

Assumption of Risk, After All

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Assumption of risk — the notion that one cannot complain about a harmful state to which one has willingly exposed oneself — figures prominently in our extra-legal lived experience. In spite of its deep roots in our common-sense morality, the tort doctrine of assumption of risk has long been discredited by many leading tort scholars, restatement reporters, courts, and legislatures. In recent years, however, growing concerns about junk food consumption, and about obesity more generally, have given rise to considerations that are traditionally associated with the principles underlying the doctrine of assumption of risk. Against this backdrop, I shall advance two claims: one negative and the other affirmative. The negative claim is that the major objections to the doctrine of assumption of risk are either misplaced or overblown. And affirmatively, I argue that this doctrine (properly reconstructed to reflect liberal-egalitarian intuitions) can provide an illuminating framework with which to address pressing social concerns such as the one associated with junk food's harmful side-effects.

INTRODUCTION

Assumption of risk — the notion that one cannot complain about a harmful state to which one has willingly exposed oneself — figures prominently in our lived, *extra-legal* experience. A citizen who casts her vote in favor of a talented, though unreliable, political candidate cannot complain about being

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offended by what she views as the unjust immigration policy this candidate comes to implement soon after being elected. A traveler who decides to explore the authentic culture of an exotic country cannot complain about being forced to consume, and thus badly suffer from, the under-hygienic local cuisine. And sophisticated market investors cannot complain when their stock portfolios (including Pareto-optimal portfolios) collapse due to a series of unfortunate circumstances that supervene on business decisions made by the officers of some of the portfolios' corporations.

In all these cases, and many others, those offended by the deeds of others cannot complain about that which, to an important extent, is the upshot of their voluntary undertaking. The harms they surely suffer are just that — harms. They do not count as wrongs: *damnum absque injuria*. And the reason is that these harms are not disrespectful of the freedom of the harmed persons; in fact, they are mediated through these persons' freedom.

Moreover, the extra-legal experience of the notion of assumption of risk permeates the law, too. For instance, the institution of criminal punishment ensures against certain forms of antisocial behavior. It does so by creating a clearly defined arena of illegality. Whoever "enters" this arena by committing an offence cannot complain about being punished accordingly, since the choice to engage in a criminal act is a form of assuming the risk of being deprived of the right not to be punished.¹ Another case in point is contract law. It provides an institutional framework in which persons can voluntarily engage in the allocation of some future risks by way of exchanging promises that take the bargain form. In that, parties to a contract decide, together, which risks are assumed by whom. And tort law — the subject matter of these pages — features the doctrine of assumption of risk, according to which risk-takers can decide unilaterally to encounter an otherwise wrongful imposition of risk by others.² In both contract and torts, assumption of risk is akin to a rule of ownership assignment: assuming a risk turns one into the owner of the assumed risk.

In spite of its deep roots in our common-sense morality, however, the tort doctrine of assumption of risk has long been discredited by many leading tort

1 For an illuminating attempt to ground criminal punishment in a consent-based conception of voluntary assumption of risk (as opposed to retributive justice), see Carlos Nino, *A Consensual Theory of Punishment*, 12 PHIL. & PUB. AFF. 289 (1983); see also T.M. SCANLON, WHAT WE OWE TO EACH OTHER 261-67 (1998) (defending an account of assumption of risk grounded in the "various conditions under which a choice is (or could be) made," rather than the "fact of the choice itself").

2 In addition, tort law features several doctrinal cousins to the assumption of risk doctrine such as consent in trespass torts and the defense of coming to the nuisance.

scholars and courts.³ It has also been broken down into discrete pieces based on two sets of distinction — viz., express versus implicit assumption of risk, and reasonable versus unreasonable implied assumption of risk — that further exacerbate its intelligibility, as I shall explain in a moment.⁴

Among many others, the most compelling charges often raised by the traditional doctrine's critics can be divided into two doctrinal objections and a philosophical one. I briefly present each of them in turn. First, it is a conclusory doctrine in the sense that its prescriptions are reached by reference to either other tort doctrines, such as duty analysis, or contract law. I shall call this complaint the *redundancy objection* since it insists that the doctrine of assumption of risk plays no independent role in the analysis leading up to the suggestion to bar the plaintiff's recovery. Second, some critics have sought to develop a knockdown argument against the very plausibility of the assumption of risk doctrine. On this objection, which I shall call the *analytical objection*, a voluntary assumption of risk is not — and can never be — a bar to liability, whether complete or partial. These critics argue that choosing to be exposed to a risk created by others cannot absolve these others of liability, since such consent is not an analytical feature of liability waiver. What is missing, that is, is a manifested consent to exonerating the injurer of *liability* for the materialized risk, rather than merely to being exposed to such risk. Third, on a philosophical level, the assumption of risk doctrine is none other than a surface manifestation of a *laissez-faire* vision of labor markets (and probably of other spheres of action). In that, the objection goes, the doctrine bends the law in rigid and undesirable ways, according to questionable assumptions concerning personal responsibility, free choice, or efficient labor markets (or a blend of all).⁵ To be clear, the objection does *not* stop at the possibly misguided application of the doctrine to the facts of

3 Some states have responded to this trend by enacting liability-barring statutes that, in effect, reintroduce the traditional notion of assumption of risk especially in respect of risky recreational activities. See, e.g., 12 VT. STAT. ANN. tit. § 1037 (stating that a participant in a sport activity “accepts as a matter of law the dangers that inhere therein insofar as they are obvious and necessary”).

4 See *infra* Part I.

5 Compare Francis H. Bohlen, *Voluntary Assumption of Risk (Part II)*, 20 HARV. L. REV. 91, 115 (1906) (observing that “in America as yet there is normally no dearth of work for competent workmen. If one job is dangerous, another can probably be found.”), with Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1769 (1981), or with Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 940 (1981).

the matter.⁶ Rather, the deeper suspicion is that the doctrine is rooted in an unattractive libertarian conception of equality.

In response, I argue that the three objections just mentioned are misplaced, or at the very least overblown. The tort doctrine of assumption of risk, I shall argue, can be adequately reconstructed so as to overcome the suspicions that have been attributed to it since the heyday of the infamous master-servant cases during the nineteenth and early twentieth centuries. Furthermore, I shall develop a liberal-egalitarian account of assumption of risk that helps to establish a firmer connection between the legal doctrine and our extra-legal lived experience of assumption of risk. Rather than reflecting a marginal and outdated bar to recovery, assumption of risk manifests an ideal which occupies the moral center of the liberal state — that of fairness, and of tort law in particular — that of respecting persons as they (really) are.⁷

The reconstruction of the assumption of risk doctrine that I shall develop in these pages has important implications for a variety of challenges facing the modern state. A particularly important such challenge concerns the problem of obesity, especially the consumption of junk food. As I shall argue, the notion of assumption of risk figures prominently in current public debates about the desirability and method of state intervention in matters of junk food harms. However, it is almost always deployed in the service of libertarian arguments against all sorts of state — i.e., legal — intervention in matters of junk food production and consumption. By contrast, liberals typically react by implicitly or explicitly rejecting the plausibility of applying the notion of assumption of risk to the obesity context (on which more below). This reaction, I argue, is disappointing and possibly self-defeating precisely because the notion of assumption of risk figures so prominently in our commonsense morality. Accordingly, I shall seek to defeat the libertarian invocation of the notion of assumption of risk by introducing the liberal account of this notion and its doctrinal implications. This move, I argue, helps to cast into sharp relief an arguably crucial aspect in the legal and public debates concerning junk food harms — that the (correct) argument from assumption of risk is as much about equality as it is about freedom.

The argument will run through the following stages. Part I sets the scene by introducing the basic distinctions that animate the tort area traditionally associated with the doctrine of assumption of risk. In Part II I shall take stock

6 As exemplified in G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 41 (2d ed. 2003).

7 Throughout, I focus on the assumption of risk doctrine in connection with the common law tort of negligence and with respect to adults, setting aside other areas in torts (such as products liability) and infants.

of two familiar objections to that doctrine: that it is completely redundant (II.A.) and that it rests on a conceptual mistake (II.B.). In Part III I seek to uncover the deep source of the hostility toward the doctrine in question, viz., the *laissez-faire* conception of assuming risk, whereas Part IV develops a liberal conception in its stead. This latter Part also sets out the doctrinal framework with which to approach cases involving assumption of risk (IV.C.) and further illustrates how this framework works in the context of junk food harms (IV.D.).

I. SETTING THE SCENE: THE DOCTRINE OF ASSUMPTION OF RISK, PROPERLY CONCEIVED

As I have observed at the outset, the doctrine of assumption of risk has been cut into discrete pieces based on several sets of distinction. I shall now argue that this way of approaching the doctrine fails to render it intelligible. This is so because it makes the (false) impression that “assumption of risk” is nothing more than a placeholder for a variety of unrelated ideas that, as a result, require different treatments and different conceptualizations.

Partly in an effort to reduce the harsh consequences of the doctrine of assumption of risk (as experienced in the area of industrial accidents during the nineteenth and early twentieth centuries), the following categories have emerged. First, assumption of risk can be either express or implied.⁸ Second, instances of implied assumption of risk, in turn, are divided into primary and secondary assumption of risk.⁹ Third, secondary assumption of risk, in turn, is split into reasonable and unreasonable encounter of a known risk.¹⁰ These distinctions have important practical implications since the rules that apply to each category may be strikingly different. The general principles of express assumption of risk remain, more or less, the same as before, though this category is no longer “officially” a matter for tort law to govern. Rather, it belongs to a set of contractual limitations on tort liability.¹¹ Secondary assumption of risk, which is the traditional core of assumption of risk, has been merged into contributory negligence (and, in many states, even then only when the conduct involving an implicit assumption of risk is unreasonable).¹²

8 See, e.g., DAN B. DOBBS, *THE LAW OF TORTS* § 210, at 535 (2001).

9 See, e.g., *Knight v. Jewett*, 834 P.2d 696, 703-04 (Cal. 1992).

10 See, e.g., *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1240-41 (Cal. 1975).

11 Compare RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 2 cmt. a (2000), with RESTATEMENT (SECOND) OF TORTS § 496B (1965).

