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Responsibility for Human Suffering: Awareness Participation and the Frontiers of Tort Law

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ESSAY

RESPONSIBILITY FOR HUMAN SUFFERING: AWARENESS, PARTICIPATION, AND THE FRONTIERS OF TORT LAW

Timothy D. Lytton†

"An injustice remains inextricably bound to all suffering"
- Albert Camus[1]

Disagreements over responsibility for human suffering frequently stem from disparate understandings of what it means to be responsible.[2] In such disputes, parties often talk past one another. They do not simply disagree; rather, they fail to communicate meaningfully. This essay examines two distinct notions of responsibility and how they shape different ways people think about injustice.

These two understandings of responsibility emerge out of different answers to the question: when are individuals responsible for the suffering of others? One might answer that individuals are re-

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1 ALBERT CAMUS, THE REBEL 304 (Anthony Bows trans., 1956).

2 Such disagreements may also arise out of different perceptions concerning the facts of a situation. Recent writings in moral and political theory have carefully examined this problem of competing perspectives and illuminated the dangers of resolving conflicts by favoring one perspective over others. *See generally* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989) (discussing the dominance of male perspective in the law); THOMAS NAGEL, THE VIEW FROM NOWHERE (1986) (offering a theory of objectivity as a shared perspective rather than a universal one).

One may question whether locating responsibility for suffering is a matter of finding it or placing it. On one hand, responsibility may be an implicit feature of human relations such that those who examine them "discover" it. On the other hand, responsibility may be an external normative judgment applied to relationships such that those who evaluate them "impose" it. This difference between uncovering and attributing responsibility is analogous to competing perspectives in literary theory between the belief that interpretation involves finding meaning in a text and the view that reading is an act of constructing meaning. *See* RONALD DWORKIN, LAW'S EMPIRE 45-86 (1986). I do not wish presently to take a position on this issue of what the act of locating responsibility really entails. I believe that this ambiguity will not significantly affect my analysis.

sponsible only when they are aware that their actions do or could cause harm to others. According to this view, responsibility for human suffering attaches only when an actor knowingly puts others at risk. This response offers a paradigm of responsibility based on a person's awareness of her potential to do harm.

One might instead answer the question by claiming that individuals are responsible for the suffering of others whenever they participate in practices that contribute to it. The causes of injury may be remote and diffuse. When this is the case, it may be difficult to identify particular actions that cause specific harms. In such complex situations, individual actors may be unable to anticipate the full effects of their actions. Yet the complexity of such causal connections ought to provide no excuse for those who take part in the creation and maintenance of practices that harm others. This second approach provides a paradigm of responsibility grounded on participation.

The difference between these two paradigms underlies many disagreements about responsibility for contemporary social problems. Adherence to one of these paradigms will shape one's approach to claims that whites are responsible for racial oppression or men for sex inequality or North American consumers for labor exploitation. The paradigm of awareness restricts responsibility to those whites, men, or consumers who knowingly promote the respective harms. In contrast, the paradigm of participation extends responsibility to all those within these groups who participate knowingly or otherwise in practices that produce these different forms of suffering.[3]

Tension between these two approaches to responsibility appears not only in political discourse but also within social institutions. Tort law, which expresses and enforces public norms concerning liability for harm to others, often provides a forum for the conflict between these two understandings of responsibility. For example, the recent extension of strict liability to manufacturers for product-related injury and reactions against this doctrinal development shed light on the strengths and weaknesses of each paradigm. While tort law generally favors the paradigm of awareness, the paradigm of participation occasionally finds expression in exceptional doctrines.

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[3] Throughout this essay I will be discussing responsibility based on individual actions, some of which occur within the context of groups. However, I will not be dealing with any theories of responsibility founded on notions of collective action or membership in a group. *See* DWORKIN, *supra* note 2, at 167-75 (discussing methods of reasoning about group responsibility and the personification of community).

This essay attempts to clarify these distinct understandings of responsibility and employ them to illuminate current conflicts in political discourse and tort law. Part I examines in detail the paradigms of awareness and participation. Part II offers examples of how the disparity between the paradigms often leads to miscommunication in contemporary disagreements about moral responsibility for various forms of human suffering. Part III considers how this conflict of paradigms manifests itself in tort doctrine.

The underlying method of this essay entails two distinct elements. First, I will analyze two particular social conflicts about responsibility that, I believe, illustrate a widespread normative difference at the heart of many contemporary disagreements in our society. The conflicts that I examine concern racial and economic relations. Second, I will interpret a particular doctrinal conflict in tort law in the light of this normative difference. In doing this, my aim is to support a particular understanding of tort law.[4] I believe that tort law is an essentially normative enterprise that both reflects and influences broader moral conflicts in society.[5] In the end, I hope to show how tort law enforces a balance between competing understandings of responsibility for injustice.

I
TWO MODELS OF RESPONSIBILITY: AWARENESS VS. PARTICIPATION

A complete theory of responsibility would include discussion of the sources of responsibility (where it comes from),[6] an account of the grounds of responsibility (what it is based on),[7] and the conse-

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4 A masterful example of this theoretical method is JULES COLEMAN, RISKS AND WRONGS (1992). *See also* Timothy D. Lytton, *Smashing the Idols of Efficiency*, 79 VA. L. REV. (forthcoming 1992) (reviewing JULES COLEMAN, RISKS AND WRONGS (1992)).

5 Several contemporary tort theorists, Richard Epstein, Jules Coleman, and Ernest Weinrib foremost among them, have argued that tort law enforces various conceptions of corrective justice for wrongdoing. *See* COLEMAN, *supra* note 4, at 361; Richard Epstein, *A Theory of Strict Liability*, 2 J. LEG. STUD. 151 (1973); Ernest Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. 403 (1989); Ernest Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485 (1989).

Epstein, Coleman, and Weinrib all exclude multi-party products liability cases from their moral accounts of tort law. Epstein accomplishes this by limiting his notion of what counts as a cause of harm in tort, Coleman by asserting that decisions in such cases exemplify economic rather than moral reasoning, and Weinrib by refusing to recognize such cases as tort cases at all. In contrast, I will offer a moral theory of tort law that accounts for multi-party products liability cases along with more traditional torts.

6 For example, responsibility might derive from some transcendent order, from political authority, or from personal conscience.

7 For example, responsibility might be based on judgments about the decisions individuals make, or the positions in family or society that they occupy, or obligations that attach to them.

quences of responsibility (what it implies).[8] This essay addresses only the second of these. It is disagreement concerning the grounds of responsibility that defines the distinction between the paradigms of awareness and participation.

In order to highlight the feature of each paradigm most relevant to the distinction between awareness and participation as the ground of responsibility, I have reduced them to simple claims. Consider the following statements of each paradigm:

> AWARENESS: A person should be responsible for harm suffered by another only if the harm results from a course of action chosen by the person *and* the person was aware of a potential for the type of harm that results.
>
> PARTICIPATION: A person should be responsible for harm suffered by another if the harm results from a practice in which the person chooses to participate.

For the purposes of this analysis, I will consider only what the paradigms have to say about *personal* responsibility.[9] Under both models, responsibility rests upon features of an individual's action.[10]

Both claims state grounds on which a person *should be*, as opposed to *is*, responsible. These are normative claims, not analytical ones. A central purpose of distinguishing between the two paradigms is to show that nothing in the definition of responsibility itself requires a person to adopt one paradigm rather than the other. A preference for awareness over participation, or vice versa, must be the result of substantive moral argument, not simply an exercise in definition.

There are three important features of each paradigm that do not distinguish them. First, both paradigms assume that responsibility for a harm requires that the harm result from human *action*.[11] Specifying what counts as human action—for instance whether this

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8 For example, responsibility might provide reasons for action, or define relations between people, or help constitute personal identity.

9 It would be possible to articulate claims about group action as the basis of responsibility under each paradigm, but this would only complicate the analysis without clarifying the contrast between the two paradigms.

10 That is, responsibility under the paradigm of participation is grounded on an individual's action within the context of a group, not on the individual's membership in that group. For a discussion of responsibility based upon membership in a group, see DWORKIN, *supra* note 2, at 167-75.

11 In defining the paradigm of awareness, I have referred to action using the phrase "course of action," whereas in defining the paradigm of participation, I have employed the term "practice." I wish both of these to denote individual action, although I am aware that the first carries a connotation of isolated action and the second a connotation of action within the context of a group activity. The reason for this discrepancy is to make the rhetoric of each claim familiar to those who adhere to it in order to provide a fair and recognizable presentation of each paradigm.

category includes nonfeasance as well as misfeasance—is essential to any full development of the two models, but does not serve to distinguish them. Clearly, one might develop different substantive theories of action for each, but one need not, and to do so at this point would only cloud the distinction between them that I wish to highlight.

Second, both paradigms require that a person *choose* to act or participate. Neither model attributes responsibility in the absence of an agent's choice to perform an act or participate in a practice that results in harm to another. While there may be a variety of substantive theories of what it means to choose an action, many of them could be applied to both models without affecting the distinction on which I wish to focus attention.

Third, in both paradigms *causation*—that harm "result from" a choice of action or participation—is necessary in order for responsibility to attach. Like action and choice, cause is an essential feature of responsibility under each model. And like action and choice, cause does not distinguish between them.[12] Analyzing any one of these three complex concepts presents an enormously difficult task, one which could easily overwhelm any discussion of responsibility. However, since neither action, choice, nor cause distinguish the paradigms of awareness and participation, putting aside further examination of these features seems warranted.[13]

The central distinguishing feature of responsibility under the paradigm of awareness is *awareness of a potential for the type of harm that results*. According to this model, determining a person's responsibility for the suffering of others requires examination of his decision to act. To incur responsibility, a person's process of deliberation in choosing to act must include an awareness of the possibility for injurious consequences. Under the paradigm of awareness, one must choose to harm another, or at least choose to run the risk of doing so, in order to be responsible for any resulting injury. This condition of actual knowledge concerning the possibility of harm may be weakened without great change in the paradigm by requiring only

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12 For the purposes of this essay, I will employ the notion of Necessary Element of a Sufficient Set (NESS) causation defended by Richard Wright. The NESS test holds that a particular condition is a cause of a specific consequence if it is a necessary element of a set of sufficient actual antecedent conditions. *See generally* Richard Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735 (1985).

13 Those wishing to pursue these matters may begin by consulting the following sources. For an examination of action, see Bernard Williams, *Voluntary Acts and Responsible Agents*, 10 OXFORD J. LEGAL STUD. 1 (1990). For analyses of choice, see DAVID GAUTHIER, MORALS BY AGREEMENT 21-42 (1986) (discussing rational choice) and JOSEPH RAZ, THE MORALITY OF FREEDOM 148-57 (1986) (discussing coercion). For discussions of cause, see H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW (2d ed. 1985) and Wright, *supra* note 12.

that the person should have known, under some normatively relevant standard of knowledge, that harm might result from her chosen action.[14] But even accepting this weaker version of the paradigm of awareness, why should responsibility for harm which one causes require that one knew or should have known about the possibility of harmful consequences?

