Liability Without Regard to Fault: A Comment on Goldberg & Zipursky

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Abstract

This paper comments on John C.P. Goldberg & Benjamin C. Zipursky, The Strict Liability in Fault and the Fault in Strict Liability 85 Fordham L.Rev. 743 (2016). In their important writings over the past twenty years, Professors Goldberg and Zipursky have argued that torts are conduct-based wrongs. A conduct-based wrong is one where an agent violates the right of another by failing to conform her conduct to the standard required by the law. Strict liability in tort poses a formidable challenge to the claim that all torts are wrongs whose distinctive feature is that they violate an applicable standard of conduct. When lawyers speak of strict liability causes of action, they are describing a domain of liability where a plaintiff does not have to prove that the defendant’s conduct was defective in order to recover. Strict liability is liability without regard to defective conduct. Defective conduct may be present, but its presence is not essential to liability. When liability in tort is strict, the basis of liability is not that the defendant’s conduct was defective. The defining characteristics of strict liability in tort are obscured when strict liability torts are recast—in a negligence mold—as conduct-based wrongs.

The term “strict liability” has multiple meanings. One meaning—the meaning relevant when we speak of strict liability torts as an overarching form of tort liability—is conceptual. Here, strict liability means liability which is not predicated on defective conduct. Two other meanings are also prominent in tort discourse. These two other meanings are normative, or moral. Some liabilities are strict because they impose liability on conduct that is blameless, morally speaking. Other liabilities are strict because they impose liability on conduct which is justified, not defective. The imposition of strict liability on morally innocent conduct is prominent in connection with autonomy rights—powers of control that the law assigns to people over their own persons and property. The imposition of
strict liability on justified conduct is found in various torts that address physical harm. Here, tort law stakes out the claim that even though the conduct responsible for inflicting the harm is justifiable, the failure to repair harm justifiably inflicted is not. Neither form matches the template of a conduct-based wrong.
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H.L.A. Hart begins his classic work in jurisprudence by observing that it is extraordinarily difficult to say what “law” is. Hart’s predicament was an echo of Augustine’s puzzlement about time. We seem to know what law is until we are asked for an explanation. Once asked, however, we find ourselves stymied. No simple, cogent, explanation comes to mind. Matters are not so very different with Torts. No first-year Torts student freezes up on an exam because she cannot explain exactly what a tort is, but Tort theorists are bedeviled by the puzzle. And Torts scholarship can get in serious trouble by ignoring the question. Studying the “costs of accidents,” for example, seems both important and relevant to Torts. Accidents are at the center of tort law and they matter in part because they are costly both to prevent and to suffer. Even so, the “costs of accidents” is not the law of torts. “You imposed a cost on me” does not state a tort claim. Unsurprisingly, one of the controversies to which the economic analysis of torts has given rise is whether or not the entire endeavor is flawed because it cannot make sense of central features of the law of torts.

The main alternative to the economic conceptualization of tort in terms of costs and benefits holds fast to the hallowed conception of torts as “wrongs.” The claim that torts are wrongs seems right, but not terribly helpful. Wrongs are the reciprocal of rights. Often, once the right at issue is explicated, the only thing to say about the wrong is that it is a reflex of the right. If, for example, I have a right that other people not enter my property unless I authorize them to do so, someone who enters without my permission wrongs me. The wrong here tumbles out of the right. More generally, the claim that “torts are civil wrongs” does not so much explain what a tort is as set the stage for a set of difficult and daunting questions. What rights give rise to obligations whose violations constitute tortious wrongs? What makes a wrong a tortious wrong? If torts are civil wrongs, why isn’t breach of contract a tort? It is not easy to answer these questions adequately and it is easy to impair our understanding of particular torts by forcing them into templates that they do not match. This kind of impairment is the danger that Professors Goldberg & Zipursky court in The Strict Liability in Fault and the Fault in Strict Liability.

