Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 42-44 (1972). RIPSTEIN, EQUALITY, RESPONSIBILITY AND THE LAW, 70-72 (1999) (“Courts addressing [certain recurring situations subject to strict liability] can be thought of as adopting conclusive presumptions of negligence when injuries ensue from such actions.”). Guido Calabresi and Robert Keeton are among those who see it as a distinct and competitive kind of liability. See GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 68-134 (1970); Robert Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959). The best *characterization* of the distinction between the two forms of liability may well depend in part on what the *best justification* for the two forms of liability is. The characterization offered here should therefore be viewed as a contestable one.

without repairing.<sup>60</sup> Negligence liability is liability for wrongful conduct; strict liability is liability for conduct which is wrongful only because (and only when) reparation for harm done is not made.

Put otherwise, the fundamental difference between strict and negligence liability is that under strict liability the payment of damages to those injured by the characteristic risks of an activity is a condition for the rightful conduct of an activity,<sup>61</sup> whereas under negligence liability, the payment of damages is a matter of redress for wrongful conduct—for the wrongful infringement of the property and physical integrity of others. The choice between negligence and strict liability is thus a choice both between leaving non-negligent accident costs—costs arising out of risks reasonably imposed—on the victims who suffer them and shifting such losses back to the injurers who inflict them, and between reasons for imposing liability. Negligence is liability for unreasonable risk imposition; strict liability is liability for reasonable risk imposition.

Within modern accident law, enterprise liability is the fullest expression of strict liability ideas.<sup>62</sup> The theory of enterprise liability asserts: (1) that accident costs should be internalized by the activity responsible for them; and (2) that accident costs should be both dispersed—not concentrated—and distributed among the participants in the activity responsible for them. The various forms that enterprise liability takes—both within the common law of torts and in administrative alternatives to the common law—reflect different judgments of whether the pertinent activity is firm-wide (as with *respondet superior* and workers' compensation); or industry-wide (as with black lung disease and nuclear power); or defined by an identifiable and salient activity (as with no-fault automobile insurance and vaccinations); or society wide (as with

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<sup>60</sup>Some strict liability—in trespass and battery, for example—is predicated not on any form of wrongdoing but on the violation of a right. But the more common form of strict liability (in my view) is predicated on the judgment that in the kind of case at hand it is reasonable for the defendant to act as it did only on condition that it make reparation for any harm done thereby. See Gregory C. Keating, *Property Right and Tortious Wrong*, *supra* note 10.

<sup>61</sup> Legal doctrine and rhetoric often come very close to putting the matter this way. For example, *Koos v. Roth*, 652 P.2d 1255, 1262 (Or., 1982), a leading case on abnormally dangerous activity liability, explains that, under strict liability “the question is not whether the activity threatens such harm that it should not be continued. The question is who shall pay for harm that has been done.” The *Comment on Clause (c) to §520 Abnormally Dangerous Activities* of the RESTATEMENT OF TORTS, SECOND (1977) observes that “the utility of [the injurer’s] conduct may be such that he is socially justified in proceeding with his activity, but the unavoidable risk of harm that is inherent in it requires that it be carried on at his peril, rather than at the expense of the person who suffers harm as a result of it.”

<sup>62</sup>Enterprise liability conceptions do sometimes surface within negligence law, though negligence liability thwarts their full realization. See Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285, 1329-33 (2001).

the New Zealand compensation scheme).<sup>63</sup>

At first glance, the choice between fault and nonfault liability turns on whether it is fairer to place the costs of accidents which should not have been prevented on those whose actions have occasioned them, or to leave those costs on the victims who have suffered the accidents. Which of these alternative arrangements reconciles liberty and security more fairly? But the very statement of the idea of enterprise liability transforms the question. Enterprise liability embodies a particular idea of fairness, an idea centered on the distribution of the burdens and the benefits of risky activities. Enterprise liability expresses the idea that the burdens of accidental injury should be distributed across those who benefit from the risks which result in those injuries. This is a distinctively collective conception of responsibility and it is paired with a particular conception of the social world within which accidental injuries arise. That social world differs sharply from the social world presupposed by traditional fault liability and its more individualist understanding of responsibility.

