Strict Liability in Negligence

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INTRODUCTION

The distinction between strict liability and negligence is a fundamental feature of tort law. Tort law theory contrasts strict liability and negligence by identifying different justifications for each standard.\(^1\) Tort law in practice draws a sharp distinction between strict liability and negligence. Not only is this distinction highly important as a matter of substance; it seems to be taken for granted that the distinction is clear and uncontroversial.\(^2\)

Bob Rabin has taught us much about the relation between strict liability and negligence. Through his insights we now understand that the supposed evolution in the common law of torts from strict liability to negligence was more nearly an evolution from no liability to negligence.\(^3\) And he has shown us how the ideas that underlie enterprise liability, which are usually thought to be mainly directed at the expansion of strict liability, have influenced the development of tort liability rules in general.\(^4\)

In this Article and in his honor, I want to build on Bob’s interest in the relation between strict liability and negligence by examining yet another aspect of the complicated connection between these two bases of liability for accidental injury. Liability imposed in negligence

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\(^2\) One finds little, if anything, in major treatises suggesting that the distinction is questionable or that the boundary between the two domains is unclear. See, e.g., Dan B. Dobbs, 1 The Law of Torts § 112, at 263–64 (2001) (identifying negligence and strict liability as different bases of liability); W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 75, at 536 (W. Page Keeton ed., 5th ed. 1984) (noting that strict liability is imposed when the defendant has not “departed in any way from a reasonable standard of intent or care”).


and strict liability cannot always be as clearly and easily distinguished as tort theory and tort practice suggest. In particular, some forms of liability imposed in negligence seem more like strict liability. For example, under the objective standard of negligence, liability may be imposed even when the defendant was not capable of exercising what amounts to reasonable care. Similarly, under certain circumstances, reasonable care requires perfect compliance with precautionary requirements. Finally, the “thin-skull” rule imposes liability on a defendant who negligently risks harm to a foreseeable plaintiff even if the amount of harm this plaintiff suffers is far in excess of what was foreseeable. In the first example, the defendant is liable even if he does his best. In the second example, the defendant is liable unless he achieves perfect compliance. And in the third example, the defendant is liable for something he could not foresee. Imposing liability for negligence in these situations resembles strict liability. At the least, these forms of negligence liability certainly are “stricter” than many others.5

The existence of strict liability of this sort in negligence could, in a sense, be an embarrassment for both tort law theory and practice. Tort law in practice avoids the potential embarrassment by defining it out of existence. What actually amounts to strict liability in negligence is virtually never labeled this way in the case law. But saying that strict liability is negligence does not make it so. Some scholars have observed that there are “pockets” of strict liability in negligence law and have proposed explanations for them.6 Others have denied that this is strict liability at all.7 I am less concerned with terminology

5. For use of the term “stricter” to describe features of French and German tort law, see Cees Van Dam, European Tort Law 258 (2006).


here than with the fact that, whatever these forms of liability may be called, they are distinctive in certain ways from much of mainstream negligence and are therefore worthy of separate attention. In what follows, I will identify the arguments for imposing strict liability generally, examine the ways in which the different forms of strict liability in negligence can be explained and justified, and discuss two implications of my analysis.

The first implication is that negligence is not the pure type of liability that it is sometimes thought to be. The existence within negligence of several forms of liability that are strict, or at least stricter than the core negligence paradigm, weakens the claim that negligence liability may have to moral superiority over strict liability. One way negligence has maintained itself, and maintained its dominance of accident law, is by incorporating stricter liability within it.

The second implication of my analysis is that the normative character of tort liability is more complex, and perhaps more ambiguous, than either rights-based or instrumental theories standing alone can easily capture. One of the most interesting things about the instances of strict liability in negligence is that, whether we call them strict liability or deny them this status, there seems to be widespread agreement that they are normatively attractive. The typical justifications that instrumentalists give for selectively imposing strict liability apply fairly comfortably to all three of these forms of liability. Similarly, rights-based theories of tort law have given or can easily give justifications for all three. In short, imposing these forms of liability is not controversial, but what to call them, and how to justify them, is.

This confluence of support on the merits for doctrines whose statuses are contested suggests that tort law doctrines may need to satisfy both instrumental and rights-based concerns in order to be stable and persistent. A negligence system that purports to condition liability on the commission of wrongs—but also sometimes imposes stricter liability for conduct that is not so clearly blameworthy—would seem to be influenced in practice by the same instrumental considerations that support the imposition of strict liability. Conversely, instrumental justifications for tort doctrines are likely to be unpersuasive when these

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8. The work of the rights theorists to which I make the most reference in my analysis, Ernest Weinrib, John Goldberg, and Benjamin Zipursky, is formally positive rather than normative, but on my reading, has a consistent tone of normative approval of the doctrines that I term strict liability in negligence. It would be astounding to learn that, after all the energy they have invested in describing the normative structure of tort liability, and particularly negligence law, they nevertheless object to a significant number of its principal doctrines. As I note below, however, Goldberg and Zipursky apparently are not as wedded to the thin-skull rule as they are to the objective standard and the perfect-compliance requirement. See discussion infra Part IV.C.
doctrines do not also satisfy rights-based concerns. For example, de-
spite instrumental arguments for imposing liability in order to pro-
mote deterrence, almost no one thinks that negligence liability should
be imposed regardless of the relation between the defendant and the
plaintiff simply in order to deter risky conduct. Regardless of whether
our system of accident law has mixed “goals,” it certainly appears to
be subject to mixed side constraints.

II. THE DISTINCTION AND THE PUZZLE

It would be difficult to exaggerate the extent to which the distinc-
tion between negligence and strict liability is embedded in tort law.
At the requisite level of generality and across a wide range of settings,
the distinction is perfectly valid and easily applied. Negligence is the
failure to exercise reasonable care; strict liability is the imposition of
liability even when reasonable care has been exercised.9

There has been considerable disagreement in the tort theory litera-
ture regarding what constitutes reasonable care. Rights-based theo-
ries define reasonable care by reference to moral or social norms—the
level of respect and vigilance for physical safety that individuals are
entitled to receive from others and that others owe to individuals.10 In
contrast, instrumentalist theories define negligence as the taking of
socially or economically excessive risk.11

More precise description depends on the particular theory being ap-
plied. Some rights theories, such as certain versions of the corrective
justice conception, see negligence liability as reflecting moral respon-
sibility for wrongfully causing loss.12 Other rights theories understand
negligence as a legal wrong rather than a moral wrong13 and therefore
as the failure to act with the requisite level of civil competence or
failure to comply with some other social norm.14 For these latter
rights theories, true strict liability, which consists of the imposition of
liability even when the defendant has acted competently and complied

10. See, e.g., Benjamin C. Zipursky, Sleight of Hand, 48 Wm. & Mary L. Rev. 1999, 2030–31
(2007).
(asserting that the dominant function of the negligence system is to bring about “the efficient—
the cost-justified—level of accidents and safety”).
12. See, e.g., JULES L. COLEMAN, RISKS AND WRONGS 330–32 (1992); WEINRIB, supra note 7,
at 134–35.
13. See Goldberg & Zipursky, supra note 7, at 1154–56 (identifying reasons why it might be
plausible to see legal negligence as a form of wrongdoing).
(2003); see also Zipursky, supra note 10, at 2033–40.
with other applicable norms, does not really constitute tort liability at all.\textsuperscript{15} For the dominant instrumental theories, which apply a cost–benefit, or “Learned Hand,” test for negligence,\textsuperscript{16} any liability imposed when it would not have been cost-effective to take precautions that would have avoided the harm in question constitutes strict liability.

It is a bit simplistic, however, to treat strict liability as if it were a single, monolithic notion. On the one hand, there are forms of liability that are imposed without regard to negligence and that carry little or no disapproval. For most commentators, “traditional” strict liability for harm caused by abnormally dangerous activities falls into this category. There is no message implied in the imposition of this form of liability that the defendant should have behaved differently. Such conduct does not breach a standard of care. The term “strict liability” could be reserved for this form of liability alone.

