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Between Two Worlds: The Shift from Individual to Group Responsibility in the Law of Causation of Injury

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ARTICLES

BETWEEN TWO WORLDS: THE SHIFT FROM INDIVIDUAL TO GROUP RESPONSIBILITY IN THE LAW OF CAUSATION OF INJURY

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The principle of individual responsibility is one of the foundations of tort law, and indeed of the common law in general. Recently, however, court decisions and scholarly commentary, particularly on the issue of actual causation of injury, indicate a shift away from the principle of individual responsibility in torts toward what can be termed group, or community, responsibility. While the dimensions of this shift are as yet limited, its implications are immense: it calls into question fundamental premises regarding the nature of the individual and the individual's relationship to society. This Article addresses the emerging shift in tort law from individual to group responsibility, and its legal, political, and philosophical implications. After tracing the shift and describing the generally confused and hostile responses that

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it has evoked, I demonstrate that the shift is justified by, and intuitively expresses, a revision of the political theory of the individual and society that underlies present conceptions of legal responsibility. I conclude that the shift to group responsibility is a positive development, but one that must be understood and applied much more critically than courts or commentators have done thus far.

INTRODUCTION:

THE INDIVIDUAL RESPONSIBILITY PRINCIPLE IN TORT LAW AND ITS CHALLENGER

According to the individual responsibility (IR) principle, an individual is responsible for the consequences of his own actions: that is, (1) responsibility for those consequences rests on him and not on some other(s) who had no part in bringing them about; (2) he bears responsibility only for his actions and not for the actions of some other(s) in which he played no part. In other words, the individual is responsible for *all* he does, but for *only* what he does. This is the essence of the IR principle as it has operated in tort law.

This principle underlies both of the major elements of a typical torts case—negligence and actual causation. Negligence is assessed on the basis of whether the individual defendant's conduct, and not someone else's, met or deviated from the required standard of conduct.[1] Likewise, actual causation requires a showing that the individual defendant's conduct, and not someone else's, was a necessary link in the chain of events that caused the plaintiff's harm.[2] This is at

1. *See* W. PROSSER & P. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164–69, § 39, at 248–49 (5th ed. 1984); *see also* Newing v. Cheatham, 15 Cal. 3d 351, 363, 540 P.2d 33, 41, 124 Cal. Rptr. 193, 201 (1975) (court explained that the purpose of the exclusive control component of the res ipsa loquitur doctrine was "to link the [individual] defendant to the probability . . . that the accident was negligently caused"); Sheffield v. Eli Lilly & Co., 144 Cal. App. 3d 583, 596–98, 192 Cal. Rptr. 870, 877–78 (1983) (court rejected plaintiff's argument that several vaccine manufacturers should be held liable, since plaintiff's injuries were caused by a single defectively produced batch of vaccine and as a result only one of the manufacturers was guilty of "tortious conduct," i.e., negligence).

2. *See* R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 1.41 (2d ed. 1974); W. PROSSER & P. KEETON, *supra* note 1, § 41, at 263–65, 269; Zwier, *"Cause in Fact" in Tort Law: A Philosophical and Historical Examination*, 31 DE PAUL L. REV. 769, 777–79 (1982); *see also* Ryan v. Eli Lilly & Co., 514 F. Supp. 1004, 1017 (D.S.C. 1981); Payton v. Abbott Laboratories, 386 Mass. 540, 571–73, 437 N.E.2d 171, 188–89 (1982); Namm v. Charles E. Frosst & Co., 178 N.J. Super. 19, 28, 427

the basic doctrinal level.

At a broader level, the IR principle seems to lie at the foundation of the two theories most commonly offered to explain the social function of tort law: the utilitarian theory and the corrective justice theory.[3] In the utilitarian view,

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A.2d 1121, 1125 (App. Div. 1981). There is no contradiction between this requirement and the doctrine of joint and several liability. *See infra* text accompanying notes 6–9. In a strict liability regime, where negligence need not be shown, actual causation is the central requirement for liability; therefore, the IR principle encompasses both negligence and strict liability. Thus, the controversial shift in tort law from negligence to strict liability, if it has occurred, has not displaced the IR principle.

Some contemporary writers argue that the actual causation requirement does not represent any kind of objective measure of the individual defendant's involvement in an injury. They suggest instead that all questions of causation are ultimately policy questions and are answerable only on nonobjective, political grounds. *See, e.g.*, Horowitz, *The Doctrine of Objective Causation*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 201 (D. Kairys ed. 1982). However, Horowitz's argument and historical discussion deal essentially with the *proximate* cause question and its concern for choosing among multiple targets for liability. It is true that no one today accepts the notion of identifying a sole proximate cause of injury by objective means free of policy considerations. However, the *actual* cause question is a different matter. Before courts will even begin the policy-oriented proximate cause inquiry, they require a showing that the defendant is at least an actual cause of the plaintiff's injury. And courts usually treat this actual causation question as a policy-neutral, factual inquiry. *See* Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1740–41 (1985). Wright points out that the "policy-cause" theorists generally confuse the actual causation issue with the policy-oriented negligence or proximate cause issues, and shows at length how "the causal inquiry is a factual, empirical issue that can be—and almost always is—kept distinct from the policy issues in tort adjudication." *Id.* at 1803; *see also id.* at 1803–13. On the other hand, this Article argues that the actual causation requirement *itself* is not a neutral concept, but a manifestation of a particular world view associated with a particular theory of society. *See infra* text accompanying notes 156–86.

3. *See* G. WHITE, TORT LAW IN AMERICA 218–30 (1980); Wright, *Actual Causation vs. Probabilistic Linkage: The Bane of Economic Analysis*, 14 J. LEGAL STUD. 435, 435–37 (1985). The utilitarian theory takes the view that tort law's function is to create incentives for individuals to use resources efficiently, that is, in a fashion that maximizes societal welfare. *See, e.g.*, Fletcher, *Fairness and Utility in Tort Law*, 85 HARV. L. REV. 537, 537–38, 566–69 (1972); Hutchinson, *Beyond No-Fault*, 73 CALIF. L. REV. 755, 758–59 (1985); Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851, 859, 861–62 (1984). The corrective justice theory takes the view that tort law's function is to correct individual injustices. *See, e.g.*, Englard, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEGAL STUD. 27, 27 (1980); Rosenberg, *supra*, at 859–60, 877; Wright, *supra*, at 435; *see also infra* notes 4–5 and accompanying text.

I adopt the terms "utilitarian" and "corrective justice" because they are widely used and understood. However, different labels are often used for each theory. For example, the utilitarian theory is also called the "functional" theory, *see* Englard, *supra*, at 32–34, the "economic" theory, *see* Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32–33 (1972); Wright, *supra*, at 436–39, and the "deter-

tort law exists to create incentives for social-cost-minimizing behavior.[4] Since individuals are the targets of these incentives, liability must be based on individual conduct, or it will distort incentives and lead to socially suboptimal behavior. In the corrective justice view, tort law exists to correct injustices committed by one individual against another; therefore, liability clearly must be based on individual conduct.[5] Thus, the IR principle is fundamental to tort law at both the doctrinal and theoretical levels.

Of course, there are situations where more than one individual is held responsible to an injured victim. When the actions of several individuals combine, either sequentially or contemporaneously, to produce a particular harm that would not occur in the absence of any one of them, all are held jointly and severally liable as tortfeasors.[6] However, under joint and several liability, each tortfeasor is still seen as individually responsible to the victim for the entire harm. The separate rights of contribution or indemnity that each tortfeasor might have against the others[7] do not change the fact that each one may have to pay the entire judgment. Nor does this result violate the IR principle. Since each tortfeasor's actions constitute a cause *sine qua non* of the entire harm, each can properly be held fully responsible. In other cases, a number of individuals are held liable for having "acted in concert" in a way that resulted in the victim's injury.[8] Again, the IR principle remains intact. Each indi-

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rence" or "deterrent" theory of tort law, *see* G. CALABRESI, THE COSTS OF ACCIDENTS 26–27, 68–69 (1970); Calabresi, *Optimal Deterrence and Accidents*, 84 YALE L.J. 656, 656–57 (1975); Rosenberg, *supra*, at 861–62; Note, *Market Share Liability for Defective Products: An Ill-Advised Remedy for the Problem of Identification*, 76 NW. U.L. REV. 300, 315–21 (1981).

4. *See, e.g.*, Posner, *supra* note 3, at 32–33; Note, *supra* note 3, at 315–21.

5. *See* Englard, *supra* note 3, at 27; Wright, *supra* note 3, at 435. Beyond the functional importance of individual responsibility to both theories, the two are also deeply committed at their philosophical roots to the concepts of the integrity, autonomy and inviolability of the individual, which any principle but individual responsibility would negate. *See infra* notes 170, 186.

6. *See* W. PROSSER & P. KEETON, *supra* note 1, § 41, at 268, 271–72, § 47, at 326, § 52, at 345–48; *see also* Michie v. Great Lakes Steel Div., Nat'l Steel Corp., 495 F.2d 213 (6th Cir.), *cert. denied*, 419 U.S. 997 (1974); Hackworth v. Davis, 87 Idaho 98, 390 P.2d 422 (1964); Maddux v. Donaldson, 362 Mich. 425, 108 N.W.2d 33 (1961); Zulauf v. New York, 119 Misc. 2d 135, 462 N.Y.S.2d 560 (Ct. Cl. 1983), *aff'd*, 110 A.D.2d 1042, 489 N.Y.S.2d 1019 (1985); Landers v. East Tex. Salt Water Disposal Co., 151 Tex. 251, 248 S.W.2d 731 (1952).

7. *See* W. PROSSER & P. KEETON, *supra* note 1, §§ 50–51, at 336–45.

8. *See id.* § 46, at 322–24; RESTATEMENT (SECOND) OF TORTS § 876 (1965); *see*

vidual is considered a necessary link in a "conspiratorial" circle, and each therefore is a cause *sine qua non* and bears individual responsibility to the victim for the entire harm.

The longstanding doctrine of vicarious liability is more difficult to reconcile with the IR principle.[9] For example, if an employer can be held fully liable for harm caused by an employee without any proof of dereliction in the supervision of the employee, the result would seem to violate the IR principle. In reality, it may; however, courts have labored to show otherwise. Frequently invoking the presumed agency relationship between the employer and employee, courts have insisted that the employer has acted individually through the employee to injure the victim.[10] The tenuousness of this argument attests to the commitment of its authors to regard the IR principle as sacrosanct.

Nevertheless, the doctrine of vicarious liability does suggest an alternative to the IR principle. Professor Feinberg, who has written extensively on the philosophy of legal responsibility, discusses the possibility of imposing vicarious, or collective, liability on a *group* for the actions of its constituent members: "When the whole group . . . is held responsible for the actions of one or some of its members, then, from the point of view of any given responsible individual, *his* liability will in most cases be vicarious."[11] What emerges from Feinberg's discussion is the principle of group responsibility. This principle would hold an individual responsible for others' actions, and vice-versa, not because they actually *acted* together, but simply because they are all *associated* within a common group. Thus, a victim could argue, "since I can show that I was injured by *someone* in this group, *everyone* in this group is obligated to pay me damages, whether or not he was, or acted with, the actual injurer." Such an argument is plainly incompatible with the IR principle. Therefore, to accept this argument openly would be to challenge the IR principle and the political-philosophical basis on which it rests. Even the bare form of this argument is

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also Orser v. George, 252 Cal. App. 2d 660, 60 Cal. Rptr. 708 (1967); Agovino v. Kunze, 181 Cal. App. 2d 591, 5 Cal. Rptr. 534 (1960).

9. *See* W. PROSSER & P. KEETON, *supra* note 1, § 69, at 499–501.

10. *See id.* at 499–500; *see, e.g.*, Ives v. South Buffalo R.R., 201 N.Y. 271, 94 N.E. 431 (1911).

11. J. FEINBERG, DOING AND DESERVING 233 (1970) (emphasis in original).

likely to offend some of our deeply held ideas about responsibility by suggesting "guilt by association" and "collective guilt."

Perhaps for these reasons, few have openly advocated adoption of the group responsibility principle. However, courts and commentators in a growing number of cases and articles have actually introduced what can only be understood as group responsibility.[12] In doing so, these courts and scholars have neither advocated nor even recognized the principle of group responsibility: they have justified their decisions and proposals by reference to the rationales of utilitarianism and corrective justice, both of which may be linked to the IR principle itself.[13] As a result, these decisions and commentaries are badly confused and internally inconsistent. Nevertheless, many critics have recognized the implication of these cases and proposals and have strongly resisted what they rightly see as a challenge to the IR principle.[14]

The time has come to begin openly the debate between the principle of individual responsibility and that of group responsibility, and the political-philosophical premises that underlie each. This Article attempts to open the debate in the area of tort law, just as it has been opened in other fields.[15] Only by doing so can we make intelligent choices

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12. *See, e.g.*, Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980); Abel v. Eli Lilly & Co., 418 Mich. 311, 343 N.W.2d 164, *cert. denied*, 469 U.S. 833 (1984); Bichler v. Eli Lilly & Co., 79 A.D.2d 317, 436 N.Y.S.2d 625 (1981), *aff'd*, 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982); Collins v. Eli Lilly & Co., 116 Wis. 2d 166, 342 N.W.2d 37, 469 U.S. 826 (1984); Delgado, *Beyond* Sindell: *Relaxation of Cause-In-Fact Rules for Indeterminate Plaintiffs*, 70 CALIF. L. REV. 881 (1982); King, *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353 (1981); Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713 (1982); Rosenberg, *supra* note 3.

13. *See supra* notes 3–5 and accompanying text.

14. *See infra* notes 111–34 and accompanying text.

15. For examples of this debate in other fields, including philosophy, medicine, and political science, see J. FEINBERG, *supra* note 11; M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); French, *Collective Responsibility and the Practice of Medicine*, 7 J. MED. & PHIL. 65 (1982); Weale, *Representation, Individualism, and Collectivism*, 91 ETHICS 457 (1981).

In tort law itself, some commentators, particularly from the Critical Legal Studies school, have more or less openly challenged the IR principle as a basis for imposing liability or awarding recovery. *See, e.g.*, Abel, *Torts*, in THE POLITICS OF LAW, *supra* note 2, at 185; Abel, *A Socialist Approach to Risk*, 41 MD. L. REV. 695 (1982) [hereinafter cited as Abel, *Socialist Approach*]; Horowitz, *supra* note 2;

about tort law, instead of wandering between two worlds, with some stumbling along in confusion and others settling into blind resistance to change.

Part I of this Article documents the emerging shift from individual to group responsibility in tort law, focusing on the actual causation issue. Part II describes the prevailing attitudes toward the shift, which range from resignation to resistance, and then demonstrates that none of these responses views group responsibility as a positive phenomenon. This hostility to group responsibility stems not from an attachment to the IR principle per se, but from a commitment to the underlying political theory of liberalism, which dominates modern American political thought, and from a corresponding aversion to the rival political theory of social welfarism, which appears to underlie group responsibility.[16] Part III suggests that in introducing group responsibility,

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Hutchinson, *supra* note 3. These critics object to the IR principle and the traditional causation requirement on the ground, among others, that these concepts are tools of "liberal legalism" that are used "to protect ruling elites from the claims of those they oppress." Levinson, Book Review, 96 HARV. L. REV. 1466, 1482 (1983) (reviewing THE POLITICS OF LAW, *supra* note 2). However, their proposed alternatives rarely go beyond socialized insurance, *see* Abel, *Torts, supra,* at 196–200, and advocacy of "participatory democracy" in local health and safety activities, *see* Hutchinson, *supra* note 3, at 770–71. Neither of these alternatives would involve group responsibility as discussed in this Article. Hence, these critics have not yet specifically or directly addressed the debate I am opening here. As Levinson puts it, in commenting on Abel's work, he "does not begin to describe a nonindividualist conception of injury that would allow us to transcend liberal legalism." Levinson, *supra,* at 1482–83.

16. Liberalism is also known as liberal individualism or the liberal theory; social welfarism is also known as welfarism or the social welfare theory. The liberal theory takes the view that the individual is the fundamental unit and basis of society and society's sole function and value is to facilitate self-fulfillment for individuals. *See* M. SANDEL, *supra* note 15, at 1–11, 50–53, 66–67; Murphy, *Liberalism and Political Society,* 26 AM. J. JURIS. 125, 125, 153 (1981). This political theory is associated with the corrective justice theory of torts. *See infra* text accompanying notes 157–86. The social welfare theory takes the view that the good of society in the aggregate is the supreme value and that this good can and should override individual rights and fulfillment when the two values conflict. *See* Rosenberg, *supra* note 3, at 859–61; Wright, *supra* note 3, at 436. This political theory is associated with the utilitarian theory of torts. *See infra* text accompanying notes 157–86.

There is less consensus on terminology in political theory than in tort theory. *See supra* note 3. Liberalism is also referred to as "rights-based" theory, *see* Hutchinson, *supra* note 3, at 759–60, "individual rights" or "individualist" theory, *see* Englard, *supra* note 3, at 32–33, 57–68; Rosenberg, *supra* note 3, at 859–60, and "fairness" theory, *see* Fletcher, *supra* note 3, at 537–43. Some scholars subdivide liberalism into "rights-based" and "libertarian" theory. *See* Hutchinson, *supra* note 3, at 757–60. Social welfarism is also referred to as political "utilitarianism" and "collectivism." *See* M. SANDEL, *supra* note 15, at 3–5, 50–51, 66–67, 138–47,

courts have actually not embraced social welfarism but have rather intuited the outlines of an alternative vision to both liberalism and social welfarism. This alternative vision, referred to as the communitarian theory of society,[17] possesses a number of advantages over both liberal and welfarist theory. In addition, it both justifies and rationally restricts the application of group responsibility in torts. My conclusion is that courts should openly encourage the shift to group responsibility, but only if they explicitly base this responsibility on communitarian grounds. For only the communitarian theory can justify and properly restrict this alternative principle of tort law.

I. THE SHIFT FROM INDIVIDUAL TO GROUP RESPONSIBILITY IN THE LAW OF CAUSATION OF INJURY

A. *The Actual Causation Requirement*

Traditionally, a basic requirement for recovery in any tort action, whether based on negligence or strict liability, has been that the plaintiff must prove by a preponderance of the evidence that the defendant's conduct was an actual

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165–67; Rosenberg, *supra* note 3, at 859, 907; Sandel, *Morality and the Liberal Ideal*, NEW REPUBLIC, May 7, 1984, at 15, 17.

My choice of "liberalism" and "social welfarism" as descriptive terms rests on several grounds. In political theory itself, the term "liberalism" is the accepted usage to describe the individualist, rights-based vision. The term "social welfarism," while it is used less widely, is less confusing in the context of the present Article than "utilitarianism" or "collectivism." The term "utilitarianism," in the political theory context, has its own historical background in nineteenth-century individualist political philosophy. Consequently, the term might confuse the reader were it used to describe a theory based on aggregate welfare. *See* Brinton, *Utilitarianism*, in 15 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 197 (E. Seligman ed. 1935). Furthermore, the use of a term different than that used to describe the associated tort theory is helpful to distinguish whether tort law or political philosophy is under discussion. The term "collectivism" is, in my view, simply too ideologically loaded to be useful as a primary descriptive expression. Given the foregoing clarification, it should be clear that "liberalism" does not refer to political policies "on the left" and that "social welfarism" does not refer to governmental programs designed to aid the disadvantaged. While some possibility of confusion may remain, the attentive reader will easily avoid it, and the choice of the liberalism/social welfarism terminology both reflects the literature of political theory and avoids more serious confusion.

17. The term "communitarian" is taken from current work in political philosophy. *See* M. SANDEL, *supra* note 15, at 147–54, 172–74; Sandel, *supra* note 16, at 17. Its meaning is developed in depth in the text *infra* accompanying notes 188–234.

cause of his injury.[18] This legal rule is directly related to the IR principle.[19] It requires a showing that the plaintiff's harm was a consequence of the defendant's actions, so that liability makes the defendant responsible only for his own actions.[20] It demands that the victim identify the party who was individually responsible for his injury.[21] Despite this congruence between the traditional causation requirement and the IR principle, it is precisely in the causation area that the shift from individual to group responsibility has been most pronounced.

In the causation context, group responsibility takes two forms: holding individuals responsible for each other's injurious actions when all are members of a common group, and allowing individuals to recover for each other's injuries when all are members of a common group. This Part shows how a number of court decisions and scholarly proposals have adopted group responsibility in one or both of these forms, although few if any directly acknowledge it.

B. *Case Law: "Special" Causation Rules for Multiple Causal Possibility*

In a number of recent decisions, courts have allowed plaintiffs to proceed even when they could not possibly satisfy the traditional causation requirement.[22] Several of these

18. *See* Namm v. Charles E. Frosst & Co., 178 N.J. Super. 19, 28, 427 A.2d 1121, 1125 (App. Div. 1981); W. PROSSER & P. KEETON, *supra* note 1, § 41, at 269; Zwier, *supra* note 2, at 777–79.

19. *See supra* notes 1–2 and accompanying text.

20. *See* Payton v. Abbott Laboratories, 386 Mass. 540, 571–73, 437 N.E.2d 171, 188–89 (1982).

21. *See id.* at 571, 437 N.E.2d at 188; Zwier, *supra* note 2, at 777–79. Of course, more than one such party may be identified in cases of joint tortfeasors. Functionally, the actual causation requirement furthers the utilitarian goals of tort law. It ensures that the responsible party cannot escape the full burden of liability by shifting blame to another. It also avoids placing any burden on actors, even blameworthy ones, whose conduct was in fact harmless. The full force of deterrence is thus directed at individuals who actually produce harm. Individuals who do not actually produce harm are spared from "overdeterrence," so that incentives for cost-minimizing behavior are clear and undistorted. *See* Posner, *supra* note 3, at 40–42. At the same time, the identification requirement is crucial to the fulfillment of the corrective justice goal. Only after identifying the injurer is it possible to correct the specific injustice done, by having the individual injurer, and no one else, repay his individual victim.

22. *See, e.g.*, Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353 (E.D. Tex. 1981), *rev'd*, 681 F.2d 834 (5th Cir. 1982); Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980);

cases presented a similar fact pattern: plaintiffs injured by a generically marketed drug, DES, could not identify the specific manufacturer of the DES that injured them. The decisions in these cases and certain others have varied in their approaches and rationales and have articulated a number of "special" cause-in-fact rules to deal with the situations presented. All these "special" rules have implicitly introduced the group responsibility principle.

1. Concert of Action

A court may hold several tortfeasors jointly and severally liable when they have acted in concert in a way that causes a plaintiff injury.[23] This does not contradict the IR principle. As long as "concerted action" is defined as involving mutual cooperation and encouragement by each defendant, then each can be considered a necessary participant. Hence, each is individually responsible for the entire harm. However, at least one court in a DES case has held that a plaintiff can use a concerted action argument to establish causation even when the alleged concert of action involved no more than "conscious parallel" behavior.

In *Bichler v. Eli Lilly & Co.*,[24] the court concluded that, in testing and marketing DES, each of the multiple defendants acted independently, but in a manner that each knew was similar to the others' actions.[25] By recognizing a distinction between this kind of behavior and traditional concert of action, the court indicated that it did not believe that the defendants had "acted as one" or had "aided and abetted" one another such that each could be considered individually responsible for the entire harm. Nevertheless, while acknowledging that each manufacturer had acted independently, the court still held each liable to the plaintiff for one hundred

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Copeland v. Celotex Corp., 447 So. 2d 908 (Fla. Dist. Ct. App. 1984), *rev'd in part and modified*, 471 So. 2d 533 (Fla. 1985); Abel v. Eli Lilly & Co., 418 Mich. 311, 343 N.W.2d 164, *cert. denied*, 469 U.S. 833 (1984); Bichler v. Eli Lilly & Co., 79 A.D.2d 317, 436 N.Y.S.2d 625 (1981), *aff'd*, 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982); Martin v. Abbott Laboratories, 102 Wash. 2d 581, 689 P.2d 368 (1984); Collins v. Eli Lilly & Co., 116 Wis. 2d 166, 342 N.W.2d 37, *cert. denied*, 469 U.S. 826 (1984).

23. *See supra* text accompanying note 8.

24. 79 A.D.2d 317, 436 N.Y.S.2d 625 (1981), *aff'd*, 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982).

25. *Id.* at 324–26, 329, 436 N.Y.S.2d at 630–31, 632.

percent of the damages. In effect, since the plaintiff was unable to point a finger at a responsible individual, the court instead allowed her to point to a group, which it defined by similarity of behavior. The court then held each member of the group fully responsible for what may have been, and in some cases certainly was, other members' actions—effectively adopting the group responsibility principle.

2. Alternative Liability

Earlier cases that dealt with the problem of impossibility of proof of causation provided another basis for allowing recovery in DES cases. The alternative liability approach originated in the often cited case of *Summers v. Tice.*[26] In this case, the plaintiff had been injured by a bullet that certainly was fired by one of two negligent hunters; however, *which of the two* had fired the bullet could not be determined. Rejecting a concert-of-action rationale, the court decided for reasons of "practical justice" to shift the burden of proof on the issue of causation and to hold each defendant fully liable if he could not exonerate himself.[27] However, shifting the burden of proof actually changed the plaintiff's burden fundamentally and permanently. Once shifted, the burden could not be overcome in *Summers,* nor in most other cases in which *Summers* has been applied. In effect, the *Summers* rule is that the plaintiff who is unable to point to a single negligent actor as responsible can point instead to a group of negligent actors that certainly includes the responsible individual. All members of that group are liable, each for the entire harm.

The *Summers* approach, dubbed "double fault and alternative liability" by Dean Prosser,[28] has been applied subsequently in a variety of group settings, from medical malpractice[29] to defective products[30] to multiple-car collisions[31] and finally to DES cases.[32] The key element of the *Summers* rationale in all of these situations, including *Summers*

26. 33 Cal. 2d 80, 199 P.2d 1 (1948).

27. *See id.* at 86–88, 199 P.2d at 4–5.

28. W. PROSSER & P. KEETON, *supra* note 1, § 41, at 270–71; *see* RESTATEMENT (SECOND) OF TORTS § 433B(3) (1965).

29. *See* Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944).

30. *See* Anderson v. Somberg, 67 N.J. 291, 338 A.2d 1 (1975).

31. *See* Vahey v. Sacia, 126 Cal. App. 3d 171, 178 Cal. Rptr. 559 (1981); Copley v. Putter, 93 Cal. App. 2d 453, 207 P.2d 876 (1949).

itself, is the courts' decision to hold all the individuals in a group responsible because that group certainly includes the "guilty" party. This means that all but one in the group will pay for some other member's actions—a shift from individual to group responsibility.