According to the paradigm of awareness, holding a person responsible for harm that she did not or could not have known about would be unfair. Proponents of this view explain that the only outcomes of an individual's action that are properly subject to moral judgment are those that she considered when choosing to act.[15] Only these outcomes are expressions of her moral agency; only these are "hers" in a normatively relevant sense. Other outcomes are mere circumstantial occurrences, no more attributable to her than the weather or the wind speed.[16] Harms of which an actor was not (or could not have been) aware at the time she chose to act were not (or could not have been) part of her deliberation, and hence are not properly attributable to her for the purpose of determining moral responsibility for them.

Christopher Schroeder has described this focus on deliberation when determining responsibility as an "*ex ante*" or "before-the-fact"

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14 The difference between actual knowledge and some normatively determined level of knowledge, such as "reasonable" knowledge, will not significantly affect my analysis. However, my decision to include hoth of these formulations within the same paradigm does represent a conscious choice to present disagreements over responsibility for human suffering as differences about whether foresight is a necessary condition of responsibility. A different approach might instead interpret such disagreements as argnments about which harms are reasonably foreseeable, assuming that foresight is a necessary condition of responsibility. This second approach would locate disagreement over responsibility for human suffering entirely within the paradigm of awareness, whereas the first explains such disagreement by reference to the distinction between the paradigms of awareness and participation. Neither approach is necessary, and the superiority of one over the other depends upon which more clearly illuminates the disagreements. I am grateful to Tony Sebok for pointing out this distinction to me. *See infra* note 26.

15 *See* George P. Fletcher, *The Search for Synthesis in Tort Theory*, 2 LAW & PHIL. 63, 68, 72 (1983) (discussing excuse from responsibility for harm as based on restriction of the choice, such as *ex ante* limits on information, which led to the action that caused the harm.); Christopher Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439, 451-52, 453 nn.58 & 59 (1990) (asserting the unfairness of taking into account information unavailable to an agent *ex ante* when judging his actions and citing the prevalence of such a view among moral theorists).

16 *See* Fletcher, *supra* note 15, at 66-69 (discussing "circumstantial" harms that may result from "voluntary interaction in the public sphere" and are "the product of the inevitable interaction of human beings living in the same community"). Fletcher considers circumstantial losses as morally equivalent to natural losses. *Cf.* Tony Honoré, *Responsibility and Luck*, 104 LAW Q. REV. 530, 543 (1988) (argning that all outcomes of human actions are constitutive of personal identity and thus belong to the person who causes them).

approach. Arguing that this approach constitutes the dominant trend in moral theory, he writes:

> The person who, after the fact, judges . . . [an] actor must respect the agent's *ex ante* view. It is unfair to appraise an actor using criteria, information, or theories that were unavailable to her at the relevant moment, the moment of decision. We must ask whether the agent chose correctly or permissibly, knowing what the agent then knew. After-acquired information cannot enter into the analysis. "After the event even a fool is wise. But it is not the hindsight of a fool; it is the foresight of the reasonable man which alone can determine responsibility."[17]

This approach evaluates the question of responsibility for harm from the perspective of the choosing agent at a point in time prior to the occurrence of injury.

The paradigm of awareness reflects concern for the moral autonomy of the choosing agent. It refuses to subject individuals to moral judgment and the adverse consequences that may accompany it for harms primarily caused by circumstances or events beyond their control. To judge people by the manner in which they exercise their moral agency shows respect for them as moral agents. It encourages them to focus on the choices that confront them.[18]

In contrast, to judge individuals responsible for unfortunate outcomes of their actions, outcomes of which they were not aware when they chose to act, disregards their moral capacities. Such a focus on the unanticipated and perhaps unforeseeable provokes anxiety and distracts individuals from careful consideration of the choices that they face. The prospect of responsibility for all harm that results from an individual's action, including injuries which she

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17 Schroeder, *supra* note 15, at 452 (quoting Overseas Tankship (U.K.) Ltd. v. Masts Dock & Eng'g Co. ("The Wagon Mound (No. 1)") [1961] App. Cas 388, 424 (P.C.) (Austl.)).

18 In a similar vein, Alan Gewirth has claimed that individuals ought to be responsible only for those harms that result directly from their choice of action. This encourages people to make morally correct choices with regard to the immediate consequences of their actions, despite possibly calamitous indirect results. *See* Alan Gewirth, *Are There Any Absolute Rights?*, *in* THEORIES OF RIGHTS 91, 104-05 (Jeremy Waldron ed., 1984) (discussing the doctrine of intervening causes).

One might, as does Gewirth, draw a distinction between direct and indirect, or immediate and mediate consequences of one's actions. These distinctions might serve as alternatives to the one I have chosen (awareness and participation). One might observe a contingent coincidence between direct or immediate consequences and those of which one is (or could have been) aware. Similarly, indirect or mediate consequences might often coincide with those of which an actor could not have been aware. However, despite this overlap, there are differences between these alternative distinctions. For the purposes of this essay, I have chosen the distinction between awareness and participation because I believe that it most clearly illuminates disagreements over responsibility for human suffering. For further discussion of this point, see *infra* notes 28-33 and accompanying text.

did not (or could not) anticipate, restricts her autonomy insofar as it limits what she chooses to do for fear of unknown consequences. In addition, if she incurs a penalty for such consequences, this will reduce her ability to choose or her range of choice in the future. Thus, personal autonomy—the freedom to choose—underlies the paradigm of awareness.

In contrast, responsibility under the paradigm of participation requires only that a person's action contribute causally to another's harm.[19] According to this approach, an individual who chooses to act in a way that contributes to the suffering of another is responsible for that person's suffering.[20] This is so regardless of whether the actor considered the possibility of harm when determining how to act. More precisely, while choosing to act entails that a person have in mind *some* consequence or purpose of his action, it does not require that he be aware of *any particular* consequence. According to the paradigm of participation, a person should be responsible for even unanticipated harms. Indeed, the paradigm of participation goes even further, holding that whether the injurer knew or even could have known of the possibility for harm resulting from his action is wholly irrelevant to determining responsibility.[21] But how can it be fair to hold someone responsible for harm which he could not have anticipated?

The answer to this question lies in considering the issue of fairness not only from the injurer's perspective but also from the victim's as well. According to the paradigm of participation, when an individual suffers due to the actions of another, it seems only fair to place responsibility for the harm on the injurer. To place responsibility on the victim compounds the initial injury, for "blaming the victim" is itself a form of inflicting further harm.

To treat unforeseeable injuries caused by others as a type of natural misfortune—a result of the complexity of modern life—may simply be another way of placing responsibility on the victim. Even though a natural disaster is clearly beyond human control, it is still the victims who are responsible for taking adequate safety precautions. Furthermore, blaming human suffering on some structural

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19 By cause, I mean Wright's notion of NESS causation. *See supra* note 12.

20 For an action to "belong" to a person, that person must have chosen it. However, choosing an action is not the same as considering all of the possible consequences that might result from it.

21 The notion that a person may be responsible for harm about which he could not have known finds a parallel in Raz's assertion that an individual may act wrongly even if there is no better course of action available to him. Both of these claims undermine the idea that the sole purpose of judging people's actions—as responsible or wrong—is to influence how they or others similarly situated in the future will choose to act. Both claims locate normative grounds of judgment beyond the perspective of the choosing agent. *See* RAZ, *supra* note 13, at 364.

aspect of life, often referred to vaguely as "the system," rather than on those who perpetuate it by their participation, is too often simply a strategy for covering up the proper location of moral responsibility. Thus, according to the paradigm of participation, when injury is caused by another person's actions, the innocence of a victim demands that responsibility fall on the injurer.

At this point it may be helpful to address three objections to the initial plausibility of this model of responsibility.[22] First, one might object that if the paradigm of awareness fails properly to account for the normative relation between those who cause injury and those who suffer it, this is not simply because it is too restrictive but rather because the very concept of responsibility is inapplicable to such situations. A radically skeptical form of this objection might claim that responsibility itself is an incoherent or wholly fictional concept.[23] A more restrained version might assert that actions taken without anticipation of some of their consequences really are like natural events with regard to those unanticipated consequences.[24] If this is true, then responsibility would not apply to people who perform such actions any more than it does to the inanimate causal forces of nature.

While I cannot disprove the radically skeptical objection to responsibility itself, I can attempt to reveal one important disadvantage of holding such a position.[25] One aim of this essay is to illuminate actual contemporary disagreements in politics and law concerning responsibility for human suffering. The parties to these conflicts themselves hold and take seriously conceptions of responsibility. They see ideas about responsibility as legitimate reasons for action, and they view the outcomes of debates about these ideas as having practical influence on the way they and others behave and on the deployment of the state's power to enforce moral norms. A radically skeptical rejection of responsibility hinders any attempt to illuminate what is at stake in these contemporary disagreements in a way that is intelligible to the parties involved and that respects their deeply held concerns. Radical skepticism may indeed be true in

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22 I intend my accounts of both models of responsibility to be explications, not defenses, of them. However, an adequate presentation of them requires that they have at least initial plausibility as alternative approaches to responsibility for human suffering.

23 I am grateful to Tony Sebok for first bringing this objection to my attention.

24 I am grateful to Peter Berkowitz for helping me understand the true force of this objection.

25 For strategies in addressing radical skepticism, see DWORKIN, *supra* note 2, at 76-86 (discussing the difference between "interual" and "external" skepticism and their respective errors) and THOMAS NAGEL, THE POSSIBILITY OF ALTRUISM 143-44 (1970) ("I believe that no form of skepticism, whether epistemological or moral, can be shown to be impossible. The best one can do is to raise its cost, by showing how deep and pervasive are the disturbances of thought which it involves.").

some metaphysical or meta-ethical sense, but it is not very helpful in addressing present-day practical problems.