### **(a) Two Social Worlds**

Writing in 1897, Oliver Wendell Holmes observed that “our law of torts comes from the old days of isolated, ungeneralized wrongs, assaults, slanders and the like . . .” whereas “the torts with which our courts are kept busy to-day are mainly the incidents of certain well-known

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<sup>63</sup>See Gregory C. Keating, *Rawlsian Fairness and Regime Choice in Tort Theory*, 72 *FORDHAM L. REV.* 1857, 1861-62, 1890-1912. (2004). Compare HONORE, *RESPONSIBILITY AND FAULT*, *supra* note 55, at 90-91. For present purposes, the point is that the law *constructs* the enterprise, through the exercise of political and juridical judgment. The attribution of accidents to activities which is part of this construction requires the use of various tests designed to identify the “characteristic risks” of an activity (e.g., in the way that the “scope of employment” test in vicarious liability law seeks to identify the characteristic risks of a firm’s activity). See Keating, *Rawlsian Fairness.*, at 1861, 1900-01, 1909-12.

The evaluative nature of these tests bears underscoring. Because all accidents arise at the intersection of two or more activities, several first-rate tort theorists assert that “general strict liability” is conceptually impossible. The thought is that strict liability is liability for harm caused and harm is always caused by more than one activity. See e.g., Stephen Perry, *The Impossibility of a General Strict Liability*, 1 *CAN J.L & JURISPRUDENCE* 147 (1989); RIPSTEIN, *supra* note 53, at 32-53. Perry and Ripstein conclude therefore, that we cannot attribute accidents to activities without employing fault criteria. This is a nonsequitur. Some nonfault rules for attributing accidents to activities—the “scope of the employment” test in the law of respondeat superior, the scope of the risk test for abnormally dangerous activities, the manufacturing defect test in product liability law, and the “in the course of employment” test in workers’ compensation law—connect accidents and activities very effectively. These “nonfault attribution rules” are, however, evaluative: They express normative judgments about the character of an enterprise. The lesson here is that Perry and Ripstein are right to think that rules for attributing accidents to activities must be evaluative, but wrong to think that all evaluative judgments are judgments of fault.

businesses. . . . railroads, factories, and the like.”<sup>64</sup> Implicit in Holmes’ remark is a distinction not just between two kinds of accidents, but between two kinds of social worlds. Stylizing and simplifying, we can call these two worlds the “world of acts” and the “world of activities,” respectively. The “world of acts” is Holmes’ world of “isolated, ungeneralized wrongs.” The “world of activities” is the world in which accidents are the “incidents” of organized enterprises.

In the “world of acts,” risks are discrete. The typical actor is an individual or a small firm which creates risk so infrequently that harm is not likely to materialize from any single actor’s conduct. The typical accident materializes out of the activity of isolated, unrelated actors, acting independently (*i.e.*, natural persons or small firms separately engaging in activities on an occasional basis). Taken as a whole, the activities of these individual actors are diffuse and disorganized, and quite possibly actuarially small. The dogfight that precipitated *Brown v. Kendall*<sup>65</sup> is a representative tort in this world: It arose out of a chance encounter between unrelated parties, neither of whose activities were large enough to make such misfortunes commonplace and expected. In the “world of acts,” then, risks are isolated, “one-shot” events. Harm, when it materializes, is a misfortune. Because actors are small, and risks independent and uncorrelated, liability rules shift—but do not disperse—losses. In this world, the imposition of strict liability on reciprocal risks merely “substitute[s] one form of risk for another—the risk of liability for the risk of personal loss” as George Fletcher says in his famous paper on fairness and utility in tort theory.<sup>66</sup> A fair distribution of the costs of accidents—of harm—is hard to come by because the distribution of the costs of accidents across the activities that generate them depends upon the underlying activity satisfying basic criteria of insurability. Foremost among these criteria is the law of large numbers. In the purest form of the “world of acts,” both actors and activities are small.

At the opposite pole from the “world of acts” is the “world of activities.” In the “world of activities,” risks are generalized and systemic. Systemic risks arise out of a continuously repeated activity (the manufacture of Coke bottles, the supplying of water by a utility, the transport of gasoline) that is actuarially large. “Accidental” harm is statistically certain to result from such risks: If you make enough Coke bottles some are sure to rupture; if you transport enough gasoline, some tankers are sure explode; if you leave water mains uninspected in the ground long enough, some are sure to break; if you turn enough sailors loose on shore leave, some of them are bound to return to their ships drunk and wreak havoc. In the “world of activities,” both actors and activities are large. The cost of accidents can therefore be dispersed and distributed.

