

# IS THERE REALLY NO LIABILITY WITHOUT FAULT?: A CRITIQUE OF GOLDBERG & ZIPURSKY

Gregory C. Keating\*

## INTRODUCTION

In their influential writings over the past twenty years and most recently in their article “The Strict Liability in Fault and the Fault in Strict Liability,” Professors Goldberg and Zipursky embrace the thesis that torts are conduct-based wrongs.<sup>1</sup> A conduct-based wrong is one where an agent violates the right of another by failing to conform her conduct to the standard required by the law.<sup>2</sup> As a description of negligence liability, the characterization of torts as conduct-based wrongs is both correct and illuminating. Negligence involves a failure to conduct oneself as a reasonable person would. It is fault in the deed, not fault in the doer. At least since *Vaughan v. Menlove*,<sup>3</sup> it has been clear that a blameless injurer can conduct himself negligently and so be held liable.<sup>4</sup> Someone who fails to conform to the standard of conduct expected of the average reasonable person and physically harms someone else through such failure is prima

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\* William T. Dalessi Professor of Law and Philosophy, USC Gould School of Law. I am grateful to John Goldberg and Ben Zipursky both for providing a stimulating paper and for feedback on this Article. Daniel Gherardi provided valuable research assistance.

1. John C.P. Goldberg & Benjamin C. Zipursky, *The Strict Liability in Fault and the Fault in Strict Liability*, 85 *FORDHAM L. REV.* 743, 745 (2016) (“[F]ault-based liability is . . . liability predicated on some sort of wrongdoing. . . . [L]iability rests on the defendant having been ‘at fault,’ i.e., having failed to act as required.”). Professors Goldberg and Zipursky also assert that most strict liability “is still wrongs-based” because it involves violating demanding standards of conduct and “demanding standards of conduct are still standards of conduct.” *Id.* They share this position with leading corrective justice theorists. See Jules L. Coleman, *The Practice of Corrective Justice*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 53, 56–57 (David G. Owen ed., 1995). Wrongdoing understood as wrongful conduct is also essential to Ernest Weinrib’s theory of corrective justice in tort. See generally ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995).

2. For example, Professors Goldberg and Zipursky write:  
[T]here are common instances of strict liability in negligence, battery, trespass, nuisance, libel, and other torts. Because the standards of conduct built into these torts are defined objectively, they are often quite demanding or unforgiving. Nonetheless, as we explain, *objectivity-based strict liability* of this sort is still wrongs-based. To say the same thing: demanding standards of conduct are still standards of conduct, and violations of them are still cogently described as wrongs. Goldberg & Zipursky, *supra* note 1, at 745–46.

3. (1837) 132 Eng. Rep. 490; 3 Bing. (N.C.) 468.

4. See generally *id.*

facie liable in tort. This is true even if the person whose conduct is at issue could not have conformed their conduct to that of the average reasonable person.

An important consequence of the fact that negligence necessarily involves wrong in the doing, but not in the doer, is that in some of its applications liability for negligence may be strict in the sense that it is imposed on defendants who should not be blamed for failing to have exercised reasonable care. Whether or not Menlove possessed the cognitive capacity necessary to appreciate that his conduct was unacceptably risky,<sup>5</sup> the lesson of the case is that someone who lacks the capacity to conform their conduct to that of a reasonable person may nonetheless may be found legally negligent. Fault liability is strict insofar as legal culpability does not entail moral culpability.

This conception of fault is jarring. In ordinary moral discourse, fault and blame go hand in hand.<sup>6</sup> We blame people for not conducting themselves as they should when—and because—we think they are at fault. When a teacher faults a pupil for turning his homework in late, she is blaming the student for failing to discharge his responsibility. That blame involves a negative evaluation of the pupil—not just of his performance—and that negative evaluation has repercussions. So long as the teacher’s blame lingers, the relationship between the student and the teacher is impaired.<sup>7</sup> Because tortious negligence requires *only* conduct that is insufficiently careful, fault as tort law conceives it, is markedly different from fault as we normally understand it.<sup>8</sup> The thesis that fault liability is strict, morally speaking, is therefore sound and illuminating. In asserting that all torts are conduct-based wrongs, however, Professors Goldberg and Zipursky transform an illuminating account of negligence liability into an unpersuasive characterization of all tort liability. Indeed, their thesis is a latter day echo of James Barr Ames’s view that the more the law of torts works itself pure the more it becomes a law of fault liability.<sup>9</sup> To be sure, there is a critical difference. For Ames, fault entails moral blameworthiness. For Goldberg and Zipursky, it does not: the fault

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5. There is at least a hint that he may have appreciated the undue risk imposed by his conduct in the fact that he stacked his hay “near the boundary of his own premises” which was “dangerous to the [plaintiff’s] cottages.” *See id.* at 491.

6. In the history of tort scholarship, the canonical statement of the idea that fault encompasses blameworthiness is James Barr Ames’s “Law and Morals,” which famously and mistakenly equated legal and moral fault in this passage:

The early law asked simply, “Did the defendant do the physical act which damaged the plaintiff?” The law of today, except in certain cases based upon public policy, asks the further question, “Was the act blameworthy?” The ethical standard of reasonable conduct has replaced the unmoral standard of acting at one’s peril.

James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 99 (1908).

7. *See generally* T.M. SCANLON, *MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME* (2008) (discussing how blame affects relations among persons).

