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WHO ARE THE BEARERS OF TORT LAW'S DUTIES?

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Abstract: Like corrective justice theorists, Gregory Keating contends that tort law is centrally concerned with the vindication of individual rights. Like economic theorists, he rejects the idea that individual injurers are the inevitable site of tort duties. While some tort doctrines instantiate relational rights and duties, others instantiate collective duties to potential victims. There is thus a deep continuity between tort law and administrative law according to Keating. Is such a conception of tort law compatible with a principled commitment to deontological morality or will it inevitably devolve into a utilitarianism of rights where tort rights and duties are merely instrumentally justified as mechanisms for the protection of individual rights against harm? I will argue that at least some of the institutional heterogeneity that Keating highlights and defends can be a principled entailment of deontological theorizing, if we move away from an understanding of torts as wrongs to a view of tort law as a site of deliberation about what justice between the parties requires in the face of normative uncertainty about justice.

Economic theorists of law view tort law as an institution for realizing a collective end—the maximization of social welfare. The individual duties of tort law have only instrumental significance arising from the ways they work together with other rules to produce collectively optimal outcomes. Qua legal duty-holders, persons are mere agents of the collective, following rules that further the collective end. Qua legal right-holders, they are private attorneys' general, holding others accountable for breaches of collective duties. At the moral level, there is, in effect, a single right holder—the entity embodying our collective ends.

Corrective justice and civil recourse theorists, by contrast, view tort law as a site of relational rights and duties. The individual duties of tort law have intrinsic significance, expressing what persons owe to others morally speaking. And right-holders speak for themselves when they seek legal enforcement of their rights.

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In his deep and illuminating book, *Reasonableness and Risk*, Gregory Keating carves out a conception of tort law that sits on neglected middle ground between these extremes. Keating agrees with corrective justice theorists that tort law is centrally concerned with the vindication of individual rights, but he joins economic theorists in rejecting their commitment to the individual injurer as the inevitable site of the relevant duties. Thus, he rejects the idea that tort rules necessarily reflect relational duties owed by potential injurers to potential victims. In at least a range of cases, they instantiate collective duties. There is thus a deep continuity between tort law and administrative schemes that combine the direct regulation of risk with social insurance. Keating's concerns here are in part practical ones about the inability of money damages to repair serious harm to a victim's person and, in some cases, their property (185-86). More strikingly, though, he suggests that parts of tort law might even yield to administrative law entirely as has happened in New Zealand, with the communities of those who engage in risky activities collectively protecting those who end up injured through ex ante risk regulation and social insurance (77, 118-19). At the same time, however, Keating views fault-based tort doctrines that are more straightforwardly accounted for by corrective justice theory as properly vindicating what we owe to one another (125).

While Keating makes a powerful case that there are multiple and overlapping bearers of tort duties, it isn't clear to what extent he regards these duties and their location across various entities as instrumentally justified by the protection they provide to individual rights or non-instrumentally justified as direct entailments of deontological political morality. Keating agrees with the corrective justice theorists that "wrongs and rights [are] at the center of the institution" (60). The substantive norms of tort law tell us what justice between the parties requires: the negligent defendant ought to have taken the reasonable precautions that would have prevented the plaintiff from being injured; having breached that primary norm, the defendant ought to compensate the plaintiff for his injuries (52, 60). At the same time, Keating views the substantive considerations of justice that ultimately justify both tort and administrative law as arising from the same fundamental concern—the importance of "safeguarding our right to physical integrity" (44). In the domain of worker safety, for example, "[w]hether workers' compensation (plus safety regulation) or tort law does a better job of protecting workers' urgent interests in physical

safety is . . . the most important question to ask about the choice between them" (45). It seems that the relationality of tort rights and duties has dropped out of the picture or been rendered contingent on the extent to which it promotes our underlying interests in physical safety.

Has Keating departed from core deontological commitments in favor of a kind of utilitarianism of rights? Or can collective and relational duties simultaneously be principled entailments of deontological commitments? Is there a way to draw jurisdictional boundaries between tort and administrative risk regulation that doesn't simply reduce to claims about the superior efficacy or one over the other in protecting our fundamental rights to safety and security in certain domains of social life?

I will argue that at least some of the institutional heterogeneity that Keating highlights and defends can be a principled entailment of rights-based political morality, if we move away from an understanding of torts as wrongs to a view of tort as a site of deliberation about what justice between the parties requires. What is distinctive about tort as an institution compared to administrative schemes of risk regulation is the way in which it gives private parties wide latitude to resolve their disputes in ways that might diverge from the outcomes that would be prescribed by the substantive norms that regulate disputes that are litigated to a conclusion. Wrongs-centered views of tort don't have an easy way to explain why tort grants this discretion to private parties: if there is an injustice that meets a certain level of seriousness, the law should step in to correct it, regardless of the wishes of the parties.[1] But, as I argue elsewhere and sketch below, if we view tort liability as a mechanism for encouraging deliberation between the parties about what justice between them requires where there is normative uncertainty about what that entails, we can offer a principled justification of this institutional fact.[2] As I will now argue, we can also provide a framework for theorizing about the boundary between tort and administrative schemes that protect the same fundamental rights to physical security and integrity.