In their important writings over the past twenty years, Professors Goldberg and Zipursky have embraced and developed an answer to the question “what are torts?” Their answer, in a...
nutshell, is that torts are conduct-based wrongs. A conduct-based wrong is one where an agent violates the right of another by failing to conform her conduct to the standard required by the law. As a description of negligence liability, the characterization of torts as conduct-based wrongs is both correct and illuminating because negligence involves a failure to conduct oneself as a reasonable person, but this failure may not be blameworthy. Negligence in tort is fault in the deed, not fault in the doer. At least since *Vaughan v. Menlove*, it has been clear that a blameless injurer can conduct himself negligently and so be held liable. In general, if you fail to attain the standard of conduct we expect of the average reasonable person and physically harm someone else through your failure you are *prima facie* liable in tort. This is true even if you could not have conformed your conduct to the conduct of the average reasonable person and are, therefore, blameless morally speaking.

An important consequence of the fact that negligence necessarily involves wrong in the doing, but *not* in the doer, is that in some of its applications liability for negligence is strict in one sense of that slippery word. Some of the time, negligence liability is imposed on the conduct of a person who cannot be faulted for having failed to conduct themselves as a reasonable person would have. Fault, in the sense now at issue, has to do with blameworthiness. An individual without the capacity to act as a reasonable person may not be blameworthy, but they may nonetheless be negligent—at fault—legally speaking. This is surprising and jarring. In our ordinary moral discourse fault and blame go hand and hand. We blame people for not conducting themselves as they should when and because we think they are at fault. When a teacher faults a pupil for not turning her homework in on time she is blaming the student for not having discharged his responsibility. That blame involves a negative evaluation of the pupil—not just of his performance—and that negative evaluation has repercussions. As long as the teacher’s blame lingers, the relationship between the student and the teacher is impaired. Blame affects relations among persons.

Tort and ordinary moral discourse thus diverge. To establish that a defendant was negligent one need not establish that he was blameworthy. One need only prove that he did not conduct himself in the way that a reasonable person would have. Tortious negligence entails conduct which is negligent—and nothing more. In asserting that all torts are conduct-based wrongs, Professors Goldberg & Zipursky’s account of tort generalizes an illuminating account of negligence liability. As they recognize, strict liability in tort poses a formidable challenge to the thesis that all torts are wrongs whose distinctive feature is that they violate an applicable standard of conduct. When lawyers speak of strict liability *causes of action*, they are describing a domain of liability where a plaintiff does *not* have to prove that the defendant’s conduct was defective in order to recover. Strict liability is *liability without regard to fault*. Fault in the doing may be present, but its presence is not essential to

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8 Id. at 745 (2016) (“fault-based liability is . . . liability predicated on some sort of wrongdoing . . . liability rests on the defendant having been ‘at fault,’ i.e., having failed to act as required.”). The Professors also assert that most strict liability “is still wrongs based” because it involves violating demanding standards of conduct and “demanding standards of conduct are still standards of conduct.” Id. This is a position that they share with leading corrective justice theorists. See Jules Coleman, *The Practice of Corrective Justice*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 53 (DAVID G. OWEN ED., 1995), at 56–57. Wrongdoing understood as wrongful conduct is also essential to Ernest Weinrib’s theory of corrective justice in tort. *See* WEINRIB, supra note 5.
9 *Vaughn v. Menlove*, 3 Bing., N.C., 468 (Common Pleas, 1837)
12 Goldberg & Zipursky, supra note 7, at 745.
liability. When liability in tort is strict, the basis of liability is not that the harmful conduct (or the conduct responsible for violating of the plaintiff’s right) was defective.

Strict products liability, for example, involves a wrong in the product but not a wrong in the conduct responsible for the product reaching the market. As Andrzej Rapaczynski remarked recently in commenting on *Escola v. Coca Cola*:

"[T]here was something obviously ‘wrong’ with the bottle that exploded in Ms. Escola’s hand. Indeed, the whole point of a Coke bottle is that it is supposed to allow the consumer to enjoy the drink without anyone ending up in the emergency room of a nearby hospital. So when the bottle exploded in the waitress’s hand it was clearly ‘defective’: it did not work the way that such bottles were *supposed* to work. And this remained true even if the manufacturer had not done anything wrong: the bottle at issue was a useful product that had probably been produced and filled according to state-of-the-art technology . . . there was no evidence of any unreasonable failure in the inspection process or any other negligent action anywhere along the way of getting the bottle into the hands of Ms. Escola."

