

Rules and Relationships: The Varieties of Wrongdoing in Tort Law

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What accounts for different standards of liability in tort law? Why do courts judge battery according to intent, medical malpractice according to negligence, and product liability according to defect? In all three of these cases, liability requires that (a) the plaintiff suffered harm (b) caused (c) proximately (d) by the wrongdoing of the defendant.¹ Each case, however, involves a distinct conception of wrongdoing: intent to harm, failure to exercise reasonable care, and manufacture of a defective product. Furthermore, each case governs a distinct type of relationship: assailant-victim, doctor-patient, and manufacturer-consumer. Thus, it appears that

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¹ These four elements represent a single framework by which to compare the requirements of recovery for intentional battery, negligence, and strict liability.

Intentional battery requires proof that (a) plaintiff suffered a harmful or offensive contact, (b) an action of defendant caused the contact, (c) the contact was to the person of plaintiff, and (d) defendant acted with an intent to cause harmful or offensive contact or apprehension thereof.

Negligence requires proof that (a) plaintiff suffered physical injury, property damage, or financial loss, (b) defendant's negligence caused plaintiff's harm, (c) defendant's negligence was a proximate cause of plaintiff's harm, and (d) defendant owed a duty to plaintiff to exercise reasonable care and breached that duty.

Strict liability requires proof that (a) plaintiff suffered physical injury, property damage, or financial loss, (b) defendant's activity or product caused plaintiff's harm, (c) plaintiff's harm resulted from the particular risk that made the defendant's activity abnormally dangerous or the specific defect that rendered the product unreasonably dangerous for normal use, and (d) the defendant engaged in an abnormally dangerous activity or marketed a defective product.

While formally these four required elements are identical, substantively they differ. This article focuses exclusively on variations in the meaning of the fourth element, wrongdoing by the defendant.

the meaning of wrongdoing in tort liability standards varies according to the relationship between the parties.

Examining liability standards in the context of the relationships to which they apply reveals that they rely upon unarticulated intuitions. Incidents of wrongdoing that cause harm evoke moral intuitions about how to judge and respond to them. These intuitions arise out of a sense of the relationship between the wrongdoer and the person harmed. When parties litigate over such incidents, their allegations and defenses express these intuitions. In adjudicating tort claims, judges weigh these competing intuitions in the context of the relationship between the parties, and their opinions articulate favored intuitions in doctrinal form.

Highlighting the association between tort rules and the relationships that they govern can help us identify and articulate the underlying intuitions that they enforce. I shall call this the relational approach to tort law. This approach reveals that widespread consensus with regard to some tort doctrines, such as intentional battery, is due to general agreement concerning the intuitions that support them. By contrast, persistent debate over other tort doctrines, such as strict liability for product design defects, reflects a clash of divergent intuitions. Thus, one purpose of the relational approach is to identify the normative assumptions underlying liability standards in order to understand tort law as a response to harmful wrongdoing based on moral intuitions. A second purpose is to explain doctrinal dispute in the law of torts as a contest between reasonable intuitions. The relational view does not attempt to correct parties' and judges' views from an authoritative critical position but rather to reveal their plausibility to those who oppose them and expose their shortcomings to those who hold them.²

Historical accounts of tort law have long maintained the claim that liability standards vary according to the relationship between the parties.³ The relational approach offers a conceptual analysis of this historical link between rules and relationships that constitutes an enduring insight from legal history.

The relational approach offers an alternative to economic analysis of tort law. Economic analysis views liability standards as cost-allocation mechanisms and focuses attention on the behavioral incentives that they

² See Timothy Lytton, *Responsibility for Human Suffering: Awareness, Participation and the Frontiers of Tort Law*, 78 CORNELL L. REV. 470, 470-71 (1993) (arguing that controversy over issues of proximate cause in tort law reflects a difference of moral intuitions about responsibility for the suffering of others).

³ See, e.g., Wex Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 LA. L. REV. 1, 28-42 (1970); George Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 484-95 (1985).

create. This perspective has greatly enhanced our understanding of tort law and significantly influenced the practice of it. Economic analysis, however, either ignores the language of wrongdoing in pleadings and decisions or attempts to interpret it exclusively in terms of inefficiency. By contrast, the relational approach sees this language as an expression of genuine moral concern about injustice. The relational approach views liability standards as responses to harmful wrongdoing based on moral intuitions by examining the stated reasoning of parties and judges in whose pleadings and decisions these responses originate.⁴

The relational approach also differs from corrective justice accounts of tort law. Corrective justice accounts seek to provide a single foundational theory that justifies all liability standards. These efforts have given rise to a highly technical philosophical discourse entirely unfamiliar and inaccessible to practitioners and all but a few academics. While not denying the possibility of a single foundational theory, the relational approach recognizes that those engaged in the practice of tort law neither have one nor are very concerned about finding one. According to the relational approach, liability standards are founded on unstated moral intuitions that vary according to the type of relationship to which they apply.⁵ This approach explains persistent disagreement over the fairness of disparate liability standards as a clash between competing intuitions rather than a misunderstanding about the true principle of justice.

Clarifying and defending the claims of the relational approach to tort law involves several steps. Part I establishes an association between distinct conceptions of wrongdoing in different liability standards and particular types of relationships. Part II demonstrates how viewing tort rules in light of the relationships to which they apply illuminates the role of intuitions in the way parties and judges reason about liability. Part III addresses objections to the relational approach, and Part IV offers several reflections on the relationship between legal rules and moral intuitions.

I. DIFFERENT CONCEPTIONS OF WRONGDOING IN TORT LAW

Judges determine tort liability on the basis of parties' allegations of wrongdoing and such language features prominently in pleadings, judicial opinions, and doctrinal treatises. Examining this language reveals several distinct conceptions of wrongdoing within tort law. What differentiates these conceptions is that they locate wrongfulness in different features of

⁴ Although they offer different insights, the economic-behaviorist and relational-normative accounts of tort law are complimentary. *Cf.* H.L.A. HART, *THE CONCEPT OF LAW* 88 (1961) (contrasting the external and internal perspectives on law).

⁵ *Cf.* LLOYD WEINREB, *NATURAL LAW AND JUSTICE* 245 (1987) (observing that judgments concerning justice are founded on deep convention not a systematic basis).

doing, such as an actor's state of mind or the outcome of his action. The use of one conception rather than another depends upon the relationship between the parties.

In associating distinct doctrinal conceptions of wrongdoing with particular types of relationships between people, I do not mean to imply the existence of sharply delineated categories by which one can classify all interpersonal relations. Instead, I mean to locate conceptions of wrongdoing along a spectrum of interactions with relationships of a personal nature at one end and relationships of a public nature at the other end. A kiss or a punch in the nose are examples of what I mean by personal interactions, whereas an advertisement or a gas-main explosion are commercial or quasi-public interactions.

In the analysis that follows, I will characterize relationships, whether personal, professional, or commercial, by the types of interactions that occur within them. So, for example, I will consider a punch in the nose to constitute a personal relationship whether it occurs between individuals on the street, between a doctor and patient in a clinic, or between a salesperson and a customer in a store. Some interactions, however, do not fall clearly within one category. For example, one might plausibly consider a punch in the nose between a police officer and a suspect apparently resisting arrest to be a personal or a professional interaction. Nonetheless, such hybrid cases merely represent points along the spectrum that fall outside the range of clear, or paradigm, cases. As such, they pose no significant obstacle to maintaining an association between doctrinal categories of wrongdoing and general types of relationships. To establish this association, I will consider the doctrines of intentional battery, negligence, and strict liability.

A. *Intentional Battery*

A defendant is subject to liability for intentional battery if he acted intending to cause harmful or offensive contact, or apprehension thereof, with the person of another and such contact occurs.⁶ The notion of intent distinguishes the conception of wrongdoing in battery. Intent may mean one of two different things. First, it may mean that the defendant acted with a desire to cause a harmful or offensive contact.⁷ Second, it may

⁶ See RESTATEMENT (SECOND) OF TORTS §§ 13, 18 (1965). According to the doctrine of transferred intent, a defendant who acts intending contact with someone other than plaintiff may be liable for battery against plaintiff if contact with plaintiff results. See *id.* § 16(2).