3. "Market Share" Liability

"Market Share" liability is a third theory used to allow DES plaintiffs to proceed despite their inability to prove which defendant caused their injury. This theory, adopted by the California Supreme Court in *Sindell v. Abbott Laboratories,*[33] is best understood as an attempt to balance a concern for plaintiff's recovery against a perception that the concert of action and alternative liability approaches were unfair to defendants.[34] The court fashioned a compromise. Plaintiff could point to a group of possible causal actors that probably, but not certainly, included the actual responsible party. Each member of this group would be liable unless exonerated, but the liability of each would be limited to a portion of plaintiff's damages proportional to that defendant's share of the total sales of the drug. In effect, the market share represented the rough equivalent of the statistical probability of causation by each defendant.[35] This approach diluted the *Summers* requirement that all possible causal actors be joined, making it easier for plaintiff to recover; but at the same time it limited individual exposure, making it less likely that individual defendants would bear full liability. As a compromise between no recovery and joint and several liability, market share liability was brilliant. However, it is an even clearer example than the two previously discussed "special" causation rules of the shift from individual to group responsibility.

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32. *See* Abel v. Eli Lilly & Co., 418 Mich. 311, 343 N.W.2d 164, *cert. denied,* 469 U.S. 833 (1984).

33. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied,* 449 U.S. 912 (1980).

34. Under either of those approaches, any single defendant included within the group responsible for the harm could bear the entire burden of the plaintiff's damages. The *Sindell* court was probably troubled about imposing such extensive liability for a mere possibility of causation. However, the court was equally troubled by the solution of barring the plaintiff's recovery unless causation could be proven in the traditional manner.

35. *Sindell,* 26 Cal. 3d at 612–14, 607 P.2d at 937–38, 163 Cal. Rptr. at 145–46.

The *Sindell* court, implicitly recognizing the problem of adopting what amounted to group responsibility, emphasized that under its theory, each defendant would pay for no more than the aggregate injuries caused by its own actions.[36] In other words, the court claimed that the IR principle, threatened by the other theories, was kept intact here. However, this was disingenuous. *Sindell's* market share liability represents group responsibility in several ways. First, as the dissent in *Sindell* and other observers have argued, the decision implies that the plaintiff who sues can recover one hundred percent of her damages from the named defendants, even if they represent less than one hundred percent of the market, provided that they represent a substantial share.[37] If this reading is accurate, then even considering aggregate harm, each individual defendant would almost certainly pay for harm done by others—that is, producers in the same market who are not or cannot be joined as defendants in the litigation. Second, even if all producers were joined in a *Sindell* action, the strong possibility remains that not every *victim* would be included, whether in a class suit or a series of individual suits. If this is the case, some of the defendants who pay on a market share basis once again will pay for harm they did not do to the actual plaintiffs, even in the aggregate, since their victims, by hypothesis, would not be plaintiffs at all. Finally, even if all injurers and victims were included in a *Sindell* action, each injurer would not necessarily compensate *his* victims for the harm that he caused. Rather, the effect of the market share theory is that a class pays a class, with each individual defendant paying a portion of each individual plaintiff's damages. Every defendant pays for some, but not all, of the harm he actually did and for some harm done by others in the group. The IR principle is therefore violated for every defendant!

The court's disclaimer does not alter the difficulty of defending *Sindell* under the IR principle. On the other hand, *Sindell* can be readily understood as an application of a principle of group responsibility, whereby a plaintiff who is unable to point to a responsible individual can point instead to

36. *See id.*, 607 P.2d at 937–38, 163 Cal. Rptr. at 145–46.

37. *See, e.g., id.* at 618–19, 607 P.2d at 940, 163 Cal. Rptr. at 148 (Richardson, J., dissenting); Note, *DES: Judicial Interest Balancing and Innovation*, 22 B.C.L. REV. 747, 776–78 (1981).

a responsible group and hold individual members of the group liable for each other's actions.

C. *Scholarship: Group Justice for the "Indeterminate Plaintiff"*

Following the DES cases, scholars began examining the implications and possible extensions of those decisions to other areas where the traditional causation requirement was difficult or impossible to satisfy, particularly in so-called "toxic torts" or mass exposure cases.[38] In these cases, the problem was one or both of the following: (1) the source of a toxic agent that damaged the plaintiff was, as in the DES cases, only generally but not specifically identifiable; (2) a toxic agent from a specifically identifiable source was known to have harmed some individuals within an identifiable group, but the specific victims within that group could not be identified. One commentator dubbed the latter case the problem of the "indeterminate plaintiff," the mirror of the DES "indeterminate defendant" problem.[39]

The inherent difficulty of satisfying the traditional causation requirement in these cases is illustrated by the following example. A leak by a chemical producer exposes 1000 individuals to a toxic agent known to cause a particular form of cancer. This form of cancer also occurs at a certain "background level" in the population because of other unknown environmental sources. Following the leak, the number of cancer cases in the exposed population rises well above the background level. Although it is statistically certain that some of the postexposure cases were caused by the leak, no one can determine which cases are attributable to the leak. If the traditional causation rule is followed and statistical evidence is relied upon,[40] a greater-than-one hundred percent postexposure increase in cancer incidence will result in every cancer victim recovering one hundred per-

38. *See, e.g.*, Delgado, *supra* note 12; Robinson, *supra* note 12; Note, *Epidemiologic Proof of Probability: Implementing the Proportional Recovery Approach in Toxic Exposure Torts*, 89 DICK. L. REV. 233 (1984) [hereinafter cited as Note, *Epidemiologic Proof*]; Note, *The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation*, 35 STAN. L. REV. 575 (1983) [hereinafter cited as Note, *Inapplicability of Traditional Tort Analysis*]; Note, *Tort Actions for Cancer: Deterrence, Compensation, and Environmental Carcinogenesis*, 90 YALE L.J. 840 (1981) [hereinafter cited as Note, *Tort Actions for Cancer*].

39. *See* Delgado, *supra* note 12, at 882–83.

40. *See infra* notes 64–65, 127–34 and accompanying text.

cent of his damages from the toxic leaker, even though many have acquired cancer for reasons unrelated to the leak.[41] This result would violate the IR principle because the defendant would pay for injuries he did not cause. However, if the increase in cancer incidence is one hundred percent or less, or if statistical evidence alone is not considered sufficient, then no victim will recover, although many almost certainly contracted cancer because of the leak.

The solution to this conundrum, according to Professors Rosenberg and Delgado, who write separately but reach quite similar conclusions, is that courts must regard the situation as one involving harm done by a class or an individual to a class. Courts then must modify the causation requirement accordingly.[42] The implicit corollary to this solution is that the underlying principle of responsibility must shift from individual to group responsibility.

Delgado's proposal would require an indeterminate plaintiff to proceed against the defendant through a class action. Plaintiff's causation requirement would be limited to a showing that defendant's action was the only possible human cause of the type of injury suffered. Once plaintiff met this burden, presumably by epidemiologic evidence, defendant would be presumed responsible for the injuries of a victim group corresponding in number to the excess of post-exposure injuries over the preexposure level. The total damages would be paid to the entire plaintiff class of exposed individuals and distributed according to various possible schemes.[43] Delgado acknowledges, but does not discuss in depth, the possibility of an indeterminate plaintiff variation of the *Sindell* situation, in which a defendant group or

41. The incidence must increase by more than 100% to permit any recovery. If the statistical evidence of the increased incidence of disease is the sole evidence of causation, a 100% or less increase in cancer incidence following the leak shows, for any individual victim, that there is a 50% or less probability that his cancer was caused by the leak. There is an equal or greater probability that it resulted from another source. Under the traditional rule requiring proof by a preponderance of the evidence, this would be insufficient to prove causation, and no one could recover. Conversely, if the incidence increases by more than 100%, every victim can meet the burden and recover because for each victim there is a greater-than-50% chance that his cancer was caused by the leak.

42. *See* Rosenberg, *supra* note 3, at 855, 884–85, 905–07; Delgado, *supra* note 12, at 899–901.

43. Delgado, *supra* note 12, at 899–900, 901 & n.97. The method of calculating total damages is not entirely clear. *See id.* at 901 n.96.

class would pay the plaintiff group, each individual defendant paying according to his market share.[44] Rosenberg's proposal is very similar, although he frames it in terms of imposing on the defendant liability "proportional" to the excess risk that he created.[45]

Both Rosenberg's and Delgado's proposals rely on the conception of group responsibility or group justice. Delgado notes that in these types of cases, "a class is in a sense injured."[46] He recognizes that a class award "undercompensates some victims while overcompensating others, a result some class members will see as unfair," but he implies that fairness to the class as a whole is a legitimate alternative.[47] Rosenberg is even more forthright in facing the issue of plaintiffs' windfalls and group fairness:

> [O]ne could . . . logically describe the defendant's duty in aggregative terms as a duty extending from the defendant to a class—the exposed population. Such a view suggests that the defendant's wrongdoing inflicts loss on the exposed population as a whole . . . . The proportionality rule simply holds the defendant liable for . . . the . . . losses it has caused in the "body" of the exposed population . . . . the population as a whole gains no windfall . . . . Essentially, the aggregative conception envisions that courts will assess liability on behalf of the entire exposed population . . . .[48]

In effect, Rosenberg and Delgado shift the focus of the search for an alternative to the IR principle from the source to the target of responsibility. Just as the special causation rules imply that responsibility can *rest on* groups of individuals,[49] so also responsibility can be *owed to* groups of individuals. In other words, a group responsibility principle carries

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44. *See id.* at 907–08.

45. *See* Rosenberg, *supra* note 3, at 859. Under Rosenberg's formulation, which also requires a class action, plaintiff's causation requirement would be to establish—by epidemiologic and, when appropriate, by market share evidence—the "probability of causation assigned to the excess disease risk in the exposed population, regardless whether that probability fell above or below the 50% threshold . . . ." *Id.* at 859. Defendant(s) would be liable for a portion of the aggregate injuries of the entire plaintiff class (the exposed population in this example) proportionate to this excess risk figure and market share.

46. Delgado, *supra* note 12, at 888.

47. *Id.* at 892. This alternative is even more compelling because the result under traditional rules is unfair to all—no recovery for anyone.

48. Rosenberg, *supra* note 3, at 884–85; *see also* Note, *Epidemiologic Proof*, *supra* note 38, at 256–58; Note, *Tort Actions for Cancer*, *supra* note 38, at 852–55.

49. *See supra* notes 22–37 and accompanying text.

implications for victims as well as injurers.[50] Under the IR principle, a victim's claim can never rest on any basis other than injuries he has suffered individually. Under group responsibility, a victim's claim can be based on injuries suffered by a group of which he was a member. Thus, the corollary of group responsibility is group rights.[51]

While Rosenberg and Delgado do not articulate these ramifications in the shift from individual to group responsibility, the implications are inherent in their proposals. Their focus on the victim significantly widens the implications of the group responsibility principle. Not only can a plaintiff unable to identify an individual injurer point to an identifiable group of possible injurers and hold individual members of that group responsible; but a plaintiff unable to identify himself individually as a victim can point to an identifiable injured group of which he is a member, hold the injurer responsible to this group, and share in the compensation. From both directions, individual responsibility shifts to group responsibility.

D. *Scholarship: "Individual Justice" Based on Probability of Causation and Risk Contribution*

Another group of commentators seems to suggest that the problem of causation in the indeterminate plaintiff or defendant case can be handled in a manner consistent with the IR principle.[52] All of these scholars contemplate individual victims recovering from individual injurers, and all rely to some degree on the use of statistical evidence to establish

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50. Under the IR principle, an injurer is responsible only for harm that he does and only to victims he personally affects. Under group responsibility, he is responsible for harms done by others in his group to victims he has not affected personally. Rosenberg and Delgado imply that he is responsible even for harms done by others *not* in his group, at least when their victims are indistinguishable from his, i.e., are members of his victim's group. In other words, by affecting some victims, an injurer becomes responsible for others in the victims' group. The point may also be framed from the victims' perspective as in the text.

51. *See* Weale, *supra* note 15. From a different perspective, group responsibility places responsibility on one victim for other victims. When we are in a common group, I cannot single out my injury in disregard of yours. Instead, I recognize that a response to my situation must include a response to yours as well; hence, our claim is one of responsibility owed to a group, or a claim of group right.

52. *See generally* King, *supra* note 12; Robinson, *supra* note 12; Note, *Epidemiologic Proof*, *supra* note 38; Note, *Tort Actions for Cancer*, *supra* note 38.

causation and on the device of awarding recovery for an amount other than the victim's full actual damages. Despite appearances, however, the underlying basis of these proposals is not individual responsibility but group responsibility.[53]

There are two basic approaches taken by this group of scholars. The first would impose liability based on risk contribution or probability of causation. The second approach would hold defendants liable for loss of expected value. Under the first approach, suggested most notably by Professor Robinson, the individual plaintiff who encounters difficulty proving traditional causation because of either defendant or plaintiff indeterminacy could recover from any individual defendant under "a rule that imposes liability for the creation of a risk and apportions liability according to the magnitude of that risk."[54] That is, the court would merely require the plaintiff to establish a statistical figure reflecting the "probability of causation" by a particular defendant. The plaintiff then would recover a portion of his damages from that defendant. The amount recovered would be proportional to the "probability of causation" figure, whether the probability was fifty-one percent or lower and whether it was established by purely statistical evidence or otherwise. Robinson's "probabilistic approach to causation"[55] can encompass both the problem of the indeterminate defendant and that of the indeterminate plaintiff. Robinson's hypothetical examples represent a combination of the two.[56]

The second approach is best exemplified by the writings of Professor King.[57] King suggests that courts should permit the individual toxic exposure victim, for example, to recover against an individual defendant or defendant class for

53. The reasons for the discrepancy between substance and appearance in these proposals will be discussed later. *See infra* text accompanying notes 136–48.

54. Robinson, *supra* note 12, at 749.

55. *Id.* at 766.

56. *See id.* at 750–51, 758, 762. Other writers, including Rosenberg, have stressed the potential usefulness of a "proportional liability" rule in the indeterminate plaintiff situation. *See* Rosenberg, *supra* note 3, at 858–59. However, while Rosenberg envisions a class action and class remedy, *id.* at 905–24, others follow Robinson and adopt proportional liability for probability of causation as a rule for individual victim-injurer suits. *See* Note, *Epidemiologic Proof*, *supra* note 38, at 249–55; Note, *Inapplicability of Traditional Tort Analysis*, *supra* note 38, at 612–18; Note, *Tort Actions for Cancer*, *supra* note 38, at 855–59.

57. *See* King, *supra* note 12.

the present value of the increased risk that the victim bears because of exposure.[58] This ordinarily will be measured by reduced life or health expectancy in statistical terms. The exposure victim suffers the immediate loss of some preexisting chance of a healthy and extended life. He is thus entitled to recover this loss immediately. If he suffers no ill effects from the exposure he still keeps the award, but if he suffers severe effects he receives no further compensation. The parallel to the individual plaintiff windfall-shortfall problem in Delgado's class remedy is plain,[59] but the form of the remedy here retains an individual character.

Both Robinson's risk contribution theory and King's lost value theory give the impression that liability in these cases can be imposed on the basis of injurers' individual responsibility for risk-creation or destruction of value. Nevertheless, while proposals like Robinson's and King's seem to maintain the IR principle, they actually involve group responsibility.

The underlying logic of risk contribution liability is that over time, an injurer will pay to a series or group of individual victims an amount roughly equal to the aggregate damage he caused to some of the victims in that group. This is precisely the kind of "responsibility to a group" phenomenon involved in Delgado's indeterminate plaintiff proposal.[60] On the other hand, if the case involves indeterminate defendants, as in Robinson's hypothetical case of a cancer caused by one of three alternative sources,[61] risk contribution liability in effect ascribes responsibility to a group of in-

58. *See id.* at 1370–73, 1383–84; *see also* Note, *Epidemiologic Proof*, *supra* note 38, at 255. King draws an analogy to the patient who suffers paralysis due to a botched operation, but whose preexisting condition made the paralysis likely even after a perfect operation. Such a patient is allowed by some courts to recover for the "destruction of the chance" of recovery. *See* King, *supra* note 12, at 1363–70; *see also* Hicks v. United States, 368 F.2d 626 (4th Cir. 1966); Kimball v. Scars, 59 A.D.2d 984, 399 N.Y.S.2d 350 (1977); Kallenberg v. Beth Israel Hosp., 45 A.D.2d 177, 357 N.Y.S.2d 508 (1974), *aff'd*, 31 N.Y.2d 719, 337 N.E.2d 128, 374 N.Y.S.2d 615 (1975). The opinions in the foregoing cases are vague as to whether recovery in these cases is limited in proportion to the original probability of survival, as King's approach would suggest. However, a concurring opinion in a Washington Supreme Court case explicitly cited King and argued for a proportional recovery rule in such cases. Herskovits v. Group Health Coop., 99 Wash. 2d 609, 630–36, 664 P.2d 474, 485–87 (1983) (Pearson, J., concurring).

59. *See supra* text accompanying notes 46–48.

60. *See supra* text accompanying notes 48–51.

61. *See* Robinson, *supra* note 12, at 750, 762.

dividuals whose activities tend to cause similar injuries. In every individual case, risk contribution liability would hold each of the multiple defendants partially responsible for what may be another's actions. The logic is that the total damages paid by each defendant over a number of individual cases will approximate the aggregate harm he inflicted. Nevertheless, this is the logic of "responsibility on a group" reflected in the *Sindell* decision;[62] it is not the logic of the IR principle. The risk contribution theory makes sense only in terms of a group responsibility principle.[63]

The lost value theory depends equally upon a group responsibility premise. Moreover, an analysis of this theory helps to understand better the group premise of the risk contribution theory. The essence of the lost value approach is its reliance upon probabilistic or statistical evidence to assess both the victim's preinjury "value" and the impact of the injurious exposure on that value.[64] Statistical evidence essentially calls for inferences about the individual based upon information about some group of which he is a member.[65] This is true whether the statistical argument is ap-

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62. *See supra* text accompanying notes 36–37.

63. Robinson notes that in adopting his theory, he rejects Cardozo's famous injunction against imposing liability for "negligence in the air." Robinson, *supra* note 12, at 738–39. In other words, he believes that the defendant need not actually harm the individual plaintiff to justify imposing liability on the defendant. Liability should lie for negligence, or risk imposition, alone. Therefore, under Robinson's theory, a plaintiff exposed to injury by two tortfeasors, but actually injured by only one of them, would recover from the noninjurer as well as the injurer. If the noninjurer's probabilistic contribution to risk is greater, plaintiff would recover *more* from him than from the known actual injurer. *See id.* at 739, 754–58. There could hardly be a clearer violation of the IR principle, from the perspectives of both the injuring and the noninjuring defendant. (This is not simply a version of the rule of concentrating responsibility on a superceding intervening cause, because all proximate cause discussions presume that every proximate cause is also an actual cause.) From the victim's perspective, risk contribution liability would mean that a victim would never recover from any individual defendant the actual damage done to him by that defendant. Each individual case would involve a shortfall or windfall to the plaintiff vis-à-vis the particular defendant. Again, the IR principle would be violated.

64. The victim's preexisting value is established by reference to actuarial evidence. This evidence reflects expected life, health, and productivity values for a group of individuals sharing certain characteristics that the victim possessed prior to the incident. Likewise, the impact of the injury is established by epidemiologic evidence of the expected impact of the risk exposure on a "population" sharing certain characteristics, in which the victim is included. *See* King, *supra* note 12, at 1382–85.

65. *See* Dore, *A Commentary on the Use of Epidemiologic Evidence in Demonstrating*

plied to the injurer's conduct and its consequences or to the victim's injury and its source. In effect, if an individual defendant is held liable to an individual victim for "lost value," it is because the defendant is considered responsible to a *group,* of which the plaintiff is a member. If every individual in that group recovered for lost value, the defendant would ultimately pay an amount equal to the aggregate harm done to the group, although each individual member would either reap a windfall or suffer a shortfall. This is identical, then, to the "group justice" of Delgado's proposal, despite its individualistic appearance.

The more general point is that any theory that relies primarily upon statistical evidence necessarily accepts arguments about the individual based on his group affiliation or membership. These arguments are acceptable and even normal under a group responsibility principle. They are completely antithetical to the IR principle. The central role of probabilistic and statistical evidence of causation both in King's lost value theory and in Robinson's risk contribution theory implies that each theory rests upon and represents group responsibility. Both these theories, regardless of their emphasis on actions by individual victims against individual injurers—with the apparent implication of loyalty to the IR principle—are only coherent in terms of the group responsibility principle.

E. *Recent Decisions: Applications of Theory*

A number of recent decisions have demonstrated that the theories just described are having an impact on the courts. These decisions extend group responsibility even further than *Bichler, Summers, Sindell,* and other cases which articulated "special rules of causation" that implicitly adopted group responsibility. In *Collins v. Eli Lilly & Co.*,[66] a DES case, the Wisconsin Supreme Court concluded that none of the special causation rules were applicable and then articulated a variant theory involving group responsibility to an even greater degree. Explicitly citing Professor Robinson's article, the court adopted a more radical version of his

Cause-in-Fact, 7 HARV. ENVTL. L. REV. 429, 431, 436–37 (1983); Note, *Epidemiologic Proof, supra* note 38, at 237, 239–40.

66. 116 Wis. 2d 166, 342 N.W.2d 37, *cert. denied,* 469 U.S. 826 (1984).

risk contribution theory.[67] According to the court, the basis for liability was that "[e]ach defendant contributed to the risk of injury to the public and, consequently, the risk of injury to individual plaintiffs . . . ."[68] The court therefore dispensed with the *Sindell* requirement of joining defendants who represent a substantial share of the market and instead held that "plaintiff need commence suit against only one defendant . . . ."[69] Under *Collins,* as Robinson had proposed, a plaintiff can thus sue any single party for "possible causation" of injury.[70]

The *Collins* court went even further. After supposedly adopting the risk contribution theory, the court then held that "the plaintiff may recover all damages from the one defendant."[71] This means that *Collins* casts one hundred percent responsibility in *every* individual case on *any* "possible cause"![72] This goes further than the original *Summers* rule, which imposes one hundred percent liability on each possible cause only when all are sued.[73] It also goes beyond the proportional liability of *Sindell* and the Robinson proposal.[74] In effect, the *Collins* court decided that even if the plaintiff can point to only one member of an injurer group, that individual can be held fully responsible for the actions of every

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67. *See id.* at 191 n.10, 342 N.W.2d at 49 n.10.

68. *Id.* at 191, 342 N.W.2d at 49.

69. *Id.* at 193, 342 N.W.2d at 50.

70. *See* Robinson, *supra* note 12, at 752–53; *supra* text accompanying notes 54–56.

71. 116 Wis. 2d at 194, 342 N.W.2d at 50.

72. Either the plaintiff or defendant may be able to join other possible causal actors. If they do so, a comparative negligence scheme would proportionally limit the liability of each defendant. However, if other possible causal actors cannot be joined, the single possible cause must pay for all the plaintiff's damages.

73. *See* Summers v. Tice, 33 Cal. 2d 80, 86–88, 199 P.2d 1, 4–5 (1948); *see also* Sindell v. Abbot Laboratories, 26 Cal. 3d 588, 603, 607 P.2d 924, 930–31, 163 Cal. Rptr. 132, 138–39, *cert. denied,* 449 U.S. 912 (1980); RESTATEMENT (SECOND) OF TORTS § 433B(3) (1965); W. PROSSER & P. KEETON, *supra* note 1, § 41, at 270–71. Under a *Summers* rule, the individual bore some risk of shouldering a disproportionate share if codefendants were insolvent. Nevertheless, the individual could generally count on some contribution and was shielded completely if any potential codefendant (possible cause) was unavailable for the suit.

74. *See Sindell,* 26 Cal. 3d 612–14, 607 P.2d at 937–38, 163 Cal. Rptr. at 145–46; Robinson, *supra* note 12, at 739, 749. Under *Sindell* and the Robinson proposal, the risk of vastly disproportionate liability is even less than under *Summers,* because liability is always limited in proportion to market share or probability of causation. *See supra* notes 34–36, 54–56 and accompanying text.

other absent member of his group.[75]

A second example of the effects of recent scholarship is the decision by the Federal District Court of Utah in *Allen v. United States.*[76] In this case, radiation generated by nuclear tests conducted in the Nevada desert allegedly caused injuries to residents of the area. The court was presented with a situation in which the primary evidence of causation was the statistical correlation between exposure to radiation and disease incidence. None of the injuries were "specifically traceable to the asserted cause on an injury-by-injury basis."[77] Nevertheless, the court cited "indeterminate plaintiff" proposals by Delgado and others, as well as theories supporting the sufficiency of probabilistic "causal linkages" to establish causation.[78] Relying on these theoretical bases—all premised upon group responsibility—the court held that the requisite element of causation had been satisfied: "Where a defendant . . . negligently creates a radiological hazard which puts an identifiable population group at increased risk, and a member of that group . . . develops a . . . condition which is consistent with having been caused by the hazard . . . a fact finder *may* reasonably conclude that the hazard caused the condition . . . ."[79]

Allen thus appears to accept the sufficiency of probabilistic proof of causation, with its implicit group responsibility

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75. Subsequent to *Collins,* the Washington Supreme Court allowed 100% recovery from one possible causal actor in a DES case. *See* Martin v. Abbot Laboratories, 102 Wash. 2d. 581, 604, 689 P.2d 368, 382 (1984). However, the Washington court allowed the single defendant to escape full liability by proving specific market share, whereupon plaintiff's recovery would be limited to that portion of damages. *Id.* at 605–06, 689 P.2d at 383. The *Collins* court allowed the single defendant no similar opportunity; it insisted that the plaintiff be assured of full recovery from some source.

76. 588 F. Supp. 247 (D. Utah 1984).

77. *Id.* at 406.

78. *Id.* at 407, 414–16 (citing *Calabresi, Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.,* 43 U. CHI. L. REV. 69, 72 (1975); Delgado, *supra* note 12; Thode, *Tort Analysis: Duty-Risk vs. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury,* 1977 UTAH L. REV. 1, 5–6; Note, *Inapplicability of Traditional Tort Analysis, supra* note 38).

79. *Allen,* 588 F. Supp. at 415 (emphasis in original); *see* Ball, *The Problems and Prospects of Fashioning a Remedy for Radiation Injury Plaintiffs in Federal District Court: Examining* Allen v. United States, 1985 UTAH L. REV. 267. Ball indicates that the government is appealing the decision, and gives his view that, in the long run, legislation may be a better and more effective remedy. *See id.* at 314, 315–24. *But see infra* note 134, discussing the lack of legislative action on compensation schemes.

premise.[80] However, the court does not limit the victim's recovery in proportion to the probability proven, as Robinson and King suggest.[81] Instead, the court allows a recovery of one hundred percent of damages to each individual plaintiff.[82] This rule provides no averaging effect over a series of individual cases. Consequently, the defendant ultimately will be held responsible for far more than the aggregate damage he caused. This result attenuates the IR principle even further.