12 See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 2 cmt. i (2000).

Making classifications and sub-classifications can surely improve the law's intelligibility and operation, but not when the underlying rationales are inadequate and possibly indefensible. To begin with, the distinction between express and implied assumption of risk rests on the formality of writing, which is in this context a sort of empty formalism. Once the express/implied distinction collapses, it can be seen that the doctrine of assumption of risk — as aptly captured in the Latin proverb *volenti non fit injuria* — does not rest on a contractual engagement between the victim and the risk-creator (or injurer). It is important to note, because this point is easily missed, that it is *not* that instances of assumption of risk cannot arise from an explicit or implicit contract between the two parties. Rather, the point is that having a contract of this kind is not necessary for barring the victim's recovery on the theory that she assumed the risk. Cases falling into the "category" of secondary assumption of risk demonstrate this point. Indeed, in these cases, the injurer *has already* breached his duty of care by creating an unreasonably risky environment and then the victim, who is aware of this risk, decides to encounter it.¹³

More generally, the conceptual mistake of collapsing (some parts of) the assumption of risk doctrine into contract stems from obscuring the distinction between a voluntary undertaking and one species of such undertaking, namely, a voluntary undertaking that involves the exchange of promises and takes the bargain form. In other words, the assumption of risk doctrine picks out a voluntary undertaking, and although this undertaking may sometimes be a bilateral one, it is not an essential feature thereof. Instead, it is the *unilateral* voluntary undertaking that lies at the core of this doctrine.

Finally, the application of the notion of reasonableness to the doctrine of assumption of risk is misplaced. This is because the question that animates the doctrine does not pertain to the quality of the victim's conduct as measured against some external reason (the reasonable person), but rather to the existence of a *choice* to encounter a known risk, regardless of whether the choice meets the standard of the reasonable person. The baseline against which to determine whether the victim assumed the risk in the relevant sense is subjective all the way down.¹⁴

The shortcomings just mentioned are not surprising (and, perhaps, even understandable) if indeed the motivating force behind the classifications of the doctrine into express/implied, primary/secondary, and reasonable/unreasonable is fear of the regressive energy that is built into the doctrine.

13 I shall have occasion to discuss this scenario below. See *infra* text accompanying notes 24-26; see also RESTATEMENT (SECOND) OF TORTS § 496C cmt. f (1965).

14 I further elaborate this point in *infra* text accompanying notes 16, 70.

However, as I shall argue presently, no such energy is really built into this doctrine so that it can be reconstructed in a way that strikes a familiar and attractive liberal-egalitarian chord. For this reason, the artificial classifications in question should be put to rest — the thin conceptual core of the doctrine of assumption of risk is choice, *tout court*. Accordingly, the substantive questions that a successful reconstruction of the doctrine of assumption of risk must address are choice-based, rather than consent-based: what counts as a “choice” and, more importantly, what are the legal implications of making a choice, including a unilateral one, to act in the face of unreasonable risk of harm to oneself?

II. TWO DOCTRINAL OBJECTIONS TO ASSUMPTION OF RISK

The tort doctrine of assumption of risk has come under many different attacks. Some of them take aim at one or another aspect of the doctrine. By contrast, I shall focus on objections to the tort doctrine of assumption of risk that propose to reject the doctrine itself by arguing that it is either completely redundant or conceptually implausible.

A. A Redundant Doctrine: Assumption of Risk Really Is (for the Most Part) a No-Duty Rule

1. *The Critique*

Assumption of risk, it has been argued, can be fully subsumed in established tort doctrines, especially contributory negligence and duty of care, and, partially, in contract law.¹⁵ I shall set the attempt to subsume assumption of risk in contributory negligence to one side, since it rests on obscuring the distinctive identity of assumption of risk *vis-à-vis* contributory negligence. To be sure, assumption of risk and contributory negligence recommend the same outcome — a complete bar to recovery from a negligent defendant. But it is equally important to recall that the manner in which they do so and the

15 Strictly speaking, it is sometimes argued that a voluntarily assumed risk indicates that the injurer was not negligent in carrying out his risky activity. However, if this activity is not unreasonably risky, the invocation of the assumption of risk becomes superfluous — the injurer did not breach the duty of reasonable care. Arguably, this is a better way to approach the landmark case of *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173 (N.Y. 1929) than the one taken by Cardozo. Cf. Kenneth W. Simons, *Murphy v. Steeplechase Amusement Co.: While the Timorous Stay at Home, the Adventurous Ride the Flopper*, in *TORT STORIES* 179 (Robert L. Rabin & Stephen D. Sugarman eds., 2003).

logic they display is qualitatively different. Contributory negligence deals with how well the victim responded to the injurer's breach of the duty of care. Focusing on her conduct, the relevant inquiry pertains to the question of whether the victim failed to exercise reasonable care for her own safety. Assumption of risk, by contrast, focuses on the *deliberate choice* of a victim to encounter an unreasonable risk of harm generated by another person.¹⁶ Accordingly, it does not turn on the reasonableness of the victim's conduct (however reasonableness is measured). This is precisely why a victim may not recover for the materialized risk she assumed *even when* her behavior is faultless.¹⁷

The second doctrinal candidate, the duty of care, provides a more promising foundation for the redundancy of assumption of care. Indeed, judgments grounded in the doctrine of assumption of risk are often presented as, and indeed often taken to be synonymous with, "no duty" rulings, especially in the context of implied primary assumption of risk.¹⁸ There is no coincidence here: as I have argued from the outset, a person who assumes the risk (in the appropriate sense) cannot complain about the resulting harm, since such a harm counts as *damnum absque injuria*. This is so because the assumption of the risk eliminates the wrongful character of the otherwise negligent conduct of the injurer. A "no duty" determination is tort law's official seal with which to announce that the injurer's activity does not constitute a wrong (even when it is harmful and despite being conducted unreasonably). Thus, the argument from redundancy is that the bar to recovery we tend to associate with the assumption of risk doctrine is, in essence, a conclusion reached by way of duty analysis.

16 See, e.g., *Poole v. Cookley & Williams Const., Inc.*, 31 A.3d 212, 226 (Md. 2011); *Hughes v. Omaha Pub. Power Dist.*, 735 N.W.2d 793, 807-08 (Neb. 2007); *Hacking v. Town of Belmont*, 736 A.2d 1229, 1235 (N.H. 1999); see also Dilan A. Esper & Gregory C. Keating, *Abusing "Duty,"* 79 S. CAL. L. REV. 265, 290 (2006) (observing that "[n]egligence law is concerned with carefulness; assumption of risk is concerned with choice").

17 This possibility can be made vividly clear in a case of express assumption of risk — a victim might release the injurer from his duty of care for reasons that are, on balance, reasonable.

18 See, e.g., *Turcotte v. Fell*, 502 N.E.2d 964, 967 (N.Y. 1986); see also Fleming James, Jr., *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185, 187-88 (1968). Although the close connection between assumption of risk and "no duty" is most explicitly noted with respect to primary assumption of risk, I see no principled reason to suppose that the other two categories of assumption of risk (express and implicit secondary assumption of risk) cannot be cast in terms of "no duty." See discussion *infra* note 30.

Make no mistake, the redundancy objection is *not* that talk of assumption of risk is just another doctrinal way to convey a “no duty” judgment. Rather, it is that replacing a concern for duty analysis with a concern for analyzing assumption of risk comes at a cost. The resort to assumption of risk, instead of duty, might obscure, conceal, and even distort the analysis of the relevant considerations that ought to be controlling.¹⁹ To begin with, by asking whether the victim assumed the risk, the court “puts the emphasis in the wrong place.”²⁰ For what is at stake, according to critics, is the activity of the injurer — its value and the (negative and positive) implications of imposing a duty on potential injurers to be vigilant for others’ safety. Of course, the decision of the victim to expose herself to certain risks may be allowed to weigh in the balance of interests at play (in both duty and contributory negligence analysis). However, the assumption of risk doctrine places the *entire* weight on the victim’s willingness to encounter the risk, to the exclusion of the values and other considerations that arise in and around the injurer’s activity.²¹

Moreover, the analysis of the duty element from the perspective of assumption of risk leaves unaddressed many of the considerations that would have been attended to by “proper” duty analysis. This shortcoming need not mean that courts engage in an incomplete inquiry when they decide cases by reference to the assumption of risk doctrine. To the contrary, it means that part of a decision to bar recovery may be grounded in considerations — principles and policies — *other* than those stemming from the assumption of risk doctrine, and that these considerations remain concealed behind the rhetoric of assumption of

19 Another possible worry concerning the deployment of assumption of risk to derive no duty decisions may be linked to the division of labor between the judge and the jury. This worry has been a major motivating force behind the *Third Restatement’s* treatment of the duty element. See W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671, 729 (2008) (noting that “the Third Restatement shares concern about [no duty determinations by courts] because it usurps the jury function”). That said, this worry is merely apparent, rather than real. Even if assumption of risk, like duty, is for the judge to decide, it is still possible, and, indeed, appropriate, to “outsource” questions of fact to the jury. In particular, questions such as whether the risk to which the plaintiff voluntarily exposed herself is inherent in the defendant’s activity can also be determined by the jury. See, e.g., *Scott v. Pac. W. Mountain Resort*, 834 P.2d 6, 12, 14-16 (Wash. 1992) (ruling that the factual question concerning the nature of the risk, whether or not it is inherent in the activity, should be decided by the jury).

20 Stephen D. Sugarman, *Assumption of Risk*, 31 VAL. U. L. REV. 833, 847 (1997).

21 *Id.* at 846-51.

risk.²² As a result, whenever courts deploy assumption of risk to derive a no duty judgment, there is a good chance that some of the considerations that served these courts in reaching (or rejecting) a “no duty” decision are not transparently reported and adequately articulated.

