

Optimal Deterrence and Accidents

To Fleming James, Jr., *il miglior fabbro*

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Much recent writing on the fault system and on strict liability has concerned itself with the goal of minimizing primary accident costs, that is, the sum of accident costs and of accident prevention costs.¹ Perhaps because this literature has been genuinely interdisciplinary, the writers have frequently seemed simply to be firing past each other.² Words like “negligence,” “contributory negligence,” or “strict liability” have been used in different senses by different authors, and light and misunderstanding in roughly equal parts have predictably resulted.

Because I too have been guilty of using these concepts in ways which could be misinterpreted,³ I think it worthwhile to try to explain what I view the fault system and strict liability to mean *in terms of the goal of minimizing accident and accident prevention costs*. For short I shall call this goal “optimal deterrence.” A clear mapping of the concepts will be an appropriate tribute to my teacher, Fleming James, Jr., whose work has combined lucidity with originality to an extraordinary degree. Should I fail and simply add another bit of mud to the waters, I will at least have demonstrated how very rare are Jimmy’s qualities as a scholar and writer.

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1. This is only one of the goals which might appropriately be achieved by a legal system dealing with accidents. I have discussed other goals and their interrelations in *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970) [hereinafter cited as *COSTS*], and other articles, e.g., Calabresi & Hirschhoff, *Toward a Test for Strict Liability in Torts*, 81 *YALE L.J.* 1055 (1972) [hereinafter cited as *Calabresi-Hirschhoff*]; Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1089 (1972) [hereinafter cited as *Calabresi-Melamed*].

2. See, e.g., Brown, *Towards an Economic Theory of Liability*, 2 *J. LEGAL STUD.* 323 (1973); *COSTS*, *supra* note 1; Calabresi-Hirschhoff, *supra* note 1; Diamond, *Single Activity Accidents*, 3 *J. LEGAL STUD.* 107 (1974); Diamond, *Accident Law and Resource Allocation*, 5 *BELL J. ECON. & MAN. SCI.* 366 (1974); Posner, *A Theory of Negligence*, 1 *J. LEGAL STUD.* 29 (1972) [hereinafter cited as *Posner, Negligence*]; Posner, *Strict Liability: A Comment*, 2 *J. LEGAL STUD.* 205 (1973) [hereinafter cited as *Posner, Strict Liability*].

3. I have used the term “strict liability” to mean systems in which the decision as to which party to an accident was to bear the financial burden of the accident is based on which party is best suited to make a cost-benefit analysis between accident costs and accident prevention costs. See Calabresi-Hirschhoff, *supra* note 1. My use of the term “strict liability” has been read by some to imply virtually absolute injurer liability. See, e.g., Posner, *Strict Liability*, *supra* note 2, at 206-07, 213-14. See also pp. 665-68 *infra*.

I. The Fault System's Initial "Non-Fault" Assumption

The fault *system*, viewed entirely as a system for achieving "optimal deterrence," must be taken as making the initial assumption that, other things being equal, the victim (or more accurately, the class to which the victim belongs)⁴ can best decide whether it is worthwhile to prevent the accident. Whenever we lack information as to who, if anybody, ought to have avoided the accident, the loss lies where it falls, that is, on the injured. This will result in accident avoidance *only* if those in the class to which the victim belongs believe that prevention, even if costly, is more desirable than bearing the risk, and occasionally the actual cost, of such accidents.

This "no-liability" rule, with which the fault system begins but where it by no means ends, can achieve "optimal deterrence" only if we make either of two incredible assumptions. The first incredible assumption postulates that the victim-class is *always* the category which can (a) best decide whether accident avoidance is worthwhile, and (b) best accomplish such worthwhile avoidance. The second incredible assumption is the familiar old chestnut, the absence of transaction costs.⁵ If the victim-class had perfect knowledge and could, without administrative costs, bribe injurer-classes to avoid all those accidents which the injurer-classes could avoid more cheaply than the victim-class, then "optimal deterrence" would be achieved.⁶

II. Negligence: The "Regulatory" Determination

The fault system does not, as everyone knows, stop with the simplistic no-liability rule. It shifts losses from the victim-class to the injurer-class when the injurer is negligent. In terms of the goal of "optimal

4. This "class" includes those who are in the same insurance category, and those who, though uninsured, should view the accident risks and costs to themselves as roughly the same as those the victim actually bore. "Class" in this sense has no socio-economic connotation.

