MUST TORTS BE WRONGS? AN EMPIRICAL PERSPECTIVE

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> "The business of the law of torts is to fix the dividing lines between those cases in which a man is liable for harm which he has done, and those in which he is not."[1]

INTRODUCTION

In this Article, we report four studies that explore peoples' preferences for strict liability or negligence in assigning responsibility for accidents between strangers. Depending on the situation, a substantial percentage of individuals assign liability to actors who are not negligent. We relate these findings to the current debate over whether the essence of tort law is compensation to victims for wrongs committed by defendants.

In brief, we found that many of the factors considered relevant by courts and legal scholars (e.g., whether the activity was unusual, whether it was being conducted in a seemingly inappropriate locale, whether the actors imposed reciprocal risks on each other) affected the extent to which participants imposed liability absent negligent conduct. Other factors, however, such as whether the defendant was acting for business or for pleasure, also played a role. This relative preference for strict liability held both when our

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1. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 54 (Am. Bar Ass'n Publ'g 2009) (1881).

participants were university students and when they were members of the general public.

Perhaps most significantly, we further found a boundary condition for the imposition of strict liability. When we degraded the conditions for strict liability as far as we could—using an activity that was conducted in its proper place, by a noncorporate actor, and that posed only a normal and reciprocal risk—most participants imposed no liability, and most of the remainder imposed only partial liability. This suggests that participants may be willing to divide the risk of reciprocal harms but, absent special circumstances, are generally not willing to assign full liability based on mere causation. When asked to put themselves in the role of jurors and instructed on the negligence standard, participants routinely applied that standard in many instances but did not do so when injury occurred by virtue of an innocent accident involving a chemical spill.

Part I reflects briefly on the relative roles that strict liability and negligence play in the tort system, both historically and in current doctrine. In essence, both the scholarly literature and the law have, in recent decades, moved away from liability without fault, except in a limited number of circumstances. Part II reports four experimental studies that presented participants with scenarios in which one person caused another to be injured but varied whether the injury was negligently or innocently caused and varied the circumstances in which it occurred. Part III concludes by explaining these results in light of current competing theories about the nature of tort law.

I. *BROWN V. KENDALL* AND THE DOMINANCE OF FAULT

Early in their law school careers, most American law students read *Brown v. Kendall*,[2] and for good reason. It is a fulcrum about which courts in the United States turned from the old regime dominated by the forms of action (trespass and trespass on the case) and toward the "modern" categories of intentional torts, negligence, and strict liability that continue to define the tort landscape today.

In *Brown*, two dogs, one owned by the plaintiff and one by the defendant, got into a fight.[3] The defendant took a four-foot-long stick and began beating on the dogs in an attempt to separate them.[4] The plaintiff was standing behind the defendant, who was retreating "backwards from before the dogs, striking them as he retreated; and as he approached the plaintiff, with his back towards him, in raising his stick over his shoulder, in order to strike the

2. 60 Mass. (6 Cush.) 292 (1850).
3. *Id.*
4. *Id.*

dogs, he accidently hit the plaintiff in the eye, inflicting upon him a severe injury."[5]

The suit was brought as a trespass action.[6] The question presented to the court was what the plaintiff must prove in order to prevail.[7] Specifically, could the plaintiff prevail merely by showing that the defendant directly struck him, or must he prove that the defendant was negligent (i.e., failed to act with "ordinary care")?[8] At the time *Brown* was decided, many argued that, at least in medieval times, trespass *vi et armis* was a strict-liability tort.[9] In the case of a "direct" injury, a plaintiff could prevail without showing either intention or negligence on the part of the defendant.[10] The trial judge seems to have been confused on this point and instructed the jury that it could find for the plaintiff if the defendant failed to "exercise extraordinary care."[11] On this instruction, the plaintiff prevailed and the defendant appealed.[12]

The supreme court, per Justice Shaw, reversed and ordered a new trial.[13] On the key issue he made the following pronouncement: "[T]he plaintiff must come prepared with evidence to show either that the *intention* was unlawful, or that the defendant was *in fault*; for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable."[14] With this pronouncement, Judge Shaw helped to ensure the dominance of fault-based liability in American tort law.

In short order, the fault-based system was praised as the morally correct approach. Here is the well-known passage from Oliver Wendell Holmes Jr.'s essays in *The Common Law*:

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5. *Id.* at 292–93.

6. *Id.* at 292. At common law, the writ of trespass (trespass *vi et armis*) was appropriate when the plaintiff could prove that his injury was "direct," as when the defendant struck him. *See* PHILIP S. JAMES, INTRODUCTION TO ENGLISH LAW 278–79 (9th ed. 1976). An action "on the case" was appropriate when the injury was indirect or, as it was sometimes described, mediate, as when the plaintiff ran into an obstruction on the road negligently placed there by the defendant. *Id.*

7. *Brown*, 60 Mass. (6 Cush.) at 293–94.

8. *Id.* at 292–94. All agreed that Kendall did not intend to strike Brown. *Id.* at 294. If Kendall were to be held responsible it would have to be on some other grounds. *Id.* at 294–95.

9. It is now generally agreed that the old writ of trespass never imposed strict liability on those who caused direct injury. *See generally* Fowler v. Lanning, [1959] 1 Q.B. 426 (Eng.) (discussing the history of the writ of trespass). However, in the middle of the nineteenth century, this was much more of an open question. *See* HOLMES, *supra* note 1, at 56.

10. HOLMES, *supra* note 1, at 57.

11. *Brown*, 60 Mass. (6 Cush.) at 293–94 (citations omitted).

12. *Id.* at 294.

13. *Id.* at 298.

14. *Id.* at 295–96.

> The general principle of our law is that loss from accident must lie where it falls, and this principle is not affected by the fact that a human being is the instrument of misfortune. But relatively to a given human being anything is accident which he could not fairly have been expected to contemplate as possible, and therefore to avoid. In the language of the late Chief Justice Nelson of New York: "No case or principle can be found, or if found can be maintained, subjecting an individual to liability for an act done without fault on his part. . . . All the cases concede that an injury arising from inevitable accident, or, which in law or reason is the same thing, from an act that ordinary human care and foresight are unable to guard against, is but the misfortune of the sufferer, and lays no foundation for legal responsibility."
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> . . .
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> The undertaking to redistribute losses simply on the ground that they resulted from the defendant's act would . . . be open . . . [to the grave objection] of offending the sense of justice. Unless my act is of a nature to threaten others, unless under the circumstances a prudent man would have foreseen the possibility of harm, it is no more justifiable to make me indemnify my neighbor against the consequences, than to make me do the same thing if I had fallen upon him in a fit, or to compel me to insure him against lightning.[15]

The alleged superiority of a fault-based system over non-fault-based liability relegated strict liability to a very small domain, which included liability for those who kept wild animals, those whose cattle strayed onto a neighbor's property, and, most importantly, those who carried on abnormally dangerous activities.[16] This last category of liability was first developed in the English case, *Rylands v. Fletcher*,[17] and slowly found its way into the jurisprudence of most American jurisdictions. With a few exceptions,[18] strict liability applied to competing land uses and occupied a very small corner of tort law.

This state of affairs remained in place until the middle of the twentieth century, when the dominance of negligence came under attack in what Professor Owen has labeled the "Great Strict Liability Experiment."[19] This is most frequently associated with the Supreme Court of California's seminal opinion in *Greenman v. Yuba*

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15. HOLMES, *supra* note 1, at 64–65 (citation omitted).
16. *Id.* at 78–79.
17. [1868] 3 L.R.E. & I. App. 330.
18. *See, e.g.*, Klein v. Pyrodyne Corp., 810 P.2d 917, 920 (Wash. 1991) (discussing an injury to a patron at a fireworks show).
19. David G. Owen, *Bending Nature, Bending Law*, 62 FLA. L. REV. 569, 581 (2010).

Power Products, Inc.[20] and section 402A of the Second Restatement of Torts, which established strict liability for injuries caused by defective products.[21] As John Goldberg and Benjamin Zipursky note, this movement was justified by an academic approach that conceived of the law of torts as a body of rules for the allocation of the costs of accidents and that decoupled tort liability from notions of wrongdoing.[22] Sometimes the decoupling was justified by a desire to focus on the goal of compensating the injured individual.[23] More frequently, it was tied to a desire to have the tort system send the correct (i.e., efficient) signal concerning the allocation of the costs of accidents.[24]

Now, a half a century after the great experiment, it is fair to say that its impact has been quite limited. By the mid-1980s, fault principles once again played a dominant role in products liability cases.[25] The promulgation of the Third Restatement of Torts: Products Liability at the end of the century formalized this re-imposition of fault principles in all domains except that of manufacturing defects, a category that itself had shrunk over time.[26]

Moreover, the law and economics turn in tort law that helped to create the intellectual justification for strict liability has itself come under repeated attack in the last twenty years. Perspectives that view law simply as a means of inducing cost-effective precaution taking[27] have been countered by a variety of corrective-justice

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20. 377 P.2d 897, 901 (Cal. 1963).

21. RESTATEMENT (SECOND) OF TORTS § 402A (1965); *see also* Owen, *supra* note 19, at 582.

22. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 918 (2010).

23. PETER CAIN, ATIYAH'S ACCIDENTS, COMPENSATION AND THE LAW 474 (7th ed. 2006).

24. GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 26 (1970) (arguing that the tort system should be assessed in terms of its ability to minimize the costs of accidents); JOHN G. FLEMING, AN INTRODUCTION TO THE LAW OF TORTS 1 (2d ed. 1985).

25. *See* David Owen, *Products Liability Law Restated*, 49 S.C. L. REV. 273, 277–78 (1998).

26. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (1998). For a review of the retreat from strict liability in design defect and warning defect cases, see Owen, *supra* note 19, at 600–02.

27. *See generally* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987); Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1 (1980). One should note that Posner and many other law and economics scholars generally support a fault-based liability system. As the influential Shavell article argues, a negligence rule is the correct rule when exercising due care produces the efficient mix of accident costs and accident avoidance costs. *Id.* In those situations where due care is insufficient because a substantial number of accidents occur in the absence of due care, however, a strict liability rule may be justified because it encourages actors to reduce their level of activity. *Id.*

approaches. These approaches do not agree on every point, but they often share two attributes that are particularly relevant for this Article.

First, corrective-justice theories find at least part of their justification in their reflection of social norms.[28] Second, and even more centrally, corrective-justice approaches view torts as wrongs.[29] According to this view, the law of torts is designed to recognize and repair harms caused by wrongs.[30] A tort, therefore, is a wrong. In this tradition, John Goldberg and Benjamin Zipursky's civil recourse theory agrees that we should view torts as wrongs and they define wrongs in terms of the act of the defendant.[31] An injurer who has not acted wrongfully should not be considered a tortfeasor. Wrongfulness, in turn, is inextricably tied to intention[32] and fault.[33]

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28. "[W]e have made an effort to put forward a tort theory that explains the sense in which the common law of torts and a variety of socially and institutionally embedded norms of conduct are synergistically related to one another." John C.P. Goldberg & Benjamin C. Zipursky, *Civil Recourse Revisited*, 39 FLA. ST. U. L. REV. 341, 366 (2011).

29. *See generally* JULES L. COLEMAN, RISKS AND WRONGS 197 (1992); ROBERT STEVENS, TORTS AND RIGHTS (2012) (arguing that one of the aims of the liability and compensation tort system is to rectify wrongs); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 134–35 (1995) (explaining that a corrective-justice tort system requires defendants to violate a duty, whereby that violation is considered an "act of wrongdoing"); Glanville Williams, *The Aims of the Law of Tort*, 4 CURRENT LEGAL PROBS. 137 (1951) (identifying and discussing the four goals of tort law, appeasement, justice, deterrence, and compensation).