Finally, insofar as “proper” duty analysis focuses on the category of cases in the light of abstract and general principles and policies that apply across particular cases, the doctrine of assumption of risk threatens too much flexibility when used to derive “no duty” judgments. The worry is that considerations of assumption of risk require, to an important extent, case-by-case determinations, in which case duty analysis would leave judges up to their necks in ad hoc crafting of particularistic rules of conduct.²³

2. *Response: Assumption of Risk Is an Especially Interesting Particular Instance of “No Duty”*

From the correct observation that it is intimately connected with duty analysis, it does not follow that the doctrine of assumption of risk must be swallowed up into the ordinary considerations that guide the analysis of the duty element. I shall argue that the assumption of risk doctrine does not lose its distinctive identity even when it is placed, as it were, within duty analysis, for it deals with questions that warrant a separate treatment. As such, reducing assumption of risk to ordinary duty considerations ignores an important vision that underlies the duty analysis — that the object of the duty is not (merely) the physical integrity of the plaintiff, but rather her status as a free and equal person. Assumption of risk is one of those tort doctrines that help sustain this vision.

Consider the following hypothetical. Suppose that you and I participate in the Tel Aviv Marathon. The organizers of the race have decided, partly on the basis of consulting the relevant experts, not to postpone it to another day despite the anticipated heat wave.²⁴ As we approach the starting line, you immediately feel the soaring temperature, but inadvertently fail to give this feeling its due consideration; whereas I don’t feel anything of the kind, perhaps due to the combined effect of being very excited to run my first marathon ever

22 See, e.g., RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 2 cmt. i (2000) (noting that “[o]ne reason courts have rejected the broad doctrine of implied assumption of risk is that it duplicates other doctrines, such as plaintiff’s negligence and the scope of a defendant’s duty”); Sugarman, *supra* note 20, at 846-51; John W. Wade, *The Place of Assumption of Risk in the Law of Negligence*, 22 LA. L. REV. 5, 14 (1961).

23 See Esper & Keating, *supra* note 16, at 272.

24 Of course, this was *not* the actual case in the otherwise tragic 2013 Tel Aviv Marathon.

and trusting the organizers' decision to proceed with the marathon. Like many other participants, both of us do not make it to the finish line due to suffering badly from heatstroke and severe dehydration. It is clear that the organizers' decision to hold the race as planned was inappropriate, failing to display reasonable vigilance for the runners' physical wellbeing. Based on these facts, there will be no difficulty to establish a prima facie case in negligence with respect to the injuries both of us suffered. The only interesting question might be whether, and if so to what extent, your disregard of the weather conditions, and my complete ignorance of the risk, amounts to comparative fault, in which case the damages may be subject to an apportionment of liability.

Now suppose that a third person decides to run the same race, fully aware of the high likelihood that the weather conditions are imminently dangerous (say, she is an Olympic marathoner). This person may be inclined to encounter the risk for any number of reasons. If she has a risk-preferring personality, she may do so for the sake of the danger, say, out of curiosity regarding her body's ability to endure the hot weather. By contrast, she may do so in spite of, rather than for the sake of, the risk, as when she is *desperately* seeking to prove her unusual courage and stamina to herself or to others (such as her over-demanding peers).

Moreover, just as the right resolution of the case does not seem to turn on her being a risk-preferring or a risk-averse person, considerations of fault remain irrelevant. Indeed, running the Tel Aviv race under these circumstances need not always be considered as foolish or otherwise unreasonable. Suppose that another injured runner is in the final stage of inventing a drug that protects the human body from the adverse consequences of exercising under severe weather conditions (and so would be able substantially to improve human welfare across the globe). Additionally, or even independently of that detail, she has an outstanding record of participating in ultra-marathons under extreme conditions, including harsh conditions that far exceed the current conditions. Pursuant to the appropriate balance of the relevant reasons, she decides that participating in the race is, nonetheless, the right thing for her to do under the circumstances.

Now, it seems that, unlike the curious or peer-pressured person from the cases mentioned above, the drug inventor/Olympic marathoner is not straightforwardly unreasonable to behave this way.²⁵ Be that as it may, being reasonable — or, for that matter, unreasonable — should make no difference when determining whether the severe harm she suffered as a result of participating in the Tel Aviv Marathon should be left to lie where it falls. That is, the true ground

25 For a somewhat similar conclusion reached in a slightly different context, see SCANLON, *supra* note 1, at 258-59.

for barring recovery in this case is independent of how well — or how reasonable — she responded to the carelessness of the organizers. Rather, it is that she cannot complain about the harm done to her when it emanates, in the appropriate sense, from her *judgment* to encounter the risk.

The crucial point of this hypothetical is to emphasize that the doctrine of assumption of risk tackles an aspect of the tortious interaction that is otherwise virtually missing from the duty analysis. That is, it casts into sharp relief the notion that the duty of care is ultimately an obligation to take others seriously, and that taking others seriously means, among other things, to respect others as free and equal persons. And to respect others in this way requires that the duty element take into account not just the welfare or interest of these others, but also take seriously that which renders the welfare of others normatively important — that is, the fact that they, taken separately, constitute personhoods.²⁶

Against this backdrop, the risk-assuming *judgment* of the drug inventor, to the extent it is genuinely hers, is the direct manifestation of her constituting a distinctive personhood. In that, the tort doctrine of assumption of risk serves as a check on the duty element to ensure its conformity with the commitment of tort law to regulate human affairs in a way that engenders minimal relations of respect and recognition among compatriots. Therefore, eliminating the doctrine by subsumption into the ordinary duty analysis fails to acknowledge its special place. Indeed, even if the doctrine of assumption of risk is just another instance of making “no duty” determinations, it is, nonetheless, a sufficiently special instance thereof. Once again, its exclusive focus on the judgment of the victim to assume the risk and the conditions under which this choice was made justify its freestanding place among the other doctrines that help courts decide whether a careless actor owed the victim a legal duty to refrain from so acting.

B. An Analytical Objection: “Assumption of Risk” Is Not a Waiver of Liability

1. The Critique

Leading tort scholars and judges in various common law jurisdictions have raised the analytical objection.²⁷ It stems from a distinction between two senses

26 Persons constitute distinctive personhoods in the sense, and to the extent, that they each possess the critical capacity to intend, reason, and judge.

27 See, e.g., *Nettleship v. Weston* [1971] 2 QB 691, 701 (*per* Lord Denning) (noting that “[n]othing will suffice short of an agreement to waive any claim for negligence. The plaintiff must agree, expressly or impliedly, to waive any claim for any injury that may befall him due to the lack of reasonable care by

in which a victim can expose herself to risk for the purpose of invoking the doctrine of assumption of risk: first, a risk of physical injury; and second, a risk of bearing the entire financial burden of the physical injury. The objection is that the first sense of risk-assuming cannot entail the inference that the victim is thereby barred from recovery (not even a partial recovery). Assuming the risk of physical injury is just that. A person who assumes such a risk does not thereby lay down her right to raise her grievance at court by seeking the rectification of the loss suffered.

This objection can be viewed as merely offering a reinterpretation of the existing doctrine. However, if successful, much of what we know about the doctrine must be thrown out, in which case the objection in question does offer a reinterpretation, but a radical one at that.²⁸ Indeed, it is better to read this objection as an attempt to show that the *only* valid way for a victim to have the negligent injurer released from tort liability is by forming an explicit or implicit agreement to waive the right to seek redress. Thus, it is never enough for the victim voluntarily to encounter the risk created by a careless person; she must assume the *different* risk of not having a right to seek redress for the physical harm done through the carelessness of another.

Thus, the analytical objection seeks to show that even if it could overcome the redundancy objection, assumption of risk is deeply incoherent unless it is reduced to the general proposition that parties to a contract are free to

the defendant.”); *see also* Car & Gen. Ins. Corp. v. Seymour [1956] S.C.R. 322, 2 D.L.R. (2d) 369 (same); C.A. 1354/97 Akasha v. State of Israel 59(3) PD 193, 203-04 [2004] (*per* Barak CJ) (observing that the defense of assumption of risk turns on the explicit or implicit consent of the plaintiff to waive his right to seek legal redress); GLANVILLE L. WILLIAMS, *JOINT TORTS AND CONTRIBUTORY NEGLIGENCE* 308 (1951); Jason M. Solomon, *Judging Plaintiffs*, 60 VAND. L. REV. 1749, 1770 n.109 (2007) (same); Sugarman, *supra* note 20, at 834 (distinguishing between “consent to the physical injury” and “consent to the legal injury,” urging that by giving the former consent, one does not thereby give the latter).

28 This “reinterpretation” is broad enough to capture even cases of express assumption of risk insofar as the victim agrees to waive the duty of care owed her by the injurer. To count as a valid invocation of the doctrine, the victim must waive her right to file a suit, rather than to have the injurer exercise due care toward her. The two other forms of assumption of risk, primary and secondary implicit assumption of risk, would also need to conform to the analytical objection. They, too, would be reduced to instances where the victim gives her consent to surrender her right to seek compensation, rather than be protected from being exposed to unreasonable risk creation.

design their mutual rights and obligations and that this freedom overrides, to an important extent, the demands of tort law.²⁹

2. *Response: Filling the Analytical Gap*

Before I take up the analytical objection, it will be apt to draw a distinction between two notions of “risk of physical injury” to which the assumption of risk doctrine may refer: mere risk, on the one hand, and unreasonable risk, on the other. By using the road, we all assume some risk of physical harm that might be caused by other motorists and pedestrians. But this way of describing our dispositions toward our fellow travelers may be misleading if it is meant as an allusion to the doctrine of assumption of *risk*. For all we typically assume under these circumstances is mere risk, that is, the reasonable risk that we must inevitably bear when acting in the proximity of others. And there is no point to a doctrine of assumption of risk in this case, since there is no duty in negligence law to refrain from creating reasonable risk to begin with. Thus, whenever the doctrine of assumption of risk is invoked, it must be the case that one who assumes a risk of physical injury undertakes to encounter an *unreasonable* risk of such injury. With this clarification at hand, I shall seek to respond to the analytical objection’s attempt to drive a wedge between assuming (unreasonable) risk of physical injury and assuming the risk of bearing the financial burden of a non-redressable injury.