On the other hand, we sometimes use the term “strict” to refer to forms of liability that do not have the wholly neutral normative valence of traditional strict liability but are not censurable in the same way as ordinary negligence either.\textsuperscript{17} If we understand the paradigm example of negligence to involve conduct that is careless, foolish, or selfish, and therefore subject to serious (often moral) disapproval,\textsuperscript{18} then there are a variety of forms of negligence liability that are stricter than this, regardless of whether we would label them “strict liability” in the traditional sense. Liability imposed under the objective standard, the perfect-compliance requirement, and the thin-skull rule fits this description. The first two forms of liability, especially, often result from conduct that is not subject to serious disapproval and arguably to no disapproval at all. In contrast to traditional strict liability, we may prefer that the conduct not occur, but nonetheless regard the conduct as inevitable and, for practical purposes, not wholly avoidable. In contrast to traditional strict liability, this conduct breaches a standard of care, but even if not justified, the conduct might be excused. Yet, tort law does not excuse it.

\textsuperscript{15} See Goldberg & Zipursky, supra note 1, at 267 (“Although by convention, strict liability for abnormally dangerous activities clearly is part of what lawyers define as ‘tort law,’ strictly speaking it does not belong in this department.”).

\textsuperscript{16} See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.) (describing the level of care required as being a function of the burden of precautions, the probability of loss, and the gravity of the resulting injury if that loss occurs).

\textsuperscript{17} But see Coleman, supra note 12, at 368 (“Ultrahazardous activities are inherently faulty.”); Weinrib, supra note 7, at 188–89 (arguing that strict liability for abnormally dangerous activities “is an extension, not a denial, of the fault principle”).

\textsuperscript{18} I am grateful to Vincent Blasi for suggesting this division of the forms of negligence to me.
Regarding this form of stricter liability as an anomaly, or simply assimilating liability for this kind of conduct with the negligence paradigm, ignores both the special reasons we might impose liability for it and the extent to which negligence liability consists of it. In my view a good deal of this liability can be explained by reference to the same set of (admittedly, sometimes controversial) reasons that can explain strict liability generally. I therefore turn to the theories of strict liability that may help us understand strict liability in negligence.

III. THEORIES OF STRICT LIABILITY

There is no single authoritative or canonical statement of the theory underlying strict liability in tort. A number of courts and scholars have developed different positive or normative theories that explain or support strict liability.\(^\text{19}\) It is important to recognize that many of the arguments for strict liability implicitly accept the notion that some, perhaps even most, liability for accidental harm should be based on negligence. But they contend that, in certain contexts, the negligence requirement does not or should not apply and that strict liability is or should be imposed. Thus, these are not simply theories about strict liability; they are theories about the boundary between negligence and strict liability and about the circumstances under which each approach is or should be applied.

A. Reducing Information and Error Costs

Determining whether a party has been negligent is often a highly fact-intensive process. Adducing proof of negligence may therefore be economically costly and time consuming. For example, showing how carefully the defendant acted on a particular occasion may in-
volve more cost and time than showing that the defendant was involved in a particular activity for which strict liability is imposed. Expert testimony is more likely to be required or permitted to prove negligence than to prove the defendant's involvement in such an activity. Evidence of compliance with, or violation of, a customary practice is admissible because it is relevant to negligence, but it is unlikely to be relevant in a strict liability action. Because an unexcused violation of an applicable safety statute constitutes negligence, whether a statute was violated may be at issue in negligence but not in strict liability cases. Imposing strict liability makes all of these issues irrelevant, as there is no need to gather evidence necessary to determine at trial how the defendant acted, whether the defendant complied with a custom or violated a statute, or whether the defendant was negligent in some other way. And there is no need to occupy a trial with these factual questions; accordingly, trials may be shorter or may not even need to occur. Strict liability may therefore reduce litigation costs in the category of cases in which the cost of making the factual findings necessary to resolve the relevant negligence issues would otherwise be substantial.

Further, because it is potentially more fact intensive, there is a greater risk of error in making the negligence determination than in determining whether the facts necessary to support strict liability have been proved. In strict liability, for example, there may be a need only to determine whether the defendant used explosives or whether bodies of water are common in the area in which a reservoir burst. These factual determinations tend to produce less error. In negligence, by contrast, the care with which the defendant acted is at issue. Such questions are probably more prone to error in fact-finding. Therefore, parties who were not negligent may be found liable, and parties who were in fact negligent may be found not to have been negligent. Such errors may have a variety of undesirable effects: the fact that the law does not accomplish what it purports to do may undermine respect for the law; there may be overdeterrence or undert deterrence of future actors because of the over-imposition or under-imposition of liability; and like cases may not be treated alike. In contrast, if strict liability is imposed in the category of cases in which information or error costs are likely to be comparatively high, these deficiencies may be reduced.20

20. The reduction of information and error costs is an instrumental goal of the sort that rights theorists rule out of consideration. See Goldberg & Zipursky, supra note 1, at 65 (arguing that deterring accidents and compensating victims are effects of imposing tort liability but not "functions" of tort law). Nevertheless, it is not entirely clear what rights theorists would have to
B. Influencing Activity-Level and Research Decisions

Exercising reasonable care does not eliminate the risk of injury. Other things being equal, therefore, the more a party engages in an activity, even if she exercises reasonable care, the more often injury or damage will result. The threat of liability for negligence thus generates no incentive to determine whether it would be more sensible to engage in less of the activity because exercising reasonable care will insulate a party from any liability for injury or damage that results from engaging in the activity. In theory, liability in negligence could be imposed for engaging in too much of an activity, albeit with reasonable care. In practice, however, negligence liability is rarely imposed for engaging in an excessive level of activity. A party who drives

say about whether reducing information and error costs could ever help to justify the imposition of strict liability. Suppose that injuries caused by a particular activity (1) are almost always caused by negligence, but that (2) determining whether there was negligence in any particular instance would be costly and subject to considerable error. The availability of res ipsa loquitur would not always or necessarily solve this problem because defendants would still be free to introduce potentially extensive evidence showing that they were not negligent and juries would still be free to find that defendants were not negligent.

Ernest Weinrib argues that imposing strict liability in cases satisfying the first condition is appropriate on corrective justice grounds, without making any reference to information or error costs. See Weinrib, supra note 7, at 189–90. But the fact that imposing such liability is appropriate does not necessarily mean that corrective justice requires it. As long as either approach was acceptable, it is uncertain whether Weinrib would permit the choice between strict liability and negligence to be influenced by the magnitude of these potential costs. Similarly, although John Goldberg and Benjamin Zipursky deny that strict liability is "tort" liability, they do not seem to rule out imposing strict liability in all instances. See Goldberg & Zipursky, supra note 1, at 267. Nor do they seem committed, as a normative matter, to imposing liability in all cases where a civil wrong has been committed. The question then becomes whether other factors, such as information and error costs, might incline Goldberg and Zipursky to support or oppose imposing liability when doing either would otherwise be acceptable to them.

My hunch is that, were the choice between two otherwise acceptable liability rules, rights theorists such as Weinrib and Goldberg and Zipursky might deny that reducing information or error costs is or should be a goal or function of tort liability, but that they might consider the existence of these costs to be acceptable practical considerations and would not contend that the costs are or should be irrelevant to the formulation of tort liabilities. See, e.g., Goldberg & Zipursky, supra note 7, at 1158 (recognizing, in a discussion about the objective standard of negligence, "that judges and legislators should avoid resting legal determinations on questions that are difficult to adjudicate"). For this reason, I think that these rights theorists might well permit consideration of information or error costs in deciding whether to adopt a rule imposing strict liability for harm caused by a particular category of activity; in deciding whether to impose a particular form of negligence liability; or in identifying the particular legal wrongs that should be subject to negligence liability.

21. In my view, a level of activity could be considered negligently excessive if the marginal costs of engaging in that level of activity were greater than the marginal benefits that resulted from the activity.

22. See Abraham, supra note 9, at 171. I am using the notion of a "level of activity" to mean how much or often an actor engages in an activity. Stephen Gilles has usefully distinguished among (1) the decision to engage in an activity at all; (2) the decision to engage in it under certain circumstances; and (3) the decision about how much or how often to engage in it. He
safely is not held liable in negligence for having driven too many miles during the week in which he is involved in an automobile accident; oil companies are not held liable in negligence for drilling too many wells as long as the wells are not drilled in a negligent manner.