Put differently, Traynor’s point is that whether or not Coke *did* anything wrong is beside the point. The important point was that the product failed to function properly and failed in a harmful way. The proper focus of product liability law should be product safety, not producer conduct.

Section 402A codifies Traynor’s point when it provides that “[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer” even if “the seller has exercised all possible care in the preparation and sale of his product.” Even the *Third Restatement*, which, as Goldberg and Zipursky observe, pushes the law of products liability back in a negligence direction, preserves this focus on the product, not on the conduct responsible for producing that product. Section 1 provides: “[o]ne who is engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.” Section 2 (“Categories of Product Defect”) underscores the fact that it is the product itself—and not the conduct involved in designing, manufacturing and marketing the product—to which product liability attaches.

In determining whether or not a product is defective, the defendant’s conduct is legally irrelevant. And this is true of all strict liabilities. Just as blameworthy conduct may be present in negligence cases, wrongful conduct may be present in strict liability cases. But just as the imposition of

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14 *Escola*, 24 Cal.2d at 462 (“Even if there is no negligence, however, public policy demands that responsibility be fixed where it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.”).
15 *Restatement (Second) of Torts* § 402A.
18 *Id.* at §2.
negligence liability does not turn on the blameworthiness of the defendant’s conduct, so too the imposition of strict liability does not turn on the defectiveness of the defendant’s conduct.

Professors Goldberg & Zipursky are not unaware of the fact that strict liability causes of action are generally understood to not require establishing that the defendant conducted herself wrongly. Their response to this fact has several faces. Sometimes they argue that strict liability wrongs do involve violations of a standard of conduct. This is the approach that they take to product liability and to battery and trespass. In other cases, they separate the strict liability from the law of torts proper. For example, they treat vicarious liability as more agency law than tort law and abnormally dangerous activity liability as a rare exception to the general truth that torts are wrongs.

Professors Goldberg & Zipursky’s thoughtful, learned and detailed treatment of diverse strict liabilities raises a variety of issues. For instance, the implicit consignment of an employer’s strict liability for the torts of its employee to the law of agency ignores the fact that the strictness of vicarious liability was a fertile source of the general expansion of strict liabilities for most of the 20th century. And their carving off of conditional privilege to trespass, strict liability for intentional nuisance, and abnormally dangerous activity liability from each other obscures the common structure of these torts.

This brief comment cannot do justice to every argument in their paper. Instead, it will focus on general reasons to doubt their claim that most strict liabilities can be recast as conduct-based wrongs. One general reason is that strict liability causes of action are understood by tort lawyers to not require showing that the defendant did, in fact, fail to conform its conduct to a standard required by the law. Professors Goldberg & Zipursky are thus forcing various strict liabilities into a mold not meant to fit them. Another, less general reason is that some strict liabilities are rooted in autonomy rights. Battery, trespass and conversion are cases in point. The conduct which constitutes these tortious wrongs is wrong only because the conduct is in fact incompatible with plaintiff’s legally protected power over her person or property. That right is the reason for the imposition of liability. Shoehorning these torts into the template of conduct-based wrongs puts the shoe on the wrong foot. It emphasizes the wrong when the right does the work. This impedes a clear understanding of the nature and the normative basis of these torts. And their strategy of distributing abnormally dangerous activity liability, vicarious liability, conditional privilege and intentional nuisance into different categories obscures the common structure which leads courts to characterize these torts as strict.

