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ARTICLES

Corrective Justice and the Torts Process

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INTRODUCTION

Instrumental accounts of tort law[1] demonstrate its weaknesses as a system of compensation and deterrence.[2] Actual and proposed reforms[3]

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1. Instrumentalist critiques of law assess legal rules and practices based on their capacity to implement certain goals. An instrumental conception of tort law, for example, views the compensation of victims and/or the prevention of future accidents as central. In contrast, corrective justice theory posits a moral foundation of and rationale for tort law.

2. The economic analysis of tort law focuses on the use of tort law as a mechanism for accident prevention. According to this approach, the possibility of damage awards acts as an incentive for business and individuals to adopt cost-effective measures either to control or to eliminate accidents. *See generally* GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970); WILLIAM LANDES & RICHARD POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987); STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW (1987); *Symposium on the Economics of Liability*, 5 J. ECON. PERSP. 3 (1991). Other criticisms of tort law focus on the compensation of accident victims as well as accident prevention, but the thrust of the argument is that government regulation will most effectively prevent accidents. Similarly, many maintain that a legislatively-imposed and implemented system of social insurance will most effectively compensate those who are injured by accidents. *See generally* STEPHEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW (1989) [hereinafter SUGARMAN, PERSONAL INJURY LAW]; Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785 (1990) [hereinafter Abel, *Critique*]; Richard L. Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443 (1987) [hereinafter Abel, *Tort Crisis*]; Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555 (1985) [hereinafter Sugarman, *Tort Law*].

3. In the late 1980s, almost every state enacted tort reform legislation. *See* Joseph Sanders & Craig Joyce, *"Off to the Races": The 1980s Tort Crisis and The Law Reform Process*, 27 HOUS. L. REV. 207, 220-22 (1990).

and even calls for the abolition of the system as it now exists proliferate.[4] Corrective justice stands in direct opposition to instrumental views of tort law, positing a moral foundation of and rationale for the present system of tort law. The corrective justice theorists' insistance that tort law is grounded in the community's moral sensibilities and serves important social functions beyond instrumental concerns[5] requires close attention. If corrective justice theorists are right, the generally admitted fact that tort law falls far short of achieving the goals of compensation and deterrence[6] may be of diminished significance. Moreover, calls for revamping or dismantling the tort system may fail to give adequate consideration to the role of community morality in tort litigation.

Although definitions vary, one may broadly characterize corrective justice as the correction of certain imbalances or losses created by individual action.[7] As conceptualized by corrective justice theorists, the problem is determining *ex ante* which imbalances should be corrected. These theorists have suggested a number of solutions. Richard Epstein suggested (and retreated from the suggestion) that causal responsibility (or strict liability) is the appropriate basis for tort liability grounded in corrective justice.[8] Ernest J. Weinrib argues that corrective justice in tort law is a matter of restoring equality to those impaired by another's wrongful conduct. According to Weinrib, wrongfulness or fault is measured by Kantian moral philosophy.[9] Jules L. Coleman suggests that

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4. *See, e.g.*, SUGARMAN, PERSONAL INJURY LAW, *supra* note 2; Abel, *Critique*, *supra* note 2; Abel, *Tort Crisis*, *supra* note 2; Larry A. Alexander, *Causation and Corrective Justice: Does Tort Law Make Sense?*, 6 LAW & PHIL. 1 (1987); Mark Kelman, *The Necessary Myth of Objective Causation Judgments in Liberal Political Theory*, 63 CHI.-KENT L. REV. 579 (1987); Sugarman, *Tort Law*, *supra* note 2.

5. *See infra* text accompanying notes 7-11, 25-27, 62-87, 100-08.

6. *See generally* AMERICAN LAW INSTITUTE REPORTERS' STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY (1991); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147 (1992).

7. This broad definition is consistent with that used by corrective justice theorists generally, but it fails to capture variations among theories.

8. *See* Richard A. Epstein, *Causation and Corrective Justice: A Reply to Two Critics*, 8 J. LEGAL STUD. 477 (1979) [hereinafter Epstein, *Causation and Corrective Justice*]; Richard A. Epstein, *Causation—In Context: An Afterword*, 63 CHI.-KENT L. REV. 653 (1987) [hereinafter Epstein, *Causation in Context*]; Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974) [hereinafter Epstein, *Defenses and Subsequent Pleas*]; Richard A. Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391 (1975) [hereinafter Epstein, *Intentional Harms*]; Richard A. Epstein, *Nuisance Law: Corrective Justice and its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979) [hereinafter Epstein, *Nuisance Law*]; Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973) [hereinafter Epstein, *Strict Liability*].

9. Ernest J. Weinrib has written brilliantly and extensively on issues of legal

corrective justice grounds tort liability in instances of wrongful conduct, which may consist of rights invasions (wrongs) or conduct involving fault (wrongdoing).[10] Stephen R. Perry maintains that "outcome responsibility" coupled with fault is the basis for determining which actor or actors should bear losses.[11] In general, these suggestions focus on the

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theory. *See* Ernest J. Weinrib, *Aristotle's Forms of Justice*, 2 RATIO JURISPRUDENCE 211 (1989) [hereinafter Weinrib, *Aristotle*]; Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407 (1987) [hereinafter Weinrib, *Causation and Wrongdoing*]; Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1992) [hereinafter Weinrib, *Corrective Justice*]; Ernest J. Weinrib, *Law as a Kantian Idea of Reason*, 87 COLUM. L. REV. 472 (1987); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988) [hereinafter Weinrib, *Immanent Rationality*]; Ernest J. Weinrib, *Liberty, Community, and Corrective Justice*, 1 CAN. J.L. & JURISPRUDENCE 3 (1988) [hereinafter Weinrib, *Liberty*]; Ernest J. Weinrib, *Non-Relational Relationships: A Note on Coleman's New Theory*, 77 IOWA L. REV. 445 (1992) [hereinafter Weinrib, *Note on Coleman*]; Ernest J. Weinrib, *Right and Advantage in Private Law*, 10 CARDOZO L. REV. 1283 (1989) [hereinafter Weinrib, *Right and Advantage*]; Ernest J. Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. 403 (1989) [hereinafter, Weinrib, *Special Morality*]; Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 LAW & PHIL. 37 (1983) [hereinafter Weinrib, *Moral Theory*]; Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485 (1989) [hereinafter Weinrib, *Understanding Tort Law*].

Weinrib's analysis of tort law and corrective justice is a building block in an extremely complicated argument for the internal rationality and coherence of law. Although I believe that this particular building block is central to Weinrib's theory of law, I will not explicitly address the implications of my critique of his theory. *See infra* text accompanying notes 72-75, 82-93, for that theory. For an extended critique of Weinrib's larger claim for the internal coherence of law, see Richard W. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625, 631-64 (1992).

10. *See* JULES L. COLEMAN, RISKS AND WRONGS (1992) [hereinafter COLEMAN, RISKS AND WRONGS]; Jules L. Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421 (1982) [hereinafter Coleman, *Wrongful Gain*]; Jules L. Coleman, *Justice and the Argument for No-Fault*, 3 SOC. THEORY & PRAC. 161 (1975); Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427 (1992) [hereinafter Coleman, *Mixed Conception*]; Jules L. Coleman, *Moral Theories of Torts: Their Scope and Limits (Part I)*, 1 LAW & PHIL. 371 (1982); Jules L. Coleman, *Moral Theories of Torts: Their Scope and Limits (Part II)*, 2 LAW & PHIL. 5 (1983) [hereinafter Coleman, *Moral Theories II*]; Jules L. Coleman, *The Morality of Strict Tort Liability*, 18 WM. & MARY L. REV. 259 (1976) [hereinafter Coleman, *Strict Liability*]; Jules L. Coleman, *On the Moral Argument for the Fault System*, 71 J. PHIL. 473 (1974); Jules L. Coleman, *Property, Wrongfulness and the Duty to Compensate*, 63 CHI.-KENT L. REV. 451 (1987); Jules L. Coleman, *The Structure of Tort Law*, 97 YALE L.J. 1233 (1988); Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349 (1992) [hereinafter Coleman, *Demands*].

11. *See* Stephen R. Perry, *Comment on Coleman: Corrective Justice*, 67 IND. L.J. 381 (1992) [hereinafter Perry, *Comment*]; Stephen R. Perry, *The Impossibility of General Strict Liability*, 1 CAN. J.L. & JURISPRUDENCE 147 (1987) [hereinafter Perry, *Strict Liability*]; Stephen R. Perry, *The Mixed Conception of Corrective Justice*, 15 HARV. J.L. & PUB. POL'Y 917 (1992) [hereinafter Perry, *Mixed Conception*]; Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992) [hereinafter Perry, *Moral Foundations*].

substantive morality of tort law rules; all of them are mistaken in the narrowness of their focus. Contrary to the descriptive claims of corrective justice theorists, tort law principles often fail to produce substantively moral outcomes, and many tort law principles do not conform to broadly accepted notions of morality.[12] Corrective justice, as currently conceptualized, does not provide a compelling moral counterargument to instrumental critiques of tort law.

This Article advances an expanded theory of corrective justice which accepts the importance of community morality, but provides a distinct moral rationale for tort law. The focus of corrective justice theorists on substantive principles as animating corrective justice is reasonable, but radically incomplete. I suggest that the means by which imbalances are corrected is a crucial, but generally neglected element of corrective justice. Under this view, corrective justice is a matter of tort law processes engendered by highly flexible principles and rules, rather than merely a matter of identifying a particular formal element like causation or fault which calls corrective justice into play. One may justify modern tort law as a matter of corrective justice (if at all) because it permits individualized assessments of responsibility through the interplay between its generalized standards and its processes.[13] Those who propose alternative systems to compensate individuals more equitably and efficiently

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12. Corrective justice theorists do not uniformly agree that tort law, as a descriptive matter, is moral. Epstein, for example, proposes a system of tort law in corrective justice which would render tort law coherent and moral. *See infra* text accompanying notes 164-68. Coleman, whose writings are positive rather than normative, concludes that only portions of tort law are morally based. *See infra* text accompanying notes 94-96. However, corrective justice theory is fairly described as being based in morality. I will assess the corrective justice theorists' arguments that both tort law generally and problem areas of tort law specifically satisfy moral constraints. *See infra* part I.

13. Some participants in the corrective justice debate have recognized the importance of the torts process. *See generally* Catherine Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348 (1990); Steven D. Smith, *The Critics and the 'Crisis': A Reassessment of Current Conceptions of Tort Law*, 72 CORNELL L. REV. 765 (1987). Corrective justice as pragmatism differs from corrective justice as process in that pragmatists deny the substantive content of tort law standards. They maintain that the system is based upon intuitive, subjective deliberation. Glen O. Robinson and Kenneth S. Abraham have also recently focused on the tort process rather than on the particular substantive rules of tort law. Glen O. Robinson & Kenneth S. Abraham, *Collective Justice in Tort Law*, 78 VA. L. REV. 1481 (1992). They conclude that corrective justice permits, and may require, collective adjudication of mass tort claims. *Id.* at 517-19.

More general contributions to the literature on process include James A. Henderson, Jr., *Process Constraints in Tort*, 67 CORNELL L. REV. 901 (1982). The concept of a morality of procedure relies upon the seminal work of Lon Fuller. *See* LON L. FULLER, THE MORALITY OF LAW (1964).

than the present tort system,[14] or incremental reforms which place limitations on the functioning of the present system,[15] must factor into the calculus the moral value to the community of the processes of tort law. Specifically, they must consider the process of tort law as a means of establishing or affirming a normative order and as a means of implementing a community sense of justice. Those who advance corrective justice as a counter to proposals for the reform or abolition of the existing system must acknowledge weaknesses in the formal substantive morality of tort law. Further, they must recognize that process—the right to tell one's story—is an additional, and perhaps the primary component in the morality of tort law.[16]

A recognition of corrective justice as process-based explains the apparently contradictory conclusions of corrective justice theorists concerning what is and what is not a matter of corrective justice in tort law.[17] Corrective justice commentary tends to be highly abstract; I will focus on concrete examinations of the objective standard of the reasonable person in negligence, as compared to general strict liability. In particular, I will focus on the work of the following prominent corrective justice theorists: Ernest J. Weinrib,[18] Jules L. Coleman,[19] and Stephen R. Perry.[20] Each argues that wrongdoing or fault (or in Perry's case, "outcome responsibility" coupled with "faulty" or "fault-like" conduct)[21] provides the normative rationale for tort law. Each characterizes strict liability as inconsistent with corrective justice.[22] Nevertheless, each accepts and

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14. These include, for example, legislatively-adopted no-fault compensation schemes that provide compensation for any injury or, alternatively, that designate certain events as compensable.

15. These include, for example, caps on nonpecuniary damage awards.

16. The increasing use of stories in legal scholarship reflects the importance of contextualization in the legal process. *See infra* text accompanying notes 141-42.

17. The focus of much corrective justice theory has been negligence. Accordingly, my analysis will address the morality of negligence. I will not specifically address issues raised by intentional, reckless, or grossly negligent behavior.

18. *See infra* part I.B.1.

19. *See infra* part I.B.2.

20. *See infra* part I.B.3.

21. Perry, *Comment*, *supra* note 11, at 395-96; Perry, *Moral Foundations*, *supra* note 11, at 507-12.

22. Coleman, *Demands*, *supra* note 10, at 354-57; Perry, *Strict Liability*, *supra* note 11; Weinrib, *Special Morality*, *supra* note 9, at 411; Weinrib, *Moral Theory*, *supra* note 9, at 58-62. It is occasionally difficult to determine whether the corrective justice theorists dealt with here object on moral grounds to currently used forms of strict liability, or to theoretical, causally based strict liability, or to both; I will assume that they generally find both forms immoral.

Coleman's position on strict liability is not entirely clear. He retains his position that strict victim liability in tort (in which a faultless victim bears the losses occasioned by

attempts to defend some instances of non-fault liability in tort as matters of corrective justice. Specifically, each accepts as consistent with corrective justice what is essentially strict liability based on an incompetent actor's nonconformance to the standard of the reasonable person in negligence.[23] Neither strict liability nor liability of incompetent actors under the objective standard involves fault. Thus, something other than fault appears to be central to these notions of corrective justice. I suggest that the operative distinction between these two forms of liability, and a central concern of corrective justice, is the process accorded with each. Utilizing strict liability, based upon causal responsibility,[24] preempts thorough, fact-sensitive adjudication. *Requiring* courts to impose liability based solely upon a defendant's causation of harm is contrary to notions of procedural fairness. In contrast, *permitting* courts to impose liability absent fault at the conclusion of an individualized, fact-sensitive inquiry satisfies concerns about the justice of such liability.

Part I will address current conceptions of corrective justice, focussing on the central claim that morality, typically in the form of a requirement of fault, underlies the tort system. I will identify problems with general claims for the morality of tort law, as well as problems with specific assertions by Jules L. Coleman, Ernest J. Weinrib, and Stephen R. Perry that the objective standard of the reasonable person is moral. Part II will advance and defend an expanded conception of corrective justice, which includes process concerns. I will argue that recognition of the importance of process in tort law explains the corrective justice theorists' acceptance of the objective standard of the reasonable person

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the actions of a faultless injurer) is central to tort liability. Coleman, *Strict Liability*, *supra* note 10. He maintains that corrective justice forms the basis of liability in cases of necessity *absent* fault. COLEMAN, RISKS AND WRONGS, *supra* note 10, at 292-96. He also maintains that fault is central to tort law and its morality and that corrective justice is the principle of justice which grounds the fault rule. *Id.* at 285. These conclusions are at least facially inconsistent.