The analytical objection fails. The source of the failure is that advocates of this objection overlook the structure of the *prima facie* case of negligence (or, for that matter, torts more generally). In particular, they fail to see that one who voluntarily assumes the risk of another’s breach of the duty of care cannot retain any tort-based right of action against the negligent injurer. If no duty of care is owed to the victim as a result of choosing to encounter the risk of the duty’s violation, no *prima facie* case of negligence can be stated successfully and, as a result, the victim cannot bring a suit in negligence against the careless injurer.

To forestall misunderstandings, my argument is *not* that signing a liability waiver cannot be sufficient to bar the tort recovery of the victim. Rather, it is that this way of “assuming the risk” — an express assumption of risk — is not unique or otherwise necessary, since it does not exhaust other ways in which one cannot complain about a harmful state to which one has willingly

29 There are limits to freedom of contract, to be sure. However, the point of the argument in the main text above is that the analytical objection presents the notion of assumption of risk as just another possible iteration on the (non-absolute) freedom of parties to a contract to fix the content of their interaction.

exposed oneself, including through exposure to the unreasonable risk of physical injury.

Indeed, the assumption of risk doctrine operates on the correlativity of the right to safety held by a potential victim and the duty of care owed to her by the potential injurer. To the extent she knowingly and voluntarily decides to put up with another person's disregard of the duty to exercise reasonable care, the victim cannot complain on the basis of that right about being wronged, rather than harmed.³⁰ Note that the right to seek redress in a court of law does not enter the analysis yet; the duty of care's correlative right is conceptually, normatively, and doctrinally prior to it.³¹

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- 30 The right/duty correlativity that is key to understanding how the assumption of risk doctrine operates reinforces the view, presented above, that this doctrine forms a particularly special instance of "no duty" determinations. This showing also allows us to see why civil recourse theorists are wrong to reject the strong connection between the doctrine in question and the duty of care, emphasizing, instead, the arguably strong relation between this doctrine and the right to seek legal redress. See John C.P. Goldberg & Benjamin C. Zipursky, *Shielding Duty: How Attending to Assumption of Risk, Attractive Nuisance, and Other "Quaint" Doctrines Can Improve Decisionmaking in Negligence Cases*, 79 S. CAL. L. REV. 329, 344 (2006). Goldberg and Zipursky's objection to the association of assumption of risk with "no duty" is also belied by the analogy they use to clarify their argument. They argue that

[a]nalogous to the defense of implied consent to torts such as battery, implied assumption of risk . . . concerns whether the plaintiff has done something that undermines her entitlement to complain about the defendant's conduct, not whether the defendant was under an obligation to take care to avoid injuring a person such as the plaintiff, or whether that obligation was breached.

Id. The analogy to battery only reinforces my argument — that assumption of risk is a ground for "no duty" determination — because consent to "battery" vitiates the tortious aspect of the defendant's act, rather than merely disempowers the plaintiff from suing the defendant for the breach of a standing duty. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 113 (5th ed. 1984).

- 31 It is important to note that my response to the analytical objection does not turn on any particular view of the content of the duty of care. Advocates of the objection probably conceive of the duty as a requirement to discharge reasonable care. Lawyer economists, however, believe that the duty contains a disjunctive obligation, according to which risk-creators can either exercise due care or pay for the loss suffered through their lack of care. On this view, the duty of care is akin to a liability rule. As just mentioned, my response can accommodate this view of the duty's content as well. Recall the case of the marathon. The Olympic runner, as we have seen, assumes the risk and, therefore, cannot complain if

III. THE DEEP SOURCE OF THE HOSTILITY TOWARD THE ASSUMPTION OF RISK DOCTRINE

A. Assumption of Risk and Tort Law's *Laissez-Faire* Aspirations

While the two doctrinal objections discussed above do not support the case for abolishing a freestanding doctrine of assumption of risk, the motivating force behind them may remain alive and (arguably) well. It is that the doctrine of assumption of risk threatens too much libertarianism and too little fairness (broadly defined to capture concerns for the dignity and welfare of each and every individual person). To be sure, this is not a doctrinally-oriented objection to the doctrine; instead, it stems from a deeper suspicion that the law's preference for the doctrine exacerbates, reinforces, or merely licenses the status quo.

In fact, the worry is twofold. First, that a vigorously enforced doctrine of assumption of risk forestalls a state's *public* law efforts to take aggressive action against the risks that, in the context of tort law litigation, are said to be assumed by the plaintiffs. For instance, the prominence in which this doctrine figures in public debates over the best legal response to the problem of obesity might control not only the question of what tort law can do about it, but rather what the law — including policymaking at the level of public law — should do about it.³² Very loosely speaking, this worry suggests that the assumption

the risk she voluntarily encounters materializes into physical harm. The act of forfeiting her right to reasonable safety means that the careless organizers are relieved of their correlative duty of care. Hence, insofar as the case would be resolved on “no duty” grounds, it does not matter whether or not the duty's content is disjunctive. This last duty-related question (concerning the content of the duty) does not arise where none exists. To be sure, I reject the disjunctive picture of the duty's content. It may be the most economically attractive way to reconstruct the “duty,” but in my view it is not an accurate account of the common law duty of care or of the idea of legal duty, more generally. It is beyond the purpose of the present argument to take stock of the economic picture of the duty's content. Suffice it to say at this stage that viewing the duty as a liability rule is inconsistent with the availability of punitive damages for injurers who *self-consciously* seek to convert the obligation to discharge due care into a duty to pay money damages for the harm done. *Punitive* damages, it is worth emphasizing, are a special form of injunctive relief granted *ex post*, which is another way to say that the duty of care is not a liability rule *simpliciter*.

32 In this respect, it is interesting to note the outpouring of state legislations of “commonsense consumption” laws whose point is to prevent obesity-based suits from reaching past the summary judgment stage. See JEFFREY LEVI ET AL., *F AS IN FAT: HOW OBESITY THREATENS AMERICA'S FUTURE* 47 (2010) (reporting that,

of risk doctrine might generate a sort of reverse-side preemption mechanism whereby private law becomes the primary (if not exclusive) legal response to public risks associated with obesity and junk food consumption.³³

And second, the worry is that, in addition to the state's reluctance to intervene with individual persons' choices through public-law initiatives, the doctrine of assumption of risk exerts pressure toward overstretching the value of personal responsibility to the point of betraying the basic commitment to the equal concern and respect for persons, taken separately. The regressive application of the assumption of risk doctrine during the nineteenth and early twentieth centuries is perhaps an extreme demonstration of overstretching, though other, small-scale instances of enforcing the doctrine may be sufficient to support the suspicion that too narrow a focus on the plaintiff's responsibility for her "choice" would, in fact, launder basic fairness concerns.

The two worries concerning the assumption of risk doctrine are intimately connected because both are surface manifestations of a *laissez-faire* vision of the state. The first worry corresponds to the *laissez-faire* vision of the expansive role that private law plays in the law's overall effort to regulate the conflicting choices and interests of persons.³⁴ The second worry corresponds to the *laissez-faire* vision of what private law is or, rather, what private law's underlying conception of personal responsibility is.

B. The Difference That a Liberal Account of Assumption of Risk Could Make: Changing the Question at Stake

These worries, it is important to note, persist even if the redundancy and analytical objections have been rejected. Addressing them is particularly important because the notion of assumption of risk — both the moral principle and the legal doctrine — figures prominently in public and legal debates that span a wide range of health and safety issues (such as obesity and tobacco).³⁵

as of 2010, twenty four states have passed commonsense consumption laws, in effect barring tort liability in the context of obesity lawsuits).

33 By *reverse side preemption mechanism* I mean to acknowledge the imperfect allusion to the preemption doctrine characteristic of certain federal governments (such as the U.S. government). The preemption I am interested in applies to the distinction between state private law, on the one hand, and state and federal public law, on the other.

34 By *expansive* private law I mean broad presumptive force to freedom of contract and private ownership which, in turn, serves to render legitimate the redistribution of resources through economic markets.

35 In a recent study, Eric Feldman and Alison Stein have found that sheer politics (including group interests and other forms of political pressure on courts and

It purports to exert pressure not only at the tort law level. This notion, recall, has strong roots in our everyday morality, in which case its influence is likely to be felt beyond tort law to capture other instances of active government intervention in markets (such as the market for food consumption). Indeed, the controlling sentiment among opponents of government intervention in matters of public health, such as obesity, is influenced at almost every turn by a commitment to the moral principle of assumption of risk.³⁶

Another way to make this point is to say that the *laissez-faire* approach that prevailed in assumption of risk cases (as well as in other contexts, such as the infamous *Lochner* case³⁷) during the nineteenth and early twentieth centuries was *not* merely a mistaken (or biased) application of the libertarian philosophy to the area of industrial accidents. Rather, it was — and, as just mentioned, still is — an expression of an ideal of formal equality of opportunity that animates the libertarian theory of justice.³⁸ I do not suppose that every self-identified libertarian endorses this theory, including its implications for the doctrine of assumption of risk. It is sufficient to note, as I just did, that the discussion of the *laissez-faire* approach in these pages does not create a straw man out of the past and present libertarian outlook.

Accordingly, it seems very difficult to make a convincing case for enlisting the law in general, and tort law in particular, in the service of bringing about social change in these matters without invoking the notion of assumption of risk.³⁹ That is, the challenge for those seeking to invoke the law to make our society healthier and safer *for all* is to engage, rather than dismiss or ignore, the conservative instinct for the assumption of risk (moral) principle and

legislatures) cannot fully account for the development of the assumption of risk doctrine. See Eric A. Feldman & Alison Stein, *Assuming the Risk: Tort Law, Policy, and Politics on the Slippery Slopes*, 59 DEPAUL L. REV. 259 (2010). As I mention in the main text, it is possible to explain this finding by reference to the moral, legal, and philosophical debates surrounding the notion of assumption of risk in tort law and beyond.

36 See, e.g., Richard A. Epstein, *What (Not) to Do About Obesity: A Moderate Aristotelian Answer*, 93 GEO. L.J. 1361, 1384 (2005); Thomas J. Philipson & Richard A. Posner, *Is the Obesity Epidemic a Public Health Problem?*, 46 J. ECON. LITERATURE 974, 981 (2008).