Senses of Strict Liability

The term “strict liability” has multiple meanings. One meaning—the meaning relevant when we speak of strict liability torts as a form of tort liability—is conceptual. Here, strict liability means liability which is not predicated on defective conduct. Two other meanings are also prominent in

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19 Goldberg & Zipursky, supra note 7, at 745, 772 (discussing battery, trespass, and nuisance, and product liability, respectively).
20 Id. at 755, n. 50.
21 Id., at 762–67.
tort discourse and these two other meanings are normative, or moral. Some liabilities are strict because they impose liability on innocent conduct, on conduct that is blameless, morally speaking. This is the strictness that Goldberg & Zipursky point to in fault liability. Other liabilities are strict because they impose liability on justified conduct, on conduct which is right, not defective. Both of these forms of strict liability are entrenched in our law of torts. The imposition of strict liability on morally innocent conduct is prominent in connection with autonomy rights—powers of control that the law assigns to people over their own persons and property. The imposition of strict liability on justified conduct is found in various torts that address physical harm. In the first circumstance, tort law takes the view that predicating liability on fault would compromise unacceptably people’s sovereignty over their own persons and possessions. In the second circumstance, tort law stakes out the claim that even though the conduct responsible for inflicting the harm is justifiable, the failure to repair harm justifiably inflicted is not. The object of the law’s criticism is not the defendant’s primary conduct in inflicting injury, but their secondary conflict in failing to repair harm justifiably inflicted.24

Each of these two forms of strict liability in tort involves wrongdoing in an extended sense, but neither of them fits the model of a conduct-based wrong smoothly. The wrong of harming-without-repairing involves objectionable exploitation—impairing the physical integrity or property of someone else simply to benefit oneself. Autonomy-rights-based strict liabilities address the starkly objective wrong of failing to respect the sovereignty of others over their person and their property. Even reasonable ignorance does not excuse a failure to respect the rights in question. Because these two most common forms of strict liability redress genuine wrongs, they are properly housed in the law of torts. Their character and their basis are, however, misunderstood when they are assimilated to the template of conduct-based wrongs.

There is more than taxonomical correctness at stake in the legal classification of these strict liabilities. Strict liabilities in tort embody distinctive, plausible, and insufficiently appreciated moralities of responsibility. Harm-based strict liabilities articulate a morality of responsibility for unavoidable harm. They assert that—in a range of diverse circumstances—it is only fair that those who inflict harm that should not be avoided bear the burden of the harms that they inflict. Autonomy-rights-based strict liabilities assert that some legal powers are compromised unacceptably when they are protected only by fault liability. Professors Goldberg and Zipursky obscure these aspects of tort law when they impose the template of conduct-based wrongs on these strict liability torts.

*Autonomy Rights and Strict Liability for Blameless Conduct*

As Professors Goldberg & Zipursky recognize, torts including trespass, battery and conversion are understood to embody strict liability.25 These torts are properly characterized as strict for two reasons. First, the basis of liability (the wrong) is not that the conduct involved is defective, but that the conduct violates a right that assigns a power of control over some valued domain of someone (call her D) for something she did (call it φing), irrespective of any steps that she took in order not to φ and irrespective of whether she knew or had reason to know that she was φing. Never mind that D did all that it was reasonable for her to do to avoid φing, all that she was personally capable of doing, even all that it was humanly possible to do. Never mind that she could not reasonably, possibly, imaginably have known that she was φing."

24 See, infra note 42 and accompanying text.
25 Goldberg & Zipursky, supra note 7, at 748.
discretionary choice. In legal terminology, this liability is strict. All that must be shown to make out a prima facie case for liability is that the plaintiff’s right was violated. Second, these torts may impose liability on boundary crossings which may both do no harm and be entirely free of fault. Thus they permit the imposition of liability on morally innocent conduct.

In this form of strict liability, the law’s specification of various powers of control gives rise to liability predicted on the voluntary violation of that right. If you enter my land, or appropriate my pen, without my permission you have violated my right of exclusive control over these objects, even if your entry is eminently reasonable. The wrong consists in the failure to respect the right. Fault is simply irrelevant. If you enter my property under an entirely reasonable and innocent misapprehension of where the boundary between my property and yours lies, you trespass. You need not even know that you have entered my property without my permission, much less intend the wrong of entering my property without permission. You need intend no wrong and you need do no harm other than the harm of violating my right of control over my person or my property. Indeed, you may benefit me—say, by trimming, topping and cleaning my trees of bagworms. So, too, you may trespass if you are innocently and reasonably mistaken about which building you have permission to use as a set for your movie, or if you are simply mistaken about the scope of the permission that I have given you. And you may convert my chattel simply by exercising dominion over it in a way which is “in denial of or inconsistent with [my] rights therein.” You do not need to intend to deny my rights, or even know that you are. Liability for battery may likewise be predicated on innocent touchings, and even on touchings which benefit those who are touched without their consent. Medical batteries can take this form: a patient can be operated on without her consent and her diseased condition can be cured. She is benefitted by the cure, even though her right of control over her own person is violated.

