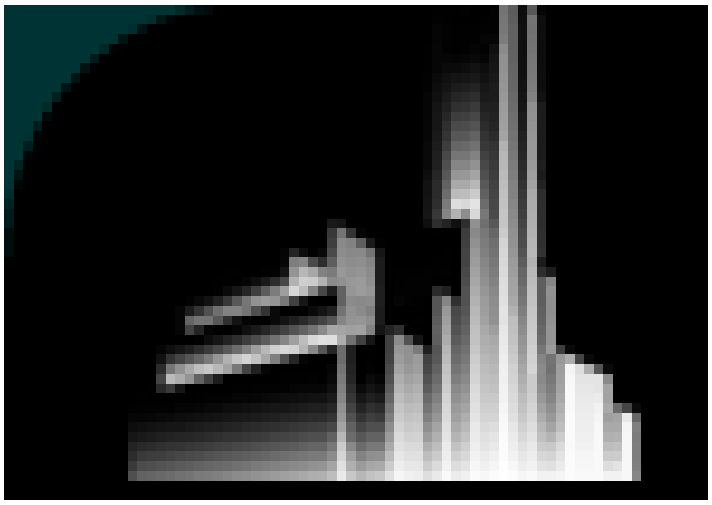
Strict Liability and the Liberal Justice Theory of Torts

Alan Calnan
Professor of Law
Southwestern Law School



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Abstract: *Strict Liability and the Liberal Justice Theory of Torts*
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Ask a group of tort scholars to explain the relationship between fault and strict liability and the responses are likely to be sharply split. An economist might reply that strict liability—assigned on the basis of efficiency—should be the rule and fault, if it is to apply at all, but a reluctant and occasional exception. A moralist, however, would likely give the opposite opinion—that fault, defined as deontological culpability, should be the rule and strict liability the exception.

Ironically, both economists and moralists often base their views on liberal principles. Economists rely on the political dimension of liberalism, arguing that government generally should not intervene in free market transactions, but if it must, it should do so only with clear tort rules that minimize accident costs. Not surprisingly, moralists rely on the moral dimension of liberalism, contending that tort law should promote private rights and freedoms by creating and enforcing personal responsibilities.

Both views, however, share the same three flaws. Methodologically, they are one-dimensional in outlook (focusing on either the moral or the political, but not both) and unilateral in objective (seeking to either punish or deter injurers while virtually ignoring the injured). Substantively, they are strangely illiberal (promoting either social welfare or some particular conception of the Good).

In this article, I offer a liberal justice tort theory that avoids these pitfalls. It is holistic, encompassing both sides of tort law's dual personality; relational, invoking justice concepts that illuminate the bilateral aspects of all torts; and classic, adopting a longstanding and mainstream perspective that seeks only to protect and promote individual liberty. After recapturing and redefining strict liability, I demonstrate how that ancient concept can lay the groundwork for a new metatheory of torts.

My thesis, in short, is that strict liability is both a moral-political and a substantive-procedural concept that must be implemented in a two-step process. The first step determines whether the parties' encounter and its effects were consensual. If consent exists, the consenter is held strictly liable for her own loss, irrespective of the fault of her counterpart. If no consent is found, or if it is not an issue, liberal justice theory then implements a scheme of reasonableness, grounded in concepts of strict law and equity, to determine the actor's liability. Strict law creates substantive rules that forbid, inhibit or sanction certain people, activities or relations that pose the greatest and surest threats to freedom and equality. However, even when a person, activity or relationship is not covered by a strict substantive rule, equity may episodically impose strict procedural requirements on actors who hold an unfair advantage in the trial of their actions. Because litigation itself is a threat to the freedom of the loser, the *ad hoc* adjustment of procedural burdens serves to correct an important imbalance between the parties and restores them to a state of moral and political equality.

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Alan Calnan[*]

INTRODUCTION

All torts scholars seem to agree that tort law's bases of liability consist of fault and strict liability. They also seem to agree that fault requires blameworthiness while strict liability does not. They even seem to agree that strict liability is based on public policy concerns like deterrence and loss spreading. But this is where the consensus ends.

Ask a group of tort scholars to explain the relationship between fault and strict liability and the responses are likely to be sharply split. An economist might reply that strict liability—assigned on the basis of efficiency—should be the rule and fault, if it is to apply at all, but a reluctant and occasional exception.[1] A moralist, however, would likely give the opposite opinion—that fault, defined as deontological culpability, should be the rule and strict liability the exception.[2]

Ironically, both economists and moralists often base their views on liberal principles. Economists rely on the political dimension of liberalism, arguing that government generally should not intervene in free market transactions,[3] but if it must, it should do so only with clear, efficient tort rules that maximize social welfare.[4] Not surprisingly, moralists rely on the moral dimension of liberalism—the part that focuses on the individual. They contend that tort law should promote private rights and freedoms by creating and enforcing personal responsibilities.[5]

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[*] Professor of Law, Southwestern Law School. I want to thank the faculties at Wake Forest University School of Law and Southwestern for permitting me to present earlier drafts of this paper at faculty workshops and for offering many thought-provoking comments. I also want to thank Jeff Lipshaw for reading a prior draft and providing helpful written commentary. Finally, I must give a special nod of recognition and appreciation to my colleague Byron Stier, who not only read several versions of this piece, presented many probing questions on its structure, scope and content, and offered both written and verbal ideas for making it better, but who also gave generously of his time to listen to my rants and share his own views on torts, liberalism and beyond, all while maintaining an infectious enthusiasm and an irrepressible sense of humor. Any errors that remain reflect my stubborn refusal to see or accept their wisdom.

[1] *See, e.g.,* GUIDO CALABRESI, THE COST OF ACCIDENTS 250-51 (1970); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 293-94 (1987); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 166 (3d ed. 1986); Steven P. Croley & Jon Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability,* 91 MICH. L. REV. 683, 767-86 (1993).

[2] *See* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 171-83 (1995); Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 FORDHAM L. REV. 1811, 1820-21 (2004).

[3] *See* Croley & Hanson, *supra* note 1, at 688-89.

[4] *See* John C.P. Goldberg, *Twentieth-Century Tort Theory,* 91 GEO. L.J. 513, 544-45 (2003).

[5] *See* Stephen R. Perry, *The Moral Foundations of Tort* Law, 77 IOWA L. REV. 449, 507-12 (1992); Richard W. Wright, *The Grounds and Extent of Legal Responsibility,* 40 SAN DIEGO L. REV. 1425, 1429-34 (2003); Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts,* 51 VAND. L. REV. 1, 4-5 (1998); *see generally* Richard S. Markovits, *Liberalism and Tort Law: On the Corrective-Justice-Securing Tort Law of a Rights-Based Society,* 2006 U. ILL. L. REV. 243 (analyzing "the tort-related moral obligations of the members of and participants in a liberal, rights-based society and the tort-related constitutional obligations of such a society's government(s).").

Unfortunately, these liberal perspectives appear not only potentially at odds with each other,[6] but also internally inconsistent with the positions they have been enlisted to support. Though liberal economists prefer the market's *invisible* hand to the state's quite visible *helping* hand, their desired liability regime—strict liability—seems to invite greater government involvement in and more burdensome regulation of private action than a regime based on fault.[7] Likewise, while liberal moralists pay lip service to fault-based liability, some theorists among them have argued that a true libertarian tort system should be grounded in strict or even absolute liability.[8]

At first, it may appear that liberalism itself is the source of such confusion. With its "do-your-own-thing" mentality, liberalism can come off as indeterminate, or worse, substantively vacuous. But there are other problems at work here—problems that preclude such a snap judgment. For one thing, both economists and moralists have fragmented liberalism and selectively transformed their chosen pieces into one-dimensional analyses. The trouble is, tort law is not one-dimensional. Because it is created and applied by the state to right private wrongs, tort law is necessarily *both* political *and* moral. Thus, it cannot be accurately explained or adequately justified without an account of *each* aspect of its dual nature.

In addition, both combatants have applied their already limited liberal perspectives in a decidedly restrictive manner, typically concentrating their attention on the actors who inflict harm and virtually ignoring the victims who suffer it. Although each camp has its own objective—for economists, to pursue optimal deterrence and for moralists, to punish wrongdoers—both see tort cases in essentially unilateral terms.[9] However, torts are not unilateral events, but complicated bilateral power struggles. In resolving these struggles, one simply cannot deter or punish one party without also empowering, enriching or immunizing the other. Thus, any liberal approach that addresses the freedom of only one disputant is virtually predestined to be incomplete and unfulfilling.

Perhaps the biggest problem with these liberal tort theories is the illiberal and, for lack of a better word, un-American value systems they seek to serve. Economists embrace liberalism not for its own sake, but to achieve the "higher" ends of utilitarianism and efficiency. But such values seem awkwardly out of place in "the land of the free and the home of the brave"—the land of Big Macs and Big Oil, ozone and Oxycontin, Botox and buffalo extinction, clear-cutting and credit cards, self-help and supersizing, Las Vegas and Love Canal, Hummers and haute couture, and Chia Pets and channel-surfing. Similarly, deontological moralists endorse liberalism as a necessary precondition to some

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[6] A liability regime committed to social utility may have to sacrifice the private rights of certain citizens. For example, a tort rule that protects an abnormally dangerous but socially useful activity like oil refining may efficiently distribute fuel but also produce pollution that will harm the health and property of surrounding landowners. Likewise, a regime committed to a policy of laissez faire may face difficulty inculcating moral values. Thus, a tort rule that rejects a duty of easy aid may promote individual autonomy but also fail to instill values of respect, care or benevolence.

[7] The burden here is two-fold. Unlike negligence, strict liability covers not just specific acts, but entire activities. Thus, the mere participation in these activities makes one susceptible to liability. Because strict liability is easier than negligence to prove, such activities also are more likely to invite lawsuits and more likely to result in findings of liability.

[8] *See* Jules Coleman & Authur Ripstein, *Mischief and Misfortune*, 41 MCGILL L.J. 91, 102 (1995).

[9] This point has not gone unnoticed by others. *See* Goldberg, *supra* note 4, at 554-55, 577 (discussing the asymmetrical, agent-focused nature of both economic and corrective justices theories).

greater, universal conception of the Good. But given our heterogeneity and pluralism, which has fostered division over such basic questions as abortion, assisted suicide, immigration policy, gay marriage and the death penalty, not to mention the tort issue of imposing a duty to aid, does anyone really believe that a moral unity beyond liberalism itself actually exists or could ever be found?

These problems obviously leave liberal tort theory in a precarious state. Yet they do not necessarily compel its demise. Indeed, in this article, I shall offer a modified liberal tort theory that not only overcomes the pitfalls of its predecessors, but also better reconciles its competing theories of fault and strict liability.

I call this new theory the liberal justice theory of torts.[10] Unlike previous theories, it takes a holistic approach to liberalism which encompasses both the political and the moral sides of tort law's dual personality. In addition, it looks to justice concepts both to avoid the prevailing trend toward unilateralism and to illuminate the relational and bilateral aspects of all torts. Finally, it does all of this using a "classic" liberal perspective that has as its only objective the protection and promotion of liberty.[11]

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[10] I presented some of the pieces of this theory in Alan Calnan, *In Defense of the Liberal Justice Theory of Torts: A Reply to Professors Goldberg and Zipursky,* 1 NYU J.L. & Lib. 1023 (2005).

[11] I use "classic" here in two different senses, one for each dimension of liberalism. Morally, classic suggests a longstanding commitment to individual rights and responsibilities that can be traced back to ancient Greece and Rome. Politically, classic conveys the typical and well-accepted view that government generally should not interfere with private interests.

Combining these connotations may seem inconsistent and controversial. After all, the ancients, though they spoke of rights and duties, often used law to compel virtuous behavior. Still, there is no reason why these ideas must be taken together as a whole. While the ancients often failed to differentiate among various fields of intellectual inquiry, their moral views concerning the individual certainly were comprehensive enough to stand apart from their views on government and politics. History supports this conclusion. During the Middle Ages, the ancients' moral philosophies actually were embraced by English jurists who gradually integrated them into the common law, including the common law of torts, where they later were received into American law. *See generally* ALAN CALNAN, A REVISIONIST HISTORY OF TORT LAW: FROM HOLMESIAN REALISM TO NEOCLASSICAL RATIONALISM (2005)(describing the development of tort law from classic liberal sources). By contrast, though the ancients planted the seeds of democracy, their political institutions did not have a direct and immediate impact on Anglo-American political traditions, which sprouted from feudalism, were nurtured by later philosophers like John Locke, Adam Smith and John Stuart Mill, and blossomed during the Glorious and American Revolutions.