30. COLEMAN, *supra* note 29.

31. Goldberg & Zipursky, *supra* note 22, at 918, 925. In this Article, we do not engage in a serious discussion of the differences among those who reject an accident approach to tort law. *See generally* Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003) (arguing that tort law is not based on allocating the costs of accidents, but rather it is focused on wrongs and the recourse available after these wrongs are committed). We do, however, recognize that civil recourse theory has its critics. *See, e.g.*, Guido Calabresi, *Civil Recourse Theory's Reductionism*, 88 IND. L.J. 449 (2013); Richard A. Posner, *Instrumental and Noninstrumental Theories of Tort Law*, 88 IND. L.J. 469 (2013); Christopher J. Robinette, *Two Roads Diverge for Civil Recourse Theory*, 88 IND. L.J. 543 (2013); Emily Sherwin, *Interpreting Tort Law*, 39 FLA. ST. U. L. REV. 227, 228 (2011). A separate problem arises when one does act wrongfully but, fortunately, no injury results. *See generally* John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625 (2002). We address this type of situation in an earlier article. *See generally* John Darley et al., *Doing Wrong Without Creating Harm*, 7 J. EMPIRICAL LEGAL STUD. 30 (2010).

32. Questions of intentional wrongdoing are beyond the scope of this Article.

33. Goldberg and Zipursky are not alone in this view. Stephen Perry views corrective justice as the correction of harms for which the tortfeasor is responsible, where that responsibility, in turn, is to be analyzed in terms of having had an adequate capacity and opportunity to avoid causing those harms.

Goldberg and Zipursky structure their argument as an empirical statement as well as a normative position. The core of products liability law has been brought back within the fault fold. Even the venerable strict liability for abnormally dangerous activities has such a limited scope that Goldberg and Zipursky can be dismissive of this doctrine as a body of law "that sits at the margin of tort law."[34] Whether or not this is a fair assessment, it does appear to be the case that the domain of abnormally dangerous activity law is not expanding and perhaps is even contracting. In the widely cited case of *Indiana Harbor Belt Railroad v. American Cyanamid Co.*[35] for example, Judge Richard Posner ruled that the transportation of acrylonitrile—a flammable, highly toxic, and possibly carcinogenic chemical—by rail through a major city is not an abnormally dangerous activity.[36] Though acknowledging the danger of the substance, Posner concluded that proper precautions could sufficiently minimize the risk of the activity and that a rail yard was an appropriate place through which to transport such chemicals.[37] This case illustrates reluctance on the part of the courts to deem activities abnormally dangerous and, therefore, to impose strict liability when a negligence rule will suffice.[38] Certainly, this is the case in other common law jurisdictions.[39]

Stephen R. Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, *in* PHILOSOPHY AND THE LAW OF TORTS 72, 72 (Gerald J. Postema ed., 2001).

34. Goldberg & Zipursky, *supra* note 22, at 952. Not all corrective-justice scholars are quite so dismissive. Coleman does acknowledge that some pockets of strict liability may be justified on other considerations. Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349, 350–51 (1992). These considerations include factors such as those we consider in the studies reported below— especially risky ventures and nonreciprocal risks. *Id.*

35. 916 F.2d 1174 (7th Cir. 1990).

36. *Id.* at 1182–83.

37. *Id.* at 1177–79.

38. Among the most widely cited strict liability cases, *Indiana Harbor* is also among the most widely critiqued by those who believe the bar for imposing strict liability was set unreasonably high. *See generally* David Rosenberg, *The Judicial Posner on Negligence Versus Strict Liability:* Indiana Harbor Belt Railroad Co. v. American Cyanamid Co., 120 HARV. L. REV. 1210, 1215 (2007) ("[T]he inquiry Judge Posner prescribed and conducted would have courts determine not only the extent to which the negligence rule leaves residual risk, but also the efficacy of strict liability in reducing that risk. The first determination is far from straightforward, especially if courts must delve into technological and operational details. The second, however, is likely beyond judicial capacities altogether."); Alan O. Sykes, *Strict Liability Versus Negligence in* Indiana Harbor, 74 U. CHI. L. REV. 1911, 1912 (2007) (discussing the "questionable logic" of applying the Restatement's criteria for strict liability to tort cases). See the reporter's notes accompanying RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 20 (2013) for a general discussion of the state of strict liability for abnormally dangerous activities.

39. *See, e.g.*, *Burnie Port Auth. v. Gen. Jones Pty. Ltd.*, (1994) 179 CLR 520, 556–57 (Austl.) ("[T]he rule in Rylands v. Fletcher, with all its difficulties,

Conceptually and empirically, fault is at the heart of American tort law.[40]

And yet . . .

Those of us who teach *Brown* or some equivalent case to first-year students are often struck by the fact that, given a chance, many people in the class resist Justice Shaw's fundamental rule—what some have called the fundamental law of tort—absent wrongdoing, injuries lie where they fall. They are prepared to hold Mr. Kendall responsible because he caused Mr. Brown's injury. While Mr. Kendall may not have acted with fault, he did injure Mr. Brown, who surely did nothing wrong. For them, as Keating notes, "strict liability *competes* with fault liability because it imposes liability on *reasonable* conduct."[41] These students appear to adopt the contrarian approach long advanced by Richard Epstein, in which the default rule is one of strict liability for one's acts that cause injury.[42]

Is this reluctance shared by the general population? An earlier study of ours suggests that it is.[43] As part of that project, which

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uncertainties, qualifications and exceptions, should now be seen, for the purposes of the common law of this country, as absorbed by the principles of ordinary negligence. Under those principles, a person who takes advantage of his or her control of premises to introduce a dangerous substance, to carry on a dangerous activity, or to allow another to do one of those things, owes a duty of reasonable care to avoid a reasonably foreseeable risk of injury or damage to the person or property of another."); Transco plc v. Stockport Metro. Borough Council, [2003] UKHL 61, [2004] 2 A.C. (H.L.) [39] ("[C]ounsel could not find a reported case since the second world war in which anyone had succeeded in a claim under the rule [in *Rylands v. Fletcher*]. It is hard to escape the conclusion that the intellectual effort devoted to the rule by judges and writers over many years has brought forth a mouse.").

40. Peter M. Gerhart, *The Death of Strict Liability*, 56 BUFF. L. REV. 245, 311 (2008); David G. Owen, *The Fault Pit*, 26 GA. L. REV. 703, 703 (1992).

41. Gregory C. Keating, Is Tort a Remedial Institution 32 (2010) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1633687.

42. *See generally* Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973). Epstein argues that tort law should be organized around a principle of strict liability for personal injury and trespass: "[I]n the prima facie case, any physical invasion triggered by the defendant is sufficient to impose liability." Richard A. Epstein, *Toward a General Theory of Tort Law: Strict Liability in Context*, 3 J. TORT L. 6, 11 (2010) [hereinafter *Toward a General Theory of Tort Law*].

43. Darley et al., *supra* note 31, at 57. Not all tort scholars would be surprised by this result. When discussing the extent of strict liability, the Restatement (Third) of Torts asserts that strict liability "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." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 20 cmt. *f* (2010). Nor is this a recent observation. Consider this passage from Francis Bohlen:

> The concept universal among all primitive men, that an injury should be paid for by him who causes it, irrespective of the moral or social

focused on inchoate torts, we presented subjects with a vignette describing a toxic tort scenario.[44] A majority of individuals who heard the nonnegligent version of the vignette held the actor responsible under conditions in which United States courts would not impose strict liability.[45]

Most current scholars writing from a corrective-justice perspective couch their arguments at a theoretical and normative level and thus do not concern themselves with studies such as the ones reported here. We believe this omission to be unfortunate.[46] Moral judgment has always been part of the rationale underlying tort doctrine. Recall that Holmes himself rejected strict liability on the grounds that it "offend[ed] the sense of justice,"[47] a rationale sometimes used by courts to justify their adherence to a negligence standard in certain kinds of cases.[48] By the same token, the Supreme Court of New Jersey has characterized strict liability as "liability without moral blame,"[49] showing that, at least to some extent, the judiciary conceptualizes both sides of the negligence/strict liability debate in terms of moral judgment.

Moreover, as in many other areas of law, the legitimacy of tort law is impacted by ordinary individuals' perceptions of fairness and by their sense of the obligations that each of us owes to those with whom we come into contact.[50] Legal legitimacy is influenced by the degree to which legal rules correspond with everyday notions of what the law should be. Recent research on community code

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> quality of his conduct, while it has disappeared from legal thought, still dominates the opinion of the sort of men who form the average jury.

Francis A. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 118 (1924).

44. Darley et al., *supra* note 31, at 35.

45. *Id.* at 56–57.

46. Unfortunate, but hardly fatal. As Goldberg and Zipursky note, civil recourse theory is not empirical social science and they are certainly correct that sound legal analysis does not have to take the form of empirical analysis. *See generally,* John C.P. Goldberg & Benjamin C. Zipursky, *Civil Recourse Defended: A Reply to Posner, Calabresi, Rustad, Chamallas, and Robinette*, 88 IND. L.J. 569 (2013). But they are also correct when they note that civil recourse theory "can both aid empirical analysis (by helping to frame cogent hypotheses) and benefit from it." *Id.* at 600. We view our Article as part of such a dialogue.

47. HOLMES, *supra* note 1, at 65.

48. *See, e.g.*, Boggs v. Plybon, 160 S.E. 77, 81 (Va. 1931) ("To hold that a guest who, for his own pleasure, is driving with his host, may recover from him for injuries suffered where there is no culpable negligence, shocks one's sense of justice.").

49. Fischer v. Johns-Manville Corp., 512 A.2d 466, 471 (N.J. 1986).

50. For a rich account of tort law motivated by concerns of fairness, see ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW ch. 3 (1999).

agreement[51]—the degree to which lay attitudes are consistent with legal rules—finds that citizens are more likely to respect legal rules when they are consistent with the citizens' own views or when deviations from those views are modest or explicable.[52]

Given that this is so and that we have previously found a preference for strict liability in one set of facts, a number of questions arise. First, is there a general preference for strict liability among the lay populace? Second, which factors in a case affect preferences for negligence or strict liability? Third, do some combinations of factors completely eliminate the preference for strict liability?

In the next section of this Article, we report a series of experiments that explore these questions in the context of accidents between strangers. After we present our results, we discuss how they speak to the ongoing resurgence of corrective-justice theories.

II. LAY PREFERENCE FOR STRICT LIABILITY IN DIFFERENT CONTEXTS

Our studies seek to answer two questions about community attitudes toward strict liability. One asks whether, in general, people are more willing than in the current tort regime to use strict liability standards.[53] The other asks what factors affect whether individuals are more or less inclined to impose strict liability standards. In particular, do the factors considered by the law and legal commentators—those listed in section 520 of the Restatement (Second) of Torts,[54] and reciprocity of risk—affect lay intuitions as

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51. *See generally* NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW (2001); PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW (1995); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997); Tom R. Tyler & Robert J. Boeckmann, *Three Strikes and You Are Out, but Why? The Psychology of Public Support for Punishing Rule Breakers*, 31 LAW & SOC'Y REV. 237 (1997).

52. *See, e.g.*, ROBINSON & DARLEY, *supra* note 51; Tyler & Boeckmann, *supra* note 51; Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399 (2005).

53. The Third Restatement suggests this possibility. *See supra* note 26.

54. Section 520 of the Restatement (Second) of Torts lists six factors that might be considered when deciding whether to label an activity "abnormally dangerous":

a) existence of a high degree of risk of some harm to the person, land or chattels of others;
b) likelihood that the harm that results from it will be great;
c) inability to eliminate the risk by the exercise of reasonable care;
d) extent to which the activity is not a matter of common usage;
e) inappropriateness of the activity to the place where it is carried on; and
f) extent to which its value to the community is outweighed by its dangerous attributes.

well? The first three studies demonstrate that a substantial percentage of individuals are comfortable with liability based on the causation of harm across a variety of circumstances.[55] In a final study, we examine whether asking individuals to play the role of juror and telling them the appropriate legal rule alters this pattern.[56]

A. Study 1

Historically, the factor that has played the most significant role in determining whether an activity is abnormally dangerous, and thus subject to strict liability, is whether the activity is "out of place." The rationale first appears in Lord Cairns's "non-natural use" test in *Rylands v. Fletcher*, which held that a person should be liable, even absent fault, if the harm caused stemmed from a nonnatural use of land.[57] More recently, the Second Restatement listed this factor in section 520(e).[58]

Arguments about the appropriateness of the location of an industry still play a role in strict liability decisions. They were at the core of the district court opinion in the previously mentioned *Indiana Harbor* case[59] and were discussed, albeit negatively, in Judge Posner's opinion.[60]

RESTATEMENT (SECOND) OF TORTS § 520 (1977). Section 20 of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm abandons the six factor test of the Second Restatement and replaces it with the following language:

> § 20. Abnormally Dangerous Activities
>
> a) An actor who carries on an abnormally dangerous activity is subject to strict liability for physical harm resulting from the activity.
>
> b) An activity is abnormally dangerous if:
>
> 1. the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and
> 2. the activity is not one of common usage.

RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 20 (2010). For our purposes, however, the list in the Second Restatement is particularly useful because it provides a guideline of factors that might influence judgments about the appropriateness of a strict-liability rule. As our data indicate, they in fact do so.

55. *See infra* Subpart II.E.

56. *See infra* Subpart II.F.

57. Rylands v. Fletcher, [1868] 3 L.R.E. & I. App. 330, 339.

58. RESTATEMENT (SECOND) OF TORTS § 520. The Restatement (Third) of Torts also considers location as a factor in determining strict liability, though its importance is diminished. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 20 cmt. k.

59. The United States District Court for the Northern District of Illinois noted:

> Cyanamid provides an extended list of reasons why it thinks transporting acrylonitrile by rail, if dangerous, is not abnormally so

We investigated this factor in our first study by using a series of vignettes that varied on two factors. We manipulated across participants whether a dangerous glue-making factory was in an industry-appropriate area or in a residential area. Within each location, the owner's state of mind was manipulated; the owner was either said to have negligently allowed a toxic chemical to escape or to have taken every precaution and to have been the victim of misfortune.[61]

1. Materials and Procedure

Eighty-four participants were recruited from a paid-experiments website run by a university. Most of the participants, fifty-eight, were undergraduates.[62] Participants saw the following core story:

> Gregory Pilling is a chemist. He previously worked for a chemical company but, in the evenings, he developed an improved version of glue that is used for installing wall-to-wall carpeting. Several carpet installing companies contracted to buy his product, so he quit his company job and has set up a small production system to make batches of his glue. He set up a company called Glu-Tight Plastics and Cement Company in a garage near his home, needing no employees to do the production runs. He has been producing for about six months, and making excellent profits.

> under the *Restatement* standard. In its opinion, the risk of harm is small and the likelihood of extensive injury is also low because the chemical can be transported safely with the exercise of reasonable care. Indeed, millions of gallons of it are shipped safely every year, which in Cyanamid's lexicon makes the activity one of common usage. It also points forcefully to the many useful products made from acrylonitrile to contend that the activity of shipping it is valuable.
>
> . . .
>
> However, perhaps the single most important factor in determining whether or not an activity is abnormally dangerous is what the Restatement calls the "inappropriateness" of bringing the danger to the particular place where the damage occurred.

Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co., 662 F. Supp. 635, 641 (N.D. Ill. 1987), *rev'd*, 916 F.2d 1174 (7th Cir. 1990).

60. Judge Posner put the onus of conflicting land usage on the plaintiff and compared building a residential neighborhood near such a busy railroad yard as akin to "building your home between the runways at O'Hare." *Ind. Harbor*, 916 F.2d at 1181.

61. The order in which state of mind was presented was counterbalanced.

62. The participants on this site are largely undergraduates, but there are also some graduate students, staff, and members of the community. As compensation, participants were entered into a raffle. Of the eighty-four participants, twenty-seven were male and fifty-seven were female.

> The manufacturing process takes about 10 days to make a batch, and involves a good many steps. At one point in the process, if the batch does not receive a buffering chemical, it emits a chemical that could be harmful to humans who are taking a certain medication. Essentially, it increased their risk of having a stroke. Pilling understood the need for this buffering treatment and regularly provided it during his production runs.
>
> Kyle Jackson lives a few hundred feet from the Glu-Tight factory. He is part of the at risk population. Due to an error at the plant, the toxic chemical was released and he came into contact with it. Quickly thereafter, Kyle had a stroke. He remains partly paralyzed, his speech is slurred, and little or no additional improvement is expected. His medical costs have been high, and his wife has had to take time off from work to care for him. Their finances are strained. Doctor's tests conclude that his stroke was the result of contact with the chemical. He is suing Pilling.
>
> Some people have asked where the production facility is located. When Pilling was looking for a place to set up the production system, he found one in an un-zoned area near where he lives. The area is entirely homes. It is a residential community; Pilling's factory is the only one. Pilling was able to rent a two-car garage that had enough room for him to do his production.

In this version, Pilling's factory is standing among homes. Another version put it among other similar factories. This was the between-subjects location manipulation.

Following the core scenario were two variants. One variant described the accident that caused the chemical to be released as a result of Pilling's negligence. Had Pilling been more careful, Kyle would never have been injured. The other variant said that a part had failed during the production process. This part was not rated for high temperatures and failed through no fault of Pilling; he did not receive a notification to that effect from the supplier. These were respectively the negligent and innocent conditions.[63]

This mixed between-subject and within-subject design enabled us to investigate the following question: Given that a factory is located in an industrial/residential area, does it matter to you whether the owner acted negligently or innocently in causing injury? The place of the factory is taken as a given, since we did not make the subject aware of another possibility. Being presented with both states of mind, however, permits the subject to make a comparison

63. The order in which subjects saw these two conditions was counterbalanced. Half the time subjects saw the negligence version first and half the time they heard the innocent version first.

and to decide how much to increase or decrease the consequences of the harm depending on whether the factory owner did not meet a normal standard of care. This choice is therefore more of a policy judgment than a bare intuition.

Three questions were asked for each version of the scenario. First, participants were told to check the appropriate description of Pilling's conduct from the following list of five options:

1. A. Pilling was innocent of misconduct. A reasonable person in the same situation would have not have taken more precautions.
2. Between A and B.
3. B. Pilling was negligent. A reasonable person would have been more careful in his situation. He did not sufficiently consider the risks of the glue making process.
4. Between B and C.
5. C. Pilling was reckless. He knew there were risks in the glue making process, but actively disregarded these possibilities.

This question measures the perceived state of mind of Mr. Pilling. Participants' responses were significantly affected by the state of mind manipulation.[64] In the innocent conditions, Pilling's state of mind score fell midway between the innocent and negligent choices (Mean = 2.01, *SD* = 1.03 on the 1–5 scale). In the negligent condition, Mr. Pilling's state of mind score fell midway between the Negligent and Reckless Choices (Mean = 3.85, *SD* = .91).

Second, participants were asked to decide whether Pilling should be liable for Kyle's medical costs. There were two options: compensation and no compensation. In the negligent condition, nearly all participants assigned liability regardless of location (residential area = 100% full liability; industrial area = 95%). In the innocent condition, however, participants were significantly less likely to assign liability if Pilling was working in an industrial area (61% full liability) than if he was working in a residential area (88%).[65] These results are shown in Table 1.

64. $F(1, 76) = 230.14$, $p < .001$, $\eta^2 = .75$.
65. $\chi^2 (1, N = 76) = 7.04$, $p < .01$.

TABLE 1: EFFECTS OF STATE OF MIND AND LOCATION OF FACTORY ON JUDGMENTS OF LIABILITY

	Residential Area	Industrial Area
Negligent	100%	95%
Innocent	88%	61%

Third, participants were asked how much, if any, punitive damages Pilling should be made to pay on a scale ranging from 1 (no damages) to 7 (maximal damages). Punitive damages were described as being intended to punish an offender whose conduct was especially egregious or morally unacceptable. The magnitude of punitive damages assigned was significantly affected only by the state-of-mind manipulation.[66] Punitive damages were much higher in the negligent condition (Mean = 3.90, *SD* = 1.62) than in the innocent condition (Mean = 2.15, *SD* = 1.44).[67]

2. Discussion

These results lend some support to the proposition that Lord Cairns's distinction resonates with lay people. When Pilling's factory is in a location appropriate for its activity and Pilling takes proper precautions, he is assigned liability by a substantially smaller proportion of people than when the factory was in an inappropriate location and those same precautions are taken. Consistent with section 520 of the Second Restatement,[68] participants seem to indicate that they believe a higher standard of care is required when Pilling is working in a residential area.

However, the rate at which subjects held Mr. Pilling responsible for the plaintiff's damages in the industrial-area-innocent condition is still quite high. A majority (61%) of participants believed that Mr. Pilling should be held responsible for damages even when he was not negligent and even when his activity was not conducted in an inappropriate locale. People are sensitive to the location of a dangerous activity, but this substantial residual liability implies that location is only part of the story.

Before we make too much of this very high rate of liability in the innocent condition, however, we must return to the results of the perceived-state-of-mind question. In the innocent condition,

66. $F(1, 76) = 111.90$, $p < .001$, $\eta^2 = .60$.

67. Both perceived state of mind and punitive damages were analyzed using a two (state of mind) by two (location) mixed ANOVA. There were no effects of order on any measure so that variable was dropped from the final analyses.

68. RESTATEMENT (SECOND) OF TORTS § 520 (1977) (providing six factors to determine whether activity on land is abnormally dangerous, including the "inappropriateness of the activity to the place where it is carried on"); *see also id.* § 520 cmt. j (providing further analysis of inappropriate activity on land).

Pilling's state of mind is perceived as falling midway between the innocent and negligent options. Participants therefore did not uniformly feel that the defendant acted reasonably. In part, this may reflect a general tendency to read an outcome or behavior that had negative consequences to be less innocent than it is in fact. But there may also be a degree of negligence lurking in the Pilling story. This interpretation is supported by the presence of punitive damages assigned in the innocent condition (approximately 2 on a 7-point scale where 1 represents no damages).

B. Study 2

In Study 2, we explore whether the fact that the harm was caused by a chemical agent, as opposed to by some mundane means, is contributing to the strict liability finding in Study 1. Though it is unlikely that a court would rule Pilling's conduct to be "abnormally dangerous," lay participants may have a less casual view of industrial chemicals. The Second Restatement holds that strict liability is more appropriate when the activity is "not a matter of common usage."[69] This idea is picked up in the Third Restatement, which notes that "public attitudes tend to be accepting of familiar and traditional risks, even while apprehensive of risks that are uncommon and novel."[70]

By this criterion, working with toxic chemicals may be seen as an abnormally dangerous activity in lay eyes. If that is the case, then using strict liability standards in Study 1 would be consistent with a broad or liberal reading of strict liability law; participants would have used the appropriate decision rule but applied the label "abnormally dangerous" to a more expansive set of cases than does the law.

The Pilling scenario may also raise the issue of vicarious liability. Although the innocent condition description in Study 1 explicitly absolves Pilling of misconduct for the mechanical failure, there may still be a feeling that the failure is someone's fault (one participant suggested that the equipment manufacturer was to blame). If Pilling is seen as vicariously responsible for someone else's negligence, then assigning him liability might be justified based solely on that perception and not as a result of a strict liability rule. It is also possible that some subjects felt that Pilling was at fault for not detecting the flaw in the equipment, notwithstanding our saying that he was not. This problem is hard to eliminate within the confines of the Pilling facts, so a new scenario that allows

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69. *Id.* (discussing the fourth abnormally dangerous activity factor (d), the "extent to which the activity is not a matter of common usage").

70. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 20 cmt. j (2010).

for harm to come from a more plainly innocent cause would be helpful in determining what to make of the high number of strict liability responses across all the conditions.

Therefore, in Study 2 we manipulate uncommon usage, the factor set forth in section 520(d). The new vignette describes a traffic accident in which the driver of a pickup truck injures a bicyclist. As in the first study, we used a mixed between-subject and within-subject design.

1. Materials and Procedure

Each subject[71] was presented two scenarios. The scenarios described the owner of a construction company, Mr. Philip Blair, harming a bicyclist in an automobile accident. There were four versions of this story, varying on two factors. For the first factor, each story described the driving conduct of Mr. Blair. For some participants, both stories described him as being a safe driver who kept his vehicle in good repair. Mr. Blair in this case loses control of his vehicle when an unseen spike in the road blows out his tire. This is the innocent-state-of-mind condition. For other participants, both stories described Mr. Blair as a careless driver who was irresponsible in his maintenance habits. In this case, Mr. Blair's tire blows out due to shoddy maintenance. This is the negligent condition.