8. This point is developed powerfully in Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 152–60 (1973).

9. *See generally* Ames, *supra* note 6.

characteristic of negligence liability is substandard conduct, and only substandard conduct.

Strict liability in tort poses a formidable challenge to the thesis that all torts are wrongs that predicate liability on the wrongdoer's failure to conform their conduct to the requirements of an applicable standard of conduct.<sup>10</sup> Strict liability asserts that proof of defective conduct is not necessary to establish liability. Wrongful conduct is a form of fault, and strict liability is *liability without regard to fault*. Fault in the doing may be present, but its presence is not essential to liability. Thus, when liability in tort is strict, the basis for liability is not that the defendant's conduct was defective. The basis of liability is that the defendant inflicted unjustifiable harm or unjustifiably violated plaintiff's right.

Strict products liability, for example, involves a wrong in the product but not a wrong in the conduct responsible for the design, manufacture, or marketing of the product.<sup>11</sup> As Andrzej Rapaczynski remarked recently in commenting on Judge Traynor's concurrence in *Escola v. Coca Cola Bottling Co. of Fresno*<sup>12</sup>:

[T]here was something obviously "wrong" with the bottle that exploded in [Ms. Escola's] hand. Indeed, the whole point of a Coke bottle is that it is supposed to allow the consumer to enjoy the drink without anyone's ending up in the emergency room of a nearby hospital. So when the bottle exploded in the waitress's hand, it was clearly "defective": it did not work the way that such bottles were *supposed* to work. And this remained true even if the manufacturer had not *done* anything wrong . . . .<sup>13</sup>

Put differently, Judge Traynor's point is that whether Coca Cola *did* anything wrong is irrelevant. The point is that the product failed to function properly and failed in a harmful way. Product safety, not producer conduct, is the proper focus of products liability law.<sup>14</sup>

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10. Professors Goldberg and Zipursky recognize that this is the prevailing understanding. See Goldberg & Zipursky, *supra* note 1, at 745. Their argument is complex but its overall thrust is to explain away most strict liabilities as not truly strict while conceding the existence of a rump end of strict liability left over as the historical residue of the old English case *Rylands v. Fletcher* (1868) 3 LRE & I App. 330 (HL). See Goldberg & Zipursky, *supra* note 1, at 745. They explain trespass, conversion, and battery as not truly strict by arguing that such torts involve the violation of stringent standards of conduct. See *id.* at 745. And they argue that the true strict liability found in *Rylands* rests on a "licensing-based" conception of liability, which is anomalous in the law of torts. See *id.* at 745 n.5.

11. See, e.g., RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (AM. LAW INST. 1998) (emphasizing that products liability attaches to the product itself and not to the conduct involved in designing, manufacturing, and marketing the product).

12. 150 P.2d 436 (Cal. 1944).

13. Andrzej Rapaczynski, *Driverless Cars and the Much Delayed Tort Law Revolution 9* (Columbia Law & Econ. Working Paper No. 540, 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2764686](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2764686) [<https://perma.cc/XB5S-7LHK>].

14. See *Escola*, 150 P.2d at 440 (Traynor, J., concurring) ("Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.").

Section 402A of the Second Restatement of Torts embraces Judge Traynor's strict conception of products liability. It provides that "[o]ne 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" even if "the seller has exercised all possible care in the preparation and sale of his product."<sup>15</sup> Even the Third Restatement of Torts, which, as Goldberg and Zipursky observe, pushes the law of products liability back in a negligence direction, preserves the Second Restatement's focus on the product, not on the conduct of those who make and sell that product.<sup>16</sup> Section 1 provides: "One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect."<sup>17</sup> Section 2, "Categories of Product Defect," underscores the fact that it is the product itself—and not the conduct involved in designing, manufacturing, and marketing the product—to which product liability attaches.<sup>18</sup> In determining whether a product is defective, the defendant's conduct is legally irrelevant. This principle holds true for all strict liabilities: just as the imposition of negligence liability does not turn on the blameworthiness of the defendant's conduct, so too the imposition of strict liability does not turn on the defectiveness of the defendant's conduct.

Professors Goldberg and Zipursky are well aware that strict liability causes of action are generally understood not to require establishing that the defendant conducted herself wrongly.<sup>19</sup> They respond with a diverse set of arguments. Sometimes they argue that, contra the conventional understanding, strict liability wrongs do involve violations of a standard of conduct. This is their approach to products liability and to battery and trespass.<sup>20</sup> This strategy involves recharacterizing the "wrong" in question so that it becomes a conduct-based wrong. Products liability, for example, involves the wrong of selling a product that is defective.<sup>21</sup> Trespass and battery involve extraordinarily stringent standards of conduct.<sup>22</sup> In the case of products liability this recharacterization obscures the fact that the safety of the product, not the conduct of the producer, is the focus of the tort.<sup>23</sup> In

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15. RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965).

16. See Goldberg & Zipursky, *supra* note 1, at 773.

17. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (AM. LAW INST. 1998).

18. *Id.* § 2.

19. See Goldberg & Zipursky, *supra* note 1, at 745 ("According to prevailing academic usage, strict liability is liability *without wrongdoing*. A defendant subject to strict liability must pay damages irrespective of whether she has met, or failed to meet, an applicable standard of conduct.").