Threatening to impose strict liability for injury or damage resulting from engaging in an activity can therefore create an additional incentive. Because a party will be held liable even for harm that results when it exercises reasonable care, liability costs can be reduced by engaging in less of the activity or partially or fully substituting a different, cost-effective activity. Businesses that previously delivered goods to their customers may find it cost-effective to deliver less often or to deliver through a third party such as UPS or FedEx. Restaurants that previously sold both hamburgers and fish cakes may find that, if they are strictly liable for injuries caused by the food they sell, risking liability for harm caused by bones in their fish cakes is not cost-effective. They may therefore stop selling fish cakes. Alternatively, if the businesses continue to sell fish cakes but their prices rise to take account of this increased liability, customers may buy fewer fish cakes and more hamburgers, thus changing the restaurants' activity levels. In short, either the parties who are threatened with strict liability or those who deal with these parties may have increased incentives to consider whether to reduce their activity levels or to substitute less costly activities for more costly ones.

The prospect that activity levels may be reduced not by those threatened with liability, but by their potential victims, suggests the fundamental point that, in a sense, there is always strict liability. Either the injurer is strictly liable or the injurer is liable only for negligently caused harm and the victim bears the cost of nonnegligently caused harm. In effect, the victim is strictly liable for harm caused by some of her own choices and therefore has activity-level incentives analogous to those that the injurer would have if it were strictly liable. The choice, therefore, is not whether to impose liability only for negligence or also to impose strict liability for nonnegligently caused harm, but whether to impose strict liability on the injurer or on the victim.

From the activity-level standpoint, this insight helps explain why some activities are subject to strict liability and why others are governed by negligence. Strict liability should be imposed when potential injurers' activity levels are likely to have more impact on accident

2012]  STRICT LIABILITY IN NEGLIGENCE  279

argues that negligence law often addresses whether either of the first two decisions is negligent but rarely addresses the third, which is the sense in which I am using the notion. See Gilles, supra note 6, at 332–36.

rates than potential victims' activity levels. In addition, there is little or no need for strict liability on the part of either potential injurers or potential victims when the exercise of reasonable care, coupled with the defense of contributory or comparative negligence, is sufficient to eliminate the risk of most accidents. For example, if virtually all automobile accidents are caused by negligence, then imposing liability based on negligence alone will create sufficient incentives for accident reduction, and strict liability will not be necessary.

Similarly, parties threatened with strict liability have a greater incentive than those who are liable only for negligence to investigate alternatives that will reduce their liability costs. If a substitute activity is not immediately feasible, investing in research that will identify or invent a substitute activity may be cost-effective. The parties in the best position to decide whether to perform research are sometimes potential injurers, sometimes potential victims, and sometimes there is little prospect that more research will be performed by either injurers or victims. Moreover, whether it is worthwhile to invest in research and development is often uncertain because the results are not known in advance. But the point is that, whatever research and development incentives there may be, in certain settings they may be greater under strict liability.

C. Promoting Insurance of Losses

A third argument for strict liability rests on distributional, rather than cost-reduction or incentive-creating, considerations. We saw above that, in a sense, there is always either injurer strict liability or victim strict "liability" for the costs of nonnegligently caused accidents. Strict liability might be imposed because the injurer is in the best position to insure or otherwise broadly distribute the costs of nonnegligently caused accidents.

The cost of nonnegligently caused injuries must be borne by either injurers or victims. If those in a particular category of injurers are generally more likely to be better insurers of these costs, then their superiority in this respect is an argument for imposing strict liability on them. For example, blasters may be better situated to purchase

25. See Shavell, supra note 6, at 24.
26. See, e.g., Abraham, supra note 9, at 173–74 (noting that injurers generally, but not always, will be superior insurers); see also Guido Calabresi, The Costs of Accidents 248 (1970) (observing that the breadth of the insurance categories that will actually bear costs depends on the amount of differentiation among categories).
liability insurance, or to raise the cost of their services, than their occasional individual victim is able to purchase health and disability insurance. On the other hand, if particular categories of victims are likely to be superior insurers of the costs of nonnegligently caused accidents, then this is an argument against imposing strict liability. Capacity to insure depends in part on knowledge of the nature and probability of the risks posed by an activity. Because such knowledge is also a factor, along with the capacity to control risk, in an actor's ability to influence whether accidents occur, insuring capacity will sometimes, though not always, be congruent with activity-level considerations.

D. Satisfying Norms of Responsibility

The last cluster of arguments for strict liability turns on the existence of some norm of responsibility for harm-causing conduct. One version of this approach is the venerable "benefit" theory developed by Francis H. Bohlen, which has been more recently been expounded by Gregory Keating. The notion at the core of this theory is that those who benefit from engaging in an activity should rightly bear the costs associated with the activity. The benefit theory leads its proponents to support strict enterprise liability on the ground that the owners, employees, and customers of enterprises benefit from their activities. At this high level of generality, the benefit theory cannot decide individual cases. Standing alone, the benefit theory cannot differentiate among the different enterprises that derive benefits from activities that result in harm. Additionally, it cannot explain why enterprises should be held strictly liable to their own customers, who are both beneficiaries and potential victims of enterprise activity. For answers to these questions, reference to incentive-based or insurance-based arguments is likely to be necessary.

A quite different version of a rights-oriented norms approach has been developed at length by John Goldberg and Benjamin Zipursky.

27. The exception would be cases in which an actor has little or no ability to control a risk or to conduct research that might identify ways of controlling it, but has superior knowledge of the risk and is therefore likely to be a superior insurer of that risk.


29. Keating, supra note 19, at 1289.

30. Keating subsequently argued that strict liability must be justified not only by the benefit theory, but also by showing that the extra burden that strict liability places on injurers is less than what results when victims must bear losses that are nonnegligently caused. See generally Gregory C. Keating, Rawlsian Fairness and Regime Choice in the Law of Accidents, 72 Fordham L. Rev. 1857 (2004).
These two theorists reject the notion that negligence liability redresses only moral wrongs. They contend that negligence liability provides civil recourse for the commission of a variety of wrongs and that many instances of what others (including myself) might call strict liability actually involve legal wrongs that fit comfortably within the normative structure of negligence. What makes these instances wrongs, even when they are not moral wrongs, is that they involve a breach of a relational norm linking the victim and injurer.

There is, in my view, an understandable ambiguity about exactly what renders conduct legally wrongful under this theory when the conduct is not morally wrongful. Zipursky, writing alone, describes reasonable care as "civil competence" and negligence as the failure to satisfy this standard. Writing together, Goldberg and Zipursky argue that legally wrongful conduct displays a series of characteristics "defined in terms of success rather than best efforts." Unlike in traditional strict liability, we think that defendants should not, or at least wish that they would not, have behaved as they did. But, unlike the negligence cases in which the defendant has been (in my terms) careless, foolish, or selfish, we recognize that there may not have been anything that these defendants could have done to avoid behaving as they did. Nonetheless, they are answerable for negligence.

31. See Goldberg & Zipursky, supra note 7, at 1144.
33. Goldberg & Zipursky, supra note 7, at 1157.

The first feature of negligence law that connects it to the idea of wrongs is that it consists in large part of norms enjoining people not to act (or to act) in certain ways with respect to certain interests of others. . . .

Second, victims of these norm violations are likely to regard themselves as having been wronged and tend to have concomitant feelings of resentment and blame in response. . . .

Third, and connecting the first two points, various systems and practices of education and norm reinforcement exist that involve identifying norms of careful conduct, identifying transactions in which the norm has been violated with respect to some person, and then permitting, sanctioning, or facilitating a response by the victim that involves isolating the norm-violator and subjecting such person to adverse treatment. . . .

Fourth, the language of wrongs fits quite naturally with negligence law's core idea that one has a duty—is literally obligated—to refrain from acting toward others in certain ways, and correlatively, with the idea that others have the right not to be acted upon in such ways. . . .

Finally, the issue of whether an individual has wronged another generates a series of questions regarding how the wrongdoer should be treated. At a minimum, tortious behavior such as negligence stands to harm the wrongdoer's reputation. This consequence goes hand in hand with the opprobrium that accompanies the determination that a person has acted negligently toward another.