37 *Lochner v. New York*, 198 U.S. 45 (1905).

38 The *locus classicus* is ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

39 The prominence of the notion of assumption of risk has been observed in the case of tobacco litigation as well. See, e.g., Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163, 1183-86, 1319 (1998).

(legal) doctrine.⁴⁰ Hence, the challenge is to either defeat or substantially weaken the assumption-of-risk-based argument against legal intervention *on its own grounds*. Thus, whereas friends of the *laissez-faire* approach suppose that the argument from assumption of risk produces an “airtight”⁴¹ case against introducing tort liability for harms (arguably) caused by junk food consumption, liberal egalitarians should be able to show, negatively, that assumption of risk does not entail this outcome and, positively, that a better reconstruction of assumption of risk may support a more affirmative role for legal regulation (in the form of either public or private law, or both).⁴²

In the case of obesity, the prominence of this task becomes especially critical since the economic argument for or against government intervention happens to turn on whether obesity *in fact* creates externalities. That is, the economic case rests on the empirical question whether or not obesity increases overall spending. The suspicion (already familiar from the tobacco context⁴³) is that the saving it produces — decreasing spending on Social Security and other pension payouts — may offset the medical costs associated with obesity.⁴⁴ Of course, it may well be the case that the overall social costs of obesity are positive. However, the important point is that an economic argument for active government intervention is purely contingent on factual assessments, not on any principled objection to the deteriorating *health* of the many.⁴⁵

40 There is another important aspect to this. The public and legal debates concerning the role of the state and of tort law, in particular, are effectively integrated in the case of the juries who are, at the same time, both private citizens and holders of a legal office.

41 Epstein, *supra* note 36, at 1384.

42 Let me emphasize that I am not seeking to advance a rhetorical gambit here. Rather, my argument is that the debate over the desirability of legal regulation of some risky activities, such as the consumption of junk food, is, in part, a moral debate concerning the right interpretation of the notion of assumption of risk and its appropriate place in the law, tort law included.

43 See WILLARD G. MANNING ET AL., *THE COSTS OF POOR HEALTH HABITS* (1991); W. KIP VISCUSI, *SMOKING: MAKING THE RISKY DECISION* (1992). *But see* Hanson & Logue, *supra* note 39, at 1354-61.

44 The thought is that higher-than-average mortality rates could save society the retirement benefits of those obese people who tend to die earlier. See Philipson & Posner, *supra* note 36 at 978; Katherine Pratt, *A Constructive Critique of Public Health Arguments for Antiobesity Soda Taxes and Food Taxes*, 87 *TUL. L. REV.* 73, 79-87 (2012).

45 Unsurprisingly, the economic argument grounds its recommendations in notions of welfare, rather than health (which is but one ingredient among many in society’s as well as the individual’s welfare function).

But here is the rub. The absence of a straightforward economic case for active government intervention in connection with obesity might leave critics of the *laissez-faire* conception of assumption of risk in a rather weak position. Unable to engage the conservative on her own assumption-of-risk court, the critics are left with saving obese (or potentially obese) people from themselves as the main argument in their arsenal. It is against this backdrop that liberals pursue two main alternative strategies. The first is to deny the relevance of moral concepts such as responsibility and choice to the proper resolution of public health issues⁴⁶ — casting the phenomenon of obesity in terms of an *epidemic* clearly illustrates this strategy.⁴⁷ The second emphasizes that many individuals are afflicted with irrational impulses and other forms of systematic bias (such as the “present bias”) that distort the decisions *they would have made* save for their imperfections.⁴⁸ On this strategy, choice and personal responsibility can bear on the resolution of public health concerns, but only insofar, and only because, free choice is defined in terms of rational choice, which is vividly illustrated by advocates of this strategy styling themselves libertarian paternalists.⁴⁹

Whereas both strategies are good as far as they go, they do not go far enough to question the strict association of choice and personal responsibility with the *laissez-faire* conception of assumption of risk.⁵⁰ The liberal conception of assumption of risk that I shall develop presently aspires to do just that. That is, it will reject the libertarian account of choice and responsibility by offering a better understanding of these notions in a way that does not rest on (hard or soft) paternalism.⁵¹ To this extent, the distinctive contribution of the liberal conception of assumption of risk is in shifting the focus of the debate from mere choice versus paternalism to the different question concerning the

46 See, e.g., SARAH CONLY, *AGAINST AUTONOMY: JUSTIFYING COERCIVE PATERNALISM* (2013).

47 For a critique of the new public health approach on this (and other) point, see Richard A. Epstein, *Let the Shoemaker Stick to His Last: A Defense of the “Old Public Health,”* 46 *PERSP. BIOLOGY & MED.* S138, S154 (2003).

48 See generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008); M. Gregg Bloche, *Obesity and the Struggle Within Ourselves*, 93 *GEO. L.J.* 1335, 1345-46 (2005).

49 See, e.g., Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 *U. CHIC. L. REV.* 1159 (2003).

50 For a recent attempt that goes in the general direction that I shall defend, see Kelly D. Brownell et al., *Personal Responsibility and Obesity: A Constructive Approach to a Controversial Issue*, 29 *HEALTH AFF.* 379 (2010).

51 Of course, the liberal account of assumption of risk need not oppose various paternalistic policies. The point, however, is that it does not depend on them.

conditions under which making a choice justifies the attribution of the entire responsibility to the choosing person.

The argument going forward, therefore, seeks to make the first couple of steps in this direction. I shall show that nothing in the notion of assumption of risk entails the libertarian picture of the law as reflected in the two worries discussed above. Moreover, I shall argue that a liberal conception of assumption of risk makes better sense of the connection between freedom and personal responsibility that animates much of the debate about the role of the law in tackling new health and safety issues.

IV. TOWARD A LIBERAL ACCOUNT OF ASSUMPTION OF RISK

A. Why Can and Should the *Laissez-Faire* Account of the Assumption of Risk Doctrine Be Resisted?

In this Section, I shall seek to exploit an embarrassing period from the history of the doctrine of assumption of risk to show why a *laissez-faire* account of this doctrine fails to settle a reflective equilibrium between its organizing idea and our considered judgments about the significance of choice to attributing responsibility.⁵² This account is wanting, I shall argue, since it focuses almost exclusively on the *fact* of individual choice, but overlooks the circumstances under which a choice is made. This missing element motivates the introduction of a liberal account of the assumption of risk doctrine. On this latter account, attributing personal responsibility for one's choice is apt not merely because the decision to encounter the risk was voluntary and sufficiently informed, but also because it was made under conditions of fairness. Or so I shall argue.

To fix ideas, consider *Lamson v. American Axe & Tool Co.*⁵³ In this familiar case, Holmes, who was at that time the Chief Justice of the Supreme Judicial Court of Massachusetts, held that an employee is barred from recovering for the harm suffered when a hatchet from a defective rack fell on him.⁵⁴ The outcome is grounded in the conscious choice of the employee — in particular, the employee alerted his employer to the defective rack, but decided to remain

52 “Reflective equilibrium” represents a method of articulating a moral justification that aims at reconciling our considered judgments about the particulars with general principles (and vice versa). See JOHN RAWLS, *A THEORY OF JUSTICE* 48-51 (1971).

53 *Lamson v. Am. Axe & Tool Co.*, 177 Mass. 144, 58 N.E. 585 (Mass. 1900).

54 Strictly speaking, the suit was brought under the Massachusetts Employers' Liability Act. That said, the court incorporated the common law doctrine of assumption of risk into this Act's scheme.

at work after the employer responded with an either/or option, that is, use the racks as they are or simply leave.⁵⁵ It is hard to doubt the existence of the choice to remain at work, which is to say the conscious decision to “assume” the risk. But what this case illustrates vividly is that the fact of making a choice may not be able to bear the heavy burden of *justifying* the outcome: that of releasing the employer from its duty to exercise care, which is another way to say holding the employee responsible for his own injury.

Indeed, a successful theory of the doctrine in question must account for the failure of Anglo-American courts during the nineteenth and early twentieth centuries to reject the proposition that employees typically assumed the risk of work-related injuries. Operating under the sway of the *laissez-faire* conception of assumption of risk, these courts reduced the question of responsibility to a factual question about the existence of a choice, one which is manifested in the fact of a bargain over two modes of compensation, higher wages or greater safety.⁵⁶ One familiar line of criticism of this *laissez-faire* approach is to say that the employee’s choice is not sufficiently voluntary. But as mentioned above, this criticism is bound to fail if it confronts the *laissez-faire* account on the factual question of choice. The difficulty, rather, is that consent may not be enough to justify the attribution of personal responsibility for the materialization of the risk to which the employee gave her consent.⁵⁷

Indeed, a plausible account must be able to explain why the existence of a conscious choice — to enter an employment contract in the first place or to carry on with the work in the face of a known risk — may be necessary, but not sufficient to trigger the defense of assumption of risk.⁵⁸ In other words,

55 *Lamson*, 58 N.E. at 585-86.

56 This is most eloquently expressed in Lord Bramwell’s dissent in *Smith v. Baker & Sons*, [1891] A.C. 325, 344 (H.L.).

57 This proposition is familiar from other contexts. For instance, a minor’s consent to a sexual relationship may not protect the other party from certain criminal allegations. The reason does not pertain to the fact of consent, but rather to the background conditions — in this case, the age — that vitiate the moral significance of consent.

58 The proposed liberal reconstruction of the assumption of risk doctrine begins with the same observation from which Thomas Scanlon develops his account of the morality of the assumption of risk doctrine (especially, though not exclusively, in and around the institution of criminal punishment). Scanlon observes that, contrary to what he calls the Forfeiture View, a conscious choice to assume a given risk is not sufficient to justify holding the choosing person responsible for the adverse consequences. An additional element is the conditions under which the choice is made. See SCANLON, *supra* note 1, at 259. The Forfeiture View is defended in Nino, *supra* note 1. My account departs from Scanlon’s,

what makes the *laissez-faire* account of assumption of risk inadequate is that it rests on the notion that the doctrine should only concern itself with the *formal freedom to enter in, or exit from, a potentially risky state of affairs*.