Finally, in a decision that reflected many of the theoretical proposals previously discussed, the Federal District Court for the Eastern District of New York recently approved a settlement in *In re Agent Orange,*[83] the complex litigation over the effects of the defoliant "Agent Orange" on U.S. veterans who served in Vietnam. Although described as "reasonable under the law,"[84] the agreement reached in this case presented the unprecedented solution of awarding recovery to a class of plaintiffs and "distributing the damages charged to all defendants as a group among all class members on a pro rata basis."[85] The court acknowledged that "it is doubtful whether the legal system is ready to employ this device except, perhaps, as part of an overall settlement plan voluntarily entered into by the parties."[86] The court viewed the case as presenting a combination of the indeterminate defendant and indeterminate plaintiff problems, together with the issues of the sufficiency of probabilistic evidence and the appropriateness of nonindividualized treatment of plaintiffs' claims.[87] In effect, the case combined all the elements of the different hypotheticals used by the different theoretical proposals to explain and argue for group responsibility. To impose liability in this situation would involve group responsibility in both senses: responsibility imposed on a group and responsibility owed to a group. Despite the lack of firm precedent, the court

80. However, see *infra* text accompanying notes 135–40 for a different level of analysis.

81. *See supra* text accompanying notes 54–59.

82. *Allen,* 588 F. Supp. at 446–47.

83. *In re* Agent Orange Prods. Liab. Litig., 597 F. Supp. 740 (E.D.N.Y. 1984).

84. *See id.* at 749.

85. *Id.* at 748.

86. *See id.*

87. *Id.* at 819–43.

stated: "We should not unduly restrict development of legal theory and practice . . . by dismissing a class action such as the one now before us . . . ."[88] This statement suggests that the *Agent Orange* decision may become a precedent for future toxic torts decisions that recognize and apply the theory of group responsibility to both defendants and plaintiffs.[89]

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88. *Id.* at 749, 842–43.

89. Another frequent response to the problem presented by the traditional causation requirement, particularly in situations in which plaintiff or defendant identification poses substantial difficulties, is to advocate abandoning not only the identification requirement, but the torts adjudication process as a whole. Such a response is particularly appealing in relation to cases like *Collins* and *Agent Orange,* in which the attempt to find a remedy within the torts system threatens to stretch tort doctrines beyond the breaking point. This has led various authors to propose the creation of administrative mechanisms outside the torts system to compensate victims of injuries such as those resulting from toxic exposure. *See, e.g.,* Downey & Gulley, *Theories of Recovery for DES Damage: Is Tort Liability the Answer?,* 4 J. LEGAL MED. 167, 196–200 (1983); Ginsberg & Weiss, *Common Law Liability for Toxic Torts: A Phantom Remedy,* 9 HOFSTRA L. REV. 859, 928–40 (1981); Schwartz & Mahshigian, *Failure to Identify the Defendant in Tort Law: Towards a Legislative Solution,* 73 CALIF. L. REV. 941, 964–74 (1985); Note, Sindell v. Abbott Laboratories: *Is Market Share Liability the Best Remedy to the DES Controversy?,* 18 CAL. W.L. REV. 143, 172–77 (1981) [hereinafter cited as Note, *Best Remedy*]; Note, *Torts-Market Share Liability—The California Roulette of Causation Eliminating the Identification Requirement*—Sindell v. Abbott Laboratories, 11 SETON HALL L. REV. 610, 627–28 (1981) [hereinafter cited as Note, *Eliminating the Identification Requirement*]; Note, *Inapplicability of Traditional Tort Analysis, supra* note 38, at 589–91; Note, *Industry-Wide Liability,* 13 SUFFOLK U.L. REV. 980, 1015–22 (1979).

While these proposals change the context of the debate over group responsibility, they do not avoid the issue. In fact, these proposals themselves form part of the shift from individual to group responsibility: the proposed compensation schemes almost always rely on a group responsibility premise. The common form of these proposals suggests the creation of a compensation fund, usually by levying some form of tax on producers whose processes use or create toxic substances that tend to produce certain kinds of injuries. *See, e.g.,* Ginsberg & Weiss, *supra,* at 928–40; Note, *Best Remedy, supra,* at 172–77. In general, the charges are ex-ante levies unrelated to the involvement of the individual producer in specific cases of injury. (However, the fund may be supplemented by amounts recovered from specific injurers who are proven responsible in actions brought by the fund itself. *See* Note, *Inapplicability of Traditional Tort Analysis, supra* note 38, at 590–91.) Victims can recover from the fund by showing that they suffered a type of injury associated with toxic exposure after an incident of possible exposure. Typically, damages are scheduled or otherwise standardized. In some versions, recovery is limited in proportion to the probability of causation the plaintiff can establish.

Thus, the typical proposed compensation scheme involves group responsibility from both the defendant and the plaintiff perspectives. By rejecting the possibility of funding such a scheme from general tax revenues, most proposals clearly imply that, lacking a responsible individual, it is legitimate and preferable to affix responsibility upon an identifiable and limited group, rather than diffuse it among the population as a whole. *See* G. CALABRESI, *supra* note 3, at 64–66, 255–63. The victim points to a (preestablished) group of individuals involved in the kind of activity that injured him, and each individual in this group, by his ex-ante pay-

F. *"Mass Torts" vs. "Sporadic Accidents": The Wider Implications*

One response to the foregoing discussion is that while the decisions and theories analyzed may involve group responsibility concepts, they are all limited to the narrow area of "mass torts" committed by business enterprises producing undifferentiated products. Therefore, the group responsibility principle they adopt will simply not apply to the vast majority of torts cases, which will continue to involve "sporadic" accidents committed by individuals and enterprises dealing in identifiable actions and products.[90] It can thus be argued that the shift from individual to group responsibility, however well-documented in the mass torts context, carries little significance for the average citizen, who is unlikely to be exposed to group responsibility because he will rarely be involved in the kinds of activities that cause mass torts.

This argument seriously understates the significance of the shift from individual to group responsibility. First, the shift encompasses not only the injurer's but also the victim's perspective.[91] Cases that hold injurers responsible to groups of individuals, only some of whose members are actual victims, manifest the group responsibility principle. The average citizen may well be a victim in a mass tort incident; and the adoption of group responsibility for mass torts will seriously affect the individual as victim. Specifically, it will expose him to the real possibility of receiving less than full compensation while his neighbor receives a windfall for

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ments, is held responsible for some share of an injury that may have been caused by another. From the victim's perspective, he receives some compensation from the fund, even though his injuries may have been caused by a source unrelated to any of the fund's contributors. However, he receives a standardized award that may be less than the actual injuries he suffered, even when they *were* caused by a fund-member's actions. These results represent group responsibility, because they compensate victims in the aggregate accurately, i.e., to the full extent of aggregate fund-related injuries. However, individual victims receive shortfalls or windfalls. Compensation schemes proposed as alternatives to the tort system, in part because of the causation requirement, thus represent and reflect the shift from individual to group responsibility. See *infra* note 106 for a discussion of the distinction between these schemes and "social insurance" schemes that involve societal or collective rather than group responsibility.

90. The distinction between mass torts and sporadic accidents is suggested by Rosenberg, among others. *See* Rosenberg, *supra* note 3, at 854–55, 858–59 *passim; see also* Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323 (1983).

91. *See supra* notes 38–51 and accompanying text.

an unrelated condition. The dissatisfaction expressed by individual victim group members with class awards or settlements in mass tort cases attests to the serious consequences of group responsibility for individual citizens in this area.[92]

Second, an example will demonstrate that the distinction between mass torts and sporadic accidents is ultimately illusory with respect to the application of group responsibility. Suppose that an individual drove carelessly down a street where a pedestrian stood on the curb waiting to cross. Just as the driver reached the point where the pedestrian stood, a careless tree-trimmer working directly over the pedestrian's position dropped a tree limb. Simultaneously, a large, unleashed dog ran past the pedestrian. At that moment, something—the pedestrian could not afterward say what—caused the pedestrian to fall, and he suffered a serious head injury. The dog disappeared, the tree-trimmer went bankrupt, and the pedestrian sued the driver for one million dollars. Several people witnessed the occurrence: some testified that the tree limb knocked the pedestrian down, some that the dog tripped him, and some that the driver actually hit him. No one was obviously lying and the physical evidence of impact was ambiguous. The evidence was truly inconclusive. It probably would be impossible for plaintiff in this case to establish causation under the traditional rule requiring proof of causation by a preponderance of the evidence. The individual driver, although careless, would be free of liability, and most of us would say rightly so, because his individual responsibility for the harm could not sufficiently be established.

However, under Robinson's risk contribution theory, for example, any probability of causation, whether fifty-one percent or less, would provide grounds for imposing proportional liability on the individual driver.[93] If the jury found that there was a ten percent chance that the driver actually hit the plaintiff, this "possibility of causation" would result in the imposition of $100,000 liability on the driver, who was by hypothesis almost surely innocent of inflicting the harm.[94] Robinson never states that his theory would ap-

92. *See* Note, *Epidemiologic Proof*, *supra* note 38, at 247 & n.88.

93. *See* Robinson, *supra* note 12, at 755–60, 764–67.

94. Take another example of a slightly different kind. Suppose that a property owner fails to light a stairway adequately, and a visitor slips and falls, suffer-

ply only to mass torts. On the contrary, he clearly implies that his theory would alter the basis of tort liability across the board. Many cases of causal ambiguity, like the preceding hypothetical, involve individuals as possible causes and usually result in findings of no liability under the traditional rule. The sweeping alteration of this rule certainly would have a major impact on individual citizens as injurers, and this impact would ultimately stem from the use of a group responsibility principle to impose liability. The same can be said of other proposals involving group responsibility.[95]

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ing a crippling injury. Suppose also that no evidence about the actual cause of the fall can be found, other than the fact of the fall and statistical data showing that in cases of falls on unlighted stairs, the lack of light is a contributing cause of the fall 88% of the time. Under a strict application of the traditional causation requirement, with its IR premise, it might be impossible for plaintiff to prove causation in this case. *See infra* notes 127–40 and accompanying text. It certainly would be impossible if the statistical correlation were only 48%. In either case, even if some additional evidence of causation is available, it might be insufficient to convince a jury that the absence of light more likely than not was a necessary cause of the fall. The property owner would be found free of liability because his individual responsibility for the harm could not be established.

In contrast, under Robinson's risk contribution theory, any probability of causation—whether 51% or less and whether established by statistical evidence alone or by more specific evidence—would provide grounds for imposing proportional liability on the individual property owner. Even if the victim admitted that the cause of her fall was that her heel broke a minute before the fall, the individual property owner would still be proportionately liable for risk contribution alone. *See id.* at 755–60, 764–67; *see also* Wolf v. Kaufmann, 227 A.D. 281, 237 N.Y.S. 550 (1929) (dismissing complaint by decedent's heir because there was no eyewitness testimony or other specific evidence that the unlighted stairway caused the fall). *But see* Reynolds v. Texas & Pac. Ry., 37 La. Ann. 694 (1885) (affirming judgment for plaintiff in essentially identical circumstances, based solely on the court's perception of "the natural and ordinary course of events" in these situations, that is, a rough idea of statistical correlation).

95. Proposals urging greater reliance on statistical and probabilistic evidence, although often made in the context of mass torts and toxic torts, could apply equally to any sporadic accident case in which statistical evidence of causation is available. *See, e.g.*, Note, *Epidemiologic Proof*, *supra* note 38; Note, *Inapplicability of Traditional Tort Analysis*, *supra* note 38; Note, *Tort Actions for Cancer*, *supra* note 38; *see also* King, *supra* note 12. Similarly, under some proposed accidental injury compensation schemes, the hypothetical individual property owner discussed *supra* note 94, along with all other multilevel property owners, might be charged a yearly tax corresponding to his pro rata share of the aggregate harm expected to occur during that year from darkened stairway falls. The tax would go to a fund from which stairway fall victims could recover. *See* Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967); O'Connell, *Expanding No-Fault Beyond Auto Insurance: Some Proposals*, 59 VA. L. REV. 749 (1973); O'Connell, *No-Fault Liability by Contract for Doctors, Manufacturers, Retailers, and Others*, 1975 INS. L.J. 531; *see also supra* note 89.

In fact, compensation advocates have made such proposals for ordinary or

The shift from individual to group responsibility in the context of the traditional tort doctrine of causation therefore must be seen as a phenomenon of major significance and potentially widespread impact. Actually, the shift has also occurred in other areas of tort doctrine[96] as well as in other

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sporadic accidents as well as for mass torts. The proposals for sporadic accident compensation, including the original automobile accident plans, actually predate the toxic torts proposals. This suggests that the group responsibility principle behind such schemes is by no means limited to mass torts committed by impersonal conglomerates. Rather, the principle of group responsibility can apply to the whole panoply of tort situations and thus have far-reaching effects on the individual citizen, both as potential injurer and, as discussed above, as potential victim.

96. The doctrine of strict liability for defective products is one example of the shift from individual to group responsibility outside the causation area. One basis for imposing strict liability on manufacturers is the product's failure to live up to the reasonable consumer's expectations of safety. *See* Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 429–30, 573 P.2d 443, 454, 143 Cal. Rptr. 225, 236 (1978); RESTATEMENT (SECOND) OF TORTS § 402A and comments g & i (1965). In effect, the basis of liability is quasi-contractual: It arises from a breach of the warranty implied by defendant's marketing the product. Generally, courts focus their inquiry in these cases on what expectations the individual defendant's marketing conduct could have created in a reasonable consumer. However, some commentators have suggested that the proper focus of inquiry is what expectations were created among consumers as a class by the marketing conduct of producers as a class. If the producer class created high expectations of safety, consumers should be able to recover when those expectations are not fulfilled, regardless of the individual producer's marketing behavior. The individual producer should be held responsible for the conduct of the group with which he is associated. *See, e.g.*, Rintala, *The Supreme Court of California 1968–1969—Foreword: "Status" Concepts in the Law of Torts*, 58 CALIF. L. REV. 80, 85–94 (1970). Rintala suggests approvingly that courts actually follow this group responsibility approach in product liability cases and in other cases involving quasi-contractual tort liability. *See id.* at 95, 101, 104–05, 126–29.

Other commentators have observed that traditional strict liability rules that impose liability without regard to individual fault on those who engage in abnormally dangerous activities, *see* RESTATEMENT (SECOND) OF TORTS §§ 519–520 (1965), serve to place responsibility on individual actors because of the riskiness of the conduct of the group they belong to as a whole. From this perspective, these rules can be seen as applications of the group responsibility principle to the negligence issue. In effect, one who is not personally negligent nevertheless may be held responsible because the group of which he is a part created an unreasonable level of risk. *See, e.g.*, Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1064–70 (1972); Fletcher, *supra* note 3, at 541–43, 549. The same commentators argue for the wider application of such group-based rules of liability.

A third example of the shift to group responsibility in torts is perhaps most significant, though less obvious. While superficially unrelated to the issue, the vast increase in the use of comparative fault has often meant the de facto application of group responsibility. The Uniform Comparative Fault Act provides that "[i]n determining the percentages of fault [and liability], the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the

areas of the law.[97] However, the foregoing examination of the causation requirement provides ample evidence of how the shift is affecting court decisions and legal theories of major significance.

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causal relation between the conduct and the damages claimed." UNIF. COMPARATIVE FAULT ACT § 2(b) (1977). Some commentators suggest that this statute, and the many state statutes based on it, mandate a rule of "comparative causation," similar in practice to Robinson's proposed rule of proportional liability, *see supra* text accompanying notes 52–65, by which any possible causal actor who is negligent can be held liable in proportion to the probability that he caused the accident. *See* Twerski, *The Many Faces of Misuse: An Inquiry Into the Emerging Doctrine of Comparative Causation*, 29 MERCER L. REV. 403, 431–34 (1978). The Kansas Supreme Court has observed that this view is not merely theoretical:

> [T]he Kansas comparative negligence act is a multi purpose act which goes far beyond a basic comparison of the contributing negligence of each of the parties to the cause of an accident or injury. The act comprehensively provides machinery for drawing all possible parties into a lawsuit to fully and finally litigate all issues and liability arising out of a single collision or occurrence, and apportion the amount of total damages among those parties against whom negligence is attributable in proportion to their degree of fault.

McCart v. Muir, 230 Kan. 618, 622, 641 P.2d 384, 389 (1982); *see also* Eurich v. Alkire, 224 Kan. 236, 237, 579 P.2d 1207, 1208 (1978). Moreover, according to the Kansas statute, any *possible* causal actor "*shall* be joined as an additional party." KAN. STAT. ANN. § 60-258a(c) (1983) (emphasis added). This implies that, as under Robinson's proposed approach, any negligent possible causal actor is subject to proportional liability. Because proportional liability involves a form of group responsibility, *see supra* text accompanying notes 52–65, the increasing use of "comparative causation" under the rubric of comparative fault is a major, if not necessarily obvious, part of the shift to group responsibility.

97. Outside of tort law, there are many examples of the shift to group responsibility. One is a trend in contract law, similar to that in tort law, *see supra* note 96, to impose quasi-contractual liability on individuals based on expectations created by group conduct. *See, e.g.*, Tobriner & Grodin, *The Individual and the Public Service Enterprise in the New Industrial State*, 55 CALIF. L. REV. 1247 (1967). Another is the growth in the use of class actions and group litigation as an alternative to individualized adjudication of claims. *See, e.g.*, Hazard, *The Effect of the Class Action Device Upon the Substantive Law*, 58 F.R.D. 307 (1973); McGovern, *Management of Multiparty Toxic Tort Litigation: Case Law and Trends Affecting Case Management*, 19 FORUM 1, 5–17 (1983); Rosenberg, *supra* note 3, at 905–16; Williams, *supra* note 90.

Generally, the shift to group responsibility outside of the torts causation area has been neither obvious nor explicit, except in the class action movement. Probably for this reason, only the group causation decisions have aroused great controversy and hostility, although the class action phenomenon has met its own wave of opposition. *See, e.g.*, McGovern, *supra*, at 11; Rosenberg, *supra* note 3, at 908–09; Weinstein, *Some Reflections on the "Abusiveness" of Class Actions*, 58 F.R.D. 299, 306 (1973); Williams, *supra* note 90, at 331–35; Note, *Federal Mass Tort Class Actions: A Step Toward Equity and Efficiecy*, 47 ALB. L. REV. 1180, 1183–87 (1983); Note, *Class Actions and Mass Toxic Torts*, 8 COLUM. J. ENVTL. L. 269, 269–73 (1982); Note, *Class Actions in New York: Recovery for Personal Injury in Mass Torts Cases*, 30 SYRACUSE L. REV. 1187 (1979).

II. RESPONSES TO THE SHIFT: RESIGNATION AND REJECTION

The decisions and proposals discussed in Part I have evoked hostile responses from the majority of courts and commentators. These responses have taken two distinct forms. The first accepts the causation theories discussed above, but only as an accommodation to the needs of practical justice for innocent victims. I call this the "necessary evil" response. The second type of response rejects the above theories, in whole or part, as unacceptable challenges to the IR principle, which is viewed as fundamental and inviolable. I call this the "unmitigated evil" response. Neither response views the new causation theories, or the group responsibility principle underlying them, as an essentially positive and progressive phenomenon. In Part II, I illustrate these responses and then argue that they stem from the courts' deep commitment to the IR principle. This commitment is so powerful because the IR principle is inextricably linked to the theory of political structure that prevails in our legal system and in the larger society as well. I conclude that the new causation theories, in any form, are unlikely to find wide acceptance until we explicitly examine the group responsibility principle and its underlying political-philosophical premises to determine whether they are truly inconsistent with the IR principle and its premises.

A. *Resignation: Group Causation as a Necessary Evil*

Even the *Sindell* court was sensitive to the inconsistency between the market share liability doctrine and the IR principle.[98] The court insisted that there were, however, "forceful arguments in favor of holding that plaintiff has a cause of action."[99] The very first of these reasons was the argument of necessity:

> Advances in science and technology create fungible goods . . . which cannot be traced to any specific producer. The response of the courts can be to adhere rigidly to prior doctrine, denying recovery . . . or to fashion remedies to meet these changing needs . . . . [S]ome adaptation of the rules of causation . . . may be appropriate

98. *See* Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 612–14, 607 P.2d 924, 937–38, 163 Cal. Rptr. 132, 145–46, *cert. denied*, 449 U.S. 912 (1980); *see also supra* text accompanying notes 36–37.

99. *Sindell*, 26 Cal. 3d at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144.

in these recurring circumstances.[100]

In essence, the court recognized that the new causation rules do compromise the IR principle and that this result is indeed regrettable. However, this compromise is a necessary expedient to achieve "practical justice" by somehow compensating innocent victims of producer negligence. Likewise, in a recent pro-plaintiff DES decision, *Martin v. Abbott Laboratories*,[101] the Washington Supreme Court explicitly acknowledged the trade-off between providing some compensation to victims and honoring the IR principle: "We are presented with a conflict between the familiar principle that a tortfeasor may be held liable only for damages that it has caused, and the sense of justice which urges that the victims of this tragedy should not be denied compensation . . . ."[102] Echoing a similar sentiment, the Wisconsin Supreme Court ruefully admitted in the *Collins* case that "some of the . . . defendants may be innocent, but we accept this as the price the defendants, and perhaps ultimately society, must pay to provide the plaintiff an adequate remedy . . . ."[103] Other courts, in both DES and asbestos cases, have articulated the same kind of justification.[104] Thus, even the most supportive courts acknowledge that the new rules weaken and undermine the IR principle, and they regard this as an evil. But they conclude, somewhat uncomfortably, that it is a necessary evil because innocent victims otherwise will be left without a remedy.

A number of post-*Sindell* commentators have joined the courts and justified the decision and its progeny as a necessary evil—a mixed blessing at best.[105] Some commentators

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100. *Id.*, 607 P.2d at 936, 163 Cal. Rptr. at 144.

101. 102 Wash. 2d 581, 689 P.2d 368 (1984).

102. *Id.* at 603, 689 P.2d at 381.

103. Collins v. Eli Lilly & Co., 116 Wis. 2d 166, 198, 342 N.W.2d 37, 52, *cert. denied*, 469 U.S. 826 (1984).

104. The *Bichler* Court, for example, justified its expanded concert of action rule by reference to the "exigencies of trying a case in the rapidly developing area . . . of strict products liability . . . [and] the exigencies of rapidly developing technologies." Bichler v. Eli Lilly & Co., 79 A.D.2d 317, 326, 328, 436 N.Y.S.2d 625, 630–31, 632 (1981), *aff'd*, 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982); *see also* Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353, 1358 (E.D. Tex. 1981), *rev'd*, 681 F.2d 834 (5th Cir. 1982); Copeland v. Celotex Corp., 447 So. 2d 908, 913 (Fla. Dist. Ct. App. 1984), *rev'd in part and modified*, 471 So. 2d 533 (Fla. 1985).

105. One recent Note concludes that "an alternative liability theory . . . may cause traditional concepts and basic principles of tort law to be distorted or aban-

add another note to the "necessary evil" argument. Recognizing that concern for victim compensation alone might justify a social insurance scheme as easily as special causation rules in tort law,[106] they argue that increased deterrence is a second mitigating factor that weighs in favor of using group causation rules in tort, despite the fundamental conflict between these rules and the IR principle.[107] For example, Del-

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doned. . . . [Nevertheless,] our traditional legal notions must evolve to keep up with our progressing society." Note, *Proving Causation in Toxic Torts Litigation,* 11 HOFSTRA L. REV. 1299, 1325 (1983); *see also* Note, *DES and a Proposed Theory of Enterprise Liability,* 46 FORDHAM L. REV. 963, 1002, 1007 (1978).

106. *See* Note, *supra* note 3, at 329; Note, *Manufacturers' Liability Based on a Market Share Theory:* Sindell v. Abbott Laboratories, 16 TULSA L.J. 286, 315 (1980) [hereinafter cited as Note, *Manufacturers' Liability*]. For those concerned above all else with compensating victims, the most effective measure to ensure compensation is social insurance. *See* G. CALABRESI, *supra* note 3, at 46–47; Epstein, *Products Liability: The Search for the Middle Ground,* 56 N.C.L. REV. 643, 659 (1978). Such a system establishes a compensation fund out of general taxes, which provides the largest possible revenue base, and compensates all accident victims from this fund, whatever the circumstances of their injury. *See* Henderson, *The New Zealand Accident Compensation Reform,* 48 U. CHI. L. REV. 781 (1981); Palmer, *Accident Compensation in New Zealand: The First Two Years,* 25 AM. J. COMP. L. 1 (1977); *see also infra* text accompanying notes 241, 271. This system is identical in form to private loss insurance (also referred to as casualty, or first party, insurance) funded by individual premiums, but a socialized revenue base and government administration make universal compensation more of a reality under social insurance. Thus, social insurance usually means socialized loss insurance.

Pure loss insurance, whether private or socialized, should be distinguished from private and public insurance mechanisms, which, while they compensate victims, charge the cost of compensation neither to the victims nor the public at large, but to individuals or groups considered responsible for the injury. In theory, this result places a deterrent burden on injury-causing actors and groups. *See* G. CALABRESI, *supra* note 3, at 46. But it also narrows the resource base for victim compensation. Therefore, if compensation is the supreme goal, any such scheme would be inferior to social insurance. The most obvious example of such "cost imposition insurance" is private liability insurance. *See infra* note 123. However, most public "nonfault" injury compensation systems involve at least some measure of cost imposition on specific individuals or groups. *See supra* note 89. In the context of this Article, the significance of the distinction between these types of insurance is that social insurance is a form of societal or collective responsibility, whereas cost imposition insurance is a form of group responsibility. Neither involves individual responsibility.

107. There is some irony in the argument that the special causation rules should be preferred because they increase deterrence, despite their negative impact on the IR principle. *See infra* notes 108–10 and accompanying text. The deterrence argument is based essentially on the utilitarian view that the tort system is a vehicle for minimizing social costs of accidental injury. This view is most persuasively argued by the law and economics theorists, including Calabresi and Posner, who share this general view even if they disagree about specific legal rules. *See, e.g.,* G. CALABRESI, *supra* note 3, at 26–31; Calabresi, *supra* note 3, at 656; Calabresi & Hirschoff, *supra* note 96, at 1057; Posner, *supra* note 3, at 31–34.

gado argues that the greater exposure of defendants to liability under group causation rules "deter[s] the defendants from engaging in the liability generating practice" and "encourages them to investigate the way in which their actions endanger others."[108] Rosenberg agrees that group causation rules increase deterrence and produce both safer activities and more safety research.[109] At the same time, he is candid about the negative effects on the IR principle, acknowledging that the group causation/class action approach

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The economic-utilitarian view, as applied by Posner and Calabresi, typically analyzes conduct in group terms rather than in individual terms. As one commentator aptly states: "Calabresi stipulates that the problems of accident law must be treated in terms of *activities* rather than careless [individual] conduct. 'An activity may properly be defined as the doing of something by an actuarial class, which may tend to do it carelessly.' " Englard, *supra* note 3, at 40 (quoting Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713, 715–16 (1965)); *see also* G. CALABRESI, *supra* note 3, at 246–50, 255–59, 282–85; Calabresi & Hirschoff, *supra* note 96, at 1067–70, 1075. According to Englard, although Posner disagrees with Calabresi's desire to abandon the individual case adjudication system of tort law, Posner does believe that "[individual] litigants . . . serve only as the appropriate means to achieve an overall economic aim. The law is not concerned with the plaintiff's quest for personal redress. It views him as a convenient tool . . . ." Englard, *supra* note 3, at 54. Posner himself declares: "[T]he economist is not interested in the one question that concerns the victim . . . : [W]ho should bear the cost of *this* accident? . . . The issue becomes what is a just and fair result for a *class* of activities . . . ." R. POSNER, ECONOMIC ANALYSIS OF LAW 18–19 (2d ed. 1977).