The more restrained version of this first objection claims that responsibility simply does not characterize the normative relation between human agents and the unforeseen consequences of their actions. This objection rests on an alleged similarity between human action without foresight and natural events. The paradigm of participation, however, claims that the normatively relevant dividing line for the purposes of attributing responsibility falls between human action (with or without foresight) and natural events. The presence or absence of a chosen action delineates the bounds of responsibility in this model. The objection, by likening unfortunate injury to natural disaster, claims that the normatively relevant distinction where responsibility is concerned is between human action with foresight and human action without it. The presence or absence of awareness thus defines the frontier of responsibility under this approach. Seen in this light, the objection is really the paradigm of awareness, posed as an objection to the paradigm of participation rather than as an alternative to it.[26] A full defense of either one of these two models would have to address this issue of where to locate the frontier of responsibility, the boundary between injustice and misfortune.[27]

These considerations do not defeat this more restrained objection. However, they do reveal that it is simply a restatement of the

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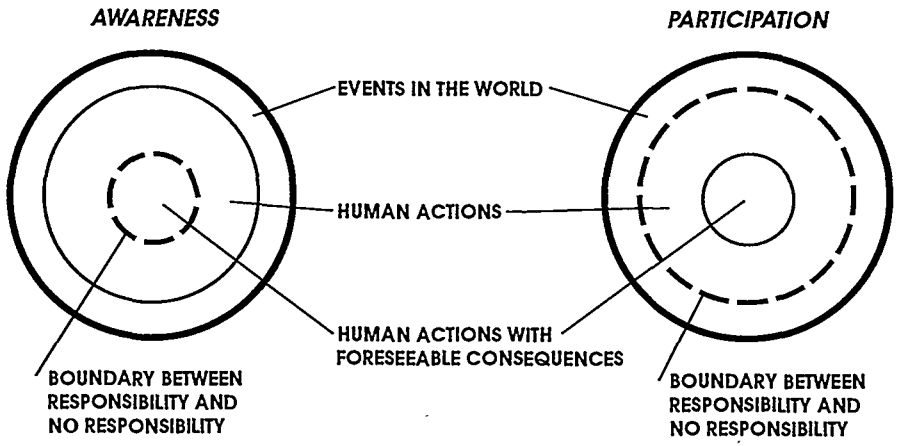
26 One might visualize the difference between the two paradigms with the help of two alternative Venn diagrams:



27 Claiming that misfortune is better addressed by remedies that do not attribute responsibility—such as social insurance—does not resolve the question of whether injury caused by action without foresight constitutes injustice or misfortune. To say that such unforeseen injury is better addressed by remedies that do not attribute responsibility is to presuppose an answer to this question based upon the paradigm of awareness.

opposing paradigm of awareness. While such a restatement may pose an alternative, it does not undermine the initial plausibility of the paradigm of participation. My purpose here is not to decide between the two paradigms; it is to highlight that doing so is not simply a matter of initial impressions but rather requires complex substantive considerations.

A second objection to the initial plausibility of the paradigm of participation questions the very distinction between awareness and participation.[28] A more fitting distinction might be drawn between responsibility for direct and indirect consequences of one's actions. Using this distinction one might reformulate the two models of responsibility as follows:

> DIRECT: A person should be responsible only for the immediate results of her actions.
>
> INDIRECT: A person should be responsible for all results of her actions even when the connection between act and result is mediated by a complex of natural or social forces.

This distinction between these two alternative paradigms focuses on the structural nature of the causal relation between actor and sufferer.[29] In contrast, the distinction between awareness and participation emphasizes the difference between how those who cause injury and those who suffer it perceive the relationship between themselves.

Clearly there may be considerable overlap between these two pairs of paradigms. Proponents of the awareness/participation distinction may claim that directness provides generally reliable evidence for determining what an injurer is (or should have been) aware of. Adherents of the direct/indirect distinction might claim that awareness is simply a proxy for directness. This debate over

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To say that *all* injury is hetter addressed in this way is to adopt the radical skeptic's approach to which I have responded ahove.

The separate question of whether social insurance is the appropriate response raises issues concerning the consequences of responsibility not the grounds of it. *See supra* notes 6-8 and accompanying text. One might construe insurance as a consequence of responsihility that attributes responsibility to all contrihutors to the insurance pool or as an alternative to attributing responsibility to anyone. This would depend on one's interpretation of insurance, not responsibility.

28 In the following discussion of this objection, I owe much to conversations with Ernest Weinrib.

29 Ernest Weinrib has pointed out to me that these two paradigms are characterized by the same distinction as that between corrective and distributive justice in his work. *See, e.g.*, Ernest Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1992). Weinrib has taken his observation one step further and asserted that the structural difference between direct and indirect harm *necessitates* a different account of responsibility for each. Such an explanation appears consistent with his generally formalist approach to such questions. *See* Ernest Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988).

which distinction better accounts for competing claims concerning responsibility arises in tort law, where some define proximate cause according to directness and others according to foreseeability.[30]

Ultimately, both pairs of models are plausible, and favoring one over the other comes down to deciding which one better explains contemporary disagreements about responsibility in politics and law. This essay makes a case for the awareness/participation dichotomy. Whether or not that case is convincing must await the conclusion of the discussion and judgment by the reader.

A third objection to the initial plausibility of the paradigm of participation concerns the meaning of innocence. What exactly is it that makes a victim innocent? Clearly not all those who suffer injury are innocent. Many victims contribute to their own suffering, and according to the paradigm of participation, they should be responsible for it. But does a victim *ever* not contribute causally to his suffering?

Stephen Perry argues convincingly that injuries arising from the interaction of two parties are "*always* . . . the result of choices to act which were made by both parties."[31] When both parties choose to act, both contribute causally to the injury.[32] This being so, causation alone can never serve as the ground upon which to distinguish an injurer from a victim on the basis of blameworthiness or innocence. However, Perry does point out that injury may be caused by only one party in exceptional cases where a victim exercises no choice with regard to the circumstances of her injury.[33] Thus, only when an injurer participates by choice in a practice that causes injury to a victim who is subject, but not by choice, to the effects of that practice, does it make sense to conceive of the victim as innocent.

The extent to which victims in fact exercise little or no choice concerning the events that lead to their suffering will in the end affect any *defense* of the paradigm of participation. However, this essay seeks to *explain* disagreements over responsibility as due to disparate understandings of responsibility, understandings given by the paradigms of awareness and participation. So what matters for the purposes of this discussion is simply whether adherents of the paradigm of participation believe that it correctly characterizes relations be-

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30 *See infra* notes 54-58 and accompanying text.

31 Stephen R. Perry, *The Impossibility of General Strict Liability*, 1 CAN. J. L. & JURISPRUDENCE 147, 156 (1988). Perry qualifies this assertion by mentioning two exceptions: cases in which third parties place a victim's (1) property or (2) person in the way of harm caused by an injurer. In both instances it is the third party rather than the victim whose action places the victim in harm's way.

32 *Id.* at 154-60.

33 *Id.* at 156.

tween injurers and victims in particular instances, not whether it is empirically true.

A situation in which an injurer's chosen participation contributes to the suffering of a victim who has little or no choice in defining her part in the interaction constitutes an offense against the victim's autonomy. Suffering, writes H. Richard Neibuhr, "is the frustration of our movement toward self-realization[,] . . . the presence in our existence of that which is not under our control, . . . the intrusion into our self-legislating existence of an activity operating under another law than ours . . . ."[34] The act giving rise to harm is properly attributable to the injurer; it is "his" insofar as it is an expression of his autonomy. According to the paradigm of participation, respect for the victim's autonomy demands that the injurer be considered responsible for the results of his action. Whether the injurer was aware of the possibility for harm is irrelevant.

In contrast to the paradigm of awareness, the paradigm of participation focuses on the suffering of harm rather than the choice of action when determining responsibility. It is an *ex post*, or after-the-fact, approach to responsibility. The paradigm of participation evaluates responsibility from the point of view of the victim as one who suffers at the hands of others. In doing so, it seeks to rehabilitate the victim's injured autonomy.

The paradigms of awareness and participation will conflict whenever one person unknowingly causes harm to another. Cases of "structural" harm—injuries caused by a complex of natural and social forces—will often be the object of this conflict. The paradigm of awareness restricts injurer responsibility to situations in which an injurer made a knowing decision to subject a victim to harm or should have known that harm would result from his actions. To do otherwise would fail to respect the injurer's autonomy. In this way the paradigm of awareness privileges the injurer's autonomy over that of the victim. In contrast, the paradigm of participation extends injurer responsibility to circumstances in which a victim's suffering results from an injurer's decision to act, no matter how unforeseeable the harm. Not recognizing the injurer's responsibility would fail to rehabilitate the victim's damaged autonomy. Thus, the paradigm of participation favors the victim's autonomy over that of the injurer.

The less expansive character of responsibility under the paradigm of awareness leaves many victims subject to the further degradation of having nowhere to place responsibility; it adds injustice to suffering. At worst it blames the victim. At best it blames "the sys-

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34 H. RICHARD NEIBUHR, THE RESPONSIBLE SELF 60 (1963).

tem"—an impersonal amorphous entity—and allows active participants to hide behind the complexity of doing harm in the modern world.

The paradigm of participation dramatically expands each actor's responsibility for the suffering of others. It threatens to overwhelm simple daily activities that somehow, in some small way contribute causally to suffering beyond the field of one's consciousness. The notion of opportunity cost in economics, according to which everything *always* has a cost (equal to whatever one forgoes to have it), entails that nothing is ever free. Similarly, the understanding of responsibility given by the paradigm of participation has a pervasiveness that seems to threaten the possibility that any act can be innocent. This calls into question the practical import of a responsibility defined so expansively that it serves to link one's actions to injuries about which one has no knowledge, suffered by people with whom one has no acquaintance.

Thus, the paradigms of awareness and participation each protect fundamental moral values, and each also contains unsettling flaws. My aim in this part of the discussion has not been to defend one over the other, but rather to reveal the plausibility of both. I have sought only to outline the salient features of each model in a way that is recognizable to those who hold it. However, I have not attempted to fortify either one against serious objections by those who have adopted its rival. Doing so would require constructing substantive theories a good deal more detailed than those held by most adherents to either paradigm. While individuals may have deep convictions concerning their understandings of responsibility, these are rarely rooted in detailed philosophical analysis. My goal is descriptive rather than justificatory. I hope by this analytic clarification to illuminate the source of normative conflict in many contemporary political and legal disagreements. With the paradigms of awareness and participation in mind, consider next how they shed light on two illustrative political conflicts concerning responsibility for human suffering.

II

Two Examples of the Tension Between Awareness and Participation: Responsibility for Racism and Imperialism

The difference between the paradigms of awareness and participation underlies many disagreements about responsibility for human suffering. Contemporary discussions about racism and imperialism provide examples of how this difference creates a form of discourse that more often resembles miscommunication than de-

bate. Perhaps examination of these issues in light of the distinction between paradigms can make the discourse more meaningful.

Racial inequality in the United States has given rise to much discussion of responsibility for racism. Consider the following hypothetical dialogue between a black student and a white student:

> *B*: All whites are racist.
> *W*: I'm not a racist.
> *B*: Yes, you are. You're a racist because you're responsible for racial oppression.
> *W*: That's not fair. I am not responsible for racial oppression. In fact, I have never done anything to injure or exploit black people. You've insulted my character.
> *B*: This is not about your character, it's about the suffering of my people. You obviously don't care about my concerns. You don't respect me.

This type of exchange, rather than fostering open discussion between the two parties, results instead in a breakdown of communication.