Some critics also might find controversy in each individual usage of classic liberalism. For example, many scholars believe that Aristotle's Greece was not liberal at all, but was strictly communitarian. They also believe that these two political conceptions are irreconcilable. I disagree, at least in part. While it is true that the Greeks revered the *polis* and sought to promote it, they also recognized the need for rights. As Fred Miller Jr. has shown, Aristotle's understanding of justice was based not just on objective "natural" rights, but also on subjective claim rights—like the right to corrective justice—that could be pressed against others. *See Fred* D. Miller Jr.*, Aristotle's Theory of Political Rights*, *in* ARISTOTLE AND MODERN LAW 309 (Richard O. Brooks & James Bernard Murphy eds., 2003). Moreover, although the Greeks emphasized man's social nature, their idea of communitarianism, or at least something very close to it, is not necessarily inconsistent with liberalism. Indeed, the two concepts are actually symbiotic. As Hayek recognized, communities create the preconditions for individual action. *See* 2 FRIEDRICH A. VON HAYEK, LAW, LEGISLATION , AND LIBERTY 2 (1976); FRIEDRICH A. VON HAYEK, THE CONSTITUTION OF LIBERTY 62-67 (1960); FRIEDRICH A. VON HAYEK, INDIVIDUALISM AND ECONOMIC ORDER 22-24 (1948); *see generally* C.R. McCann, Jr., *F.A. Hayek: The Liberal as Communitarian*, 15 REV. OF AUSTRIAN ECON. 5 (2002)(arguing that Hayek's philosophy was one of communitarian liberalism). They generate opportunities for choice and customs, traditions and values to guide their selection. These conditions, in turn, inculcate in the citizenry moral sensibilities which identify certain choices as good or

I have chosen this perspective for several reasons. One is history. As I have argued elsewhere, early tort law was directly adapted from the liberal justice ideas of Aristotle, Justinian, Aquinas and a host of other ancient and medieval thinkers.[12] Another reason is constancy. As noted above, corrective justice—a critical feature of Aristotelian liberalism—has existed in tort law since its inception and remains one of its defining characteristics.[13] Yet another reason is consistency. Despite its ancient heritage, liberal justice theory contains a belief-system that I believe still resonates with the values of many if not most Americans. The final reason is necessity. While many modern liberals have explored the moral and/or political dimensions of liberalism, few have grappled with its dualism of strict law and equity and none has attempted to make this dualism a central feature of tort law.

Since strict liability has been the most elusive part of tort law's formal structure, I will attack that enigma head on. Specifically, my objective is to posit a liberal justice theory of strict liability which not only fits comfortably within the existing fault matrix, but also supports a comprehensive metatheory of torts.

My thesis, in short, is that strict liability is a moral-political concept that must be implemented in a two-step process. The first step is to determine whether the parties' encounter and its effects were consensual. Under liberal justice theory, one who consents to an act or activity risk is not wronged. Thus, she has no claim-right against the actor and no right to expect protection from the state. This is true even if the conduct of the risk-creator appears to be objectively unreasonable. Given the power and priority of consent, liberal justice theory requires that this issue always be litigated first. If consent exists, the consenter is held strictly liable for her own loss, irrespective of the fault of her counterpart.

If no consent is found, or if it is not an issue, liberal justice theory then implements a scheme of reasonableness, grounded in concepts of strict law and equity, to determine the actor's liability. Strict law creates categorical rules that forbid, inhibit or sanction certain people, activities or relations that pose the greatest and surest threats to freedom and equality. These rules are substantive. They expand duties, heighten standards of care, extend causal responsibility and limit or eliminate defenses. Equity expands strict law when its application would prove unjust under a particular set of facts. Thus, even when a person, activity or relationship is not covered by a strict substantive rule, equity may episodically impose strict procedural requirements on actors who hold an unfair advantage in the trial of their actions. Because litigation itself is a threat to the freedom of the loser, the *ad hoc* adjustment of procedural burdens serves to correct an

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bad. Only when these conditions are set is it possible to operate a liberal system where people exercise the freedom to choose and accept the responsibility to own up to the consequences of their actions.

As for the other "classic" liberal usage—that government generally should stay out of private affairs—I endorse a weak form of paternalism consistent with the Millian harm principle. Egalitarian liberals and libertarians might take umbrage with this usage, arguing for greater or lesser paternalism. However, because my usage stands at the midpoint between these two extremes, and represents the mainstream of liberal political thought, it aptly earns the "classic" moniker. In any event, switching to one of these extreme forms of liberalism would not alter the basic structure of my liberal justice theory; rather, as I will show within, it would only expand, narrow or eliminate the policy-based exceptions to the consent theory within this paradigm. *See infra* II.B.1.

[12] *See* CALNAN, *supra* note 11.

[13] *See generally* Calnan, *supra* note 10 (rebutting various critiques of corrective justice and explaining its continued relevance to modern tort law).

important imbalance between the parties and restores them to a state of moral and political equality.

I will present this argument in two parts. In Part I, I summarize the philosophical foundations of liberal justice theory in general, and of liberal-justice strict liability in particular. Then, in Part II, I sketch out in greater detail the contours of my metatheory. I conclude by identifying some implications of this project and highlighting the work yet to be done.

I. THE PHILOSOPHICAL FOUNDATIONS OF LIBERAL JUSTICE THEORY

Tort law is a social mechanism which mediates the relationships between citizens in conflict and between those citizens and the state. Strict liability, in particular, mediates these relationships in a way that appears unequal. By definition, it empowers the state, which in turn empowers certain persons, to treat some citizens more harshly than others. Although the modern "theory" of strict liability justifies such disparate treatment only on public policy grounds, liberal-justice strict liability offers a comprehensive philosophical explanation for this apparent anomaly.

As I shall demonstrate below, liberal-justice strict liability starts from values of freedom, equality and security. It assembles these values into standards of reasonableness and justice, which govern the private and public relationships falling within their ambit. In the private sphere, liberal-justice strict liability relies on ancient principles of general and particular injustice to explain why certain victims deserve more assistance, and certain wrongdoers deserve more restraint, than their counterparts in the tort system. It also explains why those who voluntarily choose injustice do not deserve the same deference, but receive strict treatment of their own. Finally, in the public realm, liberal-justice strict liability uses principles of distributive justice to make some laws more burdensome than others, and concepts of strict law and equity to rigidly enforce or leniently expand or relax the law when so required.

A. Reasonableness and Justice

As Aristotle once observed, political justice can exist only "among people who are associated in a common life with a view to independence, and who enjoy freedom and equality."[14] This seemingly simple statement locates the three core values of liberal-justice strict liability: freedom, equality and by implication, security. Freedom is a state of choice and action which gives individuals the power of autonomous will and self-determination, and with it, the rights and responsibilities of moral agency. Security is merely a form of negative freedom—specifically the freedom to be left alone by others. It reinforces the power of self-determination by protecting people from outside incursion. Equality stands on different ground. Although it applies to freedom, it is not, in itself, an aspect of freedom. Instead, it (1) guarantees that all people enjoy freedom, thus establishing their basic dignity and worth as moral agents, and (2) sets criteria for coordinating freedoms among individuals in a political association.

Of course, these values are not always harmonious. They can and often do come into conflict, especially in tort cases. One person's exercise of freedom is frequently a

[14] ARISTOTLE, THE NICOMACHEAN ETHICS 165 (J.E.C. Welldon trans., Prometheus Books 1987).

threat to the security of someone else. Likewise, one's assertion of equality may operate to limit the freedom of those with extraordinary powers or needs. The goal of tort law is to determine how to resolve these conflicts. This is difficult enough in ordinary cases of negligence. It is even more pronounced, however, in cases of strict liability, where the law's aspiration—of treating one party more harshly than others—is itself seemingly inimical to the law's core values. In this situation, it is especially important for the law to rely for its liability judgments on some defensible standard or standards of evaluation.

In liberal justice theory, reasonableness serves as the ultimate standard of both law and conduct. According to Aristotle, reasonableness has two forms. Intuitive reason is the innate capacity to discover first principles.[15] It searches for truths that are objective, universal and timeless, and not tied to changing social circumstances or shifting social policies. Practical reasonableness, on the other hand, is the quest for truth in particular factual settings where the first principles are too vague, too general or simply inapplicable.[16] Where first principles do exist, practical reasonableness seeks to apply them to the facts in a manner which most closely fulfills their purpose or spirit. Where, however, such principles are absent, practical reasonableness examines the facts in the light most favorable to any "bordering" principles, and then proceeds inductively to the creation of a new general principle.[17]

In a liberal legal system, intuitive reason reveals several "natural" truths about human social behavior.[18] These truths are not unique to American tort law, but instead have guided some of the oldest and most revered legal systems, including Justinian's Roman *Corpus Juris Civilis*[19] and England's burgeoning common law. As the *Corpus* first declared, and Bracton later observed in his thirteenth-century treatise on English law, reasonableness requires people to (1) live honestly, (2) do no harm to others, and (3) treat others justly.[20]

Not surprisingly, each principle ingrains and enforces the three values of liberalism. The "honesty" precept promotes positive freedom by fostering consensual exchange. On a social plane, this injunction creates the condition of trust necessary for forming a democratic social contract, which in turn guarantees the freedom and equality absent in a state of nature. On a more personal level, it ensures that people are not duped

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[15] *Id.* at 193-94, 204.

[16] *Id.* at 196-99.

[17] For example, a society that punishes unjustified killing but rewards creative effort would have to reconcile these principles in deciding whether to allow a murderer to profit from a book about her crime.

[18] I am not contending that that the ensuing list is exclusive. Certainly, communitarian cultures could fashion of list of truths different from and significantly at odds with the one provided. There also may be other truths common to all or most liberal cultures. What I am arguing is that the provided list is the one developed by our classic liberal ancestors and later adopted by the founders of Anglo-American tort law.

[19] The *Corpus* is a compilation of ancient Roman law commissioned by Emperor Justinian in the sixth century B.C. It consists of three parts: the Code (a collection of imperial statutes and decrees), the Digest (a compendium of treatise fragments and juristic opinions) and the Institutes (a student textbook). *See* HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 128 (1983).

[20] *See Medieval Sourcebook: The Institutes of Justinian, 535CE,* at 3 (visited July 27, 2006) <http://www.fordham.edu/halsall/basis/535institutes.html#I.%20Justice%20and%20Law (Code's Institutes); HENRY DE BRACTON, DE LEGISBUS ET CONSUETUDINIBUS ANGLIAE (BRACTION ON THE LAWS AND CUSTOMS OF ENGLAND) 25 (c. 1300) (visited October 15, 2001) <http://bracton.law.cornell.edu/bracton/Common/index.html (Bracton's treatise).

into making involuntary choices or forgoing opportunities on the basis of incomplete or inaccurate information.

The "harm" precept, by contrast, promotes security and equality, and indirectly negative freedom, by prohibiting nonconsensual encounters. Under this precept, an actor must treat others as moral agents—ends worthy of dignity and respect—and not merely as instruments to be used as means to the actor's own ends.

Finally, the "justice" precept serves as a sort of master principle informing and enveloping the other two. Indeed, its breadth bespeaks its importance, which will be addressed in greater depth momentarily. For now, it is enough to note that justice not only compels the requirements of honesty and no-harm, it fills whatever voids exist between them, delegating and coordinating freedoms to ensure that each and every party to a social encounter receives what she is due.

Through these precepts, reason aims to guide mankind toward a mean state of equality and proportion, and away from the extremes of excess and deficiency.[21] This mean applies to every type of human action, and guides every step of each action.

All actions have four components: conditions of external and internal freedom which allow the actor to act, an end, a chosen means of achieving that end, and a consequence for the actor and for the world around her.[22] Reason seeks balance at each phase. It promotes the conditions of external freedom—equality and security—by forbidding the extremes of absolute autonomy on the one hand and absolute subservience on the other. It also promotes the conditions of internal (moral) freedom: first, by securing the physical prerequisites to agency (rational capacity, life and health), and second by requiring a mental state or state of will necessary for balanced action—specifically, that state which permits the actor to pursue her instincts and fulfill her needs without becoming a slave to her passions. Reason informs the means of acting by judging not only the efficacy and integrity of the act, but also how well the act balances the competing interests of others. Finally, even when all else is right, reason still evaluates the act's ends and consequences.

Ends, however, are harder to judge. Since reasonable people can disagree about what constitutes a good life, the evaluation of ends and consequences will depend on the value system of the society in which the action occurs. Liberal democratic states typically remain neutral about ends, opting instead to protect the conditions of freedom necessary for each citizen to pursue her own conception of the good. Nevertheless, even liberal states judge some ends and consequences, at least in an exclusionary way. Specifically, they prohibit ends designed to curtail or destroy the ends of others (intentional harms), and they condemn consequences that, although efficacious for the actor, have an unfair impact on others.

If intuitive reason requires the search for the mean and fixes it permanently at the mid-point on the scale between excess and deficiency, practical reason establishes different scales for different acts and adjusts these scales as circumstances change. For example, the welfare scales for drinking poison, on the one hand, and imbibing water, on the other, are drastically different. Although both poison and water can be dangerous if ingested in excessive quantities, the mean of reasonable ingestion for poison would be

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[21] *See* ARISTOTLE, supra note 14, at 63, 150-53.

[22] This description of action draws from Kant's *Metaphysics of Morals*. *See* IMMANUEL KANT, THE METAPHYSICS OF MORALS 185-213 (Mary Gregor trans., Cambridge Univ. Press 1991)(1797).

much lower than the mean for imbibing water. Even the same act may have different means depending on the context of its performance. Thus, the mean speed for reasonable driving may be quite low when the vehicle is operated on curvy streets in bad weather and around a lot of people, but quite high when operated on a flat, even surface in good weather in a barren desert.

In these examples, the means are circumstantial. But they need not be. Sometimes means can be normative. For example, certain cultures encourage or require body piercings as symbols of beauty or status, while others consider this practice offensive.[23] Even within the same culture, values and tastes may change the mean gradually over time. American culture traditionally discouraged all body piercings for men, and tolerated only ear piercings for women. Today, body piercing is far more common and accepted for everyone.[24] As a result, practical reason has shifted both the scale and the "reasonable" mid-point for this behavior.

The mean of reasonableness applies not just to the types of self-regarding acts discussed above. It also applies to relations. Sometimes relations are formed unilaterally, as when an actor imposes risk or inflicts harm upon another without her consent. Other times, relations are formed with the consent of both parties. In either case, the relation is a concern of justice, which determines the amount of freedom due to each party. In fact, justice is the mean state of a relation, apportioning freedoms on the bases of equality and proportionality.