The economic interpretation of the deterrent goal of torts is therefore a fairly clear application of group responsibility. That this theory should lend support to group causation rules is hardly surprising. It is merely circular to argue that group causation rules should be favored, despite damage to the IR principle, because they further deterrence. This obscures the point that both group causation and the group-oriented economic premises of deterrence theory conflict with the IR principle and its individualistic premise. Properly understood, the deterrence argument for the special causation rules only emphasizes the conflict with the IR principle. It cannot be offered, as it often is, to settle the conflict. Most courts have at least intuitively grasped this point and have refused to adopt group causation rules on deterrence grounds. *See infra* text accompanying notes 157–86.

108. Delgado, *supra* note 12, at 893–94.

109. Rosenberg, *supra* note 3, at 877 ("[T]he loss of deterrence that results from applying either version of the [traditional] preponderance rule in mass exposure cases is likely to be direct and very substantial."). A Note proposing adoption of a rule allowing recovery based on statistical proof of the possibility of causation in cancer cases phrased the same idea more technically: "The proposal would force producers [of carcinogens] to internalize the actual social costs of their activities, thereby providing an incentive for producers to reduce their emissions . . . to socially optimal levels." Note, *Tort Actions For Cancer*, *supra* note 38, at 859. Some of the courts adopting group causation rules also advert to the deterrence rationale, although less explicitly than the commentators. *See Sindell*, 26 Cal. 3d at 612–13, 607 P.2d at 936–37, 163 Cal. Rptr. at 144–45; *Collins*, 116 Wis. 2d at 192–93, 342 N.W.2d at 49–50.

he favors "seeks to achieve the benefits of deterrence by sacrificing some of the benefits of individualized treatment of claims."[110]

The common theme is that the new rules are a mixed blessing—a necessary evil. They further victim compensation and deterrence but inevitably weaken the IR principle. Thus, the shift from individual to group responsibility has been met with ambivalence at best, even by the supporters of the new causation rules.

B. *Resistance: Group Causation as an Unmitigated Evil*

Among both courts and commentators, the two most common responses to the whole spectrum of proposed modifications of the traditional causation requirement have been either outright rejection or subtle resistance. The main reason behind these negative responses is an implicit or explicit commitment to the IR principle, which is seen as fundamentally challenged by the new rules and proposals.

1. Rejection of Group Causation

Even the *Sindell* opinion contained a strong dissent that would have rejected market share liability. Justice Richardson, the author of the dissenting opinion, succinctly articulated the minority's principal complaint: "The majority now expressly abandons the . . . traditional requirement of some causal connection between defendants' act and plaintiffs' injury . . . [rejecting] over 100 years of tort law which required that before tort liability was imposed, a 'matching' of [an individual] defendant's conduct and [an individual] plaintiff's injury was absolutely essential."[111] In other words, the court had abandoned the IR principle along with the traditional causation requirement.

In *Payton v. Abbott Laboratories,*[112] a DES case in which

110. Rosenberg, *supra* note 3, at 907.

111. Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 615–16, 607 P.2d 924, 939, 163 Cal. Rptr. 132, 147 (Richardson, J., dissenting), *cert. denied,* 449 U.S. 912 (1980).

112. 386 Mass. 540, 437 N.E.2d 171 (1982). Subsequently, the Federal District Court for Massachusetts adopted market share liability in a DES case, basing its decision in part on a comment by the *Payton* court that they might in the future consider adopting a form of market share liability different than that proposed by plaintiffs in *Payton.* McCormack v. Abbott Laboratories, 617 F. Supp. 1521, 1525 (D. Mass. 1985). *See also Payton,* 386 Mass. at 574, 437 N.E.2d at 190.

the court rejected market share liability, the Massachusetts Supreme Court explicitly recognized the connection between the IR principle and the traditional causation requirement. "Identification of the party responsible for causing injury to another is a longstanding prerequisite to a successful negligence action. This requirement . . . ensures that wrongdoers are held liable only for the harm that they have caused."[113] The court warned of the consequences of adopting the market share theory: "[It] would create the risk of holding the named defendants liable . . . for more harm than they caused. The . . . theory does not protect tortfeasors from liability exceeding their responsibility . . . ."[114]

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113. *Payton*, 386 Mass. at 571, 437 N.E.2d at 188 (citations omitted).

114. *Id.* at 573, 437 N.E.2d at 189. Some readers might recall that this same problem was presented in a series of cases in the early 1950's, at which time it was resolved with little fanfare *in favor* of group responsibility. Those cases dealt with the problem of apportioning damages when several independent tort-feasors had inflicted closely successive or contemporaneous injuries on the plaintiff. The classic situation involved multiple polluters. *See, e.g.*, Phillips Petroleum Co. v. Hardee, 189 F. 2d 205 (5th Cir. 1951); Rusch v. Phillips Petroleum Co., 163 Kan. 11, 180 P.2d 270 (1947); Landers v. East Tex. Salt Water Disposal Co., 151 Tex. 251, 248 S.W.2d 731 (1952). Multiple-vehicle accidents presented another instance of the problem of apportioning damages among a number of tort-feasors. *See, e.g.*, Hackworth v. Davis, 87 Idaho 98, 390 P.2d 422 (1964); Maddux v. Donaldson, 362 Mich. 425, 108 N.W.2d 33 (1961).

In all of these cases, the separate injuries were often so similar and intermingled that while negligence and causation could easily be proven against each defendant, the plaintiff often had great difficulty proving which part of his damage was caused by each defendant. The traditional rules of causation required such proof; otherwise, one individual might be held responsible for harm done by another—a violation of the IR principle. *See Maddux*, 362 Mich. at 438, 108 N.W.2d at 39 (Carr, J., dissenting) (objecting to the majority's departure from the traditional rules); Sun Oil Co. v. Robicheaux, 23 S.W.2d 713, 715 (Tex. Ct. App. 1930); RESTATEMENT OF TORTS § 881 (1934). However, beginning with *Landers* in 1952, several state and federal courts concluded that the traditional apportionment rule was manifestly unjust and instead adopted a rule that held defendants jointly and severally liable. Some courts treated this as a rebuttable presumption that each individual defendant could rebut with proof of apportionment. *See, e.g.*, Michie v. Great Lakes Steel Div., Nat'l Steel Corp., 495 F.2d 213, 215–18 (6th Cir.), *cert. denied*, 419 U.S. 997 (1974); *Maddux*, 362 Mich. at 436, 108 N.W.2d at 38; *Landers*, 151 Tex. at 256–57, 248 S.W.2d at 734.

This new rule was a fairly clear example of group responsibility in an area where the law had previously held fast to the IR principle. Indeed, Rosenberg cites *Michie* as an example of group responsibility. *See* Rosenberg, *supra* note 3, at 884 n.139. However, the rule gradually spread to a considerable number of jurisdictions. *See* W. PROSSER & P. KEETON, *supra* note 1, § 52, at 350–51 & n.52; Note, *Torts—Successive Automobile Collisions—Joint and Several Liability*, 44 N.C.L. REV. 249, 251 (1965); Note, *Torts—Liability—Independent Tortfeasors Jointly and Severally Liable for Separate Acts of Negligence Where Harm is Indivisible:* Holtz v. Holder *(Ariz. 1966)*, 9

Other courts have been quick to recognize that the various special causation rules not only depart from the IR principle, but actually impose group responsibility. For example, the dissent in a Florida appellate court decision noted that "the theory espoused in *Sindell* has the effect of making every manufacturer an insurer not only of its own product, but of all generically similar products made by others."[115] Perhaps the clearest statement of this recognition was made by a New Jersey court in *Namm v. Charles E. Frosst & Co.*,[116] a DES case brought on an alternative liability theory:

> The application of the principle of alternative liability to any one or all of the 44 defendants herein would impose liability without fault upon any one who manufactured a product manufactured by others as well. It would result in the taking of the property of all the named defendants in order to pay for harm which may have been caused by

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ARIZ. L. REV. 129, 131–32 (1967). Furthermore, this shift from individual to group responsibility evoked no flood of criticism or controversy among commentators. *See, e.g.*, Note, *Recent Developments in Joint and Several Liability*, 14 BAYLOR L. REV. 421, 425, 435–37 (1962); Note, *Torts—Independent Tort Feasors—Joint and Several Liability*, 31 N.C.L. REV. 237, 241 (1953). On the contrary, for years prior to the first cases commentators had loudly insisted upon such a change. *See Landers*, 151 Tex. at 254–55, 248 S.W.2d at 733; Jackson, *Joint Torts and Several Liability*, 17 TEX. L. REV. 399 (1939); Prosser, *Several Liability*, 25 CALIF. L. REV. 413 (1937).

If courts and commentators all accepted the shift to group responsibility in the context of apportionment of damages, why then should its recurrence in the context of the causation issue engender so much resistance? The answer is that some observers regard the modern rule of apportionment of damages as simply a different version of the traditional rule that when multiple independent tortfeasors inflict an indivisible injury, they are held jointly and severally liable because each is responsible for a harm indivisible from any other, hence for the entire harm. *See, e.g.*, *Maddux*, 362 Mich. at 450, 108 N.W.2d at 45–46 (Black, J., concurring). Even if the indivisible harm rationale is difficult to accept in some cases, the modern apportionment rule is still distinguishable from the group causation decisions. It is one thing to say that when several negligent defendants cause the plaintiff harm, we will sometimes allow the plaintiff to recover, even if he cannot prove the precise share or portion of harm done by each defendant. Whichever defendant or defendants pay, we at least know that those who pay actually injured the plaintiff. It is significantly different to say that when *only one* of several defendants injured the plaintiff, *each* can be held liable for some or all of the damages. The point here is precisely that we do not know that the defendant who pays actually injured the plaintiff at all. In other words, although the IR principle technically may be violated in both cases, the violation is much more open and obvious in the group causation situation.

115. Copeland v. Celotex Corp., 447 So. 2d 908, 922 (Fla. Dist. Ct. App. 1984) (Nesbitt, J., concurring in part and dissenting in part), *rev'd in part and modified*, 471 So. 2d 533 (Fla. 1985).

116. 178 N.J. Super. 19, 427 A.2d 1121 (App. Div. 1981).

> only one of the defendants, or even by one who is not a party to the lawsuit, who is unknown to the defendants, over whom they have no control or even any meaningful contact.[117]

The court's reaction was also clear: "We reject the theory . . . on principle."[118] Of course, the principle on which it is rejected is the IR principle. Other courts, in similar kinds of toxic exposure cases, have rejected the special causation rules as radical departures from traditional concepts of causation and tort liability.[119] These decisions clearly rest on the courts' commitment to preserving the IR principle.[120]

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117. *Id.* at 33, 427 A.2d at 1128; *see also* Abel v. Eli Lilly & Co., 94 Mich. App. 59, 90–92, 289 N.W.2d 20, 33 (1979) (Moore, J., dissenting), *modified,* 418 Mich. 311, 343 N.W.2d 164, *cert. denied,* 469 U.S. 833 (1984).

118. *Namm,* 178 N.J. Super. at 34, 427 A.2d at 1128.

119. *See, e.g.,* Thompson v. Johns-Manville Sales Corp., 714 F.2d 581 (5th Cir. 1983) (rejecting alternative, enterprise, and market share liability in a case involving injuries caused by exposure to asbestos), *cert. denied,* 465 U.S. 1102 (1984); Hannon v. Waterman S.S. Corp., 567 F. Supp. 90 (E.D. La. 1983) (rejecting alternative liability, concert of action, enterprise liability, and market share liability in an asbestos case); Tidler v. Eli Lilly & Co., 95 F.R.D. 332 (D.D.C. 1982) (rejecting market share liability in a DES case); Morton v. Abbott Laboratories, 538 F. Supp. 593 (D. Fla. 1982) (rejecting alternative liability, concert of action, enterprise liability, and market share liability in a DES case); Mizell v. Eli Lilly & Co., 526 F. Supp. 589, 596 (D.S.C. 1981) (rejecting market share liability in a DES case on the grounds that under this rule "liability is placed on defendants bearing no responsibility for the defective product"); Zafft v. Eli Lilly & Co., 676 S.W.2d 241 (Mo. 1984) (rejecting alternative liability, concert of action, enterprise liability, and market share liability theories in a DES case); *see also* Downey & Gulley, *supra* note 89, at 191 & n.114, and cases cited therein.

Even in California, where *Sindell* was decided, the courts have refused to extend market share liability. In a case in which plaintiff was injured by a defectively produced batch of polio vaccine and could not prove which of several producers had produced the defective batch, a state appellate court held that it would not use market share liability to hold the entire producer group responsible. Sheffield v. Eli Lilly & Co., 144 Cal. App. 3d 583, 597, 192 Cal. Rptr. 870, 878 (1983) (indicating that neither *Summers* nor *Sindell* can be used to create "a shared liability indiscriminately imposed on manufacturers of safe and defective products of the same [generic] nature"). The loss spreading, deterrence, and compensation rationales of the *Sindell* decision actually would seem to favor extending the rule to cover a defective *unit* of specifically unidentifiable origin. Nor would this involve any greater an extension of the group responsibility premise in theory. Some have even read *Sindell* as approving imposition of liability on "the careful and careless producer alike." *See* Note, *supra* note 3, at 317. Yet the *Sheffield* court specifically refused to do just this. *See* 144 Cal. App. 3d at 597, 192 Cal. Rptr. at 878. The only explanation of the *Sheffield* court's refusal to extend *Sindell* is that to do so would represent too blatant an adoption of group responsibility. The court simply gagged on a more obvious version of what the higher court swallowed quite readily in *Sindell.* Loyalty to the IR principle apparently dies hard. *See infra* note 294.

120. This is not to say that the decisions offer no other bases for rejecting the

While some commentators have accepted the group causation rules on a "necessity" rationale, many others have supported the courts' general rejection of these rules and have severely criticized them. The key reason for this resistance has again been commitment to the IR principle: "Holding manufacturers liable for accidents for which they are in no way responsible, merely because they sold the same product, offends the notion that liability must bear some connection to [individual] responsibility . . . ."[121] Another commentary quotes approvingly from the dissenting opinion in a Michigan DES case that upheld alternative liability: "Michigan law does not support 'collective liability.' . . . Injury alone does not justify imposing liability on one manufacturer for injuries caused by another manufacturer of the same or similar product."[122] Loyalty to the IR principle

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group causation rules. Frequently, courts argue that these rules, by increasing the individual producer's exposure to liability, will have an inhibiting effect on the development and marketing of new drugs and other useful but potentially injurious products. *See Sindell,* 26 Cal. 3d at 619, 607 P.2d at 942, 163 Cal. Rptr. at 146 (Richardson, J., dissenting); *Payton,* 386 Mass. at 571–75, 437 N.E.2d at 189–90. However, this concern about overdeterrence is not clearly a logical basis for rejecting group causation. On the one hand, greater deterrence is one of the arguments often made in *favor* of the group causation rules, *see supra* notes 108–10 and accompanying text. On the other hand, some critics argue that group causation is undesirable because it will shield individual wrongdoers and thus provide *too little* deterrence. *See* Note, *supra* note 3, at 315–21. But see *infra* note 254 and accompanying text for the view that group causation rules do increase deterrence. Therefore, the deterrence issue is much less clear than the IR principle as a basis for favoring or disfavoring the new group causation rules.

121. Note, *supra* note 3, at 327.

122. Downey & Gulley, *supra* note 89, at 191 (citing Abel v. Eli Lilly & Co., 94 Mich. App. 59, 90–92, 289 N.W.2d 20, 33 (1979) (Moore, J., dissenting) (buttressing this conclusion by observing that "one may not be obligated for the fault of a fellow lawyer, or doctor, or engineer, or a drug manufacturer"), *modified,* 418 Mich. 311, 343 N.W.2d 164, *cert. denied,* 469 U.S. 833 (1984)). Several authors conclude that the group causation rules in effect institute a nonfault compensation plan for drug injuries by judicial fiat. Recognizing that nonfault compensation plans generally abandon the IR principle, *see supra* note 89, these authors object to such a radical departure from traditional torts principles. In the alternative, they suggest that only legislative action can legitimately support such a departure, as in other compensation schemes. *See* Downey & Gulley, *supra* note 89, at 195–200; Note, *Manufacturers' Liability, supra* note 106, at 315; Note, *Products Liability*: Sindell v. Abbott Laboratories: *Proportional Unidentifiable Fairness and the Oklahoma Perspective,* 34 OKLA. L. REV. 843, 861 (1981); Note, *Eliminating the Identification Requirement, supra* note 89, at 627–28; *see also* Note, *Best Remedy, supra* note 89; Note, *Beyond Enterprise Liability in DES Cases*—Sindell, 14 IND. L. REV. 695 (1981) [hereinafter cited as Note, *Beyond Enterprise Liability*]; Comment, *Market Share Liability Adopted To Overcome Defendant Identification Requirement in DES Litigation,* 59 WASH. U.L.Q. 571 (1981) [hereinafter cited as Comment, *Market Share Liability Adopted*].

leads these commentators to resist and reject the group causation rules.[123]

However, the legislative response may be equally stymied by commitment to the IR principle. *See infra* note 134.

123. Some readers may object that this loyalty is misplaced and unrealistic, arguing as follows. Given the prevalence of liability insurance coverage, "collective liability" or group responsibility has long been the reality of tort law, whatever the formal doctrine says. For many decades, tort liability has coexisted with a broadly utilized system of accident liability insurance. The insurance system itself operates in large part as a risk-pooling device, grouping together individuals with similar accident-risk profiles and charging each individual ex-ante an amount proportional to his share of the aggregate risk, or expected accident cost, of the group as a whole. When an accident occurs and an insured individual is held liable under traditional tort rules based on the IR principle, the actual cost of liability nevertheless is shared with other members of his risk pool because the award is paid out of the funds generated by all the ex-ante contributions. Similarly, whenever any other member of the "relevant actuarial category" is held liabile for inflicting an injury, every insured individual will pay a share of the damages through his premium. In short, whenever a defendant is insured, the insurance system, by its very nature, converts individual responsibility into group responsibility. For a discussion of this phenomenon, and an argument that it is not only desirable but also necessary, see G. CALABRESI, *supra* note 3, at 60–64, 90–92, 103–07. For a discussion of the distinction between liability insurance and social insurance, which involves societal or collective rather than group responsibility, see *supra* note 106.

A similar analysis can be made from the victim's perspective. For most victims of insured defendants, the insurance settlement process determines their compensation. In this process, settlement offers are standardized by reference to categories and types of accidents and injuries. The individual is thus functionally treated as a member of a group of similarly injured individuals, each of whom receives an offer that roughly reflects his share of the aggregate sum set aside for that kind of injury in a given period. *See* H. ROSS, SETTLED OUT OF COURT 114–16, 133–35 (1980); Rosenberg, *supra* note 3, at 909 n.229. Some victims get windfalls, while others receive shortfalls. Therefore, the character of the system, from both the victim's and defendant's perspective, is much like Delgado's and Rosenberg's group responsibility proposals. *See supra* text accompanying notes 38–51. Given the widespread and accepted utilization of liability insurance and insurance settlements, why should group causation rules in tort law be considered controversial, when the system has functionally involved group responsibility for decades, despite the individualistic form of the legal rules?

The response to this question illuminates the nature of the current controversy over the group causation rules and proposals. The liability insurance system, though it represents a form of group responsibility, does not present the kind of open and obvious challenge to the IR principle that the group causation rules present. The liability insurance system is a creature of private enterprise, not a rule of public law. It is acceptable for individuals to choose on their own to share risks; it is altogether different when individuals are forced by the state to share responsibility for the actions of others. Indeed, when the insurance system has taken on a public character, as in laws compelling insurance coverage, or laws establishing or proposing administrative compensation schemes functionally equivalent to state sponsored liability insurance, there has been significant controversy and resistance. *See, e.g.*, Blum & Kalven, *The Empty Cabinet of Dr. Calabresi: Auto Accidents and General Deterrence*, 34 U. CHI. L. REV. 239 (1967); Blum & Kalven,

The judicial and scholarly resistance has not been limited to the group causation rules themselves. It has extended to the risk contribution and lost value theories, both of which clothe group responsibility in a more individualistic form. The source of the resistance in this context can also be found in the courts' concern for the IR principle. For example, in *Jackson v. Johns-Manville Sales Corp.*,[124] a plaintiff exposed to asbestos sued for damages representing his increased risk of future cancer, based on epidemiologic studies. While Robinson's and King's proposals endorse precisely this kind of recovery, the court rejected plaintiff's claim: "To permit this assumption of causation to control liability would cause massive dislocation in the rights of the parties . . . . '[Some] [p]ersons . . . will receive a windfall and, in the aggregate, the defendant will overcompensate the injured class.' "[125] The court was bothered by precisely the aspects of the risk contribution theory that involve recognizing responsibility to a group, rather than to particular individuals. In essence, the court rejected the shift from individual to group responsibility.[126]

Basing responsibility on purely probabilistic evidence

A Stopgap Plan for Compensating Auto Accident Victims, 1968 INS. L.J. 661 (1968); Schwartz, *Professor O'Connell's No-Fault Plan for Products and Services: Have New Problems Been Substituted for Old?*, 70 NW. U.L. REV. 639 (1976); Atiyah, Book Review, 45 U. CIN. L. REV. 340 (1976) (reviewing J. O'CONNELL, ENDING INSULT TO INJURY (1975)).

In short, there is an open and obvious challenge to the IR principle inherent in the group causation rules that is absent in the private insurance process (and in the modern rule of apportionment of damages, *see supra* note 114); and this challenge has evoked resistance and rejection. As long as the IR principle was left substantially and formally intact as a limit on what kind of responsibility society can impose forcibly, there was no real challenge and no need for a response. But when a change in a major legal rule openly declared that society can in some cases, perhaps many, forcibly impose group responsibility, then the challenge was issued in no uncertain terms. The response likewise has been loud and clear. *See* notes 111–34 and accompanying text; *see also supra* note 97.

124. 727 F.2d 506 (5th Cir. 1984).

125. *Id.* at 520 (quoting Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 120 n.45 (D.C. Cir. 1982)).

126. In a similar case involving an action for increased cancer risk from pesticide exposure, a California court concluded on the basis of scientific and medical literature that "as a matter of law it cannot be determined with any degree of medical probability whether a *particular plaintiff* . . . will contract cancer in the future as a result of his exposure . . . ." Arnett v. Dow Chem. Co., 6 Chem. & Radiation Waste Litig. Rep. (BNA) 383, 390 (Cal. Super. Ct. 1983). The court was uncomfortable allowing a plaintiff who was unable to identify himself *individually* as a victim of the defendant's actions to recover simply by proving his mem-

involves a form of group responsibility. This undoubtedly explains the widespread judicial suspicion of probabilistic or statistical evidence as sufficient to meet the causation requirement in a torts action.[127] For example, the Utah Supreme Court, in the widely cited case of *Garner v. Hecla Mining Co.*,[128] rejected a uranium miner's claim for damages from radiation-caused cancer, which he based on the strong statistical correlation between exposure and incidence of the disease:

> While it seems logical that the unusually high incidence of lung cancer in uranium miners would indicate in the same ratio the higher probability than otherwise that such was the cause of the disease, it nevertheless falls short of compelling a finding that such was the cause *in any individual case.*[129]

The court was unwilling to determine the defendant's liability on any basis other than responsibility to an individual victim, which simply could not be proven. Such statistical evidence does prove responsibility for an aggregate injury to a group of uncertain membership, but courts generally have been very reluctant to hold defendants liable on this basis, for this would be a form of group and not individual responsibility.

In perhaps the best-known critique of probabilistic evidence, Professor Tribe ultimately bases his manifold objections to the use of statistical evidence upon "our society's traditional affirmation of the 'presumption of innocence,' " and its underlying values of "affirm[ing] the dignity of the accused," "displaying respect for his rights as a person," and "refusing to sacrifice him to the interests of others."[130] Statistical evidence leads us to pay too little attention to the individual because it shifts our attention from his rights and

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bership in a *group*, some of whose members very likely suffered or would suffer injury from the defendant's actions.

127. *See* Dore, *supra* note 65, at 430 & n.11; Robinson, *supra* note 12, at 764–65; Rosenberg, *supra* note 3, at 857; Wright, *supra* note 2, at 1821–26; Note, *Judicial Attitudes Towards Legal and Scientific Proof of Cancer Causation*, 3 COLUM. J. ENVTL. L. 344, 355–70 (1977); Note, *Tort Actions for Cancer*, *supra* note 38, at 847–48 & n.32, 851 & n.51, 854 & n.65, 858 & n.78. *But see* Dore, *supra* note 65, at 434 & nn.43–46 for cases holding otherwise.

128. 19 Utah 2d 367, 431 P.2d 194 (1967).

129. *Id.* at 370, 431 P.2d at 796 (emphasis added).

130. Tribe, *Trial By Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1370, 1374 (1971).

responsibilities to those of some statistically determined class. Others have made the point in closer connection to tort law.[131] Criticizing Calabresi's work,[132] one commentator rejects the notion that "causal linkage," essentially another term for statistical correlation, is sufficient to establish causation: "It [causal linkage] obtains only between *classes* of conduct and harm . . . . The causal relation that is pertinent in a system of corrective justice must exist between the [particular] defendant's conduct and the [particular] plaintiff's harm."[133] For these critics, reliance on statistical correlation to prove causation is unacceptable because it would be a shift from individual to group responsibility.[134]

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131. *See, e.g.*, Borgo, *Causal Paradigms in Tort Law*, 8 J. LEGAL STUD. 419 (1979).

132. Calabresi, *supra* note 78.

133. Borgo, *supra* note 131, at 424–25.

134. The rejection of group causation theories and proposals occurs just as consistently in the legislative arena as in the judicial arena. As noted earlier, *see supra* notes 89, 122, many commentators have argued in favor of legislative action to establish nonfault compensation schemes that would effectively involve group responsibility. Despite the substantial number of legislative proposals actually introduced, lawmakers have refused to enact them. *See* Downey & Gulley, *supra* note 89, at 196–200; Note, *Inapplicability of Traditional Tort Analysis*, *supra* note 38, at 589–91. As Rosenberg has observed, "[l]egislatures continue to rely on the tort system . . . [and] have declined the invitation to formulate a comprehensive administrative solution—in part because . . . such a solution seems politically infeasible. . . . Congress has consistently rejected comprehensive plans." Rosenberg, *supra* note 3, at 926 & n.283. I suggest that the political barriers to the compensation schemes reflect a concern for the IR principle among both legislators and their constituents. There probably is little support for proposals that would tax individuals to pay for injuries that they did not personally cause, and offer them less compensation than they might recover in the traditional tort system.

