

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

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The Restatement Third of Torts and traditional strict liability:

Robust rationales, slender doctrines

by

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*Abstract:* The traditional strict liability doctrines—liability for abnormally dangerous activities, for wild animals, for abnormally dangerous animals, and for intruding livestock—can largely be explained by a small set of rationales. The Restatement Third Draft offers six principal economic and fairness-based rationales for strict rather than negligence liability: providing the injurer an incentive to optimize (1) the level of care and (2) the level of the activity; and recognizing the justice of requiring the injurer to pay when his activity (3) creates a nonreciprocal risk, (4) affords him a nonreciprocal benefit, (5) is the exclusive cause of the harm, or (6) when the community’s sense of fairness supports strict liability. The Draft also rejects (7) loss-spreading as a rationale in this context. With the notable exception of (5), exclusive causation, this is a defensible and plausible set of rationales. However, the actual strict liability doctrines endorsed in the Draft are narrower in scope than the robust logic of these rationales would imply. This mismatch is probably best explained by judicial reluctance to impose strict liability unless the effects of such liability are modest. At the same time, from a wider perspective, the supposed contest between strict liability and negligence approaches is overstated, for each approach contains traces of the other.

- I. Introduction
- II. The Restatement Third’s rationales for traditional strict liability
- III. The surprisingly narrow scope of traditional strict liability rules
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- I. Introduction

Chapter 4 of the Draft Restatement Third of Torts: Liability for Physical Harm, Proposed Final Draft No. 1 (April 6, 2005) (“the Draft”), addresses traditional strict liability—liability for abnormally dangerous activities (§20), intrusion by livestock or other animals (§21), wild animals

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(§22), and abnormally dangerous animals (§23).<sup>1</sup> But is there a principled basis for these strict liability rules? The Scope Note to the strict liability chapter candidly asserts:

Just as there is no single rule of strict liability in tort, but rather a range of specific strict-liability doctrines, so it is appropriate to observe that there is no single theory for strict liability in tort. While a number of rationales and policies are generally available in explaining both the coverage and the limits of strict-liability doctrines, each of the particular doctrines may balance or accommodate these rationales and policies in its own distinctive way. ... Moreover, each of these doctrines has its own history; strict liability is one area of tort law in which a page of history can be at least as relevant as a page of logic.<sup>2</sup>

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

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

The most significant changes in traditional strict liability doctrine suggested by the Draft are with respect to abnormally dangerous activities. First, the controversial “value of the activity” factor identified in the Restatement Second as one factor militating against strict liability has been eliminated, and explicitly disavowed. Second, the spongy and indeterminate multifactor test of the Second Restatement has been replaced by a more straightforward two-factor test, which asks only whether the activity is uncommon and whether, even if all actors use reasonable care, the activity creates a significant residual risk. The traditional rule that contributory negligence ordinarily has no effect on recovery while assumption of risk bars recovery<sup>4</sup> has been supplanted

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<sup>1</sup> Other sections address scope of liability (§24) and comparative responsibility (§25). The Restatement Third does not revisit the nuisance sections of the Restatement Second, which contain a strict liability provision. =

<sup>2</sup> P. =.

<sup>3</sup> See Kenneth W. Simons, *A Restatement (Third) of Intentional Torts?*, 48 Ariz. L. Rev. 1061, = (2006).

<sup>4</sup> See Rest. 2nd, §§515 (animals); 523 (AR as defense to strict liability for ADA), 524 (CN as no defense to strict liability for ADA); see also §524A (Abnorm. sensitive P). For discussion, see Draft Rest. 3<sup>rd</sup>, §25, comment e.

by a comparative fault principle,<sup>5</sup> but, intriguingly, a ghost of the assumption of risk doctrine lingers: if the plaintiff suffers harm as a result of approaching the defendant's animal or abnormally dangerous activity "for the purpose of securing some benefit" from the approach, strict liability does not apply.<sup>6</sup> (I shall have a bit more to say about this last doctrine below.<sup>7</sup>)

## II. The Restatement Third's rationales for traditional strict liability

In the earlier Restatement Second of Torts, the provisions on traditional strict liability explicate the rationales for these doctrines in an almost tautological way. For the most part, the comments simply redescribe the relevant doctrine and then pretend that that redescription counts as a justification of the doctrine's scope and content. For example, the only explanation given for strict liability for wild animals is as follows:

The rule stated in this Section is based upon the fact that by keeping a wild animal of a class that has dangerous propensities, its possessor has created a danger not normal to the locality in question.<sup>8</sup>

Similarly, the only explanation given for strict liability for abnormally dangerous domestic animals<sup>9</sup> is:

One who keeps a domestic animal that to his knowledge is vicious, or which though not vicious possesses dangerous propensities that are abnormal thereby introduces a danger not usual to the community and which, furthermore, is not necessary to the proper functioning

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<sup>5</sup> Draft, §25.

<sup>6</sup> Draft, §24(a).

<sup>7</sup> Other changes in the Draft Restatement Third are minor. Thus, for animals (intruding, wild, and dangerous domestic), the Draft makes only minimal changes, including a more sensible and less awkward definition of "wild animal," =, and an expansion of strict liability from possessors to both owners and possessors. =; Reporter's Notes 364.

<sup>8</sup> Rest. 2<sup>nd</sup> §507, comment e. Indeed, this stated rationale is offered more as an explanation of the limits of strict liability, for the passage goes on to say:

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

<sup>9</sup> I use the term "domestic" animals for simplicity; the more precise term would be "animals other than the wild animals for which there is strict liability." As the Reporter's Notes indicate, Restatement Third §23 encompasses both what the Restatement Second calls domestic animals and also "nondomestic animals that are not covered by §22 because they belong to a class that does not entail an inherent risk of personal injury." RN 377, to comment b, §23.

of the animal for the purposes that it serves.<sup>10</sup>

The Restatement Second is slightly more explicit in affording a rationale for strict liability for abnormally dangerous activities. After clarifying that liability for such activities is indeed strict, and not based on negligence, comment d states:

[Liability] is founded upon a policy of the law that imposes upon anyone who for his own purposes creates an abnormal risk of harm to his neighbors, the responsibility of relieving against that harm when it does in fact occur. The defendant's enterprise, in other words, is required to pay its way by compensating for the harm it causes, because of its special, abnormal and dangerous character.<sup>11</sup>

But this minimal, opaque exposition still teeters on the edge of tautology. What counts as imposing a risk “for his own purposes”? And why do abnormality and dangerousness require a strict liability rule? Why, for example, is it not sufficient to consider these factors in determining whether the defendant acted with due care?<sup>12</sup>

The Restatement Third Draft provisions and comments on traditional strict liability are an enormous improvement in this respect. The comments offer six distinct rationales for strict liability doctrine, all but one of which is plausible. It is worth reviewing these rationales with care, for they demonstrate two important points. First, traditional strict liability categories are less of a hodge-podge than they might seem. But, second, in some respects the rationales are too robust: they justify broader strict liability rules than the specific rules that the Draft defends.