The second factor concerned the manner in which this accident harmed the bicyclist. Two possibilities were presented. In one, Mr. Blair is driving a truck full of traditional construction supplies and he hits the bicyclist directly. The image here is of a classic accident; this is the "impact condition" and is meant to reflect a "common usage" situation. In the other version, Mr. Blair's cargo consists of toxic solvents and the force of the accident causes these to breach their containers, spilling on the bicyclist. This "chemical condition" is meant to reflect an uncommon usage. Each participant saw both impact possibilities, one after the other (order counterbalanced).

Regardless of the state of mind and harm agent presented, all stories ended with the bicyclist being hospitalized temporarily (at a cost of $15,000) and making a full recovery. The innocent-impact version is printed below:

> Mr. Philip Blair is the owner of State Home Improvements: a midsized construction company that has been doing rather well in recent months. Mr. Blair was driving his company's pickup truck along the highway at 4pm on a Saturday afternoon. In the back of the truck was a large order of lumber

71. Seventy-six participants (twenty-three male, fifty-three female) were recruited from the same paid-experiments site as in Study 1. The sample consisted primarily of undergraduates (forty-four).

> and other home improvement supplies that he was taking to his company's jobsite. Mr. Blair is a conscientious driver, obeying all traffic laws and keeping the truck, which he often drives, in good repair. As he is going along, one of his tires blows out. Mr. Blair is taken by surprise. He struggles to regain control of his vehicle, but is unable to prevent it from running off the road and hitting a bicyclist.
>
> Later investigation reveals that the tire blowout was due to a small spike that had been in the road; the tires had been in good condition. The bicyclist sustains moderate injuries and is hospitalized. He ultimately makes a full recovery. The bicyclist has asked Mr. Blair's company to pay for his medical costs; his bills totaled approximately $15,000. The court will decide whether this should happen.

Beneath the scenario were four questions. The first question was a check on the state-of-mind manipulation. Participants were asked to check the description that best describes Mr. Blair's conduct. Their choices were slightly modified from those used in Study 1.[72]

2. Results and Discussion

Perceived state of mind was significantly affected by the state-of-mind manipulation.[73] In the innocent conditions, Mr. Blair was seen falling between the innocent and innocent-negligent choices, but closer to the innocent choice (Mean = 1.41, *SD* = .71). In the negligent conditions, Mr. Blair was seen falling midway between the negligent and negligent-reckless choices (Mean= 3.69, *SD* = .71). Interestingly, Mr. Blair was also seen as having a more culpable state of mind when the cargo was the toxic chemical (Mean = 2.85, *SD* = 1.44) than when it was other construction supplies (Mean = 2.30, *SD* = 1.37).[74] Table 2 reports the means for all four conditions.

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72. The choices were as follows:
    1. A. Mr. Blair was innocent of misconduct. A reasonable person in the same situation would have not have taken more precautions.
    2. Between A and B
    3. B. Mr. Blair was negligent. A reasonable person would have been more careful in his situation.
    4. Between B and C
    5. C. Mr. Blair was reckless. He knew there were risks of dangerous outcomes, but recklessly ignored these possibilities.

73. $F(1, 67) = 182.43$, $p < .001$, $\eta^2 = .73$.

74. $F(1, 67) = 37.43$, $p < .001$, $\eta^2 = .36$. A three-way interaction between state-of-mind condition, harm agent, and order of presentation revealed that, when the chemical story came first in the innocent-state-of-mind condition, the difference between perceived culpability in the chemical and in the impact

TABLE 2: MEAN PERCEIVED STATE OF MIND FOR INNOCENT AND NEGLIGENT ACTORS WHO INFLICTED HARM VIA A CHEMICAL SPILL OR A TRUCK ACCIDENT.

	Chemicals	**Impact**
Innocent	1.71	1.11
Negligent	3.94	3.44

Note again that some of the respondents in the innocent condition perceived the actor to be less than purely "innocent" and thus perhaps somewhat culpable. This suggests the utility of an internal analysis of the respondents' thinking about strict liability—whether those perceiving that the actor *innocently* caused damage still require compensation for that damage. We have conducted such an analysis on each of our four studies, but we defer this discussion until later in the Article.

The second question asked participants whether they personally thought that Mr. Blair and his company should be liable for the bicyclist's medical bills. Participants could assign either full liability, liability for some proportion of the bill (indicated as a percentage), or no liability.

In the innocent conditions, approximately two-fifths of the sample chose the partial liability option, which required them to indicate the percent of the medical bills they wished to cover on a 0–100 scale. Thus, the liability data can be expressed as either a percentage of medical bills covered (effectively an expected value as it averages the percentage of damages awarded by each participant in a condition) or as a score on a 1–3 scale with total liability coded as 3, partial as 2, and none as 1. The distribution of responses better fits a normal curve when the latter option is used, so we employ that approach in the main analysis. As the expected value is more meaningful from a practical standpoint, we also report it for significant contrasts. There were no effects of order on this measure.

The amount of liability assigned by the subjects varied as a function of state of mind (Negligent Mean = 2.96, SD = .52; Innocent Mean = 2.13, SD = .52).[75] In percentage terms, the plaintiff was awarded 98.3% of the damages in the negligent condition and 53.9% in the innocent condition. The amount of damages assigned was also affected by whether the agent of harm was the chemical spill or

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stories was nonsignificant (interaction $p < .05$). These results suggest that subjects were less willing to discount for a mundane accident when they had already reacted to a chemical accident than they were to increase the consequences when confronted with the chemical accident after already having reacted to a mundane accident.

75. $F(1, 67) = 44.71$, $p < .001$, $\eta^2 = .39$.

the impact (Chemical Mean = 2.61, *SD* = .64 Impact Mean = 2.49, *SD* = .73).[76] This translates to a difference between 80.2% of total damages in the chemical harm condition and 72.7% in the impact harm condition. There was also an interaction between state of mind and harm conditions.[77] Whether the agent was chemical or simple impact mattered only in the innocent condition (Chemical Mean = 2.23, *SD* =.73; Impact Mean = 2.03, *SD* = .79).[78] The expected value for the plaintiff who was innocently harmed by a chemical spill was 61.3%, but for one who was innocently hurt by the impact of the truck it was 46.7%. In contrast, participants who reacted to vignettes about negligent actors assigned close to total liability regardless of whether the injury resulted from direct impact or a chemical spill. Because liability in both scenarios was at a ceiling, there was no distinction between them.

Both the expected value and proportion of participants assigning some liability may be important in forming policy. They are reported for all conditions in Table 3.

TABLE 3: PERCENTAGE OF SUBJECTS ASSIGNING FULL OR PARTIAL DAMAGES (EXPECTED VALUE IN PARENTHESES)

	Chemicals	**Impact**
Negligent	100% (99%)	100% (98%)
Innocent	83% (61%)	71% (47%)

The third question following the vignette asked participants to indicate on a scale ranging from 1 (no damages) to 7 (maximal damages) the amount of punitive damages that was appropriate.[79] Punitive damages were described as "intended to punish an offender if their conduct is especially egregious or morally unacceptable." The magnitude of punitive damages varied as a function of state of mind (Negligent Mean = 2.72, *SD* = 1.28; Innocent Mean = 1.40, *SD* = 1.28).[80] It was also affected by whether the agent was chemical or impact (Chemical Mean = 2.37, *SD* = 1.69; Impact Mean = 1.80, *SD* = 1.37).[81]

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76. $F(1, 69) = 7.41$, $p < .01$, $\eta^2 = .10$.
77. $F(1, 69) = 4.24$, $p < .05$, $\eta^2 = .06$.
78. $p < .05$.
79. We also asked subjects the amount of pain and suffering they would award. We have excluded the analysis of that variable from this Article.
80. $F(1, 67) = 19.00$, $p < .001$, $\eta^2 = .22$.
81. $F(1, 67) = 23.49$, $p < .001$, $\eta^2 = .26$. There was also an interaction between the agent of harm and scenario order $F(1, 67) = 17.85$, $p < .001$, $\eta^2 = .21$ such that whether the agent was chemical or impact only mattered with respect to the assignment of punitive damages when the chemical story followed the impact story ($p < .05$; Chemical Mean = 2.57; Impact Mean = 1.51) but there was no effect when the chemical story came first.

Our state-of-mind manipulation was more successful in Study 2. Fewer subjects responding to the innocent condition perceived the defendant to be negligent. Similarly, although the negligence condition overshot the mark by a bit—subjects perceived the defendant in the negligence condition as slightly more than simply negligent—these perceptions better tracked the manipulations than did those in Study 1. The success of the manipulation is reflected in the results of the punitive damages question. Respondents are not inclined to be punitive towards those who cause harm while acting innocently.

One finding was unexpected: the presence of the chemical implied a more culpable state of mind. A plausible interpretation of this interesting result is that subjects believe the standard of care should be higher when transporting toxic chemicals. This suggests that they believe transporting chemicals is a particularly dangerous activity in the sense that it poses a high degree of risk of harm or the harm it causes will be great or both. These, of course, are the factors listed in the Second Restatement sections 520(a) and (b).[82] If this is the correct interpretation, it helps to explain the greater willingness to assign damages even in the "innocent" condition. Moreover, it suggests that a similar perception may have been present in Study 1.[83]

The impact of the type of injury is also reflected in the subject's liability decision. Not surprisingly, negligent drivers are almost always assigned total liability. In the innocent conditions, the driver was assigned a greater proportion of liability if the cargo was a toxic chemical and the injury was caused by a chemical spill than if it was caused by something mundane (e.g., an ordinary truck accident), consistent with the idea that subjects, like the courts, are more willing to impose strict liability in situations where an activity has the attributes of being abnormally dangerous. Yet under precedents such as *Indiana Harbor*, it seems unlikely that transporting an unspecified dangerous chemical establishes a sufficient basis for strict liability.[84] Again, our subjects appear to adhere to a more liberal conception of what is sufficiently dangerous to justify strict liability than do the courts.

Importantly, however, even in the situation of an innocent driver carrying mundane cargo such as building supplies, our

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82. RESTATEMENT (SECOND) OF TORTS § 520 (1977).

83. Such an effect would not be detectable in Study 1 because we did not manipulate the cause of the injury. In all situations the injury was a chemical.

84. *Cf.* United States v. Union Corp., 277 F. Supp. 2d 478, 494–95 (E.D. Pa. 2003) (holding that strict liability of Restatement (Second) sections 519 and 520 are concerned with the activity rather than the substance itself); E S Robbins Corp. v. Eastman Chem. Co., 912 F. Supp. 1476, 1489–90 (N.D. Ala. 1995) (holding that strict liability was inappropriate for a hazardous chemical spill).

subjects still assigned liability for 47% of the damages. Driving a truck is presumably not an abnormally dangerous activity, yet substantial liability is being assigned in the absence of negligence. Put another way, only 29% of respondents assigned no liability to the driver who has a mundane accident while taking every reasonable precaution. This study therefore both supports the distinction between abnormally dangerous and routine activities and, at the same time, reveals what appears to be a generalized preference for strict liability among some of our participants.

C. Study 3a

In both Studies 1 and 2, a considerable proportion of participants assigned liability in a manner consistent with a strict liability approach. There are, however, two questions that should be examined before firmly interpreting the results as a repudiation of the "wrongs" approach of corrective-justice theories. First, would participants assign liability in a strict liability fashion were the agent in question not engaged in a profit-making endeavor? All of the previous scenarios have involved wrongdoing by corporate actors in one form or another. Although various efforts to establish enterprise liability in American tort law have made little headway over the years,[85] a number of studies have found that individuals hold corporate actors to a higher standard of responsibility than they do natural persons.[86] This suggests that people may be more inclined to assign liability to corporations and would be less willing to target natural persons. Moreover, it may be that people believe that all enterprises should internalize the costs of the harm they cause as an offset against profits even if the same conduct would not produce liability if it were not conducted in a business context.

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85. Enterprise liability comes in a number of different guises. In its strongest form, enterprise liability argues that enterprises should be strictly liable whenever they cause harm. Professors Keating and Geistfeld have been among the proponents of various forms of enterprise liability. *See generally* Mark Geistfeld, *Should Enterprise Liability Replace the Rule of Strict Liability for Abnormally Dangerous Activities?*, 45 UCLA L. REV. 611 (1998); Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266 (1997) [hereinafter *The Idea of Fairness*]; Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285 (2001). For a leading article opposing enterprise liability in the products-liability context, see generally James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263 (1991). As we noted earlier, one small pocket of such liability does exist for manufacturing defects. *See supra* note 26 and accompanying text.

