In three studies, participants assigned civil liability at moderate to high rates to injurers whose conduct was not negligent, holding them to a strict liability standard. The law would generally not assign liability in these cases, instead only imposing it when the actor was negligent or when the activities were “abnormally dangerous.” Participants are more likely to assign liability in the absence of negligence when the injurious activity takes place in an inappropriate location (study 1) or when it is abnormally dangerous in a lay sense (study 2). It also matters whether the injurer is engaged in a business activity and if the injured party poses a reciprocal risk to the injurer (study 3). But, even absent all of these special circumstances and even when both the injurer and injured parties were engaging in identical highly mundane behaviors, many respondents still believe that some liability should be assigned for non-negligent conduct. In study 3, participants report explanations consistent with a strict liability perspective. We compare the intuitions of our participants to both the doctrine and proposed theoretical foundations of current tort law.

INTRODUCTION

Joe loses control of his bicycle, swerving and knocking over Mike, who has been roller-skating along the same path. Mike falls and breaks his arm. Should Joe be forced to pay Mike’s medical bills? If Joe lost control of his bike because he was negligent or reckless then most people would likely think that he should. But imagine that Joe was taking every reasonable precaution when he lost control of his bike and that the accident was a result of random chance, perhaps a wild animal darting across his path. If Joe is truly innocent of misconduct, should he be made to pay for harm that was beyond his control?
Under American law, the answer would generally be ‘no;’ Joe would need to be behaving negligently to be liable for the harm he causes. In this paper, we report on studies in which we present participants with civil liability decisions in which one person harms another while not acting negligently or recklessly. We investigate the degree to which lay individuals agree with courts’ reluctance to impose liability in the absence of negligence, and the circumstances under which strict liability is more appealing. We further examine the extent to which first party insurance and deep pockets affect people’s judgments as to who should ultimately bear the cost of injury that one person bestows on another.

In an earlier publication, Doing Wrong without Creating Harm,¹ we found that lay individuals react strongly to the harm element in tort: An individual who causes injury through his conduct is liable to the injured party for the full amount of the loss. An individual who does exactly the same thing, but causes no injury, is liable for nothing. We also found that criminal sanctions work quite differently in the minds of lay people: A bad act that does not cause injury should receive nearly as great a punishment as the bad act that does cause injury. Thus, there is a strong moral luck component to people’s intuitions about tort law, which corresponds to the law itself:² The moral luck component in people’s judgment about crime and punishment is still present, but is far smaller.

Notably, we also found that subjects assigned liability to a business that caused an injury to a person living nearby even when that business had done nothing wrong. Liability increased as the state of mind of the injuring party moved from innocence to

¹ John M. Darley, Lawrence M. Solan, Matthew B. Kugler, & Joseph Sanders, Doing Wrong without Creating Harm, 7 JOURNAL OF EMPIRICAL LEGAL STUDIES 30 (2010).
negligence to recklessness. Nonetheless, a significant majority of our respondents thought that a person who suffered a stroke as the result of a toxic emission from a factory was entitled to compensation even though the respondent agreed that the company was completely innocent.

Why should we care whether ordinary people think about tort liability? The answer depends upon what tort law seeks to do. If, as Judge Posner would have it, tort law is primarily about placing the ultimate burden of paying for the cost of injuries inflicted by one person on another on the party who can most cheaply avoid future injuries through planning, thus contributing to a more productive society, then the moral intuitions of the population are not relevant to making policy. They are relevant, however, to establishing and maintaining a legal order with sufficient “buy-in” to sustain such institutions as the civil jury and to promote general respect for the rule of law as a value in itself. If, in contrast, tort law is about compensating victims for injuries they suffer by virtue of having been wronged by others, then it is certainly relevant whether society generally considers a particular activity that leads to injury to constitute a wrong. Thus, Jules Coleman’s “corrective justice” approach to tort law, which focuses on who is deserving of compensation, contains a heavy moral component.

Two recent articles, one by John Goldberg and Benjamin Zipursky, the other by Gregory Keating, attempt to combat tort theories based upon the allocation of loss -- whether based on economic or moral grounds -- by advocating instead for a theory of tort

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4 See Part II infra.
5 JULES COLEMAN, RISKS AND WRONGS (1992).
based on wrongs committed that cause injury to victims. Goldberg and Zipursky are especially careful to separate legal wrongs from moral wrongs as the basis of tort theory because of such doctrines as trespass, which is possible to commit by entering the property of another through no moral blameworthiness; and the absence of a duty to rescue under tort law, which does not stand up to contemporary moral values.

Nonetheless, the authors acknowledge throughout their article a rough correspondence between tort doctrine and everyday morality.8

When it comes to strict liability, torts theorists are in sharp disagreement. Richard Epstein argues that strict liability does a better job than does negligence in creating incentives to make safer products and to use safer systems.9 By internalizing the costs of incidental harm caused by the product or its manufacturing, even innocently-caused harm, the manufacturer that does not have to pay damages because it has made a safer product more safely will come out ahead. Ernest Weinrib, who characterizes torts as “wrongdoings,”10 argues that strict liability is merely an extension of negligence: Some activities are so risky that no amount of care is sufficiently reasonable to relieve the actor from paying for whatever injuries are caused.11 Keating bases strict liability in its being “unfair” to leave the cost of harm on the plaintiff, a position hard to reconcile with his general eschewal of corrective justice as an explanatory principle in tort law.12

None of these theorists would regard a survey of laypeople to be dispositive of the reasons for and against strict liability. But all – other than the pure economists –
understand tort law to be driven by considerations of fairness, reasonableness as perceived by ordinary individuals, and by a sense of obligation that each of us owes to those with whom we come into contact. Thus, a study of lay reaction to various accident scenarios can add to our understanding of the extent to which losses are at the heart of our intuitions about liability, and the extent to which they come from our reaction to wrongs; and our understanding of the circumstances in which most people believe it fair to hold people responsible for the harm they cause simply because it would be wrong to do so. We will see that people’s intuitions generally comport with legal doctrine, demonstrating once again the general coincidence of moral and legal judgment. But we will also see that people feel strongly that a business should not profit by externalizing the physical harm it causes others, whether it acted wrongly or not. Thus, it should not be surprising that BP, as a public relations matter, quickly and perceptively recognized that it was going to have to pay to clean up the Gulf of Mexico and to compensate victims beyond the bounds of tort law, whether it was at fault or not. We further found that people are not heavily influenced by whether a defendant was insured, but they are heavily influenced by whether a plaintiff is insured, a fact with significant legal consequences.