20. See *id.* at 748–54, 771 (discussing battery, trespass, nuisance, and products liability, respectively).

21. See *id.* at 767 ("The defendant who sells a defective product that injures a consumer violates a standard of conduct. And the standard is not simply 'do not injure a consumer.' The standard is 'do not injure a consumer by sending into commerce a dangerously defective product.'").

22. See *id.* at 748–50.

23. Modern products liability law has a long prehistory. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), is as important a chapter as any in that prehistory. Product

the case of battery, trespass, and conversion, we misunderstand both the conceptual center and normative basis of these torts if we claim that the key to understanding them is that they involve “wrongful conduct.” The key to understanding them is that they require the violation of autonomy rights that plaintiffs do, in fact, have. And that is all they require.

In other cases, Professors Goldberg and Zipursky separate the strict liability from the law of torts proper, either by identifying it with a different body of law or by classifying it as exceptional. For example, they treat vicarious liability as more agency law than tort law,<sup>24</sup> and abnormally dangerous activity liability as a rare repudiation of the accepted principle that torts are wrongs.<sup>25</sup> Their treatment of diverse torts is thoughtful and learned, but the cumulative effect of their strategies of exception (*Rylands v. Fletcher*<sup>26</sup>), expulsion (respondeat superior), and recharacterization (products liability) is to obscure the commonalities that lead courts and commentators to classify these diverse liabilities as instances of strict liability. The implicit consignment of an employer’s strict liability for the torts of its employees to the law of agency is misleading both about the doctrine and about the law of torts, because it overlooks the fact that the strict liability of a master for the torts of its servant has the same “conditional wrong” structure as the abnormally dangerous activity liability growing out of *Rylands*. More generally, the treatment of vicarious liability as an interloper in the law of torts is hard to square with the fact that the strictness of vicarious liability was a generative and transformative doctrine in twentieth-century tort law.<sup>27</sup> Vicarious liability was not a historical relic of an earlier age; it was a fertile source of the general expansion of strict liabilities for most of the twentieth century. Classifying conditional privilege to trespass, strict liability for intentional nuisance, and abnormally dangerous activity liability as separate sui generis liabilities conceals the common structure of these torts. All three doctrines instantiate harm-based strict liability. Harm-based strict liability represents the distinctive wrong of harming justifiably but unjustifiably failing to repair the harm done.<sup>28</sup>

This brief Article cannot do justice to every argument in Professors Goldberg and Zipursky’s rich and learned paper. Instead, it focuses on general reasons to reconsider their claim that most strict liabilities can be recast as conduct-based wrongs. One general reason is that

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liability in *MacPherson* is negligence liability trained on the conduct of product manufacturers. *MacPherson* is, however, superseded by *Escola*, which shifts the focus of products liability law from producer conduct to the safety of the product itself. See Gregory C. Keating, *Products Liability as Enterprise Liability*, 10 J. TORT L. (forthcoming 2017). Goldberg and Zipursky’s conduct-focused characterization of products liability describes the law as it was 100 years ago, not the law as it is today.

24. See Goldberg & Zipursky, *supra* note 1, at 755 n.50.

25. See *id.* at 762–67.

26. (1868) 3 LRE & I App. 330 (HL).

27. See Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285, 1287–88 (2001).

28. See *infra* Part III.

[w]hen strict liability is at stake . . . the law does not give two hoots *either way* about the care that D took. The most inhuman lack of care does not count against her but by the same token the most superhuman investment of care does not count in her favour. It is this double-edged obliviousness to D's precautions that lawyers have in mind when they call liability by the evocative name "strict."<sup>29</sup>

Indeed, what needs to be shown to establish a strict liability claim is not that the defendant conducted himself improperly but that the defendant unjustifiably violated a right, or inflicted harm whose infliction required reparation on the part of the party responsible for its infliction, even though that infliction was not itself wrongful. Recasting various strict liabilities as conduct-based wrongs forces them into a mold that deforms them.

As this Article explains, some strict liabilities are rooted in autonomy rights. Battery, trespass, and conversion are instances of this kind of strict liability. The conduct that constitutes these tortious wrongs is wrong only because such conduct is in fact incompatible with the plaintiff's legally protected power over her person or property. The plaintiff's power of control over their person or their property is the reason for the imposition of liability. Squeezing these torts into the template of conduct-based wrongs puts the emphasis in the wrong place. It emphasizes the wrong when the right does the work. This impedes a clear understanding of the nature and the normative basis of these torts. Other strict liabilities incarnate a distinctive kind of wrong whose essence is "harming-without-repairing."<sup>30</sup> That is they are harm-based strict liabilities. Abnormally dangerous activity liability, respondeat superior liability, conditional private necessity, and nuisance liability as transformed by *Boomer v. Atlantic Cement Co.*,<sup>31</sup> are all cases in point.

Accordingly, Part I of this Article discusses the various species of strict liability generally. Parts II and III then describe in more detail strict liability for blameless conduct (autonomy-rights-based strict liability) and strict liability for justified conduct (harm-based strict liability)—two variants of strict liability that fail to fit the template of conduct-based wrongs proposed by Professors Goldberg and Zipursky.

#### I. ITERATIONS OF STRICT LIABILITY

The term "strict liability" has multiple meanings. The meaning relevant when we speak of strict liability torts as a *form* of tort liability is conceptual. Here, strict liability means liability that is not predicated on defective conduct.<sup>32</sup> Two other meanings are also prominent in tort

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29. John Gardner, *Obligations and Outcomes in the Law of Torts*, in RELATING TO RESPONSIBILITY: ESSAYS FOR TONY HONORÉ ON HIS EIGHTIETH BIRTHDAY 111, 113 (Peter Cane & John Gardner eds., 2001).