In general, the terms strict liability and negligence are unsatisfactory indicators of the existence of fault. Fault in negligence often involves no moral culpability and very little beyond the assignment of causal responsibility. *See infra* part I.A.. Strict liability as it is currently imposed is not "strict." Liability for ultrahazardous activities and products liability shares much with negligence liability. *See infra* text accompanying notes 157-63. Tort law does not impose strict liability based upon causal responsibility.

The distinction between theoretical causal strict liability and existing forms of strict liability is important to my argument. Where it is important to do so, I will specify whether my argument addresses currently utilized strict liability or theoretical (causal or "true") strict liability.

23. *See infra* parts I.B.1, 2, 3.

24. No current form of strict liability is purely causal. *See supra* note 22. I argue below that the acceptability of current strict liability stems at least in part from its satisfaction of process concerns. *See infra* text accompanying notes 157-63.

as applied to incompetent actors. It also explains their implicit acceptance of other facially immoral tort doctrines as well as tort law's current acceptance of some forms of strict liability. Finally, Part II will attempt a preliminary assessment of this expanded alternative corrective justice rationale for tort law against claims that the tort system is a costly, inefficient, and ineffective method of providing compensation to injured individuals.

I. Corrective Justice and the Substantive (Im?)Morality of Tort Law

Although conceptions of corrective justice vary, there are identifiable commonalities in corrective justice theory. Most importantly, corrective justice theorists posit a moral basis for negligence law. Although this statement involves a simplification, corrective justice theorists defend negligence liability as moral because it is grounded in fault.[25] Strict liability is immoral because it imposes liability in the absence of fault.[26]

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25. I intend to treat the arguments of Ernest J. Weinrib, Jules L. Coleman, and Stephen R. Perry as closely related for purposes of my thesis. I will ignore significant distinctions among the three theorists to focus on what I view to be a central and shared feature of their views of corrective justice and the morality of tort law: the centrality of fault in tort law's claimed morality.

Coleman's theory explicitly identifies fault as essential to tort law's morality and to the operation of corrective justice: "Fault is central both to the institution of tort law and, in my view, to its ultimate moral defensibility. The principle of justice that grounds the fault rule is corrective justice." Coleman, Risks and Wrongs, *supra* note 10, at 285.

Weinrib's theory of corrective justice is part of a much larger project devoted to the internal coherence and rationality of law: "[C]orrective justice is part of a wide complex of ideas that not only includes natural right, but also affirms the significance of formalism, the relevance of abstraction, and the autonomy of juridical thinking." Weinrib, *Corrective Justice*, *supra* note 9, at 425. Corrective justice, according to Weinrib, is a form of justice whose content is based upon the Kantian conception of the equality of individuals. The inequality which justifies and necessitates the operation of corrective justice is the wrongdoing or faulty action of one individual, resulting in injury to another. *See generally infra* part I.B.1.

Perry identifies outcome responsibility and fault as the moral bases for liability in tort law. *See* Perry, *Comment*, *supra* note 11, at 399; Perry, *Moral Foundations*, *supra* note 11, at 496-512. There are significant similarities between Coleman's and Perry's approaches. *See infra* parts I.B.2, I.B.3.

26. *See supra* note 22. Richard Epstein is unique among corrective justice theorists in his defense of strict liability as the appropriate standard in tort law. Epstein's early theory rested entirely on causation as it is defined in ordinary usage, excluding reference to fault or wrongdoing as requisites for tort liability. Epstein, *Defenses and Subsequent Pleas*, *supra* note 8; Epstein, *Intentional Harms*, *supra* note 8; Epstein, *Nuisance Law*, *supra* note 8; Epstein, *Strict Liability*, *supra* note 8. As modified in subsequent work, the theory emphasizes rights invasions as opposed to causation. Epstein, *Causation and Corrective Justice*, *supra* note 8. As others have recognized, strict liability has an intuitive

Relatedly, they argue that the primacy of morality is distinct from purely instrumental concerns.[27]

A difficulty with this conception of corrective justice is the attempt to assess morality retrospectively at the point of the injury-causing action. In negligence law,[28] the conduct which causes injury and results in liability is typically neither moral nor immoral. That is why discussions of fault or responsibility do not explain the bases or purposes of negligence law. The arguments advanced by Weinrib and Coleman, that those who are at fault should bear the losses occasioned by their conduct, fail to account for the true character of negligent acts.[29] Perry's argument, that outcome-responsibility designates the appropriate bearer of loss, fails to distinguish adequately between fault and responsibility and to justify his differentiation of the moral character of negligence and strict liability under a theory of responsibility.[30]

A. The Immorality of Tort Law

There are several underlying problems with arguments that negligence law is substantively moral. First, moral principles and legal rules are functionally dissimilar. In everyday life, apart from the law, moral principles are guides for behavior. People confronted with various possible courses of action often deliberate rationally and refer to moral principles

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moral appeal. As between faultless individuals, it may seem appropriate to place the losses arising from injury on the individual who caused the injury. Both theories have been criticized. *See, e.g.*, Ihzak Englard, *Can Strict Liability Be Generalized?*, 2 OXFORD J. LEGAL STUD. 245 (1982); Perry, *Strict Liability*, *supra* note 11; Richard Posner, *Epstein's Tort Theory: A Critique*, 8 J. LEGAL STUD. 457 (1979); N.E. Simmonds, *Epstein's Theory of Strict Tort Liability*, 51 CAMBRIDGE L.J. 113 (1992). Epstein has since retreated from his earlier positions. *See* Epstein, *Causation in Context*, *supra* note 8.

27. Tort law as a system of corrective justice may be characterized as advancing certain moral values such as individual autonomy. In that sense, it may be instrumental.

28. I do not include intentional torts, recklessness, or gross negligence here. I also exclude strict liability as it is currently utilized. Although strict liability in its present form is similar to negligence, see *supra* note 22, there may be distinctions between strict liability and negligence that require differing treatment. Strict liability, which is typically imposed on enterprises rather than individuals, may result from calculated, considered decisions. Although many characterize negligence liability as involving a risk/benefit analysis, *see, e.g.*, United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947), negligent behavior by *individuals* is often inadvertent rather than calculated. *See infra* text part I.A. In other words, the risk/benefit analysis in individual negligence occurs *ex post*, focusing on what a reasonable actor should have known or considered. The individual actor in most cases of negligence did not undertake such an assessment prior to the injury-causing conduct. In contrast, cases involving strict liability often involve an actor who is more likely to have made such an assessment.

29. *See infra* parts I.B.1, I.B.2.

30. *See infra* part I.B.3.

in choosing what to do. Some legal rules may function in this way. The criminal law, for example, is intended to influence behavior by imposing sanctions for intentional or reckless action. By contrast, the rules of negligence do not, and are not intended to function as guides for behavior. The central standard in negligence law is reasonableness as determined by a jury. One can hardly say that this standard provides guidance.[31] In everyday life moral principles also provide guides for assessing the morality of completed action. Individuals make moral judgments concerning their own activities as well as those of others. No systemic external consequences typically attach to those judgments.[32] Again, law is very different. Individuals may predict whether a particular action will be found to be negligent, and lawyers may do so quite accurately in some instances. However, legal decisions, and the consequences of those decisions, occur only in the context of the legal system. The structure of the legal system and the processes of adjudication constrain the substantive morality of tort law.

Second, tort law comes into play *only* if an individual's behavior causes injury. Because tort law assesses conduct only if injury occurs, the moral question central to negligence law is who should bear losses caused by negligent action, and not whether that action was faulty or wrongful. The focus on the moral character of injury-causing behavior as wrongful or faulty espoused by Weinrib and Coleman, and, to a lesser extent, Perry,[33] is inherently flawed.[34] If tort law is moral in the

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31. In some instances, negligence may consist of the violation of a legislative enactment or of an administrative regulation. In these instances, the standard of reasonableness derives specific content from the statute, regulation or ordinance at issue. Nevertheless, there is minimal guidance provided for individuals subject to potential tort liability for two reasons. First, a violation is not equivalent to negligence. The statute will apply only if a court first determines that the plaintiff is within a specific class of persons who the statute was designed to protect and suffered an injury of the type the statute was designed to prevent. Second, if these requirements are satisfied, some courts hold that the violation is negligence per se. Others hold that the violation is only evidence of negligence. In these latter jurisdictions, the evidence of a violation is merely one factor in the reasonableness inquiry. *See generally* RESTATEMENT (SECOND) OF TORTS §§ 286, 287, 288, 288A, 288B, 288C (1965).

32. In some cultural or religious communities, such consequences may attach (the Amish practice of shunning, for example).

33. Perry's reliance on fault identifies his theory with those of Coleman and Weinrib. His dual focus on fault *and* outcome responsibility sets his theory apart, suggesting that the occurrence of an injury is, in itself, morally significant, independent of the fault requirement. *See infra* part I.B.3. Coleman's argument that a central concern of corrective justice is the consequences of faulty action may also indicate a dual focus. *See infra* text accompanying notes 110-14. However, Coleman does not develop the point.

34. The approach, which is similar to deontological approaches in ethics, is understandable, particularly in light of its opposition to the instrumentalist conceptions of

sense proposed by corrective justice theorists, its morality is a matter of faulty action *and* injurious consequences.[35] Tort law ignores negligent action which fortuitously does not result in injury. Under tort law principles, liability (and thus moral culpability according to corrective justice theorists) attaches only to negligent actions which cause harm.[36] But surely negligent actions, if such actions involve fault, do so regardless of their consequences. Surely morality is a matter of something more than luck.[37] In tort law, however, as conceptualized by corrective justice theorists, whether an action is moral (and thus legal) or immoral (and thus illegal) does in fact seem to be a matter of luck. The issue of moral luck is a significant problem for corrective justice theorists if it

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law that an economic analysis advances. The dichotomy presented by instrumentalist (economic) and non-instrumentalist (moral) theories is not absolute. One may view tort law as a morally-based, forward-looking institution, one that differs from administrative compensation systems because it seeks to further non-economic human interests as well as to compensate accident victims. *See generally* Ken Kress, *Formalism, Corrective Justice and Tort Law*, 77 IOWA L. REV. i (1992).

35. Not all corrective justice theorists agree. Christopher H. Schroeder's suggestion that tort liability be imposed for risk creation completely severs the connection between conduct and the resulting injury by suggesting the imposition of tort liability for risk creation. In this view, negligent conduct which fortuitously does not cause injury is the moral equivalent of negligent conduct that does. Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439 (1990) [hereinafter Schroeder, *Increasing Risks*]. For a critique of Schroeder's work and his response, see Kenneth W. Simons, *Corrective Justice and Liability for Risk Creation: A Comment*, 38 UCLA L. REV. 113 (1990); Christopher H. Schroeder, *Corrective Justice, Liability for Risks, and Tort Law*, 38 UCLA L. REV. 143 (1990) [hereinafter Schroeder, *Liability for Risks*]. In his earlier work, Jules L. Coleman distinguished between grounds for recovery and modes of recovery in corrective justice. The distinction permitted Coleman to argue that corrective justice could be satisfied by compensating the injured party through any means. This argument minimizes the connection between conduct and injury, and to some extent avoids the problem of moral luck. Coleman, *Moral Theories II*, *supra* note 10. Stephen R. Perry's theory of corrective justice based on fault and outcome responsibility also avoids this problem to some extent. *See infra* part I.B.3.

36. Criminal law provides an instructive analogy. An attempt to commit a crime is itself a crime, punishable in the federal system to the same extent as the completed crime. The conduct itself, regardless of the consequences, is morally and legally culpable. In tort law, the necessity of an injury deflects the focus on conduct.

37. *See, e.g.*, Tony Honoré, *Responsibility and Luck: The Moral Basis of Strict Liability*, 104 LAW Q. REV. 530 (1988). Paul F. Rothstein, *Causation in Torts, Crimes, and Moral Philosophy: A Reply to Professor Thomson*, 76 GEO. L.J. 151 (1987); Judith Jarvis Thomson, *The Decline of Cause*, 76 GEO. L.J. 137 (1987); Emily Sherwin, *Why Is Corrective Justice Just?*, 15 HARV. J.L. & PUB. POL'Y 839, 847 (1992) ("[I]f the duty to repair a wrongful loss is conceived as a moral duty, grounded in notions of autonomous agency, it should address the choices defendants have made rather than the fortuitous consequences of their choices."). For extended philosophical discussion of these issues, see Thomas Nagel, *Moral Luck*, *in* MORTAL QUESTIONS (1979); Bernard A.O. Williams, *Moral Luck*, *in* MORAL LUCK (1981).

involves, as it seems to, the conclusion that a system of law allegedly grounded in morality concerns itself with only a very limited subset of immoral action (that which results in injury). Corrective justice theorists may address this difficulty by noting that the morality of the system is constrained by the structure and functioning of the system itself: the requirement of an injury is essential to the operation of a bilateral litigation system. However, the recognition of nonmoral instrumental concerns raised by practical systemic requirements (like the requirement of an injury) undercuts a central purpose of corrective justice theory; namely, how to justify tort law on moral as opposed to instrumental grounds.

Third, the identification of the morality of negligence with the requirement of fault presents additional problems for corrective justice theorists. As many have recognized, fault in tort law is an attenuated concept which often bears little relationship to morality.[38] Although notions of individual responsibility dominate tort law, legal responsibility attends countless actions to which morality is indifferent. A momentary lapse of attention, a common mistake, or a simple error of judgment may result in fault-based liability. Do such impositions of liability conform to the moral intuitions of members of society? Should individuals whose "fault" consists primarily in causal responsibility shoulder the burden of what may be enormous losses?[39] Negligence law, despite its purported reliance on fault, shares much in common with strict liability.[40]

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38. RESTATEMENT (SECOND) OF TORTS § 282 (1965), Special Note and comment f, use the term "social fault", apparently to distinguish fault in tort law from fault in the normal sense of the word. *See also* Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 778-89 (1985), in which Ingber notes: "The trend in tort law over the last 150 years has been to distinguish moral wrongdoing from the legal fault of negligence. . . . Because negligence—legal fault—requires nothing more than momentary inadvertence, the demand for restitutive justice in such cases is influenced less by moral fault than by rule and expectation violation."

39. Tony Honoré would answer this question in the affirmative. Honoré, *supra* note 37. He argues that outcome responsibility rather than fault is the moral basis of tort law. Outcome responsibility involves accepting responsibility for the consequences of one's action or inaction; it is a necessary aspect of personhood. That is, people accept that their actions may have negative consequences and they accept responsibility for those consequences, even though they may be fortuitous. "[T]he fairness of holding someone responsible outside or inside the law depends on their possessing a general capacity for decision and action such that, under the system of bets into which society forces them, they stand over a span of time to win more than they lose." *Id.* at 552. An incompetent actor should not be held liable: "The system is not a fair one to apply to those whose limited capacities make them consistent losers." *Id.* at 552-53.

40. Although "fault" in negligence may involve some level of actual moral culpability, and although strict liability is purportedly imposed in the absence of any finding of fault, in many instances the distinctions between these two bases of tort liability blur. *See infra* text accompanying notes 157-63.

In the bulk of negligence law, it is difficult to maintain that a *moral* concept of fault operates. In many cases, it is difficult to maintain that *any* meaningful concept of fault exists. Corrective justice theorists generally reject strict liability.[41] However, it is certainly arguable that a system of strict liability (one in which the moral focus is causal responsibility for injury and compensation of the injured victim, rather than attribution of what may be an empty concept of fault) may conform more closely to communal moral intuitions.[42] Tort law reflects a basic tension between these two independent, conflicting, and often equally compelling premises: holding individuals liable only for their "blameworthy" conduct (fault-based liability) versus imposing the economic consequences of conduct on the actor who causes harm rather than on the injured victim (liability based on causation).