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<sup>64</sup> O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 183 (1954 [original publication date, 1920]). The paper itself was originally delivered in 1897. For further discussion see JOHN WITT, *Widows, Actuaries, and the Logic of Social Insurance*, THE ACCIDENTAL REPUBLIC, 127-51, esp. at 139-41 (2004) (discussing this passage from Holmes in connection with the rise of a statistical approach to thinking about accidents and the rise of workers’ compensation schemes).

<sup>65</sup>60 Mass. (6 Cush) 292 (1850).

<sup>66</sup>George Fletcher, *Fairness and Utility in Tort Theory*, 85 Harv. L. Rev. 537, 547 (1972).

In the “world of activities,” the typical injury arises not out of the diffuse and disorganized acts of unrelated individuals or small firms, but out of the organized activities of firms that are either large themselves, or small parts of relatively well-organized enterprises. The waterworks which is the defendant in *Lubin v. Iowa City* is large in the first sense: A single entity is responsible for the piping of water through underground pipes, for laying and maintaining those pipes, for charging consumers for the water so transported, and so on. The transportation of large quantities of gasoline in tractor trailers on highways is large in the second sense: The firms that do the transporting may (or may not) be small and specialized but they are enmeshed in contractual relationships with those who manufacture and refine the gasoline, those who operate gasoline stations, those who manufacture tractor trailers, and so on.

In the modern “world of activities,” accidents are not the random byproducts of discrete individual acts, but the regular and predictable consequences of large activities, enduring over time. It is a matter of luck just which agent within such activities will inflict injury—negligently or faultlessly—but it is not a matter of luck that injuries will be inflicted. That injuries will be inflicted is a matter of the actuarially certain consequences of human agency, expressed collectively. The closer our social world draws to the pure type of the “world of activities,” the more fully we know not just that accidents are certain to happen, but how frequently they are certain to happen. The closer our social world draws to the pure type of the “world of activities,” the more it is the case that collective agency is dealing out death and devastation and that individually inflicted injury is merely the conduit through which the inevitable consequences of an activity express themselves.

In the “world of acts,” it is unreasonable to impose strict liability on risks that potential injurers and victims impose equally on each other. In a world of unorganized risk, it is not possible to distribute (the financial costs of) harm fairly, and reasonable injurers may object that the move to strict liability imposes as great a burden on their freedom of action as negligence imposes on the security of victims. Under negligence, the concentrated costs of non-negligent accidents strike victims like lightning; under strict liability those costs strike injurers like lightning. Because strict liability yields a distribution of accident costs which is no fairer than the distribution under negligence liability, it is reasonable to maximize the size of the pie by preferring the cheaper liability regime. In the world of activities, by contrast, the burdens are asymmetrical. Enterprise liability distributes the costs of non-negligent accidents through injurers across those who benefit from the underlying risks. Negligence liability leaves the costs of those accidents concentrated on unlucky victims. It may be *rational* to want to reap the benefits of a risky common enterprise without sharing in its burdens, but it is not *reasonable* to do so.

### **(b) The Facets of Fairness**

The fairness case for enterprise liability is not fully captured by the statement that it distributes the costs of accidents across those who benefit from the underlying risks. Indeed, four distinct facets of the fairness case for enterprise liability can be distinguished. The first of the four facets of enterprise liability fairness 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, and it is therefore 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 they suffer when they are physically harmed by the enterprise. Here, too, 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 risk choose wisely—if they put others at risk only when they stand to gain more than those 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. The Coast Guard lets its sailors loose on shore leave for its own benefit (as well as for theirs) and it reaps the rewards of their shore leave. If the costs of shore leave are greater than the benefits, the Coast Guard has only itself to blame for the practice and society has reason to discourage it. Imposing risks whose expected costs exceed their expected benefits is negligence.

The conception of responsibility invoked in the last paragraph is a familiar and widely accepted one. We take it for granted, for example, that “the person to whom the income of property or a business will accrue if it does well has normally also to bear the risk of loss if it does badly. In the law of sales, when the right to income or fruits passes to the buyer, the risk of deterioration or destruction normally passes to him as well.”<sup>67</sup> The same point might be made about the purchase of stocks, or even lottery tickets. It is fair to ask agents who choose to act in pursuit of their own interests and stand to profit if things go well to bear the risk of loss when things go badly. Enterprise liability is fair to injurers.