A better account of assumption of risk must insist that in order for the exercise of formal freedom to *justify* the shifting of responsibility from the negligent injurer to the victim, the latter must be acting under conditions that render thus shifting fair.⁵⁹ Of course, what counts as fair in general and in any particular case poses a difficult set of questions — as always, there will be some hard cases (on which more below) along with easy ones (such as in the typical case of industrial accident then and, probably, now or in cases of inherently risky recreational activities).⁶⁰ At any rate, however, the insistence on fairness is in and of itself significant. This is because it allows us to see that the important questions are *normative* rather than merely *causal*. The focus is on questions such as what fairness consists of, rather than on whether one consciously chose to effect a tradeoff between different modes of compensation by entering/exiting a given state of affairs.⁶¹ And the move

however, as soon as he proceeds from this correct observation — that choice is not sufficient — to claiming that choice is not even necessary for the purpose of the assumption of risk doctrine. This turn of his prevents the approach he advances from qualifying as an account of assumption of risk properly so-called. In the absence of an element of conscious choice, the case for attributing personal responsibility to one who inadvertently encounters a risk fails to render sufficiently precise the distinction between comparative fault and assumption of risk. This failure is clearly seen in one of Scanlon's core cases (which is, to me, a paradigmatic instance of comparative fault) — a person who was adequately informed of an ultrahazardous area located outside the city but, nonetheless, “simply forgot” about it. SCANLON, *supra* note 1, at 259.

- 59 Formal freedom includes some, minimal reference to notions of fairness, especially to fraud and duress, but it makes no room for thicker considerations of fairness and, indeed, substantive equality.
- 60 By saying that industrial accidents are *typically* easy cases I explicitly acknowledge circumstances under which barring the recovery of the victim may be compatible with the demands of fairness. Arguably, this is illustrated in *Monk v. Virgin Is. Water & Power Auth.*, 53 F.3d 1381 (3d Cir. 1995). At any rate, the introduction of Workers' Compensation Acts has made this traditional area of tort claims nearly (but not absolutely) obsolete in many Western jurisdictions.
- 61 See Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899, 912 (1994) (observing, with respect to implied assumption of risk, that the “doctrine is shaped by evolving social norms concerning fundamental issues of morality: the meaning of fairness, reciprocity in relationships, the extent of free will, individual responsibility for choice, and the like”). Moreover, the focus on causal considerations in connection with the assumption of risk doctrine invites

from the causal to the normative at the very least creates the opening for the development of a liberal account of assumption of risk.

B. The Liberal Conception of Assumption of Risk: An Overview of Its Theoretical Framework

The most dramatic break from the *laissez-faire* conception of assumption of risk that the liberal conception purports to make lies in integrating concerns for equality in the assessment of the conscious decision of the victim to encounter a risk. This integration will not make much of a difference in some cases, as when the liberal and the *laissez-faire* conceptions of the doctrine point toward the same conclusion. Certain recreational activities illustrate this overlap — worries regarding the fair conditions under which skydivers typically make a conscious decision to assume the risk are quite trivial. In certain other activities, the question of background conditions of fairness seems wholly irrelevant to whether or not the victim has acted in a way that justifies barring her recovery for the harm caused by the carelessness of another. The hypothetical case of the marathon mentioned above exemplifies this possibility — that is, the attribution of responsibility for the deliberate decision of the Olympic athlete to run the marathon does not turn in any important sense on inequality or unfair conditions against which the choice is made.

But the happy convergence between the liberal and the *laissez-faire* conceptions is coincidental. As a result, they may pull in different directions. The historical example of industrial accidents is one case in point; and as I shall seek to suggest presently, approaching the case of junk food consumption from the perspective of the liberal, rather than the *laissez-faire*, conception of assumption of risk can raise important considerations of fairness.

Any attempt to reconstruct a liberal conception of assumption of risk must begin by presenting the theoretical framework that underlies the thought that only the combination of conscious choice *and* background conditions can justify releasing the careless injurer from his duty to exercise due care. The mainstream liberal framework gives rise to a moral division of labor between the state and the individual.⁶² Roughly speaking, the division casts the responsibility of the state for the provision of the background conditions

daunting metaphysical questions concerning freedom of will. Cf. G.A. Cohen, *On the Currency of Egalitarian Justice*, 99 *ETHICS* 906, 934 (1989).

62 See RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 290-91 (2011); RONALD DWORKIN, *LAW'S EMPIRE* 295 (1986); ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* ch. 9 (1999); John Rawls, *Social Unity and Primary Goods*, in *UTILITARIANISM AND BEYOND* 159 (Amartya Sen & Bernard Williams eds., 1982); Arthur Ripstein,

that are necessary for individuals to set and pursue their plans according to their respective conceptions of the good life. On this framework, the state sets out institutions that seek to neutralize, to the desirable extent, the fortunes and misfortunes that befall each person so as to reduce morally arbitrary circumstances such as physical disability or being born to an extremely rich family.⁶³ This commitment on the part of the state rejects pre-political or pre-institutional notions of desert: a person is not held responsible for the causal upshots of her choices because the natural faculty of choice does not manifest itself in the world completely separately from unchosen circumstances (such as certain personal traits or undeserved economic conditions).⁶⁴ Instead, responsibility can be appropriately attached to persons against the background of political institutions that have already provided these persons with their fair share of certain goods (whatever they consist of).⁶⁵ The ideal liberal state, in other words, delineates a starting point of fairness (whatever it is) from which voluntary choice could trigger responsibility that is not arbitrary from a moral point of view. To this extent, the notion of personal responsibility that figures in the liberal theoretical framework cannot be fully specified apart from the existence and operation of state institutions.

To be sure, no one should insist that unless the *actual* state fully accomplishes the liberal egalitarian *ideal*, personal responsibility is intelligible. Rather, the point is that, negatively, our personal responsibility is no mere extension of the responsibility that we would have, if at all, in a state of nature. And affirmatively, personal responsibility is a regulative ideal of a society of free and equal persons to which both the liberal-egalitarian state and its constituents must simultaneously aspire.

The Division of Responsibility and the Law of Tort, 72 *FORDHAM L. REV.* 1811 (2004).

63 For discussion of some necessary limitations on the neutralization efforts, see Elizabeth Anderson, *What Is the Point of Equality?*, 109 *ETHICS* 287 (1999).

64 See Samuel Scheffler, *What Is Egalitarianism?*, 31 *PHIL. & PUB. AFF.* 5, 17-18 (2003) (criticizing luck-egalitarianism for attempting to ground state commitment to distributive justice in a causal, and hence naturalistic, distinction between choice and circumstances).

65 The most familiar elaboration of these goods, social primary goods, remains RAWLS, *supra* note 52, at 90-95. Although Rawls provides the right form of argument for their necessity, these goods have been subject to powerful objections on the merits — such as the individualistic bias that underlies his articulation of these goods. See Thomas Nagel, *Rawls on Justice*, in *READING RAWLS* 1 (Norman Daniels ed., 1975). There are, of course, other approaches to deriving an adequate list of these goods (such as the capabilities approach developed by Amartya Sen and further elaborated by Martha Nussbaum).

C. A Liberal Account of Assumption of Risk: Outline of the Doctrinal Structure

My ambition is to sketch the doctrinal structure within which policymakers and courts could determine whether it is appropriate to hold responsible one whose injury is a result of encountering a known risk. The proposed structure does *not* seek to elicit the answers, but rather the questions that ought to be raised in order to get at the right answers about the connection between a voluntary act of encountering a risk and the attribution of personal responsibility for so acting. It emphasizes that the fact of informed and voluntary choice does not exhaust the assessment of personal responsibility as captured by the notion of assumption of risk, properly conceived.

On my proposed account, there are four sets of considerations that, together, inform the doctrinal structure of assumption of risk: attitude-, epistemic-, action-, and fairness-based considerations. I take each in turn, discussing very briefly those considerations that have already been studied in more detail above and elsewhere.

1. Attitudinal Considerations: Risk-Preferring and the Right to Exit

Although on the proposed account the fact of making a conscious decision to encounter a known risk is not sufficient to justify attributing the entire responsibility to the victim, there arises one important exception. A person whose motivation to engage in an unreasonably risky activity arises, in some nontrivial measure, from being exposed to such risk cannot complain if it materializes. The crucial distinction is between putting oneself in a dangerous state *for the sake* of the risk as opposed to doing so *in spite* of the risk. Thus, unlike an employee who decides to keep her job despite a known risk, a person who knowingly and voluntarily crosses through an otherwise negligently marked area of landmines in order to get a sense of what it is like to be there can be said to assume the risk (in the right sense).

Indeed, considerations pertaining to fairness and requisite background conditions seem wholly irrelevant to the normative assessment of the choice in question.⁶⁶ After all, being put in an unreasonable risk is the point of the decision to enter the area, rather than a regrettable side effect thereof. As with many right-based approaches,⁶⁷ and subject to familiar side-constraints such

66 This is perhaps best illustrated in assumption of risk's logical extremes — suicide and euthanasia in the face of guardians who are duty-bound to protect the safety of another.

67 Arguably, not all rights-based approaches (to assumption of risk or to tort law, in general) can make sufficient space for a genuine desire to assume a risk (for its

as the harm principle or injustice, the liberal account of assumption of risk must and should accommodate the basic liberty of any person to pursue her preferred heterodox conception of the good.⁶⁸

2. Epistemic Considerations

Setting aside cases in which risk is encountered for its own sake, a decision to assume risk must be sufficiently informed with respect to the nature of the risk (such as its potential magnitude and the probability of materializing into harm).⁶⁹ In particular, the relevant information must not be misleading, let

own sake). This suspicion arises in connection with the modern Kantian theory of tort law. In short, the Kantian commitment to a natural, innate right to freedom might be undermined by seriously risking one's physical integrity which is, for Kant, the locus of self-determining agency. For a careful discussion of this point, see ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* 126-43 (2009).