Relatedly, the character of much negligent conduct supports the contention that fault is not central to tort law's morality. Negligent behavior, by definition, is not deliberate or intentional behavior. Some negligence involves action performed with knowledge that it poses risk to others. However, it is often the product of fatigue, inattention, mistake, thoughtlessness, forgetfulness, or countless other causes—but it is not deliberate;[43] it is not chosen in a morally meaningful way.

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41. *See supra* note 22.

42. The much-debated theories of Richard Epstein articulate the corrective justice rationale for strict liability. *See* Epstein, *Strict Liability*, *supra* note 8; Epstein, *Causation and Corrective Justice*, *supra* note 8; Epstein, *Defenses and Subsequent Pleas*, *supra* note 8. Ernest Weinrib accepts the intuitive appeal of strict liability, especially from an instrumentalist perspective. Weinrib, *Causation*, *supra* note 9, at 416. Coleman takes Epstein's position that even justifiable rights violations support tort liability, and are properly considered matters of corrective justice. Coleman, *Demands*, *supra* note 10, at 354-57, 379.

Corrective justice theorists correctly reject absolute or causally-based strict liability. Despite partially conforming to moral notions on a formal level, strict liability minimizes and perhaps eliminates the torts process. *See infra* text accompanying notes 145-51.

43. A number of early torts scholars reached this conclusion. *See, e.g.*, H. GERALD CHAPIN, HANDBOOK OF THE LAW OF TORTS 499 (1917); W.T.S. STALLYBRASS, SALMOND'S LAW OF TORTS § 7 (9th ed. 1936); Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40 (1915). Courts also noted that negligence typically arose from inadvertence. *See, e.g.*, *Ex parte* McNeil, 63 So. 992, 993 (Ala. 1913) ("Simple negligence is the inadvertent omission of duty."); Parker v. Penn. Co., 34 N.E. 504 (Ind. 1893) ("Negligence arises from inattention, thoughtlessness, or heedlessness . . . ."); Barrett v. Cleveland C.C. & St. L. Ry., 96 N.E. 490, 492 (Ind. Ct. App. 1911) ("[N]egligence . . . imports inattention, inadvertence and indifference . . ."); Christy v. Butcher, 134 S.W. 1058, 1059 (Mo. Ct. App. 1911) ("[N]egligence . . . is characterized by . . . inadvertence."); Bolin v. Chicago St. P., M & O Ry., 84 N.W. 446, 450 (Wis. 1900) ("[I]nadvertence, in some degree, is the distinguishing characteristic of negligence. . . .").

Modern commentary similarly recognizes that negligence often involves simple unskillfulness, inadvertence, inattention, mere error in judgment, mistake, or mere thoughtlessness. *See* RESTATEMENT (SECOND) OF TORTS § 500, cmt g (1965).

The claim that much negligent behavior lacks moral content, and the subsidiary claim that moral analysis of negligence is inapposite, derive support from arguments typically advanced against economic theories of tort law. Those arguments maintain that the deterrent effect of negligence law is marginal.[44] Deterrence and morality are related; moral consid-

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44. The deterrent effect of any law will depend, *inter alia*, upon the certainty of the applicable legal standard, the potential defendant's knowledge and understanding of that standard, the ability to conform to the standard, and the likelihood that noncompliance will result in legal action against the defendant. Negligence law, particularly as applied to individual behavior, does not meet these criteria because the rules are not specific; individual defendants are not likely to know much about them, and it is impossible for human beings to avoid all inadvertent negligent behavior. The inability of tort law to deter negligence is compounded because the occurrence of an injury following negligent action is fortuitous. Most negligent behavior does *not* result in injury. A United States Department of Transportation study found, for example, that: "[I]n Washington D.C. a 'good' driver *viz.* one without an accident within the preceding five years commits on average, in five minutes of driving, at least nine errors of different kinds." U.S. DEPT. OF TRANS., AUTOMOBILE INSURANCE AND COMPENSATION STUDY 177-78 (1970). Even if negligence results in injury, insurance will likely provide substantial protection for the defendant. Finally, as a practical matter, it seems unlikely that tort liability would provide additional safety incentives beyond those that follow. First, negligent behavior may cause injury to the negligent actor as well as to potential plaintiffs. Second, criminal sanctions may be imposed for negligent behavior. If in fact individuals have an incentive toward safety, that incentive is likely to be regulatory. Individuals generally have some impulses to obey the law, and although the likelihood of being sanctioned for traffic violations may be minimal, it is far more likely than being sued for negligence. The moral questions that arise in this context involve the moral defensibility of noncompliance with legislative enactments and not the morality of the underlying action. There is nothing inherently immoral about driving at a speed of 60 mph, but there may be something immoral about doing so when there is a 40 mph speed limit.

Accident prevention is a central concern in economic analysis of tort law. Critics of law and economics argue that tort law's deterrent effects are marginal at best, particularly as applied to individual behavior. *See, e.g.*, Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1174 (1989); Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313, 346-47 (1990); Sugarman, *supra* note 2, at 564-91. *See also* Mark F. Grady, *Why Are People Negligent? Technology, Nondurable Precautions, and the Medical Malpractice Explosion*, 82 NW. U. L. REV. 293 (1988). Contrary to the predictions of deterrence theory, New Zealand's experience with comprehensive accident compensation system suggests that abolishing tort liability will not necessarily result in more accidents. Craig Brown, *Deterrence in Tort and No-Fault: The New Zealand Experience*, 73 CAL. L. REV. 976 (1985). For an alternative view, see Richard S. Miller, *The Future of New Zealand's Accident Compensation Scheme*, 11 U. HAW. L. REV. 3, 34-45 (1989).

Some claim that motor vehicle and medical malpractice litigation has some deterrent effect. *See generally* Don Dewees and Michael J. Trebilcock, *The Efficacy of the Tort System and Its Alternatives: A Review of Empirical Evidence*, 30 OSGOODE HALL L.J. 57 (1992). With regard to automobile accidents, Trebilcock and Dewees conclude:

> [A]t least some driving patterns that are significantly correlated with accidents, such as speeding or drunk driving, are likely to be responsive to the tort system's

erations may function to deter certain behavior. The general failure of negligence law to deter negligent conduct suggests that such conduct is not the product of considered moral (or economic) choice, but of inadvertence. The bulk of negligence cases against individuals arise from accidents.[45] They are not the result of considered moral choices. This point undercuts both moral and economic analysis of negligence law. Both moral and economic analysis of action presume deliberate choice rather than the inadvertent, accidental conduct which grounds much negligence liability. Economic analysis of tort law, like moral analysis, assumes that defendant rationally chooses among various courses of action. Although this assumption may be warranted in some instances (for example, in cases of design defects in strict products liability), it is unwarranted in many other instances.[46] Moral analysis of negligent

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incentives. This is less clear, though, with respect to momentary acts of inadvertence, where possible tendencies of some individuals to discount low-probability risks may reduce driver responsiveness to the tort system's deterrence signals, at least relative to various penal or regulatory alternatives. *Id.* at 65-66.

The statistical evidence cited by Dewees and Trebilcock, which compares the incidence of accidents under a third party system of liability insurance to a first party no-fault compensation scheme, is inconclusive. Some studies found that the accident rate increased, while others found no correlation between the adoption of no-fault and highway safety. It is similarly unclear whether the increased rate of accidents was attributable to the effects of insurance pricing and regulations or to levels of driver care. Similar difficulties attend the conclusion that the threat of liability may deter medical malpractice. Studies have found that doctors react to the risk of malpractice actions by increased use of specific diagnostic procedures, increased record-keeping, and increased communication to patients concerning treatment and alternatives. It is unclear whether these changes have any positive impact on the rate of medical injury, given that malpractice often results from inadvertence. Schwartz, *supra*, at 347. Some commentators suggest that increased use of various diagnostic procedures may be harmful to patients, thus increasing the injury rate. *E.g.*, Saks, *supra* note 6, at 1284-87.

45. Statistical evidence tends to support this assertion. National Safety Council statistics for 1989 indicate that auto accidents accounted for more than half of the country's accidental deaths and almost twenty percent of disabling injuries. Another thirty-five percent of disabling injuries occurred in the home. Because the Council's figures include categories of deaths and injuries *not* covered by the tort system (notably, work-related accidents), it is clear that a substantial portion of negligence litigation involves accidents that likely resulted from mistake or inadvertence and that do not raise questions of the morality of the injury-causing behavior. *See* NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 2-8 (1990).

Empirical evidence from state courts also demonstrates that the bulk of tort litigation, excluding professional malpractice and products liability, involves automobile accidents (42%) and other types of personal injury (32.9%). Brian Ostrom, David Rottman, & Roger Hanson, *What are Tort Awards Really Like? The Untold Story from the State Courts*, 14 LAW & POL'Y 77, 81 (1992).

46. Schwartz, *supra* note 44, at 346-49. Schwartz notes: "[F]rom the economist's perspective . . . negligence essentially consists of a defendant's deliberate choice to engage

action is similarly anomalous. A retrospective moral assessment of injury-causing action ignores the amoral character of most negligent action.

The claim that much negligent behavior is inadvertent and consequently lacks moral content also derives support from economic theory itself. Although most economic analysis of negligence focuses on "durable" precautions, Mark Grady has concluded, based on analysis of "nondurable" precautions, that "most real-world negligence will center in precautions that people have to remember frequently."[47] His arguments provide support for the insight of scholars who maintain that inadvertent conduct is a primary source of negligence liability.[48] Grady recognizes that negligence liability is routinely imposed for forgetfulness.[49] While economic analysis takes account of the burdens of using a particular precaution, it does not account for compliance costs, which include the inadvertent failure to notice risks or the failure to use precautions. Thus, "most negligence claims will come from someone's failure to use a nondurable precaution because, for precautions of this type, courts exclude a significant part of the actual cost. Because people respond to real costs, they will find it economic to be negligent some of the time."[50] That is, they will continue to forget to use nondurable precautions and will fail to notice when such precautions are warranted.[51]

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in conduct the riskiness of which he distinctly appreciates. . . . [T]his is an assumption of behavioral rationality that most of us non-economists would find somewhat excessive." *Id.* at 346-47. Schwartz argues that individuals have little control over significant categories of negligent behavior. He "invite[s] [his] reader to clarify his own attitudes toward the preventability of negligence" by considering his response to hypothetical offers of premium reductions from an auto insurer if the policy excludes coverage for accidents caused by: (1) the insured's drunk driving; (2) the insured's excessive speeding (at least 25 mph in excess of the limit); (3) the insured's speeding; and (4) the insured's absent-mindedly taking his eyes off the road. *Id.* at 347-48 n.154. Most insureds would take advantage of the first offer. Some would accept the second offer; very few would accept the third; and presumably no one would accept the fourth because inadvertent carelessness is often beyond an individual's control. *See also* Cooter, *supra* note 44, at 1174 ("The present inability of economists to model lapses [in parties' behavior] is a serious weakness in the economic analysis of law.").

47. Grady, *supra* note 44, at 295. Durable precautions are precautions that have "a long service life and . . . [do] not need to be used repetitively." Grady cites the example of a dialysis machine. Nondurable precautions, in contrast, are repetitive, short-term, and easily forgotten. The dialysis machine will "not be effective unless someone properly connects it to the patients, carefully tests the hemodialytic solution, regularly checks the patients' shunts, and so forth." *Id.* at 299.

48. *See supra* note 43 and accompanying text.

49. Grady, *supra* note 44, at 300-10.

50. *Id.* at 310-11.

51. Grady provides empirical evidence for his theory that nondurable precautions account for the bulk of negligence claims. Pilot or personnel error accounts for the great majority of airplane crashes (87.6% in 1984). *Id.* at 328, citing NAT'L TRANSP. SAFETY

Yet another difficulty in asserting the tort system's morality stems from the common disassociation of legal and financial responsibility. As noted above, legal responsibility and moral responsibility are not parallel, and even if legal responsibility is grounded in some measure in a defendant's fault, financial responsibility may not follow. Financial responsibility is often reallocated in ways which may violate traditional notions of morality. A defendant held liable in tort typically does *not* personally compensate the plaintiff. The defendant's insurance company may compensate the plaintiff;[52] an uninvolved third party (or the third party's insurer) may compensate the plaintiff under the theory of vicarious liability. The availability of personal liability insurance may be attributed to the defendant's previously responsible behavior,[53] and, in some cases, the vicariously liable third party bears some measure of actual responsibility. One such example is when an injury occurs as a consequence of negligent supervision. However, the very existence of liability insurance and the utilization of doctrines like vicarious liability unquestionably dilute the moral character of tort law.

Fault-based moral analysis of action cannot explain or justify the allocation of negligence liability. Individuals who are negligent do not make primary moral choices which lead them to be negligent; negligent behavior is often inadvertent. Given the amoral character of many negligent acts, and the virtually imperceptible distinction between negligent actions and actions which ground some forms of strict liability,[54] the question of whether injury-causing action was faulty is meaningless. An assessment of the morality of particular legal rules from the perspective of fault cannot demonstrate the morality of tort law. Furthermore, a legal decision that a particular action was or was not negligent is not a moral decision. Such legal decisions may include a moral component, but the legal system significantly constrains the nature and the extent of that moral component. The moral question important to negligence law centers not on behavior, but on the *consequences* of behavior[55] and the attendant issue of liability. It is not the function of

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Bd., Annual Review of Aircraft Accident Data: U.S. Air Carriers Operations for Calendar Year 1984 (1987). Medical malpractice claims are most numerous in urban centers where the practice of medicine is most sophisticated and there are greater opportunities for omission of nondurable precautions. Grady, *supra* note 44, at 300, 330-31.

52. For an excellent discussion of the issues, see Schwartz, *supra* note 44.

53. Typically, this responsibility is *not* appropriately characterized as morally-derived because most people carry insurance to protect themselves and not to ensure that those they may injure will be protected.

54. *See infra* text accompanying notes 157-63.

55. Jules L. Coleman and Stephen R. Perry both attach importance to the con-

negligence law to prescribe behavior; but rather, given the occurrence of injury, to determine whether tort liability should attach.

In short, the question of whether a particular tort rule is moral may be interesting, but the answer is not particularly illuminating. An answer will bring us no closer to a convincing morally-based defense of the current system of negligence. Negligent actions are generally too trivial to warrant moral analysis. Often neither the character of the action (for example, momentary inattention), nor the context in which it occurs (for example, driving a car) raise moral issues. Rather, the *consequences* of negligent action (and not the action itself) as well as the issue of who should bear the financial burden of such consequences raise moral concerns.

B. The Problem of the Reasonable Person

The difficulties with characterizing tort law as substantively moral are reflected in the moral analysis of individual tort law principles. If "fault" provides the moral basis of tort law, numerous substantive negligence principles suffer from serious moral deficiencies. Among these are: rules which expressly permit non-fault liability (as in necessity cases[56] and the objective application of the reasonable person standard to incompetent actors);[57] rules which expressly permit the imposition of liability for another's conduct (as in vicarious liability);[58] rules which preclude liability in the clear presence of fault (sovereign, parental, and charitable immunities);[59] and rules which require the system to ignore true moral

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sequences of action in their theories of corrective justice. *See supra* note 33. Each does so in an attempt to demonstrate the fault-based character of negligence. *See also* Wright, *supra* note 9, at 697-98 (describing importance of consequences of conduct to Aristotelian corrective justice and locating moral issues in actors' decisions to rectify injuries caused by their conduct).

56. The takings cases seem to accord with moral intuitions. Vincent v. Lake Erie Transp. Co., 124 N.W. 221 (Minn. 1910), provides one example. In *Vincent*, the defendant's agent prevented potential destruction of its ship at the cost of some damage to the plaintiff's dock. The court did not view the conduct as faulty. In fact, the court characterized the conduct as prudent, but upheld an award of damages to the plaintiff. *See infra* text accompanying notes 152-53 for further discussion of this case.