86. *See, e.g.*, VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY ch. 7. (2000); Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the "Deep-Pockets" Hypothesis*, 30 LAW & SOC'Y REV. 121, 125–27 (1996).

Second, the previous scenarios have involved nonreciprocal risks. The injured party posed no risk to the injurer in all cases and (other than the simple truck-bike accident in Study 2) was harmed in a fairly unusual manner. Perhaps subjects perceive responsibility for harm differently in a David/Goliath situation rather than when both parties to the accident are engaged in more or less the same activity. Although the absence of risk reciprocity is not one of the six factors listed in the Restatement (Second) of Torts,[87] it has been advanced as a reason to impose strict liability since the time of *Rylands v. Fletcher*.[88] Modern authors have also argued for this position. Professor George Fletcher has suggested the following principle as an explanation for a number of tort doctrines: "[A] victim has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant—in short, for injuries resulting from nonreciprocal risks."[89] We therefore test the relevance of reciprocity to people's judgments of liability in this study. Our overarching goal in this study was to create a "pure" case in which all relevant factors pointing toward strict liability were eliminated.

1. Materials and Procedure

In this study, as in Study 2, the injured party was a bicyclist struck by another vehicle driven by Mr. Blair. Again, we use a mixed within-subject-between-subject design. Each subject saw two vignettes.[90] In one, the vehicle striking the bicyclist was another

87. RESTATEMENT (SECOND) OF TORTS § 520.

88. *See* Rylands v. Fletcher, [1868] 3 L.R.E. & I. App. 330, 338–39; *see also The Idea of Fairness*, *supra* note 85, at 1324–25 (discussing reciprocity in terms of the *Rylands* decision).

89. *See* George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 542 (1972). Fletcher's approach runs into difficulties, which have been pointed out in the literature. For example, a doctor imposes a nonreciprocal risk on a patient, yet the rule in medical malpractice cases is one of negligence. *See* STEPHEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW 58–59 (1989). Such a critique may not be devastating to the reciprocity approach, however, in that patients can be seen to have consented to medical risk up to the point of negligence. We incorporate reciprocity here as a potential value that motivates judgments, and not as a general theory of tort law that can stand alone.

90. Ninety-four participants (forty male, fifty-four female) were recruited from the same paid experiments site as in Studies 1 and 2. The sample consisted primarily of undergraduates (sixty-four). In addition, 120 participants (thirty-six male, eighty-four female) were recruited from the Amazon Mechanical Turk website—for a description of Mechanical Turk's use as a data collection tool, see Michael Buhrmester, Tracy Kwang, & Samuel D. Gosling, *Amazon's Mechanical Turk: A New Source of Inexpensive, Yet High-Quality, Data?*, 6 PERSPS. ON PSYCHOL. SCI. 3, 3–5 (2011). Data from sixteen participants were discarded because their completion times were less than half that of the median participant. The final sample (sixty-nine male, 129 female)

bicycle and, in the other, the vehicle was a pickup truck. Both vignettes described Mr. Blair as either working on company time (thus both he and his company were being sued) or on his own time (thus he alone was being sued).[91] In every version of the story Mr. Blair was said to have taken every precaution and to have struck the bicyclist only due to unusual circumstances beyond his control. Following is the bike-on-bike story with the business/nonbusiness changes marked by parentheses.

> Mr. Philip Blair is the owner of State Home Improvements: a midsized construction company. He is married, lives in a modest house, and has two children.
>
> While (off work; working) one weekday afternoon, Mr. Blair was riding his bike along the street (carrying important business documents to a jobsite from the office). Mr. Blair is a conscientious rider, obeying all traffic laws and keeping the bike, which he often rides, in good condition. As he is going along, one of his tires blows out. He struggles to regain control of his bike, but is unable to prevent it from running off the road and hitting another bicyclist.
>
> Later investigation reveals that the tire blowout was due to a small spike that had been in the road; the tires had been in good condition and Mr. Blair did not see the spike because it was obscured by leaves. Even the very best riders would not have been able to maintain control of their bicycles in this situation. The other bicyclist sustains moderate injuries and is hospitalized. He ultimately makes a full recovery. The bicyclist sues Mr. Blair ('s company) to pay for his medical costs. The bill totaled approximately $15,000.

By manipulating whether it was Mr. Blair alone or Mr. Blair and his company being sued, we could more directly test the first concern, that of enterprise liability. By varying vehicle type, we could examine the role of reciprocity—when Mr. Blair was riding a bicycle, he posed no greater inherent risk to the injured party than the injured party did to him.

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consisted primarily of adults with a median age of thirty-four. There were no differences between samples on any of the dependent measures, so they are combined for data analysis.

91. Again, the stories were counterbalanced. Half the time subjects heard the bicycle version first, and half the time they heard the pickup truck version first. There were no significant order effects on any of the dependent measures, so they were dropped from the analysis.

2. Results and Discussion

Following each scenario were the same questions as in Study 2.[92] Again, the state of mind question was on a five-point scale ranging from "innocent" to "reckless." Recall that in every version of this story, Mr. Blair's behavior was described as "nonnegligent." The overwhelming majority of participants perceived Mr. Blair's level of culpability to be minimal. Only 13% of participants assigned a nonminimal level of culpability in the bike case and only 20% in the truck condition. In both the truck (Mean = 1.23, *SD* = .51) and bike conditions (Mean = 1.14, *SD* =.40), Mr. Blair's actions were seen, on average, as being closer to innocent than to the midpoint between innocent and negligent. Chi-square tests comparing the percentage of those rating the actions as purely innocent versus not revealed no cross-condition differences.

On damages, participants were sensitive both to whether Mr. Blair was said to be on business and whether he was driving a truck or riding a bicycle. They assigned more liability when the activity Mr. Blair was engaged in involved his business (Business Mean = 1.84, *SD* = .68; Personal Time Mean = 1.56, *SD* = .69).[93] This can also be expressed as 39.1% of damages in the business condition and 24.7% of damages in the nonbusiness condition. They also assigned less liability when Mr. Blair and the victim were engaged in the exact same activity (Bicycle Mean = 1.59, *SD* = .72; Pickup Mean = 1.79, *SD* = .78).[94] This can be expressed as an expected value of 37.1% of the medical costs for the plaintiff struck by the truck and 25.6% for the one struck by the bicycle.[95] Both of these factors, along with the appropriateness of the location and the commonness of the activity investigated in Studies 1 and 2, are apparently important to participants' willingness to adopt strict liability standards. The expected value and proportion of participants assigning liability are reported for all conditions in Table 4.

TABLE 4: PERCENTAGE OF SUBJECTS ASSIGNING FULL OR PARTIAL DAMAGES (EXPECTED VALUE IN PARENTHESES)

	On Business	**Own Time**	**Total**
Pickup Truck	63% (46%)	53% (30%)	58% (37%)
Bicycle	52% (33%)	39% (20%)	45% (26%)
Total	58% (39%)	46% (25%)	—

92. The liability measure was analyzed using a two (on business or on personal time) by two (driving a truck or riding a bicycle) mixed ANOVA. The state-of-mind and punitive-damages measures experienced dramatic floor effects and are presented in categorical form.

93. $F(1, 196) = 7.98$, $p < .01$, $\eta^2 = .04$.

94. $F(1, 196) = 28.10$, $p < .001$, $\eta^2 = .13$.

95. There was no interaction ($F < 1$).

Next, participants were asked the punitive damages question. Very few participants assigned any punitive damages (damages greater than 1, "no damages"); only 9% did so for the bike vignette and only 13% did so for the truck case. Chi-square tests comparing the percentage of those assigning damages versus not revealed no cross-condition differences.

From the preceding measures it is clear that both the truck and bike cases were viewed almost universally as being free from negligence. It is also clear that a meaningful amount of liability was assigned in all conditions. Even in the bike-nonbusiness condition, 39% of participants assigned full or partial liability. Thus, strict liability was again present.

In the previous studies, participants did not directly state that they were adopting a strict liability view of the cases presented. It could be that participants were employing other decision rules and that it is only the characteristics of the scenarios that make their judgments appear to be a matter of strict liability. In this study, we added questions that explicitly ask participants to justify their liability decisions.

If participants assigned liability (full or partial) for a given scenario, they were asked on the following page to give the reason(s) for their decisions. They could check any of the below options (multiple allowed) and/or provide their own.

- Mr. Blair was responsible for the accident in the sense that he was negligent or careless, and thus should compensate the injured bicyclist.
- Mr. Blair was responsible for the accident in the sense that he caused it even though he was not negligent or careless, and thus should compensate the injured bicyclist.
- The injured bicyclist did nothing wrong and thus should not be left uncompensated.
- Mr. Blair can better afford to pay the injured bicyclist's medical bills than the bicyclist himself.

If they did not assign liability, participants were instead presented with these options to explain their decision (again they were allowed to give their own answer or select several):

- Though Mr. Blair was technically the cause of the injury, he did not do anything wrong. He is therefore not responsible for the accident and should not be held liable.
- Though Mr. Blair was technically the cause of the injury, he did not do very much wrong. He is therefore not responsible enough for the accident and should not be held liable.

- Though Mr. Blair was the cause of the injury and was not careful enough in his driving, he should not be held liable.
- The injured bicyclist is at fault for not avoiding the accident.

Seventy-four percent of those assigning liability chose an option that was consistent with a strict liability view of the case, saying that mere causation created liability.[96] Forty-eight percent of those assigning liability (including considerable overlap) said that the injured party was blameless and should not be left uncompensated. Very few participants read negligence into the scenario (3%) or explicitly said that the defendant could better afford to pay (2%), even when he was thought to be traveling on business.

Those who did not assign liability were even more consistent. Nearly everyone (86%) who did not find Mr. Blair liable claimed to be using a negligence standard. Nine percent said that the defendant had not done enough wrong to be responsible, 4% thought the victim was at fault, and 1% said that the defendant should not be held liable despite being negligent.

These results, along with the results on the state-of-mind and punitive damages measures, indicate that participants are not reading negligence into the vignettes in Study 3 and that many of those who do assign damages to the defendant are not doing so based on a negligence rule. Most interesting in this regard is the bicycle-own-time cell of the study. Even here, nearly 40% of the participants assigned at least some liability and, when pressed, they overwhelmingly endorsed a strict liability rationale—even though he is not at fault, Mr. Blair caused the accident and therefore he should pay.

D. Study 3b

There are two small methodological points worth exploring in a conceptual replication of Study 3a. First, all of the prior studies have employed, at least in part, a university-student sample. In a variety of ways, university students are different from the general population, and it would be reassuring if the effects replicated in a purely adult sample. Second, all the prior studies have employed a mixture of between- and within-subject factors. Use of within-subject manipulations effectively asks participants whether they

96. The reasons given for assigning liability (or not) did not appear to differ across conditions. Responses are therefore collapsed across vehicle type and business conditions.

wish to distinguish between two variants,[97] for instance the bike and truck cases. This may have the effect of exaggerating small differences. Given these concerns, it would be useful to know whether the differences observed in Study 3a were robust to a change in design.

1. Materials and Procedure

This study used the same scenarios and questions as Study 3a. The only differences were, one, the use of an entirely adult sample[98] and, two, use of an entirely between-subject design. Each participant saw only one liability scenario.

2. Results and Discussion

The results of this Study replicated those of Study 3a. The overwhelming majority of participants perceived Mr. Blair's level of culpability to be minimal. Only 92% of participants assigned a nonminimal level of culpability in the bike case and only 93% in the truck condition. In both the truck (Mean = 1.07, SD = .25) and bike conditions (Mean = 1.09, SD = 34), Mr. Blair's actions were seen, on average, as being very close to innocent.

Expanding on Study 3a, here we replicate the truck-bike difference even though reciprocity of risk is now manipulated between subjects rather than within. Participants assigned less liability when Mr. Blair and the victim were engaged in the exact same activity (Bicycle Mean = 1.55, SD = .71; Pickup Mean = 1.91, SD = .81) than when Mr. Blair was driving a truck.[99] Participants also assigned more liability when the activity in which Mr. Blair was engaged involved his business (Business Mean = 1.82, SD = .81; Personal Time Mean = 1.65, SD = .74), though this effect was only marginally significant.[100] The expected value and proportion of participants assigning liability are reported for all conditions in Table 5.