30. See *infra* Part III.

31. 257 N.E.2d 870 (N.Y. 1970). For further discussion of *Boomer*, see *infra* Part III.

32. Cf. John Gardner, *Some Rule-of-Law Anxieties About Strict Liability in Private Law*, in PRIVATE LAW AND THE RULE OF LAW 207, 207 (Lisa M. Austin & Dennis Klimchuck eds., 2014) ("In legal parlance, strict liability is liability regardless of fault. 'Fault' here has a

discourse, and these two other meanings are normative, not conceptual. They identify ways in which liability can be imposed on conduct that is not subject to moral criticism. First, some liabilities are strict because they impose liability on *innocent* conduct, on conduct that is morally blameless. This is the kind of strictness that Goldberg and Zipursky point to when they write of the “strict liability in fault.” Other liabilities are strict because they impose liability on *justified* conduct. Instances of each of these kinds of strict liability—liability for blameless conduct and liability for justified conduct—are entrenched in our law of torts.

The imposition of strict liability on morally innocent conduct is prominent in connection with powers of control that the law assigns to people over their own persons and property. The imposition of strict liability on justified conduct is found in various torts that address physical harm. In the first circumstance, tort law takes the view that predicating liability on fault would compromise unacceptably people’s sovereignty over their own persons and possessions. In the second circumstance, tort law takes the view that even though the conduct responsible for inflicting the harm is justifiable, the failure to repair harm justifiably inflicted is not. The object of the law’s criticism is not the defendant’s primary conduct in inflicting injury, but his secondary conflict in failing to repair harm justifiably inflicted.<sup>33</sup>

Each of these two forms of strict liability in tort involves wrongdoing in an extended sense, but neither matches up well with the model of a conduct-based wrong. Autonomy-rights-based strict liabilities address the starkly objective wrong of failing to respect the sovereignty of others over their person and their property. Even justifiable ignorance does not excuse a failure to respect the rights in question. The wrong of “harming without repairing” involves objectionable exploitation—impairing the physical integrity or property of someone else simply to benefit oneself. Because these two common forms of strict liability redress genuine wrongs, they are properly housed in the law of torts. Their character and their basis are, however, misunderstood when they are assimilated to the template of conduct-based wrongs.

There is more than taxonomical correctness at stake in the legal classification of these strict liabilities. Strict liabilities in tort embody distinctive, plausible, and insufficiently appreciated moralities of responsibility. Harm-based strict liabilities articulate a morality of responsibility for unavoidable harm. Such forms of strict liability assert that in a range of diverse circumstances, it is fair for those who inflict unavoidable harm to bear the burden of the harms that they inflict and

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technical lawyers’ meaning. Unpacking that meaning: strict liability is liability that attaches to someone (call her D) for something she did (call it  $\phi$ ing), irrespective of any steps that she took in order not to  $\phi$  and irrespective of whether she knew or had reason to know that she was  $\phi$ ing. Never mind that D did all that it was reasonable for her to do to avoid  $\phi$ ing, all that she was personally capable of doing, even all that it was humanly possible to do. Never mind that she could not reasonably, possibly, imaginably have known that she was  $\phi$ ing.” (footnote omitted).

33. See *infra* note 49 and accompanying text.

unfair to leave the burdens of those harms on those who suffer them.<sup>34</sup> Autonomy-rights-based strict liabilities hold people accountable for violating rights even when the tortfeasor is *reasonably—that is faultlessly*—unaware that they are violating the right. These strict liabilities assert that people can be held responsible for wholly innocent failures to respect the rights at stake because predicating liability on faulty conduct would compromise the rights unacceptably. People’s authority over their own persons, for example, would be diminished if others could touch them in harmful and offensive ways so long as the actors were reasonably ignorant of the harmfulness or offensiveness of their conduct.

When they impose the template of a conduct-based wrong on these torts, Professors Goldberg and Zipursky obscure the fact that it is the stringency of the plaintiff’s right—not the wrongfulness of the defendant’s conduct—that justifies the liability and explains its extreme strictness. The wrong in autonomy-rights-based strict liabilities is violating an autonomy right—*period*.

## II. AUTONOMY-RIGHTS-BASED STRICT LIABILITY

As Professors Goldberg and Zipursky recognize, torts including trespass, battery, and conversion are understood to embody strict liability.<sup>35</sup> These torts—grounded on autonomy rights—are properly characterized as strict for two reasons. First, the basis of liability is that the conduct violates a right that assigns a power of control over some valued domain of discretionary choice.<sup>36</sup> Second, these torts may impose liability on boundary crossings that may be *both* harmless *and* faultless.<sup>37</sup> Thus, all that must be shown to make out a *prima facie* case for liability is that the plaintiff’s right was violated.