[1] Rebecca Stone, 'Who has the Power to Enforce Private Rights?' in Paul B Miller and John Oberdiek (eds.) *Oxford Studies in Private Law Theory, Volume 2* (Oxford University Press 2023). See also Benjamin C. Zipursky, 'Civil Recourse, not Corrective Justice', *Georgia Law Review* 91 (2003): 741; John C.P. Goldberg & Benjamin C. Zipursky, *Recognizing Wrongs* (Harvard University Press 2020), p. 162.
[2] Stone, 'Who has the Power to Enforce Private Rights?'.

I develop my argument by focusing, as Keating does in much of his book, on the choice between negligence and strict liability. While much of accident law is governed by negligence, liability is strict for those who harm others while engaging in so-called abnormally dangerous activities. This harm-based strict liability is prima facie puzzling for those who view tort liability as premised on wrongdoing, because engaging in the activities themselves doesn't appear to be prohibited. Even if wrongdoing is understood in the weak sense of breaching a duty owed by injurer to victim, rather than the strong sense of acting in ways that are morally blameworthy, as most theorists in this tradition insist, it's not obvious where the wrong lies if the underlying activity is permissible. Thus, John Goldberg and Benjamin Zipursky insist that such strict liability is anomalous.[3] Others like Arthur Ripstein argue that, contrary to appearances, injuring a person for engaging in such an activity is in fact wrongful in a similar way to negligence—both types of conduct injure others by imposing on them excessive risk.[4] Keating charts an intermediate course, contending that while it isn't wrongful to engage in activities that are subject to harm-based strict liability, it is wrongful not to compensate those who are injured as a result of our engagement in them (248).

But what if the search for a wrong is futile because tort liability isn't essentially predicated on breaches of relational duties? Despite Keating's claim that strict liability involves a kind of wrong, the seeds of such an alternative approach can be found in his argument that we should focus on the different allocation of responsibility that is entailed by each type of liability regime (283-84). Negligence leaves residual risks that remain after due care is taken on passive victims, whereas strict liability assigns that risk to the creators of the risk.

On the alternative view that I develop, tort liability tracks a form of relational responsibility that can arise even when the injurer hasn't wronged the victim. And what is distinctive about activities that are subjected to ordinary negligence liability compared to some of those that the law subjects to strict liability—in particular, those that get classified by the law of tort as abnormally dangerous—is that the former are central to our social and economic lives in ways

[3] John C.P. Goldberg & Benjamin C. Zipursky, *The Oxford Introductions to U.S. Law: Torts* (Oxford University Press 2010), p. 267.
[4] Arthur Ripstein, *Private Wrongs* (Harvard University Press 2016), pp. 102-03, 127-28.

that the latter are not and so properly lie within the domain of collective responsibility. This makes it incumbent on the collective to devise appropriate standards of conduct and allocate the burdens associated with the residual risks in a just way. When the collective discharges this duty, it may also absolve persons of individual responsibility for engaging in such activities in collectively authorized ways. Abnormally dangerous activities, by contrast, are entirely within the realm of individual responsibility and thus appropriately subject to strict liability.

I. Detaching Liability from Wrongdoing

While the absence of an obvious wrong at the heart of strict liability makes it look prima facie anomalous, there are in fact several other ways in which tort liability fails to track wrongdoing—even when wrongdoing is understood as entailing nothing more than (possibly morally blameless) infringements of others' moral rights.[5] The average reasonable person standard in negligence imposes strict liability on those with subpar capacities.[6] Intentional torts like trespass and battery impose strict liability on those who intentionally cross boundaries of another's property or person without realizing they are crossing such a boundary.[7]

Keating argues that the latter "sovereignty-based" forms of strict liability have different grounds from "harm-based" strict liability for permissible risk-imposing activities (232-33). They impose liability for "crossing a normative boundary established by a right . . . even if that crossing is wholly innocent and therefore morally excused" (232) or for failing to take the level of care we are entitled to demand of others regardless of their ability to meet those standards (246). Harm-based strict liabilities, by contrast, don't reflect a judgment that persons ought not to engage in the activities from which such liabilities arise; only that they ought to compensate those who suffer harm as a result (235-36).