Part I of this article briefly sets forth general principles of tort liability and explains further why it is useful to determine the extent to which the law is consistent with the moral judgments of lay individuals. Parts II-IV describe our experiments, and Part V discusses them as a whole. Briefly, the studies tend to show considerable sensitivity toward criteria that constitute current legal norms, but far more sympathy with strict liability than current doctrine would permit. This is especially true in the business
context, suggesting that lay individuals are intuitively sympathetic with the notion of internalizing cost of the harm that flows from profit-making ventures, even when the venture was completely innocent of wrongdoing. Most significantly, when asked, individuals are perfectly comfortable stating that a harm doer can at the same time be entirely innocent of wrongdoing but liable to the injured party because it is only right to pay for the injuries that one causes, regardless of fault. This is a moral intuition— not a legal one—and we conclude the article by discussing some of its ramifications.

I

The Evolution of American Tort Doctrine

In the American legal system, there are two standards by which conduct might be assessed as tortious. The most commonly used is the negligence standard, which assigns liability only in cases where an injurer has failed to uphold a reasonable standard of care. As the legal historian Lawrence Friedman puts it, this was “a law about negligence, about not living up to standards… It was about lapses in judgment. … It was based on fault.” Under the negligence rule, a person’s liability for the harm he or she causes is linked to the moral blameworthiness of the act that caused the harm; mere causation is not sufficient absent moral fault. In our example, the negligence rule would only demand compensation if Joe had been negligent or reckless.

The competing standard is strict or absolute liability. Under a regime of strict liability, a person need only to be the proximate cause of a harm in order to be liable for

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13 We are interested here in the law governing accidental injury. We thus put aside torts such as fraud, assault, battery, and libel, which are intentional torts by their nature.
it; it need not be shown that the person negligently or recklessly caused the harm. Strict liability would hold Joe liable regardless of how careful he had been.

The negligence rule dominates U.S. tort law and the breadth of strict liability is restricted to certain categories of cases. The largest pocket of strict liability law in the United States is that governing “abnormally dangerous activities.” When a person engages in an activity that is known to be exceedingly dangerous then that person bears responsibility for the resultant harm - even if all reasonable precautions are taken. The archetypal case is that of the dynamiter. When a person is using explosives even the greatest possible standard of care cannot eliminate all risk to bystanders. Courts therefore hold dynamiters, and others engaged in abnormally dangerous activities, to a higher standard; if people and companies wish to undertake inherently dangerous activities then they must be willing to bear the cost.16

This distinction between mundane and abnormally dangerous activities is based in part on an economic analysis. In much of day to day life, a person can avoid harming others by exercising due care. Since the negligence standard encourages people to take due care, it is sufficient to incentivize harm-avoidant conduct and keep society safe. Other activities are inherently so dangerous that reasonable precautions are not sufficient to ensure safety; the negligence standard is therefore not enough in these cases. Society would like those undertaking abnormally dangerous activities to consider whether the goal of the activity is truly worth the potential cost. The strict liability standard assigns that potential cost to the actor, thus permitting the activity while also incentivising the search for less costly means of achieving the same goal.17

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Because current doctrine by and large limits strict liability to instances of abnormally dangerous activities, we must confront the scope of this concept when considering lay perspectives on liability for accidental harms. Though a bicyclist is certainly not engaged in an abnormally dangerous activity, what of a railroad engineer or a pilot? The Restatement (Second) of Torts lists 6 factors that might be considered when deciding whether to label an activity “abnormally dangerous.”\(^{18}\) They are:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes.\(^{19}\)

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\(^{18}\) Restatement (Second) of Torts § 520 (1977).

\(^{19}\) The American Law Institute recently has adopted a proposed final draft of the Third Restatement of Torts (2005). Section 20 of the new Restatement abandons the six factor test of the Second Restatement and replaces it with the following:

§ 20. Abnormally Dangerous Activities

(a) An actor who carries on an abnormally dangerous activity is subject to strict liability for physical harm resulting from the activity.

(b) An activity is abnormally dangerous if:

(1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and

(2) the activity is not one of common usage.

For our purposes, however, the list in the Second Restatement is particularly useful because it provides a guideline of factors that might influence judgments about the appropriateness of a strict liability rule. As our data indicate, they in fact do so.
The application of these factors to particular cases can be controversial. In the widely cited case of *Indiana Harbor Belt Railroad Co v. American Cyanamid Co*, for example, Judge Richard Posner ruled that the transportation of Acrylonitrile - a flammable, highly toxic, and possibly carcinogenic chemical, by rail through a major city - is not an abnormally dangerous activity. Though acknowledging the danger of the substance, Posner concluded that proper precautions could sufficiently minimize the risk of the activity and that a rail yard was an appropriate place to store such chemicals. This case illustrates a reluctance on the part of the courts to deem activities abnormally dangerous. Among the most widely cited strict liability cases, *Indiana Harbor* is also among the most widely critiqued by those who believe the bar for imposing strict liability was set unreasonably high.

Largely silent in the debate over strict liability are the views of the general public. When discussing the extent of strict liability, the proposed Restatement (Third) of Torts asserts “(strict liability) resonates deeply in public attitudes: if the person in the street is asked whether a party should be liable for the injuries the party causes, the person’s answer is likely to be in the affirmative.” Legal scholars have long considered community norms when forming doctrines, making it somewhat surprising that the Restatement would both posit the existence of strong community support for strict liability (without citing evidence) and then limit the breadth of strict liability so sharply.

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20 916 F.2d 1174 (7th Cir. 1990).
21 *Id.* at 1182.
22 *Id.* at (insert pincite).
It is even more surprising, given that many torts theorists themselves regard moral intuitions (typically their own) as relevant, even if not dispositive.\textsuperscript{26} 

Recently, however, psychologists have begun researching community-code agreement, the degree to which lay attitudes are consistent with legal rules.\textsuperscript{27} Citizens are more likely to respect legal rules when they are consistent with the citizens’ own views, or when deviations from those views are modest or explicable.\textsuperscript{28} The Restatements of Torts and cases like \textit{Indiana Harbor} lay out a fairly limited scope for strict liability. From the standpoint of community-code agreement, it would be valuable to know if the public disagrees with this distribution of strict liability versus fault-based liability and, if so, in what way.

There are two ways in which the current doctrine can be compared to community sentiments. The first asks whether people are more willing to impose strict liability in general. The proposed Restatement (Third) of Torts speaks to this point when it suggests that strict liability as a principle resonates with the public.\textsuperscript{29} Second, one could ask whether the factors the law considers when determining if strict liability is appropriate – those listed in Section 520 of the Restatement (Second) of Torts\textsuperscript{30} – affect whether the public is more or less inclined to impose strict liability standards in a given case. The first question is one of the base-rate willingness of citizens to impose liability without

\footnotesize{\textsuperscript{26} See \textit{supra} notes ___-___.} 
\footnotesize{\textsuperscript{28} Janice Nadler, \textit{Floating the Law}, 83 TEX. L. REV. 1399, 1399-1441 (2005); ROBINSON & DARLEY, \textit{supra} note 13, at (insert pin cite); TYLER, \textit{supra} note 13, at ___.} 
\footnotesize{\textsuperscript{29} Restatement (Third) of Torts, \textit{Preliminary Final Draft} (2005) American Law Institute.} 
\footnotesize{\textsuperscript{30} See \textit{supra} note ___.}
negligence, the second involves the fit between factors that make the law turn to strict liability and factors that make the community do so.