If you enter my land, or appropriate my property, without my permission, you have violated my right of exclusive control over such objects, even if your entry is otherwise reasonable. The wrong thus derives *entirely* from

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34. *See infra* Part III. Harm-based strict liabilities have the same formal structure and moral substance as the law of eminent domain. The law of eminent domain only permits the government to take private property when it acts justifiably in doing so, and it requires the government to compensate the owners of that property even though the taking of it was justifiable. *See generally* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

35. Goldberg & Zipursky, *supra* note 1, at 748, 786–87.

36. Leif Wenar, *The Nature of Rights*, 33 PHIL. & PUB. AFF. 223, 233 (2005) (distinguishing helpfully between rights that enable the exercise of powers and rights that ground duties whose protections are enjoyed). The rights at issue in harm-based torts ground duties whereas the rights at issue in sovereignty torts are powers. T.M. SCANLON, *Rights, Goals, and Fairness*, in THE DIFFICULTY OF TOLERANCE: ESSAYS IN POLITICAL PHILOSOPHY 26, 34 (2003), nicely explains how some rights “parcel[] out valued forms of discretion over which individuals are in conflict.”

37. Two useful terms for these torts are “sovereignty-based” and “trespassory-based.” The former calls attention to the connection between these torts and autonomy. The latter term calls attention to the fact that these torts involve the impermissible crossing of boundaries, not the infliction of injury. Professor Arthur Ripstein uses the word “sovereignty.” *See* Arthur Ripstein, *Beyond the Harm Principle*, 34 PHIL. & PUB. AFF. 215, 215 (2006). Professors Goldberg & Zipursky use the word “trespassory.”

the failure to respect the right. Similarly, if you enter my property under an entirely reasonable and innocent misapprehension of where the boundary between my property and yours lies, you trespass. Indeed, you may trespass even if you benefit me—say by trimming, topping, and cleaning my trees of bagworms.<sup>38</sup> So too you may trespass if you are innocently and reasonably mistaken about which building you have permission to use as a set for your movie<sup>39</sup> or if you are simply mistaken about the scope of the permission that I have given you to go about your business on my property.<sup>40</sup> Similarly, you may convert my chattel simply by exercising dominion over it in a way which is “in denial of or inconsistent with [my] rights.”<sup>41</sup> You do not need to intend to deny my rights, or even know that you are denying them.<sup>42</sup> Liability for battery, for its part, may be predicated on innocent touchings, and even on touchings that *benefit* those who are touched without their consent.<sup>43</sup> Medical batteries can instantiate this possibility: a patient can be operated on without her consent and her diseased condition can be cured. She is benefitted by the cure even though her right of control over her own person is violated.<sup>44</sup>

Notwithstanding Professors Goldberg and Zipursky’s protestations, this form of strict liability—the autonomy rights variant—does not fit the template of a conduct-based wrong. In a negligence case—the canonical example of a conduct-based wrong—the issue is whether the defendant conformed her conduct to the standard required by the law. In “sovereignty” or “trespassory” torts, the issue is simply whether the defendant violated the plaintiff’s right. The “duty” is a duty not to violate the right, and any intentional action that violates the right therefore commits the wrong. Rights-violating conduct may be otherwise innocent and even justified. The defendant doctor in *Mohr v. Williams*,<sup>45</sup> for example, benefitted the plaintiff by curing her disease.<sup>46</sup> His conduct was wrong only because it violated her right that he not touch her in a way which exceeded the scope of his permission to do so. To state, as Goldberg and Zipursky do, that the defendant’s action was wrong because it violated a stringent standard of conduct fosters misunderstanding. To commit one of these torts, the only thing that must be wrong with the defendant’s conduct is that it violates the plaintiff’s rights.<sup>47</sup>

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38. See *Longenecker v. Zimmerman*, 267 P.2d 543, 544 (Kan. 1954).

39. See *S. Clys. Ice Co. v. RKO Radio Pictures, Inc.*, 39 F. Supp. 157, 158–59 (S.D. Cal. 1941).

40. See *Cleveland Park Club v. Perry*, 165 A.2d 485, 488 (D.C. 1960).

41. *Zaslow v. Kroenert*, 176 P.2d 1, 7 (Cal. 1946) (en banc).

42. See *id.*

43. See, e.g., *White v. Univ. of Idaho*, 797 P.2d 108 (Idaho 1990); *Vosburg v. Putney*, 50 N.W. 403 (Wis. 1891).

44. See, e.g., *Mohr v. Williams*, 104 N.W. 12 (Minn. 1905). The touching in *Mohr* exceeded the scope of the consent given. See *id.* at 15.

45. 104 N.W. 12 (Minn. 1905).

46. See *id.* at 13.

47. Nominal damages, the customary remedy for these wrongs, underscore this truth. Nominal damages are symbolic, not reparative, and thus publicly affirm that the defendant violated the plaintiff’s rights.

The harm done by assimilating these torts into the template of conduct-based wrongs can be clarified by drawing on Derek Parfit's distinction among belief-relative, evidence-relative, and fact-relative standpoints. This trichotomy permits us to pin down the way in which the conduct necessary to commit trespassory torts differs from the conduct necessary to commit negligent wrongs.<sup>48</sup> Innocent batteries, trespasses, and conversions are *wrongs relative to the facts* (what is actually the case) because they violate rights that their victims actually possess. They are not wrongs relative to the beliefs of the tortious actors because such actors believe themselves to be acting with due regard for everyone's rights. Nor are innocent batteries, trespasses, and conversions *wrongs relative to the evidence* available to those who commit them. It is possible to commit batteries, trespasses, and conversions under the reasonable belief that one has consent, or is on one's own property, or owns the chattel in question. Negligence wrongs, by contrast, require *objective wrongness relative to the evidence*. Those who commit negligent wrongs are objectively failing to exercise reasonable care. This crucial distinction is lost when we characterize battery, trespass, and conversion as conduct-based wrongs. The very feature that makes these torts strict, not fault-based, disappears from view.