⁷ See *id.* § 8A & cmt. b. For the sake of simplicity, I will use "harmful or offensive contact" as an abbreviation for "harmful or offensive contact or apprehension thereof."

mean that the defendant acted with a belief that a harmful or offensive contact was substantially certain to result.⁸ Where harmful or offensive contact is in fact substantially certain to result from the defendant's action, her belief in such contact amounts to knowledge.⁹ Thus, battery employs two distinct conceptions of wrongdoing, both of which involve particular mental dispositions with regard to one's action: either desiring or consciously promoting harmful or offensive contact with another.¹⁰

In cases where intent means a desire for harmful contact, it seems clear that the defendant must intend both the contact and a harm associated with it.¹¹ Indeed, in these cases, harm provides the motive for the contact.¹² In cases where intent means knowledge of harmful contact, the defendant's knowledge must include the harm as well as the contact, although in these cases the harm may play no part in the motive for the contact.¹³ Thus, wrongdoing in battery involves desiring or consciously promoting harm to another.

⁸ See RESTATEMENT (SECOND) OF TORTS § 8A; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 8, at 33-36 (5th ed. 1984).

⁹ Compare RESTATEMENT (SECOND) OF TORTS § 8A (belief) with RESTATEMENT (SECOND) OF TORTS § 8A cmts. a, b (knowledge). However, even if harmful or offensive contact is not in fact substantially certain to occur, where defendant believes it is and it does occur, he may be liable for battery. See JAMES HENDERSON, JR. & RICHARD PEARSON, THE TORTS PROCESS 37 (3d ed. 1988).

¹⁰ See KEETON ET AL., *supra* note 8, § 8, at 34 (intention as a "state of mind"); ALAN WHITE, GROUNDS OF LIABILITY 68-72 (1985) (intention as a "mental disposition with regard to an act"). Note that battery requires proof of defendant's actual mental state, although what a reasonable person in defendant's position would have believed may be evidence of this disposition. See KEETON ET AL., *supra* note 8, § 8, at 36.

Also, note that tort doctrine in its formulation of intent distinguishes between consequences of the agent's action that she desires and consequences of which she is aware but that she does not desire. This distinction is perhaps best developed in the philosophical doctrine of double effect. While tort doctrine recognizes the difference between these two types of effect, it treats them identically for the practical purpose of assigning liability.

¹¹ To say "defendant intended harmful contact" might mean one of two things (i) he intended both contact and harm associated with it or (ii) he intended contact that, unknown to him *ex ante*, turned out to be harmful. While both of these are plausible interpretations of intent for the purposes of battery, case law favors the first. Tony Sebok first pointed this ambiguity out to me. Conversion with Tony Sebok, Professor of Law, Brooklyn Law School (1994). For simplicity I will use "harm" as an abbreviation for "harmful or offensive contact."

¹² See, e.g., *Whitley v. Andersen*, 551 P.2d 1083, 1084 (Colo. Ct. App. 1976) (defendant punches plaintiff in the mouth); *Strawn v. Ingram*, 191 S.E. 401, 401-02 (W. Va. 1937) ("Defendant admitted striking plaintiff on the head with an iron bar 'not exactly to protect' himself[,] . . . gouging plaintiff's eye with his thumb and hitting plaintiff with his fist after having him on the ground."). Reported appeals of such cases are rare given how straightforward liability is at the trial level.

¹³ See, e.g., *Field v. Philadelphia Elec. Co.*, 565 A.2d 1170, 1178 (Pa. 1989) (stating that plaintiff-technician sued his employer, the owner of a nuclear power plant, for intentional battery after plant personnel released highly radioactive steam into the tunnel where they knew he was working).

This conception of wrongdoing locates wrongfulness in the malevolent desire or disposition of an agent. Such wrongdoing arises out of the most private parts of the self. It is a highly personal expression of the wrongdoer's agency.

Intentional torts such as battery, defamation, or infliction of emotional distress originate in the most intimate parts of the wrongdoer's person, and it is these same parts that are engaged in her personal relations. What makes intentional wrongs personal, rather than professional or commercial, is that they result largely from the wrongdoer's attitudes and emotions towards the victim. Attitudes and emotions are elements of interacting with others that we associate with personal relationships. When judging personal interactions in daily life, we direct our attention to private features of the self. Understanding an act of gift-giving, for example, requires examining motives and intentions. Similarly, evaluating a harmful contact involves inquiry into an assailant's desires and dispositions.

By characterizing intentional torts as personal, I am referring exclusively to the conception of wrongdoing that such actions involve and not to the relative status of each party nor to the nature of the harm. Thus, according to this analysis, a case in which a dentist terrorizes a patient with a drill or in which a store owner falsely advertises that his competitor sells stolen merchandise both involve personal wrongdoing. In both of these cases, one might rightly claim that the wrongdoer "had it in for" or "was out to get" the victim. A central feature of intentional torts is this highly personal form of wrongdoing. Intentional torts arise out of private parts of the self, and interactions involving the expression of these private parts of the self are characteristic of personal relations.

To summarize, the conception of wrongdoing that courts employ to determine liability in intentional tort cases concerns desiring or consciously promoting harm to another. These torts involve highly personal expressions of the wrongdoer's agency; they are very personal ways of doing wrong to others. The association between the standard of liability in intentional torts cases and the personal nature of the interactions in which they occur reflects a more general practice of examining private parts of the self when judging personal relationships.

B. Negligence

A defendant is subject to liability for negligence if she fails to exercise reasonable care and this failure is a proximate cause of harm to the plaintiff. The notion of unreasonable conduct distinguishes the conception of wrongdoing in negligence. Tort law defines unreasonableness as exercising less care than would be exercised by a reasonable person in similar circumstances. Courts and commentators have interpreted the reasonable

person's conduct in a variety of ways, and each one entails a variation in the conception of wrongdoing in negligence.

Two of the most prevalent versions of the reasonable person are the "person of ordinary prudence"¹⁴ and the "rational wealth maximizer."¹⁵ Being negligent with reference to the ordinary prudence standard means acting abnormally, violating the expectations of others about the risks that they are likely to encounter.¹⁶ By contrast, being negligent with regard to the rational wealth maximizer standard means failing to take cost-effective precautions, that is, precautions that cost less than the expected risk that they eliminate. Negligence in this sense means behaving inefficiently.¹⁷

¹⁴ See RESTATEMENT (SECOND) OF TORTS § 283; KEETON ET AL., *supra* note 8, § 32, at 174.

¹⁵ See RESTATEMENT (SECOND) OF TORTS § 291; KEETON ET AL., *supra* note 8, § 31, at 171-73 (reasonable as rational implied in the discussion of the relation between reasonableness and utility).

¹⁶ See, e.g., *Flom v. Flom*, 291 N.W.2d 914, 916 (Minn. 1980) (involving a woman's suit against her husband for spinning a merry-go-round on which she was riding so fast that she fell off and suffered permanent injury to her leg). On appeal, the court affirmed a jury verdict in her favor, which found that her husband had failed "to exercise such care as persons of ordinary prudence usually exercise under such circumstances." See *Flom*, 291 N.W.2d at 916. The jury also found the city partially negligent for failure to repair the merry-go-round so that it would not wobble, and plaintiff herself partially negligent for riding the wobbly merry-go-round. For other examples of negligence as the failure to exercise ordinary care see *Ackley v. Chicago & North Western Transport Co.*, 820 F.2d 263, 267 (8th Cir. 1987) ("The right to assume that others will exercise ordinary care derives from the corresponding duty of due care imposed by the law on everyone"); *Toubiana v. Priestly*, 520 N.E.2d 1307, 1310 (Mass. 1988) ("[T]he standard by which a party's performance is measured is the conduct expected of an ordinarily prudent person in similar circumstances, . . . the person who is thought to be ordinarily prudent"). Cf. Honoré, *Responsibility and Luck*, 104 LAW Q. REV. 537 (1988) (arguing that victim reliance does not justify liability).