5. The concept of transaction costs is introduced in Coase's pathbreaking article, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960). As used by Coase, the absence of transaction costs implies that there are no impediments whatsoever to bargaining. This includes a requirement of perfect knowledge. In my article, *Transaction Costs, Resource Allocation, and Liability Rules*, 11 J. LAW & ECON. 67 (1968), I renounce some early doubts and explain why I agree that in the absence of transaction costs as defined by Coase, the sum of accident and accident prevention costs would be minimized regardless of which party to an accident were burdened with its costs. Since knowledge is never perfect, and since virtually all transactions entail some costs (any market entails some organizational costs), the placement of liability is frequently crucial to the achievement of "optimal deterrence." *Id.*

6. Precisely the same incredible assumptions are required to make the converse of the no-liability rule, which some writers have wrongly called strict liability, accomplish this same goal. Such a rule would impose accident costs on the injurer in *all* cases. See p. 665 *infra*.

deterrence," this step implies a deviation from the basic notion that the victim always knows best what accidents are worth avoiding. The injurer should avoid the accident whenever a jury, court, or legislature decides that accident prevention by him is socially more desirable than accident costs and that he ought to have known it. In a very rough way, this is what the Learned Hand definition of negligence, and its precursor, the Terry definition, are about.⁷

Were this all there was to the fault system, the goal I have been discussing would be approached, though not necessarily accomplished, whenever the tort law equivalent of a regulatory agency (a jury, court, or legislature) (a) correctly made the cost-benefit analysis between prevention and accident costs, and (b) succeeded in enforcing its conclusion. In these two cases, which are properly characterized as requiring the "absence of errors by regulators," all accident costs which are worth preventing by injurer action alone would be avoided. This follows from the absence of regulatory error. Moreover, the victims would avoid those accident costs which they foresaw injurers would not be induced to avoid, but which they nonetheless believed to be worth preventing. This is implicit in the fact that unless injurer "fault" is found, accident costs would lie, as in a no-liability system, on the victims.

This result fails to satisfy the goal of "optimal deterrence" in several respects. First, there is no assurance that those accident costs which will be avoided will be avoided most cheaply. Assume, simplistically, that an accident "costs" \$100. Assume also that the injurer can avoid this accident by spending \$80. The rule would induce injurer avoidance—at an expense of \$80—even if the victim could, let us assume, avoid the accident costs by spending only \$60.

In addition, some accident costs which are worth avoiding will still not be avoided. They may not be avoided because of victim error,

7. See Terry, *Negligence*, 29 HARV. L. REV. 40 (1915); *Conway v. O'Brien*, 111 F.2d 611, 612 (2d Cir. 1940) (L. Hand, J.), *rev'd on other grounds*, 312 U.S. 492 (1941) ("The degree of care demanded of a person . . . is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest he must sacrifice to avoid the risk."); *U.S. v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

I do not mean to suggest that the fault system actually attempts to apply the Learned Hand test precisely even were it possible to do so. Other goals of tort law, which I have discussed in *Cosrs*, *supra* note 1, would make it extremely unlikely that any such simplistic definition of negligence would actually be applied by juries however much a court might instruct them to do so. I discuss the Learned Hand test in this article because to the extent that the fault system does concern itself with minimizing accident costs and accident prevention costs, Hand's definition of negligence is a crucial part of that concern; cf. Posner, *Negligence*, *supra* note 2. Diamond, in his brilliant article *Accident Law and Resource Allocation*, *supra* note 2, discusses the effects of different negligence tests on resource allocation.

either in guessing what the regulators would compel injurers to do, or in comparing avoidance costs with accident costs. Moreover, and from a theoretical point of view more importantly, costs may also not be avoided because efficient avoidance often requires costly action by both victim and injurer. Assume, again simplistically, an accident cost of \$100. Assume also that injurers *alone* could avoid the accident at a cost of \$120, while victims *alone* could avoid the accident at a cost of \$130. Assume finally, consistently with the first two assumptions, that injurer expenses of \$40 and victim expenses of \$50 would serve to prevent the \$100 accident. Under the fault system thus far described, the \$100 accident would take place because the regulators would not find the injurer at fault (they would compare \$100 accident costs with \$120 injurer-prevention costs), while the victims, who compared the \$100 accident cost with the \$130 prevention cost would not find prevention worthwhile. Yet the \$100 accident could have been avoided by a joint expenditure of \$90.