57. *See infra* note 67 and accompanying text.

58. Courts most commonly impose vicarious liability against an employer for an employee's negligence in the context of his or her employment, based upon the employer's "control" over the employee and the policy rationale that losses are more appropriately allocated to the enterprise. Tort law also imposes vicarious liability on partners, joint enterprises, automobile owners, and parents. *See generally* W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS §§ 70-74 (5th ed. 1984).

59. Immunity doctrines have been abolished by legislation or judicial decision in many jurisdictions. The federal government waived its general immunity to tort liability

fault (the absence of affirmative obligations to assist others in almost all circumstances).[60] These particular examples do not necessarily defeat claims for the underlying substantive morality of tort law. An incomplete identification of particular tort rules or standards with the moral underpinnings of tort law may indicate only that individual rules, for a variety of reasons, do not accurately reflect that morality. Nevertheless, the general and specific charges of immorality and amorality in negligence rules are potentially devastating to corrective justice theories when viewed as a matter of substantive morality.[61] Corrective justice theorists have devoted attention to the problem of the objective standard of negligence,[62] arguing that even apparently immoral applications of the principle are in fact moral.

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with the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2402, 2671 (1988). However, it retains immunity in some instances, notably for intentional torts and for discretionary conduct. The majority of states have waived tort immunity in varying degrees, but a number of states retain significant immunities. KEETON ET AL., *supra* note 58, § 131. Approximately one-half of the states have abrogated parental immunity to some extent. *Id.* § 122. All but a few states have abrogated charitable immunities. *Id.* § 133.

60. There are generally no legal obligations to assist strangers who are in danger. The RESTATEMENT (SECOND) OF TORTS § 314 (1965), states: "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." *See, e.g.*, Yania v. Bigan, 155 A.2d 343 (Pa. 1959) (no liability where defendant's business visitor drowned in the defendant's presence after jumping into a trench containing eight to ten feet of water). The rule has been the subject of extensive scholarly comment. *See generally* John M. Adler, *Relying Upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others*, 1991 WIS. L. REV. 867; James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908); Epstein, *Causation and Corrective Justice*, *supra* note 8, at 490-92; Epstein, *Strict Liability*, *supra* note 8, at 197-204; William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83 (1978); Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879 (1986); Jay Silver, *The Duty to Rescue: A Reexamination and Proposal*, 26 WM. & MARY L. REV. 423 (1985); Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980).

61. Some corrective justice theorists posit multiple justifications for tort law. Jules L. Coleman argues that "markets and morals" underlie tort law. Morality or corrective justice is the basis of negligence law and economic considerations underlie strict liability. Coleman, *Demands*, *supra* note 10, at 361 n.12, 379. Stephen R. Perry agrees that the single rationale of corrective justice does not necessarily explain all of tort law. *See* Perry, *Comment*, *supra* note 11, at 381-82.

62. These theorists include: Ernest J. Weinrib, *see infra* part I.B.1.; Jules L. Coleman, *see infra* part I.B.2; and Stephen R. Perry, *see infra* part I.B.3.. All discussed the objective standard at some length. These scholars have *not* advanced the argument that fault is implicit in the imposition of what I have termed non-fault negligence liability. Weinrib, Coleman and Perry address the issue of incompetent actor liability under the unarticulated premise that such liability is a form of strict liability.

Corrective justice theory is largely abstract and does not address specifically those immoralities of tort law enumerated above. Exceptions include specific defenses of the reasonable person standard as applied to incompentent actors by Ernest J. Weinrib,[63] Jules L. Coleman,[64] and Stephen R. Perry.[65] Their attempted moral justification for the standard as applied to incompetent individuals in the context of their rejection of strict liability as immoral[66] presents perplexing problems for these theorists. Ultimately, their apparently contradictory positions suggest that the morality of tort law rests on something other than fault. I suggest that the operative distinction lies in the varying process afforded by negligence and strict liability.

It is well-settled doctrine that individuals who cannot conform to the standard of the reasonable person, as an unfortunate consequence of subnormal intellectual capacity or some other shortcoming, may be held liable for conduct which represents their best efforts.[67] The failure to do what is impossible surely cannot support an imputation of fault, however attenuated. If tort law's morality is based on fault, this doctrine of tort law is unquestionably immoral. Weinrib, Coleman, and Perry have, however, concluded that the standard of the reasonable person is

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63. Weinrib, *Causation and Wrongdoing*, *supra* note 9, at 427-29; Weinrib, *Special Morality*, *supra* note 9, at 409-11.

64. Coleman, Risks and Wrongs, *supra* note 10, at 218-19, 333-35; Coleman, *Demands*, *supra* note 10, at 369-71.

65. Perry, *Moral Foundations*, *supra* note 11, at 496-513.

66. For some criticisms of strict liability on moral grounds, see Coleman, *Demands*, *supra* note 10; Englard, *supra* note 26; Perry, *Strict Liability*, *supra* note 11; Weinrib, *Special Morality*, *supra* note 9; Weinrib, *Moral Theory*, *supra* note 9. Strict liability also has been criticized recently on instrumental grounds. *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); James A. Henderson, Jr. & Aaron D. Twerski, *Stargazing: The Future of American Products Liability Law*, 66 N.Y.U. L. Rev. 1332 (1991); William Powers, Jr., *A Modest Proposal to Abandon Strict Products Liability*, 1991 U. Ill. L. Rev. 639; Alan Schwartz, *The Case Against Strict Liability*, 60 Fordham L. Rev. 819 (1992).

67. *See* Restatement (Second) of Torts § 283B (1965): "Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances." The comments enumerate reasons for the rule, including the difficulties in distinguishing between mental deficiency and individual variations in intellect and temperment; the difficulties of proving mental deficiency; and the possibility that mental deficiency or insanity may be feigned. For discussions of the rule, see generally James W. Ellis, *Tort Responsibility of Mentally Disabled Persons*, 1981 Am. B. Found. Res. J. 1079; David Seidelson, *Reasonable Expectations and Subjective Standards in Negligence Law: The Minor, the Mentally Impaired, and the Mentally Incompetent*, 50 Geo. Wash. L. Rev. 17 (1981); Comment, *Tort Liability of the Mentally Ill in Negligence Actions*, 93 Yale L.J. 153 (1983).

inherently moral, even in its objective application to incompetent actors. Not surprisingly, their theoretical paths to this shared conclusion diverge. However, they are all unconvincing.

1. Weinrib and Kantian Philosophy.—Ernest Weinrib has written a series of influential articles dealing with the corrective justice foundations of tort law.[68] Corrective justice, in Weinrib's conception, is not a principle of justice, but rather a way to structure legal relationships.[69] As such, corrective justice does not in itself necessitate the choice of fault-based liability as opposed to strict liability, or vice versa.[70] One must make such a choice on substantive grounds. Weinrib finds the proper grounds in Kantian moral philosophy. The moral justification for negligence, including liability under the objective standard, is the maintenance of equality between the parties. Strict liability is immoral because it focuses on the harm to the plaintiff without reference to the defendant's right to act. Any subjectively determined negligence is immoral because it focuses on the defendant's personal characteristics without reference to the plaintiff's harm. In short, the imposition of tort liability is moral if it restores the equality of individuals disrupted by wrongdoing. Conversely, it is immoral if it creates an inequality.

According to Weinrib, negligence liability is moral because an act of negligence or wrongdoing in itself creates an inequality between previously equal individuals. The defendant tortfeasor has engaged in impermissible self-preferential action in disregard of plaintiff's interests. The morality of the negligence standard rests on the requirement of an objective comparison of risks (focusing on the potential harm to plaintiff's property) and costs (focusing on the potential limitations on defendant's actions).[71] Neither parties' interests are preferred over the other's. In Kantian terms, the categorical imperative prohibits a tortfeasor from committing invasions of another's property rights without liability. The tortfeasor could not consistently will that the rule of nonliability become universal law. To do so would render the concept of property impossible because exclusive rights, the hallmarks of property, disappear if the law sanctions the infringements of those rights.[72]

Imposing negligence liability without fault under the objective standard of the reasonable person is similarly moral because this type of

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68. Weinrib, *Causation and Wrongdoing*, *supra* note 9; Weinrib, *Immanent Rationality*, *supra* note 9; Weinrib, *Liberty*, *supra* note 9; Weinrib, *Moral Theory*, *supra* note 9; Weinrib, *Right and Advantage*, *supra* note 9; Weinrib, *Special Morality*, *supra* note 9; Weinrib, *Understanding Tort Law*, *supra* note 9.

69. Weinrib, *Moral Theory*, *supra* note 9, at 37-38.

70. *Id.* at 47.

71. Weinrib, *Causation and Wrongdoing*, *supra* note 9, at 428-29.

72. *Id.* at 427.

negligence also violates the parties' equality through the defendant's impermissible self-preference. If tort law permitted a defendant to assert subjectively subnormal capabilities as a defense, the defendant's personal characteristics would set the bounds of the plaintiff's rights. Such a power would violate the categorical imperative because a defendant could not consistently will it to become universal law. Individuals have rights by virtue of their personhood. The very concept of rights is destroyed if a defendant may subjectively determine their existence and extent.[73] The acceptance of a defendant's self-preferential assertion that her conduct is subjectively reasonable would defeat the plaintiff's rightful corrective justice claim. Thus, the court correctly decided the paradigm case of *Vaughan v. Menlove*,[74] in which defendant unsuccessfully asserted that "he had acted bona fide to the best of his judgment . . . [and] ought not to be responsible for the misfortune of not possessing the highest order of intelligence."[75] Indeed, any case in which a defendant lacks the capacity to satisfy the objective standard, but is held liable nonetheless, conforms to Weinrib's version of corrective justice as enriched by Kantian principles. The law of negligence, including its nonfault applications, maintains the principle of party equality.

In contrast to negligence law, strict liability violates the equality of the parties under Weinrib's conception of corrective justice. Strict liability is the mirror image of the subjective standard of negligence in that it sanctions a plaintiff's self-preference rather than a defendant's self-preference.[76] In other words, a plaintiff cannot, based upon subjective facts about herself, consistently will to be universal a law which limits another's actions. As Weinrib explains, strict liability "allows the plaintiff's holdings to determine the limits of the defendant's action [and so] violates the equality of doer and sufferer."[77] Weinrib argues that "holdings" are a subjective fact about the plaintiff in the same way that incapacity is a subjective fact about the defendant. Consequently, a parallel exists between a defendant's self-preference under a standard of subjective negligence and a plaintiff's self-preference under strict liability.

Despite Weinrib's contrary assertions, equality between litigants would also exist under a rule of strict liability or subjective negligence.

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73. *Id.* at 427-29. For similar arguments, see Weinrib, *Understanding Tort Law*, *supra* note 9, at 517-19.

74. 132 Eng. Rep. 490 (Ct. Common Pleas 1837).

75. *Id.* at 492. A rule much like that which the court applied in *Vaughan* extends to subnormally intelligent and insane defendants. *See supra* note 67.

76. Weinrib, *Causation and Wrongdoing*, *supra* note 9, at 427-28. For similar arguments, see Weinrib, *Liberty*, *supra* note 9, at 13-16; Weinrib, *Understanding Tort Law*, *supra* note 9, at 519-20.

77. Weinrib, *Special Morality*, *supra* note 9, at 411.

The necessary equality of the parties for purposes of Weinrib's corrective justice remains constant for negligence, subjective negligence, and strict liability. Negligence liability depends upon a balancing of risks and costs. A standard of subjective negligence would operate similarly. The difference is that under the subjective standard, balancing the parties' interests would occur according to a neutrally-adopted rule which permitted consideration of additional factors. Similarly, under a neutrally-adopted rule of strict liability, balancing the parties' competing liberty and property interests would occur *ex ante* rather than *ex post*, without reference to the particular transaction or the parties involved. It is difficult to see how strict liability or subjective negligence violates the parties' equality in a way that the objective standard does not. In each instance, the standard balances the parties' interests and contemplates that one party's interests may take precedence over the other's. The inherent reciprocity of each standard maintains equality; none of the standards involves self-preference.

The claim that a judgment for a defendant under subjective negligence or for a plaintiff under strict liability involves impermissible self-preference ignores the context of the legal system in which courts render such judgments. Weinrib's argument implicitly contemplates the litigants' assertion of power that individual litigants do not, in fact, possess. Weinrib discusses tort rules in terms which suggest that individuals choose and apply the governing legal rules. Weinrib describes the subjective standard this way: "You [the defendant] allow me [the plaintiff] property but you demarcate the border between your holdings and mine; we are both abstractly and equally free as owners, but my freedom is confined to the residue you determine."[78] The rule of strict liability is similar but the power shifts to the other party. Weinrib explains: "I [the plaintiff] recognize your [the defendant's] freedom to act, but I limit the effects of that freedom at the boundaries of what I own. I do not dispute your property owning-status, but my holdings set the line that confines your action and its effects."[79] However, individuals do not have this sort of power because law, judicial or legislative, sets the correlative boundaries of liberty rights in relation to property rights. The boundaries are set prospectively[80] and apply equally to individuals who may become plaintiffs or defendants, but who have no current stake in the choice of rule. Put another way, the analogy to Kantian ethics is imperfect because the legal system itself constrains the choices of litigants, whereas Kantian actors operate in an open moral universe.[81] Weinrib cannot

78. Weinrib, *Causation and Wrongdoing*, *supra* note 9, at 427.
79. *Id.* at 428.
80. Judicially-created rules as applied to litigation in progress are an exception.
81. *See supra* part I.A.

reasonably maintain that a defendant, whose conduct a court judged to be legal under an existing neutral rule of subjective negligence, has somehow engaged in impermissible self-preference, or that a plaintiff, whose injury is compensated through judicial application of a rule of strict liability, has unfairly preferred her own interests to those of the defendant. Contrary to Weinrib's assertion, objective negligence, subjective negligence, or strict liability may thus equally reflect the parties' moral equality in any particular transaction which is the subject of corrective justice.

Weinrib attempts to counter these arguments with the assertion that the requisite equality of doer and sufferer, defendant and plaintiff, must be *internal* to the particular transaction.[82] That is, "This equality is not an equality across transactions that would be satisfied by any liability rule so long as it was uniformly applied to all lawsuits. . . . [E]quality must operate within each transaction."[83] Under Weinrib's conception, tort law has an inherent rationality and a "special morality"[84] which treats each instance of doing and suffering as "a discrete unit of normative significance."[85] Because each transaction is a unit, its elements are "internally integrated," and the parties may not be considered independently of each other.[86] Thus, Weinrib maintains:

> Normative considerations that are unilaterally applicable either to the doer or to the sufferer are, therefore, out of place. For instance, the tort relationship is not morally explicable in terms of deterrence, because deterrence can, without loss of any of its justificatory force, focus on the doer even in the absence of any particular sufferer. If deterrence were the justification for tort law, there would be no need for actual damage, nor for compensation to be paid to the plaintiff, nor for plaintiff's injury to be the measure of damages. Similarly, tort law is not understandable as a compensation mechanism, because compensation applies one-sidedly to the sufferer and does not necessarily encompass the doer. If compensation were the justification for tort law, there would be no reason to insist on causation by the defendant or to make compensation take the form of a

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82. There may be an implicit conflict between Weinrib's reference to discrete normative units and his use of Kantian principles which require consideration of the potential aggregate effects of moral rules.

83. Weinrib, *Special Morality*, *supra* note 9, at 409.

84. *See generally id.*

85. *Id.* at 408.