This form of strict liability does not fit the template of a “conduct-based wrong.” In negligence—the canonical example of a conduct-based wrong—the issue at the center of the case is whether the defendant conformed her conduct to the standard required by the law. In “sovereignty” or “trespassory” torts, the issue at the center of the case is simply whether the defendant violated the plaintiff’s right. The “duty” is a duty not to violate the right, and any intentional action which violates the right is therefore wrongful. Viewed in isolation from the right, the conduct may be innocent and even justified. The defendant doctor in Mohr v. Williams, for example, benefited the plaintiff by curing her disease. The defendants’ conduct in cases like Mohr is wrong only because it violates a right. Put differently, the normative work is done by the plaintiff’s right. The defendant’s wrong is merely the reflex of that right. To say that defendant’s action was wrong because it violated a stringent standard of conduct fosters misunderstanding of both these torts and strict liability.

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26 Two useful terms for these torts are ‘sovereignty-based’ and ‘trespassory.’ The former calls attention to the connection between these torts and autonomy. The latter term calls attention to the fact that these torts involve the impermissible crossing of boundaries, not the infliction of injury.
30 Zaslow v. Kroenert, 176 P.2d 1, 7 (Cal. 1946).
31 Id.
32 E.g., Vosburg v. Putney, 50 N.W. 403 (Wis. 1891); White v. Univ. of Idaho, 797 P.2d 108 (Id. 1990).
33 E.g., Mohr v. Williams, 104 N.W. 12 (Minn. 1905). The touching exceeded the scope of the consent given.
34 Id.
Derek Parfit’s distinction among belief-relative, evidence-relative and fact-relative standpoints helps to pin down the way in which the conduct necessary to commit trespassory torts differs from the conduct necessary to commit negligent wrongs.35 Innocent batteries, trespasses and conversions are wrongs relative to the facts (what is actually the case) because they violate rights that their victims actually possess. They are not wrongs relative to the beliefs of the persons who commit them, because the persons who commit them believe themselves to be acting with due regard for everyone’s rights. Nor are innocent batteries, trespasses and conversions wrongs relative to the evidence available to those who commit them. These tortfeasors reasonably believe that they have consent, are on their own property, or own the chattel in question. Negligence wrongs, by contrast, are generally wrongs relative to the evidence. Those who commit them should have known that they were not exercising reasonable care. We are most at fault (most blameworthy) when we commit wrongs that we believe to be wrong. We are not at fault at all when we commit wrongs that in fact are wrongs, even though we did not believe them to be wrongs and should not, in fact, have determined that they were wrongs on the evidence available to us. In this circumstance, the only “defect” in our conduct is that it violates the plaintiff’s right.

Forcing the “wrong” involved in trespassory torts into a template which understands torts as violations of standards of conduct impairs our understanding of the nature and basis of these torts. What we want from tort theory is edification, not obfuscation. Conceptually, these torts are strict because establishing their existence does not involve proving that the defendant’s conduct was defective. All that must be shown is that the defendant’s conduct violated the plaintiff’s right. Morally, trespassory torts are strict (in some of their applications) because they attach to conduct which is entirely free of fault. We misunderstand both the conceptual center and normative basis of these torts if we claim that they key to understanding them is that they involve “wrongful conduct. The key to understanding them is that they require the violation of autonomy rights that plaintiffs do, in fact, have.