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97. *See* Albert Erlebacher, *Design and Analysis of Experiments Contrasting the Within- and Between-Subjects Manipulation of the Independent Variable*, 84 PSYCHOL. BULL. 212, 212 (1977).

98. Two hundred sixty-eight participants were recruited from the Amazon Mechanical Turk website. Data from twelve were discarded because they completed the study in less than half the median time. The remaining sample (157 male, ninety-eight female, one unknown) consisted primarily of adults with a median age of twenty-nine.

99. $F(1, 264) = 15.15$, $p < .001$, $\eta^2 = .06$.

100. $F(1, 264) = 3.19$, $p = .07$, $\eta^2 = .01$. There was no interaction ($F < 1$).

TABLE 5: PERCENTAGE OF SUBJECTS ASSIGNING FULL OR PARTIAL DAMAGES (EXPECTED VALUE IN PARENTHESES)

	On Business	Own Time	Total
Pickup Truck	68% (51%)	59% (38%)	63% (44%)
Bicycle	45% (28%)	39% (20%)	42% (24%)
Total	56% (39%)	49% (29%)	—

As in 3a, very few participants here assigned any punitive damages (damages greater than 1, "no damages"); only 14% did so for the bike vignette and 15% for the truck case. Chi-square tests comparing these percentages did not reveal any cross-condition differences.

The liability explanation measures also followed the same pattern as in Study 3a. Eighty-four percent of those assigning liability chose an option that was consistent with a strict-liability view of the case, saying that mere causation created liability. Forty-four percent said that the injured party was blameless and should not be left uncompensated. Very few participants read negligence into the scenario (6%) or explicitly said that the defendant could better afford to pay (9%).

Those who did not assign liability were even more consistent. Nearly everyone (91%) who did not find Mr. Blair liable claimed to be using a negligence standard. Ten percent said that the defendant had not done enough wrong to be responsible, and no one selected either of the other options.

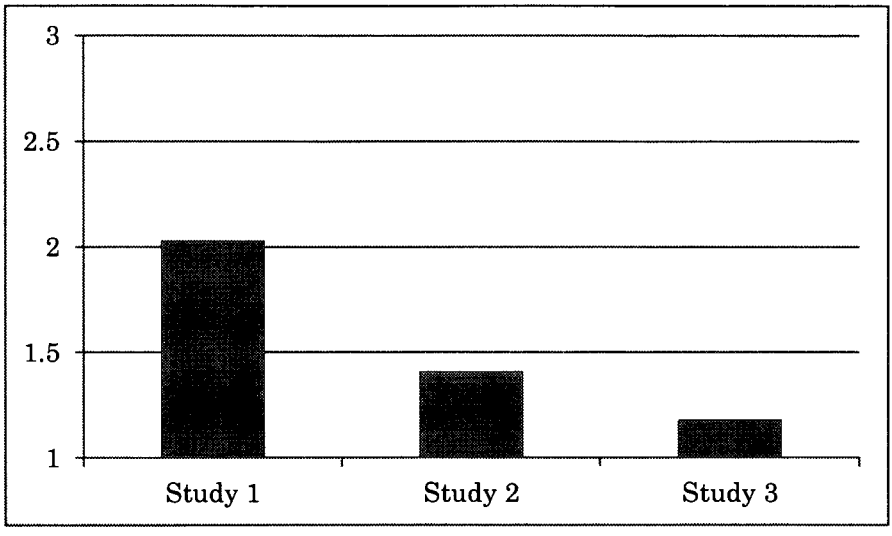
E. Summary of Studies 1–3

The results from these studies have several implications. First, they reaffirm the importance of several of the common justifications for the imposition of strict liability. The standards set by lay individuals clearly are influenced by whether an activity is undertaken in an appropriate location, whether the activity exposes people to novel, unusual, or heightened risks, whether the risk is reciprocal, and whether the risk is undertaken in relation to a profit-making enterprise. The first three of these factors can be found with varying degrees of precision in the restatements. This is an important and reassuring case of community-code agreement, though participants do seem more willing than courts to treat activities as if they are abnormally dangerous.

Overshadowing this result, however, is the base rate of liability. A large proportion of individuals are imposing a strict-liability standard to cases that, under current precedents, would not warrant it. In each of our stories we have been concerned that respondents have implied some degree of negligence into scenarios that we describe as innocent. As we discussed earlier, a mechanical malfunction that we describe as being outside the control of the character in the vignette may well be understood as a failure to

inspect and ensure the safety of a dangerous operation. In addition, at least in Study 1, the malfunction of the part could be understood to be the result of someone's negligence, and our protagonist might be seen to be vicariously responsible. As indicated in Figure 1, even in the innocent condition there was a marked deviation from innocence in subjects' assessment of state of mind.

FIGURE 1: LEVEL OF FAULT ATTRIBUTED TO INDIVIDUAL CAUSING ACCIDENT WHERE SCENARIOS IDENTIFIED HIM AS INNOCENT (1 = INNOCENT, 3 = NEGLIGENT)



In Studies 2 and 3a, however, subjects responding to the "innocent" condition generally rated the actor as without fault and still a substantial percentage assigned him some liability. In an effort to eliminate any doubt that these results might be due to people perceiving a negligent state-of-mind even in the innocent conditions, we conducted one final analysis that looks at the liability answers only of those participants who heard an innocent condition *and* who, on the state of mind variable, answered that the individual was innocent (i.e., gave him a 1 on the 5-point scale). Table 6 reports percentage of subjects in this situation who assigned some liability.

TABLE 6: PERCENTAGE OF SUBJECTS WHO JUDGED HARM DOER INNOCENT AND ASSIGNED LIABILITY

Study 1	**Residential Area** 73%	**Industrial Area** 28%
Study 2	**Chemical Spill** 65%	**Truck Impact** 71%
Study 3a	**Truck**	**Bicycle**
Business	54%	45%
Personal Time	46%	34%

Even within this select sample, a substantial percentage of respondents impose a strict-liability standard to cases that would not warrant it under current precedents. This result is clear across all studies and under increasingly controlled circumstances. Again, the most noteworthy example is the personal-time-bicycle condition in the third study. The action is common, no abnormal or excess risks are involved, and it is even the case that the victim is engaged in the very activity that goes astray for the injurer. This condition was designed to eliminate every typical justification for employing a strict liability standard. Nevertheless, 34% of the respondents who recognized the conduct as innocent extracted some compensation from the actor.

This result should be interpreted somewhat cautiously because most of those who extracted compensation from an innocent injurer substantially discounted the amount, with many more opting for partial recovery rather than full in the bike cases. This suggests that many of our participants intend to divide the burden of innocently caused harm among those involved in the reciprocal activity rather than to assign the whole amount to the one who caused the accident without fault. Apart from settlement, though, the tort system does not allow for this sort of partial compensation.

Even with this caveat, it is clear across all of the studies that a significant number of participants would hold an individual strictly liable for causing harm under at least some conditions. Causation alone is sufficient grounds for at least partial liability. Moreover, in Study 2, each participant was given both an innocent and a negligent accident, making the choice consciously salient. All assigned liability to the negligent actor, and most assigned at least some liability to the innocent actor. And an overwhelming majority of participants in Study 3 who assigned liability to the innocent cyclist or driver explained their responses in terms of a preference for strict liability.

We do not mean to minimize the differences among our participants by focusing on those with a propensity for strict liability. Some participants appear to apply a negligence standard

consistently, and many others do not always apply strict-liability standards but do use them more often than would current legal doctrine. Thus far, it is unclear what distinguishes those participants who assign liability in these nonnegligent cases from those who do not. There are several possibilities. It may be that some psychological individual differences distinguish these groups of participants. Conservatism, degree of concern for others, risk tolerance, or general economic philosophy may play roles.[101] In future work, we plan to explore these possibilities.

A second question highlighted by this research is why real world plaintiff success rates are not higher if participants are willing to assign at least partial liability in the absence of negligence.[102] Three possibilities readily present themselves, and all are interesting areas for further research. First, judges may keep cases away from the jury by granting motions to dismiss or summary judgment when it is clear the plaintiff will be unable to prove fault. Second, for those cases that make it to the jury, there is the potential effect of the combination of the "juror role" and judicial instructions. If a judge instructs a juror to impose a negligence rule, then that might be sufficient to enforce the legally preferred standard.[103] Previous work has found that instructions can have mixed effects on compliance.[104] Third, and related to the second possibility, it may be that in the process of deliberation the jurors who might be inclined to impose a strict liability rule are persuaded not to do so by fellow jurors. We cannot reasonably test the first and third possibilities with the present design. We can, however, assess the effect of asking subjects to play the role of jurors by informing them that American courts use a negligence standard in cases such as the one they are about to read.

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101. For recent work showing that various core values on which people differ can predict their reactions to various contentious legal questions, see Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 147, 161 (2006).

102. A substantial body of work suggests that plaintiff recovery rates rarely exceed 50%. *See, e.g.*, Daniel Kessler et al., *Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation*, 25 J. LEGAL STUD. 233, 238 tbl.1 (1996).

103. *See generally* Joseph Sanders, *A Norms Approach to Jury "Nullification:" Interests, Values, and Scripts*, 30 LAW & POL'Y 12 (2008) (analyzing how jury members values interplay with the law).

104. *See* Thomas R. Carretta & Richard L. Moreland, *The Direct and Indirect Effects of Inadmissible Evidence*, 13 J. APPLIED SOC. PSYCHOL. 291, 291–309 (1983); Steven Fein et al., *Can the Jury Disregard that Information? The Use of Suspicion to Reduce the Prejudicial Effects of Pretrial Publicity and Inadmissible Testimony*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1215, 1215–26 (1997); Steven Fein et al., *Hype and Suspicion: Effects of Pretrial Publicity, Race, and Suspicion on Jurors' Verdicts*, 53 J. SOC. ISSUES 487, 487–502 (1997).

F. Study 4

In the first three studies we asked subjects to assess liability without asking them to play the role of a juror. In Study 4, we asked half the subjects to answer the responsibility question as the subjects did in the first three studies. The other half of the subjects were asked to imagine themselves as jurors and instructed that negligence was the appropriate legal rule to apply in the case. We assess the effect of asking them to do so across four scenarios.[105]

Three of the scenarios come from Study 3: the private bicycle-bicycle vignette, the private truck-bicycle vignette, and the company truck vignette. The fourth vignette is new to this Study. In part because the Pilling case in Study 1 was perceived by many subjects to contain aspects of negligence, and in part because we feared there might be some unique unrecognized factor in the Pilling fact pattern generating the results we observed, we decided to create a new fact pattern designed to reflect the existence of a corporate actor, the presence of factors cited in the Second Restatement of Torts section 520,[106] and the lack of reciprocity of risk between actors. This vignette is loosely based on the facts of the *Indiana Harbor*[107] case. Following is the text of the vignette:

> The Harbor Belt Railroad was shipping a tank car full of a chemical called acrylonitrile used in making acrylic fibers which are in turn used to make sweaters, hats, rugs and upholstery. Acrylonitrile is flammable and highly toxic. A well-known table of hazardous materials shipped by rail lists 125 dangerous substances. Acrylonitrile is fifty-third on the list.
>
> While the car sat in the Harbor Belt Railroad yard, a valve on the bottom of the car failed and approximately 5,000 gallons spilled onto the railroad yard. Homes near the yard were quickly evacuated but one individual, Kyle Jackson, was down in the cellar of his home working with his power tools and failed to hear the police when they knocked on his door to ask him to evacuate. Unfortunately, he breathed in some of the toxic acrylonitrile fumes and is hospitalized. He ultimately

105. Two hundred forty-one participants were recruited from the Amazon Mechanical Turk website. Three participants were excluded from analysis due to abnormally fast completion times, two for failing a reading comprehension check, and one for failing to answer the juror prime question. This left a sample of 235 (133 male, 101 female, one unknown). The sample consisted primarily of adults. Approximately 48% of the sample had been called for jury service at some point. Study 4 is a fully crossed four (scenarios) by two (instructions) between subjects design.

106. *See supra* note 54.