There are other circumstances under which the lay public holds actors to higher standards than do legal codes. Previous work has shown that lay intuitions would support the criminalization of many cases of harm by omission.31 This finding contrasts with American legal tradition: In most jurisdictions, a person would not be held liable for failing to help another who is in mortal peril even if it is relatively easy to do so. Here, lay individuals appear to be recognizing a broader responsibility to the community than does the law. In fact, it may be that people’s concern for each other is generally underrated as a motivation for action.32 So there is some reason to believe that people are more inclined than are legal codes to recognize duties to help. This could mean lay individuals are willing to hold injurers liable even in situations where the legal system would not, including in cases where an injurer has done nothing actively wrong.

In our prior work there is some suggestive data supporting this hypothesis. Lay participants reading a toxic chemical case assigned liability at high rates even though many of them perceived the conduct of the company as not being negligent.33 This was a strict liability response but, based on the Restatements,34 such a standard would likely be considered unwarranted given the fact pattern.

In the three studies here, we manipulate various factors suggested by the Second Restatement to test the degree to which the public’s assignments of liability vary in accord with the legal criteria. This assesses whether the public conceptualizes abnormally

31 ROBINSON & DARLEY, supra note 13, at (insert pincite).
33 Darley, et al., supra note ____.
34 See supra note __.
dangerous activities in the manner outlined in section 520, and where it believes that the
presence of abnormally dangerous activities is the trigger for using a strict liability
standard in the first place. As we examine the impact of moderating factors, however, it is
important to track the degree to which the lay individuals assign liability even when the
aggravating criteria related to abnormally dangerous activities are not present. To the
extent that the baseline of liability is high, it would indicate that lay participants favor
strict liability standards even in cases of mundane harm and this would suggest a broader
preference for strict liability.

II

Study 1

One factor that has repeatedly arisen in claims that an activity is abnormally
dangerous and thus subject to strict liability is that the activity or harmful agent was “out
of place.” This rationale is first seen in Rylands v. Fletcher,\textsuperscript{35} a landmark 1868 English
case. In that case Lord Cairns imposed a “non-natural use” test, which stated that whether
an activity was inappropriate for its location or non-natural was crucial to whether a
person should be liable when that activity innocently goes awry.\textsuperscript{36}

Arguments about the appropriateness of the location of an industry still play a role
in strict liability decisions. Recall that appropriateness of location was relevant in the
previously mentioned Indiana Harbor case. There, Judge Posner famously said that
constructing a residential community in the industrial area where the accident occurred
was like “building your home between the runways at O'Hare;”\textsuperscript{37} one assumed the risk of

\textsuperscript{35} 1 L.R.-Ex. 265 (1866).
\textsuperscript{36} insert pincite
\textsuperscript{37} Indiana Harbor, 916 F.2d at 1181.
the location. In considering the importance of location, Posner was following the criteria of the Restatement (Second) of Torts.³⁸

In this study, we manipulated between participants whether a dangerous glue-making factory was in an industry-appropriate area, or in a residential area. Within each location, the owner’s state of mind was manipulated; the owner was either said to have negligently allowed the toxic chemical to escape, or to have taken every precaution and been the victim of misfortune. The order in which state of mind was presented was counterbalanced.

A. Method and Participants

Eighty-four participants (27 male, 57 female) were recruited from a paid experiments website run by the university. The participants on this site are largely undergraduates, but there are also some graduate students, staff, and members of the community. As compensation, participants were entered into a raffle. The sample consisted primarily of undergraduates (58). Six participants were excluded from analysis due to abnormally fast completion times.

B. Materials and Procedure

This study employed a 2 (factory location: industrial area or residential area) by 2 (state of mind: negligent or innocent) design. Factory location was manipulated between subjects, thus participants saw a core story that described the factory as being in one setting or the other. Following this core story, participants saw two variants. One variant

³⁸ The proposed Restatement (Third) of Torts also considers location, though this factor’s importance is diminished.
ascribed the accident to the owner’s negligence, the other to unforeseeable chance. These were presented in counterbalanced order.

The study advertisement contained a link to the survey instrument. Upon clicking the link, the participant was directed to one of the several versions of the survey instrument. In each case, the participant saw a welcome screen that briefly explained the study and, immediately following, a consent form.

After the consent form, a core scenario is presented. One version of this core scenario was as follows:

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

The manufacturing process takes about 10 days to make a batch, and involves a good many steps. At one point in the process, if the batch does not receive a buffering chemical, it emits a chemical that could be harmful to humans who are taking a certain medication. Essentially, it increased their risk of having a stroke. Pilling understood the need for this buffering treatment and regularly provided it during his production runs.
Kyle Jackson lives a few hundred feet from the Glu-Tight factory. He is part of the at risk population. Due to an error at the plant, the toxic chemical was released and he came into contact with it. Quickly thereafter, Kyle had a stroke. He remains partly paralyzed, his speech is slurred, and little or no additional improvement is expected. His medical costs have been high, and his wife has had to take time off from work to care for him. Their finances are strained. Doctor’s tests conclude that his stroke was the result of contact with the chemical. He is suing Pilling.

Some people have asked where the production facility is located. When Pilling was looking for a place to set up the production system, he found one in an un-zoned area near where he lives. The area is entirely homes. It is a residential community; Pilling’s factory is the only one. Pilling was able to rent a two-car garage that had enough room for him to do his production.

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

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

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

A. Pilling was innocent of misconduct. A reasonable person in the same situation would have not have taken more precautions.

Between A and B

B. Pilling was negligent. A reasonable person would have been more careful in his situation. He did not sufficiently consider the risks of the glue making process.

Between B and C

C. Pilling was reckless. He knew there were risks in the glue making process, but actively disregarded these possibilities.

Participants were then asked to decide whether Pilling should be liable for Kyle’s medical costs. There were two options: full compensation and no compensation. Finally, participants were asked how much, if any, punitive damages Pilling should be made to pay on a scale ranging from 1 (No damages) to 7 (Maximal damages). Punitive damages were described as being intended to punish an offender whose conduct was especially egregious or morally unacceptable.
C. Results

Perceived state of mind and punitive damages were analyzed using a 2 (state of mind) by 2 (location) mixed ANOVA. There were no effects of order on any measure so that variable was dropped from the final analyses.

1. Perceived State of Mind

Perceived state of mind was significantly affected by the state of mind manipulation $F(1, 76) = 230.14, p < .001, \eta^2 = .75$. In the innocent condition, Pilling was seen falling midway between the Innocent and Negligent choices ($M = 2.01, SD = 1.03$). In the Negligent condition, Mr. Pilling was seen falling midway between the Negligent and Reckless choices ($M = 3.85, SD = .91$).