B claims that *W* is a racist because he is "responsible for racial oppression." *W*'s response is to deny the claim, asserting that he has "never done anything to injure or exploit black people." *W*'s answer presupposes an understanding of responsibility consistent with the paradigm of awareness. Having never done anything to harm black people—or more precisely, not being *aware* of ever having done anything to harm black people—would preclude *W* from responsibility under this paradigm. However, if *B*'s accusation is rooted in an understanding of responsibility more akin to the paradigm of participation, then *W*'s answer is a non-response.[35] *B* may even perceive it as a strategy for avoiding discussion.

B's accusation and *W*'s response represent a failure to join issue. Their mutual misperceptions ultimately result in a complete breakdown in communication. *W* claims that *B* has insulted his character. Perhaps he feels that *B* has simply lumped him in with other whites—the "real" racists—on the basis of his skin color. Or maybe he feels that *B* has failed to give him credit for moral choices that he has made in the past to avoid harming black people when he was aware of a potential for doing so. Under both of these interpretations, *W* understands *B*'s accusation as an expression of disregard for his autonomy, his status as an individual moral agent.

B claims that *W* does not respect her. *B* may interpret *W*'s failure to respond to her concern as a lack of interest, or worse, an

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35 Patricia Williams has called this "the privatized response to issues of racial accountability." See her illuminating discussion of it in PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR 64-66 (1991).

affirmative attempt to ignore it. *W*'s unresponsive answer diverts the discussion from *B*'s initial claim to *W*'s feelings about it. *B* may feel that *W* is unwilling to consider an issue that is important to her, and avoids doing so by refocusing their interaction on himself and his own feelings. If *B* perceives *W*'s reaction in these ways, then she will feel that *W* does not respect her autonomy, that he is unwilling even to recognize her as an individual insofar as she has concerns that differ from his.

W's perception that *B* disregards his autonomy and *B*'s perception that *W* refuses to recognize hers make meaningful communication difficult, if not altogether impossible. Conversation entails speaking and being heard, giving others an opportunity to talk and listening to them; it requires recognition of and respect for the other party. Exchanges like the one between *B* and *W* illustrate how the difference between the paradigms of awareness and participation can lead to a breakdown of communication and exacerbate social division.

The difference in these two paradigms also frustrates attempts to communicate meaningfully about injustices other than racism.[36] Experiences while doing service work in third world countries have led some people to identify connections between standards of living in the United States and those in other poorer countries. The concept of responsibility provides one form of connection between middle-class Americans and mistreated workers in other countries.

For example, several popular U.S. clothing manufacturers ship material to Guatemala where local women assemble it under oppressive working conditions. The places where these women work are called *maquiladoras*, the Spanish term for assembly plant. The *Central America Network Newsletter* of Cleveland recently reported that some *maquiladora* employees earn as little as one dollar per day and most work at least fifty hours each week.[37] Describing the atmosphere in the *maquiladoras*, the report continued:

> [T]he factories of Guatemala offer abysmal working conditions. Warehouse-like buildings have few windows or fans, no heat, and limited exits, which . . . are usually locked.
>
> Part of the business attraction of maquiladoras lies in the lack of health, safety and environmental standards which allows companies to operate relatively free of regulation. Workers in Guate-

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36 I do not mean to suggest in this discussion that there are not connections between racism and imperialism, but only to indicate that they do have distinguishing features.

37 *Fast Track to Poverty*, C.A.N. NEWSL. (Cent. Am. Network, Cleveland, Ohio), No. 31, Spring 1992, at 4 [hereinafter C.A.N. NEWSL.]. For a detailed study of the Guatemalan *maquiladoras*, see Kurt Peterson, *The Maquiladora Revolution in Guatemala*, Schell Center Occasional Paper No. 2 (1992).

> mala are not given health and safety training or protection against toxic chemicals and dust emitted when working with dyed cloth. Reports of sexual and physical abuse are frequent. . . .
>
> Efforts to counter abuses and to fight for fair wages by forming unions are vigorously repressed. . . . The Guatemalan military and security forces are frequently used to break up union meetings, strikes or demonstrations.[38]

Few would dispute the unfairness of this treatment. However, the difficult issue arises when dealing with the question of whether U.S. consumers, who purchase the clothes made in these *maquiladoras* at affordable[39] prices, are responsible for the labor repression involved in producing them.[40]

The paradigms of awareness and participation unsurprisingly offer different answers to this question. A U.S. consumer whose understanding of responsibility reflects the paradigm of awareness might readily condemn the *maquiladora* industry, blaming the Guatemalan military, the factory owners, and perhaps even the U.S. manufacturers, while refusing to consider himself responsible. He might claim:

> I didn't even know about it before now, so how could I be responsible for it? Moreover, I don't know which of my clothes, if any, are assembled in Guatemala, and it would be unreasonable to expect me to know where everything I purchase comes from. I imagine that most of what we as Americans consume involves foreign labor at some stage of production. And although I abhor the unfair working conditions under which many of these goods are produced, it is unrealistic to expect me to accept responsibility for world-wide labor oppression. I'd have to stop buying clothes, and many other essential goods too, if that were the case. That's clearly impractical for me, and probably not even helpful to the workers.

This understanding of the problem of human suffering in the Guatemalan *maquiladoras* need not involve indifference, only a refusal to bear responsibility for something properly attributable to the actions of others more directly and foreseeably involved. Responsibility under the paradigm of awareness, as manifest in this example, demands a more direct connection between injurer and victim. Such directness is missing here because the causal link between consumer and worker seems to disappear in the complexity of an inter-

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38 C.A.N. NEWSL., *supra* note 37, at 6-7.

39 These clothes are affordable for U.S. consumers, that is.

40 For a provocative meditation on the connection between "the blood-soaked fields of El Salvador" and blouses at Sears "on sale for 20% discount," see BERNICE J. REAGON, *Are My Hands Clean?*, *on* SWEET HONEY IN THE ROCK LIVE AT CARNEGIE HALL (Flying Fish Records 1988).

national manufacturing process. This causal connection appears so tenuous that it seems unreasonable to expect the consumer to be aware of it. If this type of complex causal connection is indeed as common as this consumer asserts, then to expect awareness is to demand omniscience.

In contrast, a consumer whose understanding of responsibility reflects the paradigm of participation might readily accept responsibility. She might explain:

> It is my participation in U.S. consumer markets that creates and sustains them. And these markets help to fuel all sorts of unfair labor conditions. Given the complexity of international markets, one could not possibly be aware of all connections between what one buys and the conditions under which it is made. Nevertheless, despite my ignorance, my consumption of clothing assembled in Guatemala is part of what causes the dreadful working conditions in the *maquiladoras* there. Clearly, the factory owners and the Guatemalan military are more directly responsible for the oppression of *maquiladora* workers. However in ways about which I can never be completely clear, my investments support the manufacturers, and my tax dollars pay for the training and arming of the military. It seems hard to imagine a way of extricating myself from this responsibility and others like it short of picking up and quitting the United States altogether.

This analysis may not provide a clearer response to the problem of how to address suffering in the *maquiladoras* than the previous one, but it does characterize the normative link between consumer and worker in a significantly different way. The sense of responsibility expressed here may provide additional reasons for acting in ways that aim to overcome *maquiladora* worker oppression. Equally important, it may entail a radically new self-understanding, grounded on a different sense of one's place in the world with regard to others and one's connection to them.

In this example, both consumers express a similar sense of powerlessness in the face of the pervasiveness of their connection to labor exploitation. However, due to their disparate understandings of responsibility, this shared sense may in the end lead to another perhaps less practical difference between them. While the first consumer sees his inability to anticipate and change the harm to which his consumption contributes as defeating responsibility, the second consumer does not. Given their shared sense of powerlessness, the difference between them may simply boil down to distinct emotional responses: the paradigm of awareness leading to a feeling of exculpation and the paradigm of participation to despair.

I believe that conflict between the paradigms of awareness and participation lies at the heart of many contemporary political dis-

agreements, as it does in these hypothetical discussions of racism and imperialism. Tort law, which expresses state-sponsored understandings of responsibility, exhibits this tension. The following part examines the disparity between the two paradigms within tort doctrine.

III
THE TENSION BETWEEN THE PARADIGMS OF AWARENESS AND PARTICIPATION IN TORT LAW

The traditional procedural structure and doctrinal requirements of tort law reflect an allegiance to the paradigm of awareness. The matching of a single defendant directly to a single plaintiff in a bilateral proceeding and the requirement of proximate cause as a condition of liability are two ways in which tort law favors an understanding of responsibility based on awareness. However, not all tort trials are two-party bilateral proceedings, and doctrinal requirements are far from set in stone when it comes to complex issues of causal connection. In exceptional cases, in which, for instance, courts decide complex multi-party issues or drop proximate cause requirements, they recognize and enforce the paradigm of participation. These exceptions engender much debate, and this disagreement stems largely from the tension between the paradigms of awareness and participation.

Before examining this conflict, it may be helpful to state briefly the relation between moral and legal responsibility that I presuppose throughout the following discussion.[41] I have chosen to interpret principles of legal responsibility presented in tort doctrine as a subset of moral principles of responsibility. Judges who assert principles of legal responsibility, in the opinions that follow, often make claims about the moral legitimacy of these principles, speaking in terms such as "fairness," "innocence," and "wrongdoing." These terms pervade judicial analyses in tort law. I will accept these claims at face value as moral claims.[42] One might instead interpret doctrinal language as articulating pragmatic policies (justified by reference to a particular political theory of institutions and entitlements) that are independent of moral theories about responsibility.[43] Both

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41 A full theory of the relationship between morality and law is well beyond the modest aims of the present discussion. Perhaps equally to the point, I do not have such a theory.

42 Many contemporary tort theorists have offered interpretations of tort law that see the structure and doctrines of tort law as expressing moral principles. Theories of tort law as an expression of various ideals of "corrective justice" are perhaps the most prominent. *See, e.g.*, COLEMAN, *supra* note 4 at 373; Weinrib, *supra* note 5.

43 For an especially interesting example of this approach to tort law, see Jerry L. Mashaw, *A Comment on Causation, Law Reform, and Guerrilla Warfare*, 73 GEO. L.J. 1393,

of these approaches may illuminate judicial opinions. I have, for my purposes here, chosen to adopt the former. With this in mind, consider a central doctrinal feature of tort liability.

The requirement of proximate cause—that a victim's injuries be reasonably foreseeable from the injurer's *ex ante* perspective—reflects the condition of anticipation in the paradigm of awareness. In the following analysis, I consider proximate cause to be a condition of liability distinct from cause-in-fact. Following Richard Wright, I interpret proximate cause as providing a limit to the scope of liability wholly independent of causal considerations.[44] Proximate cause is normally a condition of liability under both negligence and strict liability.[45] Language from several classic[46] tort opinions reflects this paradigm.