While there has been little if any legislative action on comprehensive compensation schemes, a growing number of states have adopted legislation involving tort reforms of other kinds. One increasingly common reform measure that might seem related to the subject of this Article is limitation or elimination of joint and several liability in cases of multiple tortfeasors, especially for noneconomic damages such as pain and suffering. Commonly, the state statutes being adopted limit each defendant's liability for noneconomic damages to a pro rata or equitable share of the total damages figure. *See, e.g.*, N.Y. CIV. PRAC. LAW §§ 1600–1603 (McKinney 1986). For a summary of recent legislation in this area, see INS. INFO. INST., *The Civil Justice System*, in DATA BASE REP. 1–2, 9–11, 13–15 (R. Gastel ed. Oct. 1986). These measures show a tendency on the part of legislatures to be concerned, like the *Sindell* court, about the burden of joint and several liability on multiple tortfeasors and the need to place some limits on liability. *See supra* text accompanying notes 33–35. However, these measures do nothing whatsoever to change the *basis* of liability from individual to group responsibility. Legislatures have been as resistant as courts to making such a fundamental change.

2. Resistance to Group Causation

Perhaps the most interesting examples of judicial and scholarly resistance to rules and proposals involving group responsibility are decisions and articles in which the resistance is covert rather than overt. In these cases, the authors adopt a rule or proposal involving a form of group responsibility, but then retreat from their position by reintroducing elements of individual responsibility, almost as though they fear they have gone too far. Such ambivalence toward group responsibility, even among some of its most forthright proponents, speaks volumes about the grip of the IR principle on American jurisprudence.

For example, in *Allen v. United States,*[135] the case involving injuries allegedly caused by nuclear radiation, the Utah Federal District Court appears to adopt the rule that probabilistic evidence is sufficient to establish individual causation.[136] Especially where the result is full recovery, as it is in *Allen,* such a rule would involve a form of group and not individual responsibility as discussed earlier. However, having explicitly rested its holding on several theories of group responsibility, including Delgado's indeterminate plaintiff theory and Calabresi's notion of causal linkage, the *Allen* court then retreated from its initial position.[137] The court proceeded as trier of fact to consider individually, with reference to each of the twenty-four plaintiffs, "proof of additional factual connections which indicate that exposure to fallout materially augmented the plaintiffs' risk of injury, which took effect in actual somatic injury . . . ."[138] Based on these individual determinations, the court awarded damages to only ten of the twenty-four plaintiffs.[139] This is hardly the result that one would expect under a group responsibility approach to the situation. *Allen* is a far cry from adopting risk contribution liability, or any other form of group responsibility, despite the clear language in the opinion sug-

135. 588 F. Supp. 247 (D. Utah 1984).

136. *See supra* text accompanying notes 76–82.

137. *See* 588 F. Supp. at 407, 414–16.

138. *Id.* at 430.

139. *See id.* at 427–47. Many of the alleged radiation victims were deceased, and their claims were actually litigated by spouses, children, and parents. In the opinion, the court referred to the alleged victims themselves as "plaintiffs" and to the survivors as "claimants." *See id.* at 427–28, 446–47. Recovery was ultimately allowed to claimants representing only 10 of the 24 plaintiffs.

gesting adoption of this rule.[140] The court was simply unwilling to ignore the IR principle's emphasis upon the individual link between injurer and victim.

Ironically, the very commentators that appear to be the strongest supporters of group responsibility actually demonstrate ambivalence or covert resistance to the principle. Rosenberg, for instance, seems to be unequivocal in his support of an explicitly "aggregative" and class-oriented approach to causation in torts.[141] Nevertheless, within the same breath, he devotes considerable effort to arguing that "individual entitlements" would be preserved better by proportional liability than by the traditional causation rules.[142] Furthermore, after stressing the "collective" nature of the victims' interest in a mass exposure case, and the necessity for class treatment,[143] he immediately switches ground and argues that "the class action preserves the most individualized component of the trial—the phase devoted to assessing the [individual] victim's loss . . . . Class actions . . . thus make possible . . . individualized assessment of loss."[144] However, this argument is totally disingenuous, as Rosenberg himself later confirms in his discussion of scheduled damages. Such damages, he concedes, "award compensation to claimants not on the basis of their personal characteristics, but rather on the basis of characteristics of a class of which the individual was a member."[145] This hardly involves individualized assessment of loss!

Actually then, Rosenberg is not unequivocal in his support for group responsibility. Perhaps Rosenberg genuinely retains a commitment to the IR principle. This is suggested by his obvious acceptance of the corrective justice theory of tort law as one clear standard by which his proposal must be justified.[146] On the other hand, perhaps he anticipates a

140. *Allen* actually represents a relatively conservative use of what Rosenberg calls the "strong version" of the preponderance rule, which requires some particularized additions to statistical correlations before allowing recovery on that basis. *See* Rosenberg, *supra* note 3, at 857, 869.

141. *See* Rosenberg, *supra* note 3, at 855, 859–60, 884–85, 905–08; *see also supra* text accompanying notes 38–50.

142. *See* Rosenberg, *supra* note 3, at 877–81.

143. *See id.* at 907.

144. *Id.* at 909–10.

145. *Id.* at 917.

146. *See id.* at 877–87.

negative reaction to his proposal because of "apprehension about the collectivist dangers" of group responsibility.[147] Consequently, he may be trying to forestall this reaction by asserting that his scheme somehow supports the IR principle after all. Either way, the IR principle remains strong enough to influence even this foremost proponent of a group responsibility approach in tort law and to lead him into inconsistencies and contradictions.[148]

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147. *Id.* at 909.

148. The same ambivalence may underlie the efforts of other commentators, like Robinson and King, to clothe what are essentially group responsibility proposals in forms that appear to reflect individual responsibility. *See supra* text accompanying notes 52–65.

The asbestos cases present a third example of implied ambivalence toward group responsibility. In these cases, plaintiffs sued for injuries caused by exposure to asbestos over a period of time and were unable to identify which producer's asbestos caused their injury. In the majority of jurisdictions that have faced the issue, including California, the courts have rejected market share liability. *See* Thompson v. Johns-Manville Sales Corp., 714 F.2d 581 (5th Cir. 1983), *cert. denied,* 465 U.S. 1102 (1984); Hannon v. Waterman S.S. Corp., 567 F. Supp. 90 (E.D. La. 1983); *In re* Related Asbestos Cases, 543 F. Supp. 1152 (N.D. Cal. 1982); Starling v. Seaboard Coast Line R.R., 533 F. Supp. 183 (S.D. Ga. 1982); Prelick v. Johns-Manville Sales Corp., 531 F. Supp. 96 (W.D. Pa. 1982); *see also* Copeland v. Celotex Corp., 447 So. 2d 908, 917–22 (Fla. Dist. Ct. App. 1984) (Nesbitt, J., concurring in part and dissenting in part) (agreeing with the majority's conclusion that the plaintiff's complaint alleged a sufficient cause of action, but rejecting the majority's reliance upon *Sindell*). Significantly, the majority's opinion in *Copeland* was modified by the Florida Supreme Court. *See Celotex v. Copeland,* 471 So. 2d 533, 537 (Fla. 1985) ("Market share liability is an inappropriate vehicle with which to apportion liability for the asbestos-related injury in this cause."). In contrast to the substantial number of asbestos cases rejecting market share liability, few courts have upheld the theory. *See* Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353 (E.D. Tex. 1981), *rev'd,* 681 F.2d 834 (5th Cir. 1982).

In part, the courts' justification for rejecting the *Sindell* doctrine stems from their application of a special rule that has evolved in asbestos cases. When it is proven that a defendant's product caused some portion of the plaintiff's injury, the identified producer can be held fully liable for plaintiff's entire harm, because the injury inflicted by one manufacturer's product is considered "indivisible" from any injury inflicted by the products of others. *See, e.g.,* Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1094–96 (5th Cir. 1973), *cert. denied,* 419 U.S. 869 (1974). Because the courts have held that there is at least one identifiable injurer in most asbestos cases, *Sindell* and other special causation rules are unnecessary and inapplicable. *See Starling,* 533 F. Supp. at 191; *Prelick,* 531 F. Supp. at 98; *see also Copeland,* 447 So. 2d at 917 (Nesbitt, J., concurring in part and dissenting in part). Ironically, this position can result in an even stronger form of group responsibility than *Sindell:* a sole identified producer can be held responsible for injuries inflicted by all other producers. Like the single defendant in Collins v. Eli Lilly & Co., 116 Wis. 2d 166, 342 N.W.2d 37, *cert. denied,* 469 U.S. 826 (1984), the

C. *The Roots of the IR Principle: The Political Theory of Liberal Individualism*

The previous two sections have shown that the IR principle underlies a widespread resistance to the causation rules and theories discussed in Part I that involve a shift to group responsibility. As indicated in the foregoing sections, an ever-increasing number of cases involve problems of indeterminate causation. Nevertheless, most courts refuse to respond to these problems in any way that could compromise the IR principle. The obvious question is, why has the grip of the IR principle remained so strong? Why is it able to support this resistance despite major pressures for change? One answer, as suggested briefly in the Introduction, is that the IR principle underlies not only the traditional causation requirement, but also the theories of utilitarianism and corrective justice most commonly offered to explain the social function of tort law as a whole.[149] To challenge the principle on one level by abandoning the traditional causation requirement therefore challenges the larger theoretical structures as well and evokes great resistance.

There are two problems with this answer. First, the utilitarian, or deterrent, theory of torts is generally argued in economic terms which themselves involve analysis of conduct by classes or groups of actors, not individuals.[150] In other words, the utilitarian analysis itself implies that the deterrent function of torts can be served very effectively by imposing responsibility on groups of actors.[151] If so, then despite superficial impressions to the contrary, there is sim-

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asbestos producer can be held responsible for the injuries inflicted by every other member of his group. *See supra* notes 66–75 and accompanying text.

Unlike *Collins*, however, the asbestos cases that reject *Sindell* do not suggest that they are purposely extending group responsibility in order to ensure full plaintiff recovery. On the contrary, their rejection of market share liability seems tied to the simple conviction that individual identification, whenever it can be made, is preferable to group identification. This does not logically support the IR principle, and actually may involve a greater deviation from that principle than was involved in *Sindell*. But this position has the appearance of preserving individual responsibility by avoiding open identification by group membership. In the asbestos cases, the desire to maintain the appearance of individual responsibility has had the paradoxical effect of supporting a rule that may actually impose a more pronounced form of group responsibility.

149. *See supra* notes 3–5 and accompanying text; *see also infra* notes 170, 186.

150. *See supra* note 107.

151. *See, e.g.*, Calabresi & Hirschoff, *supra* note 96, at 1067–70, 1075.

ply no conflict, on a functional level, between the utilitarian theory of torts and open adoption of group responsibility. Actually, some economic and utilitarian theorists have long advocated adopting group responsibility as a key element in their proposals for overhauling the torts system as a whole.[152] In addition, some courts and commentators recognize increased deterrence as an argument in favor of the new group causation rules.[153] Thus, group responsibility hardly undermines the utilitarian theory of torts.

On the other hand, it is quite true that any principle other than individual responsibility is incompatible with the highly individualistic focus of the corrective justice theory on the connection between a particular victim and a particular injurer.[154] According to this theory, the function of tort law is to ensure that "as a matter of individual justice between the plaintiff and the defendant, the defendant who has caused an injury to the plaintiff . . . must compensate him . . . whether or not [this] . . . will further some collective social goal."[155] Any rule based upon group responsibility would obscure or destroy the individual injurer-victim connection; hence, it would obviate the whole function of tort law according to the corrective justice theory. Because any challenge to the IR principle challenges the corrective justice theory of torts, the commitment to this theory may be the real source of the resistance to group causation. However, this only broadens rather than answers the original question: Why is the grip of both the IR principle, *and* the corrective justice theory of torts that it supports, so strong?

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152. *See, e.g.*, G. CALABRESI, *supra* note 3, at 246–50, 255–59, 282–83.

153. *See supra* text accompanying notes 106–10; Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 610–13, 607 P.2d 924, 936–37, 163 Cal. Rptr. 132, 144–45, *cert. denied*, 449 U.S. 912 (1980); Collins v. Eli Lilly & Co., 116 Wis. 2d 166, 192–93, 342 N.W.2d 37, 49–50, *cert. denied*, 469 U.S. 826 (1984).

154. *See* Borgo, *supra* note 131, at 424–25, 444–45; Englard, *supra* note 3, at 27 & n.2; Rosenberg, *supra* note 3, at 877; Wright, *supra* note 3, at 435–36, 455–56; Note, *Inapplicability of Traditional Tort Analysis*, *supra* note 38, at 605–06. Rosenberg's restatement of the corrective justice basis of the causation requirement obscures the importance of the individual victim-injurer connection. When he says "the *causal connection* is a necessary . . . pre-condition to liability," Rosenberg, *supra* note 12, at 877 n.108 (emphasis added), his choice of terminology deemphasizes the concern of corrective justice for rectification of the situation between the particular victim and injurer. *See id.* at 855. Rosenberg's notion of "causal connection," *see id.* at 855 & n.27, is similar to Calabresi's "causal linkage" and can apply to *groups* of injurers and victims. *See supra* text accompanying notes 131–33.

155. Wright, *supra* note 3, at 435.

This question cannot be answered from within the confines of legal doctrine and theory per se. An answer must be sought in the larger context of political structure and theory, of which law is a part.[156] In his historical study of the traditional causation requirement, Professor Zwier notes that "[t]he burden of proving cause in fact [arose] from . . . a system of laws that placed primary emphasis on the rights of the individual."[157] That system of laws, including the IR principle and the corrective justice view of tort law, in turn derived from "an underlying conception of a society of individuals in which each individual possesses equal liberties, autonomy, and freedom."[158] In political theory, this conception is generally referred to as the theory of liberalism, or liberal individualism.[159]

The focus of liberal theory is the individual and his fulfillment:

> Society is composed of individuals. It has no reality independent of its members. What appear to be the accomplishments of the whole are in fact the sum of works of individuals. Groups exist; but they reflect a convergence of separate interests. And the group is not a source of value in its own right. For the good is relative to the wants of distinct persons. The immediate measure of conduct lies within the individual rather than in the group to which he belongs.[160]

Political philosophers and historians locate the origins of this theory in the 17th- and 18th-century attack on the aristocratic and status-based society of feudal and postfeudal Europe.[161] In that earlier order, "[s]ocial arrangements were . . . based on collective units like the family or the

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156. *See* K. LLEWELLYN, THE BRAMBLE BUSH 107–08 (1960); Kairys, *Introduction*, in THE POLITICS OF LAW, *supra* note 2, at 1, 4–5; Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669, 1671–73, 1677–79.

157. Zwier, *supra* note 2, at 784.

158. Note, *Inapplicability of Traditional Tort Analysis*, *supra* note 38, at 605 n.134.

159. *See* M. SANDEL, *supra* note 15, at 1; Murphy, *supra* note 16, at 125–26. For further clarification of the meaning of the terms "liberalism" and "social welfarism" as used herein, see *supra* note 16.

160. Murphy, *supra* note 16, at 126; *see also* J. RAWLS, A THEORY OF JUSTICE 264–65 (1971).

161. *See* MacDuff, *Causation Theory and Uncertainty*, 9 VICT. U. WELLINGTON L. REV. 87, 88 (1978); *see also* Haney, *Criminal Justice and the Nineteenth-Century Paradigm*, 6 LAW & HUM. BEHAV. 191, 193–94 (1982); Murphy, *supra* note 16, at 125, 153–54; Zwier, *supra* note 2, at 791.

guild," and "[c]ollective doctrines of legal culpability . . . flourished . . . ."[162] However, the abuses of the privileged classes provoked both philosphical and political revolt, ultimately leading to the creation of the modern democratic state. During that process, the intermediate collective units or groups that had originally provoked the demand for change were largely swept away, their legitimacy irrevocably compromised by the abuses they engendered.

At the time, political thinkers saw the result as "the achievement by the self of its proper autonomy. The self had been liberated from all those outmoded forms of social organization . . . . When the distinctively modern self was invented . . . [w]hat was then invented was the *individual* . . . ."[163] The resulting political universe was a dualist one. In both political theory and law, the only cognizable entities were the individual and the state, and all legal relations were defined accordingly.[164] Therefore, infliction of injury could only be viewed as an individual injustice. Such injustice demanded correction, but correction could only occur through reparation of the individual victim by his individual injurer. Doctrines of collective responsibility in law and elsewhere "were replaced by ones locating primary responsibility in individuals."[165] At the same time, the state itself derived its legitimacy from the individuals who were its constituents and who alone were sovereign. Therefore state action had to be precise in matching responsibility to actor; otherwise, the rights of an "innocent" individual might be violated. Thus, apart from the theory of corrective justice, the IR principle was justified as a necessary "protection of the individual from intrusion by the state."[166]

In sum, the IR principle and the corrective justice view of torts are part and parcel of the liberal theory, according to which both law and political structure must reflect the ulti-

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162. Haney, *supra* note 161, at 194; *see also* J. FEINBERG, *supra* note 11, at 235.

163. A. MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 58–59 (1981) (emphasis in original); *see also* Presser, *Some Realism About Orphism, or The Critical Legal Studies Movement and the New Great Chain of Being: An English Legal Academic's Guide to the Current State of American Law*, 79 NW. U.L. REV. 869, 878 (1984) (citing M. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780–1860 (1977)).

164. *See* Macneil, *Bureaucracy, Liberalism, and Community—American Style*, 79 NW. U.L. REV. 900, 917–18 n.65 (1984).

165. Haney, *supra* note 161, at 194; *see also* MacDuff, *supra* note 161, at 88.

166. Zwier, *supra* note 2, at 816.

mate value of the individual person as the fundamental unit and basis of society. Society's sole function, on the other hand, is to facilitate the individual's self-fulfillment.[167] Rawls states the underlying premise of this theory:

> The essential idea is that we want to account for the social values . . . by a conception of justice that in its theoretical basis is individualistic . . . . [W]e do not want to rely on an undefined concept of community, or to suppose that society is an organic whole with a life of its own distinct from and superior to that of all its members . . . .[168]

From this view is derived the fundamental principle of liberal, rights-based jurisprudence that we may not violate individuals for the greater social good: "[T]here is no *social entity* with a good [of its own]. . . . There are only individual people . . . with their own individual lives. Using one of these people for the benefit of others . . . does not sufficiently respect and take account of the fact that he is a separate person."[169] The mirror image of this individual rights principle is the individual responsibility principle.[170]

Today, the liberal theory remains the dominant conceptual framework of modern American political thought. Its primary rival has been social welfare theory, which in effect embraces the opposite pole of the dualist universe of modern political theory. Social welfarism maintains that the good of society in the aggregate is the supreme value, and the goal of law and social policy should be to maximize collective social welfare.[171] There has been a persistent tension and accomodation between these rival frameworks in American political theory, law, and public policy. Nevertheless, it has never been considered acceptable that the welfarist framework should dominate, much less negate, the liberal vision of individual sovereignty. This would legitimize a collectivist ethos that is basically repugnant to our political tradition. The common law in particular has evolved as the

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167. *See* Murphy, *supra* note 16, at 125, 153.

168. J. RAWLS, *supra* note 160, at 264–65.

169. R. NOZICK, ANARCHY, STATE, AND UTOPIA 32–33 (1974).

170. According to one commentator, all the modern tort theorists, from both the utilitarian and corrective justice schools, ultimately share the individualistic assumptions of liberalism. *See* Englard, *supra* note 3, at 68–69.

171. *See* M. SANDEL, *supra* note 15, at 3–7; Wright, *supra* note 3, at 436–37. For further clarification of the meaning of the terms "liberalism" and "social welfarism" as used herein, see *supra* note 16.

heartland of the liberal theory.[172] The traditional causation requirement and the IR principle that it embodies are the manifestation in tort law of the deeply rooted political theory of liberalism.

To answer the initial question raised in this section, courts and commentators have resisted group causation rules and theories not because of the grip of the IR principle or the corrective justice theory, but rather because of the grip of the underlying theory of liberalism. This theory consititutes the dominant conceptual view of our political and social structure as a whole. Whether or not they articulate it in this manner, the courts and commentators who resist the new rules and theories at least intuitively perceive that a shift to group responsibility would ultimately undermine the liberal theory as a political world view.

It is important, before going further, to state more clearly how and why group responsibility offends the liberal theory. This will help explain why courts committed to the liberal theory feel compelled to reject group responsibility, even if it is strongly supported by arguments of increased deterrence of injury and better compensation of victims.

D. *The Objections to Group Responsibility: Submergence of the Individual and Collectivism*

Group responsibility offends the liberal theory in two major respects.[173] First, by regarding the individual victim or injurer as essentially a member of some group or association, group responsibility rejects the most fundamental premise of liberalism—that each individual is a separate and sovereign being whose existence and fulfillment, to the extent consistent with the same for others, is the whole *raison d' être* of society.[174] Ignoring the unique identity and value of

172. As gradual democratization of legislatures posed new, majoritarian threats to individual rights, the courts emerged as the most important vehicle for carrying out the liberal theory of society. *See* Murphy, *supra* note 16, at 128–30, 154. Thus, the political philosophy of liberalism found its clearest expression in judge-made rules of law and legal doctrine. *See* M. SANDEL, *supra* note 15; Wright, *supra* note 3.

173. This section was inspired by a conversation with my colleague, Professor John D. Gregory.

174. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 198–99, 271 (1977); R. NOZICK, *supra* note 169, at 30–33; J. RAWLS, *supra* note 160, at 3–4, 264–65; *see also* M. SANDEL, *supra* note 15, at 47–59; Murphy, *supra* note 16, at 125–26, 153.

the individual, group responsibility submerges the individual in a group or class of "similar" parties and penalizes or compensates him not as an individual, but as a member of a class. Recalling Tribe's objections, such treatment fails to provide an "affirmation of respect," to "affirm the dignity," and to "respect [the] rights as a person" of the individual.[175] Group responsibility fails in all these respects precisely because it fails to recognize and address the individual as such. Advocates of group responsibility argue that it is all right to disregard the individual because the net result will be more effective deterrence and greater compensation.[176] Yet this clearly sacrifices the individual to serve the interests of others—the antithesis of the most fundamental premise of liberalism.[177] Moreover, if injury law can disregard individuals and submerge them in groups, what is to prevent the same from occuring in other areas of law, politics, or social life? Group responsibility in injury causation, however parochial a concern, is thus a thread from which the entire fabric of liberalism, and its concern for the liberation of the individual, can be too easily unraveled.[178]

The second objection of liberalism to group responsibility is related but distinct. If groups are recognized for purposes of assigning responsibility, the same can be true for assigning rights. Indeed, group causation theories involve both these notions. A concept of group rights, however, opens the door to abuses by groups of greater wealth, influence, or numbers, who are able to use their group power to establish superior "rights" to the detriment of other groups and vulnerable individuals.[179] At the extreme,

175. Tribe, *supra* note 130, at 1370, 1374. In effect, group responsibility says that society will no longer regard the individual as the fundamental unit of legal relations. Instead, society will regard groups as fundamental units, and the fate of individuals within those groups will no longer be a direct concern.

176. *See supra* text acccompanying notes 106–10; *see also* Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 611–14, 607 P.2d 924, 936–37, 163 Cal. Rptr. 132, 144–45, *cert. denied*, 449 U.S. 912 (1980); Collins v. Eli Lilly & Co., 116 Wis. 2d 166, 190–94, 342 N.W.2d 37, 49–50, *cert. denied*, 469 U.S. 826 (1984).

177. *See* R. DWORKIN, *supra* note 174, at xi, 92, 146–47, 269–70; R. NOZICK, *supra* note 169, at 32–33; J. RAWLS, *supra* note 160, at 3–4; Tribe, *supra* note 130, at 1374.

178. The focus on groups and the resulting submergence of the individual seem to threaten a return to the caste system or class orientation associated with the feudal order, in opposition to which liberalism emerged originally. *See supra* text accompanying notes 162–63.

179. *See* Baker, *Essay: Sandel on Rawls*, 133 U. PA. L. REV. 895, 896–97, 905–07

the concept of group responsibility legitimates recognition of the society or state itself—the largest group of all—not as an aggregate of sovereign individuals, but as an entity "with a life of its own distinct from and [potentially] superior to that of all its members . . . ."[180] This contradicts the concept of liberalism, which intends to prevent this very possibility. If the state has an independent existence, it may have an independent definition of the good that can be imposed justifiably on citizens regardless of individual desires. Consequently, group responsibility threatens to foster the "collectivist dangers" of not only majority tyranny but also state totalitarianism.[181]

The two objections of liberalism to group responsibility—its blatant submergence of the individual and its potential legitimation of state collectivism—are the principal reasons for the judicial and scholarly resistance to group causation. These objections explain why the courts have been largely unpersuaded by the deterrence and compensation arguments in favor of group causation. Both of these arguments are based on the social welfarist premise that society should seek to maximize the collective welfare of its members—a premise adopted by the utilitarian theory of torts.[182] The social welfare theory sanctions both submergence of the individual and collectivism because it regards society in the aggregate as supreme. As a result, welfarists and utilitarian torts theorists support group causation on deterrence and compensation grounds, even though group causation disregards individual rights and responsibility. In contrast, liberalism proclaims the individual's fundamental

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(1985). Baker believes that Sandel's "account of the group subject could provide the basis for a dangerous and unwarranted notion of group or community rights." *Id.* at 897.

180. J. RAWLS, *supra* note 160, at 264. Of course, Rawls uses the quoted language to *reject* just such a conception of society. I quote him here to emphasize how completely group responsibility contradicts the central premises of liberalism.

181. *See* Rosenberg, *supra* note 3, at 909.