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<sup>10</sup> Rest. 2<sup>nd</sup> §509, comment d. The last clause in this excerpt, pointing out that the dangerous propensity of the animal is “not necessary” to its “proper functioning,” is ambiguous. Is the point that it is probably negligent to keep such an animal? Or that keeping such an animal benefits only the owner, not others in the community? =

The passage continues in a similarly unenlightening way:

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

<sup>11</sup> =cite

<sup>12</sup> Comment f to §520 offers another explanation for strict liability that remains frustratingly incomplete. Defending the rather indeterminate multifactor test, it asserts:

Because of the interplay of these various factors, it is not possible to reduce abnormally dangerous activities to any definition. The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even though it is carried on with all reasonable care. In other words, are its dangers and inappropriateness for the locality so-great that, despite any usefulness it may have for the community, it should be required as a matter of law to pay for any harm it causes, without the need of a finding of negligence.

The draft's principal rationales fall within two broad categories, economic and fairness.<sup>13</sup> Consider first the two economic incentive arguments that the Draft invokes.

(1) Incentive for the injurer to optimize the level of care

Strict liability ordinarily will not provide an injurer any greater incentive to take reasonable care than the incentive a negligence standard already provides (at least if we ignore possible precautions by victims). But sometimes an injurer negligently fails to take a precaution yet this is difficult for a victim to prove; strict liability then provides the injurer with an additional incentive to take reasonable care. For example, if the injurer's blasting harms the plaintiff's property, the explosion might destroy the evidence that would have demonstrated that an excessive charge was used.<sup>14</sup>

(2) Incentive for the injurer to optimize the level of activity

Sometimes a dangerous activity (e.g., blasting in a densely populated neighborhood, owning a wild animal, or owning a domestic animal that has a tendency to bite) is of questionable social value, yet applying the negligence criterion to such a fundamental question as whether the actor should have engaged in the activity at all, or at that location, or at that level, is highly problematic for courts and fact-finders.<sup>15</sup> Strict liability can then provide the actor with a better incentive than the negligence rule would provide (as the latter rule would actually be applied by legal actors) to consider these activity-level effects.

These two arguments are staples of the economic literature of tort: the first argument is that strict liability sometimes improves incentives with respect to the level of care; the second, that strict liability can improve incentives with respect to the level of the activity.

Interestingly enough, the draft says relatively little about the first argument, even though case law appears to give it some prominence, especially in the abnormally dangerous activities

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<sup>13</sup> To be a bit more precise, the two categories are incentive-based rationales and nonconsequentialist rationales.

The principal rationales are discussed in the text. Subsidiary rationales include the simplicity of a strict liability rather than negligence rule, especially when the rules are largely coextensive (see §21, the fencing out rule for intruding livestock, comment d, p. 336); and =.

<sup>14</sup> cites=. The comments to the provisions on intruding livestock mention this first economic incentive argument: =

<sup>15</sup> See =)ADA; §22, comment d (wild animals); §23, comment b (abnormally dangerous domesticated animals). By the same token, one explanation for not imposing strict liability on "common" activities is a presumption that such an activity is not unreasonable to engage in: "When an activity has moved beyond its initial stages and has become common and normal, this tends to allay concerns as to the acceptability of the activity itself." Comment j, §20, p. 293.

category: the risk that the activity might destroy the evidence that might otherwise support a negligence claim is frequently offered as a reason for strict liability.<sup>16</sup> Apparently the draft finds this “destruction of evidence” argument for strict liability weak because the *res ipsa loquitur* doctrine, a doctrine that relaxes proof requirements but still requires proof of negligence, can adequately respond to the problem of underdeterrence and difficulty of proof when evidence of negligence has been destroyed.<sup>17</sup> I agree that this argument is weak. If we are honestly trying to perfect a negligence regime, applying *res ipsa* or shifting the burden of production or persuasion on negligence makes more sense than excluding any evidence of due care, as a strict liability rule would do. (One is reminded of Justice Traynor’s concurring opinion in *Escola* =<sup>18</sup>, chastising the majority for a tortured invocation of *res ipsa* doctrine to find that the defendant was negligent, and arguing for a straightforward endorsement of strict liability for product defects.)

Within the fairness category, the draft endorses three additional<sup>19</sup> rationales—nonreciprocal risk, nonreciprocal benefit, and exclusive causation. (The last of these, we will see, is highly problematic.) Overall, I believe, the comments give greater weight to fairness than to purely economic justifications. Indeed, the Reporter’s Notes criticize Judge Richard Posner’s economic interpretations of strict liability on three different occasions,<sup>20</sup> and specifically berate him for ignoring ethical or fairness arguments.<sup>21</sup>

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<sup>16</sup> See, e.g., Siegler =; etc.=

<sup>17</sup> See comment a, §17 (the *res ipsa* provision):

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

<sup>18</sup> =cite

<sup>19</sup> The need to overcome difficulties in proving negligence, which I earlier described as an incentive-based rationale, could also be characterized as based on fairness, insofar as negligence liability itself can be justified on fairness grounds. That is, quite apart from the incentive effects of a legal rule of strict liability on potential injurers, it might simply be fair to ease proof requirements for victims, in order to ensure that their valid negligence claims are preserved. Cf. Restatement Third of Products Liability §2, comment a, p. 15.

<sup>20</sup> =See RN 322-323 (identifying four problems with Judge Posner’s famous opinion providing economic rationales for the multifactor Restatement Second §520 test for abnormally dangerous activities in *Indiana Harbor Belt R.R. Co. v. American Cyanamid Co.*, 916 F.2d 1174 (7th Cir. 1990)); RN 364 (rejecting as oversimplified Judge Posner’s view that strict liability for wild animals gives the owner an incentive to consider getting rid of the animal); RN 413 (expressing skepticism over the argument, asserted by Landes and Posner among others, that when we move a negligence to a strict liability regime, it is all the more important to recognize a full defense of contributory negligence).