[5] This is the thin sense of wrongdoing that is at the heart of corrective justice and civil recourse theory. See Ripstein, *Private Wrongs*, p. 87; Goldberg & Zipursky, *Recognizing Wrongs*, pp. 189-90.
[6] John C.P. Goldberg & Benjamin C. Zipursky, 'The Strict Liability in Fault and the Fault in Strict Liability', *Fordham Law Review* 85 (2016): 746-48.
[7] Ibid. 748-49.

Yet it isn't clear that the distinction is a meaningful one. Consider a person of subpar capacities. Such a person is not prohibited from engaging in activities that are regulated by negligence. And when she drives to the best of her abilities in a subpar fashion, she faces duties to compensate anyone she ends up harming as a result.

What clearly does matter to victims and injurers alike (regardless of fault) is the allocation of losses between victims and injurers. A negligence regime leaves losses with victims so long as their injurers took reasonable care. A harm-based strict liability regime shifts all losses to the injurers. Once we attend to this difference, it seems that negligence stands in greater need of a justification than strict liability.

This is where Keating's general observation that collective duties are relevant to understanding tort law can help. The content of tort norms is shaped not only by conceptions of individual responsibility and associated notions of wrongdoing but also by our sense of the point at which individual responsibility begins because collective responsibility has run out and vice versa. Framed in these terms, the crucial difference between the regimes is that strict liability makes the harms it regulates a matter of individual responsibility, while negligence makes it so only for harms arising from actions that show individual fault in failing to comply with the standard of care with the collective responsible for the rest.

This might look like a purely semantic move—replacing individual wrongdoing with responsibility, individual or collective—that simply begs the original question. But the move isn't a semantic one if the notion of responsibility at work is one that isn't coterminous with wrongdoing. As civil recourse theorists have emphasized, a distinctive feature of the way in which tort law (and private law more generally) regulates our interactions is not through the righting of legal wrongs as such, but through the empowering of victims of legal wrongs to seek redress from wrongdoers.[8] This means that victims might decide not to pursue viable claims or to settle them in ways that depart from how they would be resolved were they litigated to their

[8] Goldberg & Zipursky, *Recognizing Wrongs*, p. 162.

conclusion.[9] If we take this institutional feature of tort at face value, strict liability entails only that victims are legally empowered to seek damages without a showing of fault, not that they will or ought to do so in order to make things right.

How can we account for this institutional feature of tort? One possibility is that we empower victims in this way as the best way of ensuring that their claims get vindicated in full, thus doing justice between them. But an instrumental justification of this kind leaves much up to happenstance, and so fits awkwardly with a deontological commitment to the vindication of persons' rights. It is also awkward to reconcile with the ways in which liability doesn't seem to be coterminous with wrongdoing, especially once we have in view the ways in which wrongdoing may be sensitive to the peculiar circumstances of the parties' relationship. If wrongdoing is context sensitive in these ways, the just result in some circumstances might be for the victim not to pursue her claim or settle her claim for a lesser amount in damages than any judgment she could expect to get. From this vantage point, tort law has got it right in not forcing a particular result, and we should view the substantive rules of tort law not as necessarily prescribing just outcomes but rather as setting default rules that prompt the parties to deliberate about what justice between them demands. In other words, the notion of responsibility that tort law is built on is one that encompasses the injured as well as the injurer taking seriously a moral responsibility to determine what justice between them requires.

II. Individual and Collective Responsibility

On the view I favor, then, the ideal tort dispute ought to be regarded not so much as a site for vindicating the rights of the plaintiff against the defendant but rather as a site for deliberation between plaintiff and defendant about what justice between them requires. Much more needs to be said in defense of this idea, some of which I have set out elsewhere.[10] For now I will briefly sketch the central components of the conception.

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[9] As John Gardner puts it: "the most extensive legal powers to determine the powers of the court, those most akin to those of a criminal prosecutor, lie with the very person who claims to have been wronged." John Gardner, *From Personal Life to Private Law* (Oxford University Press 2018), p. 200.

[10] Stone, 'Who has the Power to Enforce Private Rights?'; Rebecca Stone, 'Tort as Contract' (unpublished manuscript). See also Rebecca Stone, 'Private Liability without Wrongdoing', *University of Toronto Law Journal* 87 (2023), pp. 53-87.

While I deny that tort liability in fact closely tracks wrongdoing, tort law on my conception is ultimately grounded in what we owe one another morally—in what we owe one another as a matter of substantive justice. Justice, as I use the word, encompasses the set of normative considerations that regulate what we owe one another morally speaking in light of the conflicts that inevitably arise from our clashing partial perspectives.[11] What exactly justice entails cannot easily be pinned down in advance, because there is tremendous normative uncertainty about what we owe one another. The management of this normative uncertainty is, I contend, what private law is ultimately all about.[12]

If there weren't normative uncertainty about justice, tort liability should track relational wrongdoing, arising when and only when a person wrongs another. But normative uncertainty complicates the picture, and indeed raises a moral problem at a second level—the problem of allocating authority to settle normative uncertainty about matters of justice between the parties. A central assumption of my conception is that normative uncertainty ought to be settled by those whose rights are implicated by its resolution. Such an allocation of authority instantiates liberal values of autonomy and equal respect for persons—autonomy because empowering those whose rights are implicated by the uncertainty gives them authorial control of the rules that regulate their relationships with others, and equal respect because the ensuing allocation gives every person authority when it comes to matters that implicate their own rights.

