

**Title**

Attribution Theory and the American Tort System

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# ATTRIBUTION THEORY AND THE AMERICAN TORT SYSTEM

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## INTRODUCTION

We, as Americans, are all living, breathing liabilities. Each time we change lanes on the highway with only a haphazard glance, let our dog run free without a leash, or invite a stranger into our home and offer him a drink, we literally put everything we have on the line. In our civil law system, with the exception of some intentional torts, the actions themselves are not illegal.<sup>1</sup> Rather, it is an injury of another that creates liability.<sup>2</sup> Only when something goes wrong do we actually pause long enough to analyze causation and attribute fault. Although the system punishes only on reaction, it is designed to serve a preventative function, motivating individuals to act in a way that does not unreasonably expose others to harm.

Psychology and law often intersect when examining human behavior within the legal system. Criminal behavior, in particular, has received significant attention. Bernard Weiner's attribution theory,<sup>3</sup> which examines individuals' attributions for their own successes and failures as well as others' attributions for individuals' successes and failures, has been used in criminal

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<sup>1</sup> See *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928) (“We are told that one who drives at reckless speed through a crowded city street is guilty of a negligent act and therefore of a wrongful one, irrespective of the consequences. Negligent the act is, and wrongful in the sense that it is unsocial, but wrongful and unsocial in relation to other travelers, only because the eye of vigilance perceives the risk of damage. If the same act were to be committed on a speedway or a race course, it would lose its wrongful quality; it is risk to another or to others within the range of apprehension.”); *infra* text accompanying note 62.

<sup>2</sup> See discussion *infra* Part II.

<sup>3</sup> For a general description of attribution theory, see Bernard Weiner, *An Attribution Theory of Achievement Motivation and Emotion*, 64 PSYCHOL. REV. 557, 557–73 (1985).

contexts to examine judgments about fault and blame.<sup>4</sup> Although scholars have applied attribution theory to crime, punishment, and behavior change within the criminal domain,<sup>5</sup> they have largely ignored the theory's applicability to civil liability.

As demonstrated by our civil liability system, society is largely reactive. At the individual level, people mainly evaluate their own behavior in reactive terms. There is no need to analyze why you did not know the answer to a multiple choice question, for example, if you randomly chose the correct answer anyway.<sup>6</sup> On a social level, people also react to other's successes or failures by attributing credit or fault. A passionate baseball fan, for example, does not hold his favorite star responsible for hitting into what should have been a game-losing double-play when the opposing team drops the ball, causing the game-winning run to score instead. It is only after something goes wrong—or something unexpected happens—that society and individuals look back and attribute causation and fault.

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<sup>4</sup> For example, causal attributions have been found to influence the parole decision-making process, including judgments about the seriousness of a crime, predictions about rates of recidivism, and suggested punishments. See John S. Carroll, Richard L. Wiener, Dan Coates, Jolene Galegher, James J. Alibrio, *Evaluation, Diagnosis, and Prediction in Parole Decision Making*, 17 LAW & SOC'Y REV. 119, 119–228 (1982); John S. Carroll & Dan Coates, *Parole decisions: Social psychological research in applied settings*, 1 APPLIED SOC. PSYCHOL. ANN. 139, 139–62 (1980); Weiner, *supra* note 3, at 566–70. Similarly, causal attributions have been analyzed in conjunction with decisions to send defendants to treatment centers instead of subjecting them to criminal prosecution. See, e.g., Celesta A. Albonetti & John R. Hepburn, *Prosecutorial discretion to defer criminalization: The effects of defendant's ascribed and achieved status characteristics*, 12 J. QUALITATIVE CRIMINOLOGY 63, 63–81 (1996). Attribution theory has also been used to examine the relationship between causal ascriptions and race. See, e.g., Christina L. Azocar, *The color bias in culpability: Attribution frames of responsibility and their effects on punitive judgments of Black juvenile criminals*, DISSERTATION ABSTRACTS INT'L SEC. A: HUMAN. & SOC. SCI. 3222, 3222 (2002) (describing how racial factors contribute to jurors' causal ascriptions, including their judgments about defendants' culpability for criminal activity).

<sup>5</sup> See *supra* note 4 and accompanying text.

<sup>6</sup> See Bernard Weiner, *Attribution Theory, Achievement Motivation, and the Educational Process*, 42 REV. EDUC. RES. 203, 206 (1972) (“[L]uck as well as skill and effort subjectively influence performance.”).

This Article suggests that attribution theory can serve as a framework for viewing many elements of tort law. In certain contexts, however, the system may not work perfectly—it may serve to punish individuals who cannot be deterred—individuals whom society does not truly blame. Although the American tort system generally mirrors the ways that society attributes fault and blame, the system seemingly diverges from such attributions when applied against individuals with mental illnesses that render them incompetent.

Part I of this Article introduces attribution theory. Section A presents the theory's three basic causal dimensions. Section B offers an example of how the dimensions interact on both an individual and a social level.

Part II describes the modern tort system. Section A discusses the legal meaning of negligence and its accompanying objective reasonable person standard. Section B ponders the possible goals underlying the tort system and the importance of fault within it.

Part III examines the consistencies and inconsistencies between attribution theory and the modern tort system. Section A argues that many components of the tort system operate according to attribution theory's basic causal dimensions. Section B argues that the system seemingly diverges from attribution theory when the objective reasonable person standard is applied against mentally incompetent individuals. The Article concludes, however, that the apparent divergence is not only necessary to maintain the integrity of the tort system—it is also ultimately consistent with the underlying principles of attribution theory.

## I. ATTRIBUTION THEORY

Attribution theory focuses on “phenomenal causality, or the perceived reasons why a behavior, event, or outcome has occurred.”<sup>7</sup> The theory is based on the premise that causal ascriptions mediate emotions and expectations, which subsequently dictate how society attributes fault and blame.<sup>8</sup> The attribution process serves an adaptive function, allowing people to gauge the reasons for their successes or failures to either replicate or alter the causal network to achieve a more positive result in the future. But the process does not necessarily reflect reality.<sup>9</sup> It is laden with emotion and littered with self-protecting biases.<sup>10</sup> Despite its imperfections, the process appears to be fundamental and universal.<sup>11</sup>

Section A of this Part describes attribution theory’s three basic dimensions—locus, stability, and control—as well as a fourth quasi-dimension—intentionality. Section B compares ability and effort ascriptions to demonstrate how the dimensions interact on both an individual and a social level.

### A. Basic Dimensions

Bernard Weiner, in his conception of attribution theory, breaks causal ascriptions down into three basic dimensions, *locus*, *stability*, and *control*, each consisting of two opposite

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<sup>7</sup> Sandra Graham, Bernard Weiner, & Gail S. Zucker, *An attribution analysis of punishment goals and public reactions to O.J. Simpson*, 23 PERSONALITY & SOC. PSYCHO. 331, 333 (1997).

<sup>8</sup> See *id.*; cf. Bernard Weiner, *Integrating Social and Personal Theories of Achievement Striving*, 64 REV. EDUC. RES. 557, 557–73 (1994) (describing how, in the achievement context, fault and blame are assigned according to causal ascriptions).

<sup>9</sup> Weiner, *supra* note 3, at 555 (“Attribution decisions represent phenomenal causality—the causal world as perceived by the viewer.”).

<sup>10</sup> See *id.* at 554–57; see *infra* note 18.