2. Liability for Compensatory Damages

In the negligent condition, nearly all participants assigned liability regardless of location (Residential area = 100% full liability; Industrial area = 95%). In the innocent condition, however, participants were much less likely to assign liability $\chi^2 (1, N = 76) = 7.04, p < .01$ if Pilling was working in an industrial area (61% full liability) than if he was working in a residential area (88%). These results are shown in Table 1.
Table 1

<table>
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<tr>
<th></th>
<th>Residential Area</th>
<th>Industrial Area</th>
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<tbody>
<tr>
<td>Negligent</td>
<td>100%</td>
<td>95%</td>
</tr>
<tr>
<td>Innocent</td>
<td>88%</td>
<td>61%</td>
</tr>
</tbody>
</table>

Effects of state of mind and location of factory on judgments of liability

3. Punitive Damages

The magnitude of punitive damages assigned was significantly affected only by the state of mind manipulation $F(1, 76) = 111.90, p < .001, \eta^2 = .60$. Punitive damages were much higher in the Negligent condition ($M = 3.90, SD = 1.62$) than in the Innocent condition ($M = 2.15, SD = 1.44$).

D. Discussion

When Pilling’s factory is in a location appropriate for its activity and Pilling takes proper precautions, he is assigned liability by a substantially smaller proportion of people than when the factory was in an inappropriate location and those same precautions are taken. Participants seem to be indicating that they believe a higher standard of care is required when Pilling is working in a residential area. This is consistent with the guidelines in the Restatements. The rate at which liability is assigned in even the industrial-innocent condition, however, is still high (substantially above 50%). From the decline in liability there is reason to believe that people are sensitive to the location of a dangerous activity, but this substantial residual liability implies that location is only part of the story.
One interesting note from these results is that the state of mind in the innocent condition is perceived as falling midway between the innocent and negligent options. This is not intended. Though there is a general tendency to read an outcome or behavior as intentional even when it plainly is not, a degree of negligence may be lurking in the Pilling story. This interpretation is supported by the presence of punitive damages assigned in the innocent condition (approximately 2 on a 7 point scale where 1 represents no damages). We return to this issue in Study 2.

Study 1 shows that the degree of liability assigned is dependent in part on the appropriateness of the location of the activity. The basic effect of liability without negligence, however, still persists. In study 2 we attempt a cleaner state of mind manipulation and test whether the fact that the harm was caused by a chemical release, as opposed to by some mundane means, is contributing to the strict liability finding.

III

Study 2

The injurer’s state of mind in the innocent condition of Study 1 was perceived as falling between innocent and negligent. Though the description in that condition explicitly absolves Pilling of misconduct for the mechanical failure that caused the chemical release, there may still be a feeling that the failure is someone’s fault (one participant suggested that the equipment manufacturer was to blame). If Pilling is seen as vicariously responsible for someone else’s negligence, then assigning him liability might be justified based solely on that perception and not be the result of a strict liability

decision rule. This problem is hard to eliminate within the confines of the Pilling case without resorting to acts of God. A new scenario that allows for harm to come from a more plainly innocent cause would be helpful on this point.

It also may be the case that the percentage of participants assigning liability in Study 1 is high because the scenario involves chemical contamination. Though it seems unlikely (under such precedents as Indiana Harbor) that a court would rule Pilling’s conduct to be “abnormally dangerous,” lay individuals might be using a more easily satisfied standard. As the draft of the Restatement (Third) of Torts suggests, familiar and traditional risks are apt to seem more acceptable than uncommon and novel ones.40 Working with toxic chemicals may, therefore, be seen as an abnormally dangerous activity in lay eyes. If that is the case, then using strict liability standards there would be consistent with a broad or liberal reading of strict liability law; participants would have used the appropriate decision rule but applied the label “abnormally dangerous” to a more expansive set of cases than does the law. If liability is frequently assigned only when participants believe that the injurer is engaged in an abnormally dangerous activity, this would still not indicate a general preference for strict liability.

A. Method

To test this question a new vignette was crafted. This scenario described an automobile accident that injured a bicyclist. The driver of the truck was either driving carelessly (negligent) or conscientiously (innocent). In the course of the accident, the victim was either struck by the truck itself (impact) or by chemicals that spilled from the

truck in the course of the collision (chemical). Thus, the study employed a 2 (state of mind: negligent or innocent) x 2 (agent of harm: chemical or impact) design with state of mind as a between subjects factor and agent of harm as a within subjects factor.

B. Participants

Seventy six participants (23 male, 53 female) were recruited from the same paid experiments site as in study 1. As compensation, they were entered into a raffle. The sample consisted primarily of undergraduates (44). Five participants were excluded from analysis due to abnormally fast completion times.

C. Materials and Procedure

The study advertisement contained a link to the survey instrument. Upon clicking the link, the participant was directed to one of the several versions of the survey instrument. In each case, the participant saw a welcome screen that briefly explained the study and, immediately following, a consent form.

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

The second factor was the manner in which this accident harmed the bicyclist. Two possibilities were presented. In one, Mr. Blair is driving a truck full of traditional construction supplies and he hits the bicyclist directly. The image here is of a classic accident; this is the impact condition. In the other version, Mr. Blair’s cargo consists of toxic solvents and the force of the accident causes these to breach their containers, spilling on the bicyclist. This is the chemical condition. Each participant saw both possibilities, one after the other (order counterbalanced). Whichever scenario was presented first (with accompanying questions as described below) the other came after.

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

Mr. Philip Blair is the owner of State Home Improvements: a midsized construction company that has been doing rather well in recent months. Mr. Blair was driving his company’s pickup truck along the highway at 4pm on a Saturday afternoon. In the back of the truck was a large order of lumber and other home improvement supplies that he was taking to his company’s jobsite. Mr. Blair is a conscientious driver, obeying all traffic laws and keeping the truck, which he often drives, in good repair. As he is going along, one of his tires blows out. Mr. Blair is
taken by surprise. He struggles to regain control of his vehicle, but is unable to prevent it from running off the road and hitting a bicyclist.

Later investigation reveals that the tire blowout was due to a small spike that had been in the road; the tires had been in good condition. The bicyclist sustains moderate injuries and is hospitalized. He ultimately makes a full recovery. The bicyclist has asked Mr. Blair’s company to pay for his medical costs; his bills totaled approximately $15,000. The court will decide whether this should happen.

Beneath the scenario were several questions. The first question was a check on the state of mind manipulation. Participants were asked to check the description that best describes Mr. Blair’s conduct. Their choices were slightly modified from those used in study 1:

A. Mr. Blair was innocent of misconduct. A reasonable person in the same situation would have not have taken more precautions.