The result is to empower parties to settle by agreement normative uncertainty about what justice between them requires. But how they may do this is procedurally and substantively constrained. Their agreement is morally valid when it arises from good faith deliberations between the parties about what justice between them requires and when the ensuing agreement represents a substantively plausible resolution of applicable normative uncertainty. They may not agree to something that is clearly unjust.[13]

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[11] For further elaboration of the theoretical framework, see Rebecca Stone, 'Putting Freedom of Contract in its Place', *Journal of Legal Analysis* (forthcoming).
[12] Stone, 'Tort as Contract'; Stone, 'Putting Freedom of Contract in its Place'.
[13] A morally valid settlement is just a particular type of morally valid contract. For more on my general conception of contract, see Stone, 'Putting Freedom of Contract in its Place'.

In contrast to this picture, much theorizing about tort law proceeds as if we can offer determinate answers to questions of justice between the parties or as if we can avoid such substantive questions entirely. Insofar as he characterizes our tort duties as duties potential injurers owe their potential victims, Keating adopts the former strategy. The economists for their part also fail to reckon with normative uncertainty by taking the high-level normative question to be settled: the correct rules are whichever rules maximize social welfare. Figuring out what those rules are may raise complicated empirical questions, but there is no doubt what we are aiming at normatively speaking. The Kantian corrective justice theorists, by contrast, pursue an avoidance strategy by prioritizing equal procedural freedom in the name of securing the independence of each from all.

I think both strategies are mistaken—the approach of Keating's and the economists because of the complexity of and attendant normative uncertainty about ultimate questions of justice, and that of the Kantians because of the normative implausibility of according lexical priority to independence. If we reject the priority the Kantians accord to equal procedural freedom in favor of a conception of private law that has substantive justice at its foundation, we must contend with the fact that figuring out what substantive justice entails is a tremendously complex normative problem. This means giving up on the idea that private liability tracks wrongdoing.

While tort law can and likely does prohibit some transparently unjust behavior notwithstanding the fact of considerable normative uncertainty, it more often operates in a grey zone where it is less clear what justice between two parties demands. How should we think of tort law when it is operating in this grey zone? On my conception, we should regard tort law as setting default standards that are likely to approximate what justice between averagely situated parties demands but don't purport to settle the question as a final matter. Indeed, I believe we should say something stronger than this: it is desirable that tort law not offer the final word because normatively uncertain relationship-specific questions of justice are properly resolved by those whose moral rights are implicated by them.

This doesn't mean that relationship-specific matters ought to be left to private ordering. Private settlements have to meet demanding procedural and substantive constraints to be morally valid.

There is therefore need for public oversight of the settlement process. Legal defaults must also be fashioned with an eye to what justice between parties plausibly entails given the possibility that the parties don't reach agreement. But ultimate responsibility for resolving applicable normative uncertainty about relationship-specific questions of justice is properly assigned to the parties.

When it comes to matters of collective responsibility, by contrast, it is not the job of the injurer and the victim together to resolve uncertainty about what justice demands. It is a matter for the collective, acting through representative institutions such as the organs of the administrative state.[14]

This, I suggest, is how we should think about the boundary between tort law and administrative law. The former is an institution for facilitating private resolution of normatively uncertain questions about relationship-specific justice. The latter is an institution for facilitating collective resolution of normatively uncertain questions about justice writ large.

What determines whether a question of justice is a matter for the collective or for the parties? When the question arises from activities that persons have predominantly private reasons to undertake, applicable normative uncertainty is properly managed privately by the parties. When a question arises from activities that we collectively have reason to pursue given our shared interest in cooperative activities or practices, applicable normative uncertainty is properly managed by the collective.[15] While both individual and collective reasons will sometimes operate alongside one another making a clear separation impossible, our institutions should aim as far as is feasible to channel resolution of questions of justice of the former type to institutions of private settlement and the latter type to institutions that represent all of us.[16]

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[14] For a defense of a vision of administrative law along these lines, see Blake Emerson, 'Vindicating Public Rights', *University of Pennsylvania Journal of Constitutional Law* 26 (forthcoming 2024).

[15] See Blake Emerson, 'Collective Rights and the Obligations of Good Government' in Nicholas Kirby (ed) *What is Good Government* (Oxford University Press forthcoming) (distinguishing public right from private right and associating good government with the protection of the former and as a necessary adjunct of the latter).