In *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co., Ltd. (Wagon Mound No. 1)*,[47] the court wrote:

> It is a principle of civil liability . . . that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule. . . . [I]f it is asked why a man should be responsible for the natural or necessary or probable consequences of his act . . . the answer is that it is not because they are natural or necessary or probable, but because, since they have this quality, it is judged by the standard of the reasonable man, that he ought to have foreseen them.[48]

Holding an individual liable only for harm that he could have foreseen, continued the court, "corresponds with the common conscience of mankind. . . ."[49] Removing this foreseeability requirement "leads to nowhere but the never ending and insoluble problems of causation."[50] Thus, the court considered that any attempt to impose liability beyond the restricted area of that which

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1395 (1985) ("I am tempted to suggest that in the toxic torts context we should describe the tort system as primarily a system of guerrilla warfare [designed to spur law reform].").

44 Wright, *supra* note 12, at 1741-42.

45 Fletcher, *supra* note 15, at 77-79 (citing Madsen v. East Jordan Irr. Co., 125 P.2d 794, 795 (Utah 1942) ("[T]he results chargeable to the nonnegligent user of explosives are those things ordinarily resulting from an explosion." "Ordinarily resulting" here is a proxy for reasonable foreseeability.)).

46 I consider these cases "classic" insofar as they are included in the widely used casebook by William L. Prosser. *See* WILLIAM L. PROSSER ET AL., CASES AND MATERIALS ON TORTS (8th ed. 1988).

47 [1961] App. Cas. 388 (P.C.) (Austl.) [hereinafter *Wagon Mound No. 1*], *excerpted in* PROSSER ET AL., *supra* note 46, at 297 (The freighter Wagon Mound, belonging to defendants, was moored 600 feet from plaintiff's dock. A large quantity of oil was discharged negligently from the freighter. The oil was ignited, resulting in a fire that damaged plaintiff's wharf and two ships docked alongside it.).

48 *Id.* at 422-23.

49 *Id.* at 423.

50 *Id.*

one reasonably could have considered when choosing to act threatened to extend far too radically the legal notion of responsibility.[51]

A century before *The Wagon Mound No. 1*, a New York court justified the limits on liability imposed by the paradigm of awareness by a similar reference to the overwhelming expansion of responsibility entailed by the paradigm of participation. In *Ryan v. New York Central Railroad Co.*,[52] the court considered the issue of liability for fire spreading from one house to another. It held that a defendant ought to be liable for the destruction of a building caused by his setting fire to it, since "the result was to have been anticipated, the moment the fire was communicated to the building. . . ."[53] However, the court limited liability to this first building, asserting that defendant ought not be liable for additional damages caused as the fire spread. Posing a hypothetical, it wrote:

> A man may insure his own house, or his own furniture, but he cannot insure his neighbor's building or furniture, for the reason that he has no interest in them. To hold that the owner must not only meet his own loss by fire, but that he must guarantee the security of his neighbors on both sides, and to an unlimited extent, would be to create a liability which would be the destruction of all civilized society. No community could long exist, under the operation of such a principle.[54]

According to the court, the expansiveness of liability beyond what one could anticipate would lead to "destruction" worse even than that threatened by the fire. This fear may be due in part to the practical effect of legal responsibility—payment of money damages. However, it may also reflect the court's uncertainty as to what such an extensive web of responsibility would look like.

The court's rhetoric reflects a desire not only to restrict liability to damage that one can anticipate but also to privilege the injurer's perspective, an implicit feature of the paradigm of awareness. An injurer, reasoned the court, ought not be held responsible for damage that he caused to his neighbor's house, since he "has no interest" in it. Determining the scope of responsibility based on the

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51 For a U.S. court's statement of this rule, see *Mauney v. Gulf Refining Co.*, 9 So. 2d 780, 781 (Miss. 1942) ("The area within which liability is imposed is that which is within the circle of reasonable foreseeability . . . .").

52 35 N.Y. 210 (1866), *quoted in* PROSSER ET AL., *supra* note 46, at 289 (The defendant railroad company negligently set fire to its own woodshed, resulting in destruction of plaintiff's house 130 feet away.).

53 *Id.* at 212.

54 *Id.* at 216-17.

interests of the injurer favors his view of the situation over the victim's.[55]

Tort doctrine may reflect the limit imposed on legal responsibility by the paradigm of awareness using proximate cause language other than that of foreseeability. In *In re Polemis*,[56] which rejected the reasonably foreseeable test later rehabilitated in *Wagon Mound No. 1*, Bankes, L.J., stated that

> Given the breach of duty . . . and given the damage as a direct result of that negligence, the anticipations of the person whose negligent act has produced the damage appear to me to be irrelevant. I consider that the damages claimed are not too remote [to attribute responsibility for them to the defendant].[57]

Scrutton, L.J., added that an individual is responsible for any damages that "his negligent act directly caused," whether foreseeable or not.[58] Strictly speaking, this would seem to place liability under the proximate cause test of direct harm outside of the scope of responsibility for awareness.

However, as the *Wagon Mound No. 1* court argued, directness is often a way of expressing that resulting harm was near enough causally to an injurer's action that she should have anticipated it. That is, directness is really a test for reasonable foreseeability, without regard to whether the injurer actually foresaw the possibility of harm. In addition, responsibility in cases of "remote" suffering commonly highlights the difference between the paradigms of awareness and participation.

Proximate cause is not the only doctrinal device available to restrict legal responsibility according to the paradigm of awareness. In *Palsgraf v. Long Island Railroad*,[59] Justice Cardozo held that an injurer is negligent, and therefore can be liable, only when he wrongs a foreseeable victim. Discussing the duty of care, violation of which defines negligence, Cardozo asserted that "the orbit of the danger

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55 However, the "eggshell skull" doctrine—where the extent of damages for which the defendant is responsible depends upon the victim's injury—favors the victim's perspective. Note, however, that even when a victim has an eggshell skull, if the injury is not foreseeable, then the injurer will not be liable. *See* Bartolone v. Jeckovich, 481 N.Y.S.2d 545 (1984), *quoted in* PROSSER ET AL., *supra* note 46, at 292-94.

56 [1921] 3 K.B. 560, *quoted in* PROSSER ET AL., *supra* note 46, at 295 (Defendants chartered a ship from plaintiffs. Due to defendants' negligence, a heavy plank fell into a hole in which petrol was being stored, resulting in an explosion that destroyed the ship.).

57 *Id.* at 572.

58 *Id.* at 577.

59 162 N.E. 99 (N.Y. 1928), *quoted in* PROSSER ET AL., *supra* note 46, at 304 (Employees of the defendant's railroad assisted a man in boarding a train while it was moving. In this process, the man dropped a package containing fireworks. The fireworks exploded, knocking over some scales at the other end of the boarding platform that resulted in injury to the plaintiff.).

as disclosed to the eye of reasonable vigilance would be the orbit of the duty."[60] Thus, to harm an unforeseeable victim would not constitute negligence and would therefore not give rise to legal responsibility for the injury. According to this holding, foreseeability is a test for negligence, not for proximate cause.

Justice Andrews argued in dissent that an individual's duty of care is not limited to foreseeable victims; he asserted that one can commit negligence by harming even an unanticipated victim.[61] However, he nonetheless limited legal responsibility using the traditional foreseeability test for proximate cause.[62] While much has been written concerning the difference between these two positions,[63] for the purposes of this analysis they appear remarkably similar. Both limit an injurer's legal responsibility to what she could have reasonably foreseen at the time of her decision to act. Both Cardozo's and Andrews's *Palsgraf* opinions manifest an allegiance to the paradigm of awareness.

The above cases articulate the normal proximate cause requirement of tort law: an injurer is legally responsible for a harm that she causes only if she could have reasonably anticipated it when considering how to act. When courts in exceptional cases waive the proximate cause requirement, they reveal that responsibility in tort law may occasionally conform to the paradigm of participation. While some instances of liability without proximate cause reside safely within the borders of accepted tort practice, others serve to define the frontier of legal responsibility for harm to others. The following discussion provides four examples of tort doctrines that conform to the paradigm of participation—the first offers a well-established rule, the second signals a growing trend, the third represents a lone case, and the fourth constitutes a hotly debated theory of liability still rejected by the courts.

Consider first the case of dram-shop liability. Traditionally at common law, a dram-shop owner was not responsible for injuries caused by an intoxicated individual to whom he had sold liquor.

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60 *Id.* at 100.

61 *Id.* at 102 ("Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B, or C alone.").

62 *Id.* at 102-03.

63 *See, e.g.*, Thomas A. Cowan, *The Riddle of the Palsgraf Case*, 23 MINN. L. REV. 46, 53 (1938) ("Both judges require the breach of a duty of care as an element of liability for negligence. They differ in the way they determine the existence of the duty."); Charles O. Gregory, *Proximate Cause in Negligence—A Retreat from Rationalization*, 6 U. CHI. L. REV. 36, 47 (1938) ("These different approaches to the extension of liability for negligence represent different views of policy concerning the desirable legal incidence of negligence."); William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953) (contrasting the majority's "scope of the risk" approach with the dissent's "direct causation" approach and discussing the limitations of each).

Courts generally explained that the drinker's consumption, rather than the owner's sale of alcohol, was, as a matter of law, the proximate cause of the victim's injury.[64] The drinker's decision to indulge excessively qualified him for responsibility under the paradigm of awareness. But why didn't the owner's decision to sell the liquor, especially if the drinker were already visibly intoxicated, make the owner responsible? Surely an owner ought to anticipate the possibility of harm to a third party as a result of selling liquor to an intoxicated patron.

Legislatures and courts responded to this common-law deficiency in two ways. Some simply granted the victim an opportunity to prove that a dram-shop owner was the proximate cause of her injury. They thereby reversed the traditional rule by statute[65] or judicial opinion.[66] These jurisdictions offered victims a chance to establish owners' legal responsibility in a manner fully consistent with the general approach provided by the paradigm of awareness.

Another response to dram-shop immunity was to waive the proximate cause requirement altogether.[67] Some states considered it so difficult to draw a direct or foreseeable causal connection between an owner's sale and a victim's injury at the hands of an intoxicated patron that they allowed for liability without it. "[T]here is no requirement, in a dram shop case," held the Iowa Supreme Court in *Walton v. Stokes*, "for a plaintiff to show the serving [of liquor to an intoxicated patron] was a proximate cause of his injuries by the in-

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64 *See* Nolan v. Morelli, 226 A.2d 383, 386 (Conn. 1967) (outlining the history of the Connecticut Dramshop Act).

65 *See, e.g.*, CAL. BUS & PROF. CODE § 25602.1 (West Supp. 1992); MICH. COMP. LAWS ANN. § 436.22 (West 1978); OHIO REV. CODE ANN. § 4399.01 (Anderson 1989); 61 O. JUR. 3D § 390 (interpreting OHIO REV. CODE ANN. § 4399.01); PA. STAT. ANN. tit. 47, § 4-497 (West Supp. 1992).