182. *See* Wright, *supra* note 3, at 436–37; *see also* M. SANDEL, *supra* note 15, at 3–7. Deterrence maximizes collective welfare by preventing avoidable accidents or by reducing the level of unduly dangerous activities altogether. Compensation maximizes welfare by alleviating accidentally caused suffering and the related costs of dislocation as fully and quickly as possible. Neither of these approaches requires that every individual's rights be respected as long as the net effect is to maximize aggregate welfare.

importance—the value adopted by the corrective justice theory of torts—and therefore holds that the good of the majority must never be pursued to the detriment of individuals' rights.[183]

The larger tension and accommodation between the welfarist and liberal views has in effect bifurcated tort law. The result is a parallel accommodation between the utilitarian and corrective justice theories that exists in practice even if it is not really philosophically coherent. The social welfarist view has supported the adoption of utilitarian analysis on certain torts issues, most notably the negligence issue;[184] but the liberal theory continues to command adherence to corrective justice principles in the causation area.[185] This adherence is especially steadfast because if courts adopted utilitarian arguments on the causation issue as well, they would upset the balance between liberal and welfarist values. In effect, they would wholly displace the individualist premise of liberalism from the law of torts, and, by implication, fundamentally challenge liberalism in its entirety. As a result, even if welfare-based deterrence or compensation arguments support the adoption of group causation rules, the need to maintain a firm place in tort law for the individualist premise of liberalism precludes such a move. The general rejection of group causation manifests not only an adherence to corrective justice rather than utilitarian principles in the law of causation, but also a commitment at a deeper level to preserving the liberal theory of society.[186]

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183. *See supra* note 177.

184. *See* Fletcher, *supra* note 3, at 556–57 & n.74, 563–69:

> The question posed by the conflict [between strict liability and liability based on fault in the nineteenth century] was whether traditional notions of individual autonomy would survive increasing concern for public welfare. If the courts of the time had clearly perceived and stated the issue, they would have been shaken by its proportions.

Id. at 566. Courts today do recognize that this same issue underlies the group causation controversy and take it quite seriously.

185. *See* Wright, *supra* note 3; Wright, *supra* note 2, at 1822–26.

186. The power of the liberal theory to limit the welfarist, utilitarian rationale is understandable. Present day utilitarians argue primarily in terms of economic analysis and focus on group conduct. *See supra* note 107. Despite their group focus, however, the economic theory of the marketplace on which utilitarians rely originated as a form of pure liberalism that held the individual economic actor sovereign and inviolate. No one could question, or even penetrate, the individual's process of choice; in fact, any attempt to do so would be illegitimate. This

Some might argue that there really is no conflict between this underlying commitment and group causation. Since the application of group causation will be limited essentially to mass and toxic torts cases involving corporate business defendants who inflict untraceable harms, it will have little impact on individuals per se and on individual freedom. This is a disingenuous argument, and it has clearly failed to convince most courts. Apart from the observation that individuals can and do own businesses that inflict untraceable harms, scholars have already suggested extensions of the group causation decisions that would expose ordinary individuals to group responsibility across the board.[187] If group responsibility were accepted, its application ultimately would be extended to ordinary individuals; the distinction between mass torts and sporadic accidents simply would not hold. Consequently, the threat to liberal individualism can not be dismissed in this way.

The focus on mass torts, however, is important in another way. As these cases increasingly swell the ranks of tort plaintiffs with victims of indeterminately caused injury, what was once a tragic but limited problem becomes a tragic and massive problem. Ultimately, this growing trend will severely test the courts' commitment to the preservation of liberalism. Although it is not difficult to justify rejecting *Sindell*-type claims on traditional causation grounds, this course of action offers scant satisfaction when growing numbers of seriously injured victims are left without relief while plainly negligent actors stand out of reach behind the protective shield of presumed causal innocence. Therefore, despite all the resistance to accepting and extending the *Sindell* rule, the possibility exists that it gradually will find wider acceptance. Nevertheless, the spread of group causation, as presently justified by its advocates, would be just as troubling as its rejection. The deterrence and compensation rationales that are used to justify plaintiff recovery despite indeterminate causation entirely disregard the individual responsibility

philosophical premise underlies both the economic concept of efficiency, or Pareto optimality, as a social choice criterion, and the use of markets as a social choice process. Thus, while present-day economic analysis of tort law may depart from liberalism's focus on the individual, the underlying economic theory originates as part and parcel of liberalism. Consequently, liberal individualism has the potential to override the economic theory.

187. *See supra* notes 90–95 and accompanying text.

principle and the political theory of individual dignity and autonomy on which it rests. To adopt group causation on these grounds is to invite, if not to initiate, a collectivist legal regime for corporate and individual actors alike.

The group causation cases and proposals thus bring to the surface the longstanding tension between the underlying political theories of liberalism and social welfarism. At the same time, they reveal that neither of these theories, or world views, is ultimately capable of providing a satisfactory solution to the problem of indeterminate causation. The legal battle over group causation in tort law thus appears to be a battle between two worlds, neither of which is truly habitable.

III. A JUSTIFICATION FOR GROUP RESPONSIBILITY: THE COMMUNITARIAN THEORY OF SELF AND SOCIETY

The foregoing parts of this Article traced the recent development of the concept of group causation in certain court decisions and commentaries, documented the widespread resistance to this development, and located the reason for the opposition in the ongoing tension between the political theories of social welfarism and liberalism that underlie, and compete for sway over, the legal system. The legal conflict over group causation appears to be a manifestation of a larger conflict of rival political visions, neither of which is satisfactory in light of the indeterminate causation problem. Thus, we are confronted with a kind of Hobson's choice between two equally undesirable approaches. On one level of analysis, this conclusion is accurate. On another level, however, it is possible to give a different and more optimistic interpretation of what the group causation phenomenon represents. Rather than a simple assertion of welfarist over liberal values in the causation context, I suggest that the group causation decisions represent the courts' rough intuition that there is another world view—an alternative political vision distinct from both liberalism and social welfarism—according to which we can successfully resolve the indeterminate causation problem and thereby avoid this Hobson's choice.

Significant new work in political theory and in other fields has begun to articulate an alternative framework as a response to the inadequacies of both liberal and social wel-

fare theory. The "communitarian theory" of society claims to avoid both the individualist excesses of liberalism and the collectivist excesses of welfarism by stressing the central role of community as a personal and social good and as a mediating structure between the individual and the society as a whole.[188] In the kind of intuitive leap that often occurs in the common-law process,[189] courts introducing the group causation concept have, I believe, moved toward this new framework. This is not to say that the group causation courts are familiar with the communitarian theory and consciously adopt it. On the contrary, lacking a clear understanding or even an explicit awareness of this theory, they have continued to rely on the language of the old social welfarist framework, despite its unacceptable threat of collectivism. Nevertheless, regardless of the language used, the courts are intuitively, if unconsciously, responding to and developing new ideas about community that are already manifest in a wide variety of social, political, and intellectual contexts, even if they have not yet been articulated clearly in law.[190]

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188. *See* J. AUERBACH, JUSTICE WITHOUT LAW 4–6 (1983); M. SANDEL, *supra* note 15, at 147–54, 172–74; Sandel, *supra* note 16, at 17; *see also* R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, HABITS OF THE HEART (1985) [hereinafter cited as R. BELLAH]; A. MACINTYRE, *supra* note 163; Macneil, *supra* note 164, at 934–39; Murphy, *supra* note 16.

189. In his early work analyzing the courts' use of economic logic in developing negligence doctrine, Posner adverted to the same kind of judicial intuition: In his formulation of the negligence standard "[Judge Learned] Hand was adumbrating, *perhaps unwittingly,* an economic meaning of negligence." Posner, *supra* note 3, at 32 (emphasis added). Hand's formulation "never purported to be original but was an attempt to make explicit the standard that the courts had long [implicitly] applied." *Id.* Elsewhere, Posner realized that some may question whether judges actually think in economic terms and clarified his point:

> The reader may wonder whether it is plausible to attribute economic insight to common law judges . . . . In searching for a reasonably objective and impartial standard, . . . the judge can hardly fail to consider whether a loss was the product of wasteful, uneconomical resource use. In a culture of scarcity, this is an urgent, an inescapable question. And in most cases, at least an approximation to the answer is readily accessible to *intuition and common sense.*

R. POSNER, *supra* note 107, at 180–81 (emphasis added). Outside of tort law, scholars have argued that judicial decisions imposing new forms of contractual liability have resulted from "judicial intuitions" of structural changes in, and increased concentrations of, political and economic power in postindustrial America. *See* Tobriner & Grodin, *supra* note 97, at 1247–49, 1266, 1282–83.

190. By "intuitively" I mean that courts are reaching conclusions or insights by unarticulated perception rather than by serial logical reasoning in which all the

The shift to group causation is not simply the latest chapter in the ongoing rivalry between liberal and welfarist theory in law. On a different level, it both reflects and manifests a major shift to a new political vision that transcends the old conflict. Political theorists have begun to articulate this vision clearly. Now courts are beginning to intuit the new framework in the group causation cases. This alternative vision arises in response to changed perceptions about the real nature of human relationships, between injurers and victims and in general. This Article suggests that this vision represents a sounder and truer conception of society and should be welcomed in law as it is in political theory.

Part III of the Article describes the communitarian critique of liberalism, summarizes the basics of the communitarian theory and its advantages over liberalism, shows how the group causation theories can be explicitly justified and at the same time properly restricted by communitarian theory, and argues that the courts should pursue their initial intuition and develop the group causation rules. However, courts should develop these rules only on the explicit basis of communitarian reasoning, because this basis alone can both justify group causation and yet prevent it from degenerating into collectivism. The first portions of this Part focus on the comparison of the communitarian to the liberal theory.[191] The latter portions focus on the distinction between

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premises of the conclusion are identified. Intuition can be either a conscious or an unconscious process. In the case of the group causation decisions, the courts are employing communitarian concepts intuitively, without clearly articulating the premises behind these concepts. Most likely, they are also doing this unconsciously, without any direct awareness of the communitarian framework. Perhaps the courts' actions are a response to ideas about community that are circulating in other fields and in our general culture. *See infra* notes 262–67 and accompanying text. This Article argues that while the communitarian intuition found in these cases, conscious or unconscious, is sound, it must not remain an intuition but must be articulated in clear and logical terms. *See infra* text accompanying notes 295–301. One scholar has actually suggested that the courts' intuitive movement toward the communitarian vision can be seen in many fields, including contracts, torts, divorce law, constitutional law, and finance. *See* Presser, *supra* note 163, at 891–97. However, most of his examples seem more reflective of a move toward social welfarism than a move toward communitarianism. *See infra* note 194.

191. This comparison is stressed because liberalism presently is the dominant framework and because the communitarian objections to the collectivist premises of social welfare theory are quite similar to those of the liberal theory, which are well-known.

communitarianism and welfarist collectivism, a distinction crucial both to the political theory and to the justification of group causation rules in tort law.

A. *The Communitarian Critique of Liberal Individualism: The Stunted Self and the Fragile Community*

The communitarian political theory shares liberalism's aversion to collectivism; therefore, it rejects social welfarism because that theory "fails to take seriously the distinction between persons" and thus submerges the individual.[192] However, the communitarian theory finds liberalism equally unsatisfactory because it "fails to take seriously our commonality."[193] Professor Michael Sandel is a major contributor to communitarian political philosophy, and his views are representative of a number of communitarian theorists.[194]

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192. M. SANDEL, *supra* note 15, at 140; *see also id.* at 144–45, 173–74.

193. *Id.* at 174.

194. *See* R. BELLAH, *supra* note 188; A. MACINTYRE, *supra* note 163; Murphy, *supra* note 16. Some legal scholars have written commentaries that, to a greater or lesser degree, take a communitarian perspective without always articulating it as such. *See, e.g.*, Abel, *A Critique of American Tort Law*, 8 BRIT. J.L. & SOC'Y 199, 205–08 (1981); Fletcher, *supra* note 3, at 547–49 & n.46; Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980); Hutchinson, *supra* note 3, at 756, 766–71; Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1590–99 (1985); Lindgren, *Social Theory and Judicial Choice: Damages and Federal Statutes*, 28 BUFFALO L. REV. 711, 749–53 (1979); Macneil, *supra* note 164, at 934–48; Presser, *supra* note 163, at 891–99; Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 958, 971–78, 1011–15 (1982); Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 29–30, 56–57 (1982). However, it is important to distinguish scholars like Macneil, Radin, and Kronman, who use communitarian concepts explicitly and carefully, from scholars like Abel, whose work contains insights similar to those of communitarian theory but whose conceptual framework and proposals are clearly rooted in social welfarism, a theory which the communitarian theory rejects as strongly as it rejects liberalism. *See* Abel, *supra*, at 208–11; *see also supra* text accompanying note 192; *infra* text accompanying notes 274–79. Other scholars fall between these two poles. While some of the foregoing legal scholars appear to have been involved with, or influenced by, the Critical Legal Studies movement, their work presents anything but a "nihilist" approach—a term which some have used to characterize the Critical Legal Studies movement. *See* Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984); Note, *"Of Law and the River," and of Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1 (1985). On the contrary, their work appears deeply committed to ensuring that legal rules express and effectuate transcendent values of human dignity. The same is true of the communitarian theory as it applies to law.

At the same time, there are some important differences between communitarian legal scholarship and Critical Legal Studies. Some have argued that Critical Legal Studies, while it challenges liberalism and associated legal concepts, has either failed altogether to articulate clear alternative concepts and proposals or has presented alternatives that are essentially socialist rather than communitarian

Sandel starts by observing that liberalism as a theory of society is founded on certain assumptions about the nature of the self. He proceeds to criticize the theory by challenging these assumptions. The concept of the self at the basis of liberal theory is what Sandel describes as the detached, or antecedent, self.[195] This self is separate from all others and thus "individuated" or unique;[196] but it is also separated from its own circumstances so that it can be a totally free actor or subject, a "sovereign agent of choice."[197] This conception is essential to liberalism because it expresses the total liberation of the self from all deterministic constraints.[198] Such unconstrained liberty (consistent with the same for others) was liberalism's antidote to the static society against which it revolted.[199] For such a liberated self, the society of liberal theory provided the environment necessary for self-fulfillment through sovereign individual choice.

The communitarian critique rests not only on the practi-

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in character. (For my distinction between these two outlooks, *see infra* text accompanying notes 239–45, 268–79.) *See, e.g.*, Levinson, *supra* note 15, at 1469, 1482–84; Presser, *supra* note 163, at 883 & n.60; Macneil, *supra* note 164, at 919–29.

Even self-described communitarian legal scholars like Presser and Macneil have had difficulty translating the communitarian vision into a practical guide for legal policy and institutional reform. Presser's "alternative view," despite his language of community, is full of examples that seem more concerned with social welfare and social justice than with community. *See* Presser, *supra* note 163, at 893–97. His language sometimes suggests the same. *See, e.g., id.* at 894 ("This right to one's job has been a principle of *socialist law.*") (emphasis added); *id.* at 895 ("[W]e have seen a marked retrenchment in rights accorded to criminal defendants as the rights of . . . *society generally* seem to weigh more") (emphasis added). Macneil's articulation of the "community vision" is clearer than practically any other legal writer. I discovered his work after this Article was written, and was delighted to find what appears, in many respects, a kindred spirit. At the same time, his translation of the communitarian vision into concrete terms of legal policy is sketchy, focusing on proposals that would reduce large bureaucratic structures and giving less attention to legal means for positively encouraging community. *See* Macneil, *supra* note 164, at 942–43, 947–48. One major purpose of this Article is to show how the communitarian vision can be furthered through positive, community-strengthening legal rules and policies.

195. M. SANDEL, *supra* note 15, at 10.

196. *Id.* at 50–55.

197. *Id.* at 22. Such a self is "a creature whose ends are chosen rather than given, who comes by his aims and purposes by acts of will, as opposed . . . to acts of cognition." *Id.*

198. Thus, whatever the individual chooses is truly "his own path," *id.* at 60 (quoting Nagel, *Rawls on Justice*, in READING RAWLS 9–10 (N. Daniels ed. 1973)), and not the path dictated by any outside conditions.

199. *See supra* notes 161–66 and accompanying text.

cal difficulties of achieving this liberal vision, but also on the various conceptual flaws in the vision itself.[200] Despite its rhetoric of liberation, the liberal concept of the self is so restricted that it strips the self of important elements of identity. Ironically, the ultimate result of this is the impoverishment and disempowerment of the individual rather than his fulfillment. This in turn exposes the individual to oppression by powerful groups and by the state. In the liberal vision, the concept of the self is "shorn of empirically identifiable characteristics," including social roles and sociological circumstances, in order to liberate it from any predetermined limits that would interfere with its exercise of free choice.[201] This vision fails because the self that remains is a truncated, impoverished self. Liberalism "makes the individual inviolable only by making him invisible, and calls into question the dignity and autonomy [it] seeks above all to secure."[202]

Dignity is undermined because the liberal self ultimately is not liberated but empty.[203] Devoid of commitments other than at a superficial level, since deeper commitments would threaten to confine the self and constrain its total freedom, the self is left not "an ideally free and rational agent, but . . . a person wholly without character, without moral depth."[204] Liberalism produces neither dignity nor liberation, but, in Murphy's words, "isolated individuals in various stages of a debilitating narcissism."[205] In effect, the refusal to recognize the possibility of deep commitment to any external social reality results in a self that is totally free, but only at the price of being stunted, because full development of the self requires just such commitment.[206]

Autonomy is threatened in two ways. First, since every pure self is free of identifying and limiting characteristics, it is also devoid of intrinsic merit. As a result, society as a whole *can* override individual expectations and can even use individuals as tools for social purposes. This is how Sandel

200. M. SANDEL, *supra* note 15, at 1.
201. *Id.* at 95; *see also id.* at 93–94.
202. *Id.* at 95.
203. *See* R. BELLAH, *supra* note 188, at 80, 152.
204. M. SANDEL, *supra* note 15, at 179.
205. Murphy, *supra* note 16, at 155.
206. R. BELLAH, *supra* note 188, at 81.

characterizes liberalism's justification for affirmative action.[207] Second, by definition, the stripped self is isolated and vulnerable to external oppression. When individuals accept the liberal concept of self, they withdraw into varying degrees of isolation and lose the protective elements of association.[208] Ordinary individuals abandon their group ties and are left alone, without any protective network of allies. As a consequence, they are highly vulnerable, both to corporate economic interests and to the vastly increased machinery of the modern state.[209] The self of liberalism is thus "less liberated than disempowered"[210] and winds up lacking coherence in the face of the external world.[211]

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207. "Once the self . . . is dispossessed, the claims of the individual fade to betray an underlying utilitarianism which . . . fails to take seriously the distinction between persons." M. SANDEL, *supra* note 15, at 140. Sandel hypothesizes letters of acceptance and rejection, written to convey the moral basis of affirmative action policy according to liberalism. Paradoxically, this turns out to be the principle of using individuals and their attributes as instruments of wider social purposes. Thus, the rejection letter reassures the unsuccessful candidate that he was rejected not because of any lack of personal merit, but simply because he did not meet society's current needs. The successful applicant is congratulated, not because of any personal or intrinsic merit, but simply because he was "lucky to have come along with the right traits at the right moment" for society's purpose. *Id.* at 142. Both individuals are told that they are intrinsically worthless and that their treatment stems from society's needs alone. Sandel does not reject affirmative action itself: he rejects the liberal justification for it. The policy itself might actually be justifiable under the communitarian theory. *See id.* at 143–45.

208. In his observations of early American culture, de Tocqueville saw its individualism as a potential threat to individual freedom. *See* A. DE TOCQUEVILLE, 2 DEMOCRACY IN AMERICA 107–13 (P. Bradley ed. 1945). It is one of the bitter ironies of liberalism that the sweeping rejection of class and group identifications as oppressive has exposed the individual to more oppressive forces than ever existed in premodern times.

209. *See* R. BELLAH, *supra* note 188, at 286. It can only be considered a cruel joke that individuals were persuaded to abandon important sources of social power, whether real or potential, for formal legal rights that have often proven to have little value without the social power to claim and enforce them. *See* Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893, 982–84; Galanter, *Why The "Haves" Come Out Ahead: Speculations On The Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 137–39 (1974); Rubenstein, *Procedural Due Process and the Limits of the Adversary System*, 11 HARV. C.R.-C.L. L. REV. 48, 66–70 (1976).

210. M. SANDEL, *supra* note 15, at 178.

211. A second aspect of the communitarian critique is that the liberal theory of the self is simply at odds with our experience of reality. Individuals are not, and do not perceive themselves to be, totally separate beings devoid of deep connections to the world beyond them. *See* M. SANDEL, *supra* note 15, at 143, 179; *see also* R. BELLAH, *supra* note 188, at 152–62. Therefore, the pure liberal theory fails to help us order our social life. Despite its power, it remains at some level not be-

A corollary of the critique of the liberal concept of self is that the liberal concept of community is likewise inadequate. The "fragile community" of liberalism is an aggregate of convenience, "put together to meet the utilitarian and expressive needs of individuals."[212] But there is no recognition that community is an absolute necessity upon which the individual depends for self-protection and self-fulfillment. There can be no such recognition in liberalism because this would contradict the liberal premise that there is no reality of community co-equal with the reality of the individual self.[213] At the extreme, by disregarding community, individualism is carried so far that social cohesion is undermined. Ironically, this creates an environment in which individual fulfillment is itself impossible.[214]

Liberalism fails as a theory of society in the view of

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lievable and leaves us simply disoriented and without any coherent world view. *See id.* at 163.

This criticism is related to the sociological criticism of liberalism, which argues that empirical sociological observation demonstrates the reality and depth of group influences and attachments for individuals. *See* Murphy, *supra* note 16, at 141–42. Individuals are "embedded" in a social milieu and cannot be understood or understand themselves without reference to it. However, the communitarian critique is not empirical but conceptual. It argues that apart from empirical evidence, the liberal idea of the self is not coherent as a *concept.* As a result, "we cannot coherently regard ourselves as the kind of beings the [liberal] ethic [of Kant or Rawls] . . . requires us to be." M. SANDEL, *supra* note 15, at 14; *see also* A. MACINTYRE, *supra* note 163, at 241. Not only does the liberal self fail to cohere in the face of the external world, it also fails to cohere with our own internal reality.

A third criticism is that the liberal theory is also internally incoherent. Focusing on Rawls' theory of justice as the most refined development of liberal theory, Sandel argues that Rawls' own definition of "justice as fairness," *see* M. SANDEL, *supra* note 15, at 15 (quoting J. RAWLS, *supra* note 160, at 586) cannot be accepted if the individual is viewed as a separate and sovereign self. The reason is that Rawls' basic fairness principle, the "difference principle," has redistributional effects that inevitably violate individual sovereignty. *See* M. SANDEL, *supra* note 15, at 70–71, 77–78. Sandel suggests that Rawls himself resolves this problem by implicitly altering his concept of the self, abandoning the detached self he originally posits and recognizing an intersubjective self with deeply rooted attachments to others. *Id.* at 79–82. Such a self can be told to share the fruits of its own achievements with others without being violated because it experiences and directly participates in the resulting common good that unites the self with others. *Id.* at 80–81, 143–44. The point of the communitarian critique is that the liberal concept of self proves insufficient even for liberalism, and the introduction of a different and sufficient concept results in inconsistencies between the theory and its own basic premises.

212. R. BELLAH, *supra* note 188, at 50.

213. *See id.* at 143, 334.

214. *See* Murphy, *supra* note 16, at 154–55; R. BELLAH, *supra* note 188, at 275–83.

Sandel and others because it is based on flawed conceptions of the self and community that are ultimately incoherent and self-contradictory: "Liberalism cannot . . . [continue] to insist upon the supremacy of the separate self. It must articulate a new conception of the person . . . ."[215] It is this new concept of the person that the communitarian theory presents.

B. *The Communitarian Theory: The Expanded Self and the Constitutive Community*

Liberalism views the self as separate and detached from others and views community as *constituted by* separate individuals. Communitarian theory views the self as joined and attached to others and views community as *constitutive of* an expanded self.[216] Central to this theory is the role of community as a personal and social good.

In contrast to the detached self of liberalism, communitarians conceive of the self as attached to others through commitments so deep that the individual cannot understand himself without reference to these commitments. Such a conception requires what Sandel refers to as an "intersubjective" form of self-understanding: "Intersubjective conceptions allow that the relevant description of the self may embrace more than a single, individual human being, as when we attribute responsibility or affirm an obligation to a family or community or class or nation rather than to some particular human being."[217] Given this expanded conception, "the self has to find its moral identity in and through its

215. Murphy, *supra* note 16, at 158.

216. The terminology used here is borrowed from Sandel and has special meaning in communitarian thought. *See* M. SANDEL, *supra* note 15, at 62–65, 147–54. A community "constituted by" individuals is a structure made up, or formed by, individuals either to accomplish joint aims or to satisfy joint desires for interrelationship. Self-aware individuals construct such a community to achieve what they already know they want. A community "constitutive of" individuals is a structure in which individuals discover what they want and who they are through interaction and shared reflection with others. Thus, the individuals are themselves made up or formed by their participation in the community. Such a community is vital to the individual's understanding and definition of who he is in the first place. It is not merely an attribute or instrument of the self, but a constituent of the individual's identity. *See id.* at 150. The "constitutive" conception of community stresses the active role played by community in the formation or constitution of the self.

217. M. SANDEL, *supra* note 15, at 62–63.

membership in communities such as those of the family, the neighbourhood, the city and the tribe . . . ."[218] The individual "knows himself to be a participant in a form of life through which his own identity is fulfilled."[219] Communitarian theory regards as crucial to self-understanding and fulfillment the social attachments and commitments that liberal theory rejects as constraining barriers to self-fulfillment. In the communitarian view, the individual can be understood only in relation to some community or communities within which he finds his identity and personal fulfillment as a member. Thus, the concept of the self leads directly to the concept of community.

Moreover, this is a very different kind of community from the fragile aggregation of individuals found in liberalism. This conception of community "penetrates the self":

> [C]ommunity . . . describe[s] not just a *feeling* but a mode of self-understanding partly constitutive of the agent's identity. . . . [T]he members . . . conceive their identity . . . as defined to some extent by the community of which they are a part. For them, community describes not just what they *have* as fellow citizens, but also what they *are* . . . not merely an attribute but a constituent of their identity.[220]

According to this "constitutive conception"[221] of community, participation in the community truly fulfills the individual, not because it is pleasing in itself or because it helps him to get what he wants, but rather because it enables him to discover and constitute his very self. Community is vital, because the self is not a wholly antecedent being as liberal theory suggests, and it cannot be developed fully without participation in community. In mirror fashion, the concept of self leads to that of community and the concept of community leads to that of the self. Self and community,

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218. A. MACINTYRE, *supra* note 163, at 205. MacIntyre calls this conception the "narrative view of the self," and he sees it as extending in time as well as in space, to prior and succeeding generations. *Id.* at 204–07; *see also* R. BELLAH, *supra* note 188, at 153.

219. R. BELLAH, *supra* note 188, at 162; *see also* Murphy, *supra* note 16, at 156 (explaining that the "crucial status is membership in a political society").

220. M. SANDEL, *supra* note 15, at 150 (emphasis in original). This constitutive conception of community also differs from the sentimental conception, according to which a community is simply a consensual gathering of separate individuals who happen to share a certain preference for sociability and cooperation per se. *See id.* at 148–49.