107. Ind. Harbor Belt R.R. v. Am. Cyanamid Co., 916 F.2d 1174, 1175 (7th Cir. 1990).

> makes a full recovery. Kyle Jackson sues the railroad to pay for his medical costs which totaled approximately $15,000.
>
> Subsequent investigation indicates that the valve on the tank car had been inspected the very day it failed and had been in perfect working order. The cause of the valve failure was ultimately traced to a defect in an internal part of the valve. There was no way anyone working for the railroad could ever have detected the defect before the valve failed.

As one can see, we attempted to construct a story where the actor has taken every reasonable precaution. The findings of fact included in the closing paragraph were intended to convey the impression of diligent care; the valve had been inspected the very day it failed and there was no way anyone could have detected the defect. We set the damages to be consistent with the other three vignettes.

Based on Study 1 and Study 3, we would expect participants in the control condition to assign the most liability in the new chemical case and decreasing liability in the company truck, private truck, and private bicycle cases. The two central questions in this study are: (1) Does the juror manipulation change liability assessment in any of these cases; and (2) If there is an effect is it limited to the cases where the preference for strict liability is weak, such as the bicycle case, or does it apply more generally? Below we describe the details and results of this study with respect to these questions.

1. The Effect of the Juror Manipulation.

Consistent with the first three studies, subjects in the control condition were given no information concerning the law and were not asked to play the role of jurors. In the juror condition, we asked participants to play the role of juror. With respect to these subjects, we began by asking them to imagine either past jury experiences or what it would be like to play the role of juror.[108]

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108. Specifically, we asked the following:

> Before we ask you to think about specific legal cases, we would like to get a sense of how you feel about the law. If you have served on a jury in the past, think about the last time you were called for jury service. Write, in a sentence or two, how it felt to be in a courtroom and to listen to a judge explain the law and your duty as a juror. If you have never been called for jury service, imagine being in a jury box listening to a judge ask you if you can listen to a case fairly, evaluate the evidence impartially, and apply the law. Write about how you think it would feel.

We did not attempt to analyze these answers. The question was introduced solely to put subjects in the frame of mind of jurors.

Next, we instructed them as to the appropriate legal rule to be applied to the case.[109] Note that, contrary to a standard judicial instruction, we did not tell the subjects that they should use this rule, although the context surely suggested that application of the negligence standard was appropriate:[110]

> In cases like the one you are about to see, American courts use a negligence standard to determine whether a person causing harm should be held liable. People are only made to compensate those they harmed if the accident was the result of negligence, that is, if the person causing the harm failed to exercise reasonable care to protect bystanders. A person is not held liable if he or she took all the precautions we would expect from reasonable people.

To test whether they understood the rule, we provided a pair of examples and asked whether or not the law would hold responsible the person who caused harm.[111]

Subjects then were presented with one of the four vignettes. Each vignette was followed by the same set of questions that followed the vignettes in Studies 2 and 3. Recall that these included the five point scale asking subjects to rate the actor's conduct from 1 representing innocent to 5 representing reckless; a question asking whether the actor should be made to pay full compensation, partial compensation, or no compensation; a follow-up question for those who responded "partial compensation" asking them to assign the appropriate percentage of compensation; and questions asking whether punitive damages were in order.

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109. In order to keep the study manageable, we chose not to include a third alternative that would have instructed the subjects about the law but not asked them to play the role of juror.

110. *See* H. PAUL GRICE, *Logic and Conversation*, *in* 3 SYNTAX AND SEMANTICS: SPEECH ACTS 41, 43–46 (Peter Cole & Jerry L. Morgan eds., 1975). This chapter presents Grice's cooperative principle of conversational implicature. One of the maxims set forth in the article is the maxim of relation, which says that in conversation, we expect ourselves to be relevant and construe what we hear as relevant. *Id.* at 46. Thus, we would expect participants being told of the operative legal principle to infer that it has been articulated for a reason, and would be inclined to follow it.

111. The question appeared as follows:

> Before turning to the scenario, please answer the following questions to show that you have understood the above description.
>
> - Would the law hold someone liable for an injury if the injury was caused by their abnormally poor maintenance, for example a landlord for a collapsed roof? YES NO
> - Would the law hold someone liable for an accident if the accident was caused by an act of nature, for example a hurricane collapsing a well-maintained roof? YES NO

We excluded two subjects who failed this reading comprehension check.

The overwhelming majority of participants hearing the truck and bicycle cases perceived the actor's level of culpability to be minimal, though this was less true in the chemical case.[112] The liability question was modified from that used in our prior studies to simply read "should [insert actor here] be held liable for Kyle Jackson's injuries?" This was intended to remove a potential demand characteristic; the previous wording may have suggested to participants that they were supposed to distinguish themselves from the law. Also, in the juror condition, participants were reminded of the law immediately prior to answering the liability question:

> In cases like this, American courts use a negligence standard to determine whether the person causing harm should be held liable. People are only made to compensate those they harmed if the accident was the result of negligence, that is, if the person causing the harm failed to exercise reasonable care to protect bystanders. [insert actor here] would not be held liable if he took all the precautions we would expect from reasonable people.

Recall the three-point liability question was coded 1 representing no liability, 2 representing partial liability, and 3 representing full liability. Across all vignettes, significantly less liability was assigned in the juror condition (Mean = 1.28, SD = .59) than in the control condition (Mean = 1.86, SD = .59).[113] There were no significant differences among the first three stories, but liability was significantly more often assigned in the chemical case (Mean = 2.02, SD = .89) than in the other three (Company Truck Mean = 1.46, SD = .75, Private Truck Mean = 1.46, SD = .67, Bicycle Mean = 1.33, SD = .58).[114]

The expected value and proportion of participants assigning liability are reported for all conditions in Table 7.

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112. Chi-square tests comparing the percentage of those rating the actions as purely innocent versus not revealed that, in both the juror and control cases, the chemical scenario was rated as less than purely innocent more often (41% of the time) than the other three (company truck, 5%; private truck, 5%; private bicycle, 7%). χ^2 (3, N = 235) = 44.41, $p < .001$. Further, within the chemical case, the state of mind was rated as less than purely innocent more often in the control condition (55%) than in the juror condition (28%). χ^2 (2, N = 61) = 4.60, $p < .05$. We discuss this result below.

113. The liability measure was analyzed using a four (case) by two (juror) ANOVA. There were main effects for both the juror manipulation $F(1, 227) = 45.85$, $p < .001$, $\eta^2 = .17$ and case $F(3, 227) = 13.15$, $p < .001$, $\eta^2 = .15$, but no interaction ($F < 1$).

114. $p < .001$ for all comparisons with chemical.

TABLE 7: PERCENT OF SUBJECTS ASSIGNING FULL OR PARTIAL DAMAGES (EXPECTED VALUE IN PARENTHESES)

	Control	Juror	Total
Private Bicycle	46% (26%)	7% (1%)	28% (14%)
Private Truck	58% (35%)	13% (4%)	36% (20%)
Company Truck	43% (37%)	17% (7%)	31% (22%)
Chemical	83% (71%)	44% (36%)	62% (53%)
Total	58% (42%)	21% (13%)	—

Recall that in the bicycle-bicycle vignette in Study 3, 39% of the subjects assigned full or partial responsibility to the actor. In the current study, an even higher percentage of subjects in the control condition did so—a full 46% (11% full, 36% partial). On the other hand, in the juror condition, no subjects assigned full responsibility and only 7% assigned partial responsibility. Being asked to play the juror role basically erased strict-liability responses even though the subjects were not instructed that the law required them to apply this rule. Similar strong effects can be seen in both truck stories. In Study 4, the percentage of respondents assigning some liability in the private truck story fell from 58% to 13% and in the business truck story from 43% to 17%.[115] Finally, in the chemical story, there was also a dramatic reduction, from 83% assigning full or partial liability in the control group to 44% doing so in the juror group.

The verdicts of our juror condition respondents come much closer to those that the legal system expects of real jurors.[116] One should keep in mind that this substantial effect is achieved through the use of a very weak manipulation compared to the actual experience of being a juror and being asked by a judge to decide a case based on the judge's instructions. Moreover, it is achieved without the benefit of a deliberation in which the majority wishing to impose a negligence rule would very likely have persuaded the minority to adopt their position.

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115. Note that the effect in this vignette is more substantial than suggested by these numbers. If we look only at subjects who assigned full responsibility, 13% did so in the bicycle story, 19% did so in the private truck story, and a full 30% did so in the business truck story. In all three vignettes, however, no subjects in the juror condition assigned full responsibility to the actor. Obviously, this effect is most dramatic in the business truck scenario.

116. Of course, we do not have any real juror judgments against which to compare our data. However, there is indirect evidence that this is the case. For example, Kalven and Zeisel's seminal work on the American jury interviewed judges in civil cases and found that the judge agreed with the jury seventy-eight percent of the time. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 63 (1966). The disagreements were equally divided between cases where the judge would have found for the plaintiff but the jury found for the defendant and cases where the judge would have found for the defendant but the jury found for the plaintiff. *Id.* at 63–64.

Participants were asked the same punitive-damage question as in previous studies. Very few participants (13%) assigned any punitive damages (damages greater than 1, "no damages"). Chi-square tests comparing the percentage of those assigning punitive damages revealed a case effect but no differences based on the juror manipulation.[117] However, the case effect was dramatic. Participants reading the chemical case were more likely to assign punitive damages (40%) than those reading the company truck (3%), private truck (5%), and private bicycle (4%) cases.[118]

This result along with the result from Table 6 provides us the opportunity to turn from a discussion of the effect of the juror manipulation in general and turn to a comparison of its effect in the chemical story as compared to the other three vignettes.

2. The Limited Effect of the Juror Manipulation in the Chemical Case.

After subjects in both the control and the "juror" condition had responded to the previous questions (and were prevented from going back to change them), we asked several more questions designed to explore their understanding of the law and how it applied to the case they had just decided. The first question again defined the negligence rule and asked the subjects if, using this rule, the actor would be held responsible.[119] Chi-square tests revealed that the juror manipulation had no effect on responses to this question.[120] The case presented, however, did matter.[121] Participants were more likely to believe the law would hold the actor liable in the chemical case (22%) than in the company truck (3%), private truck (3%), and private bicyle (2%) cases. This was the case even though participants, for the most part, did not think of the actor as being negligent.

Participants were also asked whether they would be willing to apply the law if they were asked to in an actual case. Their answers

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117. Case effect: χ^2 (3, N = 235) = 49.28, $p < .001$. Juror effect: $\chi^2 < 1$.

118. $p < .001$ for all comparisons with chemical.

119. We asked the following question:

> In cases such as these, American courts use a negligence standard to determine whether a person causing harm should be held liable. People are only made to compensate those they harmed if the accident was the result of negligence, that is, if the person causing the harm failed to exercise reasonable care to protect bystanders. A person is not held liable if he or she took all the precautions we would expect from reasonable people.
>
> - Under the law—not using your personal judgment—would Mr. Blair be held liable in this case? YES NO

120. $\chi^2 < 1$.

121. χ^2 (3, N = 235) = 24.61.

were again affected by the scenario they had read[122] but not by whether they had been asked to think of themselves as jurors.[123] Participants who had read the chemical case were more likely to say they would not follow the law (17%) than participants who had been given the company truck (0%), private truck (7%), and private bike (3%) cases, though the difference between the chemical case and the private truck case did not reach significance.[124]

After the other measures had been completed, the distinction between strict liability and the negligence rule was explained to participants, and they were asked to rate their relative preference on a scale ranging from 1 = Strict liability to 7 = Negligence.[125] In accordance with earlier results concerning the juror manipulations, participants reported preferring the negligence rule more when they were in the juror condition (Mean = 4.88, *SD* = 1.51) than in the control (Mean = 4.39, *SD* = 1.82). Clearly, being told what the law is and being asked to play the juror role moved them in the direction of accepting negligence as the correct standard by which to judge cases such as these.

Participants who heard the chemical story, however, favored the negligence rule less (Mean = 3.79, *SD* = 1.71) than participants who heard the company truck (Mean = 5.05, *SD* = 1.75), private truck (Mean = 4.95, *SD* = 1.47), and private bicycle (Mean = 4.78, *SD* = 1.51) cases.[126] In Study 4, preference for strict liability in general is therefore in part a function of the type of case one is imagining.