<sup>11</sup> Weiner, *supra* note 3, at 555; see *infra* text accompanying note 54.

alternatives.<sup>12</sup> In the dimension of locus, an outcome can be attributed as either *internal* or *external*; in the dimension of stability, an outcome can be attributed as either *stable* or *unstable*; and in the dimension of control, and outcome can be attributed as either *controllable* or *uncontrollable*.<sup>13</sup> Weiner postulates that people attribute their successes and failures, as well as those of other individuals, according to different combinations of the above six ascriptions.<sup>14</sup> These causal attributions, in turn, lead to emotions and expectations, which motivate or deter behavior on an individual level and dictate community responses on a social level.<sup>15</sup>

1. *Locus*. The first causal dimension, locus, refers to whether an outcome is ascribed to an internal or external source.<sup>16</sup> When an individual's outcome is "success," an internal causal ascription should consistently produce self-directed feelings of pride and bolster self-esteem.<sup>17</sup> An internal ascription following a "failure," however, may produce a wide range of negative, self-reflective emotions, as well as judgments and emotions from others, depending on the dimensions of stability and controllability.<sup>18</sup>

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<sup>12</sup> BERNARD WEINER, AN ATTRIBUTION THEORY OF MOTIVATION AND EMOTION 159–90 (1986); Weiner, *supra* note 3, at 551–52.

<sup>13</sup> Weiner, *supra* note 3, at 551–52.

<sup>14</sup> *Id.* at 561–62.

<sup>15</sup> *Id.* For example, attribution theory has been used to design behavior change programs during jail sentences. See, e.g., Angles des Crusier & Pamela M. Diamond, *An exploration of social policy and organizational culture in jail-based mental health services*, 24 ADMIN. & POL'Y MENTAL HEALTH 129, 129–48 (1996). Causal ascriptions have also been used, with some success, as a predictor of behavior change. Daryl G. Kroner & Jeremy F. Mills, *The Criminal Attribution Inventory: A Measure of Offender Perceptions*, 39 J. OFFENDER REHABILITATION 15, 15–29 (2004) (describing how the Criminal Attribution Inventory (CRAI), a device specifically designed to measure intervention treatments by examining how criminals attribute crimes and who they blame for them, has shown preliminary promise).

<sup>16</sup> Weiner, *supra* note 3, at 551–52.

<sup>17</sup> *Id.* at 551.

<sup>18</sup> *Id.* at 551–64. If a failure is seen as internal, for example, it may not lower self-esteem unless it is also seen as stable. Moreover, to protect self-esteem, individuals are biased towards attributing certain failures to external sources. *Id.* If a failure is ascribed to an external source, it may be seen as circumstantial, relieving the individual of fault.

2. *Stability*. Under Weiner's theory, the stability of causal ascriptions largely shapes individuals' expectations for future outcomes.<sup>19</sup> Weiner suggests that the perceived stability of the causes that an individual ascribes to an outcome dictate that individual's expectations for the future.<sup>20</sup> If an individual attributes an outcome to a stable cause, it will increase the individual's expectation that the same outcome will reoccur in the future, representing a "typical shift."<sup>21</sup> When an individual attributes an outcome to an unstable cause, however, the individual may not adjust his expectations at all.<sup>22</sup> If an individual believes that the cause of his own success or failure is stable, he is likely to anticipate the same result in the future, producing emotions of hopefulness or hopelessness, respectively.<sup>23</sup> If, however, the individual attributes the failure to something unstable, he will not believe that future actions are constrained by those of the past.<sup>24</sup>

3. *Controllability*. The third causal dimension, controllability, is important for conceptions of responsibility and free will.<sup>25</sup> Although, on a social level, society may view an individual as having a "lazy" temperament that is fairly stable, yielding low future expectations, the individual could presumably work harder. A higher level of performance, therefore, would be volitional and within his optional control.<sup>26</sup>

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<sup>19</sup> See *id.* at 565 (presenting a diagram of the entire attribution theory of motivation and emotion).

<sup>20</sup> See *id.* (diagramming how judgments about the stability of an ascribed cause determine the expectancy of success, which dictates whether both an individual and the society around that individual are hopeless or hopeful that a positive outcome will result in the future).

<sup>21</sup> *Id.* at 556–65.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 563; see *supra* note 20.

<sup>24</sup> Weiner, *supra* note 3, at 563–65.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

If others ascribe an individual's failure to a factor within the individual's control, they are likely to feel angry at the individual and punish him for the failure.<sup>27</sup> Weiner describes anger as "an accusation, or a value judgment," resulting from a belief that an individual was capable of, and should have delivered, a better performance or result.<sup>28</sup> Anger represents an attribution of blame for an unjustified and avoidable failure.<sup>29</sup> It tends to motivate aggression and retribution, particularly when the consequences of a failure implicate others.<sup>30</sup>

One study, for example, found that when individuals were asked to describe events that induced anger, they most often cited incidents that could be considered "voluntary," in which the actor knew of the likely consequences of the action yet proceeded anyway, without an adequate justification.<sup>31</sup> Individuals also described anger at actors who did not intend harm but nonetheless caused it through carelessness or negligence.<sup>32</sup> Although the negligent actor was not considered as responsible as one who voluntarily caused harm, the harm was nonetheless avoidable and thus perceived as subject to personal control.<sup>33</sup> The study also found that, once initiated, anger served as a "goad" for undertaking retaliatory actions.<sup>34</sup>

Accompanying the anger that an individual receives socially, the individual who ascribes his failure to something controllable will likely experience guilt, based on feelings of personal

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<sup>27</sup> *Id.*

<sup>28</sup> Weiner, *supra* note 8, at 566; accord Bernard Weiner, *On Responsibility Inferences and the Perceived Moral Person*, 1 INT'L J. EXISTENTIAL PSYCHOL. & PSYCHOTHERAPY 66, 70 (2004) ("Anger is an accusation or a value judgment that follows from the belief that another person 'could and should have done otherwise.'" (quoting James R. Averill, *Studies on anger and aggression*, 38 AM. PSYCHOL. 1145, 1145-60 (1983))).

<sup>29</sup> Weiner, *supra* note 28, at 70.

<sup>30</sup> See Weiner, *supra* note 3, at 568 ("Crimes committed because of intentional and/or controllable factors are believed to be more deserving of punishment than are crimes due to unintentional and/or noncontrollable causes.").

<sup>31</sup> James R. Averill, *Studies on anger and aggression*, 38 AM. PSYCHOL. 1145, 1145-60 (1983).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

responsibility.<sup>35</sup> Guilt, in turn, may stimulate performance increments.<sup>36</sup> In contrast, if others perceive an individual's failure to result from something uncontrollable, others will not be inclined to punish the individual for the failure. Instead, others may shower the individual with compassion, pity, and sympathy.<sup>37</sup> Moreover, in place of guilt, the individual is likely to feel ashamed of his perceived inadequacy.<sup>38</sup> This feeling of shame generally causes performance decrements.<sup>39</sup>

The dimension of controllability is also significant because of its implications for social interaction. Causal ascription on an individual level is intimately tied to the attribution cues that the individual receives on a social level.<sup>40</sup> People have a natural understanding of the emotional reactions that certain attributions produce in others.<sup>41</sup> Thus, for example, we generally frame excuses to produce pity ("I missed the meeting because I was feeling sick") rather than anger ("I missed the meeting because I was hung-over and vomiting").<sup>42</sup> Moreover, individuals may be acutely aware of the distinction between anger and pity, allowing the attributions and emotions of others to influence their own attributions and emotions.<sup>43</sup>

4. *Intentionality.* An additional dimension that Weiner considers is intentionality.<sup>44</sup>

Although intentionality is often seen as a property of control, the two have important distinctions. As Weiner articulates, "[t]he differentiation between intent and control lies at the

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<sup>35</sup> Weiner, *supra* note 3, at 562.