[16] There are both private and collective dimensions of rights against discrimination and sexual harassment, for example. On discrimination, see Adi Goldiner, 'Discrimination as a Public Wrong', *Oxford Journal of Legal Studies* (forthcoming). Non-disclosure agreements that prohibit victims of sexual harassment from speaking out about what happened to them implicate the rights of other victims and potential victims.

In the context of accident law, a question of justice is relationship specific when it depends on what transpired between the parties given the circumstances of their relationship in light of the individual reasons they had to pursue the activities that gave rise to the accident. This doesn't mean that systemwide questions of justice are irrelevant. It means that such questions are relevant only insofar as they bear on the parties' relationship. If, for example, one party is unjustly rich and the other unjustly poor because of systemic injustice, a just resolution of their dispute may need to take heed of that disparity. Whether and how it should is a complex matter about which there is much normative uncertainty. But that is normative uncertainty that the parties ought to resolve because it is a relationship-specific matter, even though it depends on systemic injustice that is primarily the community's responsibility.

III. Strict Liability and Negligence

Consider ordinary risk-creating activities that we all engage in or benefit from to some degree in our everyday lives because they are deeply woven into the fabric of society. Driving is a canonical example. Most people do some amount of it and/or directly and indirectly benefit from others' driving in myriad ways. We construct our social and economic lives around the fact that driving is a ubiquitous way of getting around.

Keeping a lion in one's backyard, by contrast, is an activity that primarily serves the idiosyncratic ends of the person engaging in it. Neighbors won't feel inclined to adjust their behavior to accommodate their eccentric neighbor. Most will strongly prefer not to have a lion nearby, even when the owner takes precautions that keep the risk of the lion escaping and injuring a neighbor to a minimum.

Activities like driving are generally regulated by negligence while activities like lion keeping are regulated by strict liability. The different treatment is often justified by appeal to a distributive notion of fairness: the risks are reciprocal in the former case and non-reciprocal in the latter.[17]

[17] George P. Fletcher, 'Fairness and Utility in Tort Theory', *Harvard Law Review* 85 (1972): 537-73.

But any notion of distributive fairness that might be invoked here seems too rough and ready to do justificatory work. The benefits and burdens of driving are not distributed in a perfectly egalitarian fashion. People have their own individual reasons to drive and to rely on others' driving that diverge significantly across persons. Even when it comes to eccentric activities like keeping a wild animal in one's yard, benefits likely redound to others who aren't engaging in the activities to a greater or lesser extent. Perhaps some neighborhood kids enjoy listening to the lion roar. While the benefits and burdens are likely more equitably distributed in the case of driving compared to lion keeping, the difference is one of degree rather than kind. Even if lion keeping were a common activity, moreover, it would remain an individualistic pursuit, and subjecting it to strict liability would, I suggest, continue to be apt.

More progress can be made not be thinking in terms of reciprocal and non-reciprocal risks but by distinguishing between practices that we have predominantly collective reasons to engage in and practices that we have predominantly individual reasons to engage in. Driving is at the collective end of the spectrum, because much of what is valuable about it is the fact that we have organized our economic and social lives around it. We thus have powerful collective reasons not merely to permit driving but to encourage it. These are collective reasons because insofar as economic and social life depends on driving, our collective reasons to encourage driving transcend any given individual's own reasons to drive or undertake activities that depend on others driving.

Collectively, of course, we might have done things differently by, for example, restricting opportunities to drive and constructing more comprehensive systems of public transportation. Such a system might be superior to our current system. But any suboptimality here is suboptimality from a collective rather than individual standpoint that would require collective action to correct. It wouldn't make sense for an individual to boycott driving because of its collective suboptimality, even if it would make sense for an individual to seek change through appropriate representative channels. Because we have organized our social and economic life around driving, individual people have collective reasons to support the system rather than boycott it, even if the collective might have come up with something better.

Lion keeping lies at the other end of the spectrum. A person's reasons to keep a lion in their back yard are self-regarding reasons arising from their attachment to the animal or their interest in having a ferocious creature in their backyard. The community at large has no reason to encourage the keeper to continue to do so or otherwise support their hobby.[18]

Of course, many activities lie in a murkier middle ground between driving and lion keeping. Consider the activity of transporting gasoline. Insofar as it is important to all of us that gasoline gets transported, we have collective reasons to permit, even encourage, the activity. At the same time, the risks of a massive explosion injuring many innocent people should make the collective wary, especially if less risky alternatives exist or might be developed. So a judgment will have to be made about whether gasoline transportation is on the predominantly individual or predominantly collective side of the line.