These findings must be discounted to some extent by the fact that the level of fault assigned to the actor in the chemical case was greater than in the other three vignettes. As was the case in the first toxic-release scenario in Study 1, we were unsuccessful in constructing a story that everyone thought evinced nonnegligent behavior on the part of the actor (the Harbor Belt Railroad). The level of fault assigned to the railroad (Mean = 1.61) was not as great as assigned to Pilling in Study 1 (Mean = 2.04) and, as noted above, only two participants in Study 4 said that the railroad was negligent. This level of fault, however, is substantially greater than in the other three vignettes.[127]

We suspect that it is not entirely our draftsmanship that produced higher fault scores here or in the Pilling case in Study 1.

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122. χ^2 (3, N = 235) = 14.37, p = .002.

123. $\chi^2 < 1$.

124. χ^2 (1, N = 115) = 2.16, p =.15.

125. Preference for strict liability versus negligence was analyzed using a 4 (case) by 2 (juror condition) ANOVA. Effect of juror condition: F(1, 227) = 6.18, p = .01, η^2 = .03. Effect of case: F(1, 227) = 8.10, p < .001, η^2 = .10

126. p < .001 for all comparisons with the chemical story.

127. Company Truck Mean = 1.05; Private Truck Mean = 1.07; Bicycle Mean = 1.05.

Our inability to draft a purely innocent story is consistent with Ernest Weinrib's hypothesis that strict liability is not strict at all.[128] Certain activities are so inherently dangerous that no reasonable precautions are adequate to relieve the actor of responsibility for causing harm.[129] Moreover, the general willingness to assign more fault in these vignettes is consistent with other research that indicates that higher status individuals and corporate actors are assigned more responsibility for the same behavior than are lower status individuals and natural persons.[130] In Study 4, those individuals who preferred a strict-liability rule in the chemical case assigned more liability to the actor.[131]

However, differences in the assignment of liability between the chemical scenario and other scenarios are not solely due to those individuals who attributed some fault to the actor. A look at the liability responses of only those participants who stated that the railroad was completely innocent indicates that only part of the greater willingness to assign liability to the actor is due to the belief it was not innocent. Table 8 updates Table 6 by including the results from all four studies. Recall that the values in each cell are the percentage participants who said that the actor was innocent but still assigned some liability.

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128. WEINRIB, *supra* note 29, at 203. The results of Study 2 lend some support to this position. Subjects presented with innocent conduct (a vehicle struck a hidden spike in the road) were more likely to award damages when the plaintiff was injured by a chemical spill than by a direct collision. Yet as we see in Table 5 and Table 7, those who found the conduct innocent actually awarded damages more frequently in the standard type of accident, although not significantly so. This means that the overall results of the study were affected by people finding the defendant to be less than fully innocent in the chemical spill version, but not in the direct collision version of the story. This is despite identical descriptions of the level of care employed by the actor. What this suggests is that when it comes to hauling dangerous substances, some people do not believe that any level of care is sufficient, since the only reason for the accident was the truck's hitting a hidden spike in the road.

129. *See id.* at 188.

130. *See, e.g.*, HANS, *supra* note 86, at 117; MacCoun, *supra* note 86, at 141; Joseph Sanders et al., *Distributing Responsibility for Wrongdoing Inside Corporate Hierarchies: Public Judgments in Three Societies*, 21 LAW & SOC. INQUIRY 815, 822 (1996).

131. The correlation between the liability measure and endorsement of the negligence rule was significant both in the chemical case, $r(61) = -.51$, $p < .001$, and overall, $r(235) = -.52$, $p < .001$. The more participants preferred the negligence rule, the less liability they assigned. Interestingly, preference for negligence over strict liability did not correlate with a measure of political orientation, $r(229) = .07$.

TABLE 8: PERCENTAGE OF SUBJECTS WHO JUDGED HARM DOER INNOCENT AND ASSIGNED LIABILITY

Study 1	**Residential Areas**	**Industrial Areas**
	73%	28%
Study 2	**Chemical Spill**	**Truck Impact**
	65%	71%
Study 3	**Truck**	**Bicycle**
Business	54%	45%
Personal Time	46%	34%
Study 4	**Control**	**Juror**
Chemical	62%	30%
Company Truck	41%	15%
Private Truck	59%	10%
Private Bicycle	44%	8%

Undoubtedly, the juror manipulation had a substantial effect in all scenarios. It nearly eliminated the assignment of any liability among those who viewed the actor as innocent in the truck and bicycle stories. In the chemical vignette, however, even within the constrained group of individuals who found the actor to be completely innocent, 30% continued to assign him some liability.

III. GENERAL DISCUSSION

In all of our studies, participants uniformly hold an actor liable when that actor commits a "wrong" in the sense of harming someone negligently. In this regard, tort law is consistent with the moral intuitions of our respondents.

Though nearly all would agree that the law of torts should include liability for wrongful acts, strict liability for nonnegligent acts has been a matter of controversy and instability in the law. Over the last fifty years, the American tort system has waffled as to the proper scope of strict liability. It is fair to say that the scope of liability without fault shrunk over that period of time. This shrinkage has been accompanied by the reemergence of corrective-justice theories of tort that argue not only that a "wrong" is sufficient for tort liability but also that it is necessary. The most extreme versions of such schemes relegate strict liability to the backwater—an insignificant puddle in the sea of tort.

But our studies indicate that strict liability is not a backwater within the realm of everyday moral intuitions. More importantly, it does not appear that a wrong, as that term is commonly understood, is a necessary requirement for liability among a substantial number of people. For many of our participants, legal liability does not flow only from a moral wrong. Some substantial percentage of respondents do not rest their judgment on the distinction between malfeasance and misfortune when assigning liability.

One can attempt to address this fact in several ways. One approach, used with some frequency in the corrective-justice literature, is to distinguish between first order duties not to injure, which are defined by social norms, and second order legal duties of repair.[132] One could argue that the latter duties are narrower than the former, but it is hard to see how this move does more than say that law is unwilling to institutionalize certain social norms.

More directly, one can adopt the position that the wrong involved here is the failure to pay for the injuries one causes. In our opinion, this way of thinking is not particularly helpful. At best, it is useful to explain liability in situations such as those described by Weinrib, where engaging in very dangerous activities is itself unreasonable.[133] The position loses all purchase, however, if it is meant to describe situations such as our bicycle-on-bicycle accident. There, no one would say that the actor committed a wrong in any sense other than he caused an injury, and if a bicycle wreck is an occasion for such a wrong, then so is separating fighting dogs and, indeed, so is everything else. If this is what we choose to have "wrong" mean, we would be better served by saying that corrective justice is not about wrongs, it is about causation. Richard Epstein has made a similar point when critiquing Goldberg and Zipursky's work: it achieves little to ground tort law in a notion of wrong absent a meaningful and robust definition of wrongfulness.[134] By the same token, we see little benefit in distinguishing between "legal wrongs" and "moral wrongs" in this regard. If the bicycle accident is nothing more than a legal wrong, then the word "wrong" is doing very little work.

In this regard, it is worth observing once again that those respondents, like some of our students who support strict liability in all situations, seem to fit more comfortably into Richard Epstein's libertarian view of tort law than they do a corrective-justice view that limits liability to wrongs. This approach is premised on the idea that I have a choice whether or not to act in the world. When I choose activity versus passivity I am entitled to reap the gains my action produces but also should not be permitted to externalize any losses on others. By this view, strict liability is the default rule in a number of situations such as "A hit B" or "A created a dangerous condition that resulted in harm to B." These paradigms are intended to capture the idea that the harm is unilaterally caused.[135] These participants seem to be relatively insensitive to the idea that

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132. *See* Jules L. Coleman, *The Practice of Corrective Justice*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 53, 56 (David G. Owen ed. 1995).

133. WEINRIB, *supra* note 29, at 188.

134. *Toward a General Theory of Tort Law*, *supra* note 42, at 7–10.

135. Stephen R. Perry, *Tort Law*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 64, 84 (Dennis Patterson ed., 2d ed. 2010).

most accidents are bilateral in nature and involve the actions of both injurer and victim.[136]

Other participants, perhaps a majority, appear to be more Fletcherian in their perspective.[137] That is, they do not necessarily believe that all accidents are unilateral (i.e., caused only by the "actor"). Rather, they seem to be more open to a negligence rule when there is greater reciprocity of risk, which helps to explain why an innocent truck driver hitting a cyclist is more likely to be held liable than an innocent cyclist hitting another cyclist.[138] In this regard, it is noteworthy that most of our participants assigning liability in our innocent bike-on-bike accident assigned only partial liability, dividing the cost of harm between the actors when each imposed similar risk on the other, and one of them was injured through no fault of either.

Tort law does not have much to offer to those who share the intuition that innocent harmdoers and victims should share the cost of injury. While the law recognizes comparative fault when both actors are guilty of wrongdoing to one extent or another[139] and recognizes that joint tortfeasors should contribute according to the extent that each caused the harm (although the plaintiff may be permitted to collect from either),[140] the law makes no provisions for the division of the cost of a purely innocent accident other than allowing all of the burden to fall on the victim. Many of our participants felt, in contrast, that the cost of harm caused by people engaged in innocent activity should be shared among them, especially when the risks are reciprocal and the activity of the harmdoer is nonpecuniary. These reactions are more closely in keeping with an insurance scheme than with a tort system.

CONCLUSION

When students express a desire to impose strict liability in *Brown v. Kendall*, the instinct of some professors—including at least one of the authors—is to employ the various tricks of the trade to talk them out of this position. We ask them to imagine themselves

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136. Stephen R. Perry, *The Impossibility of General Strict Liability*, 1 CAN. J. L. & JURISPRUDENCE 147, 169 (1988).

137. Perry, *supra* note 135, at 85.

138. Keating adopts a similar "disproportion test." Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 352 (1996).

139. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 8 (2000). For recent discussion of that doctrine and some of its difficulties, see Paul H. Edelman, *What are We Comparing in Comparative Negligence?*, 85 WASH. U. L. REV. 73, 74 (2007).

140. For discussion and defense of this doctrine, see Richard W. Wright, *The Logic and Fairness of Joint and Several Liability*, 23 MEMPHIS ST. U. L. REV. 45 (1992).

the innocent defendant, not the plaintiff. Or we appeal to the transaction costs involved in getting the money out of the defendant's wallet and into the hands of the plaintiff. Or we note, à la Coase[141] and Shavel,[142] that it usually takes two to make an accident and ask them whether if, by trying to watch the dog fight, the plaintiff has also caused the accident.[143] Even a strong advocate of a strict liability regime would recognize that a defendant has any number of possible responses to the prima facie case, most relevant here being assumption of risk.[144] This set of tactics seems to work on most holdouts, although who knows what percentage are merely saying what they think the professor wants them to say.

Even then, the entire issue frequently resurfaces when the course gets to products liability. Those who believe that some form of strict liability is appropriate in that context are often less willing to surrender their position and less willing to believe the move from section 402A of the Restatement (Second) of Torts to section 2 of the Restatement (Third) of Torts: Products Liability was a step in the right direction.

This Article helps us to better understand these reactions and simultaneously cast a shadow over arguments that torts are only wrongs. Our data suggest that it was relatively easy to talk people out of a strict-liability approach in *Brown v. Kendall* both because most of us do believe negligence is the correct rule in that context, and even those of us who prefer strict liability only weakly support this position. When it comes to situations such as that described in the toxic gas release in Study 1 or the chemical spill in Study 4, however, the preference for strict liability is stronger and the willingness to acquiesce to the negligence rule attenuated. Even when they are told that the proper legal rule is negligence, 44% preferred a strict-liability rule in the chemical case.[145] They are not easily persuaded that the law of torts is only about wrongs.

Whenever community norms conflict with the law it is important to remember that the community is not inherently "right." It may be that tort law's broad retreat from strict liability is a wise course of action. The fact that a substantial portion of the community considers simple causality sufficient for liability in many

141. R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 12–13 (1960).

142. STEVEN SHAVEL, ECONOMIC ANALYSIS OF ACCIDENT LAW (1987).

143. *Id.* at 9; Coase, *supra* note 141, at 12.

144. *See generally* Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974) (discussing the defenses required in a strict liability regime).

145. Indeed, we suspect that, were we to conduct a study using the chemical scenario and a juror condition that told people the proper legal rule was one of strict liability, the great majority of our subjects would apply this rule and would agree that it is correct.

situations, however, suggests that the scope and centrality of strict liability is far from being fully resolved.

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