Between A and B

B. Mr. Blair was negligent. A reasonable person would have been more careful in his situation.

Between B and C

C. Mr. Blair was reckless. He knew there were risks of dangerous outcomes, but recklessly ignored these possibilities
The second question asked participants whether they personally thought that Mr. Blair and his company should be liable for the bicyclist’s medical bills. Participants could assign either full liability, liability for some proportion of the bill (indicated as a percentage), or no liability.

Participants were then asked to indicate on scale ranging from 1 (No damages) to 7 (Maximal damages) how much, if anything, should be awarded as compensation for the bicyclist’s pain and suffering. Lastly, on a similar scale, participants indicated the amount of punitive damages that was appropriate. Punitive damages were described as “intended to punish an offender if their conduct is especially egregious or morally unacceptable.”

The same dependent measures followed each of the two scenarios.

D. Results

All dependent measures were analyzed using a 2 (state of mind) by 2 (agent of harm) by 2 (order) mixed ANOVA.

1. Perceived State of Mind

Perceived state of mind was significantly affected by the state of mind manipulation $F(1, 67) = 182.43, p < .001, \eta^2 = .73$. In the innocent conditions, Mr. Blair was seen falling between the Innocent and Innocent-Negligent choices ($M = 1.41, SD = .72$), but much closer to the Innocent choice than the Negligent choice. In the Negligent conditions, Mr. Blair was seen falling midway between the Negligent and Negligent-Reckless choices ($M = 3.69, SD = .71$). Mr. Blair was also seen as having a more culpable state of mind $F(1, 67) = 37.43, p < .001, \eta^2 = .36$ when the cargo was the toxic
chemical \((M = 2.85, \ SD = 1.44)\) than when it was other construction supplies \((M = 2.30, \ SD = 1.36)\).

A 3-way interaction between state of mind condition, harm agent, and order of presentation revealed that, when the chemical story came first in the innocent state of mind condition, the difference between perceived culpability in the chemical and in impact stories was nonsignificant (interaction \(p < .05\)).

The reader will have noticed that despite our changes, some of the respondents in the innocent condition perceived the actor to be less than purely “innocent” and thus perhaps somewhat culpable. This creates the possibility of an internal analysis that will be informative about the respondents’ thinking about strict liability—whether those perceiving that the actor *innocently* caused damage still require compensating for that damage. The possibility of this internal analysis exists in all of the three studies we report, and we will defer discussing it until all studies are reported.

2. Liability for Compensatory Damages

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

The amount of liability assigned varied as a function of state of mind $F(1, 67) = 44.71, p < .001, \eta^2 = .39$ (Negligent $M = 1.04, SD = .20$; Innocent $M = 1.87, SD = .75$). In percentage terms, the plaintiff was awarded 98.3% of the damages in the negligent condition and 53.9% in the innocent condition. The amount of damages assigned was also affected by whether the agent of harm was the chemical spill or impact $F(1, 69) = 7.41, p < .01, \eta^2 = .10$ (Chemical $M = 1.39, SD = .64$; Impact $M = 1.51, SD = .73$). This translates to a difference between 80.2% of total damages in the chemical harm condition and 72.7% in the impact harm condition.

There was also an interaction between state of mind and harm condition $F(1, 69) = 4.24, p < .05, \eta^2 = .06$ by which whether the agent was chemical or mundane only mattered in the innocent condition ($p < .05$; Chemical $M = 1.77, SD = .73$; Impact $M = 1.97, SD = .79$). The expected value for the plaintiff who was innocently harmed by a chemical spill was 61.3% but for one who was hurt by the impact of the truck it was 46.7%.

Both the expected value and proportion of participants assigning liability may be important in policy terms. They are reported for all conditions in Table 2.

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41 The pattern and significance of the results did not differ if expected value is used as the dependent measure. This is also true in all subsequent studies.
Table 2

<table>
<thead>
<tr>
<th>Chemicals</th>
<th>Impact</th>
</tr>
</thead>
<tbody>
<tr>
<td>Negligent</td>
<td>100% (99%)</td>
</tr>
<tr>
<td>Innocent</td>
<td>83% (61%)</td>
</tr>
</tbody>
</table>

Assignment of liability for innocent and negligent actors who inflicted harm via a chemical spill or a truck accident (expected value in parentheses)

3. Pain and Suffering

The magnitude of the pain and suffering damages varied as a function of state of mind $F(1, 67) = 12.21, p = .001, \eta^2 = .15$ (Negligent $M = 3.42, SD = 1.39$; Innocent $M = 2.27, SD = 1.40$). It was also affected by whether the agent was chemical or impact $F(1, 67) = 20.12, p < .001, \eta^2 = .23$ (Chemical $M = 3.20, SD = 1.75$; Impact $M = 2.54, SD = 1.51$).

4. Punitive Damages

The magnitude of Punitive damages varied as a function of state of mind $F(1, 67) = 19.00, p < .001, \eta^2 = .22$ (Negligent $M = 2.72, SD = 1.27$; Innocent $M = 1.40, SD = 1.28$). It was also affected by whether the agent was chemical or impact $F(1, 67) = 23.49, p < .001, \eta^2 = .26$ (Chemical $M = 2.37, SD = 1.69$; Impact $M = 1.80, SD = 1.37$).

There was an interaction between the agent of harm and scenario order $F(1, 67) = 17.85, p < .001, \eta^2 = .21$ such that whether the agent was chemical or mundane only mattered with respect to the assignment of punitive damages when the chemical story followed the mundane story ($p < .05$; Chemical $M = 2.57, SD = 1.61$; Impact $M = 1.51$, ...
but there was no effect when the chemical story came first (Chemical $M = 2.16, SD = 1.76$; Impact $M = 2.08, SD = 1.65$).

**E. Discussion**

The state of mind manipulation was successful, though the “innocent” condition was perceived as slightly more culpable than purely innocent and “negligent” slightly more so than purely negligent, these perceptions better tracked the manipulations than in Study 1. Unexpected though unsurprising is that the presence of the chemical implied a more culpable state of mind, perhaps indicative of a belief that the standard of care should be higher when transporting toxic chemicals. This is consistent with Weinrib’s\(^\text{42}\) position, that strict liability and negligence are not as different as they might appear, since strict liability is imposed in dangerous situations for which it is predictable that accidents will happen despite the greatest of care.

For both punitive damages and damages for pain and suffering we see greater awards when the state of mind is negligent than when it is innocent, and greater awards when the harm is caused by a chemical spill. For punitive damages, and for the perceived state of mind, we see slight order effects as participants who first see the more mundane story respond more harshly to the chemical scenario. These measures show that participants are sensitive to the state of mind manipulation, and are not inclined to be punitive towards those acting innocently.