¹⁷ See, e.g., RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 15 (3d ed. 1988) (citing *Hendricks v. Peabody Coal Co.*, 253 N.E.2d 56 (Ill. Ct. App. 1969)). In *Hendricks*, a teenage boy sued a coal company for a crippling neck injury he suffered when diving into a shallow reservoir left over from the company's strip mining operations. See *Hendricks*, 253 N.E.2d at 57. Plaintiff alleged that defendant was negligent for failing to fence off the reservoir in order to discourage swimmers. See *Hendricks*, 253 N.E.2d at 57. Affirming a jury verdict for plaintiff, the court argued that defendant was negligent because "[t]he entire body of water could have been closed off with a steel fence for between \$12,000 and \$14,000. This cost was slight compared to the risk to the children involved." *Hendricks*, 253 N.E.2d at 61. Plaintiff's negligence consisted in the failure to take a cost-effective precaution. See *Hendricks*, 253 N.E.2d at 61; see also *Smith v. City of Denver*, 726 P.2d 1125, 1127 (Colo. 1986) (existence of negligence involves consideration of "risk involved" and "consequences of placing the [safety] burden upon the actor"); *Fuhrer v. Gearhart-by-the-Sea, Inc.*, 760 P.2d 874, 878 (Or. 1988) (negligence where "the risk is great, either in likelihood or magnitude, and the cost is minimal"). For the classic statement of this form of negligence, see *United States v. Carroll Towing*, 159 F.2d 169 (2d Cir. 1947).

Unlike intentional wrongdoing, negligence is a standard of conduct, not a state of mind.¹⁸ One may act negligently with a variety of attitudes or mental dispositions including resolution, distraction, or abandon. When one's negligence poses a near certain risk of harm to another and one knows it, then one's negligence is intentional. When one's negligence poses a high risk to another and one is consciously indifferent to the other's welfare, then one's negligence is reckless. Defendant's state of mind may modify her negligence, may make it a certain type of negligence. Establishing negligence, however, does not require any evidence or proof of defendant's state of mind.

There are three ways in which a defendant can be negligent. Each one involves a different failure on the defendant's part. First, a defendant can be negligent for failing to exercise abilities that she could have exercised had she so willed, the exercise of which would have produced reasonable care. For example, she failed to use ordinary prudence but could have done so had she chosen to, or she failed to maximize her wealth despite her rational capacity to do so. By the phrase "could have exercised had she so willed," I mean only that she would have done so had she so willed but do not assume that she could have so willed. That is, I assume that her will determines her action, but make no assumption about what determines her will.¹⁹

Second, a defendant can be negligent for failing to possess abilities, the exercise of which would have produced reasonable care. That is, she was simply incapable of exercising ordinary care. This type of negligence relies on a distinction between personal incapacities viewed as limiting circumstances and personal incapacities viewed as incompetencies.²⁰ Negligence—the failure to exercise reasonable care given the circumstances—takes account of the former but not the latter. Courts generally view immaturity, physical disability, and emergency conditions as adverse circumstances.²¹ A blind defendant, for example, is held to the standard of a reasonable blind person. In contrast, courts view mental shortcomings,²² lack of knowledge, and inexperience as

¹⁸ See Henry Edgerton, *Negligence, Inadvertence, and Indifference: The Relation of Mental States to Negligence*, 39 HARV. L. REV. 849 (1926); cf. *Bryant v. Hornbuckle*, 782 P.2d 1132 (Wyo. 1986); WHITE, *supra* note 10, at 100-04.

¹⁹ See Bruce Aune & Keith Lehrer, *Cans and Ifs: An Exchange*, in FREE WILL 36-45 (Gary Watson ed. 1982); Harry Frankfurt, *Freedom of the Will and the Concept of a Person*, in FREE WILL 81-95.

²⁰ See Honoré, *supra* note 16, at 533.

²¹ See RESTATEMENT (SECOND) OF TORTS §§ 283A, 283C, 296 (1965); KEETON ET AL., *supra* note 8, § 32, at 175-76, 179-82, 196-97.

²² These include inattention, misperception, poor memory, below average intelligence, bad judgment, and abnormal temperament.

incompetencies.²³ A person with an abnormally short attention span is thus held to the standard of the reasonable person whose attention span is normal.

Third, a defendant can be negligent when the context in which she acts fails to provide her with proper incentives to behave reasonably. That is, a rational wealth maximizer can be negligent in instances of market failure, where individually rational behavior is inefficient. For example, in the absence of preexisting liability rules, it may be individually rational for a health care provider not to institute particular precautionary tests that are cost-effective.²⁴

I will refer to these three types of negligence respectively as inadequate effort negligence, best effort negligence, and market-failure negligence. Inadequate effort negligence demands that individuals behave up to their ability for reasonable conduct. Best effort negligence requires that they behave beyond their ability for reasonable conduct. Market-failure negligence mandates that individuals behave in spite of their ability for reasonable (rational) conduct.

One might object to best effort negligence as a conception of *wrongdoing* given that the defendant could not have done better. This objection assumes that conduct can be wrong only if the person doing it could have done better. This assumption, however, is not self-evidently true. An act that represents the best that a person can do may be wrong on a variety of grounds, including that it entails harmful consequences²⁵ or fails to conform to some independent norm of conduct. Negligent action is wrongful insofar as it fails to conform to the standard of reasonable care, and its wrongfulness need not depend upon the ability of the defendant to have done better.

One might object to market-failure negligence as a conception of *wrongdoing* because it judges a defendant on the basis of the faultiness of her environment rather than her action. This objection assumes that

²³ See RESTATEMENT (SECOND) OF TORTS §§ 283B, 289, 290; KEETON ET AL., *supra* note 8, § 32, at 176-79, 182-85.

²⁴ See WILLIAM LANDES & RICHARD POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 64, 312 (1987) (liability rules provide incentives to use reasonable care); POSNER, *supra* note 17, at 147-48; John Prather Brown, *Towards an Economic Theory of Liability*, in LAW, ECONOMICS AND PHILOSOPHY 199-205 (Mark Kupperberg & Charles Beitz eds., 1983) (liability rules that employ a negligence standard as an element or a defense provide incentives for efficient behavior); see also *United States v. Carroll Towing*, 159 F.2d 169, 173 (2d Cir. 1947) (concluding that defendant was liable for failure to employ non-mandated, non-customary cost-effective safety equipment).

²⁵ See JOSEPH RAZ, THE MORALITY OF FREEDOM 364-65 (1986) (claiming that an action can be considered wrongful "because of what it does to the well-being of the agent and others").

market-failure negligence locates wrongfulness entirely in the inefficiency of the incentive structure faced by defendant. The wrongfulness, however, consists of the failure of the individually rational defendant to meet a standard of care that would require acting irrationally from her individual point of view but rationally from a collective point of view.

Market-failure negligence occurs in situations where it is individually rational to behave inefficiently due to the lack of proper incentives.²⁶ Tort rules provide these incentives in the absence of appropriate market forces.²⁷ For example, liability for failure to prescribe cost-effective precautionary tests for a patient provides incentive for an individually rational health care provider to do so. Thus, market-failure negligence only occurs before any similar case in a jurisdiction has arisen to construct the liability incentives necessary to make individually rational action efficient. After liability has been imposed in one case, negligence thereafter in similar cases becomes inadequate effort negligence.

Market-failure negligence demands that individuals be global wealth maximizers, even though the reasonable person is normally an individual wealth maximizer. One way to reconcile this tension is to see market-failure negligence as a demand that a defendant anticipate the liability rule that would create incentives to behave efficiently. Given the existence of the tort system, this long-range perspective is consistent with individual wealth maximization. If this is a plausible interpretation of the rational wealth maximizer, then all market-failure negligence becomes merely a form of inadequate effort negligence.

These different versions of wrongdoing in negligence all locate wrongfulness in the inadequacy of a person's conduct when compared to reasonable behavior. Wrongdoing arises out of a person's failure to conform her actions with external standards of care. It is a failure to measure up.

Negligence locates wrongfulness in observable features of conduct such as giving warnings or taking precautions. These actions are interactive extensions of the self, less private than desires and knowledge. They are interpersonal expressions of agency.

Negligence involves a violation of shared norms of behavior as opposed to the expression of individualized motives or desires. These

²⁶ The prisoners' dilemma offers a model of market failure where individual rationality fails to produce an optimal outcome. See JULES COLEMAN, *RISKS AND WRONGS* 42-43 (1992).

