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THE *RESTATEMENT (THIRD) OF TORTS* AND  
TRADITIONAL STRICT LIABILITY: ROBUST  
RATIONALES, SLENDER DOCTRINES

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INTRODUCTION

Chapter 4 of the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* addresses traditional strict liability—liability for abnormally dangerous activities (section 20), intrusion by livestock or other animals (section 21), wild animals (section 22), and abnormally dangerous animals (section 23).<sup>1</sup> But is there a principled basis for these strict-liability rules? The Scope Note to the chapter on strict liability candidly asserts:

Just as there is no single rule of strict liability in tort, but rather a range of specific strict-liability doctrines, so it is appropriate to observe that there is no single theory for strict liability in tort. While a number of rationales and policies are generally available in explaining both the coverage and the limits of strict-liability doctrines, each of the particular doctrines may balance or accommodate these rationales and

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1. Other sections address scope of liability (section 24) and comparative responsibility (section 25). The *Restatement (Third) of Torts* project does not revisit the nuisance sections of the *Restatement (Second) of Torts*, which contain two strict-liability provisions. *Restatement (Second)* section 822(b) recognizes private-nuisance liability when the invasion of the victim's interest in the private use and enjoyment of land is "unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities." RESTATEMENT (SECOND) OF TORTS § 822(b) (1979). And section 826(b) provides that "[a]n intentional invasion of another's interest in the use and enjoyment of land is unreasonable if . . . the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible." *Id.* § 826(b). Although phrased as a criterion of "unreasonableness," this provision is better understood as imposing strict liability, for the provision considers the defendant unreasonable not in conducting the activity as he did, but in continuing the activity *without paying for its costs*. *Id.* § 826(b) cmt. f (emphasis added).

policies in its own distinctive way . . . . Moreover, each of these doctrines has its own history; strict liability is one area of tort law in which a page of history can be at least as relevant as a page of logic.<sup>2</sup>

This passage overstates the distinctly problematic nature of strict-liability doctrine. In the first place, there is also “no single rule” of *intentional*-tort liability, but instead a range of specific intentional torts.<sup>3</sup> Secondly, with respect to the supposedly mishmash nature of strict liability, one person’s hodgepodge is another person’s sensible distinction. The passage is, I hope to show, unduly pessimistic, for the traditional strict-liability doctrines can, to a significant extent, be explained by the same set of rationales.

After briefly discussing the changes in traditional strict-liability doctrine that the *Restatement (Third)* proposes, I turn in Part I to a detailed discussion of the rationales for that doctrine contained in the *Restatement (Third)*. After raising questions about some of those rationales, in Part II I suggest that the actual strict-liability doctrines endorsed in the *Restatement (Third)* are narrower in scope than the robust logic of the rationales would imply. Finally, I offer concluding observations about some of the reasons why this is so.

The most significant changes in traditional strict-liability doctrine suggested by the *Restatement (Third)* are with respect to abnormally dangerous activities. First, the controversial “value of the activity” factor identified in the *Restatement (Second) of Torts* as one factor militating against strict liability has been eliminated, and explicitly disavowed.<sup>4</sup> Second, the spongy and indeterminate multifactor test of the *Restatement (Second)* has been replaced by a more straightforward two-factor test, that asks only whether the activity is uncommon and whether, even if all actors use reasonable care, the activity creates a significant residual risk.<sup>5</sup> A third change concerns the relevance of the victim’s conduct. The historical rule, once applicable to all of the traditional strict-liability categories, that contributory negligence ordinarily has no effect on recovery

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2. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM ch. 4 scope note (Proposed Final Draft No. 1, 2005).

3. See Kenneth W. Simons, *A Restatement (Third) of Intentional Torts?*, 48 ARIZ. L. REV. 1061, 1083–88 (2006).

4. Compare RESTATEMENT (SECOND) OF TORTS § 520(f) (1977) (stating that the value of the activity to the community is a factor in determining whether an activity is abnormally dangerous), with RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 20 cmt. k (Proposed Final Draft No. 1, 2005) (“[T]he value that the defendant or others derive from the activity is not a direct factor in determining whether the activity is abnormally dangerous.”).

5. Compare RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 20(b) & cmt. k. (Proposed Final Draft No. 1, 2005) (setting forth a two-prong test for abnormally dangerous activities), with RESTATEMENT (SECOND) OF TORTS § 520 (1977) (utilizing a multifactor test for abnormally dangerous activities).

while assumption of risk bars recovery,<sup>6</sup> understandably has been supplanted by a comparative-fault principle,<sup>7</sup> but, intriguingly, a ghost of the assumption-of-risk doctrine lingers: if the plaintiff suffers harm as a result of approaching the defendant's animal or abnormally dangerous activity "for the purpose of securing some benefit" from the approach, strict liability does not apply.<sup>8</sup> (I shall have a bit more to say about this last doctrine below.)<sup>9</sup>

#### I. THE *RESTATEMENT (THIRD)*'S RATIONALES FOR TRADITIONAL STRICT LIABILITY

In the *Restatement (Second)*, the provisions on traditional strict liability explicate the rationales for these doctrines in an almost tautological way. For the most part, the comments simply redescribe the relevant doctrine and then pretend that that redescription counts as a justification of the doctrine's scope and content. For example, the only explanation given for strict liability for wild animals is as follows: "The rule stated in this Section is based upon the fact that by keeping a wild animal of a class that has dangerous propensities, its possessor has created a danger not normal to the locality in question."<sup>10</sup>

Similarly, the only explanation given for strict liability for

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6. See *RESTATEMENT (SECOND) OF TORTS* § 515 (1977) (relevance of plaintiff's conduct to strict liability for animals); *id.* § 523 (assumption of risk as defense to strict liability for abnormally dangerous activities); *id.* § 524 (contributory negligence as no defense to strict liability for abnormally dangerous activities); see also *id.* § 524A (abnormally sensitive plaintiff).

7. *RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM* § 25 (Proposed Final Draft No. 1, 2005). For a discussion of the old and new rules, see *RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM* § 25 cmt. e (Proposed Final Draft No. 1, 2005).

8. *Id.* § 24(a).

9. Other changes in the *Restatement (Third)* are minor. Thus, for animals (intruding, wild, and dangerous domestic), the *Restatement (Third)* makes only minimal changes, including a more sensible and less awkward definition of "wild animal" in section 22(b) and an expansion of strict liability from possessors of wild animals to both owners and possessors. *Id.* § 22 cmt. e & reporters' note cmts. b, d.

10. *RESTATEMENT (SECOND) OF TORTS* § 507 cmt. e (1977). Indeed, this stated rationale is offered more as an explanation of the limits of strict liability, for the passage goes on to say:

Therefore, he is liable for only such harm as the propensities of the animal's class or its known abnormal tendencies make it likely that it will inflict. Thus one who keeps a tame bear upon his premises or leads it along a public highway is liable to anyone whom the bear may maul or bite, even though he has taken every precaution to control it. On the other hand, if the bear, having escaped, goes to sleep in the highway and is run into by a carefully driven motor car on a dark night, the possessor of the bear is not liable for harm to the motorist in the absence of negligence in its custody.

*Id.*

abnormally dangerous domestic animals<sup>11</sup> is this:

One who keeps a domestic animal that to his knowledge is vicious, or which though not vicious possesses dangerous propensities that are abnormal, thereby introduces a danger not usual to the community and which, furthermore, is not necessary to the proper functioning of the animal for the purposes that it serves.<sup>12</sup>

With respect to strict liability for abnormally dangerous activities, the *Restatement (Second)* offers a slightly more explicit rationale. After clarifying that liability for such activities is indeed strict, and not based on negligence, comment *d* states:

[Liability] is founded upon a policy of the law that imposes upon anyone who for his own purposes creates an abnormal risk of harm to his neighbors, the responsibility of relieving against that harm when it does in fact occur. The defendant's enterprise, in other words, is required to pay its way by compensating for the harm it causes, because of its special, abnormal and dangerous character.<sup>13</sup>

But this minimal, opaque exposition still teeters on the edge of tautology. What counts as imposing a risk "for his own purposes"? And why do abnormality and dangerousness require a strict-liability rule? Why, for example, is it not sufficient to consider these factors in determining whether the defendant acted with due care?<sup>14</sup>

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11. I use the term "domestic" animals for simplicity; a more precise description would be "animals other than the wild animals for which strict liability is imposed." As the Reporters' Note indicates, *Restatement (Third)* section 23 encompasses both what the *Restatement (Second)* calls domestic animals and also "nondomestic animals that are not covered by [section] 22 because they belong to a class that does not entail an inherent risk of personal injury." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 23 reporters' note cmt. b (Proposed Final Draft No. 1, 2005).

