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# THE IDEA OF FAIRNESS IN THE LAW OF ENTERPRISE LIABILITY

Gregory C. Keating\*

## ABSTRACT

*The theory and practice of enterprise liability are oddly disjointed. On the one hand, case rhetoric insists that considerations of fairness are among the primary justifications for imposing enterprise liability. On the other hand, normatively inclined and theoretically ambitious scholarship on enterprise liability is overwhelmingly economic in cast. Economically inclined scholars have flocked to the field, while other kinds of tort theorists have shunned it, implicitly or explicitly conceding it to economic analysis. This paper argues that, contrary to this consensus, there is a powerful and important fairness case to be made for enterprise liability. This case fits the rhetoric of the decisions and the structure of the doctrines, and draws philosophical support from Kantian social contract theory. When enterprises are in a position to spread the costs of nonnegligent accidents across the class of those who benefit from the risks that inevitably issue in such accidents, enterprise liability is more reasonable than negligence liability. Under these circumstances, enterprise liability reconciles the competing claims of liberty and security more fairly, and more favorably, than negligence liability.*

## I. THE ESTRANGEMENT OF TORT THEORY FROM TORT LAW

In one of his more memorable and arresting aphorisms, Oliver Wendell Holmes remarked that “[o]ur law of torts comes from the old days of isolated, ungeneralized wrongs, assaults, slanders, and the like,” whereas “the torts with which our courts are kept busy today are mainly the incidents of certain well known businesses. . . .

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railroads, factories, and the like.”<sup>1</sup> The movement from a world of discrete and insular risk to one of generalized and interconnected perils transformed the impact of tort liability on the distribution of the costs of accidents. In the days of “isolated, ungeneralized wrongs,” tort damages “might be taken to lie where they fell by legal judgment.”<sup>2</sup> In the emerging world of risks incidental to great industrial enterprises, “liability for [accidents] is estimated, and sooner or later goes into the price paid by the public.”<sup>3</sup>

Holmes went on to observe that juries were quite sensitive to the moral significance of the differences between the old and new worlds, and did not seem to share the sense of justice embodied in traditional tort doctrine. In the vast majority of cases involving industrial accidents, they considered it fair to impose the costs of those accidents on the enterprises that engendered them. This double discrepancy between inherited legal categories and the social world that they assumed on the one hand, and emerging social realities and juries’ sense of justice on the other, led Holmes to suggest that the law of torts might need to be wholly rethought.<sup>4</sup>

In the century that has passed since Holmes wrote, tort law has been reconstructed in ways that have reduced — though not erased — the mismatch that caught his eye. Modern vicarious liability, abnormally dangerous activity liability, and product liability all show the influence of an “enterprise” or “activity” conception of strict liability. That conception holds that the characteristic risks of the modern world are the inevitable by-products of planned activities — not the random consequences of discrete acts — and seeks to make activities — not actors — bear the costs of the accidental injuries that they occasion.

Yet if the law of torts has been partially reconstructed, our understanding of the sense of justice expressed in that reconstruction remains incomplete. In fact, our understanding is incomplete precisely because it slights the sense of justice that lies behind enterprise liability. George Priest’s influential history of the rise of

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1. OLIVER WENDELL HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 183 (Peter Smith 1952) (1920). Holmes originally delivered the paper as a lecture 100 years ago, on January 8, 1897, at the dedication of a new hall at the Boston University School of Law.

2. *Id.*

3. *Id.*

4. *See id.* at 182-84. Although Holmes was, to put it mildly, hardly an uncritical admirer of juries and often argued for limiting their role in tort adjudication, he nonetheless conceded that juries had a place to play in the formulation of liability rules, as well as in the determination of facts, because they embodied the sense of justice of the community. *See* O.W. HOLMES, JR., *THE COMMON LAW* 123 (Sheldon M. Novick ed., Dover 1991) (1881).