As with self-regarding acts, the mean for relations is often socially or politically determined. In liberal democracies, this mean is fixed by rights and duties. Rights are markers of freedom; duties are symbols of freedom restriction. Since rights and duties are correlative—limiting one's freedom to the exact same extent as they empower another—every right-duty coupling establishes the reasonable mean state of freedom for that relation. An act which violates this mean disturbs the relation's moral equilibrium. The actor takes more freedom than she deserves. Thus, justice reaches up to rein her in, restricting her freedom to bring her back down to the mean of equality. The victim, in turn, receives less freedom than she is due. Thus, justice reaches down to lift her up, affording her the extra freedom necessary to protect or restore her interests.

Because justice regulates relations, it also regulates law, which establishes a public relationship between people and their government. When people enter a political association, they give up their natural liberties in return for equality and security. The state then distributes freedoms and freedom restrictions back to its citizens in the form of rights and duties. Justice—more specifically, distributive justice—determines the proper manner of this distribution.

Distributive justice operates on a principle of proportional equality. Although it recognizes that people are morally equal, and thus entitled to freedom and security as matter of natural right, it also acknowledges that they do not always deserve the same amount of freedom all of the time. There are certain circumstances in which certain people deserve more or less freedom than others. In these situations, the law may be stricter or more lenient than normal. It must, in short, proportion its relative distributions

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[23] *See Body Piercing*, *in* WIKIPEDIA (visited July 28, 2006) <http://en.wikipedia.org/wiki/Body_piercing#Body_piercing_today.

[24] *See id.*

of freedom in accordance with an objectively unequal geometric ratio determined in advance.[25]

The trick is in knowing how to set this ratio. Many moral philosophers argue that distributive justice should permit inequalities created by choice and action and correct only those conditions which are beyond people's control. In other words, the state should use its distributive power to fix the ill-effects of luck and not to undo the unwanted consequences of agency.[26] Although this scheme seems consistent with the tenets of liberal justice theory, it also seems incomplete, at least as it applies to private actions. Nonconsensual threats to autonomy are beyond the victim's control. Thus, the threatened party needs and deserves the freedom necessary to protect and vindicate her rights. Those who, by choice and action, precipitate these nonconsensual encounters, however, should not be rewarded for their illicit initiative. Indeed, no one would excuse a tax or welfare cheat because she found a way to beat the system. When such parties use their autonomy to exceed social norms and infringe the rights of others, they deserve to be brought back down to the standard of equality, just as potential victims deserve to be lifted up. Distributive justice serves both purposes. It allocates extra benefits to the vulnerable and extra burdens to the powerful to keep the parties in balance.

So if control merely limits access to distributive justice, and luck merely activates it, we have yet to determine the criteria by which distributions, including unequal distributions, can be made. To have any weight, an unequal distribution must comport with practical reason. Yet, as Aristotle noted, there are many criteria which practical reason might approve.[27] Ultimately, the choice comes down to values. Those who value hard work will likely agree to make effort a basis for giving the industrious more freedom than others. Those who value wisdom might choose age or education level as the appropriate distributive criterion. In American society, which values liberty first and foremost, we use merit, risk and need to adjust distributions.[28]

Each of these criteria comports with liberal justice theory. Merit is the nonharmful and efficacious use of freedom toward some legitimate end. Risk is the external manifestation of one's positive freedom that threatens the security (negative freedom) of another. Need is the vulnerability of one's freedom or security to other agents or external forces. When conduct is meritorious, it is left unrestricted or even rewarded. However, when it creates abnormal risks or needs for others, practical reason permits "extraordinary" adjustments to the parties' freedoms, even though these distributions are arithmetically unequal, because inequality and injustice would result without them.[29]

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[25] *See* ARISTOTLE, *supra* note 14, at 153-54.

[26] *See* Mark Geistfeld, *Economic Analysis in a Unified Conception of Tort Law,* 23 (New York Univ. Law and Econ. Research Paper Series) (visited July 28, 2006) <http://ssrn.com/abstract=527742.

[27] *See* ARISTOTLE, *supra* note 14, at 151.

[28] *See* ALAN CALNAN, JUSTICE AND TORT LAW 88-95 (1997).

[29] It is important to separate the inequality of distributive justice from another type of inequality advocated by some torts scholars. They argue that the security interest of the victim deserves greater weight than the liberty interest of the actor. *See* Geistfeld, *supra* note 25, at 6; Gregory C. Keating, *A Social Contract Conception of the Law of Accidents, in* PHILOSOPHY AND THE LAW OF TORTS 22, 34-35 (Gerald Postema ed., 2001). They reason that the victim's vested interest in bodily integrity is necessarily superior to the actor's interest in acting. From this assumption they justify strict liability, which essentially transfers loss on the basis of act and injury. *See* Keating, supra, at 35.

At first, this view has some appeal. People generally value vested interests—like life or bodily integrity—more than lost opportunities—like the option of pursuing the benefits of future action. But what

In sum, reasonableness establishes a standard of justice which governs private encounters and the public law which regulates them. Although this standard is grounded in first principles, it permits adaptations as circumstances and equities require. For some actors, activities or relations, reasonableness creates mandates that are stricter than normal. In the next section, we shall identify the actions and other situations which warrant special treatment, and in the last section, examine the liberal justice concepts that justify this move toward strict liability.

B. General and Particular Injustice

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happens when liberty itself is used to protect a vested interest, as where a person acts in self-defense against an apparent assault or a driver suffering a heart attack negligently speeds to get to a hospital? One could say that the actor's liberty interest here is really just an aspect of security, so the entire question simply reduces to a relative comparison of security interests. However, one also could say that any voluntary affirmative action, no matter its objective, is still a fundamental exercise of the actor's liberty, and thus is qualitatively different from the endangered party's passive interest in being secure. If so, it seems undeniable that, under these exigent circumstances at least, the actor's liberty interests might override the security interests of her potential victims.

Indeed, one could make the case that even less "defensive" liberty interests might outweigh competing security interests. Liberty and security are not ends in themselves, but merely means to the end of happiness. Admittedly, the security interest in life is indispensable to that end, since happiness cannot be pursued without it. But the same is not true of interests in bodily integrity and mental tranquility. Pain, impairment and disability may inhibit the attainment of certain life plans, but they do not automatically foreclose those plans or prevent the formation of new ones. Liberty interests seem to share the same sliding scale characteristic. If, as Aristotle argued, liberty of action is indispensable to virtue, and virtue is indispensable to happiness, then neither virtue nor happiness is possible in a life of complete passivity. *See* ARISTOTLE, *supra* note 14, at 24, 38. Indeed, since virtue arises only from a habit of committing virtuous acts, even less complete restrictions on liberty may severely inhibit the pursuit of a Good and happy life. *See id.* at 42-44.

Indeed, the more central the act to the actor's conception of the Good, the more serious the act's deprivation will be. For folks who view freedom as the highest Good, liberty is simply more valuable than security. This idea is perhaps best expressed in Patrick Henry's proclamation: "Give me liberty or give me death!" It explains why this country was founded in revolution and why its citizens continuously have been willing to die in its defense. But it tells us much more than that. It reveals truths about the human condition that range from the sublime to perhaps the ridiculous. It explains not only why police, fire and emergency personnel risk their lives in pursuit of an altruistic or heroic ideal, but also why people seek the live-life-to-the-hilt fulfillment of sky-diving, mountain-climbing and drag-racing even in the face of serious injury or possible death.

I do not mean to suggest that security interests in bodily integrity are insignificant, or even that liberty always tops security in a hierarchy of value. Instead, my contention is that the relationship between liberty and security is too contextual to be prejudged. To assess that relationship, one must consider a number of other factors, like the specific sub-types of liberty and security at issue, the ends to which they are directed, their values in promoting those ends, and the extent of their potential impairment when they come into conflict. When this is done, it becomes clear that liberty or action rights routinely receive priority over security rights, including rights to bodily integrity. For example, pharmaceutical companies may market drugs, auto makers may market cars and cutlery manufacturers may market knives even though they know, or could foresee, that their products will injure or kill some of their customers. In each case, the actor's right to act is not determined solely by the security interests of the endangered. Rather, it is determined by balancing the parties' respective interests and assessing whether, under all of the circumstances, it is fairer for the actor to impair the interests of the recipient, or for the recipient to impair the interests of the actor. While the nature of each right is important, it certainly is not conclusive. Indeed, the variations in analysis are so broad and frequent, it is hard to see what advantage the "preferred security" rule offers to the decisionmaker.

By establishing standards of evaluation, reason and justice do not just guide human action; they also identify actions which deserve correction and punishment. Aristotle argued that no action can be praised or blamed unless it is knowing, voluntary and within the actor's power of control.[30] The coexistence of these characteristics ensures that the act is an expression of the actor's will, and not an event thrust upon her by other agents or forces. In addition to these "will" characteristics, actions, to be reasonable, have to strive toward a mean, and not exhibit excess and deficiency.[31] This "mean" characteristic applies to the actor's ends (choices), means (actions) and consequences (outcomes). Actions that are "willful" and "imbalanced" are unreasonable, and thus susceptible to moral condemnation.

Conduct does not have to be fully knowing to be "willful" in the liberal justice sense of that term. As Aristotle pointed out, acts done in ignorance are equally culpable.[32] Ignorance here can mean ignoring knowledge one already possesses, or ignoring knowledge possessed by others, if its acquisition is reasonably feasible. Either way, the conduct is willful in that the actor proceeds with the knowledge that his knowledge is incomplete or unused.

Aristotle further subdivided wrongful actions into categories of general and particular injustice.[33] General injustices deviate from virtues like courage, temperance and equanimity. Since these virtues were enforced by Greek law, Aristotle also called these wrongs unlawful.[34] Such general or unlawful injustices take two forms. Most unlawful actors display imbalance in the means by which they pursue their ends. People might drink to socialize, celebrate or enjoy, but the lawbreaker gives in to incontinence and becomes drunk. Certain acts, however, have no mean. They are wrongful no matter how "well" they are performed, because the ends to which they are directed are inimical to the freedom of others.[35] These intrinsically wicked acts include such things as adultery, theft and murder.[36] Because the actor's choice itself is bad, such conduct is strictly prohibited.

These intrinsically wrongful acts could be condemned on other grounds as well. First, they violate the natural law principle to do no harm to others. Since the harm principle is essential both to the rule of law and to the equality and dignity of those who live under it, any actor who flouts that principle must be dealt with in the strictest possible manner. Second, such intrinsically wrongful acts run afoul of the risk criterion of distributive justice. Since intrinsic wrongs are intentionally other-directed, they create a virtually certain risk of harm. In this way, they deviate farthest from the mean of relational equality. Thus, the state is justified under the risk criterion in placing its strictest burdens on such behavior, strongly deterring it in the first instance and decisively correcting and punishing it after the fact.

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[30] *See* ARISTOTLE, *supra* note 14, at 50, 72, 74.
[31] *Id.* at 54.
[32] *Id.* at 83.
[33] Aristotle referred to general injustice as "injustice as a whole"; "not a part of vice but the whole of vice." *Id.* at 147, 148.
[34] *Id.* at 148-49.
[35] *Id.* at 56.
[36] *Id.*

Particular injustices are different. According to Aristotle, an act is particularly unjust if it violates only the virtue of fairness.[37] Thus, even if an actor's conduct is not intrinsically bad, it still might be deemed wrongful if it is "willful", proceeds from a "grasping" motive and produces unfair consequences for others. Graspingness does not necessarily imply a malicious motive to hurt or dehumanize. Instead, it implies merely an intent to enrich oneself at the expense of another.[38] Here, the actor's responsibility is strict in the more modern sense. It does not stop after the act is selected and completed, but follows the actor until the act's effect upon the world is known. It then judges the actor not for her own moral failings, but for the undeserved moral deficit she inflicts upon those around her.

If we are to call this strict liability, however, we must be mindful of two important caveats. First, neither general nor particular injustices are considered "faultless" indiscretions or justifiable acts limited solely on grounds of public policy. Quite the contrary. Each is a wrong subject to moral censure. General injustices present the greatest danger to a liberal-democratic republic. Particular injustices are more insidious. However, both pose serious threats to the concept of freedom—the first by repudiating that concept directly, the second by compromising the equality of its distribution among citizens. Thus, each wrong poses its own special concern for liberal justice.

Second, these wrongs do not just invite moral condemnation; they also invite correction. Wrongs that injure others are wrongful in two senses. The act itself is wrongful because it emanates from the actor's exercise of excessive freedom. It violates the mean of reasonableness either by striving for an excessively other-directed end or consequence, or by pursuing an otherwise legitimate end in an excessively other-directed manner. In addition, the consequence of the act is wrongful because it interferes with the freedom of another, impairing her body, property, autonomy or opportunity. Where these two conditions co-exist, corrective justice empowers the injured party to correct the bilateral wrong—specifically, by taking away the actor's wrongful gain and restoring her own wrongful loss.[39] In this scheme, wrongdoing certainly helps to identify the actor as someone who deserves reproval. But that is not its sole function. It also serves as a necessary precondition to the injured party's right to correction.

C. No Voluntary Injustice

Not all harms create conditions of need which warrant awards of extra freedom to the injured. In certain cases, the law is justified in treating such victims more strictly than others. Indeed, in Aristotle's view, these injured parties are not victims at all. Instead, they are merely the voluntary subjects of injustice.