The main dependent measure, the liability decision, produced the predicted pattern. As expected, the driver was almost universally assigned total liability in the negligent conditions. In the innocent conditions, however, the driver was assigned a

\(^{42}\) See *supra* note ___.
greater proportion of liability if the cargo was a toxic chemical and the injury was caused by a chemical spill. It is interesting that the innocent driver in the mundane impact condition was still assigned liability for, on average, 47% of the damages. Driving a truck is presumably not an abnormally dangerous activity, yet substantial liability is being assigned in the absence of negligence. Put another way, only 29% of respondents assigned no liability to the driver who has a mundane accident and takes every reasonable precaution.

Under precedents such as Indiana Harbor, it seems unlikely that transporting an unspecified dangerous chemical establishes a sufficient basis for strict liability. Thus even the “abnormally dangerous” condition is not dangerous enough to meet everyday moral intuitions. Merely driving a truck loaded with building supplies certainly would not meet the criteria; this would fall under the category of common use.43 This study therefore both supports the distinction between abnormally dangerous and mundane activities44 and at the same time reveals what appears to be a generalized preference for strict liability among a substantial proportion of our participants.

IV

Study 3

In both of the first two studies, a considerable proportion of participants assigned liability in a manner consistent with a strict liability approach. There are, however, two questions that should be examined before firmly interpreting the results in that light. First, would participants assign liability in a strict liability fashion were the agent in

[43] Indiana Harbor, 916 F.2d at 1177; Proposed Restatement (Third) of Torts, 2005, § 20, comment j.

[44] Restatement (Second) of Torts, 1977, § 520, factor d.
question not engaged in a profit-making endeavor? All of the previous scenarios have involved wrongdoing by corporate actors in one form or another. Previous research has occasionally found a “deep pocket” effect by which corporations may be assigned increased liability based on their perceived ability to pay.45 It might be that people are more inclined to assign liability to corporations and would be less ready to target individual people. Second, the previous scenarios have involved non-reciprocal and relatively unusual risk. The injured party posed absolutely no risk to the injurer in all cases and was generally harmed in a fairly unusual manner (the only exception being the simple truck accident in Study 2). It could still be the case that the results reported thus far are a reflection of various special categories of people and activities being held to a higher standard of care.

Although the absence of risk reciprocity is not one of the six factors listed in Restatement (Second) of Torts,46 it has been advanced as a reason to impose strict liability since the time of Rylands v. Fletcher; modern authors also have argued for this position.47

A. Method

To address these concerns Study 3 manipulated the degree of reciprocity of the risk and the status of the person causing the harm. The injured party was always a

46 Restatement (Second) of Torts (1977) § 520.
bicyclist struck by another vehicle, driven by Mr. Blair. In one condition (manipulated within subject), the vehicle striking the victim was another bicycle. In the other, it was a pickup truck. In both cases the drivers were said to have taken every precaution and to have hit the injured bicyclist only due to unusual circumstances. Between subjects, it was varied whether Mr. Blair was on company time (thus both he and his company were being sued) or on his own time (thus he alone was sued). Below is the bike on bike story with the business/nonbusiness changes marked by parentheses.

Mr. Philip Blair is the owner of State Home Improvements: a midsized construction company. He is married, lives in a modest house, and has two children.

While (off work; working) one weekday afternoon, Mr. Blair was riding his bike along the street (carrying important business documents to a jobsite from the office). Mr. Blair is a conscientious rider, obeying all traffic laws and keeping the bike, which he often rides, in good condition. As he is going along, one of his tires blows out. He struggles to regain control of his bike, but is unable to prevent it from running off the road and hitting another bicyclist.

Later investigation reveals that the tire blowout was due to a small spike that had been in the road; the tires had been in good condition and Mr. Blair did not see the spike because it was obscured by leaves. Even the very best riders would not have been able to maintain control of their bicycles in this situation. The other bicyclist sustains moderate injuries.
and is hospitalized. He ultimately makes a full recovery. The bicyclist sues Mr. Blair’s company to pay for his medical costs. The bill totaled approximately $15,000.

By manipulating whether it was Mr. Blair alone or Mr. Blair and his company being sued, we could explicitly test the first concern, that of deep pockets and corporate liability. By varying vehicle type, we could examine the role of reciprocity; when Mr. Blair was riding a bicycle, he posed no greater inherent risk to the injured party than the injured party did to him. This condition also avoided the perhaps complex norms involved in car accidents.

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

B. Participants

Ninety four participants were recruited from the same paid experiments site as in Studies 1 and 2. Seven participants were excluded from analysis due to abnormally fast completion times, leaving a sample of 87 (37 male, 51 female). The sample consisted primarily of undergraduates (64) with a median age of 19.

In addition, one hundred twenty participants were recruited from the Amazon Mechanical Turk website for an 8 minute Legal Attitudes study. Seven participants were
excluded from analysis due to abnormally fast completion times, leaving a sample of 113 (33 male, 80 female). The sample consisted primarily of adults with a median age of 34. There were no differences between samples on any of the dependent measures, so they are combined for data analysis.

C. Materials and Procedure

The study advertisement contained a link to the survey instrument. Upon clicking the link, the participant was directed to one of the several versions of the survey instrument. In each case, the participant saw a welcome screen that briefly explained the study and, immediately following, a consent form.

After the consent form, the first of two scenarios was presented. The scenario described the owner of a construction company, Mr. Philip Blair, harming a bicyclist in an accident. It employed the 2 (on business or on personal time) by 2 (driving a car or riding a bicycle) design discussed above. Mr. Blair was either on the job or on his own time. This varied between subjects; the stories either said he was on his own time or that he was working. The nature of the vehicle Mr. Blair was using (car or bike) varied within subject; each participant saw both possibilities, one after the other (order counterbalanced). Whichever scenario was presented first (with accompanying questions as described below) the other came after.

Beneath the scenario were the same questions as in study 2 (though pain and suffering was omitted). One measured Mr. Blair’s perceived state of mind on a scale from 1 (innocent) to 5 (reckless). The next asked whether Mr. Blair (and his company in the business conditions) should be held liable for the injured bicyclist’s medical costs.
Participants were allowed to assign partial liability in this case. Finally, participants assigned punitive damages. The same dependent measures followed each of the two scenarios.

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

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

If they did not assign liability, participants were instead presented with these options to explain their decision (again they were allowed to give their own answer or select several):
• Though Mr. Blair was technically the cause of the injury, he did not do anything wrong. He is therefore not responsible for the accident and should not be held liable.

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

• Though Mr. Blair was the cause of the injury and was not careful enough in his driving, he should not be held liable.

• The injured bicyclist is at fault for not avoiding the accident.

The same questions, both immediate and explanatory, followed each scenario.

D. Results

Order and participant type were found to have no significant impact on any of the dependent measures, so they were dropped from the analysis. The liability measure was analyzed using a 2 (on business or on personal time) by 2 (driving a car or riding a bicycle) mixed ANOVA. The state of mind and punitive damages measures experienced dramatic floor effects and are presented in categorical form.