<sup>36</sup> *Id.*

<sup>37</sup> Weiner, *supra* note 8, at 567–69.

<sup>38</sup> *Id.* at 567.

<sup>39</sup> *Id.*

<sup>40</sup> *See id.* at 657–69.

<sup>41</sup> Weiner, *supra* note 3, at 562.

<sup>42</sup> *See* Weiner, *supra* note 28, at 69–70.

<sup>43</sup> Weiner, *supra* note 8, at 567–68. Weiner also notes that, although anger or sympathy may cause an individual to feel guilt or shame, respectively, communication of guilt actually decreases anger. *Id.*

<sup>44</sup> Weiner, *supra* note 3, at 554–55.

heart of the distinction between murder and manslaughter.”<sup>45</sup> While another’s failure produces anger when the actions that caused the failure are seen as controllable,<sup>46</sup> intent adds an extra layer of culpability to the failure. Weiner does not ultimately award intentionality its own causal dimension, however, because “intent describes an action, or a motivation state of an organism.”<sup>47</sup> Causes, themselves, are not intentional.<sup>48</sup>

### *B. Putting it All Together: Effort vs. Ability*

The dimensions of attribution theory are more illustrative in combination, as demonstrated by contrasting how causal ascriptions of effort and ability function within personal and social systems. Particularly in the achievement domain, scholars have highlighted the emotional and motivational consequences of attributing a failed outcome to effort or ability.<sup>49</sup> Although both attributional bases are seen as internal, effort is generally perceived to be controllable and unstable, whereas ability is usually seen as uncontrollable and stable.<sup>50</sup>

Failure due to lack of effort involves a free-will decision, justifying an inference of responsibility for the failure. Failure due to lack of aptitude, however, does not involve such free will, deflecting any inference of responsibility. As effort and ability are associated with opposing attributional dimensions, they produce very different affective and motivational reactions, personally and socially.

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<sup>45</sup> *Id.* at 554.

<sup>46</sup> See *supra* notes 25–41 and accompanying text.

<sup>47</sup> Weiner, *supra* note 3, at 554.

<sup>48</sup> *Id.*

<sup>49</sup> See, e.g., WEINER, *supra* note 12, at 79–200; Weiner, *supra* note 8, at 557–71; Weiner, *supra* note 3, at 548–70; Bernard Weiner, *May I Borrow Your Class Notes? An Attributional Analysis of Judgments of Help Giving in an Achievement-Related Context*, 72 J. EDUC. PSYCHOL. 676, 676–79 (1980); Weiner, *supra* note 6, at 203–14.

<sup>50</sup> Weiner, *supra* note 8, at 558–71.

On a social level, if others attribute an individual's failure to lack of ability—an *uncontrollable* and *stable* attribution—they will not experience anger, but rather sympathy, pity, and compassion.<sup>51</sup> They would be unlikely to punish the individual for the failure. If, on the other hand, others attribute an individual's failure to lack of effort—a *controllable* and *unstable* attribution—they would judge the individual to be responsible for the failure.<sup>52</sup> A “high punishment” usually follows such an attribution.<sup>53</sup> Weiner emphasizes the universality of this tendency within social motivation: “I would venture to say that [these social reactions] are pan-cultural and have been quite consistent over historical time.”<sup>54</sup>

On a personal level, an individual's ascription to ability or effort drastically alters his own emotional and behavioral reaction to the outcome. When an individual perceives the cause of a failure to be lack of ability, he will likely feel ashamed.<sup>55</sup> Performance decrements are most often observed.<sup>56</sup> But if he perceives the cause of the failure to be the absence of effort, he will likely feel guilty because he could have chosen to prevent it.<sup>57</sup> Performance increments typically follow.<sup>58</sup>

In achievement contexts, particularly when evaluating levels of effort, the quasi-dimension of intentionality serves to distinguish failures that could have been prevented but for better strategy from failures that resulted from simply refusing to try. As Weiner explains, “one

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<sup>51</sup> See *supra* notes 35–39 and accompanying text.

<sup>52</sup> See *supra* notes 30–34 and accompanying text.

<sup>53</sup> *Id.* at 559.

<sup>54</sup> *Id.* at 560. Despite the social motivation to punish when the failure is ascribed as due to effort, Weiner notes that punishment is not affirmatively linked with behavior change. *Id.*

<sup>55</sup> See *supra* notes 37–39 and accompanying text.

<sup>56</sup> See *supra* notes 37–39 and accompanying text.

<sup>57</sup> See *supra* notes 35–36 and accompanying text.

<sup>58</sup> Weiner, *supra* note 3, at 548–70; see *supra* notes 35–36 and accompanying text.

does not purposively or knowingly use bad strategy.”<sup>59</sup> It is one thing for an individual to fail, even if he is capable of more, because he chose to employ the wrong strategy. It is quite another for that individual never to have intended to try in the first place. As Weiner articulates, “we support sickness but not sin.”<sup>60</sup> After all, “[s]ickness is associated with nonresponsibility and sympathy, whereas sin is linked to responsibility and anger.”<sup>61</sup>

## II. TORT LAW AND SOCIAL BLAME

The American tort system is essentially a system of social motivation, requiring the psychological and physical presence of others. Not only does another person have to be injured for a tort to take place,<sup>62</sup> but the level of compensation awarded to the injured party depends on a causal analysis. When an injured party is in need of aid, society examines why that aid is necessary. Did the suffering party contribute to the injury? Or was the injury *uncontrollable*, produced completely through the conduct of an external wrongdoer? These antecedent attributions, as Weiner predicts,<sup>63</sup> mediate cognitive and affective responses, shaping the help society is willing to offer.

In determining the compensability of an injury, the tort system also examines the culpability of the injuring party. If the behavior that produced the injury is seen as *controllable*, even if unintentional, liability is usually presumed unless the wrongdoer is able to justify his

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<sup>59</sup> *Id.* at 554.

<sup>60</sup> Weiner, *supra* note 28, at 70.

<sup>61</sup> *Id.* at 70–71.

<sup>62</sup> *See supra* note 1; *see also* Jane Stapelton, *Tort, Insurance and Ideology*, 58 MOD. LAW REV. 820, 820–45 (1995) (describing how tort law has emerged as a system in order to respond to misfortunes).

<sup>63</sup> *See supra* notes 25–41 and accompanying text.

behavior with an affirmative defense.<sup>64</sup> Furthermore, if the injury is seen as reckless or intentional, not only does the system impose liability for compensatory damages but punitive damages may also be appropriate.<sup>65</sup>

Thus, causal ascriptions of an injury not only determine whether an injury is compensable and what level of compensation is appropriate but also what goals society is trying to promote through the judgment. Underlying the tort system is a desire to motivate individuals to act in a way that does not unreasonably risk the safety of fellow citizens.

This Part provides background on the modern tort system and suggests that it is essentially a system of social motivation. Section A discusses negligence and the reasonable person standard of care. Section B considers the possible goals underlying the tort system and highlights the importance of fault attributions within it.