Aristotle states that "a person may be hurt, and may suffer what is unjust, voluntarily, but he cannot be the voluntary victim of injustice."[40] In so concluding, Aristotle distinguishes between the morality of the act and the morality of its effect upon the recipient. For Aristotle, a bad act is a bad act, at least insofar as the actor, God and the state are concerned. However, when a person voluntarily exposes herself to that bad

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[37] *Id.* at 147-48.
[38] *Id.*
[39] *Id.* at 154-55.
[40] *Id.* at 174-75.

act, or voluntarily accepts its consequences, neither the act nor its effects are wrongful *to her*, no matter how bad they may appear to others. As Aristotle explains, if a man voluntarily cuts his own throat, his act is illegal and unjust, but only "to the state, and not to himself."[41]

At first, this result might sound illogical. A person injured by an unjust act appears to have a claim for corrective justice. At the very least, the excessive risk of the act and the need for protection it imposes on the recipient seem to qualify the actor for special regulation and the recipient for extra freedom under a system of distributive justice. In reality, however, both assumptions are unfounded.

Corrective justice applies only where there is a wrongful gain and a wrongful loss. However, neither exists when the recipient voluntarily accepts the risky act of the actor. The recipient's voluntary choice has two important moral effects. First, it signifies that the recipient considers the transaction to be an overall gain and not a loss, even if it exposes her to a risk of harm. Second, the choice licenses the actor to proceed with that risk, thus legitimating whatever gain she might accrue from the transaction.

The recipient's choice has an even more profound impact on distributive justice: it completely removes the transaction from the reach of that system. First, choice-based losses do not create needs. A need is a vulnerability or freedom deficit. The exercise of an informed choice, however, is neither. In fact, it is a power which permits the chooser to promote her interests and pursue her ends. Second, even if voluntary choices created needs, these needs would not fit the criteria for distributive justice. As was noted earlier, distributive justice applies only to luck-based needs, not to needs which lie within a person's control. No risk could be more controlled than one voluntarily chosen by the recipient. Thus, if the chooser succumbs to those risks, she may not seek to redistribute her losses to the state, the risk-creator or anyone else, even if such losses otherwise would create a need worthy of a distributive dispensation. Here, the law is justified in treating the chooser strictly, forcing her to live with the consequences of her choice.

D. Strict Law and Equity

The apparent harshness of this approach does not make the law amoral or prove its insensitivity or arbitrariness. In fact, the strict application of a good law is an unwavering imperative of justice, and a central tenet of liberal justice theory. Good laws embody justice by giving each citizen exactly as much freedom as she deserves. Thus, anytime a lawbreaker or lawmaker deviates from the law she also deviates from justice, since the deviation inevitably causes some person to receive more or less than her fair share of freedom. To avoid injustice, then, the law must be strictly enforced against the lawbreaker and strictly applied by the lawmaker. This is the mandate of *rigor iuris* or strict law.[42]

Because laws have general application, they cannot do justice all of the time. Sometimes they are too broad, creating behavioral mandates that work unfairness in

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[41] *Id.* at 181.

[42] As I have shown elsewhere, the concept of *rigor iuris* or strict law, although of ancient origin, was later adopted by medieval jurists and used to create the early "tort" action of trespass *vi et armis*. *See* CALNAN, *supra* note 11, at 160-61, 198-99. Thus, it not only plays a critical role in liberal justice theory, but also holds a central place in the history of tort law.

specific situations. Other times, they are too narrow, failing to address situations that cry out for justice. In these scenarios, practical reason requires that the law be relaxed or expanded. This is the job of equity. Equity creates exceptions when the rules of strict law are unreasonable and unfair.[43]

The rule-exception pattern of strict law and equity can be either substantive or procedural. Substantively, strict law locates the most unjust acts and relations and subjects them to prohibitive rules. For example, one might turn the natural law harm precept into a general law forbidding acts intended to harm others. Although such a law will work well in most cases, there are a few scenarios, like those involving public necessity or self-defense, where it will not. Here, equity creates exceptions which release the actor from the law's strict mandate and permit her to intentionally harm. Yet such exceptions do not weaken the law or temper its moral credibility. Rather, they strengthen the law by filling in its moral gaps.

So long as the moral imperatives are sufficiently clear, strict law can have a number of substantive applications, especially in the civil justice system. Most obviously, it could apply to conduct forbidden by criminal statute. It also might apply to activities that create abnormally high risk, since such conduct clearly violates the risk criterion of distributive justice. It might even apply to certain "special relationships" in which one party's knowledge and control over risk places her counterpart in an especially vulnerable position. In each case, the law might burden the suspect actors with strict responsibilities, affording them variances only in exceptional circumstances where equity so requires.

These substantive mandates may be accompanied by equally strict procedural rules. Think of a civil lawsuit as a legally sanctioned assault against another. When the plaintiff initiates that assault with a claim of negligence, she generally bears the burden to prove it is justified. Why? Because no prejudgment can be made about such conduct. Negligence is not wrongful *per se*, but is wrongful only in the particular manner in which it is performed. Thus, it is not amenable to any *a priori* rule. Instead, it must be evaluated by practical reasoning, and only then, after all of the surrounding circumstances are considered.

That being said, there certainly are cases where the defendant's conduct is so bad the law may not need any proof of fault. As noted above, extremely bad acts are forbidden by strict law. When strict law's general rule is violated, our moral instincts allow us to presume fault from the mere commission of the suspect act. Here, the burden of proof shifts to the defendant to demonstrate either that the act does not fall within the general rule or that the surrounding circumstances create the need for an equitable exception.

Like substantive strict law, this strict procedural scheme finds support in distributive justice. Procedural rules are burdens on freedom in the sense that they stand as obstacles to the vindication of the parties' rights. Thus, they must be distributed justly in accordance with fair distributive criteria. In an ordinary negligence case, these criteria remain neutral. Since the defendant's conduct is not inherently wrongful or abnormally risky, she does not deserve any special burdens on her freedom, like the burden of disproving her fault. Likewise, since the plaintiff's harm is not presumptively wrongful, she displays no special need for assistance in the "assaultive" attempt to vindicate her

[43] *See* ARISTOTLE, *supra* note 14, at 178-81.

rights. Thus, it is fair to place on the plaintiff the initial burden of proving that she is justified in invading the defendant's interests.

These equities change in two scenarios. First, where the defendant's conduct is abnormally risky or presumptively wrongful, the state, through the risk criterion of distributive justice, is justified in placing on the defendant the burden of justifying or excusing the offending act. On the other hand, because the plaintiff's loss is presumptively wrongful, and the depletion of her freedom presumptively unfair, she deserves an extra allocation of freedom to restore her to the status quo. Thus, under the need criterion of distributive justice, the state is justified in alleviating her burden of proof by shifting all or part of it to the defendant.

In the second scenario, the defendant's conduct renders the plaintiff incapable of proving the defendant's fault, while the defendant exercises exclusive control over the means of proof. The case of *Ybarra v. Spangard*[44] is a good example. In *Ybarra*, the plaintiff entered a hospital to have his appendix removed. Following his surgery, he developed pain and eventually paralysis in his neck and shoulders. He sued the medical personnel who participated in the operation, but because he was unconscious during the procedure, could not identify the true culprits. The California Supreme Court relieved the plaintiff of the burden of proof, and shifted that burden to the defendants to "smoke out" the truth.[45]

The plaintiff here had been injured, and his freedom depleted, by the defendant's conduct. By placing the plaintiff under general anesthesia, and later refusing to speak out, the defendants precluded the plaintiff from acquiring the evidence necessary to prove that this taking was unjustified. Such conduct created a heightened and abnormal risk that the plaintiff would be forced to bear the unfair consequences of their interaction. Thus, under the risk criterion, the state was justified in distributing to the defendants a special burden of producing the evidence in their control. The plaintiff also needed and deserved special treatment. He could not vindicate his rights, and restore his freedom, because of the evidentiary disability imposed upon him by the defendants. Thus, unless he received a procedural advantage not enjoyed by other litigants, his right to corrective justice would be lost. The state can and did negate this disability by requiring the defendants to justify their behavior.

Such procedural adjustments, though unequal in application and onerous in effect, are not unfair. Indeed, to the extent that they perfect the law when its generality leaves it susceptible to injustice, they actually keep the law faithful to the dictates of reasonableness.

II. A PROPOSED THEORY OF LIBERAL-JUSTICE STRICT LIABILITY

So far, I have identified the values and principles or "raw material" of liberal justice theory. Grounded in moral and political concepts of reasonableness, liberal justice supports a number of "strict liability" notions. For example, people who consent to risk must do so at their peril. The same strict rule typically applies to actors who act without consent, including those who commit inherently wrongful acts, exploit highly imbalanced relationships or engage in abnormally risky activities. It even applies to actors who,

[44] 154 P.2d 687 (Cal. 1944).
[45] *Id.* at 690.

though not acting from vice, hold unfair evidentiary advantages over or impose unfair consequences on others.

Obviously, these strict liability concepts do not comport with the modern view. Some concepts—like those that apply to deliberately harmful acts and special relationships—are currently handled under the fault-based theories of intentional tort and negligence.[46] Others—like those dedicated to abnormally dangerous activities—are presently classified as "nonfault" strict liability, but actually have a firm fault basis.[47] Still others—like presumptions and shifted burdens of proof—exist indiscriminately in both liability regimes.[48] And a few—like the doctrines of consent and assumption of risk—are rarely even recognized as substantive liability concepts, let alone as aspects of strict liability.[49]

But what if we were to remove the conceptual constraints of the modern paradigm? Would a new, more coherent, theory of strict liability emerge? If so, what would this liberal justice version of strict liability look like and how would it compare to its predecessor?

My instinct is that this new paradigm would be both familiar and revolutionary. Because Anglo-American tort law derived from classical liberalism,[50] much of the subject matter of liberal-justice strict liability would remain the same. Thus, actors, activities and relationships now subject to more onerous liability rules would continue to face such treatment. However, because tort law's original liberalism has been corrupted by other influences,[51] the nature, structure and process of strict liability all would change. In the remainder of this article, I aim to show how.

Before getting started, however, I must offer a few words of caution. Since so much of liberal-justice strict liability is currently embedded in fault concepts, one cannot reformulate this area of tort law without demolishing and reconstructing much of the law's existing framework. The enormity of this task places two important limitations on this project. First, I cannot describe in detail all of the facets of a full liberal justice theory of tort law. I can only highlight its main characteristics. Second, I cannot reconsider all of

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[46] I discuss the relationship between strict liability and intentional torts in Alan Calnan, *Anomalies in Intentional Tort Law*, 1 TENN. J.L. & POL'Y 187, 238-56 (2005). A special relationship is a preexisting imbalanced relationship in which one party possesses knowledge of and control over risk and another relies on that party for protection. Relationships between business invitors and invitees, custodians and wards, schools and students, parents and children and employers and employees all have been found special. *See* DAN B. DOBBS, THE LAW OF TORTS 876 (2000). Under negligence law, the more powerful party in a special relationship owes the more vulnerable party "stricter" duties of care. *See id.* at 383-84 (discussing common carriers). I discuss the historical strict law basis of these duties in CALNAN, *supra* note 11, at 201-09.

[47] *See* DOBBS, *supra* note 46, at 952-53.

[48] *Compare* Summers v. Tice, 199 P.2d 1 (Cal. 1948)(in a negligence case, shifting to the defendants the burden of disproving causation) *with* Barker v. Lull Eng'g, Co, 573 P.2d 443 (Cal. 1978)(in a strict products liability case, shifting to the defendant the burden of disproving defectiveness).

[49] There are occasional exceptions. *See* David Horton, *Extreme Sports and Assumption of Risk: A Blueprint*, 38 U.S.F. L. REV. 599, 637 (2004); Kenneth W. Simons, *The Puzzling Doctrine of Contributory Negligence,* 16 CARDOZO L. REV. 1693, 1719 (1995).

[50] *See generally* CALNAN, *supra* note 11 (arguing this thesis).

[51] Realism and consequentialism have been the most notable influences. Realism released judges from the constraints of liberal morality and allowed them to seek other sources of inspiration. Consequentialism then directed them to look beyond the private justice of the parties and pursue social policy objectives like compensation, deterrence and loss spreading.

the tort doctrines that might be affected by such a theory. I can only address the ones most central to the theory's implementation.

I will start with basics and work toward particulars. Thus, in section A, I will identify the substantive foundations of this new paradigm. Then, in section B, I shall discuss the paradigm's structural features and will address the procedural mechanisms that make the paradigm complete.

A. Substantive Foundations

The current paradigm of tort law recognizes three substantive bases for assigning liability: intent, negligence and strict liability. Although both intentional torts and negligence are fault-based, the bases they use to assign fault are quite different. Intentional torts are faulty because those who commit them act with a subjective purpose or knowledge that their conduct will harm others. Negligent acts, by contrast, are faulty because they violate an objective standard of reasonable care. These differences aside, each fault-based tort is still different from strict liability, which assigns liability on the basis of public policy irrespective of fault.

Liberal justice theory has only one substantive foundation: reason. Reason is the medium for judging all human actions and relations. In a liberal democracy, reason judges transactions by the way they affect the freedom of the parties. Transactions that promote freedom are inherently good; those that inhibit freedom are presumptively bad.

Consensual transactions fall into the first category. Consent is an expression of will by one party to accept the will of another. It has three immanently reasonable, freedom-enhancing effects. Although these effects are well known, they are too often overlooked. Thus, it is worth a moment to review them.

First, consent enlarges the freedom of everyone it touches. It transforms the consenter's freedom from a dormant, passive state into a state of action, thus allowing her to obtain intermediate ends in pursuit of her ultimate end of happiness. It also empowers the consenter's transactional counterpart. Without consent, the counterpart's interaction with the consenter would be intrusive. Consent not only authorizes the counterpart's overture, it gives her the ability, along with the consenter, to aggrandize her freedom by pursuing an end of her own.