<sup>21</sup> RN 322 (asserting that Posner’s analysis in *Indian Harbor* “excludes or rejects all ethical arguments in favor of strict liability”).

### (3) Nonreciprocal risk

The Draft emphasize that the traditional strict liability rules tend to impose liability when the injurer's activity imposes a risk unilaterally on the victim, in situations where the victim's activity does not impose a similar risk on the injurer. Thus, in explaining the "not a matter of common usage" requirement for abnormally dangerous activities, comment j to §20 states:

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

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

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

In one sense, of course, unilateral risk imposition is a very frequent occurrence. After all, a very substantial portion of all accidents between any activity and its victims involve a unilateral risk imposition, in the limited sense that the victims is very often passive at the moment of the encounter. (Suppose one pedestrian stumbles against another; or one driver crashes his car into another while the second driver is stopped at a light; or A and B are walking their dogs together when A's dog bites B.) But the nonreciprocal risk rationale expresses a more significant idea: if one activity creates risks disproportionate to the risks of the activity in which the victim is engaged, or risks beyond some specified background level of risk, then that is a reason to require the activity to compensate those harmed by the additional risk (though it is not necessarily a reason to change the level or type of risk, as a negligence standard would require). Pedestrians as a class impose similar risks on each other, as do drivers or dog owners. But if A knows that his dog has a tendency to bite, then his dog will be considered "abnormally dangerous," and he will be strictly liable if it does bite B. One reason for this rule is that owners of abnormally dangerous

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<sup>22</sup> =cite



dogs impose nonreciprocal risks on others—even on other dog owners (unless those owners’ dogs are also abnormally dangerous).<sup>23</sup>

#### (4) Nonreciprocal benefit

In academic discussions of traditional strict liability, more attention has been given to whether the activity imposes a nonreciprocal risk than to whether the person conducting the activity obtains a distinctive, nonreciprocal benefit not shared by the class of victims or by the community as a whole. But this factor does play a role, albeit a somewhat lesser role, in the Draft’s explanation and justification of traditional strict liability rules. (The term “nonreciprocal benefit” is my own, and is not employed in the Draft.) Notice that this factor is also a prominent explanation of the “strict liability”<sup>24</sup> rule of Vincent v. Lake Erie:<sup>25</sup> one who appropriates the property of another, or deliberately chooses to create a high risk of damaging the property of another, in order to save his own property, should pay for the harm to the other, even if his decision to sacrifice that property is perfectly reasonable.<sup>26</sup> It is the private benefit to the actor that justifies the duty to compensate. In cases of public necessity, when the actor sacrifices the plaintiff’s property in order to save the property or lives of others, there is no such duty.

Several times, the Draft mentions the distinctive benefit obtained by the owner of an animal or the entity conducting the activity as a reason for the strict liability rule. Thus, one reason that blasting is a paradigm of the abnormally dangerous activities category is because “the defendant chooses to engage in blasting for reasons of its own benefit.”<sup>27</sup> By the same token, one explanation for not imposing strict liability when the activity is “a matter of common usage” is that, “the more common the activity, the more likely it is that the activity’s benefits are distributed widely among the community; the appeal of strict liability for an activity is stronger when its

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<sup>23</sup> The most famous academic defense of the nonreciprocal risk rationale is, of course, George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 Harv. L. Rev. 537 (1972). For some criticisms, see Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 Ga. L. Rev. 963, 977-986 (1981); Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 Yale L.J. 1055, 1078-1082 (1972).

<sup>24</sup> In form, of course, the rule in Vincent is that the defendant who commits an intentional tort of trespass and is privileged by private necessity has only an “incomplete” privilege and must pay for the harm he causes in exercising the privilege. Doctrinally, Vincent is an intentional tort case. But substantively, it expresses a type of strict liability.

<sup>25</sup> =cite

<sup>26</sup> =cites

<sup>27</sup> Comment e, p. 284. And, further along in the same comment, one rationale for treating blasting as a paradigm case is “the defendant’s choice to engage for its own advantage in an activity that it knows to be inevitably risky.” *Id.* at p. 285.

risks are imposed on third parties while its benefits are concentrated among a few.”<sup>28</sup> Moreover, in explaining why knowledge of the risky quality of the activity strengthens the case for strict liability, comment i states: “In such a situation, it can be said that the defendant is deliberately engaging in risk-creating activity for the sake of the defendant’s own advantage.”<sup>29</sup>

Finally, the scope of liability provision, §24(a), offers substantial support for the nonreciprocal benefit rationale. Under that provision, “strict liability under §§ 20-23 does not apply if the person suffers physical harm as a result of making contact with or coming into proximity to the defendant’s animal or abnormally dangerous activity for the purpose of securing some benefit from that contact or that proximity.” Comment a gives some examples:

[W]hile certain jurisdictions impose strict liability on airlines when an airplane crash causes ground damage, claims by injured passengers against the airline are governed by negligence law. Because the passengers are deliberately benefiting from the activity of flying, the imposition of strict liability on the airline for passenger injuries would be inappropriate. In certain wild-animal cases, the defendant is engaged in exhibiting wild animals to the public: for example, in a zoo. If an animal escapes from the cage, leaves the zoo, and injures a person living in the neighborhood, that person has a strict-liability claim against the zoo. But if the plaintiff is a patron of the zoo, exposed to wild animals because of the benefits the plaintiff secures by visiting the zoo, the plaintiff is beyond the scope of the defendant’s strict liability. Similarly, if the plaintiff is a veterinarian or a groomer who accepts an animal such as a dog from the defendant, the plaintiff is deriving financial benefits from the acceptance of the animal, and is beyond the scope of strict liability, even if the dog can be deemed abnormally dangerous. ... Likewise, if at the plaintiff’s request the defendant blasts on the plaintiff’s land, or if the defendant treats the plaintiff’s home with an insecticide, the plaintiff has no strict liability claim if the blasting damages a structure on the plaintiff’s property or the insecticide injures the plaintiff. By the same token, if the defendant furnishes a horse to the plaintiff for horse riding, the plaintiff is benefiting from the activity and is hence beyond the scope of strict liability, even if the horse can be deemed abnormally dangerous. What makes this result especially sensible is that even if the horse’s tendency to bolt renders the horse abnormally dangerous, that tendency ordinarily poses a danger only to the person who chooses to benefit from the horse by riding on it.<sup>30</sup>

The result of such a choice by the victim is not to preclude all tort liability. This provision does not, in other words, resuscitate a narrow version of traditional assumption of risk.<sup>31</sup> Rather, the

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<sup>28</sup> Comment j, §20, p. 293. And recall comment d to §22: “owning wild animals is an unusual activity, engaged in by a few, which imposes on others significant risks that are themselves unusual and distinctive.” Supra note =. The underlined phrase suggests that the localized, nonreciprocal nature of the benefit supports strict liability.