66 *See, e.g.*, Ontiveros v. Borak, 667 P.2d 200 (Ariz. 1983); Paula v. Gagnon, 146 Cal. Rptr. 702 (Cal. App. 1978), *rev'd by statute* CAL. BUS. & PROF. CODE § 25602 (West 1985).

67 *See, e.g.*, Kavorkian v. Tommy's Elbow Room, Inc., 711 P.2d 521 (Alaska 1985); Nazareno v. Urie, 638 P.2d 671 (Alaska 1981), *overruled by* Kavorkian v. Tommy's Elbow Room, Inc., 711 P.2d 521 (Alaska 1985) (both interpreting ALASKA STAT. § 04.21.020 (1986); Sanders v. Officers' Club of Conn., Inc., 397 A.2d 122 (Conn. 1978) (all interpreting CONN. GEN. STAT. ANN. § 30-102 (West 1990)); Nelson v. Steffens, 365 A.2d 1174 (Conn. 1976), *overruled by* Ely v. Murphy, 540 A.2d 54 (Conn. 1988); Nolan v. Morelli, 226 A.2d 383 (Conn. 1967); Lavieri v. Ulysses, 180 A.2d 632 (Conn. 1962); Pierce v. Albanese, 129 A.2d 606 (Conn. 1957); London & Lancashire Indemnity Co. v. Duryea, 119 A.2d 325 (Conn. 1955); Tresch v. Nielsen, 207 N.E.2d 109 (Ill. App. 2d 1965); Cope v. Gepford, 61 N.E.2d 394 (Ill. App. 1945); Hill v. Alexander, 53 N.E.2d 307 (Ill. App. 1944); Spousta v. Berger, 231 Ill. App. 454 (1923) (all interpreting ILL. ANN. STAT. ch. 43, para. 135, § 6-21 (Smith-Hurd Supp. 1992)); Thorp v. Casey's Gen. Stores, Inc., 446 N.W.2d 457 (Iowa 1989); Walton v. Stokes, 270 N.W.2d 627 (Iowa 1978); Bistline v. Ney Bros., 111 N.W. 422 (Iowa 1907) (all interpreting IOWA CODE ANN. § 123.92 (West 1987)); Bartkowiak v. St. Adalbert's Roman Catholic Church Soc., 340 N.Y.S.2d 137 (N.Y. App. Div. 1973); McNally v. Addis, 317 N.Y.S.2d 157 (Misc. 2d 1970) (both interpreting N.Y. GEN OBLIG. LAW § 11-101 (McKinney 1989)).

toxicated person."[68] In this case, the court was interpreting the state's dram-shop liability statute. In a later case, *Thorp v. Casey's General Stores, Inc.*, the same court went even farther, asserting that "liability for the sale and serving of alcoholic beverages to an intoxicated person does not require a showing that he subsequently consumed them."[69] But how could the court justify holding an owner liable for injuries that his sale did not even cause, proximately or otherwise?

Contrary to appearances, there is a causal link in *Thorp* between sale and injury; it is a complex one, not proximate but mediated through a web of relations. The court assumed a causal link between the defendant dram-shop owner's sale of liquor to an intoxicated person as part of a general practice that promotes such sales and the particular sale that resulted in the victim's injury.[70] The court explicitly recognized this, explaining that dram-shop liability is "extremely difficult to prove by traditional methods."[71] Indeed, the purpose of the Dram Shop Act, as explicated in *Walton*, "is to obviate the difficulty, amounting oftentimes to an absolute impossibility, of connecting the act of the dram shop operator and the injury."[72]

Why might the state have removed the requirement of establishing proximate causal connection between the defendant dram-shop owner and victim? One possibility is that this is a purely penal statute, seeking only to punish and thereby to "discourage the selling of excess liquor."[73] But if this were the case, what would ac-

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68 270 N.W.2d 627, 628-29 (Iowa 1978) (where the plaintiff sought recovery under the Dram Shop Act for injuries sustained in an altercation with another intoxicated patron on the defendant's premises).

69 446 N.W.2d 457, 467 (Iowa 1989) (reversing the plaintiff's summary judgment where the defendant had allegedly sold intoxicating liquor to a third person who became intoxicated and fatally injured the plaintiff's son).

70 In more precise terms, the Iowa court assumed the existence of a set of actual antecedent conditions sufficient to bring about the victim's injury, a set including the dram-shop owner's sale of the liquor in this case such that this particular sale was a necessary element of the set. For instance, one might construe the sale as promoting an environment in which the intoxicant considered driving while under the influence to be normal or reasonable behavior. What matters here is the court's assumptions concerning cause. The purpose of my analysis is to reveal the court's adherence to the paradigm of participation, not to provide a defense of it. *Id.* at 466. For a definition of this notion of causation (NESS causation), see *supra* note 12.

71 *Thorp*, 446 N.W.2d at 467.

72 I believe that the court refers to a practical impossibility of producing adequate evidence, not a theoretical impossibility of drawing a causal connection between the sale and the injury. *Walton*, 270 N.W.2d at 628.

73 *Thorp*, 446 N.W.2d at 467. For other discussions of the penal nature of dram-shop liability, see Nazareno v. Urie, 638 P.2d 671, 677 (Alaska 1981) ("Accepting an argument that bar owners cannot be held liable for continuing to serve an intoxicated patron because the patron would have committed the same acts without the additional alcohol would be contrary to the public policy at stake in prohibiting service to intoxi-

count for the state allowing a victim to recover for her injury from a dram-shop owner upon proof that the owner sold liquor to an intoxicated person who caused her injury?[74]

If tort liability is a state-enforced attribution of responsibility, the answer must be that, under some understanding of responsibility, the owner is responsible for the victim's suffering. The paradigm of participation provides just such an understanding of responsibility. Because an owner participates in the practice of selling liquor to intoxicated persons who impose injury on (relatively) innocent victims, he is responsible for their suffering. That is, the owner's liability is founded upon an assumption that his sale causally contributed to the victim's injury without regard to the foreseeability or directness of the link. Does this understanding of legal responsibility clash with tort law's traditional approach? Yes, it most certainly does. Is it beyond the bounds of what is acceptable in a system of law dedicated to fairness? No, for in *Pierce v. Albanese*, the Connecticut Supreme Court held that dram-shop liability not requiring a showing of proximate cause between the sale and injury was "not arbitrary or unreasonable" or "unconstitutional."[75]

A second example of tort liability doctrine that conforms to the paradigm of participation occurs in litigation arising out of the Federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[76] This act places liability for costs associated with clean-up of a hazardous waste site on those who produce and transport such substances and on those who own and operate disposal facilities.[77] According to the court in *United States v. Wade*, "the Act is intended to facilitate the prompt clean-up of hazardous waste dump sites and when possible to place the ultimate financial burden upon those responsible for the danger created by such sites."[78]

In *Wade*, the federal government sought recovery of costs associated with the clean-up of a hazardous waste site from several par-

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cated persons."), *overruled by* Kavorkian v. Tommy's Elbow Room, Inc., 711 P.2d 521 (Alaska 1985); Lavieri v. Ulysses, 180 A.2d 632, 635 (Conn. 1962) ("We have said that the Dram Shop Act, although in a sense penal, is primarily remedial in nature."); Pierce v. Albanese, 129 A.2d 606, 612-13 (Conn. 1962) ("The obvious purpose of the [dram-shop] legislation is to aid the enforcement of § 4293 by imposing a penalty prescribed in that section, and to protect the public." However, the court also stated that "[t]he general view is that such legislation is remedial in character and that it should be liberally construed 'to suppress the mischief and advance the remedy.' ").

74 Plaintiff must, in such cases, prove that defendant sold liquor to an intoxicated person but need not establish that the intoxicated person consumed it.

75 *Pierce*, 129 A.2d at 613.

76 42 U.S.C. §§ 9601-75 (1989).

77 42 U.S.C. § 9607 (1989).

78 577 F. Supp. 1326, 1331 (E.D. Pa. 1983).

ties, including the waste producer, transporter, and disposal facility owner. Interpreting CERCLA, the court wrote:

> the statute appears to impose liability on a generator [of waste] who has (1) disposed of its hazardous substances (2) at a facility which now contains hazardous substances of the sort disposed of by the generator (3) if there is a release of that or some other type of hazardous substance (4) which causes the incurrence of response [i.e. clean-up] costs. Thus, the release which results in the incurrence of response costs and liability need only be of "*a*" hazardous substance and not necessarily one contained in the defendant's waste. The only required nexus between the defendant and the site is that the defendant have dumped his waste there and that the hazardous substances found in the defendant's waste are also found at the site.[79]

As this passage indicates, legal responsibility for waste site clean-up attaches to any generator who deposits hazardous waste at the facility. Liability attaches even if the generator's waste was not the initial or primary reason for the clean-up.[80] Furthermore, the government need not prove that the particular generator's waste was actually present at the site at the time that clean-up commenced.[81] Finally, even if the generator did not select the site, it may be held responsible under CERCLA.[82] Legal responsibility for hazardous waste dumping under CERCLA thus rests upon a generator's participation in the dumping of hazardous substances at the site in question, regardless of how substantially, directly, or knowingly it is connected with the substances that were actually the subject of the clean-up. In other words, proximate cause is not a condition for CERCLA liability.[83]

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79 *Id.* at 1333.

80 *Id.* at 1333-34; *see also* Dedham Water Co. v. Cumberland Farms, Inc., 689 F. Supp. 1223, 1225-26 (D. Mass. 1988), *rev'd sub nom.* Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146 (1st Cir. 1989); Violet v. Picillo, 648 F. Supp. 1283, 1288-91 (D. R.I. 1986), *aff'd*, 883 F.2d 176 (1st Cir. 1989); United States v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1402 (D. N.H. 1985), *aff'd in part and vacated in part*, 900 F.2d 429 (1st Cir. 1990); United States v. South Carolina Recycling and Disposal, Inc., 653 F. Supp. 984, 991-92 (D. S.C. 1984), *aff'd in part and vacated in part*, 858 F.2d 160 (4th Cir. 1988).

81 United States v. Bliss, 667 F. Supp. 1298, 1306 (E.D. Mo. 1987) ("[I]t is immaterial whether the dioxin and TCP present in the waste were generated by [defendant] in its manufacturing . . . or the earlier production of Agent Orange by [another manufacturer] because section 107(a)(3) [of CERCLA] encompasses both generators of waste and those who merely arrange for the disposal of waste.").

82 *Wade*, 577 F. Supp. at 1333 n.3.