Id. at 1154–56.
Keating, Goldberg, Zipursky, and other rights-oriented theorists\textsuperscript{34} all contend that liability is imposed not for instrumental reasons, but because of the normative relation between certain injurers and certain victims. The content and breadth of this relation and what constitutes norm-triggering behavior may vary from theory to theory, but for each theory, the basis of what I call strict, or at least stricter, liability is (or should be) that an obligation of responsibility runs between injurer and victim that supports the imposition of liability even in the absence of moral fault.

IV. THREE FORMS OF STRICT LIABILITY IN NEGLIGENCE

There are a number of examples of strict liability in negligence that exhibit slightly different characteristics.\textsuperscript{35} In this Part, I discuss three examples of strict liability in negligence that are important doctrines in accident law, explain the sense in which each doctrine imposes strict liability, and analyze the major instrumental and rights-based arguments for these doctrines.

A. The Objective Standard

Reasonable care is judged by an objective standard. In general, the particular abilities and characteristics of the defendant\textsuperscript{36} are not relevant.\textsuperscript{37} The result is that a defendant who does not have the ability to exercise reasonable care, who can only exercise reasonable care at greater burden to himself than is socially or economically cost-effective, or who benefits from exercising less than reasonable care to such an extent that it is not socially or economically cost-effective for him to exercise reasonable care is nonetheless held liable for negligence. In these instances, the defendant is not morally at fault, has not violated the Learned Hand conception of negligence, or both. Imposing liability under these circumstances amounts to imposing some-

\textsuperscript{34} See, e.g., Epstein, supra note 19, at 151; Fletcher, supra note 19, at 537–38.

\textsuperscript{35} In addition to the examples I discuss, res ipsa loquitur, respondeat superior, liability for breach of a nondelegable duty, and joint and several liability for a single, theoretically divisible but practically indivisible harm exhibit some feature of strict liability. See generally James Goudkamp, The Spurious Relationship Between Moral Blameworthiness and Liability for Negligence, 28 MELB. U. L. REV. 343 (2004) (discussing some of these other examples).

\textsuperscript{36} For simplicity I will refer in the remainder of this Article mainly to the defendant or to defendants, whereas I could accurately refer to both plaintiffs and defendants. Although plaintiffs are also judged by an objective standard, there is a longstanding question in the literature whether they should be or already are so judged in practice. See, e.g., Fleming James, Jr., The Qualities of the Reasonable Man in Negligence Cases, 16 Mo. L. REV. 1, 1–2 (1951).

\textsuperscript{37} The seminal case on point is Vaughan v. Menlove, (1837) 132 Eng. Rep. 490 (C.P.) 492.
thing like strict liability. That is, although the defendant is described as negligent, he is without fault.38

One of the earliest justifications for the objective standard was given by Oliver Wendell Holmes, Jr., who observed "the impossibility of nicely measuring a man's powers and limitations."39 Today, one may interpret that observation as arguing that the desirability of reducing what we now call information and error costs justifies the objective standard. The cost of fine-tuning the negligence determination to take into account small variations in the abilities of different individuals would be prohibitively high. Because abilities are often subtle, the accuracy of such determinations, even if making them would not unduly increase litigation costs, would be subject to question. Thus, an objective standard is more attractive. The strict liability component of the objective standard is a means of avoiding the high cost of and uncertainty in determining what Holmes called the "powers and limitations" of each individual defendant.40 Instead, the parties need only direct their evidence toward, and the finder of fact need only compare the conduct of the defendant to, the objective standard of reasonable care.

There is more involved in the objective standard, however, than merely minimizing information and error costs. As noted earlier, strict liability has greater capacity than negligence to influence activity levels.41 In negligence, it is rare for the plaintiff to contend, and almost impossible to prove, that the defendant engaged in an unreasonably high amount of the activity that caused the plaintiff harm.42 Typically we do not have easily ascertaining norms about activity levels,43 understood as the amount or magnitude of engagement in an

38. There only a few exceptions to the objective standard. There is some concession to the young when they are engaged in children's activities, but they are judged by the objective standard when engaging in adult activities. See, e.g., Daniels v. Evans, 224 A.2d 63, 64–66 (N.H. 1966). Limitations resulting from significant physical disabilities (blindness is the recurring example) may be taken into account, but only if it was reasonable for someone with that disability to engage in the activity giving rise to harm. KEETON ET AL., supra note 2, § 32, at 175–76. Mental disabilities are less likely to be taken into account, probably because they are more susceptible to fraudulent proof and because applying the objective standard gives the guardians of those with severe mental disabilities a greater incentive to supervise them. ABRAHAM, supra note 9, at 59–60.


40. Id. For an argument that Holmes considered the objective standard to be something like strict liability, see DAVID ROSENBERG, THE HIDDEN HOLMES: HIS THEORY OF TORTS IN HISTORY 129 (1995) (referring to "his pathbreaking if cryptic explanation" of the standard's strict liability effect).

41. See supra notes 21–25 and accompanying text.

42. See ABRAHAM, supra note 9, at 171.

43. See id. at 171–72.
activity. Moreover, even if we had such norms, it would often be difficult to prove a causal connection between engaging in an excessive amount of an activity and the harm suffered by the plaintiff. Even if the defendant had driven fewer miles that week, it would be uncertain whether he would have been driving at the time of the accident with the plaintiff. Proving a causal connection between an untaken safety precaution and the plaintiff's injury is much simpler than proving the causal connection between an excessive activity level and the plaintiff's injury.

The threat of liability under the objective standard, however, can create an incentive for certain defendants to consider whether to adjust their activity levels. A potential defendant threatened with liability under a standard with which he cannot comply has the incentive to consider whether to reduce his level of injury-causing activity to the point at which the marginal benefit of any additional activity and the marginal cost of additional liability that would result from that additional activity are equal. Imposing liability in negligence under an objective standard has the potential to produce precisely this incentive for accident reduction for individuals who would otherwise be held not to have been negligent.

Those who find it impossible to comply with the objective standard or whose costs of compliance are prohibitively high are nonetheless held liable for failure to comply with that standard. In effect, they are encouraged to decide what activity level is optimal for them because it would be too costly or too likely to produce error to make this determination through litigation under a subjective standard. These parties are given the incentive to determine, given the threat of liability, whether they would be better off reducing the level of the injury-causing activity in which they engage. The "hasty and awkward" man, whose slips and falls Holmes found "no less troublesome to his neighbors than if they sprang from guilty neglect," is encouraged to decide whether it would be better for him to do less walking and instead

44. See Gilles, supra note 6, at 333.

45. Interestingly, the objective standard results in liability that is suboptimal for those who gain sufficient benefits to make noncompliance worthwhile for them. From the instrumental standpoint, this treatment is just another manifestation of the cost and difficulty that comes from determining, case by case, whether a party was subjectively negligent.

46. See Warren F. Schwartz, Objective and Subjective Standards of Negligence: Defining the Reasonable Person to Induce Optimal Care and Optimal Populations of Injurers and Victims, 78 Geo. L.J. 241, 242 (1989) (asserting that both the objective and subjective standards attempt to "induc[e] each person who engages in an activity to take what is optimal care for that person").

47. Holmes, supra note 39, at 108.
take mechanized transportation or stay at home and have people come to see him.

However, the extent to which such individuals have the capacity to react to the incentives created by the threat of liability under the objective standard should not be exaggerated. The immediate impact of the objective standard is to impose what amounts to strict liability on individuals whose capacities are below average. These individuals will consider changing their activity levels only if they know about the impact that the objective standard will have on them and also are capable of changing their activity levels in response. I do not doubt that there are some settings in which the incentives created by the objective standard actually have a real impact. For example, those whose substandard driving results from their clumsiness or inability to concentrate for substantial periods may well drive less so as to reduce the probability that they will be involved in accidents that generate increases in their automobile liability insurance premiums (as well as reduce the risk of injury to themselves and others). But in general, I am skeptical that the behavior of individuals with below-average abilities, who also typically are not repeat players in the tort system, is much affected by the strict liability component of the objective standard.

On the other hand, given the way in which vicarious liability under the doctrine of respondeat superior operates, it may well be that the principal behavioral impact of the objective standard is to influence employers’ activity levels. Regardless of whether the objective standard influences ordinary but below-average individuals through the threat of individual liability, the presence of such individuals in an employer’s workforce will increase the employer’s potential liability. As a result, employers will have an incentive either to arrive at a division of labor that reduces the involvement of such individuals in activities most likely to result in liability or, if this is not feasible, to adjust the level of the activity in question.