<sup>29</sup> p. 290

<sup>30</sup> =P. =. One other example in comment a is this: “Similarly, if a physician provides a patient with unusual therapy that is highly dangerous even when reasonable care is exercised, the plaintiff has no strict-liability claim against the physician.” Id. This is a dubious example; I would be very surprised if (assuming the patient’s informed consent) such medical treatment would qualify as an abnormally dangerous activity. =

<sup>31</sup> =But note that in some cases, conduct by the victim that satisfies §24(a) would preclude any tort liability, either (1) because it satisfies the criteria of the assumption of risk doctrine that some modern jurisdictions

result is to eliminate strict liability and relegate the plaintiff to proving a negligence claim.<sup>32</sup> Thus, the distinctive benefit rationale is a rationale specific to strict liability. And it is a rationale that presupposes that the injurer (or the injurer's activity) benefits largely at the expense of the victim (or the victim's activity). When both victim and injurer benefit from the interaction, §24(a) tells us, the default negligence regime governs.

On the other hand, does the Draft's rejection of the "value to the community" as a factor supporting strict liability cut against counting nonreciprocal benefit as a reason for strict liability in this context? So it might seem. According to the Draft, the value of an activity can be relevant to the question whether it is negligent to engage in the activity at all, but once we answer that question in the negative, value is only, at best, indirectly relevant. Specifically, as an empirical matter, common activities will tend to be valuable, but "it is their commonness rather than their value that directly pertains to the strict-liability issue."<sup>33</sup> Yet, if nonreciprocal benefit is one reason for subjecting an uncommon activity to strict liability, then, when an activity is especially valuable to the whole community, it seems that we should be reluctant to impose strict liability.

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

Of course, there are serious characterization difficulties with the nonreciprocal benefit rationale (just as the "nonreciprocal risk" rationale creates notorious characterization problems<sup>34</sup>). Don't we all ultimately benefit from blasting (if that is the most efficient way of building a foundation or demolishing a building), insofar as this activity lowers the costs of goods and services? Indeed, perhaps we all ultimately "benefit" from being able to own a wild animal if we so choose. On such a highly expansive view of "benefit," the rationale falls apart and is unable to

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retain, or (2) because the defendant owes no duty to protect the victim from harm in such circumstances (or does not breach a duty to such a victim). == E.g. a duly warned passenger who flies an experimental airplane; a veterinarian who cares for a dog that the owner has negligently mistreated; a duly warned homeowner who agrees to a more effective but more dangerous pesticide; a duly warned customer who chooses to ride a more dangerous but more challenging horse; etc..=

<sup>32</sup> As comment a continues:

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

<sup>33</sup> =comment e, p. 294.

<sup>34</sup> =cites

distinguish activities for which there should and should not be strict liability.<sup>35</sup>

Even on a narrower understanding of “benefit,” this rationale can be problematic. Consider the question whether strict liability should apply to harm caused by (a) wild animals, (b) domestic animals known to be dangerous, or (c) domestic animals not known to be dangerous. Strict liability is imposed on (a) and (b) but not (c). Why no strict liability for (c)? One explanation offered by the Draft refers to the benefits of such ownership:

[S]uch animals provide important benefits to those who own or maintain possession of them. Thus, livestock such as cows, horses, and pigs are of substantial economic value, while pets such as dogs and cats provide essential companionship for households and families.<sup>36</sup>

But couldn't Mike Tyson's pet tiger provide him “essential companionship”? Presumably those who choose to own a wild animal rather than a conventional pet do so in order to obtain some special benefit. = And, when my previously peaceable dog bites your hand, don't you have a legitimate argument that I obtain a distinctive benefit from dog ownership that you don't share? Indeed, the benefits from blasting (for which we impose strict liability) seem quite widespread, while the benefits that accrue from owning apparently peaceable pets (for which we do not impose strict liability), while significant for households owning the pets, are likely to be miniscule or nonexistent for households that do not. Interestingly enough, half of all jurisdictions do impose statutory strict liability for dog bites even in scenario (c),<sup>37</sup> which might reflect a sense that the nonreciprocal risk and nonreciprocal benefit rationales plausibly support strict liability here. =

These characterization difficulties are not easy to resolve. In the cognate context of the Vincent private necessity privilege, it is similarly difficult to say why deliberately creating a significant risk of harm to another to save yourself (but a risk of harm much less than a certainty) does not fall within the “incomplete” privilege and require compensation.<sup>38</sup> Perhaps intuition and community perceptions of fairness should play a role here. These difficulties might also explain

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<sup>35</sup> See Kenneth W. Simons, Tort Negligence, Cost-Benefit Analysis, and Tradeoffs: A Closer Look at the Controversy,” 41 Loyola Law Review =, = (2008).

<sup>36</sup> Comment b, §23.

<sup>37</sup> Comment d, §23.

<sup>38</sup> Cf. Cordas v. Peerless Transp. Co., 27 N.Y.S.2d 198 (N.Y. City Ct. 1941), where the emergency circumstances excused the cab driver, threatened by an armed robber, from negligence liability, even though, when he jumped out of the cab and permitted the cab to mount the sidewalk, he made a deliberate choice that risked the welfare of nearby pedestrians in order to save his own skin. See Stephen D. Sugarman, “The “Necessity” Defense And The Failure Of Tort Theory: The Case Against Strict Liability For Damages Caused While Exercising Self-Help In An Emergency” Issues in Legal Scholarship, Vincent v. Lake Erie Transportation Co. and the Doctrine of Necessity (2005): Article 1, at 58-62. <http://www.bepress.com/ils/iss7/art1>.

why the drafters, and courts, seem reluctant to place too much weight on this fairness rationale.<sup>39</sup>

(5) Exclusive causation

The most surprising argument for traditional strict liability in the Draft is the claim that when a defendant is the “exclusive” or “almost exclusive” cause of the harm, that is a reason for imposing strict liability. Consider some examples.