Second, consent allocates risk and fixes responsibilities between the parties in the clearest possible way. All exchanges involve some degree of risk—either of denied opportunities or of lost or damaged interests. In certain encounters, the parties may impliedly allocate such risks merely by entering into a common social relationship with a fixed set of norms and values. In others, the parties may themselves expressly consent to a particular risk allocation scheme. Either way, consent operates to establish between the parties a private network of rights and duties which memorializes their wishes and illuminates their interlocking freedoms.

Finally, consent legitimates transactions and relations, thus removing them from the realm of social concern. Under the liberal "harm" principle, the primary role of government is to protect its citizens from unwanted "harmful" intrusions upon their autonomy. Since consensual transactions promote rather than inhibit the parties' freedoms, such transactions generally are self-policing. They become susceptible to outside interference only when they threaten to injure nonparticipants.

Forced transactions stand on different ground. Lacking consent, they are automatically suspect. Since there is no organizing principle like consent to comprehensively and conclusively characterize their moral quality, they remain subject to the general standard of reasonableness.

As we have already seen, reasonableness imposes the same requirements on all actors, regardless of the specific nature of their acts. It commands them to avoid excess and deficiency and to seek the mean of virtue, including most especially the supreme virtue of justice. Since the requirements are universal, so are the consequences of their transgression. Any conduct that deviates from the standard of reasonableness necessarily is imbalanced and unjust. The perpetrator takes more freedom than she deserves and curtails the freedoms of others without asking for prior consent or making reparations after the fact. It follows that her actions, even if not deeply immoral, are faulty in at least the "thin" moral sense that they are unfair.

Nevertheless, faulty behavior is not all the same. It can differ in both kind and degree. Most conduct, even wrongful conduct, is average. The actor does not choose to engage in an inherently bad activity. She merely performs her chosen activity poorly. In doing so, the actor breaches a transactional duty to consider the rights and interests of others.[52] Even in such cases, however, the actor's poor performance generally does not create abnormal dangers. Rather, given the customary and reciprocal nature of most social activities, it merely imposes risks that, while excessive, are fairly familiar and commonplace. These negligent transgressions certainly are not morally wicked, but they also are not morally neutral. They are unfair, and thus wrongful, because they give the actor both a liberty of self-absorption and a power of domination not shared by her victim or anyone else.

Because there are so many ways of performing these ordinary deeds, they cannot be regulated by a comprehensive set of detailed rules. Instead, they must be examined for reasonableness on a case-by-case basis. The general standard of reasonable care facilitates this process. Fair and flexible, it customizes its requirements to suit the facts and equities at hand.

The same is not true of certain "extraordinary" activities, relations or actors. In liberal cultures, acts are extraordinary if they either proceed from an intention to harm or create an abnormal risk of harm. Ironically, this classification includes both intentional torts and strict liability activities—conduct which the current paradigm not only differentiates, but actually places at opposite ends of the fault-liability continuum.[53] It also includes relations, usually covered by negligence law, in which one party enjoys an abnormal power of control over her especially "needy" counterpart.[54] It even includes some actors who, because of their immaturity or mental incompetence, pose unusually

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[52] By "transactional" duty, I mean a duty which regulates the specific manner in which someone acts around, towards or with another. Transactional duties lie in the middle of the action-duty continuum, which begins with pretransactional duties and ends with posttransactional duties. Pretransactional duties regulate the choice of actions while posttransactional duties regulate responses to the consequences of actions.

[53] Intentional torts possess all the qualities of strict liability, including an abnormally dangerous act, a categorical and activity-based focus, an expansive set of duties, proof of only a triggering fact (intent) irrespective of the actor's fault, few and narrow defenses and a shifted burden of proof. *See* Calnan, *supra* note 46, at 242-56.

[54] *See supra* note 46.

great dangers to those around them.[55] As to these extraordinary actors, activities and relations, reasonableness has a much more definite and predictable position. Because they create dangers, hold advantages, aspire to ends or produce consequences that naturally exceed the relevant mean of acceptability, they are suspicious on principle. Thus, reasonableness has reason to restrict them with specific and strict rules of responsibility.

All of this leads to a few important conclusions about the possible substantive bases of a liberal justice paradigm of tort law. Although reason must serve as the paradigm's seminal concept, that concept actually generates and supports two narrower normative standards. One is the standard of consent; the other is the standard of reasonableness. Because consent promotes free will and individual autonomy, it is presumptively reasonable. This presumption creates a rule of strict liability for the consenter. Nonconsensual acts lack such a presumption. Thus, they must be independently evaluated under the standard of reasonableness. For ordinary permissible acts, reason makes no prejudgments. Because such acts could be performed in a variety of acceptable ways, they must be analyzed by practical reason in light of prevailing norms and circumstances. Other acts create extraordinary risks. Intrinsic and categorical by nature, these risks are virtually impossible to avoid and especially easy to predict. Thus, reasonableness creates specific rules to address them.

B. Structural and Procedural Features

Having established the paradigm's substantive bases, we must now consider its structure and procedure. Under the current paradigm, tort law's substance determines its structure. All torts are first classified as intentional, negligent or strict liability, and then are further categorized as either fault-based or fault-free. A liberal justice paradigm would be similar in one respect but different in many others. Like the current paradigm, the liberal justice model would fit form to substance. But, as I will show below, it would recognize only two theoretical categories: consent and reasonableness. Strict liability would not exist outside this dichotomy but within it, substantiating consent theory and constituting a major sub-category within the theory of reasonableness. In each case, strict liability would not be a faultless concept, but would be firmly grounded in the morality of liberal justice.

1. The Consent Theory

Since consent is liberalism's core concept, one would expect it to enjoy an important place in any liberal theory of torts. In this regard, my theory simply states the obvious. But what is less obvious, and what sets liberal justice theory apart, is the key role that it plays in defining the very structure of all tort law. Under this theory, consent is not just a tort negator but a paradigm delineator. It serves not simply as a defense to some other liability theory, but as the exclusive theory for analyzing all consensual transactions.

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[55] Children engaged in adult activities and adults with permanent mental disabilities are subject to an average adult standard of care and are held liable for noncompliance even though they are incapable of meeting that standard and thus are not at fault for their failure to do so. *See* DOBBS, supra note 46, at 284-85, 298-99. In this sense, their liability truly is strict.

Elevating consent to premier status may seem particularly surprising in a justice theory grounded in reasonableness. But a closer look reveals the inevitability of this move. Reasonableness, we have seen, is an objective measure of conduct whose exercise threatens the freedom of others. Consent, by contrast, is a subjective expression of free will which actualizes the wills of those who give and receive it. Because consent enlarges choice and promotes liberty, it is by nature reasonable. Thus, consent does not require objective moral monitoring; its objective morality is already ingrained. This means that, although consent derives from reason, it is free from the standard of reasonableness.

In fact, reasonableness has no basis for judging consent. Consent proceeds from an agent's subjective appraisal of means and ends. The consenter may desire to encounter risk for risk's sake. Or, she may seek to obtain benefits that exceed the attendant risks. Unless her consent exposes others to harm, there are no objective criteria for measuring the reasonableness of her choices. Only she can know if her ends comport with her values or if her chosen means will likely accomplish her ends. Since such evaluations are agent-relative, consent cannot be subordinate to reasonableness but must, at the very least, stand apart as an independent basis for assigning liability.[56]

Unfortunately, the current paradigm hides this fact. Whether cast as a privilege to an intentional tort or as the defense of assumption of risk in negligence and strict liability cases, consent is only a secondary factor which, even in theory, does not conclusively determine the ultimate issue of liability. In all theories, the central focus is on the reasonableness of the defendant's conduct, not on the parties' consent. Consent enters the discussion merely to shed light on that central issue. Even when it is raised, consent does not end but merely informs the discussion of reasonableness. Indeed, where the conduct consented to is extremely unreasonable, the issue of consent often is disregarded altogether on grounds of public policy.

Liberal justice tort theory departs from this approach in several material respects. First, it requires that the consent issue always be litigated first. Why? Because in determining the justice of a private encounter, consent always trumps reasonableness. Acts are unreasonable and thus personally wrongful only if they (1) are governed by a freedom-limiting duty owed to a specific person, and (2) violate the standard of care required by that duty. Consent affects the first prong of this analysis. If the duty-beneficiary consents to a known act, risk or consequence, she not only eliminates the risk-creator's duty to protect against that hazard, but also bestows upon the risk-creator a right of action or omission. Without a duty, there can be no tort, even if every other element of the claimant's cause of action is satisfied. Thus, from a purely pragmatic standpoint alone, it makes sense to try the consent issue before doing anything else.

But pragmatism is not the only justification for this approach. It is more firmly grounded in the morality and politics of liberal justice theory. The order of litigation signifies the values of the underlying system. The current reasonableness-first approach

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[56] The relationship between consent and reasonableness may vary in a public law context like the criminal justice system. Here, the inquiry is not simply whether the injured party got what she chose, as it is in the private law context of tort law, but also whether the injurer's conduct or the transaction as a whole is socially harmful. In this situation, reasonableness, as a measure of social welfare, may monitor and even override consent. *See* Vera Bergelson, *The Right to Be Hurt. Testing the Boundaries of Consent,* 65-69 (Rutgers Law School (Newark) Faulty Papers, 2006)(visited July 26, 2006) <http://law.bpress.com/rutgersnewarklwps/fp/art37 (arguing that consensual acts that violate the recipient's human dignity should nevertheless be criminalized because they jeopardize the entire community).

promotes values of altruism and paternalism. By putting the actor's conduct at center stage, and relegating consent to a subordinate role, the modern paradigm creates the impression that both the government and its citizens may be a responsible for protecting people against their own choices, even if those people sometimes are denied recovery for their losses. A consent-first approach reverses this impression. It suggests that people are responsible for their choices and that neither the government nor other citizens are obliged or authorized to judge them. This suggestion, in turn, helps to reinforce the liberal values of liberty and self-sufficiency.

Besides switching the trial order of reasonableness and consent, liberal justice theory seems to require more specific procedural changes. I envision the following procedure, though other schemes may be defensible as well.[57] If the plaintiff alleges that the defendant consented to protect her from the harm suffered, she must litigate that issue in a preliminary proceeding, even if she also alleges that the defendant's conduct was unreasonable. If the plaintiff proves the defendant's consent, the reasonableness issue becomes moot, and the case is ended. If the plaintiff fails to prove consent, the case then proceeds to trial on the issue of reasonableness. Here, the parties may introduce any evidence from the prior proceeding which also relates to the issue of reasonableness.

Regardless of plaintiff's allegations, the defendant also has the option of asserting that the plaintiff consented to accept the defendant's act, condition or consequence. If both parties raise the issue, each bears the burden of proving her claim. If, as is more likely, only the defendant raises the consent issue, she alone must substantiate her assertion in a preliminary proceeding. If she prevails on this issue, she wins the entire case. If she loses, the case proceeds to its second phase, where the plaintiff's claim of unreasonableness will be decided.

In addition to these procedural changes, liberal justice theory makes three important structural changes to the current paradigm. First, it applies consent to all cases, not just some. It does this by expanding the scope of consent to its logical extreme: specifically, to include not only the choice to accept a known act or consequence, as is true in intentional tort cases, but also the choice to accept a known future risk of harm, as is frequently the case in negligence. As so expanded, consent eliminates the doctrine of assumption of risk, replacing its "true choice" form and casting its "no duty" form into the realm of reasonableness.[58]

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[57] It has been suggested, in the case of consensual crimes, that the first step should be to identify the prohibitory norm underlying the offense. *See id.* at 57. If the act itself violates a prohibitory norm, then consent should operate only as an exculpatory defense. *See id.* However, if there is no *prima facie* moral prohibition against the act, then consent is inculpatory and its absence should be proven by the prosecution as an element of the offense. *See id.* While this scheme may work in the criminal context, it loses merit in the private justice system of tort law. Unlike a crime, which wrongs the public, a tort is a purely private wrong, personal to the victim. In this private realm, consent releases the actor from any prohibitory norm that otherwise might preclude her conduct. Once this prohibition is removed, the actor's conduct cannot be wrongful to the consenter, no matter how harmful or antisocial it may be. Here, consent preempts unreasonableness, not the other way around.

[58] "True choice" assumption of risk exists when the plaintiff subjectively knows and appreciates the risk of harm and voluntarily encounters it, thus effectively choosing to accept the consequences of her decision. *See* DOBBS, supra note 46, at 535. By contrast, "no duty" assumption of risk exists irrespective of the plaintiff's subjective consent when she elects to participate in an inherently dangerous occupation or activity and she is injured by one of those intrinsic risks. *See id.* at 537-38, 540-41, 547-50. Here, courts

In fact, the recategorization of "no duty" assumption or risk is illustrative of the second structural change wrought by liberal justice theory. It treats all instances of "objective" consent as matters of reasonableness. Under current law, consent can be either subjective or objective. Subjective consent is a voluntary choice made with actual knowledge and appreciation of the relevant risks.[59] Objective consent, by contrast, is an external manifestation of choice that may or may not reflect the agent's true will. It binds the agent not because she authorizes incursions upon her autonomy, but because her outward behavior limits the autonomy of others.[60]

To see this more clearly, consider the following hypothetical. Novice, an inveterate couch-potato, decides for the first time to engage in a game of football. By participating in the game, she conveys to the other players that she is willing to accept the normal risks posed by their conduct. They, in turn, rely on her representation in two ways: initially, by allowing her to join in, and thereafter, by forgoing precautions that would reduce the game's ordinary hazards. During the game, an opponent attempting to defend a pass knocks Novice to the ground and accidentally steps on her finger. In many jurisdictions, Novice would be barred from recovery under the doctrine of primary

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make an objective policy determination that no participant owes to the others a duty to protect them against these inherent dangers. *See id.*

[59] In subjective consent cases, the consenter's intention resides in his mind. Although the consenter may deny this intent, his adversary can discover his true mental state by asking questions both of the consenter and of other witnesses who know him well or to whom he may have confided. Here, the jury can weigh the credibility of the witnesses, examine the surrounding circumstances and employ their own common sense to resolve the intention issue. Given the relatively low burden of producing such evidence, and the absence of any reason to presume intent, it makes sense to force the party alleging consent to have to prove it.