Harm and Strict Liabilities for Justified Conduct

Harm-based strict liabilities occur in product liability law, in abnormally dangerous activity law,36 in the law of conditional privilege to trespass, in vicarious liability law, and in nuisance law. All of these harm-based liabilities are strict in that they impose liability on conduct which is warranted, not wrong. They impose liability on conduct that is justified, on inflictions of harm that are reasonable. Their target is not unreasonable conduct, but unreasonable harm.37 Negligence liability, by contrast, targets conduct which is unjustified—conduct which is unreasonable (as well as harmful) because it does not show due regard for the property and physical integrity of those that it harms. Conduct-based wrongs express what we may call criticism of primary conduct.38 The law lodges its criticism against the infliction of harm in the first instance, on the ground that the conduct responsible for the harm was wrongful. The harm, therefore, should never have occurred. Harm-based strict liabilities, by contrast, predicate responsibility on the judgment that the conduct at issue was justified (or reasonable) in inflicting injury, but unjustified (or unreasonable) in failing to repair the injury done. This is

35 DEREK PARFIT, ON WHAT MATTERS 150–53 (Oxford Univ. Press 2011).
36 As Professors Goldberg and Zipursky recognize, supra note 7, at 761–62.
37 I develop this distinction at length in Gregory C. Keating, Nuisance as Strict Liability Wrong, 41, TORT LAW 4 (2011).
38 I owe this term to Lewis Sargentich. Robert Keeton’s contrast between “fault” and “conditional fault” also describes the distinction drawn in the text. See infra note Error! Bookmark not defined.
criticism of secondary conduct. The law lodges its criticism against harming justifiably-without-reparing. This kind of strict liability identifies a kind of conditional wrong. It circumscribes a domain within which the infliction of harm is justifiable, but only on two conditions: (1) that the conduct inflicting injury is justified or reasonable; and (2) that reparation is made for physical harm done by that reasonable conduct.

Conditional privilege in the law of private necessity—the doctrine of *Vincent v. Lake Erie*—illustrates the distinction between primary and secondary criticisms of conduct. The defendant ship owner’s conduct in lashing its ship to, and damaging, the plaintiff’s dock was reasonable not unreasonable—right not wrong. The defendant had the right to use the dock to save its ship from destruction at the hands of the storm, even if using the dock involved damaging the dock. Plaintiff was not wronged by the defendant’s damaging of its dock in the course of saving its ship from the storm. The defendant’s infliction of that injury was right, not wrong. Legally, the defendant’s privilege to trespass was not conditioned on doing no harm to the dock, a requirement which would have been virtually impossible to meet in the circumstances. The defendant’s privilege was conditioned on making reparation for any harm done to the dock, even though that harm was done rightly and not wrongly. The wrong in *Vincent* lay not in the defendant’s doing damage to the dock, but in the defendant’s failure to step forward in the aftermath of the storm and make good the damage done to the dock. *Vincent*’s strict liability is thus liability for unreasonable harm, not liability for unreasonable conduct. In *Vincent*, making reparation for the harm done by docking prevents the injustice of shifting the cost of the ship’s salvation from the ship owner, who profits from it, onto the dock owner who does not. The imposition of liability on the ship owner for failing to make such reparation rights the wrong of shifting the cost of the ship’s salvation onto the dock owner whose property is the instrument of that salvation. The wrong in strict liability is thus “harming justifiably, but unjustifiably failing to repair the harm justifiably done.” Structurally, strict liability in tort resembles eminent domain in public law. Eminent domain law holds that it is permissible for the government to take property for public use only if the government pays just compensation from