68 The liberal justification in the main text above can also be partially reinforced by the economic analysis of the assumption of risk doctrine. Insofar as the Hand Formula assumes risk neutrality, there arises the problem that the level of due care that a tortfeasor would owe risk-preferring victims might be excessively higher than the optimal one. The assumption of risk doctrine, because it extinguishes tort liability for risk-preferring victims, operates to alleviate this problem at least in some cases. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 176 (7th ed. 2007). That said, the overlap between the liberal and the economic justifications is partial in a way that highlights the deontological foundations of the former. In some cases the liberal, but not the economic, account could rule out recovery on assumption-of-risk grounds. In fact, the hypothetical case of the Tel Aviv marathon mentioned above illustrates this point. As stipulated above, there was a breach of the duty of care owed by the marathon's organizers to the participants — this determination is warranted from a cost-benefit analysis, taking into account the expected loss of the entire body of participants. I have also assumed that in the face of this state of affairs, the drug inventor/Olympic marathoner made a reasonable decision to proceed with the race, despite (and not necessarily for the sake of) the risk. Thus, there is no comparative fault on the part of this participant. Against this backdrop, there may be good economic reasons to hold the organizers liable for her injury, not necessarily by imposing a duty to make her whole, but also by imposing a fine or through any other way that could force the organizers to internalize the social costs of their negligent decision to proceed with the race as usual. On the liberal account, by contrast, there are good reasons not to hold the organizers liable despite their negligence. See *supra* text accompanying notes 26-27.

69 See also Schuck, *supra* note 61, at 912.

alone fraudulent; in addition, it must be sufficiently transparent with respect to the unreasonable risk of harm the would-be victim is about to assume.

In order not to confuse assumption of risk — which rests on the victim's deliberate choice to encounter a risk — with contributory fault — which rests on the victim's failure to respond reasonably to such risk — considerations of knowledge and appreciation of the risk must not extend to capturing the victim's failure to make a reasonable effort to acquire the necessary information.⁷⁰ The question, instead, is whether the victim already possesses the requisite information in order to deliberate whether to assume a risk of which she is fully aware. Otherwise, the real grounds for attributing responsibility to victims on the theory of assumption of risk may not remain that of making a *choice* under the appropriate backdrop conditions. It would rather be supplemented, or perhaps even supplanted, by that of *not doing reasonably enough* to make an informed decision.⁷¹

3. Activity Considerations

Another way to understand the flaw in the *laissez-faire* account that figured in the nineteenth and early twentieth centuries is by noting its indifference to the distinction between work and recreational activities. That is, the kind of activity over which victims are said to assume the risk does not play an important role in the resolution of the particular case. From a liberal perspective, however, there is an important difference whether a person is willing knowingly to take risks in connection with earning a living in the steel industry, on the one hand, or in connection with snowboarding the exciting slopes of the Rockies, on the other. The difference does not turn on preferences, to be sure.⁷² Rather, it stems from a *thin* theory of the good. The

70 See, e.g., *Poole v. Cookley & Williams Const., Inc.*, 31 A.3d 212, 226 (Md. 2011); *Hacking v. Town of Belmont*, 736 A.2d 1229, 1235 (N.H. 1999). For more on the requirement that the victim be subjectively aware of the specific risk, see Kenneth W. Simons, *Reflections on Assumption of Risk*, 50 UCLA L. REV. 481, 485 (2002).

71 This is why on the economic analysis of assumption of risk, the distinction between knowing and not knowing about the existence of a particular risk plays no independent role in the assessment of a victim's liability. The only live question becomes whether the victim is the cheapest cost avoider. See Keith N. Hylton, *Tort Duties of Landowners: A Positive Theory*, 44 WAKE FOREST L. REV. 1049, 1063 (2009).

72 To this extent, my proposed reconstruction of the assumption of risk doctrine is very different from the preference-based account developed in Kenneth W. Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U. L. REV. 213 (1987); and in Simons, *supra* note 70.

underlying idea of this theory is that there exist certain “bare essentials” that every member of the community ought to have equal access to, no matter what (thick) conception of the good he or she happens to affirm.⁷³ There is a lively debate over what goods count as bare essentials. It is beyond the scope of the present argument to divine the list of these goods. Instead, I shall offer very preliminary and intuitive observations.

For the purpose of reconstructing the assumption of risk doctrine, it is apt to draw attention to the existence of a continuum, ranging from the utmost essentials to the most repugnant activities. Thus, activities necessary for human survival, such as consuming food and heat during the winter, capture the very core of the class of bare essentials. By contrast, many criminal activities occupy the opposite end of the continuum. Both work and recreational activities lie somewhere in-between food consumption and criminal activity. Concerning work, it seems safe to observe that the good associated with earning a living puts it into the class of the bare essentials. Moreover, it is even plausible to suppose that earning a living through work (rather than through government subsidy or private charity) must figure in the thin theory of the good. Indeed, although receiving a subsidy may contribute to one’s wealth just as a salary would, any defensible articulation of persons’ wellbeing and self-respect must be able to account for the special place that work has in our lives.⁷⁴ Concerning recreational activities, courts will face the task of determining what aspects, if any, of these activities belong to the class of bare essentials: being able to pursue *some* leisure activity may arguably be a case in point. However, it is far from clear whether just about any leisure activity should count as a bare essential, especially if the activity is inherently dangerous. It is, therefore, not surprising to see that for the last several decades, the paradigm cases in which courts readily apply the assumption of risk doctrine are those of risky recreational activity and sports.

4. Availability of Other Options (i.e., Considerations of Justice in Liberties and Opportunities: A Fair Starting Point for All)

Arguably, apparently few contemporary liberal societies fully satisfy the obligation to provide their members with the liberties and opportunities that are required by the demands of fairness (whatever they are). Moreover, it would be difficult and even preposterous to expect that courts could or should determine whether governments have fulfilled this obligation. That said, living

73 RAWLS, *supra* note 52, at 396.

74 Put in welfarist terms, the social welfare function must give the appropriate weight to work, that is, irreducible to the wealth it happens to generate.

under fair conditions (of liberty and opportunity) is a range property,⁷⁵ so every actual distribution of the goods in question which is not too drastically unfair renders plausible the attribution of responsibility for voluntary acts of encountering risk. In other words, our *capacity* for responsible agency is resilient to departures from the ideal of a perfectly fair starting point for all, up to the point where inequality becomes so pervasive as to annihilate personal responsibility for making a voluntary decision to assume a risk under background conditions of poverty.

In some cases, making a conscious decision to encounter a given risk may not be enough to hold the decision-maker fully responsible for its adverse consequences. This could be so when no other alternative course of action is available. The absence of other option(s) need not imply the *absolute* absence of other options. In principle, people can always “decide” to shun society, at least for some time (as when they can stay at home), and definitely when it comes to certain permissible, though unnecessary, activities (such as skydiving). Instead, the availability of other options concerns those activities that fall within the class of bare essentials mentioned above.

Consider work by illustration. Suppose that the labor market is sufficiently robust so that employees are term-makers and not just term-takers in relation to their employment decisions (including where to work and under what conditions). The existence of this power also implies that the overall costs of exiting one’s current job and entering a new one may be relatively low. In that case, a person who knowingly and willingly decides to work in the face of an unreasonably risky working environment cannot, in fairness, complain when the risk materializes. However, this prescription does not follow insofar as the labor market does not accommodate costless alternatives, so that the employee’s decision to remain employed in spite of the risk cannot *justify* holding this person responsible for an injury that is causally connected to the negligence of this person’s employer.

As mentioned above, one of liberal-egalitarianism’s distinctive features lies in replacing natural or causal notions of responsibility with a political ideal, or a set of ideals, of fairness as the relevant baseline against which to determine who should bear what cost of any particular choice. Outside an adequate distribution of liberties and opportunities, including the availability of options discussed a moment ago, there is no moral justification to hold a victim fully responsible at law for choosing to assume an otherwise unwarranted risk.

75 The idea of range property is borrowed from RAWLS, *supra* note 52, at 508.

D. Illustration: Junk Food Harms

The preceding sketch of considerations sets out, in preliminary fashion, the structure of the liberal account of the assumption of risk doctrine. I shall now apply this structure to the case of junk food harms. The discussion will seek to advance the following three points: first, providing further elaboration of the various considerations mentioned above;⁷⁶ second, demonstrating the important practical difference between the liberal and the *laissez-faire* accounts of assumption of risk; and third, developing an equality-based argument against the use of assumption of risk in one class of cases involving junk food harms. It is important to recall that the analysis is not confined to courts' attempt to determine whether the victim has actually assumed the risk in a particular case, but rather is also meant to help to fix the content of the *obligation* incurred by the liberal state toward its constituents with respect to the provision of a fair starting point for all.

For the last couple of decades or so, obesity has been identified as an acute health threat, especially to people living in many developed countries (including, in particular, the United States). There are several plausible causal explanations for the rise of overweight and obesity in these countries.⁷⁷ The consumption of junk food may be one of these causes, although it may also be the case that it merely plays a supporting role. Be that as it may, it is clear that reducing the consumption of junk food is part of the solution, namely, sustaining a healthier society. As mentioned above, the stakes are high since the question is not just about technology — what form of government intervention would prove most successful. Rather, there is an antecedent moral question concerning the harm to one's health caused by junk food consumption, and it is often aptly cast in terms of the notion of assumption of risk — whose responsibility it is.⁷⁸

The *laissez-faire* account suggests that responsibility should lie where the harm falls, namely, on the victims who made a voluntary choice to consume

76 I shall leave the *full* elaboration of these considerations for another occasion.

77 See, e.g., AVNER OFFER, *THE CHALLENGE OF AFFLUENCE: SELF-CONTROL AND WELL-BEING IN THE UNITED STATES AND BRITAIN SINCE THE 1950S* (2006); OBESITY, BUSINESS AND PUBLIC POLICY (Zoltan J. Acs & Alan Lyles eds., 2007); Thomas J. Philipson & Richard A. Posner, *The Long-Run Growth in Obesity as a Function of Technological Change*, 46 PERSP. BIO. & MED. S87 (2003); Ronald L. Weinsier et al., *The Etiology of Obesity: Relative Contribution of Metabolic Factors, Diet, and Physical Activity*, 105 AM. J. MED. 145 (1998); see also Timothy J. Richards et al., *Obesity and Nutrient Consumption: A Rational Addiction?*, 25 CONT. ECON. POL'Y 309 (2007).