Of course, were we to postulate no transaction costs in this last example, the goal of "optimal deterrence" would be achieved. The victim would spend \$90, \$50 on his own and \$40 to bribe the injurer to take safety measures. The accident would be avoided and \$10 would be saved. But transaction costs are always present; if they were not, any liability rule would achieve the minimization of the sum of accident and accident prevention costs.⁸ When transaction costs are relatively small (less than \$10 in our example), accident costs would be avoided (victim would pay \$50, bribe injurer to spend \$40, and incur the transaction costs of *less than* \$10, thereby saving something against the \$100 accident).⁹ But even then our objective would not be accomplished; a system which allocated \$40 in costs to the injurer and \$50 to the victim could have avoided the accident costs with lower prevention costs, since the transaction costs would also have been avoided.

Despite all these imperfections, the introduction of "fault" would probably improve an "absolute" no-liability system. It would increase the chances that we would approach the goal of "optimal deterrence." Our chances would be similarly improved, however, if the court, jury,

8. See note 5 *supra*.

9. Assume, for example, two householders who are bothered by a neon sign belonging to a neighboring factory. The bother is worth \$100 to the householders. Planting trees by the householders at a cost of anything less than \$100 will not, by itself, block the sign. Moving the sign a distance sufficient to eliminate the bother will cost the factory more than \$100. A small movement of the sign, costing the factory \$40, together with the planting of some trees, costing the householders \$50, will completely eliminate the bother. If the "transaction costs" of getting the householders and the factory together are less than \$10, the bother will be eliminated.

or legislative determination that injurer behavior was not worthwhile resulted in the imposition of appropriate fines or penalties, regardless of whether or not actual injuries occurred. The regulators could gauge the dangerousness and utility of the potential injurer's behavior and impose a fine or penalty whose size would depend on the magnitude of that undesirability based on *risk* of harm, rather than on the magnitude of the harm that occurred. *The Wagon Mound* would be brought to its logical conclusion,¹⁰ and the nonfault, no-liability system of market incentives on the victim would be modified by collective deterrence of injurer behavior deemed not to be socially worthwhile.¹¹

III. The Effect of the Negligence Determination: A Return to Market Incentives

The fault system does not, however, try to coerce compliance with its collective determinations that some injurer conduct is not worthwhile. Instead, after imposing an overlay of collective evaluation of injurer conduct on its original structure as a market incentive system with cues solely to victims, the fault system reverses direction again. Rather than penalizing wrongdoing injurer-categories regardless of the degree of harm which occurs, the fault system simply makes injurers pay the costs of the harm they cause,¹² if the jury, court, or legislature has deemed that they should have prevented the accident.

The effect of this extraordinary return to a market approach is that the decision by the regulators does not bind the injurers in any way. The collective decision, that avoidance by the injurer was worthwhile and that the injurer should have known it, is now little more than the basis for reversing the original judgment as to who could best

10. *Overseas Tankship (U.K.), Ltd. v. Morts, Dock & Eng'r Co., Ltd. (The Wagon Mound)*, [1961] A.C. 388 (P.C.). The House of Lords in the *Wagon Mound* took the position that damages should be limited to those foreseeable by the injurer. In effect, it held that the actual harm which occurred was irrelevant if the injurer could not have foreseen it. The fact that the victim might also not have foreseen it was ignored. Indeed, the very presence of an injured victim was all but ignored. The reasoning of the case was that foreseeable risk and undesirability of behavior should determine damages even if greater harm occurred. The same reasoning would lead to the conclusion that foreseeable risk and undesirability of behavior should determine damages even if less harm or no harm occurred. In both cases the presence or absence of a seriously injured victim would be irrelevant. For all its self-importance, the *Wagon Mound* has had remarkably little significance in this country.

11. Collective deterrence is employed in even the most market-oriented systems of law. No one would argue that two-year-old children should be permitted to drive simply because they or their parents can afford to compensate those they injure by driving. If a two-year-old is encouraged by its parents to drive, the parents are subject to punishment regardless of whether an accident occurs. See generally *Costs*, *supra* note 1.

12. At this level of analysis, let us assume generally in a "but for" sense.

make the cost-benefit analysis. Fault and the loss are assigned to the injurer rather than the victim; the analysis is now assumed to be best made by him. If future injurers agree with the regulators that avoidance is worthwhile, accident costs will be avoided. If they disagree, they are still free to pay the accident costs and bear the generally minor stigma of being called "at fault." Once the system returns to a market approach, the costs the injurers must pay will be those their negligence caused, for that is generally the easiest case-by-case way to burden them with those costs relevant to making the cost-benefit analysis.¹³ But the crucial point is that after seemingly adopting collective determinations of costs and benefits at level two, the fault system at level three again becomes a system of market incentives.