12. RESTATEMENT (SECOND) OF TORTS § 509 cmt. d (1977). The last clause in this excerpt, pointing out that the dangerous propensity of the animal is "not necessary" to its "proper functioning," is ambiguous. Is the point that it is probably negligent to keep such an animal? Or that keeping such an animal benefits only the owner, not others in the community?

The passage continues in a similarly unenlightening way:

On the other hand, those who keep domestic animals such as bulls and stallions that are somewhat more dangerous than other members of their species do not introduce any unusual danger, since the somewhat dangerous characteristics of these animals are a customary incident of farming and the slightly added risk due to their dangerous character is counterbalanced by the desirability of raising livestock.

*Id.*

13. *Id.* § 519 cmt. d.

14. Comment *f* to section 520 offers another explanation for strict liability that remains frustratingly incomplete. Defending the rather indeterminate multifactor test, it asserts:

Because of the interplay of these various factors, it is not possible to

The *Restatement (Third)* provisions and comments on traditional strict liability are an enormous improvement in this respect. The comments offer six distinct rationales for strict-liability doctrine, all but one of which are plausible: additional incentive for the injurer to optimize the level of care, incentive for the injurer to optimize the level of the activity, nonreciprocal risk, nonreciprocal benefit, exclusive causation, and the community's sense of fairness. These principal rationales fall within two broad categories: two are economic and four involve concerns of fairness.<sup>15</sup>

It is worth reviewing these rationales with care, for they demonstrate two important points. First, traditional strict-liability categories are less of a hodgepodge than they might seem. But, second, in some respects the rationales are too robust: they justify broader strict-liability rules than the specific rules that the *Restatement (Third)* defends.

A. *Additional Incentive for the Injurer to Optimize the Level of Care*

Strict liability ordinarily will not provide an injurer any greater incentive to take reasonable care than the incentive a negligence standard already provides (at least if we ignore possible precautions by victims). But sometimes an injurer negligently fails to take a precaution yet this failure is difficult for a victim to prove; strict liability then provides the injurer with an additional incentive to take reasonable care. For example, if the injurer's blasting harms the plaintiff's property, the explosion might destroy the evidence that would have demonstrated that an excessive charge was used.<sup>16</sup>

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reduce abnormally dangerous activities to any definition. The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even though it is carried on with all reasonable care. In other words, are its dangers and inappropriateness for the locality so great that, despite any usefulness it may have for the community, it should be required as a matter of law to pay for any harm it causes, without the need of a finding of negligence.

*Id.* § 520 cmt. f.

15. To be a bit more precise, the two categories are (1) consequentialist and incentive-based rationales and (2) nonconsequentialist rationales. The principal rationales are discussed in the text. Subsidiary rationales are also mentioned in the *Restatement (Third)*, for example, the simplicity of a strict-liability rule rather than a negligence rule, especially when the rules are largely coextensive. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 21 cmt. d (Proposed Final Draft No. 1, 2005).

16. See, e.g., *Siegler v. Kuhlman*, 502 P.2d 1181, 1185 (Wash. 1972). The comments to the provisions on intruding livestock mention this first economic-incentive argument. See, e.g., RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 21 cmt. d (Proposed Final Draft No.1, 2005).

B. *Incentive for the Injurer to Optimize the Level of the Activity*

Sometimes a dangerous activity (for example, blasting in a densely populated neighborhood, owning a wild animal, or owning a domestic animal that has a tendency to bite) is of questionable social value, yet applying the negligence criterion to such a fundamental question as whether the actor should have engaged in the activity at all, or at that location, or at that level, is highly problematic for courts and fact finders.<sup>17</sup> Strict liability can then provide the actor with a better incentive than the negligence rule would provide (taking into account how the latter rule would actually be applied by legal actors) to consider these activity-level effects.

The two arguments set forth in subparts A and B are staples of the economic literature of tort: the first argument is that strict liability sometimes improves incentives with respect to the level of *care*; the second, that strict liability can improve incentives with respect to the level of the *activity*.

Interestingly enough, the *Restatement (Third)* says relatively little about the first argument, even though case law gives it some weight, especially in the abnormally dangerous activities category: the risk that the activity might destroy the evidence that might otherwise support a negligence claim is frequently offered as a reason for strict liability.<sup>18</sup> The *Restatement (Third)* finds this “destruction of evidence” argument for strict liability weak, in part because the *res ipsa loquitur* doctrine, which relaxes proof requirements but still requires proof of negligence, can adequately respond to the problems of under-deterrence and difficulty of proof when evidence of negligence has been destroyed.<sup>19</sup> I agree that this

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17. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 20 cmt. b (Proposed Final Draft No. 1, 2005) (abnormally dangerous activities); *id.* § 22 cmt. d (wild animals); *id.* § 23 cmt. b. (abnormally dangerous domesticated animals); see also Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 22–23 (1980). By the same token, one explanation for not imposing strict liability on “common” activities is a presumption that such an activity is not unreasonable to engage in: “When an activity has moved beyond its initial stages and has become common and normal, this tends to allay concerns as to the acceptability of the activity itself.” RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 20 cmt. j (Proposed Final Draft No. 1, 2005).

18. See, e.g., *Siegler*, 502 P.2d at 1184–85; see also William K. Jones, *Strict Liability for Hazardous Enterprise*, 92 COLUM. L. REV. 1705, 1775 (1992); Cornelius J. Peck, *Negligence and Liability Without Fault in Tort Law*, 46 WASH. L. REV. 225, 240–41 (1971).

19. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 17 cmt. a (Proposed Final Draft No. 1, 2005):

[T]he *res ipsa loquitur* doctrine, properly applied, does not entail any covert form of strict liability. Indeed, the availability of *res ipsa loquitur* in one sense weakens the case on behalf of strict liability. One argument favoring strict liability is that the unavailability of evidence in some cases renders the plaintiff unable to establish what may well have been the defendant’s actual negligence. By providing the plaintiff in such a case with an alternative method of proving the

argument is weak. If we are honestly trying to perfect a negligence regime, we should apply *res ipsa* or shift the burden of production or persuasion on negligence rather than completely excluding any evidence of due care, as a strict-liability rule would do. At the same time, if we are honestly endorsing strict liability because it is independently desirable, then *res ipsa* is an inadequate solution.<sup>20</sup>

### C. Nonreciprocal Risk

Within the fairness category,<sup>21</sup> the *Restatement (Third)* endorses three additional rationales—nonreciprocal risk, nonreciprocal benefit, and exclusive causation. (The last of these, we will see, is highly problematic.) Overall, the comments give greater weight to fairness than to purely economic justifications. Indeed, the Reporters' Notes criticize Judge Richard Posner's economic interpretations of strict liability on three different occasions,<sup>22</sup> and specifically berate him for ignoring ethical or fairness arguments.<sup>23</sup>

The *Restatement (Third)* emphasizes the familiar nonreciprocal-risk rationale: the traditional strict-liability rules tend to impose liability when the injurer's activity imposes a risk unilaterally on the victim in situations where the victim's activity does not impose a

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defendant's negligence, *res ipsa loquitur* reduces the need for strict liability.

*Id.*

20. One is reminded of Justice Traynor's concurring opinion in *Escola v. Coca Cola Bottling Co.*, chastising the majority for a tortured invocation of the *res ipsa* doctrine to find that the defendant was negligent. It would be more honest, Justice Traynor pointed out, to straightforwardly endorse strict liability for product defects based on independent policy rationales. *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440–41 (Cal. 1944) (Traynor, J., concurring).

21. The need to overcome difficulties in proving negligence, which I earlier described as an incentive-based rationale, could also be characterized as based on fairness, insofar as negligence liability itself can be justified on fairness grounds. That is, quite apart from the incentive effects of a legal rule of strict liability on potential injurers, it might simply be fair to ease proof requirements for victims, in order to ensure that their valid negligence claims are preserved. *Cf.* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. a (1998).

22. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 20 reporters' note cmt. k (Proposed Final Draft No. 1, 2005) (identifying four problems with Judge Posner's famous opinion providing economic rationales for the multifactor *Restatement (Second)* test for abnormally dangerous activities in *Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174 (7th Cir. 1990)); *id.* § 22 reporters' note cmt. d (rejecting as oversimplified Judge Posner's view that strict liability for wild animals gives the owner an incentive to consider getting rid of the animal); *id.* § 25 reporters' note cmt. c (expressing skepticism over the argument, asserted by Landes and Posner among others, that when we move from a negligence to a strict-liability regime, it is all the more important to recognize a full defense of contributory negligence).