Subjective consent raises two additional issues. One is whether the consenter possessed the capacity to consent; the other is whether her consent was freely and voluntarily given. Both are necessary for moral choice and action. To have capacity, the consenter must have actual knowledge or at least the ability to know and appreciate the consequences of her choices. To have volition, she must possess a power of choice free of compulsion by internal demons or external forces.

In most situations, these conditions are highly fact-specific. They depend on the characteristics of the consenter and the circumstances surrounding her expression of consent. Thus, they must be addressed by the alleging party on a case-by-case basis. In other situations, however, these subissues are amenable to more categorical analysis. This is true where the consenter belongs to a group that generally lacks the ability to consent. Here, membership in the suspect group might create a presumption that the consenter's consent was nugatory. For example, one might presume that children and the mentally disabled are incompetent because they possess inherent mental limitations. *See* Bergelson, *supra* note 56, at 24. One also might presume that medical patients and factory workers lack volition because they choose risk under circumstances of extreme hardship or necessity. *See* Tunkl v. Regents of the Univ. of Cal., 383 P.2d 441 (Cal. 1963)(patient); Cremeans v. Willmar Henderson Mfg. Co., 566 N.E.2d 1203 (Ohio 1991)(worker); Cudnik v. William Beaumont Hosp., 525 N.W.2d 891 (Mich.. Ct. App. 1994)(patient); McCalla v. Harnischfeger Corp., 521 A.2d 851 (N.J. Super. Ct. App. Div. 1987)(worker). Such presumptions may be rebuttable or irrebuttable, depending on the extent of the incapacity or compulsion at issue. The only requirement is that they reach the right result most of the time.

[60] Objective consent can be communicated by words, conduct or in writing. Of these forms of expression, signed agreements present the greatest need for bright-line treatment. Because a contract represents the most serious formal commitment a person can make—a commitment that not only is expected but intended to induce the reliance of others—reasonableness requires that we presume consent from the signature and force the signatory to come forward with evidence in rebuttal. It should be emphasized, however, that the signatory's strict liability does not depend on her actual consent, though such consent may be present, but rather proceeds from her unreasonable interference with the expectations and thus autonomy interests of those with whom she transacts.

implied assumption of risk, even though she did not actually know of or subjectively consent to the risk of such an injury.[61] Here, the reliance interest of the other players—that is, their freedom to include Novice and play the game with abandon without doing further investigation—is presumed to be greater than Novice's interest in being protected from such unexpected risk without doing any investigation of her own.

Even if one questions the truth or wisdom of this presumption, there is no denying that the interest-balancing on which it is based is clearly a characteristic of reasonableness. It turns not on Novice's mental state or the state of her will, but on an evaluation of the objective social duties that both she and the other players owed to each other. Did Novice act in a way that would lead a reasonable person to believe that she actually consented, thus creating in Novice a duty to care about their reactions? Did the other players reasonably rely on Novice's expression to their detriment? Did these players continue to owe Novice a duty of reasonable care to inquire about her experience or to play the game in an especially careful manner? No matter how the duty balance is struck, such issues cannot be resolved without consulting prevailing norms and examining surrounding circumstances; or in other words, without employing practical reason. Thus, they are better exposed under the rubric of reasonableness than hidden under the cover of consent.

With the theoretical dividing lines more clearly drawn, the final change gives those lines more structural stability. Under the current paradigm, one who knowingly and voluntarily consents to an act, condition, consequence or risk is not necessarily bound by her choice. Instead, her consent may be overridden on grounds of public policy. These public policy exceptions to consent take one of two forms.[62] Sometimes consent is ignored in order to punish antisocial acts like intentional torts and recklessness.[63] Other times it is overlooked to regulate transactions that involve great public interest.[64] Unfortunately, these exceptions not only weaken the line between consent and reasonableness, they permit reasonableness to cross over that line and absorb cases in the other category. As a result, they are conspicuously out of place in a liberal justice system of tort law.

In fact, such public policy-based consent busters strike at the very core of that system. Liberal justice theory holds that those who consent are not wronged. This is true no matter how antisocial the chosen act may be, or how great an interest the state may have in promoting, regulating or punishing it. Granted, the consenter's consent cannot legitimate the act. It remains a public and spiritual wrong that deserves punishment. But that punishment cannot be imposed by a private party who herself is undeserving. Instead, it must come from the state in the proper public proceeding. This does not mean that public interests may never place limits on the private corrective justice of tort law.

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[61] *See* Knight v. Jewett, 834 P.2d 696, 705-06, 711-12 (Cal. 1992)(applying primary implied assumption of risk to a football injury similar to the one described in the text).

[62] In the criminal law, a greater variety of public policy arguments have been used to override victim consent. These arguments have included (1) consensually harmed victims may not be able to provide military service to the state, (2) they may become public charges, (3) their consent invites breaches of the peace, (4) their chosen activities produce more social harm than benefit, (5) their choices may undermine respect for the rule of law, and (6) their choices are immoral. *See* Bergelson, *supra* note 56, at 33-42.

[63] *See* Wolf v. Ford, 644 A.2d 522, 525 (Md. 1994).

[64] *See id.* at 526. Although *Wolf* cited unequal bargaining power as a third public policy exception to consent, this circumstance actually tends to show that true consent never existed in the first place.

Since the state administers the tort system, it can subject that system to a complement of fair administrative constraints, like duty rules which block claims too multitudinous, too trivial or too difficult to try.[65] What it does mean is that such limits must be carefully selected, narrowly interpreted and correctly applied so as not to damage the system's liberal value structure.

To summarize, a liberal justice consent theory would have both direct and indirect effects on the current tort system. Besides elevating consent to a more prominent status, this theory overtly declares that consent is first in a hierarchy of liability determinants. These changes, in turn, promote other more subtle shifts, like openly endorsing the values of liberal justice, and increasing the number of cases in which consent is raised and litigated. This in no way implies that consent will be any easier to prove or that its procedural priority will preempt potentially meritorious claims. In fact, unless consent is true, liberal justice has no interest in the other objectives. Thus, the search for consent in such a system is bound to be even more rigorous than it is today.[66]

2. The Reasonableness Theory

If a transaction is not consensual, or if the resulting harm does not fall within the scope of the consent given, neither the transaction nor its consequences can be presumed reasonable. Instead, they must be judged against the standard of reasonableness. Reasonableness thus completes the binary structure of a liberal justice paradigm of tort law. However, the reasonableness theory is not without its own architectonics. Although always grounded in fault concepts, that theory actually consists of three distinctive subsclassifications: an Ordinary Liability Matrix bracketed by matrices of Limited and Strict Liability. Because of space and scope restrictions, I will not address the Limited Liability scheme here.[67] Instead, I will focus on the Ordinary Liability Matrix and its more rigorous counterpart, the matrix of liberal-justice Strict Liability.

a. The Ordinary Liability Matrix

Most acts that people commit are ordinary. By this I mean that they are commonly carried on by other people in the same community and do not present an exceptionally high degree of risk to others. Because they are not intended to harm, they are not inherently wrongful. Because they reflect community norms, they also are not conventionally wrongful. They become wrongful, if at all, only when they are ill-suited to the circumstances in which they are performed. Such cases of circumstantial injustice cannot be prejudged. Instead, they must be held up to the standard of reasonableness and evaluated on a case-by-case basis. This is the central feature of the Ordinary Liability Matrix of liberal-justice tort law.

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[65] *See* Calnan, *supra* note 10, at 1066-68.

[66] I envision something of a sliding scale: the greater the probability and magnitude of risk, and the greater the indicia of coercion, duress or incapacity, the higher the standard and quantum of proof of voluntariness should be. *See also* Bergelson, *supra* note 56, at 29 (advocating a similar sliding scale for criminal cases).

[67] I have suggested elsewhere that this matrix might provide protections to special actors like children, owners and occupiers of land and public and quasi-public agents and entities. *See* Calnan, *supra* note 46, at 259-60.

The Ordinary Liability Matrix, like torts in our modern paradigm, must contain a definite structure—of theory, defense and procedure—for carrying out the determination of reasonableness. The plaintiff's theory offers reason-conditions for permitting the plaintiff to invade and deplete the defendant's freedom.[68] The defendant's defense offers counter-reasons for either stopping the plaintiff's assault or diminishing the degree of her invasion. Procedure determines the action-conditions that both parties must satisfy to win; and these conditions, in turn, determine how free or disabled each party will be in her pursuit of the other.[69] Unlike the modern paradigm, however, this matrix is not identified or defined by the plaintiff's theory alone. Instead, it consists of the entire concatenation of these liability-determining ingredients.

The *theory* of Ordinary Liability initiates the process of practical reasoning by assembling and organizing the arguments which favor the plaintiff's assault. These arguments form two categories: those that establish the defendant's obligations to protect and pay the plaintiff and those that trigger the plaintiff's right to relief from the defendant. To be persuasive, arguments in the first category must show that the defendant breached a duty owed to the plaintiff; while arguments in the second must show that the defendant's breach caused the plaintiff harm. Assembled together, these arguments form an elemental structure identical to that which prevails in modern negligence. Because this structure is old and familiar, one might be tempted to take it for granted. But I think this would be a mistake. These elements are so fundamental to any liberal justice theory of torts that they provide the basic starting framework for all torts in that system. Thus, they deserve a fresh look.

When the defendant's conduct is ordinary, she has both a right to act and a responsibility to keep that action reasonably self-contained. The first objective of liberal justice theory is to find the mean between this right and duty. To strike the correct balance, one must consider the breadth and depth of the duty. Specifically, to whom is it owed and what does it require?

The first question is one of scope. It seeks to discover how far into the world the defendant's duty extends and how many people it requires the defendant to protect. In a liberal justice system, both answers depend on the concept of control. Moral virtue is the choice of actions in conformance with right reason and the power of will to carry them out. Those who have this power can control themselves and others; those who do not are vulnerable to control by others. Thus, control brings responsibility to avoid subjugation, which disturbs the moral equilibrium among autonomous agents.

There are three bases for exerting control over others, and thus for incurring a duty of care. All require some sort of affirmative action. First, the actor can enter into an imbalanced relationship in which she is the more powerful party.[70] Second, she may commit an act that creates unreasonable risk and imposes it on others without their consent.[71] Here, the actor' control is delimited by the scope of risks that she could foresee prior to acting. Because one can control only what one can foresee, foreseeability shapes

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[68] A reason-condition is a substantive argument, among perhaps several, that one party must present and prove to justify taking personal or legal action against another. *See* CALNAN, *supra* note 11, at 58.

[69] *Id.*

[70] This special relationship imposes upon the party with greater knowledge and control over risk a duty to exercise reasonable care toward her more vulnerable counterpart. *See* DOBBS, *supra* note 46, at 857, 875-76.

[71] *See id.* at 334.

responsibility.[72] Third and finally, the actor can act in a way that induces another's reliance or places her in a more vulnerable or at least less advantageous position than she was in before that action.[73] In this case the actor controls the other's fate by influencing the latter's behavior or by influencing the behavior of others who might assist her.

Once the scope of the defendant's duty is defined, the next task is to determine its content. In short, how much freedom is the defendant required to relinquish for the sake of others? The answer depends on how far from the mean of equality the defendant's conduct deviates. Ordinary actions require ordinary care. Since the defendant's conduct only poses a moderate threat to others, she need only take moderate precautions to protect them, thus only moderately impairing her own freedom of action. As the risk level and the defendant's knowledge about that risk increases, so does the defendant's duty of care.[74] Indeed, as I will discuss in the next section, there comes a point at which neither the act nor the duty are ordinary. At this point liability turns strict. Likewise, there are times when the defendant faces an imminent risk of losing one or more of her vital interests. Here, the exigent circumstances justify relaxing her standard of care.[75]

Either way, the adjusted duties are not unfair. In each case, they merely require the defendant to forgo as much of her own freedom as is necessary to avoid a greater loss of freedom to those around her. If she complies with this mandate, her conduct is reasonable even though it may result in someone's injury. If she does not comply, her breach is unreasonable and thus wrongful in two different senses. Besides exercising more freedom than she deserves, she fails to accord her victim the ordinary care and respect expected of members of a liberal democratic community.[76]

The breach of a limited duty of ordinary care establishes the defendant's vulnerability to an action of corrective justice. But neither duty nor breach single out the plaintiff as the party specially empowered to bring such an action. This right arises only upon proof of two facts: the plaintiff suffered harm, and the defendant caused it.

The harm element identifies the sufferer as a victim potentially entitled to liberal justice. In a system committed primarily to protecting equality and freedom, any lapse in that protection is a matter of state concern. In some cases, the threat to these values may be so great that one may presume harm from the mere commission of the threatening act. However, such is not the case with ordinary wrongs. On a broad "activity" level, conduct which presents ordinary risks is typically legal and customary. Thus, the mere decision to engage in that conduct does not automatically jeopardize the rights of others. Even on a narrower "performance" level, ordinary behavior that creates needless risks is neither so antisocial nor so abnormal that it may be deemed inherently harmful. Thus, an alleged victim cannot simply cite the misconduct as a basis for recovery. Instead, she must *prove* that she sustained some *actual* impairment of her freedom, like damage to her bodily integrity, mental tranquility, property, reputation or economic opportunity.[77] Only then will she have been harmed in the liberal-justice sense of that term.