Like instrumental theories, rights theories have no quarrel with the objective standard, though they deny that it involves any strict liability. Ernest Weinrib argues that a subjective standard would ignore the correlative nature of the relationship between the plaintiff and the defendant and thereby create a transactional inequality between the parties, which would violate corrective justice. Jules Coleman calls the objective standard an instance of “fault in the doing” rather than

48. For example, anti-discrimination laws might prohibit such a division of labor or below-average individuals might not always be identifiable by employers.

49. WEINRIB, supra note 7, at 178–79.
“fault in the doer.”

Goldberg and Zipursky contend that one can act wrongfully, in the sense I described earlier of having committed what they call a legal wrong, even though one lacks the ability to have acted otherwise. The inability to comply with the objective standard is simply “compliance luck.” Moreover, they recognize that a subjective standard would create fact-finding difficulties, and they therefore come close to conceding that the objective standard has the advantage of reducing information and error costs. Additionally, the benefit theory developed by Bohlen and revived by Keating, while it has nothing to say directly about the objective standard, would seem to support the standard in cases where respondeat superior results in liability on the part of the employment enterprise for employee conduct that breaches the objective standard.

Avihay Dorfman has recently proposed a different justification for the objective standard. Dorfman argues that the objective standard is a means of showing people equal concern and respect. Under a subjective standard, those with weaknesses or disabilities would have to assert and prove these weaknesses in court. This would be a potentially demeaning experience. In contrast, under an objective standard, those who are not capable of complying with the standard or whose costs of compliance are prohibitively high are not put in a position that encourages them to prove their own deficiencies. In this respect, everyone is treated with equal concern and respect under the objective standard.

50. Coleman, supra note 12, at 333.
51. Goldberg & Zipursky, supra note 7, at 1161.
52. Id. at 1150.
53. Id. at 1143–44.
54. Goldberg & Zipursky, supra note 1, at 86 (“[T]he inner mental state of an actor can be difficult for the fact finder to ascertain.”).
56. As Dorfman acknowledges throughout his paper, however, and as the theory of strict liability suggests, these individuals may then find it in their interest to engage in less of the activity that generates their liability than those without these deficiencies. The effect of applying the objective standard to them is that formally they are treated as equals, but that in practice they are discouraged from engaging in activities in which they would otherwise engage. These individuals are therefore at a greater disadvantage than those who are not substandard. Similarly, to the extent that these individuals’ employers bear liability for their negligence under respondeat superior, the individuals may find that they have less access to liability-vulnerable jobs than individuals who can comply with the objective standard.

The probability that such individuals will be insured against most of their potential personal liabilities may mitigate the disadvantage that the objective standard imposes on them in their private, as distinguished from their employed, capacity. If they incur above-average liabilities in their personal lives, their experience-rated liability insurance premiums are likely to increase. This is a decided disadvantage, and the amount of this increase will be the price they pay to
B. The Perfect-Compliance Requirement

The reasonably prudent person always exercises reasonable care. Perfect compliance with this standard is required. If reasonable care requires driving no more than thirty miles per hour, driving thirty-five miles per hour for just a few seconds is, or may be found to be, negligent. If reasonable care requires keeping a lookout for cars that may be stopped ahead, even a momentary lapse of attention is, or may be found to be, negligent. As A. P. Herbert once put the point with humor that had a core of truth, the reasonably prudent man is an "odious" creature precisely because he is never negligent.57

Mark Grady has called negligence of this sort "compliance error" and argued that this form of negligence is at the heart of cases invoking the res ipsa loquitur doctrine.58 Of course, compliance error also figures in many negligence cases in which there is direct evidence of noncompliance and res ipsa loquitur is not relevant. Whether it can only be inferred that the defendant failed in some way to comply with the duty to exercise reasonable care or the particular failure to comply is specifically proved, the defendant is negligent if she falls short of perfect compliance. For rights theories, this appears to mean that even occasional or rare failures to exercise the requisite level of civil competence are wrongful and therefore negligent.59 And for instrumental theories, less-than-perfect compliance is negligent even when the cost of achieving perfect compliance is not worth its benefits.

It seems obvious that the perfect-compliance requirement sometimes results in what amounts to strict liability. If perfect compliance is impossible, then there will be instances in which the defendant has exercised all the care that is reasonable—indeed, all the care that is possible—but is nonetheless liable for harm that his conduct has caused. This can be called "negligence" or a "legal wrong," but for practical purposes it is strict liability.

One explanation for this pocket of strict liability in negligence overlaps with the explanation for the objective standard: the cost of acquiring the information necessary to determine whether any particular

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57. A. P. Herbert, Misleading Cases in the Common Law 12–17 (1st Am. ed. 1930).
58. Grady, supra note 6, at 908.
59. See, e.g., Zipursky, supra note 10, at 2018 (arguing that, even without any additional facts, "[a] waiter's clumsy dropping of a bowl of hot soup on a patron is paradigmatic of negligence").
compliance error was the result of the failure to exercise reasonable care would be prohibitively high. Even if we were willing to have a rule, for example, that keeping a proper lookout at an intersection ninety-nine times out of one hundred constituted reasonable care, it would rarely be possible to determine whether a driver had complied with this standard. The evidence, at best, would show whether the driver was keeping a proper lookout at the time of, or during a specified brief period prior to, an accident. But there would rarely be evidence of how careful the defendant had been as he approached the previous ninety-nine intersections.

Perhaps partly for this reason, the notion of reasonable care does not presuppose that there is any particular period for assessing the quality of the defendant's conduct or even that there is necessarily a relevant period of assessment. Rather, the issue is whether the defendant was exercising reasonable care in connection with the particular act or omission that caused the plaintiff's harm. Other noncausally related acts or omissions are likely to be irrelevant. This formulation does not automatically rule out considering the reasonableness of the defendant's conduct for an extended period prior to the event that culminates in harm to the plaintiff. There is no categorical rule that would exclude as inadmissible, for example, evidence that the defendant had approached the previous ninety-nine intersections carefully, although it is likely that such evidence would either be excluded or admitted only as tending to show how the defendant approached the 100th intersection. It is clear, however, that such evidence is not required; the defendant's conduct in the period prior to the allegedly negligent act or omission is not ordinarily significant.

In one sense, this is just another way of saying that there is strict liability for imperfect compliance. If the defendant's conduct consists of a series of iterated precautions, his exercise of reasonable care in connection with precautions taken in an earlier iteration is irrelevant to whether the defendant is considered negligent in connection with a later iteration.

But in a different sense, the tendency to focus only on the act or omission culminating in the harm at issue is an effort to ensure that negligence litigation is concerned with the defendant's conduct rather than the defendant's character or habits.\textsuperscript{60} That is, the longer the relevant period for assessing whether the defendant exercised reasonable care, the more concern there will be with the aggregate quality of the defendant's actions over time, as distinguished from the particular act

\textsuperscript{60. See Grady, supra note 6, at 905.}
or omission that allegedly caused the plaintiff harm. And the greater the concern with the aggregate quality of the defendant's actions over time, the greater the tendency of the inquiry will be to consider whether the defendant himself is a reasonable person, all things considered, rather than whether the particular harm-causing act or omission of the defendant was negligent. Imposing liability for imperfect compliance helps to focus the inquiry on this particular harm-causing conduct rather than on the defendant's overall character.

Another effect of this standard of perfect compliance, rather than a general-reasonableness-over-a-period-of-time standard, is to create pressure on activity levels. Potential defendants are threatened with liability for imperfect compliance despite having exercised all the care that is reasonable for them. It will therefore be in their interest to consider adjusting their activity levels or (what amounts to the same thing) substituting activities so as to reduce the instances in which they fail to achieve perfect compliance with the standards applicable to the activity in which they would otherwise engage.