If we assume that the regulators make no errors in measuring costs, this turnabout does not help achieve our objective of minimizing the sum of accident and prevention costs; indeed, it hinders it. It adds the possibility that injurers will, through error, fail to avoid those accident costs which are cheaper to prevent than to compensate for. If the regulators are right that the accident costs were worth avoiding, it makes no sense to give the injurers an *independent* opportunity to review the issue.¹⁴ If, instead, we assume the possibility of regulator error, the turnabout may or may not help. To the extent that the error is in overestimating prevention costs, fault will not be found because avoidance will be deemed too costly. Consequently, the loss will lie on the victim, and we will be no nearer our objective than before. To the extent the error lies in underestimating prevention costs, the turnabout does permit injurers to choose the cheaper alternative of compensating rather than preventing the costs.

The very fact, however, that the benefit this third level confers on the fault system presupposes regulator error should make us skeptical of both levels two and three. Whenever we believe such error is unlikely, giving injurers a second chance is silly. Whenever, instead, we believe that regulator error is likely, our object should be to find a rule which protects against regulator *overestimate* of prevention costs

13. Again, "cause" here means generally in a "but for" sense. See note 16 *infra*.

14. Of course one could view even criminal law as giving the potential law breaker a "choice" of whether it is worth his while to comply with the law, or to break it and "pay" the penalty. There is, however, a significant difference between situations, like the standard "unintentional tort," in which actors are in effect asked to compare compensation costs with prevention costs and encouraged to choose the cheaper of the two, and those like the standard "crime," in which the penalty is not directly linked to the harm done in the particular case and in which severe stigma is added to the nominal penalty. Only in the latter does society try, as best it can, to enforce its collective judgment as to whether the "crime" is worth its costs; cf. Calabresi-Melamed, *supra* note 1, at 1124-27; R. POSNER, *ECONOMIC ANALYSIS OF LAW* 66-69, 357-73 (1972). See also p. 665 *infra*.

no less than regulator *underestimate* of these costs. Applying the negligence test, which fails to do this, is equally silly.

That errors of all sorts are frequent should, of course, be obvious. If neither regulator error nor injurer error existed, there would be *no* accident costs which, given our goal, would require compensation. Fault would never be found by perfect regulators unless avoidance were cheaper than compensation. And in all cases where avoidance was cheaper than compensation, unerring injurers would choose to avoid. Hence, compensation would never be the result. One can explain some recoveries on the basis of other goals, such as the desire to spread losses. Even if one does this, however, it is hard to avoid the conclusion that regulator and injurer errors are all-pervasive.

IV. The Role of Contributory Negligence

Traditionally, however, the fault system modifies the liability decision through the doctrine of contributory negligence, which bars recovery by victims who are themselves at fault. Contributory negligence, viewed from the perspective of "optimal deterrence," could be restated in the following way: If a regulator finds that the prevention of accident costs by the victim was worthwhile, then the loss remains on the victim even if prevention by the injurer was also worthwhile.

Again, this involves the introduction of collective decisionmakers, and again their effect is only to determine who must make the cost-benefit analysis, even though the decision is couched in terms of *how* the analysis should come out. In other words, there is a reintroduction of the pattern of reasoning which we saw at levels two and three, but now applied to the victim, thereby countering any level two decision to place the incentive on the injurer.

If interpreted strictly, contributory negligence does nothing to further the objective of "optimal deterrence." In particular, it does not avoid the danger of creating incentives to avoid accidents in relatively expensive ways. Assume again a \$100 accident. Assume injurer-alone avoidance costs of \$60, and victim-alone avoidance costs of \$80. In the absence of errors, the contributory negligence rule puts the incentive to avoid the accident on the victim, and results in avoidance costs of \$80, even though an expenditure of \$60 would have sufficed. Similarly, the strict contributory negligence rule is useless when avoidance requires joint injurer-victim action. The \$100 accident which the injurer alone can avoid at \$120, and the victim alone can avoid at \$130, but which can be avoided by victim expense of \$50 together with injurer

expense of \$40, will still not be avoided. No injurer negligence, and no victim contributory negligence, will be found, and unless transaction-bribery costs are very low, the victim will find it cheaper to bear the accident costs despite the theoretical availability of efficient prevention through joint action.