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[72] *See id.*
[73] *See id.* at 861-64.
[74] *See* RESTATEMENT (SECOND) OF TORTS § 298 & cmt. b (1965).
[75] *See* Cordas v. Peerless Transp. Co., 27 N.Y.S.2d 198 (N.Y. Sup. Ct. 1941)(taxi driver was justified in leaping from his moving vehicle to avoid being shot by a criminal).
[76] *See* CALNAN, *supra* note 28, at 72-73.
[77] *See id.* at 31-36, 132-34.

Of course, proof of harm is not alone sufficient to sustain a right to redress. To be actionable, that harm must be caused by the defendant's wrongful act. As noted above, any wrongdoer who reaps an unjust gain from her misdeed qualifies for corrective action. However, she may not be corrected by just anyone. Only the party harmed by her act is entitled to disgorge her gain. Causality is the reason. Prior to a transaction, both the defendant's duty of care and the plaintiff's right to protection are abstract, isolated and undifferentiated. However, once the defendant begins to act, her duty attaches to and activates the rights of those within reach of her causal force.[78] These rights may take various forms. At first, any potential victim may have a right to regulate or preempt the threatening conduct. Since the equality and freedom of all are placed in jeopardy, each deserves a power of self-protection. If the defendant's causal force narrows to injure a single person, that victim now holds a right not shared by others in the threatened class: the right to compensation for her loss.[79] Since only the defendant owed a duty to protect the victim from this causal force, only she may repair it; and since only the plaintiff's interests were actually damaged by this force, only she has a right to reparation from its creator.[80]

Combining these requirements, we see that a plaintiff alleging Ordinary Liability must prove the familiar elements of duty, breach, causation and damage; and if she is successful, may recover at least some measure of compensation from the defendant. However, such proof does not necessarily end the determination of responsibility. It merely shifts to the defendant the burden of offering other reason-conditions for reducing or eliminating her liability.

Under the current paradigm, the defendant can package such reasons in the affirmative defenses of assumption of risk, contributory negligence and comparative fault. In the liberal justice paradigm, however, the choice of defenses is more limited. As we have already seen, consent-based arguments like assumption of risk do not simply shed light on the issue of reasonableness. They conclusively decide it. Thus, they cannot be litigated as an adjunct to a theory of Ordinary Liability. Instead, they must be addressed independently and preliminarily within the theory of Consent.

Allegations of plaintiff fault are different in two respects. First, like the defendant's ordinary conduct, the plaintiff's own ordinary but potentially self-destructive behavior cannot be prejudged, but must be measured against the standard of reasonableness. Second, to the extent the plaintiff's own conduct contributes to her harm, it affects the balance of corrective justice. Thus, it is critical in assessing the overall wrongfulness of the parties' transaction.

Indeed, plaintiff fault is a central feature of liberal justice theory. In a state committed to liberal justice, citizens generally do not owe to others a duty of altruism. The corollary to this principle is that citizens generally do not have a private right to receive assistance from their neighbors.[81] This is especially true when the need for assistance is self-imposed. As noted earlier, distributive justice—or perhaps more aptly, redistributive justice—applies only to helpless victims of circumstance, not to those who

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[78] *See id.* at 46-49.
[79] *See* Alan L. Calnan, *Distributive and Corrective Justice Issues in Contemporary Tobacco Litigation,* 27 SW. U.L. REV. 577, 594-99 (1998).
[80] *See* CALNAN, *supra* note 28, at 46-53, 153-54.
[81] *See* DOBBS, *supra* note 46, at 853.

control their own fate. Plaintiffs who cause or contribute to their own injuries run afoul of this rule. They sue in the hope of compelling others to provide financial assistance for their self-inflicted losses. This is not only impolitic, but also unjust. By acting unreasonably, negligent plaintiffs "gain" a freedom of carelessness not enjoyed by others. In the calculus of corrective justice, this gain must be set off against the plaintiff's loss. Only that part of the loss which remains becomes the defendant's responsibility. Everything else becomes a burden the plaintiff must bear alone.

b. The Strict Liability Matrix

These interpersonal equities change significantly when the defendant imposes abnormal or extraordinary risks on those around her. She deviates farther from the mean of equality than people who carelessly perform mere ordinary activities. At some level, her deviation can create a virtual power of domination over others, who incur a corresponding vulnerability. Thus, the extraordinary risk-creator is not governed by the Ordinary Liability Matrix. Though still held to the standard of reasonableness, she is subject to a separate matrix of liberal-justice Strict Liability.

The Strict Liability Matrix actually contains three subclassifications: special actors, special activities and special relationships. This matrix partially changes the coverage of modern strict liability theories. It also reorganizes these theories into more meaningful categories and identifies their common basis in reasonableness. It even places the strict liability label on a number of doctrines the current paradigm does not. Yet it does not completely redefine the concept of strict liability. Though it expands that definition somewhat, it mostly exposes strict liability's current hiding places and liberates it from its artificial theoretical shackles.

Each subclassification of liberal-justice strict liability is founded on the dual principles of inequality and unfairness. Special actors are those who either by their very nature or by an assumed status impose abnormal dangers on others. Adults with serious mental disabilities currently fall into this category. Although they possess the physical powers of average adults, they are incapable of understanding the consequences of their actions or, in some cases, of even knowing right from wrong. Thus, in a very real sense, they are both inherently *un*reasonable and abnormally dangerous people. If freed from the requirements of reasonableness, they would enjoy a political and moral status unequal and, in fact, superior to that of other "rational" citizens. They also would enjoy the unfair advantage of creating and imposing dangers that others could not reciprocate. This helps explain why courts almost uniformly have held the mentally incompetent strictly liable; in essence, subjecting them to a standard of reasonable care that they cannot comprehend and can never meet.[82]

Children engaged in adult activities receive similar treatment. Like the mentally incompetent, children possess mental limitations which prevent them from reasoning as ordinary adults. This incapacity, in turn, makes them unpredictable and somewhat dangerous, both to themselves and to others. Because of a child's small stature, limited strength and restricted realm of social interaction, however, the dangers of her "childish" activities are relatively less significant than those created by adults. In any event, these dangers, whatever their degree, are a normal and necessary incident of growing up to be a

[82] *See supra* note 54 and authorities cited therein.

responsible adult. Thus, children generally are only compared to other children of like age, intelligence, maturity and experience.[83]

However, a child that engages in an adult activity presents especially worrisome dangers not unlike those created by mental incompetents. Whether she operates a motorized vehicle or hunts with a loaded rifle, the venturous child threatens more people with far greater risks than her more reserved counterparts. This risk is only enhanced by the child's lack of physical strength, ignorance, immaturity and inexperience. Because such risks are abnormal and unnecessary to a child's development, most jurisdictions hold children strictly liable when their adult escapades cause physical injury to others. Here, strict liability is not openly proclaimed, but is deftly implemented through the unreachable reasonable adult standard of care.[84]

Employers earn their "special" status in a different way. Their abnormality is voluntary, not imposed. Nevertheless, their chosen status raises even greater social concerns than children or mental incompetents. An individual is an army of one. Because she can only be in one place at a time, she cannot invade the sovereignties of very many people. Employers, however, are or can be the commanders-in-chief of great and powerful armies of many. Their minions can travel almost anywhere all at once and can camp virtually anyplace for extended periods of time. Thus, they can cut a swath of destruction far broader and for far longer than any single soldier. As the army grows, the employer's capacity for mayhem, and thus her power over individuals and smaller groups, grows with it. To control this power and neutralize this threat, the state is justified in issuing the employer a strict admonition: you may marshal your forces and pursue your objectives, but be prepared to answer for the casualties you inflict along the way.[85]

Unlike special actors, special activities are dangerous not because of who performs them, but because of what is being done. Still, like the actors in the former category, the activities here are both inherently and abnormally dangerous. Included in this category are many of the same activities currently subject to strict liability: owning wild or vicious animals, blasting, storing or transporting flammable or toxic chemicals and so on.[86] The list may vary according to custom, tradition and community tastes for particular risks.

One "activity" currently and conspicuously left off this list is the commission of an intentional tort. This, I believe, is a flagrant omission. Intentional torts meet all of the material criteria for liberal-justice strict liability. In fact, they present the best case scenario for this theory. Intentional torts are politically and morally dangerous no matter how they are performed. Their dangers are not just abnormal, but often criminal and presumptively unreasonable. They elevate and empower their perpetrators and debase or at least subordinate their victims. Indeed, their potential for spreading inequality, risk and unfairness is virtually unparalleled in all of tort Thus, they require more than mere categorization as strict liability activities. They require their own special subcategory within the broader strict liability matrix.[87]

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[83] *See* DOBBS, *supra* note 46, at 293.

[84] *See id.* at 298.

[85] The doctrine of respondeat superior seems to have developed pursuant to this "power and control" theory of liability. *See* CALNAN, *supra* note 11, at 261-74.

[86] *See* VICTOR E. SCHWARTZ, ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS 689-91, 708 (11th ed. 2005)(and authorities cited therein).

[87] I develop this intentional-tort-as-strict-liability argument more fully in Calnan, *supra* note 46, at 238-56.

Statutes and other positive law enactments represent another overlooked form of activity-based strict liability.[88] Of course, not all statutes create tort duties. They earn this status only if they express a clear legislative intent, promote a strong public policy, establish clear behavioral requirements, resonate with existing tort duties and do not impose disproportionate liabilities.[89] Those that satisfy these criteria, however, are especially well-suited to impose strict liability.

Like intentional torts, conduct covered by such enactments is categorically forbidden (and unlike intentional torts, sometimes required) by a rigid rule of responsibility. This rule carries the prejudgment of the community that such conduct is unreasonable. Thus, any act that violates the rule is presumptively wrongful even in the absence of other evidence. Of course, equity sometimes may find a legitimate reason to excuse the breach. But such excuses certainly need not be either generous in number or expansive in scope.[90] The more dangerous the activity or the more imbalanced the relationship being regulated, the more reason may limit them. Indeed, the imperatives behind the enactment may be so great as to exclude all defenses. Although a scheme of defenseless statutory breach is supported by liberal justice, it certainly is not unique to that concept. Indeed, it presently is applied to many safety statutes that protect especially vulnerable parties—like children and workers—from endangerment and exploitation.[91]

All of the special activities described so far create imbalances that are both unilateral and episodic—meaning, they arise only when the actor chooses to perform them around others. However, sometimes such imbalances can arise out of preexisting "special" relationships. Here, the relationship itself gives one party a power of domination and makes the other vulnerable to exploitation. The "dominant" partner possesses knowledge and control over the risks of their association, and the "subordinate" partner does not. Thus, the latter relies on the former for information and/or protection.

Tort law's current paradigm recognizes many such special relationships, but treats them inconsistently. Most special relationships are governed by the theory of negligence. However, the dominant parties in these relationships often carry duties greater than ordinary care.[92] Indeed, some dominant partners—like common carriers and innkeepers—bear even higher duties of extraordinary or utmost care.[93] Other relationships—like that between product sellers and consumers—have transcended the barriers of negligence are now commonly addressed by strict liability.[94]

The key theoretical difference between these approaches is that, in negligence a dominant party may escape liability by complying with the applicable standard of care, whereas in strict liability she cannot. Nevertheless, this distinction often breaks down in practice. In products liability actions, product sellers frequently are free to argue that their products are not unreasonably unsafe, thus allowing them to prove indirectly that they are

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[88] *See* DOBBS, *supra* note 46, at 331-32.
[89] *See* Perry v. S.N. and S.N., 973 S.W.2d 301, 309 (Tex. 1998)
[90] *See* DOBBS, *supra* note 46, at 329-32.
[91] *See* SCHWARTZ ET AL., *supra* note 86, at 229.
[92] *See* Calnan, *supra* note 46, at 202-04 n.37.
[93] *See* Nelson v. Flathead Valley Transit, 824 P.2d 263 (Mont. 1992(common carrier held to utmost care); Cook v. Columbia Sussex Corp., 807 S.W.2d 567 (Tenn. Ct. App. 1991)(innkeeper held to highest standard of care).
[94] *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965).

not unreasonable for placing such goods on the market.[95] Plaintiffs, on the other hand, generally cannot prevail without presenting extensive and expensive expert evidence showing exactly how the product could have been made better.[96] Even the standard of defectiveness requires no more than that required by the standard of reasonable care: to avoid marketing products with excessive risks.[97]

Ironically, the standards imposed by negligence are or can be considerably stricter. Innkeepers can be held responsible for third-party criminal acts against their customers;[98] product sellers usually cannot.[99] Common carriers owe to their customers a duty of civility and courtesy;[100] product sellers do not.[101]

Despite their general similarities, the three subclassifications of liberal-justice strict liability—special actors, activities and relationships—do not necessarily warrant identical treatment. Reasonableness distinguishes these subcategories on various grounds, and fixes their liability rules accordingly. For example, intentional torts arise either from a bad end—to harm others—or from bad choices—to harm others as a means to some other end. Thus, they are subject to a pretransactional duty to refrain from such conduct. Violation of this duty is wrongful in three different respects. It is generally unjust because it disrespects the dignity, equality and liberty of the victim. It is particularly unjust because it reaps for the actor an unfair gain of liberty and imposes upon the victim an undeserved loss. And it is distributively unjust because it creates and dispenses risks of harm far in excess of those normally permitted in a liberal democracy. To establish the unreasonableness of the defendant's conduct, the plaintiff need not present evidence concerning the standard of care or its breach; she need only prove four simple facts: (1) the defendant committed an act (2) intended to cause a forbidden consequence (3) and her act caused (3) that forbidden consequence. Although the defendant may seek an equitable exception from liability, the available exceptions are few in number and narrow in scope.[102]

Other abnormally dangerous activities are handled differently. Owning a vicious pet is like committing an intentional tort in one respect. Both are presumptively irresponsible and thus subject to a pretransactional duty of care. However, unlike intentional torts, domestic animals are not inherently dangerous. Even when they are vicious, people generally do not keep them for the purpose of harming their neighbors. They own them for self-directed reasons like companionship or security. Thus, the ownership of vicious pets is not directly in violation of the natural law harm principle. Such conduct is wrongful only if the animal's dangerousness exceeds community norms, and even then, only if its owner knows or should know of the animal's abnormally dangerous characteristic.[103] Where these facts pertain, the owner not only transcends the risk mean of distributive justice, but also unfairly gains the advantage of threatening

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[95] *See* DOBBS, *supra* note 46, at 985-87.
[96] *See* DAVID G. OWEN, PRODUCTS LIABILITY LAW 352-58 (2005).
[97] *See id.* at 494-99.
[98] *See* DOBBS, *supra* note 46, at 876-77.
[99] *See* OWEN, *supra* note 96, at 775, 786-88.
[100] *See* DOBBS, *supra* note 46, at 824-25.
[101] In fact, product sellers often are not even held liable for emotional distress without some accompanying physical harm. *See* DAVID G. OWEN ET AL., PRODUCTS LIABILITY AND SAFETY 676 n.2 (4th ed. 2004).
[102] *See* Calnan, *supra* note 46, at 199.
[103] *See* DOBBS, *supra* note 46, at 945-47.

those around him in a way that they themselves have forsaken. Granted, the owner may deny his "scienter" or contest the animal's viciousness, but equity otherwise affords him few defenses.