### *A. Negligence and the Reasonable Person Standard*

1. *Negligence and Fault.* There are two uses of the word “negligence.” The first, the vernacular usage generally employed throughout this Article, is synonymous with “fault.” It

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<sup>64</sup> See RESTATEMENT OF TORTS (SECOND) § 5 (1965) (“The words ‘subject to liability’ are used throughout the Restatement of this Subject to denote the fact that the actor's conduct is such as to make him liable for another's injury, if (a) the actor's conduct is a legal cause thereof, and (b) the actor has no defense applicable to the particular claim.”).

<sup>65</sup> See RESTATEMENT OF TORTS (SECOND) § 435B (1965) (“Where a person has intentionally invaded the legally protected interests of another, his intention to commit an invasion, the degree of his moral wrong in acting, and the seriousness of the harm which he intended are important factors in determining whether he is liable for resulting unintended harm. . . . The rule applies not merely to physical harm to the person but also to harm to the feelings, to reputation, and to business. Its principle applies not only to permit a jury to award punitive damages, but also to cause an intentionally wrongful tortfeasor to respond for compensatory damages in cases where, were he merely negligent, he would not be required to pay damages.”); *id.* at § 501 (“The extent of liability, as well as its existence, may be affected by the fact that the actor's conduct is reckless rather than negligent. Thus, the jury may be permitted to impose punitive damages upon a reckless defendant, although only compensatory damages would be permissible if the defendant had been merely negligent.”).

represents the breach of a duty of reasonable care.<sup>66</sup> The second usage, which appears exclusively in the context of liability, refers to a claim for negligence.<sup>67</sup> To recover damages in negligence, a claiming party must prove four elements: (1) the actor had a duty of reasonable care to the claiming party; (2) the actor breached this duty of reasonable care (acted negligently); (3) the claiming party suffered an injury; and (4) the actor’s breach can be attributed as the cause of the claiming party’s injury.<sup>68</sup> In a few states, a court must also find that there was no contributory negligence on the part of the injured party.<sup>69</sup>

In aggregate, the elements of *a claim* for negligence illustrate a delicate balance designed to compensate innocent victims always and only when someone else was at fault for causing their injuries. The first two elements, taken together, can be seen as “fault,” based on the creation of an unreasonable risk of harm.<sup>70</sup> Thus, an individual can be at “fault” for acting negligently—that is, the individual can actually have a duty to a person and breach that duty—without actually incurring liability for negligence. Fault alone is generally<sup>71</sup> not enough; in tort, moral culpability is only one piece of the liability puzzle.

The necessity of all four elements also demonstrates that, although we generally owe a duty of reasonable care in avoiding injuries to others, there are circumstances under which we can cause an injury without being at fault. In such cases, a defendant could have “caused” a

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<sup>66</sup> GEORGE C. CHRISTIE et al., CASES AND MATERIALS ON THE LAW OF TORTS 108–10 (4th ed., Thompson West 2004) (1983).

<sup>67</sup> *Id.* at 109.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* (describing how the requirement of “fault on the part of the defendant” has been read to require “that the plaintiff establish a) the existence of a duty on the part of the defendant towards the plaintiff and b) the breach of that duty by the defendant”).

<sup>71</sup> There are some “strict liability” torts that fall outside the scope of this Article. For a general discussion of strict liability torts, see *id.* at 624–31.

foreseeable injury by deliberately choosing not to take action to prevent it, yet his action can still be deemed “reasonable,” relieving him of liability.

2. *The Reasonable Person Standard.* The elements of duty and breach reflect the idea that every person should be held to the standard of a hypothetical “reasonable person.”<sup>72</sup> This objective standard applies even when the actor, examined subjectively, is *not* a reasonable prudent person under the circumstances.<sup>73</sup>

What does it mean to act as a reasonable and prudent person would under the circumstances? Demonstrated by Judge Learned Hand’s famous “Hand formula,” the “reasonable person” is not expected to take every precaution that could prevent an injury.<sup>74</sup> Rather, in deciding whether to “act,” he is expected to weigh the foreseeable risks of his action against (1) the utility of the action, (2) the extent of the risk posed, (3) the likelihood of the risk actually causing an injury, and (4) the costs of and risks posed by alternative courses of actions.<sup>75</sup> Only after completing this comprehensive economic analysis does the “reasonable person” strategically determine whether it is “worth it” to go forward with the potentially harmful act. If a proper analysis determines that, in fact, the “act” was “worth it,” the actor did not act unreasonably, and thus had no duty that could have been breached.<sup>76</sup> After all, the “reasonable person” can never be at fault.

3. *Negligent Torts Distinguished from Intentional Torts.* Negligent torts should be distinguished from intentional torts. With very few exceptions, a tort is only committed if an

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<sup>72</sup> *Id.* at 117–35.

<sup>73</sup> *Id.*

<sup>74</sup> *Unites States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

<sup>75</sup> *Id.*

<sup>76</sup> *See id.*

injury results from a voluntary act.<sup>77</sup> The Restatement (Second) of Torts defines an act as an “external manifestation of the actor’s will.”<sup>78</sup> An act can reflect the actor’s will, however, without meeting the legal definition of intent. An individual who intends an act will usually incur liability, under a negligence theory, for any foreseeable injury the act causes.<sup>79</sup> He still has not committed an intentional tort, however, unless he has also acted purposely or knowingly relative to the likelihood of the resulting harm.<sup>80</sup>

Although jurisdictions vary on exact definitions of intent, the Restatement (Third) of Torts provides a good summary of the modern standard: “A person acts with the intent to produce a consequence” if the person either (1) “has the purpose of producing the consequence,” or (2) “knows to a substantial certainty that the consequences will ensue” from the conduct.<sup>81</sup> This definition implies that a person does not have to intend to cause the injury itself, as long as he intended to act and knew “to a substantial certainty” such an injury would result from his conduct.<sup>82</sup> Intent is introduced into the tort system as an element to consider in determining whether an injury is compensable and what amount of damages should be awarded if it is.<sup>83</sup>

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<sup>77</sup> See *supra* note 71.

<sup>78</sup> RESTATEMENT OF TORTS (SECOND) § 2 (1965) (“The word ‘act’ is used throughout the Restatement of this Subject to denote *an external manifestation of the actor’s will* and does not include any of its results, even the most direct, immediate, and intended.” (emphasis added)).

<sup>79</sup> *E.g.*, *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928) (defining the scope of proximate cause in terms of the foreseeability of the injury that occurred).

<sup>80</sup> See RESTATEMENT OF TORTS (SECOND) § 8 (1965) (“The word ‘intent’ is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.”).

<sup>81</sup> RESTATEMENT OF TORTS (THIRD) § 1 (Tentative Draft No. 1, Mar. 28, 2001).

<sup>82</sup> *Id.*

<sup>83</sup> See *supra* note 65 and accompanying text.

## *B. The Goals of Tort Law*

There are four basic social goals of tort law: (1) prevention of self-retaliation; (2) retribution against wrongdoers; (3) deterrence of harmful activities; and (4) compensation for injured parties.<sup>84</sup> The first three goals are shared by criminal law.<sup>85</sup> Although some experts have argued that the fourth goal, compensating innocent parties for their injuries, is now the principle justification for our tort system,<sup>86</sup> the design of the tort system implies otherwise.