Of course, contributory negligence may not operate this way in practice. Perhaps it not only considers whether avoidance by victims is worthwhile, but also which party could avoid the accident more cheaply, as some writers have suggested.¹⁵ Perhaps comparative negligence would go still further and permit the kind of cost sharing I have described above. But before we indulge in these particular dreams, we must confront an embarrassing reality. If we are concerned with the *relative* ability of injurers and victims, jointly or alone, to avoid accidents cheaply, or more fundamentally, their relative ability to *decide* whether avoidance is worthwhile, why should we go through the particular contortions required by an analysis which evades these questions and asks instead whether avoidance by a single *party-category alone* is worthwhile? Yet that is precisely what the language of negligence, contributory negligence, and even comparative negligence begins by asking.

V. Proximate Cause and Assumption of Risk: Market Deterrence Again

I say "begins," for once again the fault system, after seeming to rely on collective deterrence and "regulator" decisions as to what behavior is worthwhile, limits the effect of those decisions by adopting two doctrines which emphasize market incentives and deterrence: "proximate cause," and "assumption of risk" in its primary sense.

Even if an injurer is negligent, the loss must lie on the victim (who is free from negligence) unless the injurer's negligence proximately caused the injury. Why? The collective decisionmakers have found that injurer avoidance is worthwhile. They have found that victim avoidance is not. Yet the existence of some better avoider, or lack of foreseeability, or great distance in time and space, will serve to place the loss, that is, the *incentive to avoid such accidents*, back with the victim. Conversely, a victim who, according to the collective decisionmakers, should have avoided accident costs—that is, was negligent—will nonetheless be allowed to recover if time, space, or lack of fore-

15. See, e.g., Posner, *Negligence*, *supra* note 2, at 40.

seeability suggest that his negligence was not sufficiently proximate to the injury to be "contributory."

This article is not the place to go in any detail into my view of the role of proximate cause.¹⁶ It is enough here to suggest that implicit in the concept is a determination of the *relative* injurer, victim, and third party ability to decide whether avoidance of accident costs is desirable. The requirement of proximate cause therefore suggests that such a determination is worth making even after the regulators have decided that accident cost avoidance is worthwhile, *i.e.*, found the injurer, the victim, or both negligent.

Similarly, the doctrine of assumption of risk, in its primary meaning,¹⁷ suggests that important elements of market deterrence adhere to the fault system. An injurer does something which the regulators can say he ought not to have done; to some potential victims the injurer behavior would have been negligent because the costs of avoidance would have been less than the accident costs; once again, it could not be said by the regulators that the actual victim *should* have avoided the accident (that is, there was no contributory negligence).¹⁸ Yet once again the decision is made to leave the loss on the victim. Why? Taking the doctrine literally: because of the victim's knowledge and choice-making potential. Even though the injurer-class, according to the regulators, *ought* to have decided to avoid the accident, nevertheless the victim-class was in a better position to decide whether avoidance was in fact worthwhile and therefore the incentive should lie with it.

VI. The Fault System's Mirror Image

This extraordinary, Janus-like system—constantly shifting between regulatory decisions which would seem to imply coercion, and non-coercive incentives based on those decisions—is in rough sketch the fault system. To understand it better we should look briefly at its

16. There is much in the concept that involves goals not germane to this article, and much that is germane which would nonetheless take me too far afield. My views on causation and torts were the basis of an as yet unpublished series of Harris Lectures, delivered at the University of Indiana Law School (Bloomington), Oct. 3, 4, 7, 1974.

17. "Assumption of risk" has at times been used to mean that victim behavior is "unreasonable" or "undesirable" or even "grossly negligent." This use of the doctrine, which has been frequently criticized, *see, e.g.*, *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 155 A.2d 90 (1959), is commonly termed the "secondary meaning" of the doctrine. The "primary meaning" of the doctrine involves no judgment on the worthiness of victim behavior. Under it the victim is barred because he "freely" accepted a risk which the injurer had a "right" to impose. This, it is said, "negates" injurer "duty" and hence injurer "negligence". *Id.*

18. If there was contributory negligence, if avoidance by the victim would cost less than the accident, we would not be talking about assumption of risk *in its primary sense*.

mirror image, at what some writers (unfortunately, in my view) call "strict liability with contributory negligence."¹⁹ This will be useful because it will enable us to contrast the mirror image fault system both with true no-fault systems (what I have called strict liability systems), and with true collective deterrence systems.