83 *See Bliss*, 667 F. Supp. at 1309-10:

> [The] structure of CERCLA and its legislative history make it clear that traditional tort notions, such as proximate cause, do not apply. . . . Moreover, the practical limits on analytic techniques argue for a weaker causation standard. . . . After leaving a generator's plant, the wastes may be transferred through several intermediaries, some of whom are unknown

CERCLA does provide a defense that will exonerate a generator of waste if release of the hazardous substance was due to the fault of a third party and if the generator:

> (a) . . . exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions . . . .[84]

This looks very much like the paradigm of awareness—no responsibility if the dumper took reasonable precaution against all foreseeable consequences—considered as a defense against, instead of an element of, liability. However, one commentator has claimed that this defense "is available only when the party can show it was 'totally blameless'[85] or that the party can affirmatively demonstrate 'that a "totally unrelated third party is the sole cause of the release." ' "[86] Thus, while the language of the defense appears to adhere to the paradigm of awareness, it will not, in practice, exonerate defendants with an even minimal level of participation in hazardous waste dumping at the site.

Further reflecting the paradigm of participation, courts have recoguized that CERCLA favors the perspective of those who potentially suffer from and those who initially must clean up hazardous waste facilities over that of the generators of waste. One court observed that CERCLA "is not a legislative scheme which places high priority on fairness to generators of hazardous waste."[87] Fairness in the eyes of victims according to the paradigm of participation may entail unfairness from the perspective of injurers according to the paradigm of awareness.

A third example of tort liability that reflects the paradigm of participation has occurred in product liability litigation over the

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> to the generator, before the ultimate disposal of the waste. After disposal, the wastes may migrate and mingle with the wastes of others. Therefore, in the case of generators, courts have required only a weak showing of causation.

Id.

84 42 U.S.C.A. § 9607(b)(3) (1989). This defense is available to anyone subject to CERCLA liability.

85 United States v. Hooker Chems. & Plastics Corp., 680 F. Supp. 546, 554 (W.D. N.Y. 1988).

86 Lorelei J. Borland, *Superfund, in* BASICS OF ENVIRONMENTAL LAW (1991), at 21, 26 (PLI Real Estate Practice Course Handbook Series No. 373, 1991) (footnotes omitted) (quoting United States v. Hooker Chems. & Plastics Corp., 680 F. Supp. 546, 554-55 (W.D. N.Y. 1988) and O'Neil v. Picillo, 682 F. Supp. 706, 728 (D. R.I. 1988), *aff'd* 883 F.2d 176 (1st Cir. 1989) (quoting United States v. Stringfellow, 661 F. Supp. 1053 (C.D. Cal. 1987))).

87 United States v. Rohm & Haas Co., 721 F. Supp. 666, 686 (D. N.J. 1989).

drug diethylstilbestrol (DES). In *Hymowitz v. Eli Lilly & Co.*,[88] the New York Court of Appeals ruled that a DES manufacturer's participation in the marketing of DES for pregnancy-related use anywhere in the nation could be the basis of liability for resulting injuries. Plaintiffs in this case sued a group of DES manufacturers, seeking damages for injuries that resulted from their mothers' use of DES during pregnancy.[89]

Due to a long time lag of many years between ingestion of the drug and discovery of resulting harms, it was not possible to draw a proximate causal link between a particular manufacturer's sale and a particular plaintiff's injury. So the court allowed liability to rest upon proof that a defendant-manufacturer had participated in the national market for DES aimed at promoting it for pregnancy-related use. Legal responsibility required no showing of proximate cause. In the court's own words:

> To be sure, a defendant cannot be held liable if it did not participate in the marketing of DES for pregnancy use. . . . Nevertheless, because liability here is based on the over-all risk produced, and not causation in a single case, there should be no exculpation of a defendant who, although a member of the market producing DES for pregnancy use, appears not to have caused a particular plaintiff's injury. It is merely a windfall for a producer to escape liability solely because it manufactured a more identifiable pill, or sold only to certain drugstores. These fortuities in no way diminish the culpability of a defendant for marketing the product, which is the basis of liability here.[90]

DES cases before *Hymowitz* had shifted the burden of proof concerning direct causal connection between sale and injury,[91] but never before had a court considered such a proximate causal connection altogether irrelevant to legal responsibility for DES-related injuries.

One feature of the DES context that led the court toward a participation-based theory of responsibility was the complexity of modern market relations between manufacturers and consumers. Reflecting the underlying paradigm of participation, the court mentioned this unusual complexity and, in addition, focused attention

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88 539 N.E.2d 1069 (N.Y. 1989). For further discussion of this case, see Symposium, *The Problem of Indeterminate Defendant: Market Share Liability Theory*, 55 BROOK. L. REV. 863 (1989).

89 *Hymowitz*, 539 N.E.2d at 1069. In this case, the New York Court of Appeals consolidated and affirmed four separate denials of defendant-manufacturers' motions to dismiss and motions for summary judgment and granted the plaintiffs' motions to strike affirmative defenses.

90 *Id.* at 1078.

91 *See, e.g.*, Sindell v. Abbott Labs., 607 P.2d 924 (Cal. 1980); Martin v. Abbott Labs., 689 P.2d 368 (Wash. 1984); Collins v. Eli Lilly & Co., 342 N.W. 2d 37 (Wis. 1984).

on the victims' suffering. Seeking "to achieve the ends of justice in a more modern context,"[92] the court asserted that

> it would be inconsistent with the reasonable expectations of a modern society to say to these plaintiffs that because of the isidious [sic] nature of an injury that long remains dormant, and because so many manufacturers, each behind a curtain, contributed to the devastation, the cost of injury should be borne by the innocent and not the wrongdoers.[93]

While *Hymowitz* is clearly an exception to traditional doctrinal principles,[94] it provides a clear example of legal responsibility founded on the paradigm of participation. As in the dram-shop and CERCLA cases, the court assumed a causal link between a practice (manufacture of DES) and the injury in question (illness due to ingestion of the drug) without regard to the foreseeability or directness of the link.

A fourth instance of legal responsibility in tort law that reflects the paradigm of participation arises in arguments by advocates of civil liability for pornography. The tension between the paradigms of awareness and participation may illuminate as yet unsuccessful attempts to expand liability beyond its traditional frontiers in a variety of areas, including liability for the sale of pornography. Traditional tort doctrine, characterized by proximate cause requirements, provides precedent for restricting legal responsibility for harms related to sexual abuse to those who directly inflict them. In contrast, the examples of dram-shop, CERCLA, and DES liability provide clues as to how one might extend liability to those who participate in the marketing of pornographic material depicting sexual abuse.

A threshold problem in imposing liability on those who market pornography for harms caused by those who "consume" it has been characterization of pornography as protected expression under the First Amendment.[95] Beyond this obstacle, the difficulty of establishing a causal connection between the sale of pornographic materials and the sufferings of sexual abuse victims occupies a central place in the debate over whether to subject pornographers to civil liability for sexual violence. The question of whether pornography contrib-

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92 *Hymowitz*, 539 N.E.2d at 1075 (referring to People v. Hobson, 348 N.E.2d 894 (1976) and Codling v. Paglia, 298 N.E.2d 622 (1973)).

93 *Id.* at 1075.

94 *Id.* at 1075 ("We stress, however, that the DES situation is a singular case . . . ."); *see also* Aaron D. Twerski, *Market Share—A Tale of Two Centuries*, 55 BROOK. L. REV. 869 (1989).

95 American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985) (declaring the Indianapolis anti-pornography ordinance in violation of the First Amendment), *aff'd*, 475 U.S. 1001 (1986); *see* DONALD A. DOWNS, THE NEW POLITICS OF PORNOGRAPHY 62 (1989) (discussing Mayor Donald Fraser's veto of Minneapolis anti-pornography ordinance on First Amendment grounds).

utes causally to violence remains hotly debated.[96] Some contend that pornography exerts a cultural influence, helping to shape attitudes and beliefs that lead to abuse.[97] Such an account of pornography as a diffuse, systemic cause of sexual violence might support pornographer liability under the paradigm of participation.

The question of pornographer liability may become clearer when compared to other doctrines reflecting the paradigm of participation. Like the case of pornography, the examples examined above involve three elements charted in the following figure:

	1	2	3
DRAM SHOP:	sale of liquor	intoxication	injury
CERCLA:	dumping of toxic waste	storage of toxic waste	injury
DES:	sale of DES	ingestion of DES	injury
PORNOGRAPHY:	sale of porn.	consumption of porn.	injury

Each example involves questions of cause and questions of cause and proximate cause in holding defendants (associated with column 1) liable for harms to plaintiffs (associated with column 3). In traditional tort doctrine reflecting the paradigm of awareness, a plaintiff would have to prove a connection of both cause and proximate cause between the elements in columns 1 and 3.

In contrast, and in keeping with the paradigm of participation, dram-shop liability, CERCLA, and *Hymowitz* require a showing of cause and proximate cause only between the elements in columns 2 and 3.[98] With regard to the connection between the elements in columns 1 and 3, the courts *assumed* a causal link and *considered irrelevant* the question of proximate relation.[99] In each of these exam-

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96 GORDON HAWKINS & FRANKLIN E. ZIMRING, PORNOGRAPHY IN A FREE SOCIETY 75-108 (1988) (reviewing government commission reports on the relation between pornography and social harm). *But see* MARCIA PALLY, SENSE AND CENSORSHIP: THE VANITY OF BONFIRES 18-24 (1991).

97 *American Booksellers Ass'n*, 771 F.2d at 325; DOWNS, *supra* note 95, at 34-43 (canvassing feminist theories on pornography).

98 Dram-shop liability requires plaintiffs to prove that the intoxication of a third party is the cause and proximate cause of plaintiff's injuries. CERCLA requires that toxic waste storage by a third party be a cause and proximate cause of plaintiff's injuries. *Hymowitz* requires that pregnancy-related use of DES be a cause and proximate cause of plaintiff's injury.

99 In dram-shop liability, the courts assume, consistent with statutory prohibition, that the sale of liquor to an intoxicated patron causally contributes to injuries that result proximately from intoxication. However, the courts considered irrelevant the issue of whether such a sale is a proximate cause of plaintiff's resulting injury. In CERCLA cases, courts assume that toxic waste dumping causally contributes to injuries that result proximately from toxic waste dumping. However, they do not require any proof that such dumping is a proximate cause of plaintiff's resulting injury. Similarly, in *Hymowitz*, the court assumed that participation in the national marketing of DES for pregnancy-related use of DES contributed causally to injuries that resulted proximately from pregnancy-related use of DES. But it did not require any proof that such market participation proximately caused plaintiffs' injury.

ples, liability is grounded on two elements. The first is an assumption that participation in a particular practice contributes causally to specific harms.[100] These practices and harms are, respectively: sale of liquor to intoxicated persons and injury caused by intoxication, toxic waste dumping and injury resulting from toxic waste storage, and promotion of DES for pregnancy-related use and injury due to DES ingestion during pregnancy. The second element is proof that a specific action associated with the practice was the factual and proximate cause of the specific harms.[101] The specific actions are, respectively: intoxication, toxic waste storage, and ingestion of DES during pregnancy. Pornographer liability could be based on a parallel scheme.