Extraordinary activities like blasting deserve still different treatment. Like the other activities, blasting creates abnormal risks. Thus, it is governed by a pretransactional duty of responsibility. However, unlike the previous activities, blasting's dangers, though abnormal, are often socially acceptable or even desirable. As a result, blasting is not wrongful *per se*. It may be circumstantially wrongful if it is conducted in a place where its hazards are particularly acute. Here, fault would lie in the choice of action and location, not in the manner of the activity's performance.[104] Even if blasting is well-performed in an appropriate location, however, it still may produce unfair consequences for those injured by its commission. The blaster's grasping motive and his gain at the expense of his neighbors create a posttransactional duty of rectification. If the blaster breaches that duty by refusing to correct the imbalance, his response to the consequence is particularly unjust, no matter how valuable the activity is or how reasonably he may have conducted it.[105] Thus, it is reasonable to hold him strictly liable nonetheless.

In each of these scenarios, the concept of strict liability is basically the same. The defendant bears special or extraordinary responsibilities to control the heightened and abnormal risks created by her conduct and to pay for the losses caused to others when she fails to do so. Yet, as we have seen, there are many ways in which these responsibilities can be created and implemented. Sometimes strict liability is substantive. If the theory of Ordinary Liability establishes tort law's substantive norm, then any deviation from that norm makes the law stricter for one party or the other. If the changes help the plaintiff and/or hinder the defendant, then the movement is towards liberal-justice strict liability.

Consider the range of substantive options available for this purpose. Duties can be expanded to require protection of a greater number of people against a greater number of risks. The transferred intent doctrine goes perhaps to the greatest extreme in this regard, effectively stretching the intentional tortfeasor's duty as far as the reach of his causality.[106] The standard for evaluating the defendant's behavior can be elevated to require extraordinary or utmost care or the care of an expert in the field.[107] Or, the standard could reflect norms within the plaintiff's community rather than customs within the defendant's. The consumer expectation standard of products liability and the reasonable patient standard of informed consent both institute this sort of perspectival shift.[108] Factual causation requirements can be altered, relaxed or replaced with concepts

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[104] *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 20 cmt. b (Proposed Final Draft No. 1, 2005)("If all the risks entailed by an activity even when reasonable care is exercised outbalance all the advantages that the defendant and all others derive from the activity, it may be unreasonable and hence negligent for the defendant to carry on the activity at all, or at least to carry it on at the particular location.").

[105] *See* CALNAN, *supra* note 28, at 209-11.

[106] Under the doctrine of transferred intent, the intent to commit an intentional tort against one person may be transferred to complete a tort against another, even though the tortfeasor did not actually intend to harm the victim or even know that she was present. *See* DOBBS, *supra* note 46, at 75-76.

[107] *See* Calnan, *supra* note 46, at 202-04 & n.37 (collecting authorities)

[108] The consumer expectation standard finds a product defective if it contains dangers that exceed the expectations of the average, ordinary consumer. *See* OWEN, *supra* note 96, at 487-92. The reasonable patient standard establishes a physician's negligence if, in describing the risks, benefits and alternatives to a

like lost chance, substantial factor, alternative liability and market share liability.[109] The notion of proximate causation can be broadened to include intervening forces, like reckless misconduct or acts of God, that otherwise would break the chain between act and injury.[110] The definition of recoverable damages can be changed to include things like dignitary injury, pure emotional distress, hedonic injury, pure economic loss, increased risk or loss of a chance.[111] Even defenses can be reduced in number, made more difficult to sustain or eliminated altogether, as is true in certain negligence per se actions.[112]

There are a number of procedural options as well. As noted earlier, the plaintiff's evidentiary burden on any issue can be diminished. Thus, instead of requiring the plaintiff to actually prove breach or causation, a court might permit the plaintiff to rely solely on circumstantial evidence doctrines like *res ipsa loquitur* or the malfunction theory of products liability.[113] Alternatively, a court might control the weight of such evidence, taking away the jury's discretion and replacing it with a rebuttable or conclusive presumption.[114] Even more dramatically, the court could shift to the defendant the plaintiff's burden of proving one or more of the elements of her cause of action.[115] To compound matters further, it also could raise the defendant's burden of persuasion on these issues or on its own affirmative defenses, switching from a preponderance of the evidence standard to a standard of clear and convincing evidence.[116]

Any system of liberal-justice strict liability will of necessity contain some combination of these substantive and procedural mechanisms. What that combination will be in a particular jurisdiction is largely a question of convention or preference. However, some constraints appear endemic and inescapable. I will close by highlighting just a few of the more salient and important ones.

Before doing so, I want to emphasize that the mechanisms described above do not change the basic elemental structure of a tort. As previously discussed, each element is indispensable to the morality of a tort claim. Duty defines the scope of the defendant's

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treatment or procedure, she fails to provide material information that a reasonable patient would want to know. *See* DOBBS, *supra* note 46, at 655-56.

[109] The lost chance doctrine permits a patient with a less-than-fifty-percent chance of surviving an illness to recover for her physician's malpractice if that malpractice causes her to lose a significant chance of survival. *See id.* at 434-38. The substantial factor test finds causally responsible all actors who substantially contribute to an injury, even if the injury would have resulted from the conduct of one actor alone. *See id.* at 415-16. Alternative liability imposes joint liability upon actors who act independently but negligently towards a victim, but only one actor actually causes the victim's injury and the victim cannot establish the true injurer. *See id.* at 426-29. Where many manufacturers produce essentially the same defective product, but an injured consumer cannot identify the manufacturer that actually caused her injury, market share liability permits the consumer to sue manufacturers whose combined sales constitute a substantial share of the market for that product and then shifts to them the burden of disproving their causation. *See id.* at 430-32.

[110] *See* RESTATEMENT (SECOND) OF TORTS § 522 (1977)(broadening proximate causation for abnormally dangerous activities).

[111] *See* DOBBS, *supra* note 46, at 434-41, 821-23, 1115-16.

[112] *See id.* at 331-32.

[113] *See id.* at 370-71 (*res ipsa*); OWEN, *supra* note 96, at 45-52 (product malfunction doctrine).

[114] This is most common in negligence *per se* actions. *See id.* at 315-16.

[115] This occurs in *re ipsa* and alternative liability cases. See *id.* at 377, 426-27.

[116] Courts already impose the higher burden of persuasion on plaintiffs in certain defamation, fraud and punitive damage claims. *See id.* at 1169 (discussing defamation cases brought by public officials or figures); *id.* at 1345 (discussing fraud); OWEN, *supra* note 96, at 1203-04 (discussing punitive damages).

distributive responsibilities. Breach of duty establishes the defendant's wrongful gain, and makes her vulnerable to corrective justice. Harm establishes the plaintiff's loss and Causation links that loss to the defendant's wrongdoing, rendering that loss wrongful and triggering the plaintiff's right to corrective justice. Because affirmative defenses further clarify the parties' rights and responsibilities, the existence or nonexistence of such defenses must be disclosed to the parties in advance.

Liberal-justice strict liability may be implemented by making either categorical or episodic changes within this structure. One obvious place for categorical change is the element of duty. Strict liability itself is categorical by nature. It applies or should apply to all actors who are inherently unreasonable, all activities that are inherently and abnormally dangerous and all relationships that are inherently imbalanced. Because each subject exceeds the mean of equality, all are in need of special regulation. Because their inequalities are intrinsic and clearly antithetical to the values of liberal justice, all can be regulated by a specific and enhanced set of heightened duties. Thus, in addition to carrying ordinary transactional duties, these strict liability subjects also always bear pretransactional and/or posttransactional duties of care. Moreover, because these actors, activities and relationships pose abnormally high risks even under normal circumstances, they always should be subject to heightened standards of care.

Ordinarily, no categorical changes should be made to the plaintiff's burden of proof. As noted earlier, the requirement that the plaintiff prove the elements of her tort is supported by both distributive and corrective justice. Because a tort suit is an assault upon the freedoms of another, generally the party threatening this invasion, the plaintiff, is burdened under the distributive risk criterion with the obligation of establishing legitimate reasons for her aggression. Also, unless the plaintiff proves that the defendant's wrongdoing caused her harm, it is not clear either that she has a right to corrective justice or that she may exercise that right against the defendant.

Where the defendant is accused of an intentional tort, however, the equities are quite different. Once the plaintiff proves that the defendant acted with an invasive intent, the act may be presumed unreasonable. At this point, the plaintiff is not the aggressor but a presumed victim with a right of corrective justice. Because she has a special need to protect her interests, distributive justice affords her extra freedom by lowering her evidentiary burden. It does this by shifting to the defendant the burden of demonstrating the reasonableness of her intentional act. Such a shift is warranted not simply by the facts of a given case, but by the categorical wrongfulness of the alleged tort.

Other changes appear better suited to episodic application. In certain situations, the defendant does more than injure the plaintiff; she makes it difficult for the plaintiff to correct her loss. This might occur in at least a couple of ways. The defendant might deliberately or inadvertently destroy evidence which explains how or why the accident happened. Or, as in the *Ybarra* operating room whodunit discussed earlier, she might withhold certain incriminating evidence. In other situations, the defendant may simply have superior access to the information necessary to resolve the issues of responsibility and causality. Thus, courts might be justified in lowering the causation standard, creating presumptions of fault or causality or shifting to the defendant the burden of proving these or other issues. Here, the defendant either places at risk the plaintiff's ability to vindicate her rights or enjoys an unfair advantage in that struggle. Either way, justice requires the

defendant to relinquish her unequal status by assuming evidentiary burdens not normally carried by litigants in other cases.

III. CONCLUSION

Obviously, the liberal-justice paradigm of tort law that I have presented above is far from complete. There is still plenty of work left to do. Although I have demonstrated the plausibility of a liberal justice metatheory of torts, I have not attempted to justify its adoption. I also have not sought to prove that it is better than other theories, either moral or instrumental. While I have sketched out the broad contours of this new paradigm, I have not yet delved deeply into specifics, leaving unresolved questions concerning theories, elements, defenses, standards of analysis and burdens of proof. Indeed, I have skipped over the Limited Liability Matrix altogether. Finally, I have not addressed the tough cases such a paradigm is sure to create. Take medical malpractice. Doctors enjoy relational advantages over their patients, and hold the power to expose them to serious and abnormal risks, but they also provide an essential public service. Should they be subject to strict liability, protected by limited liability or entirely reclassified? These and other difficult questions still loom large.

Yet, despite its inchoate status, this liberal justice paradigm can still be instructive. Indeed, it offers tort law a host of lessons that are both cautionary and encouraging. On the negative side, it suggests that the modern theory of strict liability is seriously misconceived. It is not just a substantive concept, but rather a mixture of substance and procedure; and its substance need not be no-fault, but rather can be grounded in the "fault" concepts of consent and reasonableness. The liberal justice paradigm also shows that many tort theories or doctrines are misplaced. Besides treating consent as a defense and subordinating it to other theories, the current paradigm often excludes from strict liability some theories, like intentional torts, or some concepts, like negligence's mental incapacity and special relationship doctrines, that clearly should be included within it. On a broader level, the liberal justice paradigm exposes tort law's inconsistency with certain core American values. But perhaps most disturbingly, it tells us that if the modern theory of strict liability is vulnerable to attack, then the entire theoretical structure which supports it also is in jeopardy of collapse.

On the positive side, the liberal justice paradigm reinforces the validity of much of the law's underlying doctrines and concepts, including the elemental structure of negligence and intentional torts, the use of procedure as a hedge against injustice and the very notion of strict liability. As to the latter concept, the liberal justice paradigm may contradict strict liability's definition and rationale, but for the most part, does not question that concept's application. It supports imposing strict liability in most of the same situations, regardless of whether the theory for doing so is labeled strict liability, negligence, intentional tort or something else. Better yet, the liberal justice paradigm reveals that the fix for tort law's current problems may not be as dramatic as first appears. Granted, the law will have to undergo some theoretical relabeling and endure some conceptual restructuring. But in the end, this seems a small price to pay for the clarity, consistency and credibility it is likely to deliver in return.