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

blasting is an activity that causes harm essentially on its own, without meaningful contribution from the conduct of the victim or of any other actors. Typically, the victim is a passive, uninvolved third party, who is connected to the blasting only in the sense that the victim owns property in the neighborhood and suffers harm on account of the blasting.<sup>40</sup>

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

This position resonates deeply in public attitudes: if the person in the street is asked whether a party should be liable for injuries that the party causes, the person's answer is likely to be affirmative. These perceptions and attitudes can be easily explained: when a person voluntarily acts and in doing so secures the desired benefits of that action, the person should in fairness bear responsibility for the harms the action causes.

The comment goes on to acknowledge the Coasean insight<sup>41</sup> that most accidents involve the intersection of two or more activities, and thus cannot be fairly characterized as caused by only one of them. But then, remarkably, the comment asserts:

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

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

when a cow strays onto neighboring property and causes property damage, the cow is the only active entity. For highway accidents, there are at least two actors who engage in

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<sup>39</sup> =POSSIBLY DISCUSS: A similar but distinct “benefit” rationale is offered in the product liability Restatement. Here, when the injured party is a user of the product, the nonreciprocal benefit argument obviously does not apply. Rather, a different kind of “benefit” argument is invoked here:

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

Restatement Third of Products Liability, §2, comment a, p. 15. =

<sup>40</sup> Pp. 284-285.

<sup>41</sup> See Ronald Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960).

conduct that contributes to the accident; when an accident results from a combination of actions by various parties, the concept of strict liability has less appeal.<sup>42</sup>

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

[A]s Comment f has emphasized, one rationale for strict liability relates to the defendant's exclusive control over the instrumentality of harm, and this rationale is impressively applicable in aviation ground-damage cases. As the dissent in *Crosby* [v. Cox Aircraft Co., 746 P.2d 1198 (Wash. 1987)] states, the plaintiff in a ground-damage case may well be a "wholly innocent, inactive homeowner into whose home an airplane suddenly crashes." *Id.* at 1202, 1203.<sup>43</sup>

The Draft's reliance on "exclusive" (or "unitary," "almost exclusive," or "dominant") causation is not easy to understand or defend. As explained by numerous economists, philosophers, and legal academics, from Ronald Coase, to Jules Coleman and Arthur Ripstein,<sup>44</sup> to James Henderson,<sup>45</sup> to Stephen Perry,<sup>46</sup> it is incoherent to claim that the person who engages in blasting is the only or principal cause of the victim's harm. Often such a victim could take care, but it would be very burdensome or unfair to require him to do so. (If she knows that blasting is taking place nearby, she could abandon her home or office for the duration, but this option is unlikely to preclude her from recovering for personal injury if she stays put.) And even if it is literally impossible for the victim to take a precaution to avoid the harm, the victim's very presence at the scene (or her ownership of the property near to the blasting site) is a necessary causal condition of his suffering the harm. To put the point more generally, any notion that actor or activity Y has "exclusively caused" harm to actor Z is unintelligible until the meaning of the phrase is unpacked. And that meaning crucially depends on unpacking underlying assumptions

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<sup>42</sup> = p. 341.

<sup>43</sup> RN at 327. The idea that "exclusive causation" is a fair basis for imposing strict liability is also defended in some of Reporter Gary Schwartz's writings. =cites: Rylands piece, mixed theory Texas piece.

<sup>44</sup> Mischief and Misfortune, 41 McGill L.J. 91, 95 (1995).

<sup>45</sup> = The Unworkability of Court-Made Enterprise Liability: A Reply to Geistfeld, 67 N.Y.U. L. Rev.

1174 = (1992) (with Aaron Twerski); James A. Henderson & Jeffrey J. Rachlinski, Product-Related Risk and Cognitive Biases, 6 Roger Williams U L Rev. 213, 241 (2000) (noting that a given accident can often be describes as "the cost" of multiple activities). =

<sup>46</sup> The Impossibility of General Strict Liability, 1 Can. J. Law & Jur. 147 (1988); The Distributive Turn: Mischief, Misfortune and Tort Law 16 QLR 315, 322-323 (1996). The Reporter's Notes cite the latter article for the position that "unilateral imposition" of risk justifies strict liability. RN 301. But by that phrase, Perry means much more than unilateral causation.

about, inter alia: (1) who has the legally relevant background entitlements (to bodily integrity, to property, to engage in an activity), (2) the scope of those entitlements, (3) which particular types of actions by Y (intentional? negligent? or merely deliberate choices?) that affect those entitlements impose on Y a duty of compensation, and (4) what degree or kind of change in those entitlements requires compensation.

To be sure, the person on the street probably does have the strong intuition that the actor who plants the dynamite is the sole cause of the harm to the passerby hit on the head, or to the building that is damaged, by the resulting debris. But it is incumbent on those of us who promulgate restatements and write clarifying comments, and on courts which rationalize legal doctrine, to explain why that intuition oversimplifies the issues. After all, if Don has a heart attack and loses control of his car, harming pedestrian Paula, Don will not be strictly liable to Paula, even though Don is undoubtedly the “exclusive cause” of the harm in this simple intuitive sense. =[Other examples?=-]

Other arguments and rationales that the Draft offers, especially its first two fairness rationales, provide a better explanation for the “exclusive causation” intuition. In the blasting case, we clearly have nonreciprocal risk and (at least in a sense) nonreciprocal benefit. And the passage quoted earlier from comment f to §20, asserting that one who voluntarily acts and thereby “secures the desired benefits of that action” should in fairness pay for the resulting harm, obviously relies upon the nonreciprocal benefit rationale. Moreover, a later passage from that comment goes on to make the unexceptional point that a defendant who plays a “dominant role” in causing harm (such as one who engages in blasting) is invariably in the best position to consider and implement measures to reduce the risk of harm—an incentive-based rationale.<sup>47</sup> Finally, the common-sense intuition that exclusive causation justifies strict liability also presupposes that there is nothing that the victim can reasonably be asked to do to prevent the harm in question.<sup>48</sup>

The draft’s reliance on this rationale is reminiscent of the Restatement Third of Product Liability’s invoking, as one reason for product liability, a product manufacturer’s “deliberate

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<sup>47</sup> In the Reporter’s Notes, it is suggested that contemporary economists reject the Coasean view that accidents are a product of the combined causal input of two or more activities, because such economists separately model “unilateral” and “bilateral” accidents. RN at 301. But the reason that they model “unilateral” accidents separately is to capture cases in which the level of care of the victims has no effect on the accident rate. This is a valid reason for such a model, but it is consistent with the straightforward point that, even in this category of cases, the victim’s presence at the scene is a causally necessary condition of his suffering an injury.