In contrast to the objective standard, however, which I suggested is likely to have a limited impact on substandard individuals' activity levels, the threat of liability for imperfect compliance may well have considerable impact. First, most people intuitively understand that they are liable for imperfect compliance no matter how nearly perfect their compliance has been in the past. They realize, for example, that if they are speeding and are involved in an accident, their immediately preceding or longstanding lawful behavior is irrelevant. Similarly, most people understand that if someone slips and is injured on their icy sidewalk, the fact that on all past occasions they have carefully removed all snow and ice will not excuse them from liability if it was negligent not to remove the ice this time. That is, people know that harm caused by compliance failures is part of the cost of driving or home-owning—or at least part of the cost of automobile or homeowner's liability insurance. Because of the general sense that greater involvement in an activity risks greater liability, activity-level incentives may follow. Families may not buy a third car to be driven by their teenagers and may thereby limit the amount of miles their teenagers drive. And homeowners may hire others who are more capable than they are to shovel snow from their sidewalks rather than do it themselves.

Second, as with the objective standard, the most significant impact of liability for imperfect compliance may come through employers' incentives. If, because of the perfect-compliance rule, there is an irreducible level of negligence liability that employers incur in connection
with particular activities, they will have an incentive to take this potential liability into account in fixing activity levels. Instead of delivering goods on company-owned trucks, retailers may decide that shipping by a commercial carrier costs less, taking into account their accident costs under the perfect-compliance rule. Thus, even if employees are completely unaware of the perfect-compliance rule, their employers may be affected by it.

The perfect-compliance rule is congruent with rights-oriented theories as well. For Weinrib and Coleman, presumably the rule is subject to essentially the same analysis as the objective standard. That is, requiring perfect compliance is consistent with Weinrib's concern for the transactional equality of the parties and with Coleman's notion that sometimes the fault is in the doing rather than in the doer. Similarly, Goldberg and Zipursky would presumably say that the perfect-compliance rule imposes liability for a legal wrong based on negligence law's "norms defined in terms of success rather than best efforts" and is therefore uncontroversial.

I am skeptical that the intuition behind this notion—that the perfect-compliance requirement is not strict liability because victims regard themselves as having been wronged by breaches of the norm of success—is satisfied by all the cases in which we would say that the defendant was negligent even though not morally wrong. For example, although most people would regard themselves as being wronged by a driver's occasional failure to pay attention to the traffic in front of him, I am not at all sure that people would always feel wronged when Zipursky's hypothetical waiter dropped a tray on them. Res ipsa loquitur also would not change these results because Zipursky seems to be asserting that the waiter's dropping the tray is always negligent or that a jury can always find him to be negligent, not that liability is imposed because dropping the tray usually is negligent. See id. at 2017. Nevertheless, there is a good deal that is appealing about the Goldberg and Zipursky analysis, but I think that in their effort to find a suitable generalization about what characterizes all of negligence, they necessarily underemphasize what distinguishes different forms of negligence. Some negligent conduct bears a far more attenuated relationship to what is wrongful, in ordinary parlance, than other negligent conduct. To say that a social or cultural norm of success underwrites the imposition of liability for negligence in the situation involving the waiter is just slightly too strong. Unlike in traditional strict liability, it is true that we think that waiters should not, or at least wish that they would not, ever drop trays on customers. But, unlike the negligence cases in which the defendant has been careless, foolish, or selfish, we recognize that there may not have been anything that the waiter could have done to avoid dropping the tray in this case. To say that the waiter is subject to a norm of success, that he was "clumsy," or that he has committed a legal wrong is more nearly to label the outcome of a suit against him than to explain why he is liable.
regardless of whether the term "legal wrong" adequately describes the waiter's conduct, it seems clear that some such "legal wrongs" are more wrongful than others. If this were not the case, Goldberg and Zipursky would not have felt it necessary to devote an entire article to defending the proposition that rules such as the perfect-compliance requirement fit comfortably within the normative structure of negligence law.

C. The Thin-Skull Rule

A negligent defendant is liable to a foreseeable plaintiff even if the amount of harm the plaintiff suffered was unforeseeable. This liability is so firmly established that it has acquired its own name—the "thin-skull" or "eggshell skull" rule.

This rule adopts what, in my view, amounts to strict liability. It is true that the thin-skull rule is nominally a rule about damages and not about the standard of care. In thin-skull cases the defendant was negligent, but that negligence consists of risking a foreseeable harm to the plaintiff. The dominant approach to determining the scope of the defendant's liability in negligence is the "harm-within-the-risk test," under which a defendant is only liable for foreseeable harm. Thin-skull liability is an exception to the notion that, because it is not negligent to risk what cannot be foreseen, there is no liability for harm that results from risking unforeseeable harm.

I recognize that this is not strict liability in the same way that liability under the objective standard and perfect-compliance rule is strict. Defendants would not be considered "negligent" at all in the absence of these two rules, whereas a defendant held liable under the thin-skull rule would be negligent and liable for the plaintiff's foreseeable injuries, even if there were no thin-skull rule. But by definition the defendant in a thin-skull case is not negligent—is not at fault—with respect to the plaintiff's unforeseeable injuries. So the liability imposed under the thin-skull rule is, in effect, strict liability for being

65. Goldberg and Zipursky themselves recognize this. See Goldberg & Zipursky, supra note 7, at 1167 n.157 (noting that not all negligence is "highly culpable" and suggesting that victims of torts that "do not carry the full weight associated with other forms of wrongdoing" might be "entitled to less substantial redress").


67. See ABRAND, supra note 9, at 126–28 (describing the harm-within-the-risk test).

68. Blyth v. Co. of Proprietors of the Birmingham Water Works, (1856) 156 Eng. Rep. 1047 (Ex.) 1047 (stating the foreseeability requirement); see also Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co. (Wagon Mound No. 1), [1961] A.C. 388 at 423 (J.C.) ("For, if it is asked why a man should be responsible for the natural or necessary or probable consequences of his act . . . the answer is that . . . he ought to have foreseen them.").
negligent. In any event, my larger point is not merely that the standard of care in negligence sometimes amounts to strict liability, but that the liability ultimately imposed in negligence cases is sometimes strict. The thin-skull rule is a prime example of this latter phenomenon.

One explanation for thin-skull liability is a version of the information-cost explanation. If defendants were liable only for the amount of harm that was foreseeable, every negligence case would require resolution of this issue. Of course, in some cases the amount of harm that was foreseeable is relevant to the negligence determination itself and therefore is already at issue. But this determination tends to be an average of sorts—how much harm the failure to take a particular precaution is likely in general to cause, if it does cause harm, rather than a precise estimate of the particular amount of harm that was foreseeable.69

The very notion of a foreseeable amount of harm—especially bodily injury—presupposes that there is a “normal” or average degree of vulnerability on the part of potential victims. Even setting aside what may be objectionable in principle about this notion,70 the range of variations in the severity of injury that may be expected to occur around this “normal” severity, and the accompanying probabilities, would have to be ingredients in a determination of the amount of injury that is foreseeable. In the absence of the thin-skull rule, such evidence would be necessary because the damages recoverable would depend on the portion of harm the plaintiff suffered falling within the range of foreseeability. Potentially at issue in every negligence trial, therefore, would be whether the amount of harm the plaintiff suffered was foreseeable. The accompanying information costs would be considerable. The thin-skull rule saves these costs.

An additional explanation for the strict liability feature of the thin-skull rule resonates with activity-level and insurance considerations. This argument is a bit more tentative, but worth considering. If the amount of harm suffered by the plaintiff was unforeseeable not only by the defendant but also by the plaintiff, then once the defendant is liable for risking some harm to the plaintiff, it may well be that superior activity-level and insurance effects are achieved by holding the

69. See Mosian v. Loftus, 178 F.2d 148, 149 (2d Cir. 1949) (“The injuries are always a variable within limits, which do not admit of even approximate ascertainment . . . .”).

70. See MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY 180 (2010) (“Unless we are to fault plaintiffs for not experiencing the modal amount of pain and suffering—that is, for being individuals—there is nothing particularly troubling about variations in pain and suffering awards . . . .”).
defendant liable for an unforeseeable amount of harm suffered by that plaintiff. Because the plaintiff (or potential victims in the same category) is already foreseeable, an unforeseeable amount of harm to that plaintiff is not, literally, unforeseeable. After all, it is foreseeable that a foreseeable plaintiff will suffer an unforeseeable—that is, highly improbable—amount of harm. Consequently, in making activity-level decisions, potential injurers can take into account the fact that they will be held liable when foreseeable victims occasionally suffer an improbably large amount of harm. When the thin-skull rule is in force, this low probability of a large amount of harm is also automatically built into actuarial projections based on past losses made for insurance purposes.