23. *Id.* § 20 reporters' note cmt. k (asserting that Posner's analysis in *Indiana Harbor* "excludes or rejects all ethical arguments in favor of strict liability").

similar risk on the injurer.<sup>24</sup> Thus, in explaining the “not a matter of common usage” requirement for abnormally dangerous activities, comment *j* to section 20 states that

[w]henver an activity [such as the use of an automobile] is engaged in by a large fraction of the community, the absence of strict liability can be explained by principles of reciprocity. Even though various actors may without negligence be creating appreciable risks, the risks in question are imposed by the many on each other.<sup>25</sup>

Similarly, comment *d* to section 22 states that “owning wild animals is an unusual activity, engaged in by a few, which imposes on others significant risks that are themselves unusual and distinctive.”<sup>26</sup> And comment *b* to section 23 relies on this rationale as a prominent explanation of strict liability for abnormally dangerous animals:

[O]wnership of animals such as dogs and cats is widespread throughout the public; therefore, the limited risks entailed by ordinary dogs and cats are to a considerable extent reciprocal. Accordingly, the case on behalf of strict liability for physical harms that all such ordinary animals might cause is weak. However, even though animals in such categories generally entail only a modest level of danger, particular animals may present significant and abnormal dangers . . . . Even if . . . retention [of such an animal] is itself proper, an abnormally dangerous animal is by definition unusual; owning such an animal is an activity engaged in by a few that imposes significant risks on others within the community. In these circumstances, strict liability is fairly imposed.<sup>27</sup>

To be sure, “unilateral” risk imposition is, in a narrow sense of the term, a very frequent occurrence. After all, a very substantial portion of all accidents involve a unilateral risk imposition, in the limited sense that the victim is very often passive at the moment of the encounter. For example, one pedestrian stumbles against another, or one driver crashes his car into another while the second driver is stopped at a light, or *A* and *B* are walking their dogs when *A*’s dog bites *B*. But the nonreciprocal-risk rationale expresses a more significant idea: if one activity creates risks disproportionate to the risks of the activity in which the victim is engaged or creates risks greater than some specified background level of risk, then that is a reason to require the activity to compensate those harmed by the additional risk (though it is not necessarily a reason to require a change in the level or type of risk, as a negligence standard would

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24. *Id.* § 20 cmt. j.

25. *Id.*

26. *Id.* § 22 cmt. d.

27. *Id.* § 23 cmt. b.



require). Pedestrians as a class impose similar risks on each other, as do drivers or dog owners. But if *A* knows that his dog has a tendency to bite, then his dog will be considered “abnormally dangerous,” and he will be strictly liable if it does bite *B*. One reason for this rule is that owners of abnormally dangerous dogs impose nonreciprocal risks on others—even on most other dog owners (unless those owners’ dogs are also abnormally dangerous).<sup>28</sup>

#### D. Nonreciprocal Benefit

Academic discussions of traditional strict liability have paid much more attention to whether the activity imposes a nonreciprocal risk than to whether the person conducting the activity obtains a distinctive, nonreciprocal benefit<sup>29</sup>—a benefit not shared by the class of victims or by the community as a whole.<sup>30</sup> But this factor does play a role, albeit a somewhat lesser one, in the *Restatement (Third)*’s explanation and justification of traditional strict-liability rules. Notice that this factor is also a prominent explanation of the “strict liability”<sup>31</sup> rule of *Vincent v. Lake Erie Transportation Co.*: one who appropriates the property of another or deliberately chooses to create a high risk of damaging the property of another, in order to save his own property, should pay for the harm to the other, even if his decision to sacrifice that property is perfectly reasonable.<sup>32</sup> It is the private benefit to the actor that justifies the duty to compensate.<sup>33</sup> In cases of public necessity, when

28. The most famous academic defense of the nonreciprocal-risk rationale is George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972). For some criticisms, see Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1078–82 (1972); Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963, 977–86 (1981). The important point that strict-liability doctrines focus on activities, not isolated acts, is helpfully analyzed in Gregory Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285, 1330–31 (2001).

29. The term “nonreciprocal benefit” is my own and is not employed in the *Restatement (Third)*.

30. However, Gregory Keating has emphasized the “benefit” rationale as part of his general endorsement of strict enterprise liability for the characteristic risks of an activity: “[E]nterprise liability expresses the maxim that those who profit from the imposition of risk should bear the costs of the accidents that are a price of their profits.” Keating, *supra* note 28, at 1287.

31. In form, of course, the rule in *Vincent* is that the defendant who commits an intentional tort of trespass and is privileged by private necessity has only an “incomplete” privilege and must pay for the harm he causes in exercising the privilege. *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221, 222 (Minn. 1910); see also RESTATEMENT (SECOND) OF TORTS § 197 (1965). Doctrinally, *Vincent* is an intentional-tort case. But substantively, it expresses a type of strict liability.

32. *Vincent*, 124 N.W. at 222.

33. This rationale should be distinguished from an unjust-enrichment theory. Although unjust enrichment also addresses the situation in which *D* benefits at the expense of *P*, it remedies that situation by requiring *D* to

the actor sacrifices the plaintiff's property in order to save the property or lives of others, there is no such duty.<sup>34</sup>

Several times the *Restatement (Third)* mentions the distinctive benefit obtained by the owner of an animal or the entity conducting the activity as a reason for the strict-liability rule. Thus, one reason that blasting is a paradigm of the abnormally dangerous activities category is because "the defendant chooses to engage in blasting for reasons of its own benefit."<sup>35</sup> And one explanation it offers for *not* imposing strict liability when a dangerous activity is "a matter of common usage" is that "the more common the activity, the more likely it is that the activity's benefits are distributed widely among the community; the appeal of strict liability for an activity is stronger when its risks are imposed on third parties while its benefits are concentrated among a few."<sup>36</sup> Moreover, in explaining why knowledge of the risky quality of the activity strengthens the case for strict liability, comment *i* of section 20 states: "In such a situation, it can be said that the defendant is deliberately engaging in risk-creating activity for the sake of the defendant's own advantage."<sup>37</sup>

Finally, the *Restatement (Third)*'s scope-of-liability provision, section 24(a), strongly supports the nonreciprocal-benefit rationale. Under that provision, "strict liability under §§ 20–23 does not apply . . . if the person suffers physical harm as a result of making contact with or coming into proximity to the defendant's animal or abnormally dangerous activity *for the purpose of securing some benefit* from that contact or that proximity."<sup>38</sup> Comment *a* gives some illuminating examples:

[W]hile certain jurisdictions impose strict liability on airlines when an airplane crash causes ground damage, claims by injured passengers against the airline are governed by negligence law. Because the passengers are deliberately benefiting from the activity of flying, the imposition of strict

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disgorge the benefit. RESTATEMENT OF RESTITUTION § 1 cmt. a (1937). In strict-liability torts, by contrast, the remedy is damages intended to restore *P* to the condition *P* would have occupied had *D*'s activity not caused him harm. RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (1979).

34. RESTATEMENT (SECOND) OF TORTS § 197 (1965).

35. *Id.* § 20 cmt. e. And, further along in the same comment, one rationale for treating blasting as a paradigm case is "the defendant's choice to engage *for its own advantage* in an activity that it knows to be inevitably risky." *Id.* (emphasis added).

36. *Id.* § 20 cmt. j. And recall comment *d* to section 22: "[O]wning wild animals is an unusual activity, *engaged in by a few*, which imposes on others significant risks that are themselves unusual and distinctive." *Id.* § 22 cmt. d (emphasis added). The emphasized phrase suggests that the localized, nonreciprocal nature of the benefit supports strict liability. *See also id.* § 23 cmt. b (containing similar language).

37. *Id.* § 20 cmt. i.

38. *Id.* § 24(a) (emphasis added).

liability on the airline for passenger injuries would be inappropriate. In certain wild-animal cases, the defendant is engaged in exhibiting wild animals to the public: for example, in a zoo. If an animal escapes from the cage, leaves the zoo, and injures a person living in the neighborhood, that person has a strict-liability claim against the zoo. But if the plaintiff is a patron of the zoo, exposed to wild animals because of the benefits the plaintiff secures by visiting the zoo, the plaintiff is beyond the scope of the defendant's strict liability. Similarly, if the plaintiff is a veterinarian or a groomer who accepts an animal such as a dog from the defendant, the plaintiff is deriving financial benefits from the acceptance of the animal, and is beyond the scope of strict liability, even if the dog can be deemed abnormally dangerous . . . . Likewise, if at the plaintiff's request the defendant blasts on the plaintiff's land, or if the defendant treats the plaintiff's home with an insecticide, the plaintiff has no strict-liability claim if the blasting damages a structure on the plaintiff's property or the insecticide injures the plaintiff. By the same token, if the defendant furnishes a horse to the plaintiff for horseriding, the plaintiff is benefiting from the activity and is hence beyond the scope of strict liability, even if the horse can be deemed abnormally dangerous. What makes this result especially sensible is that even if the horse's tendency to bolt renders the horse abnormally dangerous, that tendency ordinarily poses a danger only to the person who chooses to benefit from the horse by riding on it.<sup>39</sup>

The result of such a choice by the victim is not to preclude all tort liability. This provision does not, in other words, resuscitate a narrow version of traditional assumption of risk.<sup>40</sup> Rather, the result is to eliminate strict liability and relegate the plaintiff to

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39. *Id.* § 24 cmt. a. One other example in comment *a* is this: "Similarly, if a physician provides a patient with unusual therapy that is highly dangerous even when reasonable care is exercised, the plaintiff has no strict-liability claim against the physician." *Id.* This is a curious example; even if a patient failed to give her informed consent to such treatment, I would be very surprised if such medical treatment would qualify as an abnormally dangerous activity. Indeed, much medical care is "abnormally dangerous" in a literal sense: even if conducted with reasonable care, some types of surgery have a very high incidence of seriously harmful side effects, yet medical treatment is almost always governed by a negligence standard of customary care.