86. *Id.*

> payment by the tortfeasor. The goals of deterrence and causation each fail to embrace both parties.[87]

Because the integration of doer and sufferer is a moral matter, the parties must be equal *within the relationship*. According to Weinrib, that is why tort law utilizes negligence rather than strict liability, and an objective rather than a subjective standard of negligence.

Weinrib's conceptualization of party equality is problematic for several reasons. First, it is unclear *why* equality between the parties must be internal to the transaction. Weinrib assumes rather than supports this key premise in his complex theoretical argument concerning the internal coherence and rationality of law.

Second, Weinrib's theoretical construct is not true to reality.[88] Weinrib strives to demonstrate that subjective facts about one of the parties do not define the relationship between them. Negligence liability achieves this purpose because it requires an objective comparison of the risk of harm and the cost of prevention. Consequently, according to Weinrib, such a comparison precludes an actor's subjective preferences or capacities from dominating what should be a relationship between equals.[89] But Weinrib is wrong. As a descriptive matter, negligence law does, in fact, routinely consider subjective facts about the parties. It may be possible to discount these occurrences as aberrational and unfaithful to the true nature of tort law, but these deviations from Weinrib's vision of tort law are sufficiently extensive and substantial to warrant his consideration. That the objective standard of negligence does in fact take account of certain subjective facts about the defendant is well-established. Although the objective standard disregards mental deficiencies, it is commonplace to find that a defendant's apparent physical disabilities,[90] physical superiority[91] or mental

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87. *Id.* at 408-09.

88. Perhaps Weinrib would maintain that his arguments are normative rather than positive and that existing doctrines which undercut equality are deviations requiring correction. He appears to be arguing, however, that Kantian principles do in fact underlie existing tort law.

89. *See supra* text accompanying notes 71-74.

90. *See* RESTATEMENT (SECOND) OF TORTS § 283C (1965), which states: "If the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like disability." *See, e.g.*, Duvall v. Goldin, 362 N.W.2d 275 (Mich. Ct. App. 1984) (epilepsy); Roberts v. State, 396 So. 2d 566 (La. Ct. App. 1981) (blindness); Otterbeck v. Lamb, 456 P.2d 855 (Nev. 1969) (deafness).

91. RESTATEMENT (SECOND) OF TORTS § 298, cmt. d (1965) ("*Necessity That Actor Employ Competence Available.* The actor must utilize with reasonable attention and caution not only those qualities and facilities which as a reasonable man he is required to have, but also those superior qualities and facilities which he himself has. Thus a superior vision

superiority,[92] or expertise[93] factor into the standard. Tort law also recognizes infancy as a factor to be considered in assessing the reasonableness of conduct.[94] Furthermore, courts routinely and necessarily consider subjective facts about the plaintiff in the calculation of damages[95] and in assessing potential defenses to negligence liability.[96] It is difficult to square these tort doctrines with Weinrib's structure. How can a system of law which rests on the equality of individuals within a particular transaction consistently take account of a plaintiff's thin skull, but not a defendant's thick skull?[97]

Third, in addition to ignoring several tort law doctrines that run counter to his theory, Weinrib apparently limits his arguments to torts involving interference with property rights by focusing on "holdings." Weinrib refers repeatedly to "holdings," suggesting that his analysis is based upon property rights:

> The virtue of the negligence standard is that it regulates the relationship between the *property holders* on the basis of equality. . . . [T]he defendant must implicitly acknowledge not only that the persons he might affect are *property owners*, but that their interests have the same claim to consideration as his own. They cannot insist—as is implied by strict liability—that their *holdings* are more valuable than his freedom.[98]

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may enable the actor, if he pays reasonable attention, to perceive dangers which a man possessing only normal vision would not perceive, or his supernormal physical strength may enable him to avoid dangers which a man of normal strength could not avoid.").

92. RESTATEMENT (SECOND) OF TORTS § 289 (1965) ("The actor is required to recognize that his conduct involves a risk of causing an invasion of another's interest if a reasonable man would do so while exercising . . . (b) such superior attention, perception, memory, knowledge, intelligence, and judgment as the actor himself has.").

93. Individuals are held to the knowledge, training and skill of an ordinary member of their profession. *See generally* KEETON ET AL., *supra* note 58, § 32.

94. RESTATEMENT (SECOND) OF TORTS § 283A (1965). Children traditionally have been held to a standard of care consistent with their age, intelligence, and experience.

95. Plaintiff's damages arising from a personal injury depend upon a variety of subjective factors, including age; physical and emotional condition; earning capacity; ability to engage in various activities (loss of enjoyment); and relationships with others (loss of consortium).

96. RESTATEMENT (SECOND) OF TORTS § 464 (1965) ("(1) Unless the actor is a child or an insane person, the standard of conduct to which he must conform for his own protection is that of a reasonable man under like circumstances. (2) The standard of conduct to which a child must conform for his own protection is that of a reasonable person of like age, intelligence, and experience under like circumstances.").

97. Again, I maintain that the existence of inconsistent tort doctrines would not defeat normative arguments about the structure of tort law. However, Weinrib clearly makes descriptive claims in his assessment of the objective reasonable person standard.

98. Weinrib, *Causation and Wrongdoing*, *supra* note 9, at 428 (emphasis added).

This focus is obviously problematic when applied to personal injury situations. Perhaps Weinrib means to include rights to bodily integrity as property rights, but he has provided no argument for the position. Moreover, the quoted passage suggests otherwise. His argument is extremely limited, failing to take any explicit account of personal injury cases.[99] In such cases, a plaintiff can consistently will to be universal a law which limits or alternatively imposes costs on human activities based solely upon human physical vulnerability. It appears that even a rule of strict liability for physical harm is consistent with Kantian morality.

If, alternatively, Weinrib intends the term "holdings" to include a plaintiff's body and the right to bodily integrity, then it may be difficult to argue that plaintiff's holdings *subjectively* limit a defendant's action. Surely every individual, regardless of age, physical condition, or other characteristic, has an equal right to bodily integrity. Even if we accept Weinrib's premise that one must view the relationship in terms of the particular transaction, the problem persists because a plaintiff and a defendant have equal rights both to bodily integrity and to act within a particular transaction. The exercise of the right to act is not a subjective assertion of a right available only to defendant. The demand for recognition of the right to bodily integrity is not properly considered a subjective demand.

Weinrib fails to demonstrate the morality of non-fault applications of the objective standard of negligence. He also fails to demonstrate the immorality of strict liability. Examination of the Kantian implications of both forms of liability indicates that Weinrib's distinction between the two is invalid, as is the resulting moral alignment of non-fault negligence with negligence rather than with strict liability. If there is some basis for the assertion that objective application of the reasonable person standard to incompetent actors is moral, while strict liability is not, it is not the tenets of Kantian moral philosophy.

2. Coleman and Corrective Justice as Fault.—Jules Coleman has also discussed the centrality of fault in tort law.[100] He writes: "Fault is central

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99. If Weinrib views an individual's interests in the preservation of his or her own bodily integrity as property rights or "holdings," then his account is a full account of tort law. However, the right to bodily integrity cannot reasonably be considered a subjective fact about an individual. Presumably all individuals, regardless of their age, physical condition, and so on, have precisely the same right to bodily integrity.

100. *See generally* Coleman, *Demands*, *supra* note 10. In his most recent works, COLEMAN, RISKS AND WRONGS, *supra* note 10, and Coleman, *Mixed Conception*, *supra* note 10, Coleman has revised his earlier theory of corrective justice. He no longer completely adheres to his unique "annulment thesis" under which corrective justice required simply the annulment of wrongful gains and wrongful losses. A corollary of the thesis was the

both to the institution of tort law and, in my view, to its ultimate moral defensibility. The principle of justice that grounds the fault rule is corrective justice."[101] Coleman's corrective justice concerns itself with wrongful losses arising from wrongful harming or from rights invasions.[102] Coleman ultimately concludes that corrective justice, with its requirement of wrongfulness, grounds two kinds of tort cases: (1) cases of unjustifiable or unreasonable conduct resulting in injury which gives rise to a duty to compensate the victim; and (2) cases of justifiable or reasonable conduct which causes injury and gives rise to a duty to compensate the victim. The first category corresponds generally to fault-based liability, but includes instances of non-fault liability under negligence law. The second category consists of private necessity cases. A third category of cases in which conduct is justified only when the injurer compensates the victim is rooted in economic considerations (markets), and not in corrective justice (morals).[103] This third category corresponds to strict liability.

Coleman maintains that non-fault liability under his first and second categories is consistent with corrective justice. That assertion, however, contradicts his central claim that the morality of tort law, and corrective justice itself, depends upon fault.[104] Under Coleman's account, the concept of corrective justice necessarily relies upon wrongfulness; wrong-

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analytical distinction between wrongful loss and wrongful gain, permitting compensation from any source, and not just from the wrongdoer, consistent with corrective justice. Coleman accepted a modified relational theory of corrective justice under which wrongdoing grounds the victim's claim to compensation, but responsibility—independent of wrongdoing—grounds the defendant's liability. Coleman, *Mixed Conception*, *supra* note 10, at 442-44. Under the annulment view, corrective justice encompasses compensation systems under which losses are paid by someone other than the person responsible for the loss. Under the mixed view of corrective justice, only the person responsible may compensate the victim. COLEMAN, RISKS AND WRONGS, *supra* note 10, at 366. For critiques of Coleman's modified theory, see Perry, *Mixed Conception*, *supra* note 11; Weinrib, *Note on Coleman*, *supra* note 9; Wright, *supra* note 9, at 678-83. I will not address directly Coleman's revisions of his theory here, since they do not affect the portion of his work relevant to my thesis.

101. COLEMAN, RISKS AND WRONGS, *supra* note 10, at 285. For an earlier and somewhat more expansive version of the same arguments, see Coleman, *Demands*, *supra* note 10, at 371.

102. Coleman, *Demands*, *supra* note 10, at 357, 364.

103. Strict liability for ultrahazardous activities illustrates this category of liability.

104. Coleman does not argue that tort law has a unified underlying rationale. *See supra* note 61. The existence of categories of tort liability which ignore fault thus poses no conceptual problems for Coleman. Some of the categories are simply not matters of corrective justice and morality. Coleman does, argue, however, that the objective application of the reasonable person standard absent fault is moral and grounded in corrective justice; my argument addresses this contention.

fulness involves fault, but not necessarily moral blame.[105] Coleman acknowledges that these premises lead to the "rather odd conclusion that fault liability in torts is really a form of liability without 'fault.' This apparent contradiction can be resolved by recalling the distinction between fault in the doing and fault in the doer. Fault liability in torts refers to fault in the doing, not in the doer."[106] According to Coleman's account, corrective justice, including the requirement of wrongfulness, is thus "perfectly compatible"[107] with non-fault liability under the objective standard of negligence. Accordingly, corrective justice requires wrongful conduct, not individual moral culpability, or a "shortcoming in the doing, not in the doer."[108]

This distinction has an intuitive appeal, and it operates in the law to differentiate the attenuated notion of fault used in negligence from fault as a moral concept. The moral standard of culpability is measured against a higher threshold than is legal responsibility. In negligence, legal responsibility typically does not track moral culpability. It is possible to say that conduct is faulty under tort law's low threshold while recognizing that it is without fault when judged against the higher moral standard. Coleman's distinction is thus familiar and appealing, but it does not support the application of the reasonable person standard to incompetent actors. Coleman's repetition of the term "fault" ("fault-in-the-doing" vs. "fault-in-the-doer") suggests that he is distinguishing between act and actor. In reality, he is distinguishing between two senses of the word "fault." The distinction cannot explain the claim that a tort rule imposing liability in the absence of *either* type of fault is moral. Liability under the reasonable person standard requires neither fault in the strong sense of moral culpability nor fault in the weak, attenuated sense generally operative in tort law.[109] Individuals who perform to the best of their subjective capabilities are not at fault in any sense of the word, but they may well be liable in tort. It cannot further Coleman's purpose to confound moral and legal fault in this way.

Further examination of the distinction between faulty conduct and fault in the actor performing the conduct reveals additional problems. What does Coleman mean by "fault-in-the-doing"? What makes conduct faulty? Coleman suggests that the consequences of the conduct are key:[110]

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105. *See infra* text accompanying notes 108-15.

106. COLEMAN, RISKS AND WRONGS, *supra* note 10, at 219.

107. Coleman, *Demands*, *supra* note 10, at 371.

108. *Id.* at 371.

109. Coleman may, of course, intend to argue that deviation from the norm is in itself fault. Such a view robs the concept of fault of all content.

110. But see the intriguing arguments that risk-creation absent consequent harm may implicate corrective justice in Schroeder, *Increasing Risks*, *supra* note 35; and the ensuing comment, Simons, *supra* note 35; Schroeder, *Liability for Risks*, *supra* note 35.

"The central concern of corrective justice is the *consequences* of various sorts of doings, not the character or culpability of the doer."[111] In this passage, Coleman seems to equate fault-in-the-doing with harmful consequences.[112] This equation cannot be correct without involving Coleman in significant inconsistency. If injury, or harmful consequences, is the key to corrective justice, then the principle of corrective justice presumably captures all actions resulting in harmful consequences, including those instances of strict liability which Coleman specifically exempts.[113] If conduct involves fault merely because it results in injury, corrective justice underlies absolute or strict liability. Defining fault-in-the-doing and distinguishing it from fault-in-the-doer is a persistent problem even if one reads the passage as implicitly enumerating jointly necessary, but independently insufficient conditions (fault-in-the-doing and harmful consequences) for the "wrongfulness" which corrective justice requires.[114]

In negligence, "fault" is in fact measured by reference to the reasonable person standard. Even conduct that results in serious adverse consequences may not involve fault as negligence defines it. Imputing fault turns on an examination of the reasonableness of conduct and not on its consequences. For example, fault may consist of an actor's failure to foresee potential risks to plaintiffs or to eliminate or minimize those risks in some way. The question of whether conduct involves fault refers to an actor, to a hypothetical "doer," and ultimately to the particular "doer" at issue. The distinction between fault-in-the-doing and fault-in-the-doer thus collapses to the extent that the legal system measures negligence by the reasonable person standard.

Coleman disregards the interdependence of whether conduct is faulty and whether an actor is at fault (using fault in its attenuated tort law sense). It is unreasonable to say, both linguistically and in the context of negligence law, that there is fault in an action but not in the actor. We cannot assess an individual's fault and retain any measure of the term's normal meaning by looking *only* at action. The notion of fault implies a failing of some sort, and presumes a capacity to act otherwise.

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111. Coleman, *Demands*, *supra* note 10, at 370 (emphasis in original). Although Coleman retains the distinction between faulty conduct and fault in an actor in his subsequent work, RISKS AND WRONGS, *supra* note 10, at 219, he does not reiterate this particular argument there.

112. Stephen Perry also reads it this way. Perry, *Comment*, *supra* note 11, at 399.

113. Coleman, *Demands*, *supra* note 10, at 355-57.

114. It is possible that Coleman's references to consequences here is a recognition of the systemic requirement of an injury. Negligence law is not implicated unless an injury has occurred as a result of conduct. He does not make clear, however, the relationship between conduct, consequences, and fault. For example, Coleman's analysis does not indicate how to distinguish between faultless conduct which causes harm and faulty conduct which causes harm.

Further, because negligence law determines whether there is fault-in-the-doing based upon an assessment of the way reasonable actors would behave, the neat division between act and actor substantially dissolves.[115] To support the distinction between fault-in-the-doing and fault-in-the-doer in the context of non-fault negligence, Coleman must first show that an incompetent actor's conduct is in fact faulty in some meaningful sense. He must also affirmatively demonstrate that tort law distinguishes between action and actor in establishing fault, despite their evident interdependence.