Forcing the wrong involved in trespassory torts into a template which conceptualizes all torts as violations of standards of conduct thus impairs our understanding of the nature and basis of these torts. What we want from tort theory is edification, not obfuscation. Conceptually, these torts are strict because establishing their existence does not involve proving that the defendant's conduct was defective: all that must be shown is that the defendant's conduct violated the plaintiff's right. Recharacterizing them by placing wrongful conduct at their center sets back our understanding both at the level of doctrine and as a matter of theory. Doctrinally, characterizing these torts as conduct-based wrongs obscures the fact that the relevant rights do the work. Theoretically, that characterization hinders clear recognition of just how strict the responsibility imposed by these torts is.

### III. HARM-BASED STRICT LIABILITY

Harm-based strict liabilities occur in vicarious liability law, products liability law, in the law of conditional privilege to trespass, in abnormally dangerous activity law, and in nuisance law.<sup>49</sup> All of these harm-based

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48. See1 DEREK PARFIT, ON WHAT MATTERS 150–53 (2011).

49. As Professors Goldberg and Zipursky similarly recognize. See generally Goldberg & Zipursky, *supra* note 1. Myriad cases and Restatement provisions recognize instances of this form. See *Konradi v. United States*, 919 F.2d 1207, 1210 (7th Cir. 1990) (“The liability of an employer for torts committed by its employees—without any fault on his part—when they are acting within the scope of their employment, the liability that the law calls ‘respondeat superior,’ is a form of strict liability.”); *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 440 (Cal. 1944) (imposing strict liability on defendant for an exploding Coca Cola bottle); *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221, 221–22 (Minn. 1910) (holding that conditional privilege to trespass requires compensating plaintiff for damage to its dock even though that damage was justifiably inflicted); RESTATEMENT (SECOND) OF TORTS §§ 519–520 (AM. LAW INST. 1977) (explaining that liability for abnormally dangerous activities is strict

liabilities are strict in that they impose liability on warranted, justified conduct. Accordingly, the ground of liability is not unreasonable conduct, but unreasonable harm.<sup>50</sup> Negligence liability, by contrast, targets conduct that is unjustified—conduct that is unreasonable and harmful because it does not show due regard for the property or physical integrity of those that it harms. Conduct-based wrongs express criticism of primary conduct.<sup>51</sup> The law focuses its criticism on the infliction of harm in the first instance and judges that the conduct responsible for inflicting that harm was wrongful. The harm, therefore, should have been avoided.

Because harm-based strict liabilities predicate responsibility on the judgment that the conduct at issue was justified (or reasonable) in inflicting injury, but unjustified (or unreasonable) in failing to repair the injury done, such liabilities embody secondary criticism of conduct. The law aims its criticism at “harming-justifiably-without-repairing.” Such strict liability identifies a kind of conditional wrong. It circumscribes a domain within which the infliction of harm is justifiable, but it does so only on two conditions: (1) that the conduct inflicting injury is reasonable and (2) that reparation is made for physical harm done by that reasonable conduct.

The doctrine of *Vincent v. Lake Erie Transportation Co.*<sup>52</sup>—conditional privilege in the law of private necessity—illustrates the distinction between criticizing primary conduct and criticizing secondary conduct. The defendant ship owner’s conduct in lashing its ship to (and damaging) the plaintiff’s dock was reasonable.<sup>53</sup> The defendant had the right to use the dock to save its ship from the storm, even if using the dock involved damaging the dock.<sup>54</sup> The plaintiff could not justifiably complain that it was wronged by the defendant’s lashing of its ship to the plaintiff’s dock, even though that conduct damaged the dock. Legally, the defendant’s privilege to trespass was not conditioned on not harming the dock, a requirement that would have been virtually impossible to meet in the circumstances.<sup>55</sup> The defendant’s privilege was, however, conditioned on making reparation for any harm done to the dock *even though that harm*

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and attaches even though reasonable care to avoid harm is exercised); RESTATEMENT (SECOND) OF TORTS §§ 826, 829 (AM. LAW INST. 1979) (stating that justified conduct can create a nuisance if the harm it inflicts is sufficiently severe).

50. I develop this distinction at length in Gregory C. Keating, *Nuisance as a Strict Liability Wrong*, 4 J. TORT L. 1 (2012).

51. I credit this characterization to Lewis Sargentich. Robert Keeton’s dichotomy between “fault” and “conditional fault” similarly illustrates this distinction. See Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 418 (1959).

52. 124 N.W. 221 (Minn. 1910).

53. See *id.* at 221–22.

54. See *id.*

55. See *id.*; see also Francis H. Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality*, 39 HARV. L. REV. 307, 319 (1926) (explaining that the doctrine of public necessity is unqualified and so does not require compensation by observing that “it may well appear unfair to make [a defendant] bear the entire burden of the loss which he causes” when the defendant “destroyed personal property for the protection of the public interest, or for the protection of others than himself as well as of himself”). Along with Keeton’s work, see Keeton, *supra* note 51, Bohlen’s article is a classic on the essential features of harm-based strict liability.