²⁷ This is what Posner means when he says that liability rules "mimic the market." POSNER, *supra* note 17, at 14.

norms constitute roles that shape civic or professional relations. Backing one's car into a neighbor's mailbox, not warning customers of a freshly mopped floor, and removing the wrong wisdom tooth all represent violations of socially constructed roles—neighbor, storekeeper, and dentist—upon which others rely. In contrast to intentional torts, these are not personal attacks.

As in the case of intentional torts, the form of wrongdoing involved, and not the relative status of the parties or the type of harm inflicted, characterizes negligence as a distinct type of wrongdoing. Consider the case of a dentist who carefully discusses with a patient which tooth to pull and the patient gives her consent to extract a particular tooth. If the dentist mistakenly removes the wrong tooth, he is negligent. He has failed to perform up to professional standards. The patient would have grounds to accuse him of being a bad dentist. By contrast, if the dentist knowingly removes a different tooth out of malevolence, he commits battery. There is, in this instance, no failure to measure up but rather the expression of a negative disposition towards another. The patient would have grounds to call him a bad person rather than an incompetent dentist. One might even judge him a competent dentist were he to have a more neutral disposition towards his patients. Even in the case where the dentist knowingly extracts a different tooth out of benevolence, he still commits battery. Here his disposition, while well-meaning, is disrespectful in disregarding his patient's wishes. The wrongdoing here, as in the case of malevolence, resides in a disposition rather than a failure to measure up.

When judging civic and professional relationships we evaluate how well the individuals in these relationships measure up to shared standards of conduct. One need not know anything of the personal motives or desires of a person to judge her a good neighbor or competent professional. The notions of "the neighborly thing to do" or "a professional attitude" manifest the less personal nature of this type of relationship.

To summarize, negligence involves failing to measure up to a standard of reasonable behavior. The conception of wrongdoing in negligence draws attention to the self's extension in observable features of conduct and examines them in the light of the social role that a person plays. The association between negligence and civic and professional relations reflects a general practice of measuring individuals' conduct with reference to the roles that they play when judging these types of relationships.

C. *Strict Liability*

A defendant is subject to strict liability if he engages in an abnormally dangerous activity or markets a defective product that is unreasonably dangerous and the danger of the activity or defect of the product causes harm to the plaintiff. The notions of abnormal danger and unreasonably dangerous product-defect distinguish the conception of wrongdoing in strict liability.

The abnormally or unreasonably high risk associated with a defendant's activity or product is what makes him a wrongdoer under strict liability. Wrongfulness in this sense is an attribute of the defendant's activity or product. Unlike wrongdoing in intentional battery, the wrongfulness of the defendant's activity or product under strict liability does not involve his state of mind. In contrast to wrongdoing in negligence, the wrongfulness of his activity or product does not depend upon the level of care he exercises. The defendant could engage in an abnormally dangerous activity or market a defective product with any state of mind or exercising any level of care. These features of his conduct are irrelevant in determining his responsibility under strict liability.

An abnormally dangerous activity is one that poses uncommon and unusually high risks in the particular context in which the defendant conducts it.²⁸ Courts have employed the terms "non-natural," "extraordinary," and "ultrahazardous" to describe abnormally dangerous activities.²⁹ An unreasonably dangerous defective product is one that

²⁸ See RESTATEMENT (SECOND) OF TORTS § 507 (ownership of wild animal); *id.* § 509 (ownership of abnormally dangerous domestic animal); *id.* § 520 (conducting abnormally dangerous activity); KEETON ET AL., *supra* note 8, § 76, at 541 (wild animal); *id.* at 543 (abnormally dangerous domestic animal); *id.* at 537, 545-56 (abnormally dangerous activity). See, e.g., *Bunyak v. Clyde Yancey & Sons Dairy, Inc.*, 438 So. 2d 891, 894 (Fla. Dist. Ct. App. 1983) (involving a suit by a cattle farmer against his neighbor, a dairy farmer, after liquefied cow manure overflowed from the latter's manure lagoon into the former's fishing pond). On appeal, the *Bunyak* court reversed the trial court's exclusion of strict liability from jury consideration. The court explained that

impounding thousands of gallons of liquefied manure on one's property certainly presents some risk to the person, land, or chattels of another. If it escapes, as the circumstantial evidence shows it did here, great harm results. Ineradicable risks attend such impoundment despite reasonable care. . . . [T]he manure lagoon here is not a matter of common usage, and this, in our view, dovetails with the non-natural use of land.

Id.; see also *Zero Wholesale Gas Co. v. Stroud*, 571 S.W.2d 74 (Ark. 1978) (storage of propane gas); *Department of Env'tl. Protection v. Ventron*, 94 N.J. 473, 468 A.2d 150 (N.J. 1983) (dumping mercury waste); *Koos v. Roth*, 625 P.2d 1255 (Or. 1982) (field burning as an agricultural technique).

²⁹ KEETON ET AL., *supra* note 8, § 78, at 545-56.

violates the reasonable expectations of consumers or employs a design that makes the risks inherent in its use outweigh its utility.³⁰

There are two ways in which an activity can be abnormally dangerous or a defective product unreasonably dangerous. First, a defendant's activity or product, while usually safe, can be abnormally dangerous or defective in a particular instance. For example, while in most cases owning a dog is a normal activity, if one's dog has vicious propensities, one may be strictly liable for any injuries that it causes. Similarly, if one's product line is normally safe, one or more units may nevertheless include manufacturing defects for which one may be strictly liable. Second, a defendant's activity may always, or almost always, be abnormally dangerous or a defendant's product, even when properly made, may be defective and unreasonably dangerous. For example, blasting is abnormally dangerous in almost all settings and an entire line of products might be defectively designed.

Some commentators define strict liability as liability without fault in order to distinguish it from negligence. This has led to the mistaken view that strict liability entails liability in the absence of any wrongdoing.³¹ While strict liability does not require that a defendant act

³⁰ See RESTATEMENT (SECOND) OF TORTS § 402A cmts. g, i; KEETON ET AL., *supra* note 8, § 99, at 698-99 (consumer expectations standard); *id.* at 699-700 (risk-utility standard). See, e.g., *Falk v. Keene Corp.*, 782 P.2d 974, 980 (Wash. 1989) (concerning a case in which the widow of a navy veteran sued an asbestos insulation manufacturer for the loss of her husband who died from lung cancer following sustained exposure to defendant's product). The *Falk* court reversed a jury verdict in favor of defendant based on a negligence instruction, arguing that strict liability was the proper standard for design defect claims. Clarifying this standard, the court held that

a plaintiff seeking to establish manufacturer liability for defective product design will establish liability by proving that, at the time of manufacture, the likelihood that the product would cause plaintiff's harm or similar harms, and the seriousness of those harms, outweighs the manufacturer's burden to design a product that would have prevented those harms and any adverse effect a practical, feasible alternative design would have on the product's usefulness. . . . If the plaintiff fails to establish this, the plaintiff may nevertheless establish manufacturer liability by showing the product was unsafe to an extent beyond that which would be contemplated by the ordinary consumer.

Id.; see also *Hull v. Eaton Corp.*, 825 F.2d 448, 454 (D.C. Cir. 1987) (declaring that for strict liability, "plaintiff must show that the magnitude of the danger from the product outweighed the costs of avoiding the danger"); *Coleman v. Excello-Textron Corp.*, 572 N.E.2d 856, 861 (Ohio Ct. App. 1989) (determining that defendant manufacturer is strictly liable if "plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner" or "plaintiff establishes that the risk inherent in the design outweighs its benefits.").