Thus, the distinction between fault-in-the-doing and fault-in-the-doer either contradicts Coleman's conception of corrective justice, implicitly taking in types of liability he explicitly excludes, or becomes untenable because faulty conduct in negligence law necessarily depends upon reference to the actor. As noted above, however, the distinction is intuitively appealing because we recognize that negligent conduct does not necessarily implicate moral culpability. The real distinction here is not between act and actor, but between two senses of the word fault. An action may involve fault in the attenuated sense of the word as utilized in negligence (fault-in-the-doing) without any corresponding moral culpability of the actor (fault-in-the-doer). This distinction is sound. But it cannot justify the imposition of liability for an actor's subjectively optimal conduct. Justifying the tort liability of actors who have conducted themselves to the best of their abilities, but who have nonetheless caused injury entails more than a demonstration that fault in a legal sense and fault in a moral sense are not equivalent. The law's identical treatment of distinct classes of actors—those who fail to meet an attainable standard and those for whom the standard is unattainable—remains to be rationalized under corrective justice.

3. Perry and "Outcome-Responsibility."—Stephen Perry contends that "outcome-responsibility" coupled with fault forms the moral basis of tort law. Outcome-responsibility is a special responsibility for a loss which results from an actor's exercise of his or her capacity to act. Although Perry argues that outcome-responsibility and causation are not equivalent,[116] the concepts are closely related. Perry recognizes that: "The law of torts holds persons to a minimal uniform level of outcome-responsibility, represented doctrinally by the rules on duty of care and proximate cause. . . ."[117] According to Perry, however, causation insufficiently explains outcome-responsibility, which includes "a sense of

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115. See W.B. Yeats for a poetic statement of the same point: "How can we know the dancer from the dance?" *Among School Children*, THE VARIORUM EDITION OF THE POEMS OF W.B. YEATS (eds. Peter Allt & R.K. Alspach, 1940).

116. Perry, *Moral Foundations*, *supra* note 11, at 503.

117. *Id.* at 506.

having made a difference in the world."[118] In itself, outcome-responsibility is not sufficient to justify shifting a loss from the victim to one or more of the group of persons (possibly including the victim) who are outcome-responsible for the loss. Something else is required. Perry identifies that additional element as fault: "[A]mong those persons who have a normatively significant connection with a given loss [are outcome-responsible], it is morally preferable that it be borne by whoever acted faultily in producing it."[119]

In its basic structure, then, Perry's argument differs very little from Coleman's. Outcome-responsibility is a rough equivalent of causation: "[T]he essential characteristic of outcome-responsibility is the fact of having voluntarily performed an action or actions that causally contributed to the outcome in question."[120] Perry attempts to demonstrate that outcome-responsibility is not, however, merely equivalent to causation. Although Perry struggles to distinguish outcome-responsibility and causation, he concedes that proximate causation in tort law, or the requirement that a resulting injury be a reasonably foreseeable consequence of action, captures this "sense of having made a difference in the world." Perry's theory, then, like Coleman's, posits causation and fault (both understood in the sense of the underlying moral principle of outcome-responsibility) as the moral foundation of tort law.

Like Coleman, Perry attempts to justify on moral grounds instances in which an "actor has only exhibited 'fault' in a nonculpable sense,"[121] or in which the objective standard of the reasonable person in negligence is applied to incompetent actors. Like Coleman, Perry is unable to account for liability imposed on the basis of "nonculpable fault." He argues:

> My claim is that in retrospectively evaluating actions that have produced harmful outcomes, we sometimes have a sense that the action should be judged morally faulty *for the purposes of reparation*. . . . [W]hen common knowledge of the relevant causal regularities would lead an agent of average mental capacities to be aware of a sufficiently high level of risk of harm to other persons, taking account of both the probability and seriousness of the outcome, then the action should be treated for purposes

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118. *Id.* at 503. Rules of causation utilized in tort law, I would argue, generally impose liability where actors have this sense and preclude liability where they do not. *See generally id.* at 503-04, where Perry discusses Hart and Honoré's "common sense" conception of causation.

119. *Id.* at 499. *See* Rothstein, *supra* note 37, at 160 (outcomes are important because they give us a statistically reliable basis for the presumption that fault occurred).

120. Perry, *Moral Foundations*, *supra* note 11, at 499.

121. *Id.* at 508.

> of reparation as faulty because it is more appropriate that the agent whose action is being evaluated should bear the loss than that the victim should. . . . What is being suggested is simply that at a certain point outcome-responsibility for the harm a given action has produced should, so far as a publicly acknowledged obligation of reparation is concerned, be treated like culpable fault.[122]

Perry acknowledges but dismisses the circularity of this argument. The evaluation of action depends on the consequences of the action. Fault lies in the outcome of action rather than in the action itself.

Again, as in Coleman's arguments, this conception of responsibility strives to legitimize retrospective moral evaluation of action. Again, the attempt fails. Negligent actors will perhaps feel that their actions have made a difference in the world and will feel a sense of regret only when they cause injuries. To that extent, outcomes are important. Recognizing these human reactions does not explain why an actor whose conduct has *not* been faulty or one who has been "nonculpably at fault" in Perry's terms should be subject to tort liability. An incompetent actor who has breached the standard of the reasonable person and whose action is retrospectively evaluated in light of the outcome may *not* possess the sense of having made a difference in the world, which is the hallmark of outcome-responsibility.

Focusing on outcome reveals a further problem with Perry's theory. He has consistently criticized "general" strict liability. His notion of outcome-responsibility as applied to actors who cannot conform to an objective standard of reasonableness, despite his well-structured arguments, constitutes a particularized notion of strict liability which one may easily generalize. If the decision to impose liability in such cases depends upon "our sense that reparation should occur" based on outcome-responsibility (causation, coupled with a retrospective subjective or objective sense of having made a difference in the world) and culpable or "nonculpable" fault, why is strict liability in general objectionable?

Perry proposes that we assign liability under a theory of "localized distributive justice." Under such a theory, one identifies the group of persons who are outcome-responsible for an injury, and chooses who is or who are liable using comparative fault. If fault in the sense of culpability has occurred, then the responsible actor should pay. If fault in a nonculpable sense exists, then the nonculpably faulty actor should pay. If no fault exists on the part of any actor (including the victim), then presumably Perry would have the victims bear their own losses.

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122. *Id.* at 509-10 (emphasis in original).

But Perry's arguments lead as well to the alternative conclusion that any outcome-responsible actor should pay, *regardless of fault*, particularly where the victim is not outcome-responsible. It is entirely possible that we may have a "sense" that reparation should occur based on outcome-responsibility absent fault. Critics of strict liability have recognized its "intuitive" appeal.[123] In accepting liability based on "nonculpable fault", Perry is perilously close to accepting strict liability.

II. Corrective Justice as Process

Corrective justice theorists have not advanced compelling moral justification for the objective standard of negligence. Others have criticized the standard itself, particularly its application to those who suffer from severe mental incapacity or illness.[124] The rule may persist for practical reasons, including economic efficiency, administrative ease or the inertia of the precedent-based common law process, rather than for normative reasons. The fact remains, however, that the objective standard, even as applied to those with subnormal capacities, is not merely accepted on practical grounds by the legal community. At least some members of the legal community defend it as moral. The flawed defenses mounted by Weinrib, Coleman, and Perry evidence their belief in the standard's morality. This support may not be dispositive on the question of morality, but it counts for something. In questions of morality or justice, it is important to attend to the ultimate claim that the doctrine is moral or just even where the proffered support for it fails. In other words, it is reasonable to take support for the objective standard on moral grounds as preliminary evidence of its morality.

Weinrib, Coleman, and Perry correctly assert that non-fault negligence, and not strict liability, is moral. They have not, however, correctly identified the distinction which accounts for the their conflicting moral assessments of the two standards. The crucial distinction between strict liability and non-fault negligence is the *process* by which liability is adjudicated in each instance. Legal process, not substantive morality, distinguishes non-fault negligence under the objective standard from strict liability. The morality of negligence law lies in the legal process that its flexible standards afford.

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123. *See, e.g.*, Weinrib, *Causation and Wrongdoing*, *supra* note 9, at 416.

124. *See, e.g.*, Paul A. Beke, *The Objective Fault Standard in Weinrib's Theory of Negligence: An Incoherence*, 49 U. Toronto Fac. L. Rev. 262 (1991) (arguing that objective standard unfair to persons of subnormal intelligence); Epstein, *Strict Liability*, *supra* note 8, at 153; Honoré, *supra* note 39, at 553; Richard Posner, *A Theory of Negligence*, 1 J. Legal Stud. 29, 31 (1972) (concluding that objective standard difficult to square with moral approach to negligence, citing example of insane defendants).

A. The Importance of Process

Recognizing the importance of process to corrective justice is not new. It dates to Aristotle.[125] According to Aristotle, in Book V of The Nichomachean Ethics, corrective justice is a form of justice concerned with voluntary and involuntary interactions[126] between equal individuals. Its aim is the rectification, through adjudication, of wrongful injury inflicted by one individual and suffered by another. Distributive justice, by contrast, is a separate concept, concerned with the appropriate distribution of goods within society.[127] Distributive concerns are irrelevant to corrective justice: "the law looks only to the distinctive character of the injury, and treats the parties as equal, if one is in the wrong and the other is being wronged, and if one inflicted injury and the other has received it."[128] The injustice lies in the disturbance of the pre-existing equilibrium between the parties, and the judge's function is to restore the equilibrium.[129] Thus, the central features of Aristotle's corrective justice are a bilateral structure involving two parties, an injury to one party caused by the wrongful conduct[130] of the other, the moral equality of the parties for purposes of corrective justice, and the use of adjudication to rectify the wrong.[131]

Significantly, although Aristotle's explanation of corrective justice includes illustrations of the application of substantive principles, one

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125. ARISTOTLE, THE NICHOMACHEAN ETHICS, Bk. V, ch. 4, 8 (David Ross trans., rev. ed. 1980).

126. Aristotle discusses three types of interactions which give rise to injury. These roughly correspond to intentional torts, negligence, and strict liability. Richard Wright maintains that Aristotle's version of corrective justice requires rectification for each of these categories. Wright, *supra* note 9, at 698. This reading is disputed, but corrective justice theorists have extended what they regard as Aristotle's more limited theory to encompass negligent as well as intentional torts. Coleman, *Wrongful Gain*, *supra* note 10, at 436; Perry, *Moral Foundations*, *supra* note 11, at 453, 454. In his discussion of Aristotle, Wright suggests that the immorality involved in unintentional unjust losses arises from the deliberate choice to avoid rectification and not from the original conduct. *See supra* text accompanying note 55.

127. For a recent treatment of the relationship between corrective and distributive justice, see Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515 (1992).

128. ARISTOTLE, *supra* note 126, at Bk. V, ch. 4, 8.

129. *Id.*

130. In Aristotle's conception, the wrongfulness of the injury arises from the intentional character of the original conduct or, in the cases of the Aristotelian analogues of negligence and strict liability, from the intentional character of the decision not to compensate. *See supra* note 55.

131. For fuller discussion of the Aristotelian roots of modern corrective justice, see Weinrib, *Aristotle*, *supra* note 9; Weinrib, *Corrective Justice*, *supra* note 9; Wright, *supra* note 9, at 683-702.

may read him as recognizing the importance of process to corrective justice. At the outset of his discussion of corrective justice, Aristotle refers to the judge and the judicial function of restoring to equality imbalances created through the action of individuals. The formal requirement which brings corrective justice into play is inequality. However, once a party has identified an alleged inequality, recourse is to a judge. Aristotle writes: "That is why, when disputes occur, people have recourse to a judge; and to do this to have recourse to justice, because the object of the judge is to be a sort of personified Justice."[132]

The attempt to explicate corrective justice in tort law as a matter of tort law processes and practices stems from the Aristotelian conception.[133] Process considerations are central to corrective justice in the Aristotelian conception, just as they are central to tort litigation today. The very nature of the law applicable to tort cases suggests the primacy of process. The central principle in tort law is the standard of the reasonable person. As compared to specific prescriptions such as "Do not do X, Y, or Z," standards require highly contextualized adjudication.[134] Accordingly, any analysis of the substantive morality of tort law principles may provide at most only partial justification for the system. Process concerns represent the other part of the analysis and it is these concerns which corrective justice theorists have neglected.

Because tort law consists primarily of standards or norms, with its central concept the formally indeterminate standard of the "reasonably prudent person," justice or morality in tort law cannot be a matter of static concepts. Although a broadly conceived concept of fault or responsibility is central to much of tort law, many have magnified and distorted the character of various actions to justify the imposition of "fault"-based liability. The formal element of fault is absent in many accepted applications of tort law principles.[135] Although the proffered moral justifications for these applications fail, the repeated and vigorous attempts at justification may suggest an underlying morality of a different sort. Perhaps many accept the objectively applied standard of reasonableness not because it relies, in many applications, on "fault," but because in all of its applications, it accords with notions of procedural fairness and the belief that individuals should have a forum in which

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132. ARISTOTLE, *supra* note 126, at Bk. V, ch. 4, 8.

133. Whether or not Aristotle intended to demonstrate an integration of process and corrective justice is unclear, but there is at least a plausible ancestral link.

134. *See generally* P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS 70-95 (1987); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15-63 (1987).

135. *See supra* notes 56-60 and accompanying text.

to resolve their arguments. Under this conception, the process of dispute resolution is the moral focus, not the particulars of applicable legal rules or the actual substantive resolution of a particular dispute. The process of dispute resolution, as a means of creating or affirming society's normative order, is the central purpose of the tort system.[136]

A substantial body of scholarly work in the fields of psychology and sociology supports these conclusions, demonstrating that participants in the legal process assess its justice based largely upon their abilities to control the content of the proceeding, rather than on the outcome of the proceeding (and derivatively, the substantive rules applicable to it). This effect has been replicated in a variety of experimental settings by numerous researchers.[137] In legal settings, disputants routinely prefer adversarial procedures, which permit greater levels of process control, to nonadversarial procedures.[138] In other types of dispute resolution, participants who were permitted to voice opinions and to present information to a decisionmaker perceived the subsequent decisions to be more equitable than did individuals who had not been permitted to participate.[139] These preferences appear to be independent of decision control. In other words, studies indicate that participation in decision-making processes, absent any power over the actual decision, is central to perceptions of the fairness of the decision. When litigants have full opportunity to speak and to be heard, to gather and to present information to the court, both they and observers of the proceedings accept the process as just and fair regardless of the outcome. This insight, if true,[140] suggests some basis for the persistence of non-fault liability under

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136. *See supra* note 13.

137. *See, e.g.*, E. Allan Lind & Tom R. Tyler, The Social Psychology of Procedural Justice (1988); John Thibaut & Laurens Walker, Procedural Justice: A Psychological Analysis (1975); Robert Folger, *Distributive and Procedural Justice: Combined Impact of "Voice" and Improvement on Experienced Inequity*, 35 J. Personality & Soc. Psychol. 108 (1977); E. Allan Lind et al., *Decision Control and Process Control Effects on Procedural Fairness Judgments*, 13 J. Applied Soc. Psychol. 338 (1983); E. Allan Lind et al., *Procedure and Outcome Effects on Reactions to Adjudicated Resolutions of Conflicts of Interest*, 39 J. Personality & Soc. Psychol. 643 (1980); Tom R. Tyler, *What is Procedural Justice: Criteria Used By Citizens to Assess the Fairness of Legal Procedures*, 22 Law & Soc. Rev. 103 (1988). *See also* Michael D. Bayles, Procedural Justice: Allocating to Individuals (1990).