Third, enterprise liability is fair because it exacts a just price from injurers for the freedom tort law confers upon them. Tort law permits potential injurers to put others at risk without their knowledge or consent, and for the private benefit of potential injurers. Indeed, tort law *requires* potential victims to entrust their lives and limbs to persons and entities who stand to profit by imperiling them. This power is of great value to potential injurers: They stand to reap rewards by imposing risks in part because they can choose to impose those risks in circumstances that maximize the benefit they gain from doing so. The price that enterprise liability exacts for this freedom and power is financial responsibility for physical harm, when that harm is either characteristic of the injurer’s activity or occasioned by the injurer’s careless exercise of its power. To induce potential injurers to exercise their power over others responsibly—and to safeguard the

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<sup>67</sup> ONY HONORE, RESPONSIBILITY AND FAULT, *supra* note 55, at 79 (1999).



security of those others—enterprise liability taxes the exercise of the power to put others at risk when it goes awry and issues in physical harm.

Negligence liability taxes the exercise of the power to imperil others only when the injurer has exercised that power without sufficient care.<sup>68</sup> Accidental harms attributable to activities that are conducted carefully but at an excessively high level of intensity, or without undertaking justified research that would yield safer ways of proceeding, tend to escape the reach of negligence liability. Strict accountability induces potential injurers—particularly large enterprises—to conduct their activities more carefully. By taxing every exercise of the power to imperil others that issues in an accident characteristic of the enterprise in question, enterprise liability induces injurers to comb through their activities in search of risk reducing precautions. Worthwhile precautions whose omission escapes the eye of negligence law may be induced by the imposition of enterprise liability.

The fourth facet of fairness returns us to the general idea of burden-benefit proportionality: Enterprise liability distributes accident costs *among actual and potential injurers* more fairly than negligence does. Negligence liability does not require that the costs of accidents—even negligent ones—be spread among those who create similar risks of harm, whereas enterprise liability does. Enterprise liability asserts: (1) that accident costs should be internalized by the enterprise whose costs they are; and (2) that those costs should be dispersed and distributed among those who constitute the enterprise, and who therefore benefit from its risk impositions. Negligence liability, by contrast, holds that injurers have a duty to make reparation when they injure others through their own carelessness. Negligence liability justifies *shifting* concentrated losses where enterprise liability justifies *dispersing and distributing* concentrated losses. To be sure, nothing in negligence liability forbids injurers from insuring against potential liability, but nothing in negligence liability requires it, either. Insurance is not integral to negligence liability, even though insuring against negligence liability is standard modern practice.

It is, moreover, important in this regard that insuring against negligence liability makes negligence liability fairer precisely because it moves negligence towards enterprise liability. Negligence liability is often harsh, and problematically so.<sup>69</sup> In part, negligence law is harsh because it justifies shifting potentially devastating losses from victims to injurers on the basis of relatively modest acts of wrongdoing. A moment's carelessness behind the wheel of a car can inflict millions of dollars of harm, and that is enough to bankrupt most drivers. The price that negligence liability exacts can thus seem quite disproportionate to the wrongfulness of the conduct

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<sup>68</sup>The ideas in this paragraph draw on Shavell, *Negligence versus Strict Liability*, 9 J. LEG. STUD. 1 (1980) and Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Tort*, 81 YALE L.J. 1055 (1972).

<sup>69</sup>“Average reasonable person” doctrine shows this side of negligence liability most clearly. See KEETON ET AL., *TORT AND ACCIDENT LAW* 345-368 (4<sup>th</sup> ed. 2004). PROSSER & KEETON ON THE LAW OF TORTS, 173-193 (4<sup>TH</sup> ED. 1984).

whose blameworthiness justifies the exaction. The ordinary negligence of natural persons is a relatively innocent sort of wrongdoing: The failure to foresee a risk clearly enough, calculate its probability accurately enough, concentrate well enough, or execute a course of action precisely enough, are all instances of ordinary negligence. We are all prone to such mistakes, human frailty being what it is. Yet negligence law is unforgiving. Failures to act as a reasonable person would act in similar circumstances are enough to support liability, even if those failures are the product of normal human frailty. And the extent of the ensuing liability can be devastating.