³¹ See, e.g., JULES COLEMAN, *supra* note 26, at 220 ("Strict liability in torts is imposed not only if the agent is blameless for her conduct but also if her conduct is blameless."). While claims for strict liability may concede that defendant is blameless with regard to the level of care that she employed, they nonetheless rest upon intuitions that she is blameworthy for the high level of risk entailed in her activity or the

negligently, it does require that he engage in wrongdoing. In order to establish strict liability, a plaintiff must prove that his harm was caused by the wrongdoing of the defendant, although here wrongdoing does not consist of the defendant's failure to exercise reasonable care. The plaintiff proves wrongdoing by establishing that the defendant's activity was abnormally dangerous or that the defendant's product violated reasonable consumer expectations or created risks that outweighed its utility.³²

Richard Epstein has claimed that strict liability requires only that the defendant cause harm to the plaintiff.³³ For practical purposes, however, strict liability in tort law requires not only harm and causation but wrongdoing as well. Stephen Perry has argued that even within Epstein's own theory, strict liability requires wrongdoing, and that his robust paradigms of causation and harm employ implicit notions of wrongdoing.³⁴

John Silber has suggested that one ground of strict product liability is a defendant's status as a marketer of a defective product independent of any specific act by him.³⁵ This places the role of wrongdoing within strict liability in doubt. Silber clarifies his suggestion, explaining that "the manufacturer or seller creates his status through prior acts even though those acts have nothing directly to do with the loss."³⁶ Thus, Silber's notion of the defendant's status is really a shorthand or proxy for the defendant's activity prior to the injury. And the claim that this activity—namely, production or sale—has "nothing directly to do with" plaintiff's harm is overstated. According to tort doctrine, its outcome is a proximate cause of the harm.³⁷

defect in the product she produced.

³² While a few jurisdictions have shifted the burden of proving this last test for wrongful action onto defendant manufacturers in design defect cases, this may merely represent a rebuttable presumption of wrongdoing. See JAMES HENDERSON & RICHARD PEARSON, *THE TORTS PROCESS* 831 (3d ed. 1988).

³³ See RICHARD EPSTEIN, *A THEORY OF STRICT LIABILITY* 14 (1980) (claiming strict liability requires only that "defendant harms plaintiff even if the risk he took is reasonable.").

³⁴ See Stephen Perry, *The Impossibility of General Strict Liability*, 1 *CAN. J.L. & JURISPRUDENCE* 147, 148 (1988).

³⁵ See John Silber, *Being and Doing: A Study of Status Responsibility and Voluntary Responsibility*, 35 *U. CHI. L. REV.* 47, 54 (1967).

³⁶ *Id.*

³⁷ One form of liability that rests upon defendant's status is vicarious liability. Depending upon one's understanding of this doctrine, it may not require wrongful action on the part of a defendant master. If one interprets the rule of respondeat superior as ascribing responsibility to the defendant master for the wrongful action of a servant, then the master's vicarious liability is based on his status with regard to the servant and the doctrine does not require wrongful action by the defendant master. One might interpret this rule, however, as insisting that the servant is really an extension of the

Other commentators, while recognizing the role of wrongdoing within strict liability, mistakenly claim that strict liability is really just a form of negligence. Gary Schwartz, for example, has asserted that strict liability employs the same conception of wrongfulness as negligence.³⁸ With regard to abnormally dangerous activities, Schwartz argues:

The *Second Restatement* . . . seeks to deprive [strict liability] of much of its strictness by insisting that the appropriateness of the activity's location and "the value of the activity to the community"—considerations seemingly bearing on the activity's reasonableness or negligence—weigh heavily on the rule's application.³⁹

Schwartz highlights the two doctrines' reliance on similar notions of what is reasonable or ordinary or normal in given circumstances. But he fails to note that negligence concerns whether the defendant exercised reasonable *care*, whereas strict liability concerns whether the defendant conducted an unreasonable *activity*. While both doctrines may be sensitive to issues of context, they involve judgments about different features of defendant's action: the level of care he exercises as opposed to the activity he undertakes.⁴⁰

Discussing strict liability for product defects, Schwartz asserts:

While the leading judicial opinions typically are written with strict liability phraseology, the liability test that most of them espouse requires the court to balance the risks of the product's design against that de-

master's agency, and the wrongful action of the servant is really the master's wrongful action. Either way, vicarious liability, like the other forms of liability so far discussed, requires that plaintiff's harm is caused by someone's wrongful action.

³⁸ See Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963 (1981) ("The doctrine of strict products liability seems little more than a reasonable and moderate adaptation of the basic negligence standard . . ."); see also Frederick Davis, *Strict Liability or Liability Based Upon Fault? Another Look*, 10 U. DAYTON L. REV. 5 (1984).

³⁹ Schwartz, *supra* note 38, at 970.

⁴⁰ See *Roach v. Kononen*, 525 P.2d 125, 129 (Or. 1974).

[I]t is generally recognized that the basic difference between negligence on the one hand and strict liability for design defect on the other, is that in strict liability we are talking about the condition (dangerousness) of an article which is designed in a particular way, while in negligence we are talking about the reasonableness of the manufacturer's actions in designing and selling the article as he did.

Id. See *Kaltenbrun v. City of Port Washington*, 475 N.W.2d 527, 529 (Wis. Ct. App. 1990) ("The essence of the duty to exercise reasonable care is not to refrain from doing a particular act, but rather it is the duty to act in a certain way—to exercise reasonable care—whenever it is foreseeable that one's conduct may cause harm to another.").

sign's benefits. But what this test essentially consists of is an application of the Hand negligence formula in the products setting.⁴¹

Here, Schwartz points out that both negligence and strict liability doctrines employ risk/utility considerations. The Hand formula,⁴² however, evaluates the cost-effectiveness of an untaken precaution, whereas the test for defective design evaluates the overall utility of a product. While the negligence standard does apply within the realm of products liability, it applies to the level of care taken in the manufacture and distribution of a product. Strict liability, however, concerns a different feature of the defendant's action—attributes of the product itself.

Schwartz's reduction of strict liability to a form of negligence reveals that these two liability standards employ similar considerations of reasonableness and cost-effectiveness, but it conceals that they involve judgments about different features of a defendant's action. This is because Schwartz begins with an overbroad conception of the so-called "negligence principle," the "idea that law should be wary of imposing liability in the absence of some negligent or inappropriate conduct on the defendant's part."⁴³ As I have argued, *all* tort liability standards—intentional wrongdoing and strict liability no less than negligence—require "inappropriate" or wrongful action by the defendant.⁴⁴ Essential to any conception of wrongdoing, however, is not only what considerations the conception employs in judging action, but also what features of action it judges. It is this second specification of wrongdoing that distinguishes strict liability from intentional torts and negligence.

Wrongdoing in strict liability for abnormally dangerous activities locates wrongfulness in the unusually high risk associated with an agent's activity regardless of how he conducts it. This form of wrongdoing consists of engaging in an activity that is likely to harm others and does so. Wrongdoing in strict products liability locates wrongfulness in the agent's defective product. Wrongdoing in this case entails making things that pose abnormal or unreasonable risks to others.

⁴¹ Schwartz, *supra* note 38, at 972.

⁴² See *United States v. Carroll Towing*, 159 F.2d 169, 173 (2d Cir. 1947) (finding that liability depends upon whether the burden is less than the probability of harm multiplied by the injury—whether $B < PL$)

⁴³ Schwartz, *supra* note 38, at 963-64.

⁴⁴ Vicarious liability may be an exception to this. See *supra* note 37 (discussing vicarious liability).

Wrongdoing in strict liability arises out of the nature or product of one's activity. These are more far-reaching extensions of the self. They are public projections of agency.

Liability for abnormally dangerous activities or defective products most often arises in the context of highly impersonal public service or mass-market relationships. These relationships, for example, between neighborhood residents and the owner of a natural gas storage tank or between consumers and a lawn mower manufacturer, normally involve no personal contact. They consist largely of non-interactive communications such as advertising or purchasing decisions and are mediated through the activities and products that become the focus of inquiry when issues of liability arise. Indeed, the very impersonality of the interaction between the plaintiff and the defendant is a large part of what seems so wrongful about blasting accidents or exploding cars. Whereas in intentional torts the defendant cares too much, and in the wrong way, about the plaintiff, and in negligence the defendant does not care enough, in strict liability cases the defendant does not seem to care at all.