When the reasons to engage in an activity are predominantly collective, it is for the collective to devise the rules that determine how the benefits and burdens of the activity are to be allocated. It is the collective's responsibility to settle applicable normative uncertainty about what justice requires. Duties of care accordingly ought to reflect reasonable collective judgments about how persons' ought to conduct themselves when engaging in such activities, and it is appropriate for judges to be mindful of relevant legislative judgments such as those embodied in the traffic code and zoning ordinances when determining the content of those duties (108). Likewise risks of harm associated with collectively authorized practices are the responsibility of the collective in the first instance. Those injured by the realization of those risks have possible complaints against the collective but not the individuals who injured them while conforming to the collectively determined standards of care. The collective therefore also has duties to establish schemes that

[18] Jordan Wallace-Wolf recently defended a similar conclusion starting from an analogy with promising. He argues that abnormally dangerous activities are distinguishable from ordinary risk-imposing activities because the actor engaging in the activity has assumed the risk they might thereby harm another, much like in making a promise, we assume the risk that we might faultlessly break it. We own the risks associated with abnormally dangerous activities much like we own the risks created by our promises. By contrast, the risks entailed by ordinary risk-imposing activities like driving, risks that Wallace-Wolf describes as reasonable in the abstract, are not really our risks in the same way; they are "owned by society at large." Jordan Wallace-Wolf, 'Deviations and Assumptions of the Risk: A Theory of Moral Aftermaths with Application to Strict Liability for Abnormally Dangerous Activities' (unpublished manuscript).

allocate residual risks of harm justly. Leaving too much to private ordering generally won't suffice.

The existence of a reasonably just scheme of collective regulation doesn't eliminate individual responsibility for risks associated with regulated activities. When an individual who engages in such an activity injures another by failing to accord with the collectively determined standards, private liability is appropriate. Given normative uncertainty about justice, the injurer has not necessarily wronged their victim. But liability is appropriate because the parties' interaction raises a question of justice that the injurer and victim (rather than the collective) ought to settle given that the injurer has exceeded the collectively authorized bounds.

Indeed, here my conception of tort suggests something stronger: the collective ought not to impose itself on private determinations of what justice requires. Tort law, not administrative schemes combined with systems of social insurance, ought to govern such questions precisely because tort allows such private determinations to prevail. Here we have the seeds of an argument that a comprehensive scheme of social insurance and safety regulation would exceed its jurisdiction were it to displace most of accident law New Zealand style.

Notice that nothing much turns on questions of ultimate wrongdoing. Rather, we demarcate jurisdictional boundaries based on whether responsibility for settling questions of justice lies with the collective or the parties. In the domain of activities like driving, liability for departing from collectively determined rules might actually be described as "strict" insofar as it is premised on the injurer's breach of collectively determined standards of reasonableness that have been devised as part of a scheme for allocating the benefits and burdens of the activities rather than on the injurer having wronged the injured party. (There might not be a relational wrong if, for example, the injurer's subpar capacities made it difficult for the injurer to conform to the collectively determined standard of care.) When it comes to activities like the lion keeping, the risk that a potential injurer creates is an inherently localized one all the way down, not a risk that generates benefits for the community as part of a practice that the collective has reasons to promote. Again, liability is appropriate, not because carefully keeping a lion who injures another

in one's backyard necessarily wrongs the latter, but because there ought to be a private determination between the keeper and victim about what justice between them requires.

But is it an obvious entailment of my conception that liability ought to be strict in the realm of activities like lion keeping? Why not make the default one of negligence rather than strict liability? The parties to a tort dispute can, after all, negotiate around any default. Indeed, on my conception, they ought to negotiate an outcome different to the outcome a court would prescribe whenever their joint view of justice would prescribe that different outcome.

The reason for the strict liability default is that the lack of community-wide authorization and regulation of the practice makes it unclear what reasonable care requires from a community standpoint. In particular, it is unclear from a collective standpoint whether the practice of lion-keeping ought to be authorized at all. Making the default one of strict liability is a way of reflecting this community-level ambivalence by punting the resolution of applicable questions of justice to the parties. Strict liability makes the lionkeeper liable to compensate those whom the lion harms, not because compensation is necessarily the just result, but because full compensation regardless of the level of care taken is an appropriate default that the parties might (indeed, where applicable, should) modify in the light of their own reflections on what justice between them demands given the circumstances of their relationship.

On the flipside, then, why not a default of no liability if strict liability doesn't reflect what justice between the parties certainly demands? One reason is that holding the injurer liable enables the victim to seek legal redress and thereby force an unwilling injurer into a negotiation about what justice between them demands. But even when both parties are willing to negotiate with one another in good faith, the community's reasonable unwillingness to endorse the practice justifies a presumption that the injurer is responsible for harms the activity causes—a presumption that the parties might decide is rebutted in the light of the circumstances of their relationship.