1. Perceived State of Mind

The overwhelming majority of participants perceived Mr. Blair’s level of culpability to be minimal. Only 13% of participants assigned a non-minimal level of culpability in the bike case and only 20% in the car condition. In both the car (\(M = 1.23\),
SD = .51) and bike conditions (M = 1.14, SD = .37) Mr. Blair’s actions were seen, on average, as being closer to innocent than to the midpoint between innocent and negligent. Chi square tests comparing the percentage of those rating the actions as purely innocent versus not revealed no cross condition differences.

2. Liability for Compensatory Damages

The liability question was again coded as a three point scale with full liability, partial liability, and no liability being represented by 1, 2, and 3 respectively.

The amount of liability assigned varied across vehicle conditions $F(1, 196) = 28.10, p < .001, \eta^2 = .13$ with greater liability being assigned in the car conditions (M = 2.21, SD = .78) than in the bike conditions (M = 2.41, SD = .72). This can be expressed as an expected value of 37.1% of the medical costs for the plaintiff struck by the car and 25.6% for the one struck by the bicycle. The amount of liability assigned was also affected by whether Mr. Blair was on business $F(1, 196) = 7.98, p < .01, \eta^2 = .04$ (on business $M = 2.16, SD = .99$; on personal time $M = 2.44, SD = .94$). This can also be expressed as 39.1% of damages in the business condition and 24.7% of damages in the nonbusiness condition. There was no interaction ($F < 1$). The expected value and proportion of participants assigning liability are reported for all conditions in table 3.
Table 3

<table>
<thead>
<tr>
<th></th>
<th>On business</th>
<th>Own time</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pickup Truck</td>
<td>63% (46%)</td>
<td>53% (30%)</td>
<td>(37%)</td>
</tr>
<tr>
<td>Bicycle</td>
<td>52% (33%)</td>
<td>39% (20%)</td>
<td>(26%)</td>
</tr>
<tr>
<td>Total</td>
<td>(39%)</td>
<td>(25%)</td>
<td></td>
</tr>
</tbody>
</table>

Percent of subjects assigning full or partial damages
(Expected value in parentheses)

3. Punitive Damages

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

4. Liability Explanation Measures

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

The reasons given for assigning liability (or not) did not appear to differ across condition. Responses are therefore collapsed across vehicle type and business conditions. The participants assigning liability were given the list of explanations we previously described and were allowed to select as many as the felt appropriate. 74% of those
assigning liability chose an option that was consistent with a strict liability view of the case, saying that mere causation created liability. 48% of those assigning liability (including considerable overlap) said that the injured party was blameless and should not be left uncompensated. Very few participants read negligence into the scenario (3%) or explicitly adopted a deep pockets view by saying that the defendant could better afford to pay (2%).

Those who did not assign liability were even more consistent. Nearly everyone (86%) who did not find Mr. Blair liable claimed to be using a negligence standard. 9% said that the defendant had not done enough wrong to be responsible, 4% thought the victim was at fault, and 1% said that the defendant should not be held liable despite being negligent.

E. Discussion

The punitiveness and state of mind measures were highly consistent across condition; both were rated at absolutely minimal levels by the overwhelming majority of the sample. These data, coupled with the self reported justifications for the liability decisions, indicate that participants are not reading negligence into these vignettes to any meaningful degree.

The key dependent measure was the liability decision. Participants were sensitive both to whether Mr. Blair was said to be on business and whether he was driving a car or riding a bicycle. They assigned more liability when the activity Mr. Blair was engaged in would bring him income and involved his business. They also assigned less liability when Mr. Blair and the victim were engaged in the exact same activity. Both of these factors,
along with the appropriateness of the location and the commonness of the activity, are apparently important to participants’ willingness to impose strict liability standards.

In the conditions of this study that are the most mundane – the ones in which there are none of the criteria that would make an activity abnormally dangerous - 40-50% of participants still assigned some liability. Unless riding a bicycle is an abnormally dangerous activity, this result is incompatible with current strict liability doctrine. When pressed for an explanation, participants who assigned liability overwhelmingly endorsed a strict liability rationale; Mr. Blair caused the accident and therefore he should pay even though he is not at fault. These data appear to support a general preference for strict liability standards in these kinds of cases on the part of some participants. Those not assigning liability instead claimed that the absence of negligence drove their decision.

V

General Discussion:
An Internal Analysis Concerning the Strict Liability Result

In each of the studies, some respondents in the innocent conditions rated the actor as less than completely innocent. The state of mind attributions for the three studies are summarized in Figure 1.
Only in experiment 1 was there a marked deviation from innocence in subjects’ assessment of state of mind. In that study, subjects ranked harm doer – Mr. Pilling – about half way between innocent and negligent, despite the fact that the leakage of toxins from a factory resulted from a faulty part in a machine that he had purchased, and the accident was not his fault.

We noted in the introduction to this article that tort theorists are not in agreement about the nature of tort law and the justifications for various doctrines. This particular result is consistent with Ernest Weinrib’s hypothesis that strict liability is not strict at all. Certain activities are inherently dangerous enough so that no reasonable precautions are adequate to relieve the actor of responsibility for causing harm. It appears that lay individuals react this way to injury caused by a malfunctioning factory. The owner of a complicated manufacturing process that uses dangerous materials cannot be totally innocent in the minds of our subjects.
But this explanation does not account for the results in our other two studies because in those, subjects generally agreed that the harm doer was entirely innocent. Let us focus on only those subjects who reported this judgment among all three experiments. Eliminating all those participants from the analysis and examining only the portion of respondents who rated the actor wholly innocent gives us a more stringent test of people’s willingness to assign liability in the absence of negligence. Table 4 presents the percentage of participants in each innocent condition of each study who assigned full or partial liability despite believing that the defendant was wholly innocent of misconduct.

Table 4

<table>
<thead>
<tr>
<th>Study 1</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Residential Area</td>
<td>73</td>
<td>Industrial Area 28</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Study 2</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Chemical Spill</td>
<td>65</td>
<td>Truck Impact   71</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Study 3</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Business</td>
<td>49</td>
<td></td>
</tr>
<tr>
<td>Personal Time</td>
<td>40</td>
<td></td>
</tr>
<tr>
<td>Car on Bike</td>
<td>50</td>
<td></td>
</tr>
<tr>
<td>Bike on Bike</td>
<td>39</td>
<td></td>
</tr>
</tbody>
</table>

Percentage of subjects who judged harm doer innocent and assigned liability

Some of the conditions reported were written to represent abnormally dangerous conduct, but others portray mundane accidents blamelessly caused by faultless actors. The case in which the actor was riding a bicycle is probably the most extreme version of this and, still, about 39% of respondents extracted some compensation from the actor.
Across the three studies, a significant number of participants assigned liability even to injurers who had not acted negligently. Even participants who explicitly rated the injurers as innocent still assigned liability at substantial rates. Though differences in rates were observed across a variety of factors - several taken directly from the Restatement (Second) of Torts - the basic effect is present even in the conditions where the activity was clearly not abnormally dangerous. When asked in Study 3, those participants who assigned liability to the innocent injurer explicitly stated that they understood that the injurer was not negligent or careless and were requiring compensation on the grounds of simple causation.