<sup>48</sup> See comment h to §20, defending the doctrinal requirement that plaintiff prove a residual risk even when reasonable care has been exercised by all actors: “Indeed, of all the activities that courts have found to be abnormally dangerous, there is none in which the accident rate ensuing from the activity is significantly influenced by the degree of reasonableness in the conduct of potential victims.” (pp. 289-290).

decision” to market a product that it knows will produce a statistically significant risk of injury.<sup>49</sup> In both instances, there is indeed a widespread popular intuition that this particular feature of the defendant’s activity is legally relevant to their obligation to compensate for resulting harm. But in both cases, the intuition does not withstand scrutiny. With respect to the “deliberate marketing despite a known risk” argument, indeed, the current Draft properly rejects the argument in the section defining “intent.” Comment e to §1 points out that an actor’s knowledge of a high risk (or even a certainty) of harm might result simply from the wide temporal or geographical scope of her activity and thus does not carry any necessary implication that the activity is negligent or otherwise tortious to undertake.<sup>50</sup>

In addition to the five rationales just mentioned, two other possible rationales are worthy of discussion. The Draft mentions one of these, (6), fleetingly. It rejects the other, (7).

(6) The community’s sense of fairness

In a couple of passages, the Draft suggests that some independent weight should be afforded to the community’s sense of fairness in determining when strict liability should be imposed. Thus, comment j to §20 provides:

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

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

...[P]erhaps because strict liability for intruding livestock is the common-law tradition, recognizing strict liability does not disturb the community's sense of justice. There is interesting evidence that American cattle owners regard their own liability as morally sound and accept strict liability in practice even in localities where it is not imposed as a matter of law.<sup>51</sup>

Some other passages also suggest that the historical acceptance of certain traditional strict liability rules provides some degree of justification for them. =EXAMPLES=.

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<sup>49</sup> See Restatement Third of Products Liability, §2, comment a, p. 15:

Because manufacturers invest in quality control at consciously chosen levels, their knowledge that a predictable number of flawed products will enter the marketplace entails an element of deliberation about the amount of injury that will result from their activity.

<sup>50</sup> See §1, comment e (“Substantial certainty: limits”), pp. 9-11; see also Simons, *The Conundrum of Statistical Knowledge* (unpublished draft).

<sup>51</sup> P. 336. The draft is here referring to the well-known study, ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* (1991).



Deference to community norms, and modesty in acknowledging the limits of our ability to justify legal doctrine, are certainly legitimate considerations. Accordingly, this rationale for strict liability is unexceptional, so long as it is not the primary source of justification. But I do think it is critical to look inside the black box of “community sentiments about justice” and see whether those sentiments can be rationally defended on the basis of sound principle and policy.

(7) Loss-spreading

Last and by no means least, the draft firmly rejects loss spreading as a rationale for traditional strict liability:

The appeal of strict liability, it can be noted, does not depend on any notion that the defendant is in a better position than the plaintiff to allocate or distribute the risk of harm: indeed, the defendant may be a small business enterprise; the property damage suffered by the plaintiff may be no more than moderate, and the plaintiff as a property owner may already be insured for the loss that that damage entails.<sup>52</sup>

Loss spreading could be characterized either as an economic or as a fairness rationale. From an economic perspective, leaving the victim with a concentrated loss might cause more disutility than imposing strict liability and thus broadly distributing that loss among consumers of the activity that caused that loss.<sup>53</sup> From a fairness perspective, loss spreading is sometimes defended as a kind of localized distributive justice.=

It is striking that the Draft so unequivocally resists the loss spreading rationale here. Advocates of enterprise liability have often cited strict liability for abnormally dangerous activities as a salient illustration.<sup>54</sup> Moreover, the Restatement Third of Products Liability endorses loss spreading as a rationale for products liability, especially for those product liability doctrines that most clearly go beyond negligence and impose something akin to strict liability (e.g., manufacturing flaw liability,<sup>55</sup> and the vicarious liability of entities in the distribution chain of a defective product<sup>56</sup>).

But the loss spreading rationale has increasingly drawn criticism for being an open-ended and highly expansive rationale for tort liability.<sup>57</sup> And product liability is a much more fitting

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<sup>52</sup> §20, ADA, comment e, p. 285.

<sup>53</sup> =note related economic arguments.

<sup>54</sup> See Mark Geistfeld, Should Enterprise Liability Replace the Rule of Strict Liability for Abnormally Dangerous Activities?, 45 UCLA Law Review 611, 648-649 (1998); Boston =, referring to Page Keeton’s endorsement of ADA strict liability as furthering the project of enterprise liability.

<sup>55</sup> =cite

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<sup>57</sup> See, e.g., Kenneth S. Abraham, The Forms and Functions of Tort Law 18 (3<sup>rd</sup> ed. 2007). It is also quite inefficient, relative to other methods of loss distribution such as insurance or government benefit programs. Id.; Geistfeld, supra note =, at 625-633.

context for invoking the rationale, since a commercial relationship exists between the seller and the purchaser of the product (and the purchaser is often the user of the product who suffers harm from the product defect). Accordingly, when a company spreads the cost of injuries to consumers of the product by increasing the product's cost, the direct result is that consumers who benefit from the product share this cost. This also affords an opportunity for the market to develop products that reflect a satisfactory, informed tradeoff of product features (considering convenience, value, safety, cost, and so forth). But when those who conduct dangerous activities, or owners of dangerous animals, are required to pay the full accident costs of their activities, their victims are normally not in a direct commercial relationship with them, so these arguments for loss spreading do not apply.

### III. The surprisingly narrow scope of traditional strict liability rules

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

First, the basic requirement that abnormally dangerous activities not be a matter of “common usage” is difficult to justify. And it is even more difficult to justify the extremely narrow way that the draft defines “uncommon.”