221. *Id.* at 150.

although distinct, are inextricably connected.[222]

The main policy implication of the communitarian theory is the need to place more emphasis on the formation of "communities in the strong sense," communities capable of not merely procuring goods for the stunted self but constituting the good of the expanded self.[223] The benefits of such "constitutive communities" would be numerous. First, constitutive communities would replenish the self, restore a sense of dignity and substance to individuals, and relieve alienation and emptiness.[224] Second, constitutive communities would help protect individuals from exploitation and oppression by joining them in strong networks of allies that could more effectively confront the corporate and bureaucratic centers of power characteristic of modern society.[225] In these ways, community formation would actually support individual self-fulfillment—the core value of liberalism. Third, the existence of constitutive communities would, by enabling groups to speak with more effective voices in public forums, enrich debate on public issues and thus improve the quality of the democratic process and its resultant decisions.[226] In this manner, community strength would further

222. In liberal theory, the self is separate not only from other selves, but also from any community that is formed as an instrument of its constituents. Thus, community depends upon and is distinct from its constituents. Given this view, while it is possible to argue that community may have instrumental value in furthering individual fulfillment, it is difficult to see what value there is in community per se. In communitarian theory, the intersubjective understanding of self links individuals and forms communities, which in turn act as the vehicle for further understanding and constituting the expanded self. Therefore, community is a "good" in the same sense and for the same reason that self-fulfillment is a "good": community life is self-fulfillment for the expanded self. *See id.* at 64–65; *see also infra* notes 223–30 and accompanying text.

223. In other words, participation in a constitutive community helps the individual discover and form his identity, including his definition of what *is* good. This definition, furthermore, necessarily takes others into account, for the expanded self has deep and undeniable connections to others.

224. *See* M. SANDEL, *supra* note 15, at 179–80; Macneil, *supra* note 164, at 936–38.

225. *See* R. BELLAH, *supra* note 188, at 159–62, 286; M. SANDEL, *supra* note 15, at 143–44. Much of the Critical Legal Studies work on community seems to focus on this value. *See supra* note 194.

226. *See* Kronman, *supra* note 194, at 1591–96. Kronman sees a strong communitarian strain in Professor Bickel's work, that recognizes the essential value of "intermediate communities" in American political life and argues for constitutional rules, such as allowance of "malapportionment in the service of group representation," that preserve and strengthen such communities. *See id.* at 1597.

the achievement of the collective good—the primary value of the social welfare theory.

The strong community would become a crucial structure mediating between the individual and the society as a whole. This mediating role, as implied in the foregoing points, would make possible the joint fulfillment of both liberal and welfarist aims, which increasingly have been perceived as mutually exclusive. This capacity to reconcile opposing liberal and welfarist goals would itself be a major benefit of increased attention to community.

All the benefits of community mentioned thus far are actually linked to the original liberalism-social welfarism framework. Community is valuable because it is an effective instrument for attaining the goals of one or the other theory, or indeed of both. However, the constitutive communities sought by communitarian theory would have additional benefits unrelated to the values of either liberalism or social welfarism.[227] Membership in a constitutive community would demand constant and shared reflection by individuals on the nature of the common good. Such reflectiveness is a good in itself because it fosters the capacity for reflection that is a defining quality of the human being. Moreover, shared reflection on common purposes, and collaborative action to achieve them, both confront the individual with his own boundedness and require that he transcend it at least in part. This draws forth the paradoxical capacity of the limited self to achieve self-transcendence, which is another essential quality of the human being.[228] Constitutive communities can thus facilitate and demand realization of the highest capacities of the self—a value quite different from that of self-fulfillment in the ordinary sense.[229]

Finally, through the shared reflection and common enterprise required in constitutive communities, individuals could more readily realize and sustain intrinsic values such as friendship, loyalty, and charity. Such values do not derive

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227. *See* Macneil, *supra* note 164, at 934–35 & n.131.

228. *See id.* at 900 n.5, 935–36. Of all the legal writers I have found taking some sort of communitarian point of view, only Macneil recognizes the self-transcendence value.

229. *See id.* at 935 n.134, 939–43. Macneil distinguishes this value from that of "establishment of 'ego identity,' " which he sees as underlying the Critical Legal Studies vision and distinguishing it from communitarianism. *Id.* at 940 (citing Levinson, *supra* note 15, at 1483).

their true worth from the role they play in achieving individual fulfillment or social welfare, and they do not vary according to circumstances. They are good in themselves, unqualified and universal. Revelation and realization of these absolute goods or "virtues" (or aspects of the "Absolute Good") would be a distinct and profound benefit of constitutive communities.[230]

The foregoing summarizes the essence of the communitarian alternative to, or revision of, liberalism. Through its focus on the key role of community, the communitarian theory would maintain and even enhance the dignity of the individual person, while balancing and thus curing the individualist excesses of liberalism. Although at odds with the dominant liberal orthodoxy, the communitarian approach claims a long and respectable pedigree, extending back to the biblical tradition of religious community,[231] the civic republican tradition of classical civilization and the renaissance,[232] and the federalist and republican political theories of the founding fathers.[233]

Descending from the philosophical to the practical level, what specific implications does the communitarian theory have for law and social policy? To begin with, communitarian theory would modify liberalism's exclusive emphasis on measures and rules that protect individual autonomy. Although such measures would still have an important place in a communitarian system, equal importance would attach to measures that increase the awareness of the intersubjective dimensions of self and foster community formation and solidarity.[234] On this practical level, communitarian theory helps to explain the development of group causation and re-

230. *See* A. MACINTYRE, *supra* note 163, at 167–89, 204–05; M. SANDEL, *supra* note 15, at 179–83.

231. *See* R. BELLAH, *supra* note 188, at 28–31, 333; *see also* J. AUERBACH, *supra* note 188, at 19–30.

232. *See* R. BELLAH, *supra* note 188, at 30–31, 335; A. MACINTYRE, *supra* note 163, at 220–22.

233. *See* R. BELLAH, *supra* note 188, at 30–31, 251–56; R. NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (1984); Sandel, Book Review, NEW REPUBLIC, June 10, 1985, at 37, 39 (reviewing J. DIGGINS, THE LOST SOUL OF AMERICAN POLITICS: VIRTUE, SELF-INTEREST, AND THE FOUNDATIONS OF MODERN LIBERALISM (1984)). *See generally* D. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST (1984).

234. *See* R. BELLAH, *supra* note 188, at 162, 251, 259–63; Macneil, *supra* note 164, at 939.

sponsibility theories in tort law, and it provides both a justification of these theories and a critical understanding of their limits and dangers.

C. *The Communitarian Justification for Group Responsibility: Addressing the Expanded Self and Encouraging Community*

Without the communitarian framework, court decisions that adopt group responsibility can only be seen as an assertion of the primacy of welfarist values, embodied in deterrence and compensation goals, over liberal concerns for individual autonomy.[235] Yet even the group causation courts admit they are uncomfortable with this "trade-off" and its collectivist implications.[236] I suggest that what inspired these courts to fashion the group causation concept was not a higher commitment to welfarist theory, but rather an intuition of an alternative vision according to which group responsibility does not undermine individual dignity, but actually enhances it. This alternative vision is the communitarian theory, which supports group responsibility rules in just this manner on two distinct levels. First, it displaces the objections of liberalism that these rules threaten individual autonomy. Second, it provides the positive justification that these rules facilitate expanded self-understanding and community development, and thus ultimately enhance individual dignity.

In response to the liberal objection that group responsibility submerges the individual, communitarian theory shows that this criticism is both ironic and false. According to the liberal view, rules based on individual rights and responsibilities are necessary to preserve the autonomous self and to facilitate its exercise of free choice. However, communitarian theory demonstrates that the autonomous individual of liberalism is in reality stunted and disempowered. If so, it is unnecessary and even undesirable to maintain the status quo by adhering to the IR principle. Moreover, group responsibility does not undermine the individual; it simply recognizes and encourages the development of community.[237] The ultimate effect of this is to strengthen the indi-

235. *See supra* text accompanying notes 157–86.
236. *See supra* text accompanying notes 98–110.
237. *See infra* text accompanying notes 247–60.

vidual by expanding and constituting the self,[238] a result that leads not to *submergence* but *emergence* of the individual.

The second liberal objection to group responsibility, that it threatens the individual by facilitating state collectivism, reflects a misunderstanding of group responsibility that arises from liberal theory itself. The liberal political universe is a dualist realm that includes only the state and the individual.[239] As Murphy comments, liberalism "wavers between anarchy and absolutism."[240] Consequently, the liberal critic assumes that a shift from individual to group responsibility can only mean a shift to collective societal responsibility and eventually state collectivism. Many proposals for tort reform—for example, those involving state-administered general social insurance—actually would replace the IR principle with societal responsibility.[241] However, these proposals do not represent group responsibility, nor are they supported by communitarian theory. Rather, state collectivism is part and parcel of the dualist political world view. It is the social welfarist mirror image of liberal individualism, the other pole of the bipolar universe. Communitarian theory rejects the collectivist along with the individualist vision. At the same time, it clarifies that group responsibility actually resists this polarization by reintroducing and legitimizing the intermediate groups that liberalism discredited at its inception.[242] Group responsibility, by fostering these intermediate groups,[243] helps repopulate the political universe and thus represents an alternative to and a

238. *See* R. BELLAH, *supra* note 188, at 152–53.

239. *See supra* text accompanying notes 161–66.

240. Murphy, *supra* note 16, at 145; *see also id.* at 144–46.

241. *See* T. ISON, THE FORENSIC LOTTERY: A CRITIQUE ON TORT LIABILITY (1968); Abel, *supra* note 194; Englard, *supra* note 3, at 49–50; Franklin, *supra* note 95; Ison, *Tort Liability and Social Insurance*, 19 U. TORONTO L.J. 614 (1969); Pierce, *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 VAND. L. REV. 1281 (1980). The pure "compensation" theory of tort law—the theory that the system's goal should simply be to compensate all victims of injury, *see, e.g.*, Note, *Beyond Enterprise Liability*, *supra* note 123, at 706—finds its justification, if it has one, in a collectivist theory of society. *See* Englard, *supra* note 3, at 68–69. For a definition of "social insurance," see *supra* note 106, which also distinguishes social insurance from other insurance mechanisms that involve group rather than societal responsibility.

242. *See* R. BELLAH, *supra* note 188, at 162, 212.

243. *See infra* text accompanying notes 247–60. Presser notes that the Critical Legal Studies scholars have focused on the reconstruction of "intermediate societies" as a central issue. *See* Presser, *supra* note 163, at 892 n.6.

safeguard against state collectivism.[244] The collectivist objection is fundamentally mistaken.[245]

The preceding arguments assume that group responsibility actually facilitates expanded self-understanding and encourages community formation. If so, the liberal objections are displaced. More important, because communitarian theory shows how these effects enhance individual dignity, group responsibility is justified as ultimately enhancing individual dignity, in addition to furthering other important values, such as fostering the self's capacity for reflection and transcendence, and revealing and realizing universal and absolute goods or virtues.[246] However, the reader may reasonably ask: Are the stated assumptions about the effects of group responsibility valid? Group responsibility theories in tort law hold individuals responsible for each other's conduct when all are members of a common group and allow individuals to recover for each other's harm when all are members of a common group.[247] I maintain that on several

244. Levinson implies that one reason Critical Legal Studies scholars have not thoroughly embraced the communitarian approach is that they fear the emphasis on community may mean both submergence of the individual and collectivism. *See* Levinson, *supra* note 15, at 1480, 1483–84. If this is true, it is ironic, for it implies that Critical Legal Studies scholars accept the liberal objections and are thus still wedded at some level to the liberal individualist framework they so harshly criticize. Macneil argues that this is largely the case. *See* Macneil, *supra* note 164, at 939–42.

245. A variation of this collectivist objection, which might be called the "tribalist objection," also fails to undermine communitarian theory. (I am indebted for this suggestion to my colleague, Professor Lawrence Joseph.) In essence, this objection rests upon the assumption that group responsibility empowers groups that can then oppress both individuals and less powerful groups. This took place in the feudal period, and liberalism developed as a response to just such oppression. Nevertheless, this objection misses the point of group responsibility in communitarian theory. Unlike liberalism's abolition of intermediate groups, communitarian theory does not advocate eradication of individual consciousness. *See* R. BELLAH, *supra* note 188, at 275–80; M. SANDEL, *supra* note 15, at 143, 150. Rather, it seeks to reinstate the intermediate group as a mediating partner between the individual and the state in the political universe. *See* R. BELLAH, *supra* note 188, at 212. In the pluralist universe of communitarian theory, the group serves to protect the individual from oppression by the state and other groups, while the state mediates between groups and protects against group oppression of individual members. The individual is further protected from oppression within any given group by his membership in other groups. This aspect of multiple and mobile membership distinguishes modern communitarianism from its medieval antecedents. Likewise, group responsibility does not necessarily mean the elimination of individual responsibility. *See infra* notes 274–82 and accompanying text.

246. *See supra* text accompanying notes 227–30.

247. *See supra* notes 22–97 and accompanying text.

levels, such measures encourage individual injurers and victims to expand their perceptions of self, acknowledge their links with others and thereby form or strengthen communities.

On the first level, when responsibility is placed on groups or is viewed as owing to groups, the legal process itself is transformed from an individual to a group process. As a result, individuals form associations with one another to pursue or defend claims.[248] The groups thus formed may continue to exist for considerable periods and develop into lasting communities, especially in the context of major litigation. In the *Agent Orange*[249] case, for example, Judge Weinstein's principles for structuring the distribution of the settlement funds recognized the way in which the litigation had coalesced individual veterans into groups, and he suggested that the distribution plan should try to strengthen this community formation process: "The task of organizing representatives of . . . veterans into an effective group . . . must be given priority. . . . Veteran representatives should be selected in a manner that will further unite the class . . . . Some form of National Center . . . should be funded to provide . . . veterans with a visible, central source of . . . power."[250]

On a second level, "[c]ollective responsibility not only expresses [group] solidarity but also strengthens it."[251] In other words, group responsibility creates incentives that help strengthen both expanded self-awareness and community. It conveys a direct message to injurers and victims that, for purposes of liability and recovery, their actions and cir-

248. *See* McGovern, *supra* note 96, at 8, 16 (reporting the increase in collaborative and joint efforts by both plaintiffs and defendants in toxic tort litigation, including formation of plaintiff and defense associations).

249. *In re* Agent Orange Prods. Liab. Litig., 597 F. Supp. 740 (E.D.N.Y. 1984).

250. *Id.* at 858–59. On the injurer side, defendant manufacturers and insurance companies in the ongoing litigation over asbestos-caused injuries have acknowledged their identity as a community. They have formed a permanent, jointly funded asbestos compensation facility to discharge their community obligation to injured individuals. *See* Maher, *Asbestos Extravaganza,* CAL. LAW., June 1985, at 60, 64. While these examples are taken from the mass tort context, the same argument could apply to the sporadic accident situation if group responsibility were more explicitly applied there. *See supra* text accompanying notes 90–95. One would then expect to see the formation or strengthening of associations of potential victims or injurers—homeowners, merchants, consumers, boaters, and the like—as categories of responsible actors were legally recognized.

251. J. FEINBERG, *supra* note 11, at 233; *see also id.* at 238–39.

cumstances will be considered linked to those of others with whom they form a cognizable group or community.[252] This message provides a strong incentive for individuals to be aware of their practical attachments to others and to take those attachments seriously—to conduct themselves not as isolated individuals but with constant attention to the affairs of others with whom they are associated.

In practice, group causation would require an individual producer, for example, to attend to the safety practices of fellow producers making similar products and to expect them to attend to his safety practices, because each stands to be affected by what the others do or fail to do: "Manufacturers unable to prove that they could not have produced the injury-causing product, will only benefit from safer behavior if they can nudge the entire industry into making the same or similar modifications to increase safety . . . ."[253] Each individual producer would have an incentive to be concerned about and involved with others. The "leading producer" would have an incentive to share risk and safety information and to control "marginal" producers. At the same time, the "marginal" producer would have an incentive to police the "leader." The safety risks that a large producer might tolerate because of the relatively limited potential impact on him could be catastrophic to the marginal producer who would have to share the consequences. Ultimately, by inducing dialogue and positive interaction among all the members of an injurer group, group responsibility encourages injurer community.[254]

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252. For a discussion of how to define a "cognizable" group or community, see *infra* text accompanying notes 280–300.

253. Note, *supra* note 3, at 319. This commentator worries, however, that such producer interaction might violate antitrust prohibitions. *See id.* at 319–20. This is a valid concern under current legal theory, but producer communities may not be viewed as an evil under the communitarian theory. Furthermore, producer communities certainly exist, and they operate for some nonprohibited purposes, such as political lobbying. Refusing to foster producer-community responsibility while permitting producer communities to seek political advantage makes little sense even under liberalism. This is another example of how liberalism leaves the individual more vulnerable by disregarding the reality of the existence of certain powerful groups and thus allowing them to act unregulated. If antitrust theory would impede the imposition of group responsibility on producers, then it too should be reexamined and revised.

254. This example is taken from an area in which group causation rules are presently used, but group causation would create the same incentives in any cognizable group of potential injurers, whether in the mass or sporadic tort context.

From the victim's perspective, group responsibility also provides incentives for expanded self-understanding and community formation. One major consequence of group responsibility is that a victim often will recover less than his full damages, while others injured by unrelated causes will get a windfall.[255] If, as Judge Weinstein conceded in the *Agent Orange* case, "[i]t is not possible for class members to receive significant individual compensation from the settlement funds,"[256] what then will the individual victim receive? In essence, the individual is asked to feel compensated by benefits that go to others in the group. In his decision, Judge Weinstein sought to assure "acceptable targeting of limited settlement funds," to fund "some form of National Center for Vietnam Veteran assistance," to establish a program for "genetic counseling," and to aid "children of members of the class with birth defects."[257]

Despite the reasonableness of these goals, one may wonder: What happens to the permanently disabled individual who has suffered hundreds of thousands of dollars of lifelong losses yet receives only a small cash award, if anything? Furthermore, what if this individual never needs genetic counseling, childrens' aid, or any of the other programs designed to benefit "the class"? On the one hand, this result seems unfair and cruel to the individual victim.

This incentive for group self-policing is noted by Feinberg, who claims that it is not as important when external controls are present and effective. *See* J. FEINBERG, *supra* note 11, at 234–41. Although Feinberg believes external controls are adequate in modern society, external policing actually becomes less practical and effective in preventing injuries as technology becomes more complex. Incidentally, this point answers the argument that group responsibility would reduce deterrence by shielding the careless individual from the consequences of his actions. *See, e.g.*, Note, *supra* note 3, at 320–21. If anything, mutual policing would increase deterrence.

255. *See supra* text accompanying notes 43–65.

256. In re *Agent Orange*, 597 F. Supp. 740, 859 (E.D.N.Y. 1984).

257. *See id.* at 858–61. Such class remedies have been advocated and sometimes applied in other cases. *See* Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264 (1946) and Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 260–63 (5th Cir. 1974) (both involving class wide estimation of total damages); Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 264 (S.D.N.Y. 1971), *rev'd*, 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 156 (1974) and Bebchick v. Public Util. Comm'n, 318 F.2d 187, 203–04 (D.C. Cir.), *cert. denied*, 373 U.S. 913 (1963) (both involving proposals for establishing a fund to benefit class members generally); *see also* Delgado, *supra* note 12, at 901 n.7; Rosenberg, *supra* note 3, at 916–24. *See generally* Developments in the Law—Class Actions, 89 HARV. L. REV. 1318, 1524–36 (1976).

On the other hand, it encourages him—actually forces him—to view himself not as an individual victim at all, but as a member of a suffering group, in which his pain is shared by others and eased by the alleviation of their pain. This asks a great deal of the individual victim. It asks him to go beyond the limits of his individual self altogether. Sandel writes of such self-transcendence in a similar context:

> Where [a] sense of participation in the achievements . . . of (certain) others engages the reflective self-understandings of the participants, we may come to regard ourselves . . . less as individuated subjects . . . and more as members of a wider . . . subjectivity, less as 'others' and more as participants in a common identity . . . .
>
> One consequence of an enlarged self-understanding . . . is that when 'my' . . . life prospects are enlisted in the service of a common endeavor, I am likely to experience this less as a case of being used for other's ends and more as a way of contributing to . . . a community I regard as my own . . . and with which my identity is bound.[258]

If expanded self-understanding and a sense of community can be gained through a sense of common achievement, they can also be gained, if more poignantly, through a sense of common suffering on the part of individual members of a victim group. Furthermore, the expanded self-awareness generated by group responsibility combines with the incentives of group recovery to encourage actual and potential victims of injury to solidify the links between them by forming actual associations or communities to defend their common health and well-being.[259]

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258. M. SANDEL, *supra* note 15, at 143.

259. Even before the event of injury, recognition of group responsibility encourages individuals exposed to common risks as potential victims to realize their connection to one another and to associate in communities and act on that realization. Such responses of community formation by victims or potential victims have been evident in situations such as the Love Canal case, the Three Mile Island nuclear reactor "incident," and the Dalkon Shield case. For a discussion of the Love Canal case, see L. GIBBS, LOVE CANAL: MY STORY (1981); Cary & Katz, *How to Track Down Toxins*, NEWSWEEK, May 6, 1985, at 81; Shribman, *A Woman Transformed by a Cause*, N.Y. Times, Oct. 30, 1981, at A20, col. 4; Brown, *Love Canal U.S.A.*, N.Y. Times, Jan. 21, 1979, § 6 (Magazine), at 23. For a discussion of Three Mile Island, see Walsh, *Resource Mobilization and Citizen Protest in Communities Around Three Mile Island*, 29 SOC. PROBS. 1 (1981); Witt, *Vital Social Issues Reach High Court*, Christian Sci. Monitor, Dec. 31, 1982, at 1, col. 4; Cummings, *Leaders of Nuclear Protests See a Shift in Strategy*, N.Y. Times, Sept. 21, 1981, at B10, col. 3. For a discussion of the Dalkon Shield case, see S. ENGLEMAYER & R. WAGMAN, LORD'S JUSTICE (1985). *See also* Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 805 (1984). Menkel-Meadow

Group responsibility in tort law thus furthers the communitarian goals of fostering expanded self-understanding and encouraging community both directly and indirectly.[260] As a result, communitarian theory not only displaces the objections of liberalism, but also justifies group causation as ultimately enhancing individual dignity as well as furthering other important values. Although courts that have adopted group causation may have intuited this communitarian vision, they typically have justified their rulings by deterrence and compensation rationales that are based on social welfarism.[261] Such rationales, with their collectivist implications, are plainly inadequate to convince the majority of courts that group causation will not undermine the liberal, individualist values they hold preeminent. Nevertheless, courts believing in liberal theory *should* be willing to accept group responsibility if it rests explicitly on an articulated communitarian rationale. For it would then be clear that group causation poses no threat to individual dignity, but rather helps to strengthen the individual by following a communitarian vision that moderates liberal individualism without embracing welfarist collectivism. If, as I contend, most courts primarily object not to the results but rather to the collectivist rationale and implications of the group causation decisions, then

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notes that "[i]n some recent products liability cases . . . plaintiffs who could not be fully returned to their previously uninjured selves have requested that the defendants rewrite their warnings in order, at least, to prevent similar injuries to others." While Menkel-Meadow attributes this to the "altruistic objectives" of the individuals involved, it is also possible that this request reflects the kind of community consciousness that Sandel describes. *See supra* text accompanying note 258.

260. There is a more general level at which group responsibility in torts might effect communitarian goals apart from direct impact through group legal process and behavioral incentives. By encouraging actual group consciousness among injurers and victims, and even by simply recognizing concepts such as group injury, group conduct, and the like, the legal system legitimizes the concept of community in a powerful way. This may encourage individuals to recognize and experience their attachments to others *outside* the context of tort injuries and to form associations and communities on this basis. Applying communitarian concepts to tort law in particular may be very influential. After all, the communitarian vision of individual self-transcendence tends to appear highly abstract and idealized. Is it in any way realistic to suppose that human beings can and do experience self and others in the way communitarian theory suggests? Using an essentially communitarian concept to deal with the harshest and grimmest realities of an injury case grounds this vision in reality in a uniquely powerful way. If we can acknowledge expanded conceptions of self and recognize community in these situations, this is a strong argument that the communitarian vision can be realized in other situations as well.

261. *See supra* text accompanying notes 98–110.

the thorough and explicit articulation of the communitarian intuition already implicit in these decisions should change the minds of many courts.

Nevertheless, it remains true that communitarian theory supports group responsibility only by departing from traditional liberalism. Therefore, while the communitarian vision in effect mediates between the poles of liberal individualism and welfarist collectivism, it still presents us with a choice between two worlds, or world views. Although advocates of the communitarian view can be found in growing numbers, not only in political philosophy[262] but also in sociology,[263] history,[264] psychology,[265] medicine,[266] and even law,[267] some crucial questions remain. If the communitarian critique helps to illuminate the limits of liberalism, what are the unarticulated limits of the communitarian theory? Despite all their flaws, are liberalism and the IR principle still preferable to the communitarian theory, whose limits may be more serious and problematic than first anticipated?

One question in particular goes to the heart of the issues raised in this Article and echoes the liberal objections to group responsibility:[268] Can any adequate definition or limit be placed on the term "community," so that the boundaries between society, community, and individual are recognizable? In the context of tort law in particular, can any adequate definition or limit be placed on the term "group," so that group responsibility neither diffuses into general societal responsibility nor wholly eliminates individual responsibility? If affirmative answers cannot be given to these questions, then despite earlier arguments to the contrary,[269] communitarian theory and group responsibility would appear to lead to collectivism, submergence of the individual, or both. That is, communitarian theory would sim-

262. *See* A. MACINTYRE, *supra* note 163; M. SANDEL, *supra* note 15; Kronman, *supra* note 194; Murphy, *supra* note 16.

263. *See* R. BELLAH, *supra* note 188.

264. *See* J. AUERBACH, *supra* note 188; Sandel, *supra* note 233.

265. *See* C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

266. *See* J. LYNCH, THE LANGUAGE OF THE HEART (1985).

267. *See* Kronman, *supra* note 194; Macneil, *supra* note 164; Radin, *supra* note 194; *see also* Hutchinson, *supra* note 3; Lindgren, *supra* note 194. *But see supra* note 194.

268. *See supra* text accompanying notes 173–82.

269. *See supra* text accompanying notes 236–47.

ply be social welfarism in different clothes. Communitarian theory helps to justify group responsibility. Does it simultaneously justify societal responsibility and eliminate individual responsibility? The links established in this Article between communitarian theory and group causation in tort law are quite important in this context, because the concrete world of injury and compensation provides at least the beginning of an answer to these final questions.

D. *The Limits of the Communitarian Justification: Recognizing Groups and Respecting Individuals*

Although communitarian political theory has greatly illuminated the limits of liberal concepts, it has not been nearly as clear about defining its own primary terms. The definition of "community" is itself fraught with vagueness and confusion in the literature, which threatens to merge "community" with society on the one hand, and with the individual on the other.[270] Lack of clarity is not necessarily fatal to political theory, which is abstract by nature and may be less concerned with defining community than with deemphasizing the centrality of the individual. However, in the context of concrete policies and legal doctrines, lack of rigor and clarity is a serious problem.