*was done rightly and not wrongly.*<sup>56</sup> Consequently, the wrong in *Vincent* was not that the defendant damaged the plaintiff's dock but that the defendant failed to step forward in the aftermath of the storm and remedy the damage done.<sup>57</sup>

Nuisance liability is another canonical incarnation of harm-based strict liability. Like conditional privilege in *Vincent*, nuisance liability is liability for unreasonable harm as opposed to liability for unreasonable conduct. A nuisance is "a substantial and unreasonable interference with the plaintiff's use and enjoyment of his property."<sup>58</sup> The harm of "substantial and unreasonable interference" is the cornerstone of nuisance liability. The *impact* of the defendant's conduct on the plaintiff's use of its property must be *unreasonable* but the *conduct* responsible for that impact can be entirely *reasonable*.

On the one hand, this focus on interference distinguishes the harm-based strict liability of nuisance law from the autonomy rights-based strict liability of its companion real property tort, trespass.<sup>59</sup> Trespass does not require the infliction of harm; it requires only an unconsented-to boundary crossing.<sup>60</sup> On the other hand, this focus on harm distinguishes nuisance liability from negligence liability and makes nuisance liability strict. Nuisance liability does not require wrongful conduct on the part of the defendant; it requires only that the defendant's conduct result in a substantial and unreasonable interference with the plaintiff's use and enjoyment of its property. The conduct responsible for that interference may be beyond reproach.

The fact that the tort of nuisance does not require wrongful conduct is best illustrated by the court's decision in *Boomer* not to order injunctive

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56. Such privilege can be considered a power in Wesley Hohfeld's terms because it allows the ship owner to modify its relationship with the dock owner absent the dock owner's permission so long as the ship enters the dock owner's property for certain purposes (to preserve its own property) and conducts itself in certain ways (only does what is necessary to preserve such property). See generally WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS (Walter Wheeler Cook ed., 1923).

57. Professors Goldberg and Zipursky argue that the concept of a conditional wrong is untenable because plaintiffs in such cases need not prove that defendants failed to pay. See Goldberg & Zipursky, *supra* note 1, at 766. They are right that no such proof is needed. Plaintiff need only prove that the defendant harmed her. The duty to repair the harm arises when harm is inflicted. If plaintiff and defendant cannot agree on what such reparation requires, the matter is for a court to determine simply because no one can unilaterally determine that they have discharged their legal obligations. The parties to a wrong may collectively so decide, but no one party has the authority to so decide unilaterally.

58. *O'Cain v. O'Cain*, 473 S.E.2d 460, 466 (S.C. Ct. App. 1996).

59. Strictly speaking, nuisance is also rights based. The right involved is the right to the reasonable use and enjoyment of one's land. The locution "harm based" is not meant to deny this point. It is meant to emphasize the fact that harm is required to violate the right to the reasonable use and enjoyment of property. It is not required to violate the right to exclusive control of one's property, which the tort of trespass protects.

60. See *supra* Part II (noting that even the beneficial entry of another's property can be a trespass).

relief and instead to order the payment of money damages.<sup>61</sup> The court did not enjoin the defendant's nuisance because the defendant was already taking all possible precautions to reduce the emissions from its cement plant that were fouling the plaintiff's property.<sup>62</sup> Enjoining the nuisance would entail shuttering the cement plant. Moreover, the defendant's conduct was free of fault, but harmful nonetheless. *Boomer* thus shows that reasonable conduct can unreasonably interfere with the use and enjoyment of neighboring land. Some nuisances are the unavoidable side effects of activities that we are not prepared to forego. Strict liability in *Boomer* thus imposes responsibility for harm that should not be avoided. Put differently, the case bases liability on the fact that the defendant's conduct interfered with the plaintiff's right to the reasonable use and enjoyment of its property to such an extent that the plaintiff should not have had to bear that harm absent compensation. The conduct responsible for inflicting the injury was not wrongful. *Boomer*, like *Vincent*, asserts that harm that should not be avoided should be borne by those who inflict it and who benefit from so doing.

Professors Goldberg and Zipursky recognize that nuisance liability presents a challenge to their account of torts as conduct-based wrongs because "nuisance liability is in some sense strict."<sup>63</sup> Consequently, they discuss it at some length and wedge it into their one-size-fits-all model of tortious wrongs by arguing that nuisance involves both the harm of substantial interference and the wrongful conduct of failing "to tailor one's activities on one's own property in a manner appropriate to [its] use and location."<sup>64</sup> This thesis fails to capture some canonical nuisance cases, including *Boomer*. If the court had concluded that Atlantic Cement was committing a nuisance by manufacturing cement in an inappropriate location, it would have enjoined the nuisance and closed the plant. Moreover, this assertion subtly misunderstands just what the locality rule means to explain. Its role is to determine when an interference is substantial and unreasonable, not to add an additional requirement of unreasonable conduct to the elements of nuisance liability. Nuisance is

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61. See *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 875 (N.Y. 1970); see also *Clifton Iron Co. v. Dye*, 6 So. 192, 193 (Ala. 1889) (refusing to grant an injunction because the nuisance was unavoidable).