78 See *supra* text accompanying note 36.

junk food. Libertarian paternalists would advocate the opposite conclusion *insofar as* junk food consumers suffer from systematic cognitive shortcomings, especially the tendency to underestimate long-term wellbeing due to immediate cravings. Both accounts hold in common the view that, in principle, the best answer to the moral question posed above should apply across the board — to *all* those who made up their minds to consume junk food. The proposed account, by contrast, reflects the intuition, and the evidence gathered so far,⁷⁹ that there exists a morally significant aspect of inequality that the other two accounts mentioned above overlook, and that this aspect allows us to see why personal responsibility for junk food harms need not be attributed across the board (to either consumers or suppliers), but rather along the more nuanced line of equality of liberty and opportunity.

Thus, the argument is that the justification for attributing personal responsibility for voluntary choice (to consume junk food) is in part a feature of the background conditions surrounding the choice. And since these conditions may not always be available to all people, through no fault or choice of their own, the answer to the question of whose responsibility is it need not elicit one answer across the board, be it negative or affirmative.

I shall briefly explain why this is so, drawing on the empirical literature in the light of the proposed doctrinal structure. I shall set aside the attitudinal and epistemic considerations mentioned above, since they do not raise any special questions in connection with the case of junk food harms.⁸⁰ I shall also assume (for lack of sufficient evidence as of this time) that junk food producers are using no addictive ingredients and, so, refrain from engaging in chemical forms of manipulating consumers.⁸¹ Instead, I shall focus on activity considerations and, especially, on considerations pertaining to the availability of options.

79 See, e.g., Shin-Yi Chou et al., *An Economic Analysis of Adult Obesity: Results from the Behavioral Risk Factor Surveillance System*, 23 J. HEALTH ECON. 565 (2004); Nicole Darmon & Adam Drewnowski, *Does Social Class Predict Diet Quality?*, 87 AM. J. CLINICAL NUTRITION 1107 (2008); Adam Drewnowski & S.E. Specter, *Poverty and Obesity: The Role of Energy Density and Energy Costs*, 7 AM. J. CLINICAL NUTRITION 6 (2004); DaeHwan Kim & John Paul Leigh, *Estimating the Effects of Wages on Obesity*, 52 J. OCCUPATIONAL & ENVTL. MED. 495 (2010).

80 For a recent, provocative study that casts serious doubts on the transparency and sincerity of the food industry in the United States, with possible important implications for the epistemic considerations mentioned above, see MICHAEL MOSS, *SALT SUGAR FAT: HOW THE FOOD GIANTS HOOKED US* (2013).

81 Otherwise, it would be hard not to hold the relevant manipulators at least partially responsible for junk food harms. I thank Bob Rabin for discussion of this point.

Concerning activity, not all cases of food consumption are worth including in the class of bare essentials. People can consume food in excess, as when they taste gourmet food at a fancy restaurant for pure pleasure or when they are simply gluttonous. But of course, beside these idiosyncratic cases of overeating, the activity of consuming food is, first and foremost, a bare essential, and a quintessential at that.⁸² As such, the bar for attributing personal responsibility to a person who voluntarily encounters a risk in this context must be higher than the one appropriate for many other activities such as skiing or bungee jumping. To this extent, the liberal account of assumption of risk conceives of junk food harms as a case in which the mere fact of making a conscious decision to assume a known risk cannot typically justify the attribution of responsibility to the decision-maker. So the next stage on the proposed doctrinal structure will be considering the availability of other options.

The availability of other options. The application of the proposed doctrinal structure to the case of junk food harms suggests that one key set of considerations must focus on what can be called “food environment.” This environment determines both the availability and affordability of healthful foods. These factors, in turn, are influenced by the way our built environment is designed — that is, how costly it is to purchase and/or cook healthful foods: for instance, are there supermarkets nearby and, if not, are there feasible transportation solutions? They are also influenced by direct and indirect regulatory schemes such as the government’s fiscal policy with respect to fresh produce and zoning considerations.⁸³ Unsurprisingly, empirical studies focusing on foods environment reinforce the suspicion that there is a serious inequality problem that permeates the problem of obesity and junk food harms.

As one report observes:

Millions of low-income Americans live in “food deserts,” neighborhoods that lack convenient access to affordable and healthy food. Instead of supermarkets and grocery stores, these communities often have an abundance of fast-food restaurants and convenience stores. In addition, stores in low-income communities may stock fewer and lower quality healthy foods. When available, the cost of fresh foods in low-income areas can be high. Public transportation to supermarkets is often lacking,

82 See Darmon & Drewnowski, *supra* note 79, at 1113 (observing that “low-cost energy-dense foods may be particularly damaging to the health of lower [socioeconomic status] groups, for whom such foods represent a source of affordable calories”).

83 Cf. Nicole Larson & Mary Story, *A Review of Environmental Influences on Food Choices*, 38 ANNALS BEHAV. MED. S56 (2009).

and long distances separate home and supermarkets in many rural communities and American Indian reservations.⁸⁴

These observations merely summarize the findings gathered from a number of studies on the subject matter of foods environment.⁸⁵ They all show that there is a substantial correlation between (low) socioeconomic status and the happenstance of living in a “food desert” or, more dramatically, “toxic food environment.”⁸⁶

To this extent, people who occupy the lower socioeconomic classes, live in an environment resembling a food desert, and often experience food insecurity can hardly deserve, morally speaking, to bear the entire adverse consequences of having chosen to consume junk food on the (*laissez-faire*) ground that they voluntarily assumed the risk. It is one thing for a wealthy person to decide to eat junk food instead of other available and (at least for her) affordable healthful food; quite another for an economically poor person to consume junk food when, in fact, the costs of obtaining healthful foods are (for her) very high. From an egalitarian-liberal point of view, the difference between the two cases expresses injustice in liberties and opportunities. And this injustice renders inappropriate the attribution of personal responsibility for junk food consumption under conditions of poverty.

To forestall misunderstandings, my claim is not grounded in the existence of a causal connection between poverty and obesity — more generally, the proposed doctrinal structure does not turn on proving a causal link between social and biological factors at all. Nor does it necessarily rest on the supposedly

84 EXEC. OFFICE OF THE PRESIDENT OF THE U.S., SOLVING THE PROBLEM OF CHILDHOOD OBESITY WITHIN A GENERATION: WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY REPORT TO THE PRESIDENT 49 (2010).

85 See, e.g., ALISHA COLEMAN-JENSEN, MARK NORD, MARGARET ANDREWS & STEVEN CARLSON, U.S. DEP’T OF AGRIC., ECON. RESEARCH SERV., HOUSEHOLD FOOD SECURITY IN THE UNITED STATES IN 2011, at 8 (2012), available at <http://www.ers.usda.gov/media/884525/err141.pdf> (reporting that “[f]ood insecurity was strongly associated with [low] income”); PAULA DUTKO ET AL., U.S. DEP’T OF AGRIC., CHARACTERISTICS AND INFLUENTIAL FACTORS OF FOOD DESERTS (2012), available at <http://www.ers.usda.gov/media/883903/err140.pdf>; Jason D. Boardman et al., *Race Differentials in Obesity: The Impact of Place*, 46 J. HEALTH SOC. BEHAV. 229 (2005); Shannon N. Zenk et al., *Fruit and Vegetable Access Differs by Community Racial Composition and Socioeconomic Position in Detroit, Michigan*, 16 ETHNICITY & DISEASE 275 (2006); Shannon N. Zenk et al., *How Neighborhood Environments Contribute to Obesity*, 109 AM. J. NURSING 61 (2009).

86 Maida P. Galvez et al., *Race and Food Store Availability in an Inner-City Neighborhood*, 11 PUB. HEALTH NUTRITION 624, 625 (2007) (quoting Kelly D. Brownell, *Fast Food and Obesity in Children*, 113 PEDIATRICS 132, 132 (2004)).

defective choice on the part of members of the lower socioeconomic classes to consume the food in question. To repeat, on the liberal approach I advocate, resort to naturalized notions such as causation and choice cannot settle the responsibility question. Nevertheless, the empirical studies mentioned above are crucial for the liberal account of assumption of risk. This is so because they help to determine whether the background conditions — the availability of options — are anywhere close, including in a loose sense, to the liberal ideal of a fair starting point for all.

In that, the doctrinal structure sketched above provides a stable framework that can guide the inquiry — the sort of questions, arguments, and evidence — that policymakers must undertake in order adequately to assess whether harms resulting from the consumption of just food should morally count as self-afflicted or not.⁸⁷ And insofar as the public debate concerning the desirability and method of state intervention in matters of junk food harms is influenced, to an important extent, by the moral principle of assumption of risk, the proposed doctrinal structure may prove helpful in the articulation of the kind of considerations that ought to control this debate.

CONCLUSION

In these pages I have sought to render the doctrine of assumption of risk both intelligible and morally defensible.⁸⁸ I have shown that the prevailing accusations against this doctrine are groundless (or, at the very least, overblown). At bottom, I have argued, the felt hostility toward the doctrine stems from the view that it has a libertarian DNA, as it were.

By way of repudiating this commonly held view, I have developed a liberal-egalitarian account of the doctrine, arguing that the *fact* of making a choice (to assume a given risk) is not sufficient to *justify* the shifting of responsibility from the negligent injurer to the choosing victim. For it is also necessary that the latter must be acting under conditions that render thus shifting fair. I have further elaborated on the theoretical and doctrinal frameworks that take the question of fairness seriously in analyzing cases of assuming risk. The proposed account, I have argued, helps to vindicate a crucial lesson for the ongoing legal and public debates over important matters such as the problem of junk food harms, namely, that the correct argument from assumption of risk is as much about equality as it is about freedom.

87 Of course, this structure need not exhaust the relevant set of considerations that might apply to the question at stake.

88 I have also found that the doctrine cannot be fully explained by reference to economic analysis. See *supra* note 68.