The association between strict liability and public service and mass market relationships is paradigmatic but not absolute. Many claimants against service providers and manufacturers plead both negligence and strict liability. Such cases illustrate how some fact patterns may be plausibly analyzed using different doctrinal and relational categories. In *Siegler v. Kuhlman*,⁴⁵ the trailer of the defendant's gasoline truck came uncoupled and spilled fuel on a local road. The plaintiff's decedent drove into the fuel spill, igniting it, and perished in the flames.⁴⁶ At trial, the plaintiff requested jury instructions on both *res ipsa loquitur* and strict liability.⁴⁷ Viewed as a negligence case, in accordance with the request for a *res ipsa loquitur* instruction, the suit is about the plaintiff's relationship to defendant as a fellow motorist and the latter's violation of highway safety norms in improperly securing his trailer. The negligence claim casts the parties in a civic relationship. Seen as a strict liability case, the suit is about plaintiff's relationship to defendant as a fuel transporter, engaged in an abnormally dangerous commercial activity and the tragic materialization of an unusually high risk. The strict liability claim casts the parties in a commercial public service relationship. Far from weakening the linkage between forms of action and types of relationships, the malleability of cases like *Siegler* reveals a tendency to interpret forms of wrongdo-

⁴⁵ 502 P.2d 1181 (Wash. 1972).

⁴⁶ *See id.* at 1182.

⁴⁷ *See id.* at 1183.

ing and relations between the parties in ways that preserve the paradigmatic association between them.

When judging public service or mass market relationships, we direct our attention to the service provided or the product consumed. A utility company earns our praise for reliable service and a manufacturer for quality products. Thus, when things go awry in these relationships, we search for wrongdoing in the unreasonable riskiness of the activity or the product.⁴⁸ The intentions or carefulness of the injurer play no part in our evaluation of such relationships. This lack of attention to the motives and conduct of the agent is characteristic of these most impersonal of our relationships.

To summarize, the conception of wrongdoing that courts employ in strict liability cases concerns the unreasonable hazards of an injurer's activity or the product of it. It focuses on public projections of her agency. These cases involve very impersonal ways of harming another in highly mediated relationships, such as relationships between service providers and members of the public or manufacturers and consumers. The association between these types of relationships and the standard of strict liability reflects a general practice of judging public service and mass market relationships by reference to the activities and products that mediate them.

II. THE RELATIONAL APPROACH TO TORT LAW

The analysis in Part I established that the different conceptions of wrongdoing in liability standards are associated with particular types of relationships. What differentiates these conceptions of wrongdoing is that they locate wrongfulness in different features of doing. What characterizes the relationships is that they engage different parts of the self. Thus, judging claims about liability for harm involves determining both what counts as a person's doing and what qualifies as a part of her self. These are alternative ways of framing a single question: What are the boundaries of her agency?⁴⁹ By viewing liability standards in the light of the relationships to which they apply, we can begin to see how variation in the meaning of wrongdoing within tort law

⁴⁸ Where the injurer is a state agency, we may grant it immunity based on the notion that it is held accountable through the political process. In the case of a private utility company or manufacturer, we seek to hold it accountable by means of civil liability.

⁴⁹ My discussion of the boundaries of agency owes much to those of Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959, 959-77 (1992) and MARION SMILEY, *MORAL RESPONSIBILITY AND THE BOUNDARIES OF COMMUNITY* 225-54 (1992).

arises out of different intuitions about the self and others in personal, civic, and commercial life.

First, it will be helpful to clarify what is meant by the boundaries of agency.⁵⁰ One might understand the self as the essential core of a person, distinguishable from its intentions and actions and their results. Saying that a person has an intention or does an action implies that these are possessed or performed by the self, not parts of the self. Under such a model, the boundaries of the self are restricted and rigid. I will call this the essential conception of the self.

Alternatively, one might understand the self as constituted by its intentions and actions and their results. These are all components of personal identity. For example, individuals view their good intentions as an important part of who they are. An Olympic champion derives a sense of self from the gold medal on her shelf. At times, one may reject these same features of action as expressions of the self, as when people disown uncontrollable urges or mistaken actions. According to this view, the boundaries of the self are expandable and retractable. I will call this the constitutive conception of the self.

Most judgments that we make about ourselves and others rely upon the constitutive conception of the self. When a person seeks praise for her accomplishments, she tends to expand the boundaries of her agency. She implies that good results are properly attributable to her; they are part of who she is. When a person seeks to avoid responsibility for her errors, she tends to retract the boundaries of her agency. She implies that a particular mistake should not be counted against her, that it is not hers in some relevant sense. She may even distance herself from it by the disclaimer, "I'm just not myself today." Thus, while most people may not be able to provide explicit accounts of the constitutive conception of the self, their judgments about personal responsibility rely upon it. Furthermore, their judgments may reflect a shifting of the boundaries of agency, expansive in some cases and restrictive in others. Consider next the mechanics of these judgments in tort law.

Findings of tort liability require two steps: (1) connecting an agent to the wrong and (2) connecting the wrong to the harm. The first step requires determining the boundaries of agency, and this step entails a collection of notoriously difficult problems in the philosophy of action.⁵¹ In tort cases, judgments concerning this step are usually intuitive and unarticulated. With regard to the second step, tort doctrine

⁵⁰ See Dan-Cohen, *supra* note 49, at 959-77.

⁵¹ See *id.* at 963 (discussing "subject responsibility").

provides rules of harm, causation, proximity, and wrongfulness. Judgments concerning this second step are not only explicit but are the subject of thoughtful debate at trial and careful scrutiny upon appeal.

Liability for intentional battery generates relatively little controversy in daily life and in law. The first-step intuition upon which it relies—that a malevolent desire or disposition is a wrong properly attributable to an agent—is widely accepted. This judgment requires extending the boundaries of agency to encompass a person's state of mind, and this is consistent with most people's intuitions about personal responsibility.

By contrast, strict liability for defective products has given rise to widespread debate among non-lawyers and lawyers alike. That a defective product is wrongful in some sense (perhaps simply that it is detrimental to human well-being)⁵² seems straightforward to most people. That producing it, especially with great care, makes its wrongfulness a doing of the producer, however, relies on an intuition that is not universally shared. Those who favor liability in such cases rely on the intuition that what a person creates is a part of his self, a projection of his agency. Those who oppose strict liability for defective products rely on the intuition that the products a person makes are not part of his self but rather are independent things out in the world, beyond the boundaries of his agency. Thus, the debate over strict products liability is in large measure a contest between competing intuitions that rely upon relatively expansive or restrictive conceptions of the self. A similar clash of intuitions about the connection between a person and his level of care concerning whether the boundaries of agency encompass one's mistakes occurs with regard to negligence.

Thus, much of the disagreement about tort liability stems from competing intuitions that rely on unarticulated assumptions about the boundaries of agency. These intuitions, at least in daily life and in law, are not grounded in any foundational theory that might justify them. The persistence of conflict about the fairness of liability standards is due to the confidence with which parties and judges believe in these intuitions and the unavailability of any dispositive philosophical justification for them. Legal debate arises out of competing plausible intuitions ungrounded in philosophical justification.

These intuitions about personal responsibility and the assumptions about agency upon which they rely develop in and regulate relationships. Consider the relationship between manufacturer and con-

⁵² See *infra* note 63.

sumer.⁵³ In marketing, manufacturers seek to encourage identification of their company with a product. New companies build a name for themselves through their connection to a successful product.⁵⁴ A company, for example, seeks to be known as the maker of the world's best lawnmower or blender. Established companies promote new products by tying them to the firm's good name. The language of advertisements often explicitly merges the company name with the product, as when an advertisement proclaims, "When you need a new truck, buy GM." The greatest reward of mass marketing is when the product itself acquires the name of the company, such as when photocopiers are referred to as Xeroxes.

This identification of a company with its products relies upon an expansive view of the boundaries of agency. This explains, in part, why consumers intuitively blame the company when a product is defective. An exploding gas tank is not merely a tragic misfortune, but a wrong done to the victim by GM.⁵⁵ The vehicle is responsible for the victim's injury, and according to the advertisements, the vehicle is a concrete embodiment of GM. Not surprisingly, in the face of claims concerning product-related injury, companies invoke a restrictive view of the boundaries of agency. Vehicles with a tendency to explode are a risk in the world, like stormy seas, and there is no wrong done in producing them as long as there are informed consumers who wish to buy them.