In contrast, when victims know that they are especially at risk of suffering an amount of harm that is unforeseeable to potential injurers, the activity-level and insurance arguments for thin-skull strict liability are weaker. For example, in *Hammerstein v. Jean Development West*, the plaintiff suffered from diabetes. Because of the defendant's negligence in maintaining a fire alarm system, an alarm sounded, elevators were disabled, and the plaintiff had to evacuate the fourth floor of his hotel by foot. In doing so he sprained his ankle. As a consequence he limped and developed a blister on his foot. Because diabetes caused poor circulation in his limbs, the blister became infected and he developed gangrene. The possibility that he might develop gangrene from a blister was certainly far more foreseeable to the plaintiff, who knew he suffered from diabetes, than it was to the defendant, if it was foreseeable to the defendant at all. The plaintiff might well have been the party in the best position to make the activity-level and insurance decisions in that situation. But the thin-skull rule still applied, in my view because of the assumption that most thin-skull plaintiffs—understood as everyone who suffers


72. See Abraham, supra note 56, at 133–35 (noting that past underwriting, namely, claim payment results, are used to project future losses); C. Robert Morris, Jr., Enterprise Liability and the Actuarial Process—The Insignificance of Foresight, 70 Yale L.J. 554, 574 (1961) (describing how liability insurance actuaries project past results into the future with little regard for what is actually foreseeable).


74. *Id.*

75. *Id.* at 975–76.

76. *Id.* at 976.

77. *Id.* at 976.

78. See *id.* at 978 (upholding the imposition of liability although “[t]he extent of the infection on Hammerstein’s leg may not have been foreseeable”).
more than a foreseeable amount of injury—are not aware of their special vulnerability. In this sense, the thin-skull rule operates at a high level of generality that applies regardless of differential foreseeability as between plaintiff and defendant except when the plaintiff is considered contributorily negligent in failing to exercise reasonable care to protect herself against her special vulnerability.

A strength of the activity-level argument for the thin-skull rule is that (along with the information-cost explanation) it helps to explain the distinction between this rule and Palsgraf’s zone-of-danger rule, which declines to impose liability for negligence that results in harm to a wholly unforeseeable plaintiff. Why impose strict liability in negligence for an unforeseeable amount of harm to a foreseeable plaintiff, but not for harm to an unforeseeable plaintiff? A plausible answer is that there is little or no reason to believe that the activity-level and insurance effects of imposing liability for harm suffered by unforeseeable victims will be superior to leaving losses suffered by these victims where they fall. Under the thin-skull rule, injurers know the universe of plaintiffs to whom they may be liable (those who are foreseeable) and can therefore anticipate in rough measure the maximum amount of liability they may face to these plaintiffs. They have these potential victims in their sights, so to speak. The number of potential plaintiffs is finite and, in this sense, foreseeable. By contrast, if the zone-of-danger rule did not limit liability, negligent injurers would have potential liability to anyone in the world who happened to be injured as a result of their negligence. The number of potential plaintiffs, and the amount of liability that might be imposed for injuring them, would be unlimited. This would be a much more open-ended threat of liability and, consequently, would be much more difficult to take into account in making meaningful activity-level decisions. The argument for imposing liability on a negligent defendant for harm suffered by an unforeseeable plaintiff is therefore much weaker than the argument for the thin-skull rule.

Whereas instrumental theories must stretch a bit to find arguments for the thin-skull rule, rights theories do not regard the rule as problematic. As far as I can tell, Weinrib, a prominent rights theorist, does not even discuss the rule in his explication of strict liability and corrective justice. Goldberg and Zipursky say that the idea of “make-whole compensation” is “a plausible metric for what should count as

79. See Palsgraf v. Long Island R.R., 162 N.E. 99, 99 (N.Y. 1928); see also Abraham, supra note 9, at 132–35 (discussing Palsgraf).
80. See Calabresi, supra note 71, at 93–98 (distinguishing the two rules on this basis).
81. See generally Weinrib, supra note 7, at 171–203.
meaningful redress" and that the rule is "broadly compatible with the idea of tort law as a law of wrongs and redress, among other possibilities." Because their article seeks to explain why liability hinging on certain forms of "luck," including luck as to the extent of injury suffered by a victim, is consistent with conceiving tort as a law of wrongs, they may not be required to say anything more.

Their emphasis on the "plausibility" of the thin-skull rule, however, rather than its superiority or correctness, suggests their own possible discomfort with it. They come close to contending that the other rules I have analyzed here are required features of tort as a law of legal wrongs. But they are quite content to accept the thin-skull rule as only one of a number of possible approaches to tort damages. And they go so far as to note in another work that "actual and potential injustices" may result from the disproportional liability that the rule permits imposing. Part of what may make liability disproportionate, of course, is that the amount of injury for which liability is imposed was not reasonably foreseeable. And in this sense, liability imposed under the thin-skull rule is strict.

V. IMPLICATIONS

My analysis has two implications. The first involves the effect of the presence of significant amounts of strict, or at least stricter, liability on the development of tort liability. I think that, in addition to other explanations that have been offered for the failure of strict liability to replace negligence in the latter half of the twentieth century, the presence of these forms of liability helps to explain why negligence liability managed to maintain its dominance over the last century, despite repeated calls for the expansion of strict liability.

The second implication follows from the fact that, however different theories of tort liability may describe or explain these instances of strict liability in negligence, all the major theories tend to approve of

82. Goldberg & Zipursky, supra note 7, at 1141–42.
83. See id. at 1142–43.
84. See id. at 1143; accord id. at 1167 n.157 (suggesting that less substantial redress might be available for wrongs that are not highly culpable).
85. See, e.g., G. Edward White, Tort Law in America 286–90 (Expanded ed. 2003) (citing as explanations the increasing appreciation of public-choice theory, the recognition of the weaknesses of expanded products liability, the increasing preference for market solutions, and the decreasing preference for solutions to injury problems based on government intervention); Gary T. Schwartz, The Beginning and the Possible End of the Rise of Modern American Tort Law, 26 Ga. L. Rev. 601, 683–99 (1992) (citing as explanations the completion of the tort modernization agenda, the replacement of liberal judges with conservative ones, the recognition of the adverse consequences of previous expansions of liability, and the declining academic support for expanded liability).
them. This concurrence of approval tells us something about the normative character of accident law. The goals or purposes that accident law serves, or should serve, may be contested. But when a doctrine simultaneously satisfies the competing values that very different theories consider important, the doctrine is much more likely to have stability and persistence. It may well be, therefore, that for practical purposes the key question is not what goals accident law serves or what functions it performs, but whether a doctrine or practice is consistent with a series of different, otherwise competing and contested, values.

A. Strict Liability and the Dominance of Negligence

The objective standard, the perfect-compliance rule, and the thin-skull rule are not obscure, little-known doctrines. The objective standard is one of the first things, and often the very first thing, that tort students learn about negligence. The perfect-compliance requirement probably figures, if only implicitly, in many negligence cases. And the thin-skull rule, at least by virtue of the evidence that it makes irrelevant and the issue that it renders moot, has operative significance in virtually every case involving bodily injury.

There is naturally going to be far less need for, or pressure to expand, strict liability when negligence often consists of what amounts to strict liability. If most inadvertent failures to take a particular reasonable precaution are considered negligent, for example, then the threat of liability for negligence will have activity-level effects resembling outright strict liability. That certainly seems to be what has occurred in the field of automobile liability. It is a rare automobile accident that cannot be said to have been caused by the failure to take some precaution and therefore to result from negligence. In practice we have something approaching strict liability for automobile accidents. And if, as Goldberg and Zipursky seem to contend, certain outcomes that violate a "norm of success" even without proof of failure to take a precaution are considered negligent, activity-level effects will be even stronger.

But even if the rules constituting strict liability in negligence had no effect on primary conduct or on the outcome of negligence cases, their information-cost-reducing impact would be significant. Because of these rules, no ordinary negligence case concerns itself in a significant

way with the personal capacities of the defendant, with the general level of care the defendant exercises in his life, or with the physical weaknesses of the average person as compared to the plaintiff.