So long as we restrict our gaze to the apportionment of costs between a particular injurer and the victim of her negligence, negligence law is exacting and intolerant, but justifiably and fairly so. The activities that negligence liability regulates are unforgiving. Small mistakes can explode into serious injuries. Momentary lapses of attention behind the wheel of a car—or at the helm of a ship or the controls of a plane—can and do destroy human lives. The seriousness of the harm risked by ordinary negligence is good reason to hold actors to strict standards of conduct. And the failure to conform to a norm of reasonable care is a kind of wrongdoing, even if not a particularly egregious one. Wrongdoing fairly exposes wrongdoers to responsibility to repair the harm that they have done. Forgiving wrongful lapses in concentration and failures of foresight would allocate the losses these frailties cause even more unfairly. Why should injured victims absorb the costs of the carelessness that harmed them? Shifting the costs of a negligent injury to the wrongdoer whose inadvertence caused it may be harsh, but it is fairer than letting the loss lie where it fell. Finally, forgiving lapses in concentration and failures of foresight might well encourage carelessness. Forbearance tends to foster the objects of its indulgence.

Holding actors accountable for the harmful consequences of their understandable errors is, then, fairer than excusing them. But this does not settle all questions of fairness, nor undermine the argument that enterprise liability is fairer still. The small lapses that very occasionally precipitate large injuries are common indeed. Most of us occasionally let our minds wander behind the wheel, give some small risk insufficient consideration, or fail to execute some all too familiar precaution with the precision that it requires. Most of us also escape without injuring anyone else. Yet the luck of the draw is all that distinguishes those of us who get away without injuring anyone from those who do not. Fate singles an unlucky few out for liability—often massive liability—and fortune spares the rest.

Those unlucky few who inflict injury cannot, on balance, claim that they are unjustly held accountable for the harm that their wrongdoing has caused, but they might justly complain that a system under which they *alone* bear the costs of the injuries they inflict is less fair than one which pools those losses among all those who create similar negligent risks.<sup>70</sup> Negligence mitigated by

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<sup>70</sup>They might also complain that their liability under negligence is out of proportion to their culpability. When corrective justice violates the retributive principle that the penalty should be proportional to the wrong, corrective justice violates our sense of justice. See Jeremy Waldron, *supra* note 55 at 389-91 (voicing this kind of objection) and at 401-405 (discussing whether a form of fault based corrective justice which concentrates devastating losses on the unlucky few can be justified as fair

the institution of liability insurance is fairer than negligence detached from that institution. Liability insurance distributes the costs of negligence among all those who are, over the long run, similarly negligent, and that is fairer than leaving the costs of negligence on those whose misfortune it is to have their negligence issue in injury. Luck and luck alone separates the negligent who cause injury from the negligent who do not. It is fairer to neutralize the arbitrary effects of luck than to let it wreak havoc with people's lives.

Just as negligence with the institution of liability insurance is fairer among actual and potential victims than negligence liability without that institution is, so too enterprise liability is fairer than negligence liability with insurance. Once negligence liability operates against the background of liability insurance, all that divides it from enterprise liability is its treatment of those accident costs that flow from reasonable risk impositions. Both negligence liability and enterprise liability pool the accident costs that issue from negligent risk impositions among those who are similarly negligent. Negligence liability, however, leaves the non-negligent accident costs of an activity on their victims whereas enterprise liability distributes those costs across the enterprise—across all those who impose the characteristic risks that lead to these accidents. Under negligence liability, victims may disperse the costs of an activity's non-negligent accidents by purchasing loss insurance, but they will not distribute those costs across those who impose similar risks.

When reasonable risk results in accidental harm, chance and chance alone separates those who injure and are injured from those who do not and are not. To leave non-negligent losses on those whose misfortune it is to suffer them, when we might readily spread these losses among all those who create similar risks of injury, is unfair. When the concentrated costs of non-negligent accident might easily be dispersed and distributed across those who benefit from the creation of the relevant risks, the victims of such accidents might reasonably object to a principle of responsibility that leaves the costs of those non-negligent accidents concentrated on victims. Those who benefit from the imposition of the relevant risks but escape injury at their hands, by contrast, cannot reasonably object to having non-negligent accident costs dispersed and distributed across all those who benefit from the imposition of the relevant risks. It may be rational to seek to appropriate the benefits of recurring risk imposition for oneself and to thrust the burdens of those risk impositions onto others, but it is not reasonable to do so.