Following the other examples of liability that reflect the paradigm of participation, pornographer liability would require two elements: (1) an assumption that the production, promotion, or sale of pornography contributes causally to sexual abuse and (2) proof that a specific instance of defendant's consumption of pornography is a factual and proximate cause of harm to an injured plaintiff. Many opponents of such liability are unwilling to assume (1) and skeptical of anyone's ability to satisfy (2). However, courts already assume causal relations between the practices of selling liquor to intoxicated persons, dumping toxic waste, and promoting DES for pregnancy use and specific harms not proximately connected to them. If the burden of proof rests on dram-shop owners, toxic waste dumpers, and DES manufacturers in these cases, why shouldn't pornographers similarly bear it?

One might argue that whereas the first three of these potential defendants are involved in wrongful practices, producing and distributing pornography is not in itself wrongful. But if these first three practices are wrongful, it is only insofar as they cause others to suffer. And in some cases, as advocates of pornographer liability claim, so do pornographers. As for skepticism concerning the second element, there exists both private and public testimony that would merit a jury's consideration.[102] Thus, acceptance of the para-

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100 This first element represents the assumed causal link between the elements in columns 1 and 3.

101 This second element represents the causal and proximate causal links between the elements in columns 2 and 3.

102 For one example of such testimony, see *Morning Edition,* (National Public Radio, Mar. 20, 1992) (written transcript on file with the author). Kathy Baldwin testified during legislative hearings on the Massachusetts anti-pornography bill that:

> Hé wanted me to watch how the various women in the video performed oral sex on the men, and then he insisted that I do the same with him while he continued to watch that movie. . . . That video became my nightmare. Every time he made me turn it on, I became sick with fear, for

digm of participation in the area of pornographer liability might well affect the outcome of this debate.

IV
REFLECTIONS ON THE MEANING OF RESPONSIBILITY AND THE FUNCTION OF TORT LAW

Why a society expresses, in political discourse and through legal institutions, a preference for one paradigm of responsibility over the other presents a difficult question outside of the realm of my expertise but not beyond the bounds of my concern. The reflections set forth in this concluding part of the discussion are just that—reflections—and not theories providing a developed conceptual framework or supported by documented empirical evidence. It is with this disclaimer that I offer them. I begin with the question: What accounts for the existence of two competing paradigms of responsibility?

Many activities that one performs every day restrict the autonomy of others. This is largely a consequence of living highly interdependent lives in a complex society. People who exert influence over others in this way and individuals upon whom they exert influence perceive such interactions from distinct perspectives.[103] Some individuals experience the receiving end of this sort of imposition as an exception to the normal course of events, while for others it is the rule. These different perspectives give rise to disparate understandings of interpersonal relationships. The distinction between the paradigms of awareness and participation characterizes this disparity.

While different perspectives give rise to disparate understandings of responsibility, one's social status does not necessarily determine which paradigm one accepts. The existence of two distinct points of view makes available two different interpretations of the injurer/victim relationship. However, some individuals may seek to adopt the perspectives of others in their attempts to understand the world around them. Thus, we witness the phenomenon popularly known as "liberal guilt," in which one who occupies the position of responsible injurer under the paradigm of participation nevertheless adopts that paradigm. So too, the propensity of some victims of

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> I knew that I was in for hours of verbal abuse, physical pain and sexual torture.

Id.

103 As Andrea Dworkin put it, "freedom looks different when you are the one it is being practiced on." Andrea Dworkin, *Pornography and the New Puritans: Letters from Andrea Dworkin and Others*, N.Y. TIMES BOOK REV., May 3, 1992, at 15.

injustice to blame only themselves arises from their adoption of the injurer's perspective and the accompanying paradigm of awareness.

Perhaps the reasons why our society favors the paradigm of awareness, and I believe that it does, lie in its historical development. In less complex liberal societies, people may most often recognize injury as a foreseeable and direct bilateral affair between individuals. The close physical and temporal proximity between injurers and victims in those preindustrial societies, from wbich our social and legal conventions derive, may have led them to adopt the paradigm of awareness. As these societies became more complex, some interactions, injurious ones included, may have been mediated through other people, whose combined and interdependent activities constituted social structures in which causal connections became indirect and often unforeseeable. This account might explain the relatively recent appearance in tort law of legal responsibility without proximate cause. However, it fails to explain why, in our own highly complex society, the paradigm of awareness has remained the dominant conception of responsibility in both political discourse and law.

Perhaps instead, the reason why our society favors the paradigm of awareness lies in the nature of power. Those with power to act in ways that impose on others may, over time, experience fewer and fewer limitations on their autonomy. This sense of freedom may lead them to seek even less restriction on their autonomy, inducing them to adopt the paradigm of awareness in matters of responsibility. This might explain why those who argue for responsibility based on participation are usually members of marginalized groups or their advocates. It might also account for why an imperial society, which exerts so much economic, political, and military power over other countries, might favor the paradigm of awareness. However, this explanation fails to account for feelings of powerlessness expressed by some "beneficiaries" of domination who feel trapped, individuals unable to respond meaningfully to suffering to which they may admit causal contribution but for which they do not feel responsibility. Indeed, the very feeling of having no meaningful response available, rather than a sense of power, may lead such people to embrace the paradigm of awareness.

The rival paradigm of participation challenges deeply rooted notions of autonomy and innocence. Confronting its implications can be emotionally very difficult. In our society, which favors the paradigm of awareness, responsibility for the suffering of others is restricted; it is an exception to the normal course of events, not the rule. Responsibility for harm to others is also a very serious matter, carrying heavy moral and practical consequences. The radical ex-

pansion of responsibility implied by the paradigm of participation threatens to crush us under the weight of moral condemnation and monetary sanctions that follow from responsibility for others' suffering in our society.

However, this frightening expansiveness of the paradigm of participation is its greatest asset. For this aspect of the paradigm highlights our connection with those who suffer. Social, political, and economic ills become difficulties in *our* relations with other individuals, rather than simply *their* problems.[104] The suffering of others, under the paradigm of participation, demands a response from us, rather than leaving us with the option of simply distancing ourselves from it. But even assuming that most people in our society were willing to accept this paradigm on a personal level, how could we structure legal institutions to reflect it? In the case of the tort system, the burden of damages would be crippling, as it has been to many defendants in pharmaceutical and environmental litigation.

While it is true that a primary function of the tort system is to attach sanctions to responsibility in the form of damages, this is not its only function. Tort law also plays an epistemic role in our society, revealing injustice by illuminating relationships in the light of our public standards of responsibility. Tort law not only remedies injustice by imposing damage awards, it also exposes normative features of relations between parties by articulating and applying conceptions of responsibility. In a world of tort law based more on the paradigm of participation, findings of responsibility might well increase, while sanctions for it might decline. Such a system might better expose the importance of sometimes simply recognizing responsibility for human suffering as a way of motivating response to it rather than always restricting responsibility to cases in which state coercion can remedy it.

In the end, we must seek to strike a balance between the two paradigms. For on one hand, the cost of fairness under the restrictive paradigm of awareness is disrespect for the autonomy of victims. And on the other hand, pursuit of justice under the expansive paradigm of participation may exhaust the ability, and perhaps the desire as well, of injurers to respond practically to the suffering of others.[105] Such a balance, it seems, represents an equal valuation of

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104 Martha Minow analyzes problems of exclusion as difficulties in relations rather than difference in MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 79-97, 111 (1990).

105 Finding a balance between the paradigms of awareness and participation would require a principle that limits liability somewhere beyond the narrow bounds of awareness, yet short of the seemingly endless horizons of participation. Perhaps some conception of wrongdoing might provide this principle. Courts in the dram-shop, CERCLA

the autonomy of injurers to act in ways that harm others unknowingly and the autonomy of victims to equal security and respect. But how could these two forms of autonomy be of equal value? Such an understanding of "balance" seems blatantly to favor the autonomy of injurers, even if only in a restrained way.

This balance between the paradigms of awareness and participation is not an ideal of justice. Quite to the contrary, it represents a compromise of justice no matter how one looks at it. For the paradigm of awareness yields an ideal of justice that is unfair from the perspective of victims, and the paradigm of participation produces one that would overwhelm all but the most oppressed.[106] The limits of pursuing perfect justice under the paradigm of awareness will leave many unsatisfied, while the vigilance of doing so under the paradigm of participation may simply exhaust most.

In such a world, perhaps the best that law can do is to articulate and safeguard this unhappy balance, an imperfect ideal of unstable equilibrium. The job of judges would not be to promote justice but rather to compromise it in the face of practical demands of individual freedom.[107] Shalom Spiegel saw justice itself as precisely this sort of compromise when he wrote that "[j]ustice cools the fierce glow of moral passion by making it pass through reflection."[108]

Remarking on the tension between the freedom to act, which often entails imposing on others, and justice in relations between individuals, which demands reciprocal respect, Camus observed that:

> Absolute freedom is the right of the strongest to dominate. . . . Absolute justice is achieved by the suppression of all contradiction: . . . it destroys freedom. . . . Absolute freedom mocks at

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and DES contexts have found a convenient limit insofar as the responsibility of only a few parties was in question—those parties joined as defendants. One might seek to account for this procedural limit substantively, using a conception of wrongfulness. I am currently reflecting on the role of wrongfulness in providing a limiting principle of responsibility that might serve to balance the paradigms of awareness and participation.

106 George Eliot wrote of our need to ignore much of the world around us:

> If we had a keen vision and feeling of all ordinary human life, it would be like hearing the grass grow and the squirrel's heart beat, and we should die of that roar which lies on the other side of silence. As it is, the quickest of us walk around wadded with stupidity.

GEORGE ELIOT, MIDDLEMARCH 144 (Gordon H. Haight ed., 1968).

107 I am grateful to Peter Berkowitz for turning my attention to this implication of the paradigm of participation.

108 ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS iv (1975) (citing SHALOM SPIEGEL, AMOS V. AMAZIAH (1957) in dedication). Robert Cover also envisioned the task of legal judgement as a conflict between two often irreconcilable ideals: loyalty to legal order and commitment to moral righteousness. *See id.* at 197-260 (discussing the "moral-formal dilemma").

> justice. Absolute justice denies freedom. To be fruitful, the two ideas must find their limits in each other.[109]

Determining fair and practical limits to our conception of responsibility for human suffering is central both to how we understand the world and how we conduct ourselves in it. Such an important task demands that we maintain a balance between the perspectives of those who participate unwittingly in injustice and those who suffer it. For, as Camus wrote, "man is not entirely to blame; it was not he who started history; nor is he entirely innocent, since he continues it."[110] We must respond to the suffering of those around us, for we are likely responsible in some measure. But we must be mindful of the limits of our attempts to establish any ideal of justice, for we are merely human by any measure.

109 CAMUS, *supra* note 1, at 287-88, 291.
110 *Id.* at 297.