138. *See generally supra* note 137. This result obtains even in cross cultural studies, minimizing the concern that correlations between increased perceptions of fairness and process control are the result of cultural factors. Unpublished research by Walker and others indicates that subjects whose own legal system is inquisitorial (thus affording greatly reduced levels of process control) rather than adversarial, prefer adversarial resolution of conflict. Thibaut & Walker, Procedural Justice, *supra* note 137, at 77-80.

139. *See, e.g.*, Folger, *supra* note 137.

140. There are grounds for questioning the results obtained by social scientists

the objective standard of negligence as against the apparently contradictory rejection of strict liability. It also suggests some basis for the broader conclusion that process concerns are central to corrective justice in tort law.

Current trends in legal scholarship indirectly support the conclusions that the morality of tort law lies primarily in the processes engendered by substantive rules rather than by the rules themselves. The torts process recognizes the importance of the litigants' stories in the context of individual adjudication. Likewise, current legal scholarship recognizes the importance of stories in the context of legal theory. A growing body of scholarly literature utilizes narrative as a means to demonstrate the law's exclusion of the perspectives of marginalized individuals and to communicate the urgent necessity of change.[141] A similarly expansive

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studying procedural justice as well as the conclusions drawn from those results. The conclusion that procedural as opposed to substantive justice predominates the litigants' assessment of the fairness of legal proceedings is based upon the results of simulated dispute resolutions using college students as subjects. Typically, the subjects participate in hypothetical dispute resolutions and are subsequently questioned about their perceptions of the proceeding's justice. Numerous objections concerning the research methodology in such simulations may arise, for example: the potential trivialization of the simulated proceeding resulting from its artificiality; the use of a relatively homogeneous experimental group; the likely inability of researchers to simulate complex legal realities, and if they cannot, to transfer conclusions drawn from simpler dispute resolutions to actual judicial processes. However, results have been consistent over numerous and varied experiments. *See generally id.* Anecdotal evidence derived from researchers' observations of and questions to participants in actual proceedings supports the findings as well. Thibaut and Walker tell the story of a woman who was angered by a traffic court decision in her favor because she perceived the process to be unfair. The judge ruled in her favor but did not permit her to explain what had happened. Bayles notes the comments of a woman did not want to contest a divorce action filed by her husband, but wanted to appear "because she wanted to someone to know how she felt about it." *See* Bayles, *supra* note 138, at 131.

A recent RAND Institute for Civil Justice study suggests that the perceived fairness of a claim resolution is not as great where claimants utilize the legal system, as opposed to directly requesting compensation from the injurer or an insurance company. DEBORAH R. HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 137-41 (1991). The dissatisfaction of claimants utilizing the legal system as opposed to other options may reflect: (1) the time and effort involved in making a legal claim; (2) the fact that many claimants utilizing the legal system had unsuccessfully attempted to utilize the other alternatives; and (3) the fact that forty percent of the legal claims were still pending at the time the researchers conducted their interviews. Not surprisingly, claimants cited compensation as the most important reason for pursuing a claim. Significantly, thirty-five percent of the claimants also cited "the chance to have someone else hear my story of what happened" as being "very important" to the decision to pursue a claim. *Id.* at 171.

141. For recent and illuminating uses of narrative in legal scholarship, see PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR (1991); Bryan K. Fair, *Foreword: Rethinking the Colorblindness Model*, 13 NAT'L BLACK L.J. 1 (1993); Martha I. Morgan, *Founding Mothers: Women's Voices and Stories in the 1987 Nicaraguan Constitution*, 70 B.U. L. REV. 1 (1990).

body of scholarly literature analyzes the uses of narrative in legal scholarship.[142] The use of individual experience to substantiate, to discredit, or to reconceptualize scholarly positions, and the recognition of the importance of personal experience in formulating such positions, reflects individualization and contextualization, both of which are central to the process of dispute resolution. All of the literature reflects the importance of individual voice and of context. If one recognizes voice and context as central to legal theory, their centrality to the just adjudication of individual cases cannot be a matter of any dispute.

B. The Objective Standard (and Other Issues) from the Perspective of Process

Recognizing a process-based moral dimension to tort law does not mean that the objective standard of negligence is moral, or that it is as moral as we can reasonably expect in an imperfect world, or even that its non-fault applications are defensible. In fact, I think otherwise.[143] I suggest only that the standard, in both its fault-based and non-fault applications, permits the litigants a level of control over the process sufficient to satisfy concerns about corrective justice as process, despite its questionable morality as a formal rule. Viewing the standard in the broad context of corrective justice as process suggests an explanation for the continuing use, acceptance, and defense of an intuitively unacceptable rule. That litigants have the opportunity to define their claims, and the ability to present those claims with factual specificity and attention to context satisfies a sense of procedural justice in a way that strict liability cannot.[144]

A comparison of non-fault negligence liability under the objective standard of reasonableness and strict liability focused on procedural variations illustrates the importance of process. The liability of incompetent actors under the standard of the reasonable person has significant formal and structural affinities with causal strict liability. Each involves liability imposed in the absence of fault. However, from the perspective of process, the affinities disappear. In non-fault negligence, the litigants

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142. *See generally* Kathyrn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073 (1989); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Robin West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145 (1985).

143. The application of the standard to many incompetent defendants is indefensible. To the extent that an insane defendant, for example, could *not* have conformed to the standard, it should not be applied. *See supra* note 124.

144. The role of the jury in this process has been explored by Catherine Wells, *supra* note 13.

have some significant measure of process control, whereas in strict liability they do not. Defendants subject to potential non-fault liability under the reasonable person standard have an opportunity to place the facts fully before the jury, to impart content to the applicable standard of reasonableness, and to convince the jury where the bounds of reasonableness lie—just as they do in negligence cases generally. The standard of reasonableness provides a basis for the situated, contextualized examination which strict liability for causation of harm preempts. Defendants subject to liability based upon causation would not have meaningful opportunities to introduce factual inquiries because the substantive rule would preclude factual inquiry beyond that regarding causation.[145] Thus, an individualized assessment of defendant's conduct under a standard of absolute liability is impossible.

An examination of the seminal case of *Vaughan v. Menlove*[146] provides further illustration of the process-based distinction between nonfault negligence and strict liability. In *Vaughan*, the defendant built a hay rick near the boundary of his property. The hay rick later caught fire due to "spontaneous heating"[147] of the hay. The fire spread and burned plaintiff's cottages located on the adjacent land. The defendant argued that he acted to the best of his judgment and "ought not to be responsible for the misfortune of not possessing the highest order of intelligence."[148] The court rejected the use of the subjective standard advocated by the defendant, relying instead on the objective standard of reasonable prudence. If the defendant was in fact incapable of understanding the dangers presented by his conduct, then he was held liable without fault. However, the court held him liable *only* after a jury trial at which his

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145. Causal determinations in tort cases may pose great difficulties. Numerous factors produce the harms which give rise to tort actions. Consequently, identifying *the* cause for legal purposes may be complex. The problem of attributing causal responsibility is magnified in cases of probabilistic harms. Causal attribution in some toxic exposure cases may be impossible, given the "background" risks of developing disease. Plaintiffs whose exposure to defendant's toxins may have caused their cancer, face what may be the insurmountable problem of proving that they would not have developed cancer absent the exposure. In cases of common accidents, however, causation is a fairly simple determination, and strict liability for causation of harm would eliminate a great deal of litigation. Although a system of strict liability would sanction many more cases, presumably fewer would actually be brought. Because rules of causation independently permit relatively certain determination of liability, many cases could be settled or adjudicated with minimal procedures. Negligence, in contrast, necessitates litigation because it requires inquiries into the reasonableness of both the plaintiff's and the defendant's actions, in addition to causal determinations. For discussions of causation issues in tort law, see generally Symposium, *Causation in the Law of Torts*, 63 CHI.-KENT L. REV. 397 (1987).

146. 132 Eng. Rep. 490 (1837).

147. *Id.* at 491.

148. *Id.*

counsel had the opportunity to give content to the applicable standard, to explore whether a reasonably prudent person would have foreseen any risk, and to convince the jury that the defendant in fact conformed to the standard of reasonable prudence.

Although the court instructs the jury to consider a hypothetical reasonable person, jurors are quite likely to do so with reference to the characteristics and limitations of the defendant before them. Clarence Morris argues that the objectivity of the standard is "more academic than real":

> [T]he defendant is usually in the trial court and testifies before the jury. Inevitably much about defendant comes out in the trial—the defendant's identification as a witness, testimony about the activity in which defendant injured someone, and defendant's appearance and actions in the courtroom all throw light on his or her discrete personality. The defendant's impact as a unique person often affects jury deliberations. A jury charged to take circumstances into account seldom compares the defendant to an abstract reasonably prudent person having none of the defendant's attributes.[149]

If strict liability based upon a defendant's causation of harm had been the applicable rule, the destruction of plaintiff's property as a result of defendant's conduct would have been sufficient for liability. The parties likely would have settled the *Vaughan* case; had they litigated it would not have presented a jury question.[150]

An examination of current tort law doctrines supports the conclusion that process is central to the morality of tort law. For example, courts impose liability without fault in necessity cases.[151] In *Vincent v. Lake Erie Transport Co.*,[152] the defendant's agent tied a ship to the plaintiff's dock during a dangerous storm, preventing potential destruction of the

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149. CLARENCE MORRIS & C. ROBERT MORRIS, JR., MORRIS ON TORTS 51-52 (2d ed. 1980).

150. It may happen, of course, that courts eliminate the jury's function by determining as a matter of law that defendant has not behaved with reasonable prudence. However, even in those cases, the court affords the defendant consideration of the circumstances beyond what would occur under a standard of absolute liability.

151. Jules Coleman argues that such liability is consistent with corrective justice; although the actions involved in necessity cases are justifiable, they are nonetheless wrongful for purposes of corrective justice. Coleman, *Demands*, *supra* note 10 at 355. Coleman's assessment runs contrary to normal conceptions of wrongfulness; in cases of necessity, the community agrees that the actor's choice to take another's private property was the correct one. Stephen Perry suggests that the wrongfulness of the conduct arises from its intentional nature, Perry, *Mixed Conception*, *supra* note 11, at 928-29.

152. 124 N.W. 221 (Minn. 1910).

ship at the cost of some damage to the dock. Despite the court's characterization of the defendant's conduct as reasonable and prudent, it upheld an award of damages to the plaintiff. Liability clearly was not fault-based. The defendant's action was based upon a determination that his compelling needs justified the possible damage to another's interests. To some extent, the intentional character of a defendant's conduct distinguishes necessity cases from both negligence and strict liability. However, process considerations are also central. If true strict liability were the rule, the harm to the dock combined with a showing that the defendant caused the harm would require a judgment for the plaintiff. But under the present rule, the court must make a number of factual inquiries, including the reasonableness of the defendant's assessments. In the *Vincent* case, these assessments would include the potential damages to the ship had the defendant's agent cut it loose and the potential damages to the dock if the ship remained moored there.[153] The acceptance of the doctrine of necessity supports a contention that process engendered by substantive rules, and not the element of fault, underlies corrective justice.

The current utilization of strict liability in tort also supports a view of tort law's morality as process-based. Corrective justice theorists characterize strict liability as immoral.[154] Others, however, have argued that strict liability approximates fault-based liability.[155] They argue that the requirement of a defect in strict products liability, or the conduct of extremely hazardous activities, is analogous to fault in negligence. However, the "fault" required by these doctrines is extremely attenuated, just as it is in negligence.[156] A view of corrective justice (or tort law's morality) which encompasses procedural concerns provides a more complete rationale for the legal community's acceptance of current strict liability categories.

Elements of strict liability for ultrahazardous activities under the RESTATEMENT (SECOND) OF TORTS §§ 519[157] and 520[158] provide an avenue

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153. In necessity cases, the result may be the same regardless of the rule of liability applied. If the defendant incorrectly and unreasonably calculated the relative potential risks, negligence will lie. If the defendant correctly assessed the risks, the rule of necessity requires compensation. If strict liability applies, the court automatically will hold the defendant liable. The intentional character of a defendant's action accounts for this anomaly. *See* Perry, *Mixed Conception*, *supra* note 11, at 928-29.

154. *See supra* note 22.

155. *See, e.g.*, Frederick Davis, *Strict Liability or Liability Based on Fault? Another Look*, 10 U. DAYTON L. REV. 5, 22-30 (1984); Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963, 970-72 (1981). Jules Coleman also notes that strict liability and negligence are conceptually linked. COLEMAN, RISKS AND WRONGS, *supra* note 10, at 258, 367-68.

156. *See supra* part I.A.

157. RESTATEMENT (SECOND) OF TORTS § 519 (1965) provides:

for factual inquiry, and thus for the expanded process which renders it morally acceptable.[159] Section 520 involves a case-by-case balancing of factors remarkably similar to that undertaken in negligence cases.[160] In assessing liability for injuries resulting from a particular activity, the court must examine the activity in depth, balancing the degree and risk of harm occasioned by the activity, the difficulty of eliminating the risk, and the value of the activity to the community. The court must also consider whether the activity is a matter of common usage and whether it is appropriate to the place at which it occurs. It is apparent that this involves a measure of liability similar to that in negligence cases.[161]

Similarly, strict liability for injuries caused by products is limited to defective products. Whether the product was in fact defective will involve factual investigation and argument. Issues of causation and the potential assertion of various defenses necessarily require further factual inquiry. RESTATEMENT (SECOND) OF TORTS § 402A, like § 520 discussed above, incorporates a negligence standard: "One who sells any product in a defective condition *unreasonably dangerous* to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property. . . ."[162] Under this rule, courts balance numerous factors to determine whether a product design is unreasonably dangerous.[163] Again, the similarities to liability under traditional negligence concepts are undeniable.

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(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

158. RESTATEMENT (SECOND) OF TORTS § 520 (1965) provides:

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

(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.

159. Many have argued that strict liability in its current usages is actually fault-based liability. *See supra* note 155.

160. *See supra* note 158.

161. *See, e.g.*, Yukon Equip., Inc. v. Fireman's Fund Ins. Co., 585 P.2d 1206 (Alaska 1978).

162. RESTATEMENT (SECOND) OF TORTS § 402A (1965) (emphasis added).

163. *See, e.g.*, Ortho Pharmaceutical Corp. v. Heath, 722 P.2d 410 (Colo. 1986),

On a more abstract level, the progression of Richard Epstein's theory of strict liability and the critical response to it also demonstrate the centrality of process to the tort system. In his early work, Epstein advocated liability based on causation of harm regardless of the defendant's intent or the reasonableness of his or her conduct.[164] He proposed a system of prima facie liability based on the causal paradigms of force, fright, compulsion, and risk creation. He developed the theory by introducing certain subsequent pleas and defenses which would limit liability by "reduc[ing] the gap between notions of causation and those of responsibility."[165]

Criticism of Epstein's causal theory of strict liability centered around the assertion that it implicitly relied upon fault.[166] Epstein's critics suggested that the very identification of the causal paradigms involved policy decisions which depend upon the resolution of moral issues. Utilizing certain defenses and subsequent pleas similarly suggests that something

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in which the court relied on the following factors in determining whether a product design was unreasonably dangerous under § 402A:

> (1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.
> (2) The safety aspects of the product—the likelihood that it will cause injury and the probable seriousness of the injury.
> (3) The availability of a substitute product which would meet the same need and not be as unsafe.
> (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
> (5) The user's ability to avoid danger by the exercise of care in the use of the product.
> (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
> (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Id. at 414.