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40 See Francis H. Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests in of Property and Personality*, 39 HARV. L. REV. 307 (1926). This privilege is also a power in Hohfeld’s terms, because it enables the ship owner to alter its relations with the dock owner without the dock owner’s permission, as long as the ship enters the dock owner’s property for certain purposes (to save its own property) and conducts itself in certain ways (only does what is necessary to save its own property). Along with Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959), Bohlen’s article is a classic statement of the essential features of harm-based strict liability.
41 Professors Goldberg & Zipursky argue that the concept of a conditional wrong is “untenable” because plaintiffs in such cases do not have prove that defendants failed to pay. Goldberg & Zipursky, *supra* note 7, at 766. They are right that no such proof is needed. Plaintiff need only prove that the defendant harmed her. The duty to repair the harm arises when harm is inflicted. If plaintiff and defendant cannot agree on what such reparation requires, the matter is for a court to determine simply because no one can unilaterally determine that they have discharged their legal obligations. The parties to a wrong may collectively so decide, but no one party has the authority to so decide unilaterally.
42 *Vincent* is thus a clear counter-example to the claims of some prominent tort scholars that strict liability involves a duty not to do harm, full stop. Jules Coleman and John Gardner hold views of this kind. See Jules Coleman, *Facts, Fictions, and the Grounds of Law*, in *LAW AND SOCIAL JUSTICE* 327 (2005). See also JULES COLEMAN, THE PRACTICE OF PRINCIPLE, 35 n.19 (2001) (“The concept of a duty in tort law is central both to strict and fault liability. In strict liability, the generic form of the duty is a ‘duty not to harm someone’, while in fault, the generic form of a duty is a ‘duty not to harm someone negligently or carelessly’.”). See also John Gardner, *Obligations and Outcomes in the Law of Torts*, in *RELATING TO RESPONSIBILITY: ESSAYS FOR TONY HONORE* 111 (P. Cane & J. Gardner eds., 2001).
those whose property it takes. This is a two-part criterion. First, the taking must be justified; it must, that is, be for a public use. Second, compensation must be paid for the property taken. Strict liability in tort has a parallel structure. In negligence, liability turns on whether the defendant’s primary conduct was wrongful. In strict liability, the defendant’s conduct triggers liability when the defendant’s failure to step forward and repair the harm faultlessly inflicted is wrongful. Strict liability asserts that the costs of necessary or justified harms should be borne by those who benefit from their infliction, and not by those whose misfortune it is to find themselves in the path of someone else’s pursuit of their own benefit, however reasonable that pursuit may be.

Modern American nuisance law exhibits the same structure when—as in the famous case of Boomer v. Atlantic Cement—it holds that damages should be paid for an unreasonable interference with plaintiffs’ rights to the reasonable use of their property, even though the conduct responsible for that interference is justified and ought to be continued. Section 826 of the Restatement Second crystallizes the regime epitomized by Boomer. When a nuisance arises from unreasonable conduct it may be enjoined. Some nuisances, however, arise from conduct which is reasonable insofar as the infliction of the harm is concerned. “It may sometimes be reasonable to operate an important activity if payment is made for the harm it is causing, but unreasonable to continue it without paying . . . .” In this circumstance, there is no defect in defendant’s primary conduct, no violation of a standard of due care. Reasonable conduct resulting in unreasonable interference with another’s use and enjoyment of land is wrong only if the party inflicting the interference fails to make reparation for the harm that they do. Reparation transforms unreasonable harm into reasonable harm, and fairly reconciles competing, equal, rights to the use and enjoyment of land. The law’s focus here is not on the wrongness or rightness of defendant’s conduct, but on the severity of the harm inflicted. Conduct which is in no way wrong may give rise to an obligation of reparation when the interference it inflicts on someone else’s use and enjoyment of their land is so great that the party harmed should not have to bear that harm without compensation. Liability for this sort of harm is strict because it is not predicated on wrongful conduct in inflicting injury. The essence of this kind of tortious wrong is masked when the wrong is shoehorned into the mold of a conduct-based wrong.

The paramount test of a theory is its ability to illuminate the subject it theorizes. When we force tort’s strict liabilities into the template of conduct-based wrongs we inflict an unnecessary injury on ourselves. We condemn ourselves to seeing the law of torts through a glass darkly. This is too high a price to pay for an answer to the question “what is a tort?” It is far better to see strict liabilities for what they are, and to accept the elusiveness of tort as a subject.

43 This “private eminent domain” conception of strict liability may make its first appearance in American tort theory in the writings of Oliver Wendell Holmes. These writings are cited and discussed in Thomas C. Grey, Accidental Torts, 54 VAND. L. REV. 1225, 1275–1281 (2001), and at greater length in his unpublished manuscript Holmes on Torts (on file with author). Two other classic statements are Francis Bohlen, Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality, 39 HARV. L. REV. 307 (1926) and Robert E. Keeton, Conditional Fault in the Law of Torts, 72 HARV. L. REV. 401 (1959).
45 RESTATEMENT (SECOND) OF TORTS §826 (1979).
46 Id., Comment on Clause (b): (f).