The standard of strict liability imposes the expansive view of the boundaries of agency that the manufacturer promoted as a central part of mass marketing to consumers. One might justify this imposition using a theory of conceptual consistency or consumer reliance or manufacturer benefit. It seems, however, that this premise of strict li-

⁵³ Clearly, a manufacturer, which is a corporate entity, is not a "self" in the same way that an individual person is. Therefore, the following discussion of agency entails a level of metaphor beyond that necessary when examining the actions of individual persons. Nonetheless, corporate entities often publicly project a unified identity not unlike an individual self, and they are perceived by those with whom they interact as capable of agency. Furthermore, individuals themselves may be less integrated and unitary in their thoughts and actions than the metaphor of self connotes. The comparability of corporate and individual "selves" is reflected in the legal status of a corporation as a "person." Thus, for the present discussion, I assume merely that the analogy between corporate and individual personhood is sufficient to sustain the claims offered here.

⁵⁴ Cf. NAHUM SARNA, *ON THE BOOK OF PSALMS 53-54* (1993) (discussing the relation between names and identity in biblical culture).

⁵⁵ See *Moseley v. General Motors*, 447 S.E.2d 302, 310 (1994) (asserting both negligence and strict liability claims against truck manufacturer for design of gas tank).

ability remains unarticulated at the level of intuition for most parties and judges.

Consumers also shift between expansive and restrictive views of the boundaries of agency. Consumers, as buyers, view themselves as autonomous agents, identifying with their deliberate choices of products. When a product goes wrong, however, they often disassociate themselves from these same choices, claiming inadequate information or unequal market power. At the time of purchase, consumers often take advantage of their freedom to choose a product or not to buy at all. After injury, descriptions of buying often sound like stories of deception or coercion. Like manufacturers, consumers also shift from an expansive to a restrictive view of the limits of their agency. Consumers, however, do not extend the limits of their agency as assertively or as publicly as manufacturers, and this may account for why many courts hold the latter to their representations by adopting strict liability.

Consider a similar account of shifting intuitions about the boundaries of agency in relationships between doctors and patients. Doctors derive a sense of professional identity from the norms that define the role of physician. Professional training entails internalization of these norms and assimilation to the role. The role of physician becomes constitutive of the self of each individual doctor. When a doctor violates the standards of this role, perhaps despite her best efforts, we construe this as a wrongdoing on her part. The doctor, however, may seek to disown the feature of her conduct that caused harm, viewing it as a "bad outcome" and thereby placing it beyond the boundaries of her agency. Patients, like consumers, also shift between expansive and restrictive views of agency following injury. What constituted an informed acceptance of risk before surgery afterwards becomes malpractice by the doctor.

A doctor voluntarily assumes her role as physician, and this may help account for why we hold her to its norms in applying the standard of negligence. The same may also be true of a motorist insofar as he chooses to travel on public roads. One might conceive of liability obligations under these roles as contractual. It is harder, however, to argue that neighbors or pedestrians voluntarily accept a set of obligations that accompany their roles. Michael Hardimon has argued for non-contractual grounds of role-obligation, based on a person's identification with a particular role. He writes:

People can and do identify with their non-contractual roles and not just with their contractual roles. And when they do . . . the fact that they occupy these roles will provide them with reasons for carrying out the tasks of their roles. . . . If a woman identifies with her role as a citizen,

this provides her with a reason—an ethical reason [where the role itself is ethical]—for paying her taxes. The basic form of motivation provided by identification with contractual and non-contractual role obligations is the same. . . . In each case, the fact that I occupy the role gives me reason for carrying out its duties.⁵⁶

Through personal identification with roles, they become constitutive of the self. Thus, negligence law serves to institutionalize civic and professional roles. The standards of reasonable conduct, for neighbors no less than for doctors, derive from these roles and negligence doctrine enforces them.

The relational approach to tort law shows that the choice between negligence and strict liability is a matter of negotiating the boundaries of agency.⁵⁷ The coexistence of these different standards, however, has led to charges that the tort system is unfair and philosophically incoherent, that it is founded on a variety of principles that contradict each other.⁵⁸ Historical and economic approaches to tort law illuminate the origins and effects of using different liability standards but fail to answer these concerns about unfairness and incoherence. While it is helpful to understand that negligence may have arisen out of a desire to shelter industry,⁵⁹ and strict liability may have arisen to protect consumers,⁶⁰ neither of these theories explains why judges who apply these standards today understand what they do as an exercise in justice rather than favoritism. Similarly, while the choice between negligence and strict liability rules may significantly influence activity levels, economic theory provides little insight into the pervasive discussion of redressing injustice within pleadings and opinions.

The relational approach to the variety of liability standards more directly addresses concerns about unfairness and incoherence, although it does not completely satisfy them. It reveals that the tort system, with its different conceptions of wrongdoing, is as fair as our general practices of judging responsibility for wrongdoing. By showing how the pleadings of parties and the decisions of judges in tort cases arise out of intuitive judgments that most of us employ, we can more sympa-

⁵⁶ Michael Hardimon, *Role Obligations*, J. PHIL., 333-63 (1994)

⁵⁷ The concept of an externality, which economic analysis employs to determine the efficient allocation of accident costs, rests upon unstated intuitions about the boundaries of agency—in this case, what constitutes an internal cost of an activity.

⁵⁸ See, e.g., WEINRIB, *supra* note 5, at 34-38.

⁵⁹ See Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951); Malone, *supra* note 3, at 28-42; cf. Gary Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717 (1981).

⁶⁰ See, e.g., G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* (1980); Priest, *supra* note 3, at 484-95.

thetically examine them. This heightened sense of identification offers internal perspectives on conflicting claims and helps one understand how parties and judges view different liability standards as fair despite their inconsistency.

Understanding the perceived fairness of competing liability standards, however, is not the same as showing their philosophical coherence. Viewing liability standards in the context of the relationships that they govern may heighten our appreciation of their fairness from the perspectives of parties and judges, but, in the end, it may not yield a unifying foundational theory for these standards. The relational approach to tort law helps explain why judges tolerate the coexistence of inconsistent liability standards (i.e., because they seem fair) despite the unavailability of a single justification for all of them. In law as in daily life, people make and execute judgments concerning fairness in particular situations without comprehensive foundational theories of justice.

Indeed, the philosophical incoherence of tolerating various liability standards may be more a problem for legal theory than a crisis for tort law. The concern about incoherence arises from a view that the purpose of legal theory is to provide a coherent foundational account of judicial decisions using philosophical principles.⁶¹ Such an understanding of legal theory grants normative priority to principles over judgments. If we question this underlying assumption, we may find that the failure of philosophical principles to account for considered judgments represents a shortcoming of this view of legal theory rather than of judicial practice.

An alternative view maintains that the aim of legal theory is to expose the assumptions and implications of parties' and judges' considered judgments using philosophical principles. According to this approach, principles do not undermine judgments but rather help us to examine and understand the reasons people have for adhering to them. Such a process may lead us either to reaffirm the plausibility of these judgments or to question them. It may turn out that those who hold them have misunderstood their own grounds for accepting such judgments and that they ought to change them. It may also happen that given strong enough intuitions concerning these judgments, we may wish to revise the principles by which we evaluate them. Under such an approach to legal theory, inconformity between principles and judgments does not require condemnation of judgments in favor of principles but rather revision of each in the light of the other in what

⁶¹ See WEINRIB, *supra* note 5, at 38-42.

John Rawls has termed the process of seeking “reflective equilibrium.”⁶²

Thus, the relational approach to tort law addresses the concern about unfairness by providing internal accounts of different liability standards that show why those who advocate and apply them consider them to be fair. It reveals the plausible fairness of each of the various conceptions of wrongdoing. The relational approach responds to the concern about philosophical incoherence not by resolving it but rather by questioning its importance for legal practice. This approach rejects the assumption that principles carry more weight than judgments where matters of right and wrong are concerned. By deepening our identification with competing viewpoints in a critical fashion, this approach promotes both self and mutual understanding.

III. OBJECTIONS

The relational approach to tort law asserts that liability standards employ various conceptions of wrongdoing as grounds for decisions and that these conceptions arise out of and regulate different types of relationships. An initial objection against this approach is the argument that objective negligence and strict liability require no wrongdoing at all. This might be so because there is no *wrong* involved in liability under these standards, only misfortune, and/or because the harm was not caused by the defendant’s doing, but rather by his inability to do or by a product that he made.