164. Epstein later developed an alternative theory of strict liability designed to meet objections to the causation model. In this more complex version of his theory, Epstein argues that causation coupled with the violation of property rights, including an individual's proprietary claim to his or her own body, renders a defendant strictly liable, subject to certain subsequent pleas and defenses. Rules of liability and property rights are correlative: "By definition, every liability rule is tied to a correlative property interest that the law protects." Epstein, *Causation and Corrective Justice*, *supra* note 8, at 500. By injuring or destroying property, a defendant necessarily invades or infringes upon ownership rights to that property. This invasion or infringement requires a remedy under corrective justice. Criticism of Epstein's rights-based theory of strict liability focuses on the conspicuous absence of any supporting theory of rights. *See, e.g.*, Simmonds, *supra* note 26, at 132-37.

165. Epstein, *Defenses and Subsequent Pleas*, *supra* note 8, at 213.

166. Perry, *General Strict Liability*, *supra* note 11; Englard, *supra* note 26, at 251.

other than, or in addition to, causation determines liability. Corrective justice theorists identify that additional factor as fault. The view that Epstein implicitly relied on fault-based considerations led his critics to advance his theory as further evidence of the vital role that fault plays in tort law's morality.[167]

Alternatively, and more correctly, one may view Epstein's theory as progressing not toward implicit acceptance of fault-based liability but toward a system which permits greater consideration of the relevant factual context. In other words, a legal system based upon Epstein's initial article would impose liability in the bulk of cases with a minimum of process. In most cases, it is a fairly easy matter to determine causation.[168] The development of Epstein's theory to include subsequent pleas and defenses would, in practical application, require more extensive factual and contextual consideration of the case. The progression of his theory may thus constitute an implicit recognition of the process-based dimension of corrective justice.

C. Implications for the Tort System

In short, there is something important to be gained from the theory of corrective justice. Even though corrective justice theorists who focus on whether fault underlies liability are not asking precisely the right question, they are correct in asserting that there is an important dimension to tort law that economic/utilitarian or other instrumental accounts fail to capture. They are also correct in characterizing that dimension as moral. Tort law is moral; sometimes as a matter of substance, but generally as a matter of the tort processes which substantive tort principles require. Nonetheless, important questions remain. First, given the moral dimensions of the tort system, would its replacement involve an immorality? If not, does the moral dimension of the present system outweigh concerns exposed by instrumental critiques?

Under substantive corrective justice as espoused by Ernest Weinrib, Jules Coleman, and others, replacement (or wide-reaching reform) of the system would not, in itself, involve an immorality. Substantive corrective justice theory does not mandate utilization of the current system. Weinrib consistently maintains that dispensing with corrective

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167. Epstein, *Causation in Context*, *supra* note 8, at 654. Epstein himself has concluded that strict liability based upon causation involves vast potential liability which can be limited only by excuses or justifications "so extensive that causation would recede quickly into the background, as a preliminary step in an analysis that, rightly understood, turned ultimately on other considerations." *Id.*

168. *See, e.g.*, *supra* note 145 and accompanying text.

justice as a system of bilateral tort adjudication would not involve any immorality.[169] Coleman agrees:

> [T]he state for a variety of presumably good reasons might choose to forgo implementing in law the demands of corrective justice. It can choose, for example, not to have a tort system, even if the tort system is itself the legal embodiment of the ideal of corrective justice. . . . [A]lthough corrective justice is private justice—justice between the parties—whether or not it imposes obligations between the parties depends on other social, political and legal practices.
>
> If corrective justice is conditional in this sense, then the state may choose to allocate accident costs in any number of ways. It may do so through a tort system that implements corrective justice; it may do so through a New Zealand no-fault scheme; it may do so through a generalized at fault plan; it may do so through a variety of localized or limited at fault plans. It may do so through a tort system that seeks to spread or minimize risk; or it may seek to do so through a tort system that seeks to do a combination of these things; and so on.[170]

The current use of alternative compensation systems such as workers' compensation and auto no-fault plans support this conclusion. Many criticize workers' compensation and auto no-fault systems on various grounds, but substantive immorality is not among them. In these alternative systems, substantive corrective justice has been replaced by another form of justice operating outside the bilateral structure of current tort litigation. Communal notions of responsibility and concerns about compensation have shifted such that they no longer implicate corrective justice as a distinct form of justice in workers' compensation or auto no-fault cases.[171]

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169. Weinrib, *Corrective Justice*, *supra* note 9, at 412, 414-15; Weinrib, *Special Morality*, *supra* note 9, at 412; Weinrib, *Understanding Tort Law*, *supra* note 9, at 494-95.

170. Coleman, Risks and Wrongs, *supra* note 10, at 402-04.

171. In the context of mass torts, similar shifts may be occurring. The individualized tort system is not particularly well-suited to handling numerous claims arising from a single incident or cluster of similar incidents. For illuminating discussion of ways to resolve issues raised by mass torts, see Francis E. McGovern, *Management of Multiparty Toxic Tort Litigation: Case Law and Trends Affecting Case Management*, 19 Forum 1 (1983); Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. Rev. 659 (1989); Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. Chi. L. Rev. 440 (1986).

While abolition or reform of the tort system may not involve immorality under substantive corrective justice, it may be problematic from the perspective of corrective justice as process. Various proposed tort reforms would limit or eliminate the litigants' ability to participate in decision-making. At least one scholar who has reviewed comprehensive alternative compensation systems has reached the general conclusion that such alternatives inappropriately sacrifice procedural fairness. As James A. Henderson, Jr. explains:

> Moving from a properly functioning common law tort system to a system like that in New Zealand might cause many citizens to feel that traditional commitments to fairness had been compromised or even abandoned. Although more victims of misfortune would be receiving benefits under the new regime and in a democracy it may be presumed that the appropriate balance of interests has been struck, I would not be surprised to discover a general feeling in the community that fairness to the individual had been sacrificed in the name of the greatest good for the greatest number.[172]

Implementing an alternative compensation scheme would not in itself necessarily involve immorality from the perspective of procedural corrective justice. Nevertheless, experiences with alternatives to tort law in this country may suggest that process-based values associated with the tort system are more important than some reformers recognize. Social insurance systems like workers' compensation or auto no-fault provide injured persons with certain, uniform and efficient compensation (at least relative to the tort system). Both systems, however, are subject to numerous exceptions: auto no-fault, by legislative design; and workers' compensation by a combination of statutory and judicially-developed rules which permit circumvention of the system. Auto no-fault plans allow tort recoveries for non-covered economic losses and for intangible losses in specified, but typically broad, circumstances.[173] As a statutory matter, workers' compensation plans typically recognize defenses to liability under the system.[174] Similarly, employer misconduct may, as a

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172. James A. Henderson, Jr., *The New Zealand Accident Compensation Reform*, 48 U. CHI. L. REV. 781, 798 (1981). For general discussions of New Zealand's Accident Compensation Act, *see, e.g.*, TERENCE G. ISON, ACCIDENT COMPENSATION: A COMMENTARY ON THE NEW ZEALAND SCHEME (1980); GEOFFREY PALMER, COMPENSATION FOR INCAPACITY: A STUDY OF LAW AND SOCIAL CHANGE IN NEW ZEALAND AND AUSTRALIA (1979).

173. *See generally* ROBERT H. JERRY, III, UNDERSTANDING INSURANCE LAW § 134 (1987).

174. These defenses include, for example: employee intoxication or impairment as a result of illegal drug use, wilful misconduct resulting in injury, wilful refusal to use employer-provided safety equipment, or wilful failure to obey an employer's safety rules. *See* ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 30-36.50 (1992).

statutory matter, permit an injured employee to maintain a common law action against the employer.[175] Judicially developed rules also undercut the exclusivity of workers' compensation by permitting injured workers to take advantage of the tort system.[176]

The proliferation of tort exceptions to existing alternative compensation schemes demonstrates the importance of process. Even though these alternatives were designed to eliminate some of the costs of the tort system, they include or revert to more costly and more contextual processes associated with tort law. There are other possible reasons for the exceptions,[177] but fairness concerns arising from the limited opportunities for participation in the process, although not quantifiable, are central.

The remaining, and more difficult issue, is the proper balance of process-based morality against other important concerns which arguably point to replacement of the current tort system. The values of individual fairness furthered by the present system compete against other values not well served by tort, including: horizontal equity, adequacy of com-

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175. For example, failure to provide safety equipment or to obey safety regulations may result in such an action. *Id.* § 69.

176. Courts permit employee actions against third-party defendants, typically manufacturers or suppliers of equipment used in the workplace. Some jurisdictions permit third-party defendants to obtain contribution from a negligent employer. *E.g.*, Skinner v. Reed-Prentice Div. Package Mach. Co., 374 N.E.2d 437 (Ill. 1977), *cert. denied*, 436 U.S. 946 (1978); Lambertson v. Cincinnati Corp., 114, 257 N.W.2d 679 (Minn. 1977); Dole v. Dow Chem. Co., 282 N.E.2d 288 (N.Y. 1972). *See generally* Lockheed Aircraft Corp. v. U.S., 460 U.S. 190 (1983) (exclusive liability provision of Federal Employees' Compensation Act no bar to third party action against the U.S.). Other bases for a tort action against the employer include intentional injury by the employer, *see* 2A LARSON, *supra* note 174, § 68, and the judicially-created intentional risk and dual capacity doctrines. *See id.* at §§ 68.13, 68.15, 72.80. However, statutes or judicial decisions have generally rejected these latter doctrines. *See generally* Merton E. Marks, *Status of the Exclusive Workers' Compensation Remedy: Actions by Employees Against Coemployees, Employers and Carriers*, 22 TORT & INS. L.J. 612 (1987).

177. The proliferation of exceptions is not entirely attributable to process-based fairness considerations. A number of the exceptions permit use of the tort system where fault, in the sense of intentional or wilful misconduct, exists. The exceptions may demonstrate nothing more than the tenacity of the fault concept in our legal system. Another obvious cluster of reasons for the exceptions are financial. There is a great deal of money to be made through the tort system. It is in the financial interests of lawyers to oppose replacement of the tort system. It is in the financial interests of prospective plaintiffs to sue in tort if they can. However, the design of auto no-fault systems, and the exceptions to exclusivity of workers' compensation, even if attributable to a confluence of factors, also illustrate the importance of process. In an important sense, the element of fault in some of the workers' compensation exceptions serves as a marker for process; the potential for larger tort awards reflects the ability of the flexible torts process to achieve adequate compensation where scheduled recoveries cannot.

pensation across a range of cases, and efficiency of administration.[178] To some extent, process-based and substantive values conflict with these instrumental goals. The solution, however, is not necessarily to determine which principle or value is paramount, but to achieve resolutions which accommodate as many of those values as possible.

Conceptualizing the problem in this way suggests that a two-tiered approach, consisting of a comprehensive compensation system with optional individualized remedies, may be optimal. Such a system would satisfy both instrumental and corrective justice concerns. A comprehensive accident compensation system implemented in conjunction with regulatory measures aimed at deterrence[179] would address the legitimate concerns of those who charge that the negligence system is an extremely costly "lottery" which undercompensates serious injuries, overcompensates minor injuries, and provides very little deterrent effect.[180] The possibility of alternative or additional individualized remedies which claimants may utilize at their option would address fairness concerns. Within this broad two-tiered structure, numerous approaches are possible. A system of mandatory accident insurance scheduled and administered like worker's compensation could possibly accommodate corrective justice as well as instrumental concerns if it permitted individuals to petition a governing agency to proceed in tort for amounts above scheduled benefits.[181]

Existing auto no-fault plans raise other options. Such schemes commonly provide minimum levels of compensation for all claimants who state a prima facie case. The current system permits supplemental tort actions in specified circumstances, typically based upon the extent and nature of injuries. Other tort/no-fault hybrids suggest additional alternative structures. The National Childhood Vaccine Injury Act of 1986,[182] for example, requires claimants to establish a specified injury from a

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178. The view of corrective justice as an interplay of substance and process may suffer from some of the same shortcomings as substantive corrective justice. As Stephen Sugarman charges, "exponents of corrective justice often have a naive air about them," Sugarman, *Tort Law*, *supra* note 2, at 604. Perhaps this observation applies whenever facts and discussions focus on fairness or morality as opposed to statistics. But the difficulties of quantifying the concerns expressed by corrective justice theorists do not render those concerns less real.

179. Such as that proposed by Sugarman, *supra* note 2, or implemented in New Zealand, see *supra* note 172 and accompanying text.

180. *See supra* notes 6, 44-51, and accompanying text.

181. The scheduling of benefits at adequate levels would be crucial to the success of any such alternative. Existing benefits under workers' compensation laws in most states are grossly inadequate. For a useful marshalling of the troubling statistics, see Marc Feldman, *The Intellectual Ordering of Contemporary Tort Law*, 51 MD. L. REV. 980, 1003-07 (1992).

182. 42 U.S.C. §§ 300aa-10 to 300aa-34 (1988).

covered vaccine in a proceeding before a special master who calculates damages based on a combination of individualized and averaged measures. Under the act a claimant may reject the decision of the special master and proceed in tort, subject to defenses permitted in products liability actions. The Superfund 310(e) Report[183] and the Environmental Law Institute Model Statute,[184] neither of which has been adopted, would establish similarly structured compensation schemes.

Other variations are possible. Instead of a tort option, the system could provide alternate mechanisms for individualized consideration of claims via professional mediation, or the use of a special master, or through bench trials. Each of these options have the potential for achieving increased efficiency, greater uniformity, and more adequate compensation than the present system. Moreover, it would permit contextualized judgments where fairness concerns warrant them.[185]

III. Conclusion

Corrective justice theorists correctly argue that tort law furthers important community concerns. They are mistaken, however, in their attempts to identify its morality with the formal element of fault. The ideal of individual liability in tort only in the presence of fault holds a great deal of intuitive moral appeal. However, allocating losses to a morally blameless individual who has caused harm rather than to an equally blameless victim is also intuitively appealing. The tort system recognizes and accommodates both of these competing moral ideals. This fact, among others, precludes moral justification of the present system of negligence as fault-based. Society accepts negligence law as just, whether or not it involves fault, because it requires individualized assessments of liability. Society accepts current applications of "strict" liability as just for the same reason. Thus, we object not to the idea that a court may impose liability in tort without fault (as in non-fault negligence under the objective standard), but to the requirement that

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183. Injuries and Damages From Hazardous Wastes—Analysis and Improvement of Legal Remedies, S. Comm. on Env't & Pub. Works, No. 97-12, 97th Cong. 2d Sess. (1982).

184. Jeffrey Trauberman, *Statutory Reform of "Toxic Torts": Relieving Legal, Scientific, and Economic Burdens on the Chemical Victim*, 7 Harv. Envtl. L. Rev. 177, 250-96 (1983).

185. Contextualization is unilateral under the first tier of each of the proposals of this type: defendants have no ability to present evidence unless a claimant chooses an alternative to scheduled recovery. This one-sidedness is not particularly problematic on fairness grounds, depending upon the funding of the comprehensive no-fault scheme. If a claimant chose to pursue an alternative second tier remedy, a defendant would also be entitled to individualized consideration of the facts.

courts must impose it without process (as in true strict liability). Tort law's capacity for individualized, contextualized judgments, and not its substantive rules of liability, provide the source of its morality.

Under this account, corrective justice is a social and a legal practice which provides a moral account of tort law. Conceptualizing corrective justice as involving a contextualized interaction of substance and process may *not* provide a compelling rationale for the perpetuation of the present system of tort litigation. Other alternatives, such as those suggested above, may better accommodate a variety of values, including process-based values. But an explicit recognition of the importance of individualization to tort law and the corresponding centrality of process is crucial to the exploration of alternatives. We cannot gauge other possibilities unless we recognize the nature and value of the system we propose to alter.