The mirror image of the fault system would begin with the rule that all losses lie on injurers.²⁰ This "absolute" liability rule would achieve "optimal deterrence" only (a) if the injurer classes were *always* better suited to make the cost-benefit analysis between accident and accident avoidance costs, or (b) if there were no transaction costs. These are the analogues of the two "incredible" assumptions required to make the fault system's starting point, the *no*-liability rule, achieve our goal.²¹ Once again, however, a modification would be available. "Victim Negligence"—that is, a finding by a court, jury, or legislature, that victim avoidance would have been less expensive than the accident costs—would justify placing the incentive to avoid such accidents on the victim. This is simply the reverse of the fault system, which starts with all losses borne by the victim and shifts the liability to injurers when they are at fault. Since we are reversing the fault system, the only effect of such a collective decision that avoidance is desirable would be to put the market incentive to avoid the accident on the victims rather than the injurers. If we were to pursue the mirror image further, we would refuse to apply this Victim Negligence restriction on basic injurer liability when the injurer was also negligent; this would function in the hypothesized system precisely as contributory negligence functions in the current fault system. Victim Negligence would also fail to shift the burden from the injurer unless the victim's negligence was a proximate cause of his own injury. Finally, certain types of injurer behavior which the regulators could in no sense say were wrong, negligent, or not worthwhile, would nonetheless justify leaving the burden and the incentive on the injurer *despite* the fact that avoidance by the victim was clearly worthwhile, and non-avoidance clearly wrong. Injurer "assumption of risk" would have its due.

Apart from having very different distributional effects from the fault system (injurers instead of victims would bear the burden of those accidents which were deemed not worth avoiding), this mirror image fault system would be very similar to the actual fault system.

19. See, e.g., Posner, *Strict Liability*, *supra* note 2, at 207-09.

20. See p. 657 *supra*.

21. *Id.*

With two exceptions, it would be about as close, and as far, from reaching the goal of "optimal deterrence" as the fault system. One can question whether it would have greater or fewer administrative costs.²² And we can ask the crucial and totally non-fault related question of whether as a starting point victim or injurer categories are better suited to avoid accidents in the absence of a regulatory decision that the opposite category *should* avoid a particular accident. Apart from these, the system would have essentially the same flaws that the fault system has, and the same advantages.

Regulatory errors would have the same effect as before on achieving our goal. So would errors in judgments by members of the class on which the loss would lie. Accidents which would be worth avoiding only through joint action by injurers and victims would be avoided only if transaction costs were very low. Moreover, even in the absence of error or joint action problems accidents would frequently be avoided in more costly ways than necessary. Nevertheless, if one is emotionally wedded to the particular mixture of market incentives and collective decisions which the fault system represents, and yet rejects the *distributional* effects of the system, then this mirror image fault system is the appropriate approach.

VII. The Strict Liability Approach

A quite different approach is that which I have in the past called "strict liability"—but which should emphatically be distinguished from absolute injurer liability. This approach would ask, both at the starting point of liability and at how ever many exception levels are deemed appropriate: Who is best suited to make the cost-benefit analysis between accident costs and accident avoidance costs? In other words, it would ask who should bear the incentive to *decide correctly*, rather than what is the correct decision. Whether the starting point would be victim incentives or injurer incentives is, as a theoretical matter, an open question. That currently there is a strong trend toward *injurer* liability as a starting position is evident. It began with ultra-hazardous activity liability, moved through workmen's compensation, and is culminating today in product liability and in part in automobile plans.²³

22. Leaving *all* accident costs on victims entails fewer administrative costs than shifting *all* accident costs to injurers. This in no way implies, however, that the actual fault system entails fewer administrative costs than would the mirror image fault system. Compare O.W. HOLMES, *THE COMMON LAW* 76-77 (M. Howe ed. 1963), with *Costs*, *supra* note 1, at 261-62; cf. Posner, *Strict Liability*, *supra* note 2, at 209.

23. No-fault automobile plans are in my terminology strict liability systems. They are not, however, primarily systems in which injurer liability is the starting position. The

But whether this trend is appropriate (as I am inclined to think) is a matter of empirical judgments, not theory. Similarly, the breadth and generality of the applicability of the starting position—the number of exceptions made to the original “incentive placement” rule, and whether their applicability is to be decided by classes or on a case-by-case basis—is also an open issue. It would be determined through empirical judgments concerning the administrative costs of making exceptions and the importance of such exceptions. This last, in turn, would depend on the likelihood that the “other” category could best make the cost-benefit analysis in significant classes of situations.