An advantage of my way of characterizing the doctrinal landscape is that it doesn't require us to identify a wrong that is inherent to strict liability. At first glance, it might seem that subjecting those engaging in an activity to strict liability is a clear expression of the collective's judgment

that engaging in the activity is always wrong. But strict liability doesn't prohibit persons from engaging in the activity. It subjects them to liability when others are harmed as a result—hence, Ripstein's characterization of the wrong inherent to strict liability as that of harming others as a result of exposing them to excessive risk.[19] There are clearer ways the collective could express the judgment that engaging in an activity is wrong—by fining people simply by engaging in it for example.

Keating takes the view that subjecting an activity to harm-based strict liability doesn't express such a judgment, but rather it makes it wrong to engage in the activity without compensating those who are harmed by it (248). But there is also something odd about characterizing the wrong experienced by people who have suffered serious setbacks to their interests as that of failing to pay the price of the harm created by the injurer's risky conduct. As Keating argues elsewhere in the book, monetary compensation can't return the lives of those who have suffered such setbacks to a place equivalent to where they were before (186-89).

Keating's characterization of the duty inherent in harm-based strict liability also requires us to be sure that the activities that are subjected to strict liability really are permissible when undertaken with reasonable care. Even though the collective hasn't clearly prohibited engaging in such activities, it hasn't clearly condoned doing so either. Keating views negligence liability as expressing the view that harming people as a result of carelessness is wrongful. But in that case, why not say, with Ripstein, that strict liability indicates that harming people as a result of merely undertaking the activity is similarly wrongful?

Keating's characterization of the duty inherent to strict liability is more compelling when strict liability is part of a larger administrative scheme for regulating workplace risk such as workers' compensation, especially when such schemes operate alongside workplace safety regulation. But the normative logic of such a scheme is different from that of strict liability for abnormally dangerous activities. Regulations determine which safety-promoting actions must be taken and the accompanying compensation scheme allocates the burdens of harms that result even when everyone is complying with the scheme. Strict liability for abnormally dangerous activities, by

[19] Ripstein, *Private Wrongs*, pp. 102-03, 127-28

contrast, simply empowers those harmed by such activities to seek redress from their injurers if they are so inclined.

Vicarious liability in tort that holds employers strictly liable for their employees' torts may come closer to the administrative model despite being a tort doctrine. A victim of an employee's tort can always go after the employee directly. Vicarious liability offers the victim another pocket to go after, thus encouraging negotiations either before the fact or after the fact between employers and their employees about how accountability for workplace injuries ought to be allocated. By drawing a boundary around the entity that will be held vicariously liable, vicarious liability thus encourages internal management of risks. Even so, vicarious liability creates a deficient form of administration insofar as any scheme of internal risk management it induces reflects the logic of the marketplace rather than the collective considerations of justice that properly ought to guide an employer's internal deliberations with its employees about risks it imposes on those outside the organization—at least if the employer is engaging in activity that lies on the collective rather than individual side of the line.

IV. Non-Ideal Considerations

I have argued that strict liability is appropriate for risky activities that haven't been affirmatively endorsed by the collective, because it encourages the parties to determine for themselves what justice demands, which is appropriate when it comes to normatively uncertain relationship-specific questions of justice. When it comes to activities that the collective ought to encourage and regulate in light of collective reasons, by contrast, tort ought not to govern risks that materialize as a result of conduct that conforms to collectively determined standards of conduct. Risky conduct that breaches such standards is appropriately subject to tort liability, not because such conduct is necessarily wrongful, but because it implicates relationship-specific questions of justice that the parties rather than the collective ought to resolve in the first instance. But the collective is duty-bound to devise appropriate rules of conduct alongside mechanisms that fairly allocate the burdens of the risks that remain when injurers conform to them.

This picture of the boundary between tort and administrative law is an idealized picture for two reasons. First, it assumes that the collective is ready and willing to discharge its responsibility to regulate the risks it encourages and to spread the associated losses justly. Second, it assumes that private parties are ready and willing to deliberate between themselves about what justice between them demands and arrive at plausible resolutions of what justice between them requires. Actual settlements and settlement negotiations in our world likely fall far short of this ideal. To get closer to the ideal, we need public regulation of the settlement process to ensure that parties are deliberating in good faith about what justice requires as well as review of the resulting agreements to ensure they are substantively plausible. We also need to ensure more egalitarian access to the legal system, a right to civil council perhaps, so that weaker parties can credibly threaten litigation to force recalcitrant parties to the deliberation table.

When these idealizing assumptions don't hold, there may be a justification for shifting the jurisdictional boundary in one or other direction depending on the source of the departure from the ideal to realize second-best justice. Consider, first, how tort law should respond to a collective failure to regulate and distribute risks associated with activities that the collective properly endorses. Such a collective failure might arise from a lack of political will or because of widespread unwillingness to conform to the scheme or because bad actors have captured the process. Ideally, a collective failure would be addressed through democratic channels to get the collective to change course, become less corrupt, and/or police non-compliance more effectively. But we are positing that the collective is refusing or unable to respond. Should tort law step into the void?