First, if the system was really principally designed to compensate injured parties, much more efficient and cheaper ways exist to accomplish it. A general system of social insurance, for example, could compensate injuries without any need to examine causation or attribute fault.<sup>87</sup>

Second, if the system's principal goal was truly compensatory, people would be entitled to recover for any unfortunate injury, regardless of fault or causation. Instead, society feels the need to examine the conduct of both the wrongdoer and the injured party as compared to that of a hypothetical "reasonable person" under the circumstances.<sup>88</sup> Only if the injury is attributed by the fact finder in a way consistent with some notion of fairness and justice may the injured party recover.<sup>89</sup> Thus, the goal of compensating injured parties is necessarily tapered by the corrective justice premise that "fault is the only acceptable reason for loss shifting."<sup>90</sup> An injuring party is

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<sup>84</sup> CHRISTIE, *supra* note 66, at 5.

<sup>85</sup> *Id.*

<sup>86</sup> *E.g.*, Glanville Williams, *The Aims of the Law of Tort*, 4 CURRENT LEGAL PROBS. 137 (1951).

<sup>87</sup> *See* CHRISTIE, *supra* note 66, at 5–6 ("Indeed, if compensation is the paramount consideration, a general system of social insurance to cover almost all the injuries for which redress is now sought in the tort system is the most logical answer.").

<sup>88</sup> *See supra* notes 48–63 and accompanying text.

<sup>89</sup> *See supra* notes 49–53.

<sup>90</sup> Daniel Shuman, *The Psychology of Compensatory Tort Law*, 43 U. KAN. L. REV. 39, 43 (1994).

responsible for compensation only if he is found to have caused an injury through behavior in need of deterrence.<sup>91</sup>

The fault requirement, furthermore, is not the only limit imposed on recovery. For an injured party to collect damages, the party at fault must also have assets to satisfy the judgment.<sup>92</sup> Additionally, recovery requires a substantial investment in resources to prove liability. These prerequisites to compensation leave a huge gap in situations in which (1) the person who caused the injury is deemed to have acted reasonably and is thus not at fault, (2) the person who caused the injury does not have the resources to satisfy a finding of liability, or (3) the injured party does not have the evidence or the resources to prove fault.<sup>93</sup>

Finally, the magnitude of damages awarded often depends on the perceived degree of culpability of the wrongdoer, indicating that the system is intended to do more than just compensate injured parties. Whereas damage awards for mere negligence are designed to make injured parties “whole,”<sup>94</sup> as though the injuries had never occurred, injuries caused by intentional conduct are punishable by punitive damages<sup>95</sup> intended to reprimand the wrongdoers and deter similar future behavior.<sup>96</sup>

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<sup>91</sup> *See id.*

<sup>92</sup> Daniel Shuman, *The Psychology of Deterrence in Tort Law*, 42 U. KAN. L. REV. 115, 119–20 (1993) (“[P]eople seriously injured through unsafe behavior thought to be in need of deterrence are not likely to institute a tort claim unless the injurer has sufficient assets or insurance to satisfy an award and the potential award is substantial.”).

<sup>93</sup> *See id.*

<sup>94</sup> *See* CHRISTIE, *supra* note 66, at 821–23 (“[T]ort common law purports to adopt a ‘full compensation’ or restoration measure of damages: the factfinder should award the sum of money that will restore the plaintiff to her pre-injury position, to the extent money can do so.”).

<sup>95</sup> *See id.* at 904 (“As a practical matter . . . when a defendant’s conduct is intentional or reckless, he may be liable for punitive damages, although some courts impose the additional requirement of some showing of actual malice in the form of ill-will or intent to injure.”); *see supra* note 65, 83 and accompanying text.

<sup>96</sup> *See* CHRISTIE, *supra* note 66, at 908–09 (describing the historical aims of punitive damages as “(1) compensating emotional suffering; (2) compensating insult; (3) personal vindication, (4)

Thus, the role of causal attributions in tort law contradicts the notion that compensation is the system's principle goal. Rather, such a causal analysis indicates that the system aspires to motivate people to make more careful and reasonable decisions. It tells decision makers that "under certain conditions, they will be forced to bear the costs of their activities . . . [giving] *rational* decision makers an incentive to incorporate the costs to others into their decisions about whether to engage in the activity."<sup>97</sup> Alas, however, the presumption of reasonability resurfaces. As Part III discusses, the system's incentives have little force when the decision makers to whom the message is directed cannot be considered "rational."

### III. OVERLAP AND DIVERGENCE BETWEEN TORT LAW AND ATTRIBUTION THEORY

#### A. *Overlap Between Tort Law and Attribution Theory*

Society generally compensates injuries another party caused and was at fault for.<sup>98</sup> Ideally, a tort system should impose responsibility on parties according to the ability they had to prevent the harm.<sup>99</sup> Thus, an ascription of fault should indicate that the behavior was preventable: the wrongdoer either acted in a way he should not have or failed to act in a way he should have. Either way, the injury is ascribed to something within the wrongdoer's *control*. If the injurious behavior was not under the injuring party's control, the tort system should and generally does excuse him from fault, even if his actions in fact caused the injury.<sup>100</sup> Whereas

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vindication of the state; (5) punishing the defendant to set an example; and (6) punishing the defendant for the aim of deterrence" (citing Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT K. REV. 163, 197 (2003)).

<sup>97</sup> Benjamin C. Zipursky, *Rights, Wrongs, and the Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 46 (1998) (emphasis added).

<sup>98</sup> 74 Am. Jur. 2d Torts (1974).

<sup>99</sup> *Id.*

<sup>100</sup> See *supra* notes 88–93 and accompanying text.

ascribing an injury to something uncontrollable generally relieves the injuring party of liability, however, an ascription of control does not necessary yield liability. Rather, other factors, including the locus, stability, and intentionality of the behavior causing the injury, must be examined in conjunction with controllability.

Society is careful to ascribe fault only when the injury was caused by something internal to the wrongdoer. The negligence standard requires a careful examination of the circumstances under which the injury occurred—external factors that would justify the injuring party’s actions amend the normal reasonability standard, limiting if not completely precluding liability.

For example, a man driving twice the legal speed limit, negligently or recklessly passing other cars, would typically be liable for any injury caused by those actions.<sup>101</sup> In fact, in some jurisdictions such behavior might be so egregious as to warrant a finding of intentionality, based on the substantial likelihood of resulting harm.<sup>102</sup> Circumstances exist, however, under which tort law would completely excuse the injuring party from liability. Perhaps the speeder is a police officer involved in a high speed chase, awarding him a privilege to speed.<sup>103</sup> Or maybe the speeder’s wife has gone into labor in the back seat and he is trying to get her to the hospital. If this were the case, the “emergency doctrine” would apply in most jurisdictions, shielding the speeder from liability.<sup>104</sup>

In other words, there are circumstances under which society views actions as reasonable, even though they would normally be considered negligent. Although arguably *controllable*, the individual’s actions are attributed to external factors that limit the free choice inherent in true

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<sup>101</sup> See *supra* Part II.

<sup>102</sup> See CHRISTIE, *supra* note 66, at 33.

<sup>103</sup> E.g., RESTATEMENT OF TORTS (SECOND) § 288A (1965) (describing excused violations of regulatory enactments).