The language of wrongdoing pervades negligence and strict liability claims. The sense of injustice reflected in tort claims for medical malpractice or blasting accidents stands in sharp contrast to the no-fault character of insurance claims for misfortunes such as hurricanes and earthquakes. The relational approach takes this rhetoric of wrongdoing seriously in attempting to understand the meaning of that term as understood by litigants and judges who use it. That an action produces an outcome harmful to human well-being makes it wrongful according to some of these participants in the tort system.⁶³ That one’s unavoidably inadequate actions or the products of one’s actions are things that one does is, as I have tried to show, more of an open question both intuitively and philosophically than this objection assumes.

⁶² See JOHN RAWLS, *A THEORY OF JUSTICE* 20 (1971); see also T. M. Scanlon, *The Aims and Authority of Moral Theory*, 12 OXFORD J. OF LEGAL STUD. 1 (1992).

⁶³ See, e.g., JOSEPH RAZ, *THE MORALITY OF FREEDOM* 364-65 (1986); Stephen Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992); see also ALBERT CAMUS, *THE REBEL* 304 (Anthony Bowers trans., 1956).

According to the relational approach, the meaning of wrongdoing is precisely what is at stake in arguments about negligence and strict liability. It rejects granting priority to fixed notions of wrongdoing over considered judgments in particular cases. Judges evaluate parties' claims about wrongdoing using a mix of intuitions and doctrinal standards, and their decisions delineate the boundary between injustice and misfortune.

As a second objection, one might respond that although parties and judges speak in the language of wrongdoing, this does not reflect the true grounds of adjudication in tort cases. This objection assumes that either parties or judges or both adhere to the language of wrongdoing on merely formal grounds. Consider each of these possibilities.

Perhaps, according to this objection, parties employ the idiom of wrongdoing not because they really believe that it pertains to their claims but out of a desire to appeal to judges who do so believe. Thus, constructing one's claims using the rhetoric of wrongdoing is a modern-day version of form pleading. Under such a scenario, wrongdoing, although an antiquated form of adjudication, is nevertheless a ground of decision in tort cases and merits examination.

Alternatively, perhaps it is the case that parties genuinely base their claims on conceptions of wrongdoing but judges only employ the language of wrongdoing in order to dress up their true, independent grounds for decision. If this means that parties' beliefs about wrongdoing serve as formal constraints on judicial decisionmaking, then wrongdoing plays an indirect role in judicial decisionmaking, as a constraint on, rather than a basis for, adjudication. If this objection assumes that judges completely disregard the substance of parties' claims and adopt the rhetoric of wrongdoing for purely cosmetic purposes, then the objection fails to take seriously the insistence of judges that they base their decisions on the claims of the parties before them. This skepticism may reveal hidden features of legal practice from an external point of view but it ignores the self-understanding of parties and judges. In contrast, the relational view seeks to expose the presuppositions of legal practice for those engaged in it in order to promote self-critical reflection and appreciation of the plausibility of others' views.

Finally, maybe neither parties nor judges really believe that the basis of tort liability is wrongdoing. Were this the case, then the language of wrongdoing would be a purely formalistic construction, as anachronistic as the forms of action in nineteenth-century English common law. If pleadings and opinions reflected neither the honest sentiments of parties nor the genuine views of judges, then one would expect to see the current tort system collapse absent convincing justifi-

cations for this formalism. This view seems highly implausible given that support for the tort system, despite its gross inefficiencies, arises largely from the belief that it clarifies matters of wrongdoing and injustice in addition to providing compensation and deterrence.⁶⁴

A third objection to the relational view is the claim that the choice of liability standard in particular cases is remedy-driven.⁶⁵ Plaintiffs may frame a claim for an injury in terms of intentional wrongdoing in order to qualify for non-compensatory damages or in terms of negligence or strict liability in order to recover more easily. They may even plead all of these in the alternative. Such considerations are most certainly central to the way lawyers think about tort law.

This objection actually supports the relational approach. Moving between different liability standards requires redescribing the act and reconfiguring the relationship between the parties. Consider the example of a plaintiff struck by a bottle that left the defendant's hand shortly prior to impact. A claim for intentional tort requires that the plaintiff argue that the defendant threw the bottle at him in a personal act of aggression. In evaluating this claim the court will focus on the defendant's intentions with regard to the plaintiff. An alternative claim for negligence requires that the plaintiff argue that the defendant was being careless in discarding the bottle, and the court will focus on his conduct in the light of standards of reasonable civic behavior towards others. Thus, each liability standard retains its association with a distinct type of relationship, even when pled in the alternative. Part of the judge's liability determination in such cases is evaluating what the nature of the relationship between the parties was given the facts presented.

The association between rules and relationships is thus reciprocal. A judge may begin by asking what liability standard properly governs a particular relationship or she may ask whether a particular liability standard properly governs an undefined relationship in question. This reciprocity merely reflects the dialectic nature of the association: Rules grow out of, as well as govern, relationships.

IV. THE RELATION BETWEEN LEGAL RULES AND MORAL INTUITIONS

The claim that the meaning of wrongdoing in liability standards varies according to the relationship between parties lies at the center of what I have called a relational approach to tort law. This approach ex-

⁶⁴ See Jules Coleman, *Justice in Settlements*, in *MARKETS, MORALS AND THE LAW* 202 (1988); Owen Fiss, *Against Settlement*, 93 *YALE L. J.* 1073, 1085 (1984).

⁶⁵ I am grateful to David Chang for alerting me to this objection. Conversation with David Chang, Professor of Law, New York Law School (1996).

amines rules in the context of the relationships to which they apply. It highlights the interaction between law and moral life.

The relational view reveals that very basic features of our self-conception are subject to debate and adjudication by courts. Determining matters of responsibility for harm in daily life is, in part, a negotiation over the definition of the self.⁶⁶ When parties fail to reach agreement among themselves, they may submit their claims to litigation. In choosing and applying liability standards judges are, by implication, determining the boundaries of agency.

The relational approach directs attention to the interdependence of role-morality and negligence standards. Sometimes disagreements over responsibility for harm require clarifying the obligations attaching to a particular role in society. Shared expectations with regard to roles serve to institutionalize them. This makes possible a higher degree of confidence in others without having first to form deep personal attachments to them. For this reason, roles are an essential component of moral life in a complex society. When the expectations that shape them conflict, liability rules can provide authoritative clarification.

The relational approach illuminates how strict liability standards delineate the border between injustice and misfortune as causing harm to others becomes increasingly impersonal and mediated in modern technological life. The expansion of liability for ultra-hazardous operations and dangerous products involves a change in the way we view the effects of an agent's activity. Effects that were once considered independent, free-standing forces in the world are now understood by many people as parts of the agent's self for which he is responsible. In economic terms, more and more external effects of an activity are seen as costs of that activity. From a political perspective, this expansion of liability signals a contraction of the private sphere, within which the state has no business interfering. Thus, tort law both reflects and influences fundamental concerns of moral judgment, economic regulation, and political life.

By viewing tort doctrine as the outcome of disputes between parties rather than an expression of philosophical principles, one comes to understand that persistent disagreement between people arises out of a clash of opposing intuitions, each of which is plausible but not grounded in a foundational theory. The relational approach puts aside philosophical concerns about conceptual coherence while using the tools of philosophy to expose and examine the presuppositions of competing views. Understanding that the source of liability rules lies in

⁶⁶ See SMILEY, *supra* note 49, at 255-57; Dan-Cohen, *supra* note 49, at 961.

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our intuitions about the self and our day-to-day relations with others illustrates Justice Cardozo's maxim that "[l]aw is . . . an expression of customary morality."⁶⁷

The relational approach reveals the intuitive plausibility of competing views while simultaneously exposing their philosophical limitations. This approach can help parties who lose in litigation understand the reasons that justify the state's judgment against them. Providing such understanding is essential to resolving disputes without discouraging disagreement. The relational approach can also help parties who win litigation avoid the mistake of thinking their own positions infallible and disregarding the claims of their opponents. Appreciation for the imperfection of dominant opinions promotes diversity of views in personal, civic, and public life. Thus, as a theory, the relational view seeks to understand interpersonal relations. As a practice, it seeks to improve them.

⁶⁷ BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 104 (1921).