Dispersing the non-negligent accident costs characteristic of an activity across pools of victims who are bound together only by their actuarial similarity is likewise less reasonable than dispersing them across the injurers who create similar risks and benefit from doing so. People who do not benefit from an activity may reasonably object to bearing its costs when those who do benefit might be made to bear its costs with equal ease. Fairness favors dispersing the costs of

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by an application to tort law of David Lewis's defense of criminal liability as a penal lottery); TONY HONORE, *RESPONSIBILITY AND FAULT*, *supra* note 55, at 89-90 (arguing that corrective justice is flawed when it violates the retributive principle requiring a "rough proportion to be preserved between the degree of fault and the burden of the sanction.")

blameless accidents among all those who create similar risks of such accidents, just as much as it favors dispersing the costs of accidents precipitated by wrongdoing among lucky and unlucky wrongdoers. Pooling the risks of negligent accidents, but not the risks of non-negligent accidents, is presumptively less fair than pooling both sets of risks.

This last argument of fairness highlights both the fact that enterprise liability relaxes the requirement of causation, and also the fact that the logic of fairness at work in enterprise liability criticizes—as arbitrary and unfair—the traditional tort insistence that a specific actor—not an activity—be held causally responsible for the harm. When cause and cause alone distinguishes those who injure from those who do not, luck and luck alone distinguishes those who bear liability from those who escape it. The requirement of causation cannot bear the weight of the justification that it must bear in these circumstances. There is no good reason why a person unfortunate enough to have her carelessness issue in massive injury should bear massive loss, while many others who have been identically culpable are spared all responsibility.<sup>71</sup>

### 3. *Institutional Agency and Individual Fault*

By de-emphasizing causation, enterprise liability repudiates corrective justice as “private law” theorists conceive it. Ernest Weinrib writes: “Corrective justice involves the intrinsic unity of the doer and sufferer of the same harm.”<sup>72</sup> The “private law” of tort has an inner unity which flows from the fact that the form of a tort lawsuit tracks a basic form of human interaction—the pervasive circumstance where one person wrongs another. That form, in turn, shapes tort law’s content. Therefore, “the requirement that the defendant have caused the plaintiff’s injury” is one of a handful of elements of tort liability whose absence marks “the disappearance of private law as a recognizable mode of ordering.”<sup>73</sup> When harms are attributed to activities and losses distributed among all those who create the same characteristic risks, the unity of doing and suffering,

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<sup>71</sup>With small numbers, this is the lesson of *Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1 (1948). *But see* Arthur Ripstein & Benjamin C. Zipursky, *Corrective Justice in an Age of Mass Torts*, in *PHILOSOPHY AND THE LAW OF TORTS*, 214 (Gerald J. Postema, ed. 2001) (defending a requirement of individualized causation but tolerating the burden shifting of *Sindell*, with respect to proof of causation.)

ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW* 75 (1995). The idea that the doing and the suffering must be of *the same harm* warrants repetition.

<sup>73</sup>*Id.* at 9. At pp. 1-2 Weinrib writes:

The most striking feature of private law is that it directly connects two particular parties through the phenomenon of liability. Both procedure and doctrine express this connection. Procedurally, litigation in private law takes the form of a claim that a particular plaintiff presses against a particular defendant. Doctrinally, requirements such as the causation of harm attest to the dependence of the plaintiff’s claim on a wrong suffered at the defendant’s hand.

corrective justice—and tort law itself—all disappear.<sup>74</sup> Or so the theorists of “private law” insist.

For his part, Professor Ripstein criticizes the arguments that Christopher Schroeder and Jeremy Waldron have made on behalf of enterprise liability and against fault liability and “private law.” Waldron and Schroeder have both advanced arguments similar to the one sketched here, namely, that enterprise liability is fairer—both to potential and actual injurers and to their victims—than individual fault liability and “private law” are. Ripstein rejoins:

Like Schroeder, though, Waldron offers no explanation of why only those misfortunes brought about by carelessness are to be compensated in this way. In the attempt to avoid the supposed arbitrariness of chance, Waldron, like Schroeder, finds himself embracing the genuine arbitrariness of selecting candidates for compensation based on how they came about while simultaneously denying the relevance of how they came about.<sup>75</sup>

Enterprise liability is wanting both conceptually and normatively. Or so Ripstein complains. Conceptually, the problem appears to be that there is no space between traditional tort liability and universal social insurance. Enterprise liability cannot coherently exist. Normatively, the problem is that we have good reason to distinguish malfeasance from misfortune.