40. But note that in some cases, conduct by the victim that satisfies section 24(a) would preclude *any* tort liability, either because it satisfies the criteria of the assumption-of-risk doctrine that some modern jurisdictions retain or because the defendant owes no duty to protect the victim from harm in such circumstances (or does not breach a duty to such a victim). *See generally* Kenneth W. Simons, *Reflections on Assumption of Risk*, 50 UCLA L. REV. 481 (2002). Suppose, for example, that a duly warned passenger flies in an experimental airplane, a veterinarian cares for a dog that the owner has negligently mistreated, a duly warned homeowner agrees to the use of a more effective but more dangerous pesticide, or a duly warned customer chooses to ride a more dangerous but more challenging horse.

proving a negligence claim.<sup>41</sup> Thus, the distinctive-benefit rationale is a rationale specific to strict liability. And it is a rationale that presupposes that the benefits to the injurer (or to the injurer's activity) are largely at the expense of the victim (or the victim's activity). When *both* victim and injurer benefit from the interaction, section 24(a) tells us, the default negligence regime governs.

On the other hand, does the *Restatement (Third)*'s rejection of the "value to the community"<sup>42</sup> as a factor supporting strict liability cut *against* counting nonreciprocal benefit as a reason for strict liability in this context? So it might seem. According to the *Restatement (Third)*, the value of an activity can be relevant to the question of whether it is negligent to engage in the activity at all, but once we answer that question in the negative, value is only, at best, indirectly relevant.<sup>43</sup> Specifically, as an empirical matter, common activities will tend to be valuable, but "it is their commonness rather than their value that directly pertains to the strict-liability issue."<sup>44</sup> Yet if nonreciprocal benefit is one reason for subjecting an uncommon activity to strict liability, then, when an activity is especially valuable to the whole community, it seems that we should be reluctant to impose strict liability.

But I think this argument does not ultimately succeed in undermining the nonreciprocal-benefit rationale because it fails to distinguish between how valuable an activity is and how widespread its benefits are. A nonreciprocal benefit is one that accrues to only a few in the community; it need not be a benefit that is of only modest value to the community.

The nonreciprocal-benefit rationale nevertheless poses a serious problem: how should one define "nonreciprocal" benefit? (The

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41. As comment *a* continues:

Thus, the airplane passenger may have a negligence claim against the airline and may be able to establish negligence by relying on *res ipsa loquitur*. Similarly, a zoo may be liable for negligence in allowing its animal to escape; the dog owner may be negligent in failing to inform the veterinarian of the dog's dangerous tendency; the physician may be liable for failing to warn the patient of the basic risks of therapy and thereby to secure the patient's informed consent; the pest-control company may be liable to the client for negligently failing to advise the client of the dangers of the insecticide and how to avoid them; the stables may be negligent for failing to warn the rider of the horse's special danger or for providing the rider with an inappropriate horse.

RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 24 cmt. a (Proposed Final Draft No. 1, 2005).

42. Compare RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 20 cmt. k (Proposed Final Draft No. 1, 2005) (whether "the activity provides substantial value or utility is of little direct relevance"), with RESTATEMENT (SECOND) OF TORTS § 520(f) (1977) (value to the community is a factor weighing against strict liability).

43. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 20 cmt. k (Proposed Final Draft No. 1, 2005).

44. *Id.*

“nonreciprocal risk” rationale also notoriously poses this characterization problem.)<sup>45</sup> Perhaps we all ultimately benefit from the activity of blasting (if that is the most efficient way of building a foundation or demolishing a building), insofar as this activity lowers the costs of goods and services. Indeed, perhaps we all ultimately “benefit” from being able to own a wild animal if we so choose. On such a highly expansive view of “benefit,” the rationale falls apart and is unable to distinguish activities for which there should and should not be strict liability.<sup>46</sup>

Even on a narrower understanding of “benefit,” this rationale can be problematic. Consider the question of whether strict liability should apply to harm caused by (a) wild animals, (b) domestic animals known to be dangerous, or (c) domestic animals not known to be dangerous. Strict liability is imposed for (a) and (b) but not (c).<sup>47</sup> Why is there no strict liability for (c)? One explanation offered by the *Restatement (Third)* refers to the benefits of such ownership: “[S]uch animals provide important benefits to those who own or maintain possession of them. Thus, livestock such as cows, horses, and pigs are of substantial economic value, while pets such as dogs and cats provide essential companionship for households and families.”<sup>48</sup>

And yet, might not Mike Tyson’s pet tiger provide him with “essential companionship”? After all, those who choose to own a wild animal rather than a conventional pet presumably do so in order to obtain some special benefit. Similarly, when my previously peaceable dog bites your hand, do you not have a legitimate argument that I obtain a distinctive benefit from dog ownership that you do not share? Indeed, the benefits from blasting (for which we impose strict liability) seem quite widespread, while the benefits that accrue from owning apparently peaceable pets (for which we do not impose strict liability), while significant for households owning the pets, are likely to be miniscule or nonexistent for households that do not. Interestingly enough, half of all jurisdictions do impose *statutory* strict liability for dog bites even in scenario (c),<sup>49</sup> which might reflect a sense that the nonreciprocal-risk and nonreciprocal-benefit rationales plausibly support doctrinal strict liability here.

These characterization difficulties are not easy to resolve. In the cognate context of the *Vincent* private-necessity privilege, it is similarly difficult to say why deliberately creating a significant *risk*

45. See generally *supra* note 25 and accompanying text.

46. See Kenneth W. Simons, *Tort Negligence, Cost-Benefit Analysis, and Tradeoffs: A Closer Look at the Controversy*, 41 LOY. L.A. L. REV. 1171, 1210–13 (2008).

47. See generally RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM §§ 22(a), 23 & cmt. b (Proposed Final Draft No. 1, 2005). See also *id.* § 23 cmt. c (explaining the “scienter” requirement).

48. *Id.* § 23 cmt. b.

49. *Id.* § 23 cmt. d.

of harm to another to save yourself (but a risk of harm much less than a certainty) does not fall within the “incomplete” privilege and require compensation.<sup>50</sup> Perhaps intuition and community perceptions of fairness should play a role here. These difficulties might also explain why the drafters, and the courts, seem reluctant to place too much weight on this fairness rationale.<sup>51</sup>

*E. Exclusive Causation*

The most surprising argument for traditional strict liability in the *Restatement (Third)* is the claim that when a defendant is the “exclusive” or “almost exclusive” cause of the harm, that is a reason for imposing strict liability.

Comment *e* to section 20, the abnormally dangerous activities provision, states:

[B]lasting is an activity that causes harm essentially on its own, without meaningful contribution from the conduct of the victim or of any other actors. Typically, the victim is a passive, uninvolved third party, who is connected to the blasting only in the sense that the victim owns property in the neighborhood and suffers harm on account of the blasting.<sup>52</sup>

Moreover, comment *f* to section 20 points out that some scholars advocate that an injurer should be strictly liable for all harm that he causes; the comment then states:

This position resonates deeply in public attitudes: if the person in the street is asked whether a party should be liable for injuries that the party causes, the person’s answer is likely to be affirmative. These perceptions and attitudes can be easily explained: when a person voluntarily acts and in doing so

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50. *Cf. Cordas v. Peerless Transp. Co.*, 27 N.Y.S.2d 198, 199–200, 202 (N.Y. City Ct. 1941) (emergency circumstances excused the cab driver, threatened by an armed robber, from negligence liability, even though, when he jumped out of his cab and permitted it to mount the sidewalk, he made a deliberate choice that risked the welfare of nearby pedestrians in order to save himself). See generally Stephen D. Sugarman, *The “Necessity” Defense and the Failure of Tort Theory: The Case Against Strict Liability for Damages Caused While Exercising Self-Help in an Emergency*, ISSUES IN LEGAL SCHOLARSHIP (2005), at 58–62, available at <http://www.bepress.com/ils> (search for “Sugarman”).

51. A similar but distinct “benefit” rationale is offered in *Restatement (Third) of Torts: Products Liability*. When the injured party is a user of the product, the nonreciprocal-benefit argument obviously does not apply. Rather, a different kind of “benefit” argument is invoked:

[M]any believe that consumers who benefit from products without suffering harm should share, through increases in the prices charged for those products, the burden of unavoidable injury costs that result from manufacturing defects.

RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. a (1998).

52. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 20 cmt. e (Proposed Final Draft No. 1, 2005).

secures the desired benefits of that action, the person should in fairness bear responsibility for the harms the action causes.<sup>53</sup>

The comment goes on to acknowledge the Coasean insight<sup>54</sup> that most accidents involve the intersection of two or more activities and thus cannot be fairly characterized as caused by only one of them. But then, remarkably, the comment asserts:

Yet even though causation is frequently indeterminate as a possible standard for liability, it is not always indeterminate . . . [B]lasting may provide a useful example of largely unitary causation. When the defendant by blasting projects debris that damages the plaintiff's property, common parlance might lead one to observe that that damage has been almost exclusively caused by the defendant's activity.<sup>55</sup>

Similarly, comment *h* to section 21, the intruding-livestock provision, explains that strict liability does not attach when livestock stray onto a highway, in part because

when a cow strays onto neighboring property and causes property damage, the cow is the only active entity. For highway accidents, there are at least two actors who engage in conduct that contributes to the accident; when an accident results from a combination of actions by various parties, the concept of strict liability has less appeal.<sup>56</sup>

Finally, the Reporters' Notes describe the question whether strict liability should attach when an airplane causes ground damage as "difficult" and one that the *Restatement (Third)* leaves open, even though this scenario concededly satisfies neither of the requirements of section 20 (that the activity is uncommon and that it creates a significant residual risk even when due care is used).<sup>57</sup> The issue remains difficult, according to the Reporters, solely because the exclusive-causation rationale clearly applies here:

[A]s Comment *f* has emphasized, one rationale for strict liability relates to the defendant's exclusive control over the instrumentality of harm, and this rationale is impressively applicable in aviation ground-damage cases. As the dissent in *Crosby* states, the plaintiff in a ground-damage case may well be a "wholly innocent, inactive homeowner into whose home an

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53. *Id.* § 20 cmt. f.

54. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 8–15 (1960).

55. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 20 cmt. f (Proposed Final Draft No. 1, 2005).

56. *Id.* § 21 cmt. h.

57. *Id.* § 20 reporters' note cmt. k.

airplane suddenly crashes.”<sup>58</sup>

The *Restatement (Third)*'s reliance on the idea of “exclusive” (or “unitary,” “almost exclusive,” or “dominant”) causation<sup>59</sup> is not easy to understand or defend. As explained by numerous economists, philosophers, and legal academics, from Ronald Coase to Jules Coleman and Arthur Ripstein to James Henderson to Stephen Perry, it is either incoherent or false to claim that the person who engages in blasting is the only or principal cause of the victim's harm.<sup>60</sup> Often such a victim *could* take a precaution, but it would be very burdensome or unfair to require her to do so. For example, if she knows that blasting is taking place nearby, she could abandon her home or office for the duration; of course, the availability of this option will not preclude her from recovering for personal injury if she stays put. And even if it is literally impossible for the victim to take a precaution to avoid the harm, the victim's very presence at the scene (or her ownership of the property near to the blasting site) is a necessary causal condition of her suffering the harm. To put the point more generally, any notion that actor or activity *Y* has “exclusively caused” harm to actor *Z* is unintelligible until the meaning of the phrase is unpacked. And that meaning crucially depends on unpacking underlying assumptions about, inter alia: (1) who has the legally relevant background entitlements (to bodily integrity, to property, to engage in an activity), (2) the scope of those entitlements, (3) which particular types of actions by *Y* (intentional?

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58. *Id.* (quoting *Crosby v. Cox Aircraft Co.*, 746 P.2d 1198, 1202 (Wash. 1987) (Brachtenbach, J., dissenting)). The idea that “exclusive causation” is a fair basis for imposing strict liability is also defended in some of Reporter Gary Schwartz's writings. See, e.g., Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1821 (1996); Gary T. Schwartz, *Rylands v. Fletcher, Negligence, and Strict Liability*, in *THE LAW OF OBLIGATIONS: ESSAYS IN CELEBRATION OF JOHN FLEMING* 209, 239 (Peter Cane & Jane Stapleton eds., 1998).

59. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 20 cmts. e–f (Proposed Final Draft No. 1, 2005).

60. See Coase, *supra* note 55, at 13; Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 MCGILL L.J. 91, 96 (1995) (Can.); James A. Henderson, Jr. & Jeffrey J. Rachlinski, *Product-Related Risk and Cognitive Biases: The Shortcomings of Enterprise Liability*, 6 ROGER WILLIAMS U. L. REV. 213, 241 (2000) (noting that a given accident can often be described as “the cost” of multiple activities); James A. Henderson, Jr. & Aaron D. Twerski, *The Unworkability of Court-Made Enterprise Liability: A Reply to Geistfeld*, 67 N.Y.U. L. REV. 1174, 1174–75 (1992); Stephen R. Perry, *The Distributive Turn: Mischief, Misfortune and Tort Law*, 16 QUINNIPIAC L. REV. 315, 322–23 (1996); Stephen R. Perry, *The Impossibility of General Strict Liability*, 1 CAN. J.L. & JURISPRUDENCE 147, 161–66 (1988). The Reporters' Notes cite Perry's article, *The Impossibility of General Strict Liability*, for the position that “unilateral imposition” of risk justifies strict liability. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 20 reporters' note cmt. f (Proposed Final Draft No. 1, 2005). But, by that phrase, Perry means much more than unilateral causation.



negligent? or merely deliberate choices?) that affect those entitlements impose on *Y* a duty of compensation, and (4) what degree or kind of change in those entitlements requires compensation.

To be sure, the person on the street probably does have the following two strong intuitions: (a) the actor who plants the dynamite is the sole cause of the harm to the passerby hit on the head or to the building that is damaged by the resulting debris and (b) the actor should therefore pay compensation to the victim. But it is incumbent on those of us who promulgate restatements and write clarifying comments, and on judges who rationalize legal doctrine, to explain why that intuition oversimplifies the issues. (For example, if Don has a heart attack and loses control of his car, harming pedestrian Paula, Don will not and should not be strictly liable to Paula, even though Don is undoubtedly the “exclusive cause” of the harm in this simple intuitive sense.)<sup>61</sup>

Other arguments and rationales that the *Restatement (Third)* offers, especially its first two fairness rationales, provide a better explanation for the “exclusive causation” intuition. Thus, the activity of blasting clearly imposes nonreciprocal risks and (at least in a sense) derives a nonreciprocal benefit. And the passage quoted earlier from comment *f* to section 20, asserting that one who voluntarily acts and thereby “secures the desired benefits of that action” should in fairness pay for the resulting harm, obviously relies upon the nonreciprocal-benefit rationale.<sup>62</sup> Moreover, a later passage from that comment goes on to make the unexceptional point that a defendant who plays a “dominant role” in causing harm (such as one who engages in blasting) is invariably in the best position to consider and implement measures to reduce the risk of harm—an incentive-based rationale.<sup>63</sup> Finally, the *Restatement (Third)* presupposes that in abnormally dangerous activity cases, there is nothing that the victim can reasonably be asked to do to prevent the harm in question;<sup>64</sup> this is also a presupposition of the common-

61. See, e.g., *Hammontree v. Jenner*, 97 Cal. Rptr. 739, 742 (Ct. App. 1971) (declining to impose strict liability on an automobile driver when the driver had taken reasonable care to control epileptic seizures).

62. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 20 cmt. f (Proposed Final Draft No. 1, 2005).

63. *Id.* The Reporters’ Note suggests that contemporary economists *reject* the Coasean view that accidents are a product of the combined causal input of two or more activities because such economists separately model “unilateral” and “bilateral” accidents. *Id.* § 20 reporters’ note cmt. f. But the reason that they model “unilateral” accidents separately is to capture cases in which the level of care of the victims has no effect on the accident rate. This is a valid reason for such a model, but it is consistent with the straightforward point that, even in this category of cases, the victim’s presence at the scene is a causally necessary condition of his suffering an injury.

64. See *id.* § 20 cmt. h (defending the doctrinal requirement that a plaintiff prove a residual risk even when reasonable care has been exercised by all

sense intuition that exclusive causation justifies strict liability.

The *Restatement (Third)*'s unwarranted reliance on this exclusive-causation rationale is reminiscent of the *Restatement (Third) of Product Liability*'s invoking, as one reason for product liability, a product manufacturer's "deliberate decision" to market a product that it knows will produce a statistically significant risk of injury.<sup>65</sup> In both instances, there is indeed a widespread popular intuition that this particular feature of the defendant's activity is legally relevant to the obligation to compensate for resulting harm. But in both cases, the intuition does not withstand scrutiny. With respect to the "deliberate marketing despite a known risk" argument, indeed, the current *Restatement (Third)* properly *rejects* that argument in the section defining "intent."<sup>66</sup> Comment *e* to section 1 points out that an actor's knowledge of a high risk (or even a certainty) of harm might result simply from the wide temporal or geographical scope of her activity and thus does not carry any necessary implication that the activity is negligent or otherwise tortious to undertake.<sup>67</sup>

In addition to the five rationales just mentioned, two other possible rationales are worthy of discussion. The *Restatement (Third)* mentions one of these, the community's sense of fairness, fleetingly. It rejects the other, loss spreading.