I would suggest that “strict liability” has always approached the problem in this way. Characteristically, once the starting position of, say, injurer liability has been established, exceptions have also been recognized. Since the system is a strict liability rather than a mirror image fault system, they have only rarely been defined in terms of Victim Negligence. That is, the “exceptions” continued to ask the characteristic strict liability question of who was best suited to bear the incentive, to make the cost-benefit analysis and act on it, and not the fault system’s standard question of how the analysis should come out in the judgment of some regulators. But these exceptions have nonetheless been fundamental. One need only think of master-servant liability, and of the independent contractor exception to it, and then of the non-delegable duty exception to *it*, and finally of the “scope of the non-delegable duty” limitation to realize how sensibly these decisions were approached.²⁴ Furthermore, while contributory negligence was only rarely a defense in strict liability cases, defenses which sounded like “assumption of risk,” “nonproximity of cause,” or which argued “this was not the type of accident which caused us to make liability strict in the first place,” were frequently accepted. This again suggests that the original decision to put incentives on injurers was limited by courts and legislatures whenever victim categories seemed better suited to decide and the administrative costs of making exceptions were not too great.

An example of the difference between a mirror image approach and a true strict liability approach may be useful. A rotary mower throws stones, a person uses it where there are stones, and is injured.

car owner or operator is required to insure himself against injuries. To that extent, these plans start with victim liability. The owner or operator is also required to insure pedestrians and his passengers. With respect to these victims, injurer liability is the starting point; *cf.* Posner, *Strict Liability*, *supra* note 2, at 212.

24. To say that the approach was sensible obviously does not imply agreement with the specific line-drawing which occurred.

The now generally applied starting position is manufacturer liability. The issue of whether to reverse this starting point could be decided on the basis of whether the user was negligent in mowing where there were stones. This would be a mirror image fault approach. By contrast, a strict liability approach (through the use of notions like "design defect," "adequacy of warning," and "assumption of risk") would focus on whether the user or producer belonged to the class best suited to bear the incentive toward safety, apart from whether in this case or in many cases the particular victim did something which we can collectively say ought not to have been done. Consider now the same mower manufacturer, and consider also a user who wants to mail a very important letter. His car won't start, he has no bicycle, and the post office closes in five minutes. He decides to ride the mower to the post office. The mower collapses and he is injured. It is perfectly possible to design mowers which would not collapse when driven on the highway. Again one could, absurdly, ask whether mailing the letter was so important as to justify, *i.e.*, make non-negligent, riding the mower down the street. Yet to let anything turn on that question would be to miscast the issue. The general starting point that manufacturers of mowers are better suited than users to decide for or against safety devices (implicit in the original decision to have products liability) should be reexamined in the light of the particular type of use, regardless of whether that use was justified or not. The necessary doctrine is again easily at hand; not *improper* use (mailing the letter may have been very *proper* if it was important enough), but unexpected, unusual, or extraordinary use can support the desired exception.

VIII. Two Advantages of Strict Liability

I have described in some detail elsewhere the advantages of using this non-fault approach and the factors relevant to making the non-fault liability decision.²⁵ But I think it is worthwhile to draw attention here to two advantages which have not been the subject of as much discussion as other, perhaps more important, ones.

The first concerns the "coalitional problem," that is, those accidents whose avoidance can best, or indeed only, be achieved by action on the part of both injurer and victim. Once one is no longer constrained by trying to decide whether avoidance by either the victim or injurer is worthwhile (a decision the fault system requires), then the problem

25. See, e.g., Costs, *supra* note 1; Calabresi-Hirschhoff, *supra* note 1.

is readily solved. It is perfectly possible to determine that in certain categories of accidents the cost-benefit decision can best be made, and acted upon, if part of the costs are borne by the injurer and part by the victim. Strict liability, as I have defined it, is in no way limited by any requirement that all the loss must lie on one class or the other. Nor are strict liability decisions limited to dividing the loss, where division is appropriate, in a purely quantitative way. Rather, one may hold that the desirability of avoiding the risk of certain *types* of damages is best determined and acted on by victim classes, even though the injurer can best make and act upon the necessary cost-benefit analysis for the accident itself and the basic damages that flowed from it. I shall not discuss the correctness of some strict liability decisions which have limited damages to economic losses, or have applied doctrines like assumption of risk to bar recovery of certain types of economic damage suffered by very special categories of victims. Their correctness depends on the accuracy with which they determined which category was best suited to make the cost-benefit analysis for the specific types of damage involved. It is enough to point out that the approach lends itself to such divisions in the arrangement of incentives, and hence is readily suited to dealing with the problem of accidents whose costs are best avoided, if at all, by decisions taken independently by both injurers and victims.