The fact that the impact of the rules in this respect is to keep some things from happening in a tort suit, which would happen in the absence of the rules, makes their impact very nearly transparent. But given the frequency at which the rules probably have an impact on what does not happen in discovery and at trial, it is fair to say that there is a lot of strict liability in negligence. And given the significance of what the rules prevent from happening, it is also fair to say that the strict liability that exists in negligence has an important impact, even apart from its possible effect on primary conduct and case outcomes. In one sense, these rules may be mere pockets of strict liability, but in another sense they are a large and important part of accident law's actual operation.

I think that the presence of this strict liability in negligence, and the effects that it has produced, are part of what has enabled negligence to fend off the expansion of strict liability over a period of a century or more. Imagine how much more appealing the arguments for broad-based strict liability would have been if, during this period, defendants had been judged by a subjective standard, permitted to introduce evidence and avoid liability on the ground that in general they were careful people, and were liable only for the foreseeable amount of injury and suffering that their victims experienced. And imagine how much more appealing the arguments for strict liability would have been if injurers' employers were vicariously liable only if their employees were liable only on these much more limited bases. If the examples of strict liability in negligence that I have discussed had not been available as alternatives to these hypothetical, liability-limiting doctrines, we would probably have a lot more of the formal kind of strict liability than we now have. There certainly would be more calls for adopting strict liability if it had not by now been adopted.

B. Normative Side Constraints in a World of Contested Goals

One of the striking things about my analysis is the degree to which instrumental and rights-based theories seem to concur on the normative attractiveness of the rules I have analyzed. It is one thing for proponents of these theories to have different descriptions of the same doctrines. This difference is at the core of the debate over the last two decades about the nature of tort liability—to oversimplify, whether tort is a system of corrective justice, civil recourse, deterrence and compensation, or some combination of these. But it is quite an-
other thing for virtually everyone to agree that the doctrines that I have termed strict liability in negligence, however differently they are described, all are appropriate and desirable.

It is significant that both rights-based and instrumental theories converge in their normative support for the negligence standard generally. It is even more significant, however, that they also converge on the strict liability exceptions within negligence that I have discussed. These are not randomly selected doctrines, but prominent deviations that require explanation. If we can say that not only mainstream negligence, but also the anomalies within it, have widespread normative support, then we have evidence that this sort of support may be important to the stability and persistence of tort doctrines.

It is true that the arguments supporting this overlapping consensus were constructed in order to make sense of, and sometimes to justify, the doctrines in question. But, this seems to me to be more than mere circularity. I think that this convergence of support may say something important about the normative character of tort law—or at least about the politics of tort law—that has gone under-emphasized in the debates. I do not wish to engage in an argument about whether this convergence would appropriately be called part of the normative “structure” of tort law, whether it is merely a contingent feature of a body of law that has a noncontingent structure, or whether it is something else. Suffice it to say that the apparent confluence of normative support on the merits for the doctrines I have discussed seems to me to be an important feature of accident law as we know and understand it actually to be today.

Might it be, therefore, that tort law doctrines can persist and be stable only if at some level they satisfy both instrumental and rights-based concerns? If so, how best to describe the normative structure of tort liability as a whole, or any individual doctrine, might then be regarded as a question distinct from whether tort law as a whole, or any individual doctrine, provides a minimum or requisite level of satisfaction of both instrumental and rights-based concerns. The former question might be of great interest, but the latter question would also be of importance.

One way to describe the set of conditions relevant to the latter question would be to say that both rights-based and instrumental goals must be served by the tort system as a whole or any particular doctrine in order to persist and be stable. But this may be too strong a statement or requirement. A different and perhaps more accurate view might be that values from one domain are likely to function as
side constraints on the acceptability of doctrines that are thought principally to serve the values of the other domain.

Under this second view, a tort system or doctrine that is understood mainly to serve the principle of civil recourse or corrective justice will not survive unless it also satisfies one or more instrumental values—unless, that is, in some minimally acceptable fashion it also reduces high information costs, deters accidents by encouraging more safety, influences activity levels, or promotes the insurance of losses. Conversely, neither the tort system nor any particular doctrine will survive, even if it satisfies instrumental values, unless in some minimal fashion it also satisfies the demand that tort liability redress the violation of private rights. 87

On this view, it is no surprise that there is so little “traditional” strict liability because rights-based theories tend to contemplate it only when there is something like negligence in the background or regard it as separate from tort law entirely. 88 Even if more strict liability would satisfy instrumental values, it probably would have less traction with most rights theories.

This description of tort law’s normative character may not please those who seek, or actually find, philosophical coherence in tort law. But the description strikes me as coming closer to the way that courts, lawyers, and many tort scholars think about tort liability than either pure rights theory or pure instrumental theory. Few courts, lawyers, or tort scholars would wish for a body of tort law that adequately redressed rights but did not effectively deter, influence activity levels, or promote the insurance of losses. We hope that in redressing rights, tort law also does at least one of these things. And few would wish for a body of tort law that adequately deterred accidents or effectively promoted insurance but had nothing to do with redressing rights. The idea that whatever the purposes of accident law, in fashioning its doctrines we should not wholly ignore any significant side effects, whether positive or negative, that are produced by existing doctrines or that might be produced by alternative doctrines, hardly seems radical.

88. See Weinrib, supra note 7, at 189 (arguing that the imposition of strict liability for abnormally dangerous activities “carries on the negligence idea”)
89. See Goldberg & Zipursky, supra note 1, at 267 (arguing that strictly liability does not belong in the “department” of tort law).
If this picture is accurate, it should come as no surprise. After all, because tort law is a human institution, there is no reason to suppose that it is philosophically pure or that its structure is perfectly coherent. And even if tort law once was this way, it no longer is. In this instance the common law may have worked itself impure. And there is no going back.

VI. Conclusion

I have tried to show that there are important doctrines in negligence law that have a lot in common with strict liability and that these doctrines can be understood to serve some of the purposes of strict liability. In addition, I have argued that the presence of these forms of strict liability in negligence helps to explain how negligence has managed to maintain its dominance over a period of more than a century. If there had not been some strict liability in negligence, there might well have been less negligence liability and more open and obvious strict liability. Finally, I have suggested that the confluence of agreement on the normative desirability of these doctrines, even while what to call them and how to justify them are contested, tells us something important about the normative character of accident law. Tort law is more pluralist, in the sense of being subject to mixed side constraints, than either the instrumentalists or the rights theorists may have acknowledged.

None of this necessarily suggests anything about whether we should have more or less negligence liability, strict liability in negligence, or strict liability. But as I have suggested in other contexts, it does argue for greater realism about, and a richer understanding of, the actual character of our system of accident law and the mixture of motives that it reflects. Achieving a greater understanding of these features

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90. See White, supra note 85, at 233 (arguing that tort law “is not a unified [body of law] but a complex of diverse wrongs whose policy implications point in different directions”). Similarly, it seems beside the point to focus exclusively on judge-made accident law when this body of law is increasingly composed of both common law and statutory reforms of the common law. See Abraham, supra note 9, at 250–51. Statutory caps on the recovery of pain-and-suffering damages, for example, were enacted at least in part for instrumental reasons. See id. at 251. But they probably could not and would not have been enacted unless it were at least arguable that they were consistent with rights-based understandings of tort liability. For discussion of this and similar issues, see Christopher J. Robinette, Why Civil Recourse Theory Is Incomplete, 78 Tenn. L. Rev. 431 (2011).

91. See, e.g., Kenneth S. Abraham, Rylands v. Fletcher: Tort Law’s Conscience, in Torts Stories 207, 207 (Robert L. Rabin & Stephen D. Sugarman eds., 2003) (suggesting that the availability of strict liability as an alternative to negligence causes us to examine the justifications for limiting liability to cases in which there was negligence); Kenneth S. Abraham, The Trouble with Negligence, 54 Vand. L. Rev. 1187, 1188 (2001) (arguing that the character of negligence liabil-
of accident law might even be worthy of the example that Bob Rabin has set for us.

_It is incompletely recognized and that closer examination "reveals that it is more troubled than its apparently central place in tort law implies."_