<sup>104</sup> *Id.*

controllability. The external circumstances would require a reasonable person to behave in a way that would usually be considered impermissible. Society does not see the speeder rushing his wife to the hospital as legally responsible for the resulting injury because the speeder is not acting in a way that society frowns upon or would like to deter. Thus, the injured party has no recourse.<sup>105</sup>

In contrast, if a driver with no external excuse purposely speeds down a narrow road either for the purpose of injuring another person or while knowing to a “substantial certainty” that the conduct would injure another person,<sup>106</sup> the tort system is willing to brandish much sharper teeth.<sup>107</sup> Although not formally included as one of Weiner’s primary dimensions, intentionality epitomizes the social and evaluative component of ascribing responsibility for an injury. Intent is important in determining whether compensation should be awarded and, if so, how much compensation is appropriate. Indeed, a finding of “intent” actually lowers the threshold for compensation. Contributory negligence, for example, is usually not a valid defense

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<sup>105</sup> Furthermore, even if there is no excuse for the speeder’s activity, perhaps the injured party was also negligent. The behavior of the speeder is no less egregious if this were the case; however, because the injured party was also negligent, both parties could have acted to prevent the accident. When fault lies in both parties, the injury is ascribed to factors both *internal* to and *external* to the speeder. Jurisdictions are divided on whether an injured party’s own negligence should prevent compensation. In the few states that maintain contributory negligence, including North Carolina, an injured party would not be able to recover anything for the speeder’s negligence. See Alison P. Raney, Stacy v. Jedco Construction, Inc.: *North Carolina Adopts a Diminished Capacity Standard for Contributory Negligence*, 31 WAKE FOREST L. REV. 1215 (1996). In the vast majority of states, however, comparative negligence would now apply, allowing fault and damages to be apportioned between the negligent parties. See CHRISTIE, *supra* note 66, at 344. Thus, whereas contributory negligence relieves a wrongdoer of causal responsibility, despite both controllability and some degree of internality, pure comparative negligence apportions causation when the injury is partially ascribed to negligent behavior internal to the speeder and in his control.

<sup>106</sup> See *supra* note 81 and accompanying text.

<sup>107</sup> See *supra* notes 80–83 and accompanying text.

when a wrongdoer acted *intentionally*.<sup>108</sup> Additionally, the concept of “transferred intent” imposes liability for an intentional tort even when (1) the person injured by the act was not the person the act was intended to harm, and (2) the ultimate tort committed was not the tort the actor intended to commit.<sup>109</sup> Furthermore, contrasting the rules that pertain to a negligent act, once the actor intentionally commits a tortious act he is responsible for all resulting consequences, regardless of the foreseeability of those consequences.<sup>110</sup>

When an individual commits an intention tort, and thus acts with a higher level of culpability than mere negligence, societal goals for imposing liability are somewhat different than they would be for imposing liability on a negligent tortfeasor. Instead of focusing primarily on compensating the injured party, greater emphasis is placed on punishing the wrongdoer, deterring similar future conduct, and preventing self-retaliation.<sup>111</sup> Thus, the quasi-dimension of intentionality is imperative in deciding whether a judgment should extend beyond compensatory damages to punish and deter particularly egregious behavior.

Moreover, intent increases the amount awarded when compensation is appropriate. An injury from an intentional tort often does not have to be proven but is rather assumed, entitling the receiving party to “nominal” (symbolic) damages.<sup>112</sup> Juries may also impose punitive damages on intentional tortfeasors.<sup>113</sup> Such punitive damages exceed the amount required to compensate the injured party for the actual injury and may be individually tailored to the wrongdoer’s assets to maximize the judgment’s “sting.”<sup>114</sup>

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<sup>108</sup> See Raney, *supra* note 105, at 1218–20.

<sup>109</sup> See CHRISTIE, *supra* note 66, at 54–55.

<sup>110</sup> *Id.* at 52–55.

<sup>111</sup> See *supra* note 65, 83, & 96 and accompanying text.

<sup>112</sup> See CHRISTIE, *supra* note 66, at 21–22.

<sup>113</sup> See *supra* note 65, 83, & 96 and accompanying text.

<sup>114</sup> See *supra* note 65, 83, & 96 and accompanying text.

### *B. Divergence Between Tort Law and Attribution Theory?*

Meanwhile, the causal dimension of *stability* introduces a difficult paradox for the legal system. If a wrongful act, criminal or otherwise, is attributed to a stable cause, the individual and society would expect the same behavior to repeat, given the same circumstances.<sup>115</sup> Punishment would be unlikely to elicit a change in future behavior. Although society may be “hopeless” that a different outcome would occur in the future, the wrongdoer’s actions may breed anger if his behavior is attributed as controllable, or even fury if his behavior is attributed as intentional.<sup>116</sup>

According to attribution theory, anger and fury may demand retribution, even if deterrence is unlikely.<sup>117</sup> If the action was a crime, punishment can also serve to protect society from reoccurrence, at least for the duration of a jail sentence. If the action was merely a tort, however, a liability judgment may only serve to compensate the injured party without furthering any deterrent goal. Nonetheless, society may feel compensation is justified, despite the stability of the behavior, based on its ascription of fault.

When the behavior that gives rise to an injury, however, is seen as *stable* and *uncontrollable*—rather than stable and controllable—an attribution of fault is no longer appropriate. Indeed, the dimension of stability, taken together with controllability, is really where attribution theory and the tort system diverge. Attribution theory postulates that when a person fails in some capacity, others analyze his inherent ability when apportioning responsibility.<sup>118</sup> This ascription process, in turn, dictates emotional responses of others to that

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<sup>115</sup> See *supra* notes 21–24, 60–4 and accompanying text.

<sup>116</sup> See *supra* notes 25–48 and accompanying text.

<sup>117</sup> See *supra* notes 25–41 and accompanying text.

<sup>118</sup> See *supra* notes 7–8 and accompanying text.

person's failure.<sup>119</sup> If, for example, a person is seen as having below average capacity to act in a "reasonable" manner, his ultimate failure to do so would produce sympathy instead of anger because the behavior would be ascribed as both *uncontrollable* and *stable*.<sup>120</sup> Therefore, punishment *should not* follow such a blunder. Nor, in such a case, would society expect punishment to serve a strategic role in motivating different action in the future. If society ascribes an injurious action to something that is stable, punishment would not promote the desired behavior in the future.<sup>121</sup> Of course, the goal of compensating the injured party remains; however, as illustrated in Part II, that goal typically dissolves in the absence of fault.<sup>122</sup>

Most states, however, employ tort systems that are a bit more callous than Weiner's attribution theory might predict. Although some personal characteristics are taken into account when determining what is reasonable under the circumstances, including minority age and visible physical handicaps, mental disabilities are generally not considered unless the injured party knew or reasonably should have known of the disability.<sup>123</sup>

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<sup>119</sup> See *supra* Part I.

<sup>120</sup> See *supra* Part I.

<sup>121</sup> See *supra* notes 37–39, 43 and accompanying text.

<sup>122</sup> See *supra* notes 65–71, 81–85 and accompanying text.

<sup>123</sup> RESTATEMENT OF TORTS (SECOND) § 283B (1965); see CHRISTIE, *supra* note 66, at 131 ("Considerable investigation has failed to find any cases in which a mentally deficient adult was not held to the objective reasonable adult standard when the mentally deficient person was a defendant in an action for negligence."). Mental capacity can be taken into account, however, when evaluating contributory negligence. RESTATEMENT OF TORTS (SECOND) § 464(1) (1965) ("Unless the actor is a child or an insane person, the standard of conduct to which he must conform for his own protection is that of a reasonable man under the circumstances."). For a general discussion of the objective reasonable person standard as applied to individuals with mental illnesses, see Patrick Kelley, *Infancy, Insanity, and Infirmary in the Law of Torts*, 48 AM. J. JURIS. 179 (2003), and Stephanie I. Splane, Note, *Tort Liability of the Mentally Ill in Negligence Actions*, 93 YALE L.J. 153 (1983).