The group causation theories are particularly susceptible to a vagueness problem because without adequate definitions, group responsibility diffuses into general societal responsibility and wholly eliminates individual responsibility. Proposals for "group responsibility" in torts have suf-

270. Some political theorists draw no clear boundary between community and society. Murphy defines community as a "political society," by which he means "a whole people." *See* Murphy, *supra* note 16, at 146. Bellah implies that "the national society" can be defined as the essential community. *See* R. BELLAH, *supra* note 188, at 250–51, 285. On the other hand, Sandel criticizes the "societal" definition of community and argues for a more "local or particular" definition. *See* M. SANDEL, *supra* note 15, at 145–46; *see also* A. MACINTYRE, *supra* note 163, at 244–45. However, Sandel's own terminology leaves it very unclear how he would define the other crucial boundary, that between community and individual. *See* M. SANDEL, *supra* note 15, at 62–63, 143, 150, 173; *see also* A. MACINTYRE, *supra* note 163, at 204–07. It is clear that Sandel thinks there is such a boundary and that his concept of community is not intended to absorb wholly the individual. *See* M. SANDEL, *supra* note 15, at 173 (insisting that the individual is "never finally dissolved"); *see also id.* at 150. It is not as clear that MacIntyre believes in this kind of boundary. *See* A. MACINTYRE, *supra* note 163, at 205. However, without a defined boundary, absorption of the individual is impossible to prevent.

fered from precisely this confusion. Some proposals have advocated nonjudicial compensation schemes funded by general tax revenues.[271] Essentially, these are social insurance plans that would make society at large responsible for all accidental harm. Other proposals, like Robinson's "risk contribution liability,"[272] would retain individual tort actions but would transform every individual situation into one of group responsibility. By imposing liability and awarding recovery only on probabilistic grounds, these proposals would eliminate individual responsibility even in a case of unequivocal actual causation of harm.[273] Neither of these approaches represents a form of group responsibility that can be justified by communitarian theory because neither fosters a community that is distinct from society at large and that still respects the bounds of the individual.

This is what communitarian theory requires. Communitarian theory envisions a political universe composed of all three elements—self, community, and society—with community mediating between the other two.[274] If society and community are identical, then the concept of community loses meaning and offers the individual no refuge or mediating context from which to relate to the larger society.[275] The dualist universe is reinstated with all its dangers. On the other hand, if community and individual are not differentiated, the individual is submerged, and the concept of community, as Sandel and other communitarians conceive it, is undermined. The community that Sandel describes depends on the "reflective self-understanding" of its participants for its formation and existence, and reflective self-understanding requires a core self to do the reflecting.[276]

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271. *See supra* note 241 and accompanying text. For a definition of social insurance, see *supra* note 106, which also distinguishes social insurance from other insurance mechanisms that involve group rather than societal responsibility.

272. *See supra* notes 54–56, 92–95 and accompanying text.

273. *See supra* notes 52–65, 92–95 and accompanying text. Many would argue that this already happens in many cases through the insurance process. Nevertheless, this result is neither open nor obvious. *See supra* note 123.

274. *See supra* note 245; *see also* R. BELLAH, *supra* note 188, at 212, 251; Macneil, *supra* note 164, at 944–45. *But see* M. SANDEL, *supra* note 15, at 146.

275. *See* Macneil, *supra* note 164, at 936 n.141.

276. *See* M. SANDEL, *supra* note 15, at 143, 150, 154–61. According to Sandel, community is formed by acts of conscious self-awareness on the part of individuals who realize and experience their attachments to others. This reflective consciousness is precisely why the formation of community expands and constitutes

The paradox of the communitarian vision is that community is necessary to constitute full persons, but individual persons are necessary to build conscious, and therefore real, community.[277] Because it requires respect for the individual identity of the person, as well as recognition of his associational identity or community, communitarian theory does not represent a total break with the liberal theory, but rather a revision of it.[278] Communitarian theory supports group responsibility, but it does not support societal responsibility or the elimination of individual responsibility.[279] Can courts and legal scholars actually structure such a form of responsibility in practice? Can any of the group causation theories thus far developed be so described? This brings us back to the crucial problem of articulating an adequate definition for the term "group" or "community."

Can courts hope to succeed where the political theorists have failed? Courts that refuse to apply group responsibility in any situation probably fear that they would be unable to draw lines and would gradually be led to eliminate individual responsibility completely. Nonetheless, courts are experts at drawing lines in concrete situations on a case-by-case basis. The common-law judicial process, not political philosophy, may be the best hope for this difficult definitional task. Unfortunately, the courts that have adopted group causation theories have only intuited the communitarian vision; therefore they simply have not addressed the definitional question. In contrast, courts that have rejected group causation have been paralyzed by the question. Neither result is desirable. Courts should recognize group causation; but they must also articulate its applications and limits by specific reference to the meaning of group or com-

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the self, which is one of the goods of community. Self-transcendence—which is one way to describe both the process and the good of community—requires a fundamental or residual self. Otherwise, self-transcendence results in self-destruction. When the self, as the source of consciousness and reflection, is destroyed, the continued life of the community through reflective self-understanding is also extinguished.

277. The communitarian vision differs from the social order of the premodern era. At that time, community identification was the product not of conscious self-awareness but rather of unconscious acceptance of circumstance.

278. *See* Macneil, *supra* note 164, at 936 n.136, 944–45.

279. Adopting societal responsibility or eliminating individual responsibility could be justified only by some form of welfarist, collectivist theory that would differ from, and violate, both the communitarian and the liberal conceptions.

munity membership. As this Article has demonstrated, it is only on the basis of its effect on community development that group causation can be justifiably applied.

Some courts have already unconsciously suggested a starting point from which it is possible to build a definition of group or community for the purpose of imposing group responsibility in tort law. For example, in *Namm v. Frosst,* a DES case involving multiple defendants, the court refused to impose a form of group responsibility because it would result in a taking of property "in order to pay for harm which may have been caused . . . by one . . . who is unknown to the defendants, over whom they have no control or even any meaningful contact."[280] The court's language here suggests that it refused to apply group responsibility precisely because it believed there was no meaningful group involved, as defined by the parameters of mutual acquaintance, interaction, and influence. The justification for group responsibility is encouraging group awareness and solidarity. If there is no significant potential for this result because the supposed group members lack any real or potential relationship, then imposing group responsibility is senseless; it cannot accomplish its purpose and can only weaken individual responsibility unnecessarily.[281]

Although the *Namm* court may not have used the above reasoning, its language nevertheless suggests a starting point for a definition of group or community. When the members of a putative injurer or victim group are situated so that they either do have, *or could potentially have,* significant contact and involvement with each other concerning the kind of activity or circumstance that is the subject of the dispute, then group responsibility would foster community formation and development and should be applied. At the very least, group responsibility should be considered and its community-strengthening effects should be weighed carefully against other competing concerns.[282]

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280. Namm v. Charles E. Frosst & Co., 178 N.J. Super. 19, 33–34, 427 A.2d 1121, 1128 (App. Div. 1981).

281. *See* J. FEINBERG, *supra* note 11, at 241.

282. These competing concerns must include the desire to retain a cognizable sphere of individual responsibility. Some consideration would have to be given to factors indicating the extent to which such a sphere remains intact. This inquiry is beyond the scope of this Article. In addition, to avoid de facto societal responsibility, the burden of responsibility should not be transferred so widely by the

Applying such a "community viability" test would support group causation in many of the cases that heretofore adopted it on different grounds. In the DES cases,[283] a producer community is arguably viable, if not extant—despite the contrary view of the *Namm* court, whose decision unconsciously suggested the community viability test but failed to apply it correctly.[284] In the asbestos cases,[285] community viability justifies imposing group responsibility on producers, but not employers. Employers are likely to be so differentiated and unconnected that no community is viable. In toxic waste cases,[286] regionally defined waste producer communities are potentially viable because all producers face similar disposal problems and could identify each other and inter-

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group members that it would be distributed indiscriminately throughout society as a whole. (This last point was raised by my colleague Professor Lawrence Kessler.)

283. *See, e.g.*, Tidler v. Eli Lilly & Co., 95 F.R.D. 332 (D.D.C. 1982); Morton v. Abbott Laboratories, 538 F. Supp. 593 (M.D. Fla. 1982); Mizell v. Eli Lilly & Co., 526 F. Supp. 589 (D.S.C. 1981); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004 (D.S.C. 1981); Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980); Payton v. Abbott Laboratories, 386 Mass. 540, 437 N.E.2d 171 (1982); Abel v. Eli Lilly & Co., 418 Mich. 311, 343 N.W.2d 164, *cert. denied*, 469 U.S. 833 (1984); Zafft v. Eli Lilly & Co., 676 S.W.2d 241 (Mo. 1984); Namm v. Charles E. Frosst & Co., 178 N.J. Super. 19, 427 A.2d 1121 (App. Div. 1981); Bichler v. Eli Lilly & Co., 79 A.D.2d 317, 436 N.Y.S.2d 625 (1981), *aff'd*, 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982); Martin v. Abbott Laboratories, 102 Wash. 2d 581, 689 P.2d 368 (1984); Collins v. Eli Lilly & Co., 116 Wis. 2d 166, 342 N.W.2d 37, *cert. denied*, 469 U.S. 826 (1984); *see also supra* text accompanying notes 22–37.

284. *See Namm*, 178 N.J. Super. at 33–34, 427 A.2d at 1128. *See supra* notes 280–81 and accompanying text.

285. *See, e.g.*, Thompson v. Johns-Manville Sales Corp., 714 F.2d 581 (5th Cir. 1983), *cert. denied*, 465 U.S. 1102 (1984); Hannon v. Waterman S.S. Corp., 567 F. Supp. 90 (E.D. La. 1983); *In re* Related Asbestos Cases, 543 F. Supp. 1152 (N.D. Cal. 1982); Starling v. Seaboard Coast Line R.R., 533 F. Supp. 183 (S.D. Ga. 1982); Prelick v. Johns-Manville Sales Corp., 531 F. Supp. 96 (W.D. Pa. 1982); Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353 (E.D. Tex. 1981), *rev'd*, 681 F.2d 334 (5th Cir. 1982); Copeland v. Celotex Corp., 447 So. 2d 908 (Fla. Dist. Ct. App. 1984), *rev'd in part and modified*, 471 So. 2d 533 (Fla. 1985); *see also supra* note 149.

286. *See* Note, *"Close Encounters of the Toxic Kind"—Toward an Amelioration of the Substantive and Procedural Barriers for Latent Toxic Injury Plaintiffs*, 54 TEMP. L.Q. 822, 824–25, 831–36 (1981) (describing a number of documented case histories of toxic waste spills and leaks). Few toxic waste cases have reached the appellate courts because the doctrinal barriers to recovery under traditional torts rules, including the traditional causation requirement, are practically insurmountable. *See* Ginsberg & Weiss, *supra* note 89, at 874–929; Note, *supra*, at 824–43. A group causation rule would greatly increase toxic waste victims' chances for success in recovering damages as a group from waste producers.

act. Note that *potential* community viability controls in this test: a group of injurers could not escape liability by consciously avoiding interaction with each other. As for victim groups, many populations exposed to toxic substances would seem to qualify,[287] because the circumstances that led to their exposure—residing in the same area or working in similar occupations and locations—support community viability.

The community viability test would also define the limits to the application of group responsibility. Consider a toxic exposure case in which victims were exposed to carcinogens by several producers involved in completely different activities that used altogether different materials and processes. Robinson, who hypothesizes such a case,[288] argues in favor of proportional recovery in these circumstances. Victim community viability may exist in this situation, *if* the exposures were concentrated in time and space. However, no producer community is viable, because by hypothesis the producers' activities are so unrelated that there is no basis for interaction and mutual influence. Consequently, imposing group responsibility may not be justified by communitarian reasoning. The case for group responsibility is even weaker if the exposures were diffused over time and space, so that there is no viable victim community either. The "cigarette cancer"[289] cases may present

287. *See* Jackson v. Johns-Manville Sales Corp., 727 F.2d 506 (5th Cir. 1984), *reh'g en banc,* 750 F.2d 1314 (1985) (reinstating portions of the panel's opinion, superseding portions of the panel's opinion, and certifying certain factual issues to the Mississippi Supreme Court); Allen v. United States, 588 F. Supp. 247 (D. Utah 1984); Arnett v. Dow Chem. Co., 6 Chem. & Radiation Waste Litig. Rep. (BNA) 383, 390 (Cal. Super. Ct. 1983); Garner v. Hecla Mining Co., 19 Utah 2d 367, 431 P.2d 794 (1967); *see also supra* text accompanying notes 38–65; *supra* notes 124–29 and accompanying text.

288. *See* Robinson, *supra* note 12, at 750–55.

289. In the "first wave" of suits by smokers against cigarette manufacturers in the 1950's, plaintiffs invariably lost, and statistical evidence of causation of cancer by smoking was excluded or found inadequate. *See* Note, *supra* note 127, at 369–73 and cases cited therein. In recent years, a "second wave" of suits against cigarette manufacturers has begun, the outcome of which is as yet uncertain, although the first case to go to a jury resulted in a verdict for the defendant. *See* Galbraith v. R.J. Reynolds Indus., No. 144,417 (Cal. Super. Ct., Sta. Barb. County 1985). In this case, statistical evidence of causation was also excluded, and the jury ruled for the defendant because, according to the foreman, the "evidence wasn't there." Chambers, *Tobacco Companies Breathe a Bit Easier,* N.Y. Times, Dec. 29, 1985, at E16, col. 4; *see also* Roysdon v. R.J. Reynolds Indus., 623 F. Supp. 1189 (E.D. Tenn. 1985); Cippollone v. Liggett Group Inc., 593 F. Supp. 1146

exactly this sort of situation. In these cases, victims are widely scattered and possible injurers include not only tobacco companies but also unrelated producers of environmental carcinogens.

Another important limit on group responsibility is the case of traditional ambiguous causation, where a particular victim's injury may have been caused by any of a number of wholly unrelated actors, and some evidence (but less than a preponderance) points to every actor.[290] Robinson's risk contribution theory, like others that suggest using probabilistic evidence and proportional recovery, would grant recovery here.[291] Group causation—as justified and limited by communitarian theory—would reject recovery because no injurer community is viable, and imposing liability on any actor would violate individual rights solely, and unjustifiably, for collectivist reasons of deterrence and compensation. This result reemphasizes the point that the goal of imposing group responsibility, according to communitarian logic, is *not* to increase deterrence or compensation, but to encourage community formation as a distinct goal. When this goal cannot be furthered because community viability is lacking, group responsibility is simply not justified under communitarian theory.

Perhaps the most difficult case to resolve is that which involves a viable injurer or victim community as well as a specific injurer and victim who are unequivocally identifiable. For example, a labeled product, similar or identical to others produced by different makers, injures a particular victim who belongs to an identifiable user class that is exposed to, but whose members do not all suffer, a similar harm. The controversy over the "Dalkon Shield" contraceptive device presents a case in point.[292] Should group responsibility

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(D.N.J. 1984). *See generally* Brody, *Recovery Against Tobacco Companies*, TRIAL, Nov. 1985, at 48; Legal Times, Dec. 9, 1985, at 8, col. 2; Sitomer, *Cigarettes on Trial: Tobacco Road is Strawn With Liability Lawsuits*, Christian Sci. Monitor, Dec. 5, 1985, at 41, col. 1; Mintz, *Cigarette Product-Safety Trial Begins*, Wash. Post, Nov. 19, 1985, at C1, col. 4.

290. See *supra* notes 92–95 and accompanying text for a concrete illustration of such a case.

291. *See id.*

292. *See, e.g., In re* Northern Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig., 521 F. Supp. 1188, *modified*, 526 F. Supp. 887 (N.D. Cal. 1981), *vacated and remanded*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); Rosenfeld

be applied to the injurer or victim class here, even though the known injurer will pay less than one hundred percent of damages to his known victims? The community formation and individual autonomy rationales clash most strongly in this case. However, it should not be a foregone conclusion that individual responsibility must prevail. The interests and benefits of community formation may be significant enough to override concern for the specific injurers' or victims' individual rights or responsibilities.[293]

However, the purpose of this Article is not to specify outcomes for different cases.[294] The standard of community

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v. A.H. Robins Co., 63 A.D.2d 11, 407 N.Y.S.2d 196, *appeal dismissed,* 46 N.Y.2d 731, 385 N.E.2d 1301, 413 N.Y.S.2d 374 (1978).

293. On one level, imposing group responsibility in such a case could serve the liberal goal of individual fulfillment even better than the IR principle. For example, in a strong community, actual and potential victims could regain a sense of dignity and connection by supporting each other. At the same time, they could be greatly empowered to confront and bargain with the corporate entities that affect their lives and well-being. On another level, the formation of a strong victim community could encourage reflective and self-transcendent conduct, as well as the affirmation and practice of unqualified virtues like loyalty, trust, charity, and the like.

294. A number of other observations regarding specific decisions and doctrines do follow from the argument in the text. First, if the purpose of legal rules is to encourage community, then parties liable under group causation should not be able to exonerate themselves by proving their actual causal innocence, a frequent result under the existing group causation decisions. *See* Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 612, 607 P.2d 924, 937, 163 Cal. Rptr. 132, 145, *cert. denied,* 449 U.S. 912 (1980); Martin v. Abbott Laboratories, 102 Wash. 2d 581, 605–06, 689 P.2d 368, 382–83 (1984); Collins v. Eli Lilly & Co., 116 Wis. 2d 166, 197–98, 342 N.W.2d 37, 52, *cert. denied,* 469 U.S. 826 (1984). Even a causally innocent producer should be held liable if he could have influenced others who actually caused the harm, since this would reinforce the incentive for community. The only ground for exoneration, then, would be lack of real ties to the responsible group, or lack of responsibility on the part of the group itself.

Second, apart from the causation issue, a communitarian theory of law would support the view that the negligence issue should also be evaluated on a group basis. *See supra* note 96. Limiting the group responsibility rule to cases in which all group members are negligent, as in the DES cases, is inappropriate. *See, e.g., Sindell,* 26 Cal. 3d at 610–11, 607 P.2d at 936, 163 Cal. Rptr. at 144. If *any* individual within a cognizable community is negligent, then holding other members responsible is justifiable because it would encourage stronger community bonds. The decision in Sheffield v. Eli Lilly & Co., 144 Cal. App. 3d 583, 192 Cal. Rptr. 870 (1983), *see supra* notes 1, 119, was therefore misconceived, and was possible only because the *Sindell* court did not recognize or articulate the communitarian basis for its original group responsibility approach.

Third, my comments do not necessarily imply that adoption of group responsibility would eliminate the negligence issue. Before imposing liability it could still justifiably be required that at least one group member be found negligent, or that the riskiness of the group's activity as a whole be found excessive. On the

viability would evolve from the litigation process. In effect, I propose to create an issue of group cognizability similar to that presented in class actions, although the determinative factors would be quite different. In every case, either plaintiff or defendant would have the prerogative to argue that the court should recognize an injurer or victim group and then apply some form of group responsibility. This would lead to litigation about how such groups should be defined. It would force the courts to determine the appropriate defining factors in light of the ultimate community solidarity rationale. The legal process itself would help to answer the definitional question and to clarify the meaning of a "viable group" or "community." This suggestion implicitly presumes that if a viable injurer or victim group, whether actual or potential, could not be shown, liability could be based only upon individual responsibility, whatever the consequences with respect to the burden of injurer liability or the adequacy of victim compensation. The party seeking to invoke group responsibility would have the burden of showing its appropriateness. Given the embryonic stage of our understanding of the factors that define group viability and justify group responsibility, this seems the most sensible approach. Proposals like Robinson's that suggest a general use of probabilistic, proportional recovery would be rejected because they make group responsibility the presumption.[295]

It is possible to look back now at the group causation decisions and proposals presented in Part I and see that, while none show any explicit awareness or use of communitarian reasoning, some at least implicitly move toward it and

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other hand, this requirement would assume that control of risk is the sole basis for group interaction and relation, whereas interaction over such issues as distribution and handling of inevitable losses might also provide the basis for community strengthening. If so, then placing liability on a viable injurer community would make sense even in the absence of any negligence. However, in the absence of a viable injurer community, both liability without fault and liability without identifiable causation would be difficult to justify under communitarian theory. Thus the communitarian theory adds a new dimension to the debate over negligence and strict liability, which has generally been conducted exclusively in corrective justice and utilitarian terms. *See, e.g.*, Calabresi & Hirschoff, *supra* note 96; Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205 (1973).

295. *See supra* text accompanying notes 54–65.

reach results consistent with it. The *Sindell*[296] decision, by focusing on the total fungibility of the product involved, effectively narrows its application of group responsibility to cases in which producer community is viable.[297] The *Agent Orange*[298] opinion addresses the victim community issue in almost explicit terms.[299] The court decisions that adopt group causation are generally limited to situations involving viable injurer or victim communities. On the other hand, the scholarly proposals[300] often call for results inconsistent with the community viability test. These proposals seem to lack the courts' intuitive perception of the link between group causation and the communitarian vision. Instead, the proposals tend to merge into a de facto social insurance approach justifiable only on pure welfarist grounds.

Even though the courts deserve credit for their intuition of the communitarian rationale for group causation, intuition is no longer adequate. By justifying their decisions in terms of increased compensation and increased deterrence, and by failing to grasp the communitarian reasoning clearly and make it explicit, the courts have confused group causation with social welfarist compensation. In turn, this confusion has emerged in the commentary on these cases. Without clarification, the group causation decisions seem to support abandoning the IR principle for essentially collectivist reasons. Unless courts go further and explicitly articulate the communitarian theory of group causation, they will fail even if they succeed. In the absence of the communitarian justification and its self-imposed limits, group responsibility can degenerate into collectivism and submergence of the individual. Even the most ardent supporters of the *Sindell* decision probably would not see these consequences as a triumph.

As this Article has demonstrated, both the shift to group responsiblity and the resistance it has encountered reflect, on one level, a fundamental tension between competing lib-

296. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980).

297. *See id.* at 610–11, 607 P.2d at 936, 163 Cal. Rptr. at 144; *see also supra* notes 33–37 and accompanying text.

298. In re *Agent Orange*, 597 F. Supp. 740 (E.D.N.Y. 1984).

299. *See id.* at 857–61; *see also supra* notes 83–88 and accompanying text.

300. *See supra* text accompanying notes 38–65.

eral and welfarist world views that extends far beyond the confines of tort law. On a different level, the shift to group causation can be seen as part of a larger movement toward an alternative, communitarian world view that in some measure transcends the liberal-welfarist dichotomy. The courts' decisions thus reflect the larger political visions of society that compete for our allegiance. At the same time, only by explicitly recognizing and articulating the underlying framework of political visions and values can the courts make decisions that truly express and effectuate these visions, instead of obscuring and distorting them. Nowhere is this truer than in causation doctrine in torts. Clarity about the underlying theory will produce sounder, and more soundly reasoned, decisions. In addition, because the language and conceptual structure used by courts can reinforce or alter our political visions themselves, judicial clarity can play a significant part in actually shaping the emerging vision of communitarian political theory.

Therefore, I conclude that courts should apply group causation and responsibility theories and should explicitly justify them by the communitarian rationale. Moreover, this application can and should depend explicitly on the issue of group viability—the only factor directly related to the communitarian rationale. Courts should not, as they have done in the past, adopt group causation and responsibility theories on ambiguous grounds. Nor should they rely upon the collectivist grounds of deterrence and compensation, because these are non-self-limiting and dangerous grounds on which to abandon the IR principle and its underlying value of individual dignity. Relying on collectivist grounds can only lead to unsound judicial decisions that lend support to an unsound collectivist political vision.

E. *Postscript: A Communitarian Theory of Law*

The communitarian theory has implications for legal doctrine well beyond the issue of causation and the law of torts in general. By articulating a vision of society in which goods, and goals, are defined in significantly different terms than those of liberalism or social welfarism, communitarian thought adds a new dimension to jurisprudence. Tort theorists have argued for nearly two decades over whether legal rules make sense in terms of social welfarist criteria of

wealth maximization or liberal criteria of individual autonomy.[301] This controversy has carried over to other legal subjects as well.[302] By changing the terms of the discussion, a communitarian theory of law would open many new doors through which to understand and criticize the function and meaning of specific legal rules and doctrines.[303]

In addition, at a more general level, communitarian theory casts new light on the debate over what is the best descriptive and normative theory of tort law and law in general. On one level, communitarian theory seems to support the emphasis of liberal, corrective justice theory on individual rights and fulfillment, as opposed to the emphasis of welfarist, economic deterrence theory on overall societal welfare. At the same time, however, communitarian theory shows that in many cases where these theories were thought to be irreconcilable, they are not. Imposing group responsibility on a viable community can both further individual dignity, by strengthening a community essential to the individual, and increase social welfare, by increasing deterrence of injurious activity. Even though communitarian theory rejects welfarist goals such as deterrence and compensation as ends in themselves, it accepts and even facilitates them as by-products of the achievement of the communitarian goals of strengthening community and enhancing individual dignity. Communitarian theory reveals that there is less inconsistency between liberal and welfarist goals, and more potential for satisfying both, than is usually recognized.[304]

Thus, apart from suggesting a distinct and potentially

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301. *See, e.g.*, G. CALABRESI, *supra* note 3; Calabresi & Hirschoff, *supra* note 96; Epstein, *supra* note 294; Epstein, *Causation and Corrective Justice: A Reply to Two Critics*, 8 J. LEGAL STUD. 477 (1979); Fletcher, *supra* note 3; Posner, *supra* note 294; Posner, *The Concept of Corrective Justice in Recent Theories in Tort Law*, 10 J. LEGAL STUD. 187 (1981); *see also* Englard, *supra* note 3; Wright, *supra* note 3.

302. *See generally* Posner, *A Reply to Some Recent Criticism of the Efficiency Theory of the Common Law*, 9 HOFSTRA L. REV. 775 (1981); *Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980); *A Response to the Efficiency Symposium*, 8 HOFSTRA L. REV. 811 (1980).

303. *See supra* note 294 for a discussion of how communitarian theory can be applied to specific legal rules other than group causation.

304. This mediative aspect of the communitarian theory is entirely consistent with the theory's concept of community itself as the crucial mediating structure between the individual and the society as a whole. *See supra* notes 225, 245 and accompanying texts, *supra* text accompanying notes 274–75.

fruitful new theory of law, the communitarian theory suggests a way to integrate existing theories and values that thus far have been seen as irreconcilably opposed. It shows that the dichotomous world of liberalism and social welfarism, with its Hobson's choice between arid individualism and oppressive collectivism, does not exhaust the field of possibility. The communitarian world of self and society mediated by community offers a new hope of integration. At present, we are still between two worlds. But stirrings all around us, in law and in other fields, suggest that we will not be suspended here much longer.