#### F. *The Community's Sense of Fairness*

In several passages, the *Restatement (Third)* suggests that some independent weight should be afforded to the community's sense of fairness in determining when strict liability should be imposed. Thus, comment *j* to section 20 provides:

The concept of common usage can be extended further to activities that, though not pervasive, are nevertheless common and familiar within the community. If in this sense the activity is normal, it is difficult to regard the activity as exceptional or abnormally dangerous. Basic public attitudes tend to be accepting of familiar and traditional risks, even while apprehensive of risks that are uncommon and novel.

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actors) ("Indeed, of all the activities that courts have found to be abnormally dangerous, there is none in which the accident rate ensuing from the activity is significantly influenced by the degree of reasonableness in the conduct of potential victims.").

65. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. a (1998) ("Because manufacturers invest in quality control at consciously chosen levels, their knowledge that a predictable number of flawed products will enter the marketplace entails an element of deliberation about the amount of injury that will result from their activity.").

66. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 1 cmt. e (Proposed Final Draft No. 1, 2005).

67. See *id.*; see also Kenneth W. Simons, *The Conundrum of Statistical Knowledge* (Oct. 25, 2006) (unpublished manuscript on file with author).

The law should be respectful of public attitudes of this sort.<sup>68</sup>

Moreover, comment *d* to section 21, imposing strict liability for intruding livestock, states:

[P]erhaps because strict liability for intruding livestock is the common-law tradition, recognizing strict liability does not disturb the community's sense of justice. There is interesting evidence that American cattle owners regard their own liability as morally sound and accept strict liability in practice even in localities where it is not imposed as a matter of law.<sup>69</sup>

Finally, comment *d* to section 22 indicates that “[t]he basis for strict liability is partly historical: at least since the middle of the 19th century, the common law has imposed strict liability for wild animals.”<sup>70</sup>

It is certainly legitimate to show some deference to community norms, especially those that have withstood the test of time, and to display some modesty in acknowledging the limits of our ability to justify legal doctrine. Accordingly, this is a valid rationale for strict liability. But it should not be the primary source of justification. In the end, academics and judges must look inside the black box of “community sentiments about justice” and determine whether principle and policy offer a secure, transparent, and persuasive foundation for those sentiments.

#### *G. Loss Spreading*

Last and by no means least, the *Restatement (Third)* firmly rejects loss spreading as a rationale for traditional strict liability.

The appeal of strict liability, it can be noted, does not depend on any notion that the defendant is in a better position than the plaintiff to allocate or distribute the risk of harm: indeed, the defendant may be a small business enterprise; the property damage suffered by the plaintiff may be no more than moderate, and the plaintiff as a property owner may already be insured for the loss that that damage entails.<sup>71</sup>

Loss spreading could be characterized either as an economic or as a fairness rationale. From an economic perspective, even when an injurer has acted with due care, strict liability provides some social-welfare benefits. Not compensating the victim and thereby

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68. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 20 cmt. j (Proposed Final Draft No. 1, 2005).

69. *Id.* § 21 cmt. d. The *Restatement (Third)* is here referring to the well-known study contained in ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

70. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 22 cmt. d (Proposed Final Draft No. 1, 2005).

71. *Id.* § 20 cmt. e.

leaving him with a concentrated loss might cause more disutility than imposing strict liability and thus broadly distributing that loss among consumers of the activity that caused that loss.<sup>72</sup> From a fairness perspective, loss spreading is sometimes defended as a kind of localized distributive justice.<sup>73</sup>

It is striking that the *Restatement (Third)* so unequivocally resists the loss-spreading rationale here. Advocates of enterprise liability have often cited strict liability for abnormally dangerous activities as a salient illustration.<sup>74</sup> Moreover, the *Restatement (Third) of Products Liability* endorses loss spreading as a rationale for products liability, especially for those products-liability doctrines that most clearly go beyond negligence and impose something akin to strict liability (for example, manufacturing-flaw liability, and the vicarious liability of entities in the distribution chain of a defective product).<sup>75</sup>

But the loss-spreading rationale has increasingly, and deservedly, drawn criticism for being an open-ended and highly expansive rationale for tort liability.<sup>76</sup> And products liability is a much more fitting context for invoking the rationale. A commercial relationship exists between the seller and the purchaser of the product (and the purchaser is often the user of the product who suffers harm from the product defect). Accordingly, when a company spreads the cost of injuries to consumers of the product by increasing the product's cost, the direct result is that consumers who benefit from the product share this cost. Loss spreading also might encourage the market to develop products that reflect a satisfactory, informed tradeoff of product features (considering convenience, value, safety, cost, and so forth). But when those who conduct dangerous activities or own dangerous animals are required to pay the full accident costs of their activities, their victims are normally not in a direct commercial relationship with them, so these arguments for loss spreading do not apply.

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72. See Stephen R. Perry, *Tort Law*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 57, 68 (Dennis Patterson ed., 1996).

73. See *id.* at 74–75.

74. See Gerald W. Boston, *Strict Liability for Abnormally Dangerous Activity: The Negligence Barrier*, 36 SAN DIEGO L. REV. 597, 623–24 (1999) (referring to Page Keeton's endorsement of abnormally dangerous activity strict liability as furthering the project of enterprise liability); Mark Geistfeld, *Should Enterprise Liability Replace the Rule of Strict Liability for Abnormally Dangerous Activities?*, 45 UCLA L. REV. 611, 648–49 (1998).

75. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. a (1998).

76. See, e.g., KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 18–19 (3d ed. 2007). It is also quite inefficient, relative to other methods of loss distribution such as insurance or government-benefit programs. *Id.*; see also Geistfeld, *supra* note 75, at 625–33.

## II. THE SURPRISINGLY NARROW SCOPE OF TRADITIONAL STRICT-LIABILITY RULES

In light of the rationales that the draft *Restatement (Third)* offers for traditional strict-liability rules, one would expect the rules themselves to impose strict liability in a wider range of circumstances than they do. Consider two limitations on scope that are surprising (at least when viewed in the abstract, apart from their historical support in case law).

First, the basic requirement that abnormally dangerous activities not be a matter of “common usage” is difficult to justify. Moreover, as we will see, the draft *Restatement (Third)* defines the scope of that requirement very narrowly; that narrow definition is even more difficult to justify.

To be sure, uncommon activities are more likely to impose nonreciprocal risks or to garner nonreciprocal benefits. And common activities are more likely to impose reciprocal risks and to reap reciprocal benefits. But these associations are quite contingent. Automobiles are widely used, yet they often impose risks on pedestrians, and these risks certainly seem to be nonreciprocal (especially in the case of pedestrians who never drive). And the immediate beneficiaries of this activity are drivers and passengers, not pedestrians.

It is sometimes argued that common activities are also more likely to be valuable to the community, and so the “incentive to optimize the level of the activity” argument for strict liability will less often apply to them.<sup>77</sup> It is less likely that we will want to discourage a common activity, such as owning pets not known to be dangerous, than an uncommon activity, such as owning pet tigers. But again the correlation is rather loose. Blasting is clearly highly valuable to industrial and residential development, yet it is considered the paradigm of an abnormally dangerous activity.

Moreover, as elaborated in the comments and as implemented in the case law,<sup>78</sup> the “common usage” category is quite broad, and thus the “not a matter of common usage” category is extraordinarily narrow. For example, comment *j* to section 20 states that

activities can be in common use even if they are engaged in by only a limited number of actors. Consider the company that transmits electricity through wires, or distributes gas through

77. See, e.g., *Ind. Harbor Belt R.R. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1177 (7th Cir. 1990) (Posner, J.).

78. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 20 cmt. j (Proposed Final Draft No. 1, 2005); see, e.g., *Chi. & N.W. Ry. Co. v. Tyler*, 482 F.2d 1007, 1010 (8th Cir. 1973) (dams, though not a common practice, are not unusual); *Toledo v. Van Waters & Rogers, Inc.*, 92 F. Supp. 2d 44, 56 (D.R.I. 2000) (transportation of chemicals on major highways is a common usage); *Warner v. Norfolk & W. Ry. Co.*, 758 F. Supp. 370, 372 (W.D. Va. 1991) (railroads are common usage).

mains, to most buildings in the community. The activity itself is engaged in by only one party. Even so, electric wires and gas mains are pervasive within the community. Moreover, most people, though not themselves engaging in the activity, are connected to the activity; electric wires and gas mains reach their homes. Accordingly, the activity is obviously in common usage, and partly for that reason strict liability is not applicable.<sup>79</sup>

This concept of “connection” to an activity is potentially quite elastic. Presumably the adjacent landowner who suffers the effects of blasting is not sufficiently “connected,” but why not? Perhaps the point is that consumers of electricity and gas utility service directly *benefit*, but if so, then that argument (rather than “commonness”) should be the rationale for declining to impose strict liability in this scenario.<sup>80</sup>

The upshot is that very few activities have been found to be abnormally dangerous under the *Restatement (Second)*'s test,<sup>81</sup> and the *Restatement (Third)*'s test is unlikely to change this result. For example, the transmission of gas through underground lines, the transmission of electricity through power lines, the underground storage of gasoline, and even the transportation of dangerous chemicals have been found not to qualify as abnormally dangerous.<sup>82</sup> And in some jurisdictions, blasting is the only activity that does qualify.<sup>83</sup>

Second, the requirement that the owner of a domestic animal have “scienter”<sup>84</sup> is also difficult to justify. The owner must know or have reason to know (from facts already within his grasp) that the animal is abnormally dangerous before strict liability will attach. This requirement is as arbitrary as the “uncommon usage” requirement for abnormally dangerous activities. The owner of a dog or cat that is not known to bite is still imposing a nonreciprocal risk on others and is still obtaining a distinctive, nonreciprocal benefit. And it is certainly foreseeable that any dog could bite.

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79. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 20 cmt. j (Proposed Final Draft No. 1, 2005). The comment goes on to say: “The concept of common usage can be extended further to activities that, though not pervasive, are nevertheless common and familiar within the community. If in this sense the activity is normal, it is difficult to regard the activity as exceptional or abnormally dangerous.” *Id.*

80. Moreover, the requirement, for a finding of abnormal dangerousness, that due care would still leave a significant residual risk is probably satisfied more frequently than the case law and the *Restatement (Third)* comments suggest. For example, we too readily assume, or pretend, that due care in driving a car or piloting an airplane will completely eliminate the risks.

81. See Boston, *supra* note 75, at 623–24.

82. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 20 cmt. h & reporters' notes cmts. h, j (Proposed Final Draft No. 1, 2005).

83. *Id.* § 20 cmt. e.

84. *Id.* § 23 cmt. c.

If followed to their logical conclusion, the *Restatement (Third)*'s various rationales might justify not only broader traditional strict-liability doctrines but also additional strict-liability doctrines not currently recognized at all. Why not impose strict liability on manufacturers when their nondefective products cause injuries to bystanders who did not use the product? Why not impose strict liability when a passerby is injured by a projectile launched from a golf course, a baseball stadium, or a soccer or cricket field?<sup>85</sup> Or when emergency medical or police vehicles save someone from harm but thereby impose higher risks on the community, resulting in injury or death? The list could go on indefinitely.

One possible explanation for the limited scope of strict liability despite the draft *Restatement (Third)*'s potentially expansive rationales is that those rationales are not intended to be a set of necessary or sufficient conditions for strict liability. It is therefore difficult to assess their significance, singly or in combination, and difficult to say with certainty that their implications demand a much more extensive regime of strict liability. Another explanation is that the *Restatement (Third)* is a "Re-statement" of Torts: it begins with the recent case law, and only then looks for the justifications that best *rationalize* the law as it stands. So it is hardly remarkable that the fit between *explanandum* and *explanans* is imperfect.

But there are also other explanations, to which I now turn.

### III. FINAL REFLECTIONS

#### A. *Strict Liability Is More (Only?) Palatable When Its Effects Are Modest*

One likely reason for the relatively confined scope of traditional strict-liability doctrine is the sense that strict liability of any type is much more palatable when its burdens and effects are modest.<sup>86</sup> Compare products liability, which is genuinely strict in two principal contexts: when a product contains a manufacturing flaw and when a food product contains an impurity.<sup>87</sup> Both scenarios are relatively limited departures from a fault system. Instances of manufacturing flaws and food impurities are relatively infrequent,

85. Cf. *Harrington v. Border City Mfg. Co.*, 240 Mass. 170, 132 N.E. 721 (Mass. 1921) (baseball); *Hennessey v. Pyne*, 694 A.2d 691 (R.I. 1997) (golf); *Bolton v. Stone*, [1951] A.C. 850 (H.L.) (appeal taken from Eng.) (cricket).

86. See James A. Henderson, *The Boundary Problems of Enterprise Liability*, 41 MD. L. REV. 659 (1982); James A. Henderson, *Why Negligence Dominates Tort*, 50 UCLA L. REV. 377, 390–98 (2002) (emphasizing that a viable system of strict liability must generate judicable liability disputes, and its risks must be insurable).

87. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. §§ 2 cmt. a, 7 cmts. a–b (1998).

in the sense that they have a relatively small effect on the price of the product or food. By contrast, an ambitious enterprise-liability doctrine for products, in which the cost of all injuries caused by knives or automobiles was impounded into the price of the product, would dramatically affect their price.<sup>88</sup>

Notably, a consumer-expectations test governs strict liability for food impurities: “a harm-causing ingredient of the food product constitutes a defect if a reasonable consumer would not expect the food product to contain that ingredient.”<sup>89</sup> Yet many courts have rejected a consumer-expectations test as the standard for product-design defects, in part because of concern that it would impose excessive liability.<sup>90</sup> So why is it widely acceptable as a test for food impurities? One answer, I think, is that the liability consequences in the context of food are relatively limited: a food consumer’s expectations with respect to safety are only rarely disappointed, and often the consumer’s injuries are relatively minor. Extending a consumer-expectations test to product designs would have much more far-reaching effects.

Another illustration of the implicit “modest burden” constraint on strict-liability doctrine is the multiple ways that the doctrine treats foreseeability of harm. In some categories, liability is strictly imposed even if the victim has not specifically proved that the harm is foreseeable. For example, a showing of such scienter is required before strict liability will be imposed for harm caused by domestic animals, but it is not required in the case of wild animals.<sup>91</sup> Of course, normally the owner of a wild animal would and should expect that the animal presents some nontrivial risk of harm even if due care is used. Yet even in the case of an extremely peaceable wild animal, “foreseeability” of harm is categorically presumed; the owner is in effect liable for both foreseeable and some unforeseeable risks.<sup>92</sup> The reason for this pattern, I surmise, is that imposing *additional* liability for “unforeseeable” (or very low-level) risks created by wild animals will not significantly burden their owners, since almost all harms that wild animals cause will be foreseeable. By contrast, imposing additional liability for the low-level risks of

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88. Products liability is also strict in imposing liability on actors in the distribution chain of a product for any previously introduced defect in the product. Here, too, the liability is not especially disruptive: it is predictable, and one can protect against it readily by advanced contractual arrangements.

89. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 7 (1998).

90. *Id.* § 2 cmt. g.

91. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM §§ 22 cmts. c–d, 23 cmt. c (Proposed Final Draft No. 1, 2005).

92. See also *id.* § 29 cmt. j (defending the definition of scope of liability (or proximate cause) in terms of whether the risk results from the risks that made the actor’s conduct tortious and pointing out that in strict-liability cases especially, this formulation is preferable to a foreseeability test because it explains why strict liability is imposed for wild animals even if the owner reasonably believes the animal is tame).



domestic animals when the owner had no specific reason to believe that his dog or cat was dangerous could saddle the owner with a substantial additional liability burden, since these unforeseeable risks will probably constitute a much higher proportion of all harms that such domestic animals cause.<sup>93</sup>

Similarly, consider the question of whether a product manufacturer must foresee the possibility of a manufacturing flaw or whether a provider of food must foresee the possibility of a foreign substance or an unexpected natural substance in the food that she serves. As in the case of wild animals, no specific proof of such foreseeability is required.<sup>94</sup> Again, although it is in a general way foreseeable that, even if due care is used, any product might not be manufactured correctly or any portion of food might contain an impurity, nevertheless in a particular circumstance this risk could be exceedingly unlikely. And yet the manufacturer or producer will still be strictly liable. Again, the reason, I suspect, is that the occasions of strict liability are likely to be extremely rare; thus, imposing strict liability despite a lack of foreseeability of the specific risk will not be unduly burdensome.

The *Restatement (Third)* should be more explicit and honest in acknowledging these concerns about excessively burdening legitimate activities, for these concerns operate to constrain strict liability to a narrower scope than its rationales would suggest.

#### *B. The Blurry Boundary Between Negligence and Strict Liability*

The last set of observations concerns the fuzziness of the boundary between negligence and strict liability. Negligence doctrine, it is clear, contains many traces of strict liability.<sup>95</sup> The objective test of reasonable care formally imposes a duty of care even on those who lack the mental capacity to satisfy that duty. No actual human being can infallibly take the nondurable precautions that negligence law requires (such as paying one hundred percent

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93. By the same token, however, the extent of harm caused by dog bites will ordinarily not be extremely serious. This might explain why so many jurisdictions impose strict liability for dog bites by statute. *Id.* § 23 cmt. d; *see, e.g.*, ARIZ. REV. STAT. ANN. § 11-1025 (2001); MICH. COMP. LAWS § 287.351 (2002); WIS. STAT. § 174.02 (2009).