Ripstein’s objections, however, are off the mark. We have perfectly good reason to distinguish between harmful human agency—the subject to which enterprise liability addresses itself—and fate (against whose perils social insurance protects us). “The nature of things,” Rousseau famously remarked, “does not madden us, only ill will does.”<sup>76</sup> Natural misfortune is neither just nor unjust. It may be feared, but it is beyond the reach of resentment. Malfeasance is another matter. People *do* have reason to resent mistreatment at the hands of others. The institutions which determine the terms on which people may impose risks of serious physical injury on one another are concerned with harmful human agency, and harmful human agency is not something which can ever be a matter of moral indifference.<sup>77</sup> The institutions of accident law

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<sup>74</sup>The great strength of this idea is that it provides an answer to the question: Why reparation? That answer is: because the person who has inflicted the harm stands in a special, morally salient relation to the victim of that harm. A weakness of this act-centered idea, however, is that it cannot account for the fact to which enterprise liability bears witness—the fact that the collective activity can be seen as standing in an even more morally salient relation to the victim than the individual actor who inflicted the injury.

RI PSTEIN, *supra* note 52, citing to Waldron, *supra* note 55.

JEAN-JACQUES ROUSSEAU, EMILE, Book 2: vol. 4, p 320 OEUUVRES COMPLETE (Bernard Gagnebin et al., eds. 1959-95). Isaiah Berlin quotes this passage in his *Two Concepts of Liberty*, reprinted in I. BERLIN, FOUR ESSAYS ON LIBERTY (1969).

HONORE, RESPONSIBILITY AND FAULT, *supra* note 55, at 84 (“It seems reasonable to put conduct that exposes others to a risk that materializes—for example selling milk that may possibly be and

are either just or unjust and people have reason to resent injustice.

From here it is but a short step to the defense of strict liability. Strict liability identifies a distinct form of mistreatment: There are some harms which may only be justly inflicted if compensation is paid for damage done. *Vincent v. Lake Erie*<sup>78</sup> is a case in point. Neither Vincent nor Lake Erie have reason to resent the natural misfortune of the storm: Whom might they call to account? But Vincent does have reason to resent Lake Erie's failure to repair the harm done his dock by Lake Erie's ship. Even though Lake Erie was fully justified in lashing its ship to Vincent's dock and even though it was that justified action which damaged Vincent's dock, Lake Erie's infliction of damage to the dock was justifiable only on condition that Lake Erie repair the damage done.<sup>79</sup> Strict liability identifies a special kind of wrongdoing—a kind where the wrongfulness lies not in the infliction of the injury but in the failure to make reparation for an injury justifiably inflicted. This is a kind of malfeasance and—as Professor Ripstein himself has argued—there is a fundamental distinction between misfortune and mistreatment.<sup>80</sup>

Enterprise liability tends toward strict liability and, as a form of strict liability, it is distinctive in its focus on organized activities not individual acts. But there is nothing incoherent or mysterious about this focus. It arises out of the perception that the accidents characteristic of our social world are “mainly the incidents” of ongoing systematic activities. From here it is but a short step to the basic precepts of enterprise liability: (1) that, in characteristically modern circumstances, protection against enterprises takes priority over protection against individual actors; (2) that this protection can and should be secured by requiring enterprises to bear the costs of their characteristic risks; and (2) that it is fairer to distribute the costs of an enterprise's characteristic risks across the enterprise, than to leave them concentrated on the particular parties to enterprise related accidents. One can contest these claims, but one cannot seriously dispute their coherence.

The complaint that we have lodged on Ernest Weinrib's behalf—that enterprise liability denies the unity of doing and suffering as Weinrib understands it—is thus true but toothless. In the “world of activities,”<sup>81</sup> doing and suffering simply are not unified in the way that Weinrib

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in fact is adulterated—at a fairly low point on the scale of misconduct on which showing indifference to and defiance of the interests of others occupy the higher reaches. The behaviour located low on the scale is not morally bad, and does not amount to fault, but neither is it morally indifferent; conduct that may affect others cannot be that. It is taking a chance of harming others.” [n. omitted])

<sup>78</sup>124 N.W. 221 (Minn. 1910).

<sup>79</sup>See Gregory C. Keating, *Property Right and Tortious Wrong*, *supra* note 10.

<sup>80</sup>Ripstein & Coleman, *supra* note 52.

<sup>81</sup>And perhaps in the world of risk imposition more generally. Weinrib adopts the expression and the idea from Aristotle. Tellingly, however, the only examples of Aristotle's that Weinrib cites to

insists that they are. To be sure, actions can be described in all kinds of ways and it is not unintelligible to say that, between two equally careless drivers, the one who inflicts a devastating injury has done something entirely different from the one whose negligent risk has dissipated harmlessly, even if chance and chance alone accounts for these wildly divergent outcomes. Intelligibility is not plausibility, however, and utterly unpersuasive to distinguish between “Fate” and “Fortune” in this way. To impose a risk is to play a lottery. When you buy a lottery ticket, you place a bet, you take your chances, and (disappointingly!) you almost always lose. A lottery spokesman who spoke of the “unity of purchasing and winning” would be courting liability for fraud. Purchasing is a necessary precondition of winning but no more. Purchasing a lottery ticket is normally paired not with winning, but with losing.