62. This aspect of *Boomer* is well understood and influential. See, e.g., *Copart Indus., Inc. v. Consol. Edison Co. of N.Y.*, 362 N.E.2d 968, 973 (N.Y. 1977). The *Copart* court clearly distinguishes the impact or harm constitutive of nuisance from wrongful conduct. Writing about the trial court decision in *Boomer*, the court observed: "[I]t is obvious that it was not a nuisance in which the substance of the wrong was negligence since it was held that 'the evidence in this case establishes that Atlantic took every available and possible precaution to protect the plaintiffs from dust.' Rather, it would appear that the nuisance found was based on an intentional and unreasonable invasion . . . ." *Id.* at 973 (citation omitted) (quoting *Boomer v. Atl. Cement Co.*, 287 N.Y.S.2d 112, 113 (Sup. Ct. 1967), *overruled on other grounds by Boomer*, 257 N.E.2d 870). As this passage makes clear, a nuisance founded on the unreasonable invasion of the plaintiff's property does not require conduct which is faulty or otherwise wrongful. All that it requires is conduct whose impact invades plaintiff's right.

63. Goldberg & Zipursky, *supra* note 1, at 752.

64. *Id.* at 754.

about wrongful invasion, interference, and impact. It is not about wrongful conduct.

Forcing nuisance into the template of a conduct-based wrong results in losing sight of the distinction between negligence and harm-based strict liability, and the different moralities of responsibility that these competing forms of tort liability embody. Negligence liability holds that “I am not responsible for any damage . . . [I] unavoidably do my neighbor,”<sup>65</sup> whereas strict liability holds that unavoidable harms ought to be shouldered by those responsible for their infliction. We need abnormally dangerous activities and must, therefore, live with their irreducible risks.<sup>66</sup> We need public and private firms and must, therefore, acknowledge that harms are “likely to flow from [their] long-run activity in spite of all reasonable precautions on [their] own part.”<sup>67</sup> We need products whose risks are not wholly eliminable by the exercise of proper precaution. In all of these cases, unavoidable and justified harms are inflicted, and strict liability is imposed on the ground that he who inflicts unavoidable harm in pursuit of its own benefit must take the bitter with the sweet and bear the cost of the harm that he inflicts.

#### CONCLUSION

The role of a theory is to illuminate the subject it theorizes. When we force tort’s strict liabilities into the procrustean template of conduct-based wrongs, we condemn ourselves to seeing the law of torts through a glass darkly. We can see the character of these liabilities more clearly if we abandon the quest for a single master conception of all tort liabilities and accept the fact that tort is a field riven by competing forms of liability. Tort includes both strict and fault-based liabilities, and these are fundamentally different. Professors Goldberg and Zipursky have done us all a service both by reviving William Blackstone’s understanding that the law of torts is a law of wrongs<sup>68</sup> and by championing the concept of conduct-based wrongs.

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65. *Losee v. Buchanan*, 51 N.Y. 476, 484–85 (1873).

66. According the Second Restatement of Torts, “What is referred to here is the unavoidable risk remaining in the activity, even though the actor has taken all reasonable precautions . . . . The utility of his conduct may be such that he is socially justified proceeding with his activity, but the unavoidable risk of harm that is inherent in it requires that it be carried on at his peril, rather than at the expense of the innocent person who suffers harm as a result of it.” RESTATEMENT (SECOND) OF TORTS § 520 cmt. h (AM. LAW INST. 1977). This observation is made about abnormally dangerous activity liability, but it applies to all harm-based strict liabilities.

67. *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 171 (2d Cir. 1968) (quoting 2 FOWLER V. HARPER & FLEMING JAMES, JR., *THE LAW OF TORTS* 1377 (1956)). Strictly speaking, vicarious liability will not always apply to harms because agents may commit underlying torts which are sovereignty based not harm based. The wrong in the master, however, remains the same: it consists of failing to make reparation for the tort of the servant even though the master’s conduct in connection with the commission of that tort is beyond reproach. The strict liability of the master is, therefore, never a conduct-based wrong.

68. See John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 918 (2010) (characterizing “private wrongs” as “an infringement or privation of the

This conception elegantly epitomizes negligence liability: victims of negligent conduct are wrongly harmed by defendants who failed to conform their conduct to that of a reasonable person.

Not all tortious wrongs, however, fit the model of a conduct-based wrong. When strict liability is predicated on an autonomy right, the victim's complaint is that the defendant violated his rights, full stop. Whether the conduct responsible for violating those rights was wrong is beside the point. The point is that the right has been violated. When the strict liability involves the infliction of harm, the victim's complaint is not that he was wronged by the injury-inflicting conduct. Harm-based strict liabilities do not require that there be anything wrong with the conduct responsible for inflicting the injury in the first instance. The wrong lies in unjustifiably saddling the victim with a burden that should be shouldered by the defendant. Here, the lesson is not that the defendant conducted herself wrongly in inflicting injury; the lesson is that she wrongs the victim if she does not repair the harm she has inflicted.

In forcing strict liabilities into the mold of conduct-based wrongs, Professors Goldberg and Zipursky restate and recast the old claim that in tort there is no liability without fault. This is mistaken. Tort law contains strict liabilities as well as fault-based ones. These are fundamentally different forms of liability and, when harm is involved, they embody competing moralities of responsibility. Fault liability imposes liability on harm that should have been avoided *because* that harm should have been avoided. Strict liability imposes liability on harm which should *not* have been avoided, because it is unfair for the defendant to reap the benefits of inflicting justifiable harm on the plaintiff while saddling the plaintiff with the burden of suffering with the harm that is the price of the defendant's benefit.

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private or civil rights belonging to individuals" (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES \*2)).