A second advantage of strict liability derives from the effect of errors by the regulators. In strict liability systems, unlike the fault system and its "mirror image," regulator error affects accidents in an unbiased way. I said earlier that the "overestimate" of prevention costs by regulators (resulting in improper failure to impose liability on the injurer) would not be cured in the fault system because, given such error, there would be no incentive for the injurer to prevent even readily avoidable accidents.²⁶ The same would be true for regulator overestimates of victim prevention costs in the mirror image fault system. On the other hand, underestimates of prevention costs in either system would be without effect, because the fault systems do not coerce compliance with their decisions that avoidance is worthwhile; as a result, injurers (in the fault system) and victims (in the mirror system) would ignore regulator underestimates of prevention costs when it suited them.

There is, however, no reason to assume a priori that regulator underestimate of avoidance costs is more frequent than regulator over-

26. See p. 661 *supra*.

estimate. Indeed, if one thinks of the possibility of developing new safety devices and the difficulty that regulators have in thinking in such dynamic terms, the opposite seems more than plausible. It would seem to me, therefore, misguided to rely on the ability of regulators not to overestimate prevention costs, as both the fault systems do, while giving parties to accidents the opportunity to reconsider, as it were, *de novo*, any possible underestimate. Our objective is more likely to be approached if we look for those sorts of situations in which regulators make errors of *both* kinds, that is, those in which regulators are unlikely to know *whether* avoidance is worth it or not. In these situations, putting the incentive on the class which is best suited to make the determination of whether avoidance is worthwhile seems much more likely to avoid error than would making a guess that avoidance was or was not worthwhile. It is precisely in these broad categories of situations, when we are uncomfortable with collective decisions that accident avoidance *is* worthwhile by either party, that we should apply strict liability systems.

IX. The Role of Collective Deterrence

But what of those accident costs whose avoidance, whether by injurers or victims, is clearly worthwhile? What of those occasions in which there is general agreement with the regulators' decisions that prevention should have occurred or that the dangerous act was not worth doing? The answer is that even in those cases the fault system does not function as well as would a system of noninsurable civil or criminal fines, imposed regardless of the individual accident costs. The reason is obvious: The fault system regulators do not coerce compliance with their decision once they decide that prevention *is* worthwhile. They rely instead on attaching an incentive, *viz.*, "the costs of such accidents," to the class which "should" prevent them. But this unnecessarily opens up the possibility of error on the part of that class in gauging whether compliance is, in fact, worthwhile.²⁷ To some extent, a decision on whether to comply is always a matter of choice on the part of the people society is trying to coerce.²⁸ Yet

27. "Error" in gauging whether compliance is worthwhile may stem from subjective desire to engage in the "faulty" behavior. If this subjective desire violates a strongly held collective view, then it is as much an error as an overestimate of prevention costs would be. For example, we correctly say that a drunk errs if he decides that drunken driving is more desirable than not combining driving and drinking. If, instead, the intensity of the desire suggests that the collective judgment for prevention was incorrect or doubtful, then we are no longer dealing with cases where "we are sure that avoidance by victims or injurers is worthwhile." And strict liability, rather than fault, is appropriate.

28. See note 14 *supra*.

who can seriously assert that the most effective way of preventing behavior that we have collectively decided to prohibit is to charge the actor's insurance company for the damages that behavior *happens* to cause? Thus, the fault system is far too tentative in enforcing those very judgments between prevention and accident costs which its regulators are reasonably sure are correct.

Assuming the goal is "optimal deterrence"—the minimization of the sum of accident costs and accident prevention costs—we are very likely to do better if (a) when we are certain that prevention is worthwhile, we coerce prevention, and (b) when we are uncertain, we attach incentives to decide *whether* prevention is worthwhile to that class which is best suited to decide the question. The fault system (or its mirror image) does neither—it requires a regulatory decision on whether prevention is worthwhile, even when that decision is not worthy of much reliance, and then fails to enforce that decision even when it is.

Perhaps the minimization of accident and prevention costs is not the proper goal. It surely is not the only objective of accident law. I have elsewhere discussed other goals which I, for one, deem every bit as important.²⁹ My object in this article was not to speculate about what all the relevant objectives, taken together, require. It was, rather, to set out schematically the ambivalent way in which the fault system approaches the goal of "optimal deterrence" and to suggest how very differently a combination of strict liability and "collective" prohibitions might approach that same goal.

It may seem ironical to emphasize, in an article in honor of Fleming James, that goal which, of all the goals of accident law, has been least attended to in his writings. I think not, however, for it is precisely because he focused his attention elsewhere that this goal, of all the goals of accident law, has remained most in need of careful analysis.

29. See note 1 *supra*.