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

It is sometimes argued that common activities are also more likely to be valuable to the community, and so the “incentive to optimize the level of the activity” argument for strict liability will less often apply to them.<sup>58</sup> It is less likely that we will want to discourage a common activity, such as owning pets not known to be dangerous, than an uncommon activity, such as owning pet tigers. But again the correlation is rather loose. Blasting is clearly highly valuable to industrial and residential development, yet it is considered the paradigm of an abnormally dangerous activity.

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<sup>58</sup> See Posner, J., in *Indiana Harbor*. =

Moreover, as elaborated in the comments and as implemented in the case law, the “common usage” category is quite broad, and thus the “not a matter of common usage” category is extraordinarily narrow. For example, comment j to §20 states:

[A]ctivities can be in common use even if they are engaged in by only a limited number of actors. Consider the company that transmits electricity through wires, or distributes gas through mains, to most buildings in the community. The activity itself is engaged in by only one party. Even so, electric wires and gas mains are pervasive within the community. Moreover, most people, though not themselves engaging in the activity, are connected to the activity; electric wires and gas mains reach their homes. Accordingly, the activity is obviously in common usage, and partly for that reason strict liability is not applicable..<sup>59</sup>

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

The upshot is that very few activities have been found to be abnormally dangerous under the Restatement Second’s test,<sup>60</sup> and the Restatement Third’s test is unlikely to change this result.<sup>61</sup>

Second, the requirement that the owner of a domestic animal have “scienter” is also difficult to justify. The owner must know or have reason to know (from facts already within his grasp) that the animal is abnormally dangerous before strict liability will attach. This requirement is quite similar to the “uncommon usage” requirement for abnormally dangerous activities; in both situations, the limitation is arbitrary. The owner of a dog or cat that is not known to bite is still imposing a nonreciprocal risk on others, and is still obtaining a distinctive, nonreciprocal benefit.

If followed to their logical conclusion, the Draft’s proffered rationales might justify not only broader traditional strict liability doctrines, but also additional strict liability doctrines not currently recognized at all. Why not impose strict liability on manufacturers when their non-defective products cause injuries to bystanders who did not use the product? Why not strict

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<sup>59</sup> Pp. 292-293. The comment goes on to say:

The concept of common usage can be extended further to activities that, though not pervasive, are nevertheless common and familiar within the community. If in this sense the activity is normal, it is difficult to regard the activity as exceptional or abnormally dangerous

<sup>60</sup> See Gerald W. Boston, *Strict Liability for Abnormally Dangerous Activity: The Negligence Barrier*, 36 *SAN DIEGO L. REV.* 597, 623-24 (1999).

<sup>61</sup> For example, many courts do not treat underground gasoline storage tanks as qualifying for strict liability. =RN 314. =OTHER EXAMPLES.

liability when a passerby is injured by a projectile launched from a golf course, a baseball stadium, or a soccer or cricket field?<sup>62</sup> Or when emergency medical or police vehicles save someone from harm, but thereby impose higher risks on the community, resulting in injury or death? The list could go on indefinitely.

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

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

#### IV. Final reflections

##### A. Strict liability is more (only?) palatable when its effects are modest

One likely reason for the relatively confined scope of traditional strict liability doctrine is the sense that strict liability of any type is much more palatable when its burdens and effects are modest.<sup>63</sup> Product liability is genuinely strict in two principal contexts: when a product contains a manufacturing flaw and when a food product contains an impurity. Both scenarios are relatively limited departures from a fault system. Instances of manufacturing flaws and food impurities are relatively infrequent, in the sense that they have a relatively small effect on the price of the product or food. By contrast, an ambitious enterprise liability doctrine for products, in which the cost of all injuries caused by knives or automobiles was impounded into the price of the product, would dramatically affect their price.<sup>64</sup>

Notice that a consumer expectation test governs strict liability for food impurities: “a harm-causing ingredient of the food products constitutes a defect if a reasonable consumer would

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<sup>62</sup> cf. *Bolton v. Stone* =.

<sup>63</sup> See *Henderson* =.

<sup>64</sup> Product liability is also strict in imposing liability on actors in the distribution chain of a product for any previously introduced defect in the product. Here, too, the liability is not especially disruptive: it is predictable and relatively easy to protect against by advanced contractual arrangements.

not expect the food product to contain that ingredient.”<sup>65</sup> Why, then, have courts in recent decades shied away from a consumer expectation test for product design defects? One answer, I think, is that the liability consequences in the context of food are relatively limited: a food consumer’s expectations with respect to safety are only rarely disappointed, and often the consumer’s injuries are relatively minor. Extending a consumer expectations test to product designs would have much more far-reaching effects.

Another illustration of the implicit “modest burden” constraint on strict liability doctrine is the way—indeed, the multiple ways—that that doctrine treats foreseeability of harm. In some categories, liability is strictly imposed even if the victim has not specifically proved that the harm is foreseeable. A showing of such “scienter” is required before strict liability will be imposed for harm caused by domestic animals, but it is not required in the case of wild animals. Of course, normally the owner of a wild animal would and should expect that the animal presents some nontrivial risk of harm even if due care is used. Yet even in the case of an extremely peaceable wild animal, “foreseeability” of harm is categorically presumed; the owner is in effect liable for both foreseeable and some unforeseeable risks.<sup>66</sup> The reason for this pattern, I surmise, is that imposing additional liability for “unforeseeable” (or very low-level) risks created by wild animals will not significantly burden their owners, since almost all harms that wild animals cause will be foreseeable. By contrast, imposing additional liability for the low-level risks of domestic animals when the owner had no specific reason to believe that his dog or cat was dangerous could saddle the owner with a substantial additional liability burden, since these unforeseeable risks will constitute a much higher proportion of all harms that such domestic animals cause.<sup>67</sup> =

Similarly, consider the question whether a product manufacturer must foresee the possibility of a manufacturing flaw, or whether a provider of food must foresee the possibility of a foreign substance or an unexpected natural substance in the food that she serves. As in the case of wild animals, no specific proof of such foreseeability is required.<sup>68</sup> Again, although it is in a general way foreseeable that, even if due care is used, any product might not be manufactured

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<sup>65</sup> §7, Rest. 3<sup>rd</sup> of Torts: Product Liability.

<sup>66</sup> See also §29, comment j, p. 595, defending the definition of scope of liability (or proximate cause) in terms of whether the risk results from the risks that made the actor’s conduct tortious, and pointing out that in strict liability cases especially, this formulation is preferable to a foreseeability test, because it explains why strict liability is imposed for wild animals even if the owner reasonably believes the animal is tame.