These results have several implications. First, they reaffirm the importance of several of the Restatement (Second) of Torts criteria. The standards set by lay individuals clearly are influenced by whether an activity is undertaken in an appropriate location, whether the activity exposes people to novel or familiar risks, whether the risk is reciprocal, and whether the risk is undertaken in relation to a profit-making enterprise. The first three of these factors can be found with varying degrees of precision in the Restatements. This is an important and reassuring case of community-code agreement, though participants do seem more willing than courts to treat activities as if they are abnormally dangerous.

Overshadowing the agreement on which factors are critical, however, is the base-rate of liability. A large proportion of individuals are imposing a strict liability standard to cases that, under current precedents, would not warrant it. This result is clear across all studies and under increasingly controlled circumstances. There is simply no reason why the most mundane case, that of a bike on bike accident, should be perceived as
abnormally dangerous activity and thus evaluated in a strict liability framework. The action undertaken is mundane and common in the extreme, no abnormal or excess risks are involved, and it is even the case that the victim is engaged in the very activity that goes astray for the injurer. This was a very conservative test and still strict liability standards are used. Even when we eliminate those respondents who rated the actor as not completely innocent, 39% of those remaining assigned some liability in the most mundane circumstances.

Thus far it is unclear is what distinguishes those participants who assign liability in these non-negligent cases from those who do not. Why do some adopt a strict liability rule and some a negligence rule? There are several possibilities. First, it may be that some psychological individual difference measure distinguishes these two groups of participants. Conservatism, degree of concern for others, risk tolerance or general economic philosophy may play roles. Alternatively, perhaps these participants do not differ on a personality dimension but instead construe the tort in different ways. One could imagine that some participants overestimate the frequency of injuries such as these, for example, and thus view compensation as more important.

One question highlighted by this research is that of actual court liability decision base-rates. If participants are so willing to assign liability in the absence of negligence in these cases then why are real world liability rates not higher? Two possibilities readily present themselves and both would be interesting areas of further research. First, it may be that judges are careful not to let strict liability cases get to the jury in the first place. Second, when cases do get to the jury, jury instructions play a role in counteracting the tendency we observe. If a judge instructs a jury to impose a negligence rule then that
might be sufficient to enforce the legally preferred standard. From the above studies, we cannot speak to the depth of commitment to the strict liability standard; it may be that instructions, perhaps accompanied by explanations, can change these attitudes. Previous work on jury instructions has found that they can have mixed effects on compliance.

Another possible explanation stems from the nature of the civil cases being considered. Perhaps the lay public is less supportive of strict liability when evaluating cases that fall into certain domains. Holding a driver or business owner liable for the harm they cause despite their best efforts may be seen differently than holding a doctor to that standard. Doctors routinely make decisions that have the potential to cause injury or death to their patients. Were they strictly liable (despite adherence to professional standards of care, best efforts, unforeseeable complications etc) for all decisions that ultimately had adverse effects then the consequences for the medical establishment would be quite dire. Perhaps lay individuals recognize this difference.

VI

Conclusion

As noted in the introduction, the justification for holding a party liable for injuring another has been debated extensively. Nonetheless, our studies do shed some light on

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50 Epstein, *supra* note 1, at (insert pincite); Fletcher, *supra* note 36, at (insert pincite); Posner, *supra* note 1, at (insert pincite).
how the problems presented here might be regarded. First, our subjects virtually always found full liability when the harm doer was negligent. That is, the basic intuition that torts are generally associated with wrongful acts\(^{51}\) is confirmed in our studies. Our manipulations had no effect when it came to wrongful actors: If you injure someone through faulty conduct, you must pay for the cost of the injury. We note, however, that these are moral intuitions – not legal judgments. This does not mean that all torts involve wrongful conduct, or that the law must require compensation for all wrongs. But it does mean that people have very strong and uniform judgments that wrongdoers should have to pay for the harm they cause, when they injury someone directly as a result of their carelessness.

As for strict liability, just as both legal doctrine and legal theorists are not entirely certain where it should begin and end, our subjects are not consistent in their judgments. It would be odd, here too, to characterize our subjects as believing that innocent harm doers have committed a “legal wrong” without having committed a “moral wrong,” since our subjects are not trained in the law.\(^{52}\) Rather, our subjects seem to be saying that as between two innocent people, it is only fair that the person who caused injury pay for it. If there is any wrong, it would be in the failure to pay, not in the injury-causing activity.\(^{53}\) This again is a moral judgment. To some extent it is consistent with current doctrine, but to a large extent it is not.

Moreover, the intuitions of many of our subjects were subtle. Only a minority of them would hold an innocent harm doer liable when neither of the two parties was on

\(^{51}\) See Goldberg & Zipursky, \textit{supra} note ___; Keating, \textit{supra} note ___.
\(^{52}\) See Goldberg and Zipursky, \textit{supra} note ___.
\(^{53}\) This finding is consistent with the views of both Coleman, \textit{supra} note ___, and Keating, \textit{supra} note ___, although they disagree sharply with each other. Thus, our studies can shed light on which descriptions of tort liability match popular intuitions, but we cannot go further than that.
business, and both were doing the same thing (riding a bike). Most of the strict liability judgments involved business. This suggests that our subjects may well have believed that when one person causes physical injury to another in the course of a profit-making activity, the harm doer has an obligation to internalize the costs. This, of course, is the argument set forth by economists, such as Richard Epstein on entirely different grounds. It may well be that economic analysis and moral intuitions are coextensive in this case.

Our results, then, seem to support aspects of a variety of theoretical approaches to tort law: wrongful conduct causing injury leads to clear intuitions that reimbursement is appropriate; strict liability blends into negligence when a factory fails to keep a complex process under control, even it did nothing wrong; innocent harm doers should better absorb the cost of an accident than innocent victims; harms caused by businesses should be internalized and netted out against profits. Yet in their partial support of so many theories, our results suggest that if tort law is even remotely as complex as the intuitions of ordinary citizens, then the law is not likely to be subject to explanation by a single principle, as a number of theorists attempt to do.

As in any case of community-code disagreement, it is important to remember that the community is not inherently “right.” It may be that the more business-friendly strict liability standards expressed by Posner in the Indiana Harbor case are “better” under some set of objective criteria. Here we consider only the question of descriptive norms and community preferences. A substantial portion of the community considers simple causality sufficient for liability. This may imply that the question of strict liability’s scope should be reopened. Alternately, it may instead imply that judicial instructions and community awareness campaigns should be crafted to target this dangerous intuition. Or
perhaps both of these need to be done to varying degrees. Regardless of the ultimate outcome of the legal policy debate, it is important to take community standards seriously in this discussion.