As discussed in Part II, the “reasonable person” standard is objective, eliminating individual differences in intelligence, capacity, and ability.<sup>124</sup> The system presumes that an ordinary person knows certain facts of common experience.<sup>125</sup> Oliver Wendell Holmes justified using a standard that “takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men,” by explaining that “when men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare.”<sup>126</sup> Even if a person is born less capable, “his slips are no less troublesome to his neighbors than if they sprang from guilty neglect.”<sup>127</sup> Thus, Holmes argues, his “neighbors” require an objective standard to ensure their own safety and wellbeing.<sup>128</sup>

This argument, however, makes far less sense in light of the fact that modern tort statutes generally allow consideration of physical handicaps and minority age when determining what is “reasonable under the circumstances.”<sup>129</sup> Why should the system consider such “individual peculiarities” as infancy and physical handicaps when apportioning liability but refuse to do so for equally debilitating mental handicaps? It would appear somewhat unfair to entirely discount a mental handicap that truly impedes an individual’s ability to act reasonable. If the individual is really unable to alter his tortious behavior in the future, why should the tort system ignore that fact? Are the “slips” of a mentally incompetent individual really more “troublesome to his neighbors” than the slips of either an infant or a physically incompetent member of society?

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<sup>124</sup> See *supra* notes 72–76 and accompanying text.

<sup>125</sup> CHRISTIE, *supra* note 66, at 117.

<sup>126</sup> OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 108 (1881).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> CHRISTIE, *supra* note 66, at 129–32, 136–37.

Perhaps they are. One justification for considering personal characteristics of such groups is based on the visibility of age and physical handicaps to others, altering expectations for what would be reasonable under the circumstances.<sup>130</sup> This justification is consistent with the position, taken by some jurisdictions, that clearly visible mental disabilities can be considered when determining what is reasonable under the circumstances.<sup>131</sup> Perhaps it is the chilling unpredictability associated with mental illness that one's neighbors would find so troublesome. After all, if the injured party knew or reasonably should have known of the injuring party's mental disability, the tort system no longer requires complete objectivity.<sup>132</sup>

Indeed, it appears that the system ignores mental incapacity only when necessary to compensate an injured party who could not have reasonably known of the injuring party's mental limitations. Fact finders may consider such factors as insanity and mental capacity when evaluating contributory negligence.<sup>133</sup> Additionally, although insanity and mental disabilities do not constitute defenses for claims of negligence, fact finders can take them into account when evaluating whether an individual had the necessary state of mind to constitute intent.<sup>134</sup> In other words, whereas the negligence standard is objective, the intentional tort standard is very much subjective.

Moreover, this approach may not be altogether inconsistent with the principles of attribution theory. Although society treats failures attributed to incapacity differently from how

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<sup>130</sup> See Splane, *supra* note 123, at 168 n.83 (noting that the tort system treats mentally ill individuals differently than it treats physically disabled individuals and children because, among other reasons, physically disabled individuals and children “are clearly recognizable and thus provide notice to potential victims”).

<sup>131</sup> See *supra* note 123 and accompanying text.

<sup>132</sup> See *supra* note 123 and accompanying text.

<sup>133</sup> See *supra* note 123.

<sup>134</sup> See, e.g., *Turner v. Caldwell*, 421 A.2d 876, 877 (1980) (distinguishing between intentional torts, for which insanity can be raised as a defense, and negligence torts, for which insanity cannot serve as a defense).

attribution theory would predict,<sup>135</sup> this distinction might actually be adaptive in motivating individuals to act as society deems appropriate. If those individuals viewed as having lower capacity were given a free pass due to the perceived uncontrollability and stability of their behavior, they would not be motivated to act differently in the future. In fact, performance decrements often follow when an individual and those around him ascribe his failure to a lack of ability.<sup>136</sup> When an individual attributes an outcome to a stable and uncontrollable cause, he would expect the same outcome to result in the future, regardless of effort.<sup>137</sup> Thus, applying Weiner's theory, adapting the "reasonable person" standard based on subjective judgments of capacity, intelligence, and ability could actually impede the goal of motivating people to act more carefully or reasonably in the future. It would be undesirable to "adopt a tort standard which tells both the [mentally ill individual] and society that the mentally ill are considered incapable of behaving in a reasonable, responsible manner."<sup>138</sup>

Likewise, to the extent that some mental illnesses are not altogether uncontrollable, the objective approach as applied to those with mental handicaps may remain consistent with Weiner's underlying principles. Although Weiner breaks the dimension of control down into controllable and uncontrollable ascriptions, the concept of control is far less black and white. Rather, there are many different gradients of control, as the distinction between negligent and

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<sup>135</sup> See *supra* notes 120–123 and accompanying text.

<sup>136</sup> See *supra* notes 37–38 and accompanying text.

<sup>137</sup> See discussion *supra* Part I.B.

<sup>138</sup> Splane, *supra* note 123, at 167–68. Splane goes on to note, "The mentally ill are not by definition incapable of conforming to a reasonable person standard. . . . [T]he whole aim of community treatment is to foster and encourage the mentally ill to behavior 'reasonably' and 'normally' in the community." *Id.* at 168.

intentional torts proves.<sup>139</sup> Perhaps some mental handicaps are more deserving of consideration than others based upon where they fall on the controllability spectrum.

For example, an individual who was born with severe mental retardation may deserve greater sympathy from the tort system because his relative lack of reasonability is entirely stable and out of his control. This is true even though his mental condition is internal. Moreover, mental retardation is typified by distinct physical characteristics,<sup>140</sup> increasing the likelihood that those surrounding the individual would be aware of his limitations. This awareness would allow others to adjust their own behaviors to take the mentally deficient individual's limitations into account. Thus, perhaps the tort system should (and would<sup>141</sup>) take an individual's severe mental retardation into account when determining whether that individual acted "negligently."

In contrast, an individual who is impeded from acting reasonably because of an acute bipolar episode should receive less sympathy from the tort system, particularly if the individual's mania was brought on by his failure to take his prescribed medication. In such a case, the mental handicap that prevented the individual from acting reasonably could be considered unstable and *controllable*—after all, medication could have allowed the individual to act "reasonable." Note that this analysis does not deny that the individual *could not* act reasonably at the time of the tort. Rather, it simply suggests that it is fair to impute fault to the manic individual despite his inability to act reasonably at the time of the potentially negligent act because the individual could

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<sup>139</sup> See discussion *supra* Part II.A.

<sup>140</sup> See RONALD J. COMER, *ABNORMAL PSYCHOLOGY* 564–73 (4th ed., Worth Publishers 2001) (1992) ("Severe and profound levels of mental retardation often appear as part of larger syndromes that include severe physical handicaps."); cf. KATHLEEN STASSEN BERGER, *THE DEVELOPING PERSON THROUGH CHILDHOOD* 86 (2d ed., Worth Publishers 2000) (1995) ("[A]lmost all people with [Down syndromes] have certain specific facial characteristics—a thick tongue, round face, slanted eyes—as well as distinctive hands, feet, and fingerprints. Many also have hearing problems, heart abnormalities, muscle weakness, and short stature.").