<sup>67</sup> By the same token, however, the extent of harm caused by dog bites will ordinarily not be extremely serious. This might explain why so many jurisdictions impose strict liability for dog bites.

<sup>68</sup> See =. See also Kenneth W. Simons, “Corrective Justice and Liability for Risk Creation: A Comment,” 38 UCLA Law Review 113, 136 (1990). And note this passage in §29, comment j, p. 595-596: “[S]trict liability is imposed for manufacturing defects. Focusing on the risks created by a manufacturing defect, rather than attempting to manipulate the concept of foreseeability, better illuminates the requisite analysis [of whether defendant’s manufacturing flaw is a proximate cause of the plaintiff’s harm].”

correctly, or any portion of food might contain an impurity, nevertheless in a particular circumstance this risk could be exceedingly unlikely, and yet strict liability will still follow. Again, the reason, I suspect, is that the occasions of strict liability are likely to be extremely rare; thus, departing from foreseeability requirements will not be unduly burdensome.

#### B. The blurry boundary between negligence and strict liability

The last set of observations concerns the fuzziness of the boundary between negligence and strict liability. Negligence doctrine, it is clear, contains many traces of strict liability. The objective test of reasonable care formally imposes a duty of care even on those who lack the mental capacity to satisfy that duty. No actual human being can infallibly take the nondurable precautions that negligence law requires (such as paying 100% attention at every moment while driving), so there is an element of strict liability in such a duty of care. The negligence per se doctrine imposes a duty of care that might be more stringent than what “reasonable care” would otherwise require, especially if the jurisdiction applying the doctrine permits few excuses.<sup>69</sup> And the rule that even a nonculpable creation of risk or causation of harm can then trigger further affirmative duties, duties that a pure bystander would not owe, perhaps should be interpreted as a kind of strict liability doctrine.

Finally, *res ipsa* doctrine, although formally a doctrine permitting circumstantial proof of negligence, in practice might frequently result in strict liability. Increasingly broad interpretations of *res ipsa* make it increasingly likely that plaintiffs will reach the jury. Although the jury’s responsibility is to deny liability if it concludes that defendant was probably not negligent, a natural sympathy towards the injured victim might frequently result in *de facto* strict liability. And in the specific context of traditional strict liability doctrines, the narrowness of those doctrines is in a sense misleading, since at least some cases that would be encompassed by a broader version of those doctrines will also get to the jury today under *res ipsa*.<sup>70</sup>

But strict liability doctrine also contains traces of negligence. As we have already seen, strict liability is sometimes imposed when negligence exists but is difficult to prove, or when it is better to have a straightforward rule that can be accurately applied rather than an indeterminate “reasonable care under the circumstances” test.<sup>71</sup>

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<sup>69</sup> However, the Restatement Third’s version of the negligence per se doctrine recognizes a very broad excuse. See §15, especially §15(e) (“the actor’s compliance with the statute would involve a greater risk of physical harm to the actor or to others than noncompliance”).

<sup>70</sup> See ==Kenneth Abraham, =Torts Stories chapter on Rylands=.

<sup>71</sup> See note = supra.

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

By contrast, in many private necessity cases (such as the famous Vincent v. Lake Erie case), the defendant's violation of the plaintiff's rights is, we might say, "unregrettable ... in every way."<sup>72</sup> It is justifiable that the ship owner trespassed and knowingly damaged the dock, in order to save his own property. We would not want to stop the trespass, even if this were somehow feasible. By contrast, we really do wish that the particular piece of dynamite that harmed the victim had not been detonated, that the owner had not taken that walk with Fido, and that Coca-Cola had never distributed that particular bottle. We wish this, even though there is no practical and reasonable *ex ante* precaution that could prevent the injury in any of these cases.

To be sure, even in Vincent, the situation is (or might be) "regrettable," in either of two senses. First, even in Vincent and other private necessity scenarios, we should distinguish unregrettably violating rights from unregrettably causing harm.<sup>73</sup> Sometimes, although the violation is unregrettable, causing the harm is regrettable, because it is not actually necessary in order to preserve property or life. Consider the hiker stranded in a sudden storm who breaks down the door of an unoccupied cabin. It is justifiable for him to knock down the door, if that is his only way to save himself. Here, both violating the owner's rights and causing harm is truly unregrettable, given the emergency. But in Vincent, it was necessary for the ship to remain tied to the dock, but not truly necessary (in the same sense) for it to collide with or damage the dock. Surely the ship owner should make every reasonable effort to minimize damage to the dock, just as the hiker should break a window to enter, rather than knock down the door. But if the ship owner had taken one of the dock owner's cables lying on the dock as a necessary means of saving his property, and if he could be certain that the cable would become frayed and useless by the end

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<sup>72</sup> The song, made famous by Nat King Cole, was written by =. It contains the lyrics: "Unforgettable in every way; And forever more, that's how you'll stay..."

<sup>73</sup> =See Sugarman, *supra* note 34=, at 58-62.

of the storm, such an appropriation of property would represent both an unregrettable violation of the owner's rights and an unregrettable destruction of his property.

Second, from a wider perspective, it is certainly regrettable that an emergency arose in the first place in Vincent or in the stranded hiker scenario that required the violation of another's property rights.<sup>74</sup> From this perspective, even the violation of rights is regrettable. But that is just to say that, alas, in the world in which we live, we face tradeoffs. We should certainly do what we can to reduce the number and severity of the tragic choices we face, but tradeoffs are an inescapable fact of life.

Of course, ex ante, the same is true of the more straightforwardly "regrettable" examples. It is inescapable, if we wish to permit dynamiting, or the keeping of animals that can bite, or the manufacture of carbonated beverages, that sometimes, despite reasonable care, accidents will happen. And this suggests a final point. I think the trace of negligence in the far more common "regrettable" forms of strict liability makes these forms much easier to accept, for they seem more consistent with the prevailing fault-based orientation of American tort law than the far more rare "unregrettable" forms of strict liability (of which Vincent is a paradigm case). That appearance is an illusion. But it is an illusion that those who defend the utility or justice of strict liability, and who are disappointed that the bark of strict liability doctrine is greater than its bite, will be in no hurry to dispel.

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<sup>74</sup> =Perhaps note Judith Thomson's distinction between (justifiably) infringing a right, (unjustifiably) violating a right, and neither infringing nor violating.