When you impose a risk of serious physical injury on others, you take your chances in a different kind of lottery: You may inflict devastating injury but your risk may also dissipate harmlessly. Usually—and fortunately—risks of devastating injury dissipate harmlessly. But whether a such risk devastates or dissipates is a matter of chance. Speaking of the “immediate relation” of doing and suffering in connection with the imposition of a risk is no more convincing than speaking of the “immediate relation” of purchasing and winning in connection with a lottery.<sup>82</sup> The claim of “immediate relation” badly distorts our understanding of the two risk impositions it so radically distinguishes: The difference between the two is determined by the luck of the draw and the luck of the draw alone. Accidental harm is one of the prime examples of “moral luck.” To impose a risk is to roll the dice. Rolling the dice is not an action where the rolling and the result are one and the same action. It is thus a virtue, not a fault, of activity liability that it denies the unity of doing and suffering as Weinrib understands it. In the world of activities, accidents are characteristically connected to activities and only coincidentally correlated with individual acts.

The metaphor of a lottery returns us to the virtues of enterprise liability. By placing the weight that it does on *individual* fault and individual reparation, “private law” subjects injurers and victims alike to a lottery. Victims are exposed to devastating losses and injurers are exposed to devastating liability. Momentary lapses of concentration dangle like swords of Damocles over both liberty and security. Enterprise liability ends this lottery, replacing the risk of devastating liability with the certainty of insurance premiums and replacing the risk of devastating loss with the prospect of more certain compensation. This exchange may well work to enhance both liberty and security, and so to secure more favorable conditions for free and equal persons to lead the lives of their choice.

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illustrate this unity are examples of intentional wrongs. “The injustice of battery and murder, for instance, (in Aristotle’s words, ‘when one has hit and the other has been hit, and when one has killed and the other has been killed’), lies in the fact that the doing and the suffering have been unequally divided.” Weinrib, *supra* note 72, at 64, n. omitted. Plainly, intentional hitting unifies doing and suffering in a way that imposing a risk of a blow to the head does not.

<sup>82</sup>See Weinrib, *supra* note 72 at 81 for use of the term “immediate relation.”

To be sure, this brief argument does no more than make a case that the commutative justice of enterprise liability must be taken seriously as a competitor to the corrective justice of “private law.” A complete consideration of the two liability regimes would require more attention to their comparative efficacy in preventing accidental injury; to the relevance of victim conduct to responsibility for harm done, to their feasibility in different kinds of settings; and to the administrative costs of these competing regimes; to name just four considerations. But these remarks may suffice to show both that the dichotomy between “public” and “private” law is overdrawn, and that liberal political philosophy has a genuine choice to make. The dichotomy is overdrawn because, in important ways, the “public” law of enterprise liability perfects the “private” law of traditional tort liability. By attributing accidents to activities, enterprise liability may well protect both liberty and security more effectively than “private law” does, and may treat similarly situated victims and injurers more fairly than “private law” does.

The Kantian idea of justice draws its power largely from its commitments to the inviolability of persons, and to the establishment of a social world in which independent and equal persons can live with one another on terms of equal freedom and mutual respect. These commitments have important consequences for the design of tort and accident law. Risks must be imposed on terms which provide to each of us equal and adequate freedom to lead the lives of our choosing. This requires that the competing claims of liberty and security be reconciled in some ways, and not in others. Regimes which sacrifice the liberty and integrity of some to the greater good of others cannot be squared either with the requirement of reciprocity among equals, or with the inviolability of persons. Untrammelled instrumentalism in accident law is incompatible with justice. But these commitments to the liberty and integrity of the person—and to a world in which risks are imposed on mutually acceptable terms—do not force “private law” upon us. “Public law” protections for the liberty and integrity of the person compete with “private law” ones for the favor of justice writ more largely. The “public law” of enterprise liability is justified as much by a principle of fairness as by policies of accident prevention and loss-dispersion. Its commitment to commutative justice is a compelling alternative to “private law’s” commitment to corrective justice.