94. Indeed, the plaintiff need not even prove *ex post* what aspect of the product was defective. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 29 cmt. j (Proposed Final Draft No. 1, 2005) (“[S]trict liability is imposed for manufacturing defects. Focusing on the risks created by a manufacturing defect, rather than attempting to manipulate the concept of foreseeability, better illuminates the requisite analysis [of whether defendant’s manufacturing flaw is a proximate cause of the plaintiff’s harm.]”); RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 3 cmt. c (1998); *see also* Kenneth W. Simons, *Corrective Justice and Liability for Risk Creation: A Comment*, 38 UCLA L. REV. 113, 136 (1990).

95. This is so insofar as negligence, as distinguished from strict liability, is viewed as a type of fault requiring at least minimal culpability.

attention at every moment while driving), so there is an element of strict liability in such a duty of care. The negligence-per-se doctrine imposes a duty of care that might be more stringent than what “reasonable care” would otherwise require, especially if the jurisdiction applying the doctrine permits few excuses.<sup>96</sup> And the rule that even a nonculpable creation of risk or causation of harm can then trigger further affirmative duties, duties that a pure bystander would not owe, perhaps should be interpreted as a kind of strict-liability doctrine.

Finally, *res ipsa* doctrine, although formally a doctrine permitting circumstantial proof of negligence, in practice might frequently result in strict liability. Increasingly broad interpretations of *res ipsa* make it more likely that plaintiffs will reach the jury. Although the jury’s responsibility is to deny liability if it concludes that a defendant was probably not negligent, a natural sympathy towards the injured victim might frequently result in *de facto* strict liability. And in the specific context of traditional strict-liability doctrines, the narrowness of those doctrines is in a sense misleading, since at least some cases that would be encompassed by a broader version of those doctrines will also get to the jury today under *res ipsa*.<sup>97</sup>

However, strict-liability doctrine also contains traces of negligence. As we have already seen, strict liability is sometimes imposed when negligence exists but is difficult to prove, or when it is preferable to have a straightforward rule that can be accurately applied rather than an indeterminate “reasonable care under the circumstances” test.<sup>98</sup>

And in a more subtle way, even when it is clear that reasonable care *ex ante* by the injurer would not have prevented the victim’s harm, almost all categories of strict liability (including traditional strict liability and products liability) contain a trace of negligence or fault in an *ex post* sense: it is almost always regrettable in hindsight that the injurer’s activity resulted in harm to the victim on this particular occasion. If we could turn back the clock, we would. We wish that the blaster had not detonated the piece of dynamite that caused the victim’s concussion; we wish that the dog owner had not taken that particular stroll with feisty Fido that resulted in his biting a stranger; we wish that Coca-Cola had not placed in the stream of commerce the specific bottle that exploded in Gladys

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96. However, the *Restatement (Third)*’s version of the negligence-per-se doctrine recognizes a very broad excuse. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 15(e) (Proposed Final Draft No. 1, 2005) (“[T]he actor’s compliance with the statute would involve a greater risk of physical harm to the actor or to others than noncompliance.”).

97. See Kenneth S. Abraham, Rylands v. Fletcher: *Tort Law’s Conscience*, in TORTS STORIES 226 (Robert L. Rabin & Stephen D. Sugarman eds., 2003).

98. See *supra* notes 15–16 and accompanying text.

Escola's hand.<sup>99</sup>

By contrast, in many private-necessity cases (such as the famous *Vincent v. Lake Erie Transportation Co.* case<sup>100</sup>), the defendant's violation of the plaintiff's rights is, we might say, "unregrettable . . . in every way."<sup>101</sup> It is justifiable that the ship owner trespassed and knowingly damaged the dock in order to save his own property.<sup>102</sup> We would not want to stop this particular trespass, even if we somehow could do so. By contrast, we really do wish that the particular piece of dynamite that harmed the victim had not been detonated, that the owner had not taken that walk with Fido, and that Coca-Cola had never distributed that particular bottle. We wish this even though there was no practical and reasonable ex ante precaution that could have prevented the injury in any of these cases.

To be sure, even in *Vincent*, the situation is (or might be) "regrettable," in one of three senses. First, even in *Vincent* and other private-necessity scenarios, we should distinguish unregrettably violating rights from unregrettably causing harm.<sup>103</sup> Sometimes, although violating the victim's rights is unregrettable, causing the harm is regrettable and indeed unjustifiable because it is not actually necessary in order to preserve property or life. Consider the hiker stranded in a sudden storm who breaks down the door of an unoccupied cabin. It is justifiable for him to knock down the door if that is his only way to save himself. Here, both violating the owner's rights and causing harm are truly unregrettable, given the emergency. But if it were possible to break a window to enter rather than knock down the door, the hiker should do so; just as the ship owner in *Vincent* should make every effort to minimize damage to the dock consistent with saving his ship.

Second, in *Vincent*, although it was necessary for the ship owner to keep his ship tied to the dock (and thus violate the dock owner's property rights), it was not truly necessary (in the same sense) for him to collide with or damage the dock. If by some miracle tying up the ship resulted in no harm to the dock, that would surely be the best state of affairs. By contrast, if the ship owner needed to take one of the dock owner's cables lying on the dock in order to save his property, and if he could be certain that the cable would become frayed and useless by the end of the storm, such an appropriation of property would represent both an unregrettable violation of the owner's rights and a more clearly unregrettable destruction of his

99. *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 438 (Cal. 1944).

100. *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221, 221 (Minn. 1910).

101. The song, made famous by Nat King Cole, was written by Irving Gordon. It contains the lyrics: "Unforgettable, In ev'ry way, And forever more, That's how you'll stay." *READING LYRICS* 493–94 (Robert Gottlieb & Robert Kimball eds., 2000).

102. *See Vincent*, 124 N.W. at 222.

103. *See Sugarman, supra* note 50, at 58–62.

property.<sup>104</sup>

Third, from a wider perspective, it is certainly regrettable that an emergency arose in the first place in *Vincent* or in the hiker scenario that required the violation of another's property rights.<sup>105</sup> From this perspective, even the violation of rights is regrettable. But that is just to say that, alas, in the world in which we live, we face tradeoffs. We should undoubtedly do what we can to reduce the number and severity of the tragic choices we face, but tradeoffs are an inescapable fact of life.

Of course, *ex ante*, the same is true of the more straightforwardly regrettable examples. It is inescapable, if we wish to permit dynamiting or the keeping of animals that can bite or the manufacture of carbonated beverages, that sometimes, despite reasonable care, accidents will happen. *Ex post* regret is perfectly consistent with *ex ante* lack of fault.

And this suggests a final point. The trace of negligence in the far more common regrettable forms of strict liability makes these forms much easier to accept, for they *seem* more consistent with the prevailing fault-based orientation of American tort law than the far more rare unregrettable forms of strict liability (of which *Vincent* is a paradigm case). That appearance is an illusion. But it is an illusion that those who defend the utility or justice of strict liability will be in no hurry to dispel.

The bark of strict-liability justifications is much greater than the bite of strict-liability doctrines. The draft *Restatement (Third)* offers a commendably thoughtful account of those justifications. But one can hope for more: that future academics, judges, and lawyers will have the will and the wisdom to revise the doctrines, the justifications, or both, and will thereby bring them into welcome alignment.

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104. The distinction I am appealing to is between harm intended as a means and harm predicted to occur as a result of a chosen means. There is a sense in which harm that one intends to cause as a means is more unregrettable, insofar as the actor has chosen to cause the harm. But the distinction between intended means and ends, on the one hand, and known side effects on the other, is notoriously difficult to draw. Perhaps even deliberately using the dock owner's cable is not actually a case of intending to destroy or damage the cable; if by some miracle the cable is not damaged at all in the storm, then again that would be best, and this suggests that even the deliberate appropriation of the cable is, in a sense, regrettable.

105. In moral philosophy, Judith Jarvis Thomson has famously argued for a distinction between (justifiably) *infringing* a right and (unjustifiably) *violating* a right. See JUDITH JARVIS THOMSON, *Some Ruminations on Rights*, in RIGHTS, RESTITUTION, AND RISK 51 (William Parent ed., 1986); see also JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 122 (1990). We might say that the ship owner in *Vincent* infringed but did not violate the property rights of the dock owner. For a criticism of this distinction, see John Oberdiek, *Lost in Moral Space: On the Infringing/Violating Distinction and Its Place in the Theory of Rights*, 23 L. & PHIL. 325 (2004).