Suppose a comprehensive scheme for distributing losses arising from activities associated with driving is absent. The collective has left it to the marketplace and the result is that the residual losses get distributed inequitably. Expanding the scope of tort liability is clearly a highly imperfect solution to the resulting problem. Tort liability forces deliberation between a victim and injurer about what justice between them demands, but when the liability results from the materialization of risks that arise from activities that collectively we have reasons to promote, the questions of justice between the parties depend on systemic questions about the distribution of benefits and burdens of such activities that the parties, as private actors, are not well placed to

assess. Empowering more victims to sue in tort creates opportunities for deliberation between injurer and victim about how they justly ought to manage their relationship in the light of the collective failure. But just settlements won't be reached, if normative implications of the collective failure for relationship-specific questions of justice are too complex for the parties to navigate.

In other circumstances, however, private deliberation may be a more propitious site for the management of the relationship-specific implications of a collective failure. Consider the activities of mass production and distribution of products that today are regulated by the law of products liability. Insofar as social and economic life depends on them, such activities look ripe for a regime of negligence liability in conjunction with administrative schemes that implement appropriate safety regulations and distribute the losses from the residual risks fairly. But given pervasive asymmetries between manufacturers and distributors and those typically injured by defective products, devising and enforcing standards of reasonable design and manufacturing on manufacturers and distributors will be difficult. Manufacturers and distributors may also exert disproportionate political power enabling them to tilt the content of any collectively devised standards in their favor.

When the collective failure is driven by the greater power and bad faith of those whom the collective seeks to regulate in these ways, there is simultaneously a collective failure and a failure of injurers to take individual responsibility for those whom they injure. There may thus be an important place for tort law to pick up the slack. Shifting towards strict liability forces the more powerful injurers to negotiate after the fact with those whom their products have injured. Although, on my conception, such negotiations are appropriate in an ideal world only when the injurer has acted unreasonably from the collective's standpoint, in a non-ideal world where devising and enforcing appropriate standards of reasonableness is hard, strict liability may do better than negligence in facilitating deliberation about what justice between the parties requires. This is because the imbalance of power that disrupts ex ante regulation by the collective can be mitigated by empowering victims to use the legal process to elicit relevant information about the causes of their injuries from their injurers, making it more likely that justice between injurer and victim is done notwithstanding the collective failure. The justification of strict liability in such

contexts is second-best insofar as it forces the parties to deliberate about matters of justice that should ideally be resolved collectively. But it may be better than an alternative that allows many bad faith actors to evade any accountability to those whom they unjustly injure.

My argument for strict liability here is different from the standard economic justification that strict liability gives injurers incentives to take cost-justified precautions by forcing them to internalize the external costs of their activities. That is to view private liability as a regulatory device. On my conception of tort, tort liability is in the first instance a mechanism for promoting individual responsibility to deliberate about relationship-specific questions of justice not a way of furthering collective ends. In its second-best mode, as I have just argued, tort liability might be used as an accountability enhancing measure where collectively devised standards cannot be easily devised or enforced. But this is not the same as using it as a substitute for comprehensive regulation at the collective level. Shifting tort law into a comprehensive regulatory mode would prevent tort law from serving its proper purpose of encouraging deliberation between parties about what justice between them demands.

Now suppose that the collective is doing its job but too few people are willing to engage in good faith deliberations about what justice between them requires when they find themselves in tort disputes. Should administrative law pick up the slack? As I suggested above, the ideal response to the prevalence of bad faith of this kind would be to discourage it directly through mechanisms that put parties on a more equal footing in negotiations and/or greater public oversight of the settlement process. If, however, such efforts don't solve the problem, the polity may have a justification for displacing tort law with administrative schemes. Perhaps New Zealand's displacement of much of accident law with social insurance and safety regulation can be understood in this light. Again, such a scheme cannot represent the first best, because it preempts the ability of private actors to settle normative uncertainty about relationship-specific questions of justice between them—questions that they are in the first instance morally authorized to settle. But if too few people are willing to settle their disputes with an eye to realizing justice despite public support and oversight, such preemption is more likely to realize justice than leaving people to the mercy of the marketplace.

V. Conclusion

Individual rights and duties arise and are shaped by activities that we collectively have reason to endorse. The scope of individual responsibility is, in part, collectively determined. But there are deontological limits on the extent to which the collective may intrude on realms of individual responsibility. On the flip side, there are collective duties that arise where individual responsibility stops and limits on the extent to which tort law can fill gaps created by collective slack. It is in these terms, I've argued, that we should understand the boundaries between administrative law and tort law and between strict liability and negligence.