<sup>141</sup> See *supra* note 131 and accompanying text.

have prevented himself from lapsing into the state of unreasonability that facilitated the negligent act. Moreover, because the manic individual's unreasonability is unstable, it would be difficult for others around the individual to recognize the individual's limitations; thus, it would be unfair to assume that others would adjust their own behavior to compensate for the manic individual's potentially tortious actions.

Moving along the controllability spectrum, an individual with a personality disorder, "an inflexible pattern of inner experience and outward behavior,"<sup>142</sup> should presumably receive even less sympathy from the tort system. Although personality disorders, diagnosable under Axis II of the DSM-IV,<sup>143</sup> are typified by stable and rigid personality traits that produce serious social and occupational difficulties,<sup>144</sup> an individual who suffers from a personality disorder remains in control of his actions. Thus, although his negligent or even intentionally malicious actions may stem from his disorder, an ascription of fault would nonetheless justify a finding of liability or, when appropriate, culpability. This is true even though society does not expect the individual to act more reasonably in the future. Indeed, even the criminal system, which is much more sensitive to mental capacity, generally provides no lenience on the basis of a personality disorder.<sup>145</sup>

Perhaps even less deserving than the individual with a personality disorder, however, would be a tortfeasor who suffers from a long-term pattern of substance abuse<sup>146</sup> or substance

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<sup>142</sup> COMER, *supra* note 140, at 509.

<sup>143</sup> MANUAL OF MENTAL DISORDERS (4th ed., text rev. 2000) (DSM-IV-TR).

<sup>144</sup> COMER, *supra* note 140, at 510–11.

<sup>145</sup> See CURT R. BARTOL, CRIMINAL BEHAVIOR: A PSYCHOSOCIAL APPROACH 87–99, 140–78 (6th ed., Prentice Hall 2002) (1980).

<sup>146</sup> Substance abuse is "[a] pattern of behavior in which people rely on a drug excessively and regularly, bringing damage to their relationship, functioning poorly at work, or putting themselves or others in danger." COMER, *supra* note 140, at 350.

dependence,<sup>147</sup> both conditions that are listed in the DSM-IV.<sup>148</sup> An individual who is experiencing intoxication as a result of either his abuse or dependence could easily act in a dangerous manner that he technically could not control at that time. But the act of becoming intoxicated would have been within his control. Moreover, the individual is more blameworthy than the individual with bipolar disorder who failed to take his medicine because, although the pattern may be resistant to change, it is possible to entirely eliminate the abuse or dependence with enough effort. The individual's negligent act would not have stemmed from an inherent inability to function in a reasonable manner.

Thus, one major difficulty with taking mental handicaps into account when making liability determinations is that not all actions that result from mental handicaps elicit pity rather than blame.<sup>149</sup> Because the controllability spectrum is so subjective, it is not altogether clear which mental handicaps should be considered. To come back to Weiner's telling words, "[W]e support sickness but not sin. Sickness is associated with nonresponsibility and sympathy, whereas sin is linked to responsibility and anger."<sup>150</sup> But "sickness," like control, is far from black and white. It can be very difficult to determine where on the controllability spectrum the line between "sickness" and "sin" should be drawn.

To be sure, certain applications of the current tort model to individuals with mental illnesses may produce an apparently unjust outcome. For example, some mental illnesses that match visible physical handicaps in stability and uncontrollability may similarly limit a suffering individuals' ability to act reasonably without presenting physical characteristics from which

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<sup>147</sup> Substance dependence is "[a] pattern of behavior in which people organize their lives around a drug, possibly building a tolerance to it or experiencing withdrawal symptoms when they stop taking it, or both. Also called *addition*." *Id.*

<sup>148</sup> *Id.* at 351.

<sup>149</sup> See discussion *supra* Part I.

<sup>150</sup> Weiner, *supra* note 28, at 70.

others could reasonably identify the mental illnesses. Why should those individuals be held liable for acting in an “unreasonable” fashion simply because their illnesses lacks physical markers?

Despite such occasional unjust outcomes, however, the system may nonetheless be justified by the reality that it is simply too difficult to identify an exact point on the controllability spectrum at which society would no longer find it fair to impose liability. If mental illness could truly serve as a defense, what would stop an otherwise mentally competent person from arguing that he, too, should not be held liable because he was distracted at the time of his tortious action or because he was experiencing intense emotions that prevented him from acting reasonably? What would stop him from arguing that he was ignorant of the standard of care or that he was just simply uncoordinated? If every case were to turn on the mental capacity of the apparent tortfeasor, the objective standard would functionally dissolve.<sup>151</sup> Thus, perhaps the somewhat calloused treatment of mental disabilities within the tort system merely reflects the reality that it would be too difficult to distinguish those who are incapable of reasonably prudent behavior from those who simply choose not to employ it. To even try, perhaps, would force us to acknowledge that there is no truly reasonable person.

#### CONCLUSION

The American tort system generally functions as Bernard Weiner’s attribution theory of achievement motivation and emotion would predict. In fact, the causal ascriptions of an injury

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<sup>151</sup> See Kelley, *supra* note 123, at 186 (“[R]ecognizing insanity as a defense to a tort action might lead defendants to claim and feign insanity, leading to the same seemingly intractable problem of determining a defendant’s sanity that we of necessity encounter in the criminal law.”); Splane, *supra* note 123, at 168 (“The objective standard is no more unjust to the mentally ill than it is to numerous other persons whose individual capacities do not quite match up to the capacities of the ‘ideal prudent person.’”).

determine (1) whether the injury is compensable, (2) what behaviors society is trying to motivate or deter through a liability judgment, and (3) the level of compensation to which an injured party is ultimately entitled. The tort system diverges from attribution theory, however, when applied against individuals with mental handicaps that prevent them from acting as reasonably prudent people would under the circumstances. The objective reasonable person standard is inconsistent with the bedrock tort concept that individuals should be held liable only for torts that they both caused and were at fault for causing. According to attribution theory, if society attributes an injury to something *internal, stable, and uncontrollably*, society would not judge the injuring party to be at fault—but the tort system would hold him liable nonetheless.

Despite this inconsistency, it may be too difficult to individualize the reasonable person standard—such individualization would require cumbersome determinations of which mental handicaps are sufficiently debilitating to waive the reasonable person standard. Moreover, permitting some individuals to evade the reasonable person standard might force the system to admit the limits of the standard as applied to the remainder of the population.

The reasonable person standard is based on an arguably unrealistic and unachievable idealism. Complex economic analyses of risk utility and cost, although conceivable for corporations, are unlikely to occur at the individual level. Even if individuals were to rationally balance the economic utility of an act against its various risks, such an analysis would be highly speculative—failing to take precautions can produce a huge range of potential injuries. Risk calculations are therefore unlikely to motivate even “reasonable” people to act more carefully.

At some level this is intuitive. It is difficult to imagine that courts and legislatures might actually expect average people to conduct an extensive economic analysis before deciding how carefully to change lanes. So then, why do we do it? Why do we force an objective standard on

every individual, regardless of mental competency? Why do we idealize this “reasonable person,” impossible as he may be to emulate? Perhaps there is no better way to balance the need to compensate innocent victims with the ethical notion that people who were not at fault should not be punished. Or maybe we need to believe that injuries really can be prevented—that most of us really are pretty reasonable. It is easier and safer to believe we never would have, or even could have, caused such an injury. Our attributions, although central to emotions, expectations, and motivation, may also function as a crutch. After all, with the “reasonable person” as your neighbor, the world is a little bit less random and a little bit less scary.