enterprise liability, for example, overlooks that sense of justice entirely. Priest argues that modern product liability law burst full-grown upon the legal landscape in the mid-1960s, the precocious offspring of an academic literature thirty years in the making. In Priest's telling of the tale, the normative thesis of that literature was simple: the twin policies of preventing accidents whose costs outweigh their benefits, and dispersing the costs of those accidents that are not worth preventing, called for discarding negligence liability and adopting enterprise liability.<sup>5</sup>

Whatever its merits as an account of the rationales and concepts informing modern product liability law,<sup>6</sup> Priest's article is a powerful account of the rationales and concepts at the center of much contemporary academic writing on the normative basis of enterprise liability. Largely under the influence of economics, that literature works from and refines the twin policies of deterrence and loss dispersion. It recasts the former as a matter of preventing those accidents whose economic costs exceed their economic benefits. It recasts the latter as a matter of supplying insurance at the correct level and the cheapest cost for harms not worth preventing.<sup>7</sup>

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5. See George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 462-64 (1985). More precisely, Priest's thesis is that these policies led to enterprise liability because they coalesced into three more specific propositions. First, manufacturers had "vastly greater power" with respect to "all relevant aspects of the product defect problem." *Id.* at 520. Second, manufacturers had commensurately superior ability to spread risks. See *id.* Third, forcing manufacturers to internalize the costs of all accidents attributable to their products would provide appropriate incentives for them to take cost-justified precautions; to modulate the level of their activities correctly; and to engage in desirable levels of safety research, development and innovation. See *id.* The policies of accident prevention ("precaution" or "deterrence") and loss distribution ("loss spreading" or "insurance") coalesced into these propositions largely because they were linked to empirical assumptions about the characteristics of modern consumer markets.

6. For forceful criticism, see Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 602, 623-34 (1992).

7. For the most part, normatively inclined and theoretically ambitious scholarship on enterprise liability is economically oriented. Although there is vigorous disagreement within that scholarship over the merits of enterprise liability, there is little disagreement that its merits are to be measured by its success at achieving optimal deterrence and supplying optimal insurance. Contemporary academic critics of enterprise liability, including Priest, often insist that it fails on both fronts, but they are especially hard on such liability as a mechanism for supplying optimal insurance against accidents that should not be prevented. See, e.g., Richard A. Epstein, *Products Liability as an Insurance Market*, 14 J. LEGAL STUD. 645, 648-53 (1985) (arguing that modern products liability law frustrates the tripartite insurance ideals of limiting moral hazard, ameliorating adverse selection, and diversifying risk); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1553 (1987) [hereinafter Priest, *Insurance Crisis*] (arguing that first-party insurance is preferable to third-party insurance through tort liability because the former can incorporate copayments, whereas the latter cannot); George L. Priest, *Modern Tort Law and Its Reform*, 22 VAL. U. L. REV. 1, 17 (1987) [hereinafter Priest, *Tort Reform*] (arguing that product manufacturers are in a poor position to acquire adequate information about the riskiness of insureds and cannot charge higher product prices to higher risk purchasers and users); Alan Schwartz, *The Case*

Contemporary academic writing has all but ignored a wholly different kind of justification for activity liability. That justification takes enterprise liability to rest “not so much” on policies of accident prevention and loss spreading “as in a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities.”<sup>8</sup> This justification insists that considerations of fairness — not efficiency — call for making activities that benefit from the imposition of particular risks bear the costs of accidental injuries issuing out of those risks. Burdens should be aligned with benefits, and “the costs of [enterprise-related accidents should therefore] be borne by those who profit from” the enterprise.<sup>9</sup> The costs of product-related accidents, for instance, should be apportioned across “the manufacturers and distributors who profit from its sale and the buyers who profit from its use.”<sup>10</sup> In case law, this “fairness” justification both competes and cooperates with efficiency justifications.<sup>11</sup>

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*Against Strict Liability*, 60 *FORDHAM L. REV.* 819, 820, 832-40 (1992) (arguing that product defects should be subject to a “market” regime of “free contract” with compulsory disclosure, because strict liability forces consumers to purchase excessive amounts of insurance and inefficiently depresses demand by forcing manufacturers to insure for nonpecuniary harm).

Contemporary academic defenders of enterprise liability have presented a head-on challenge to the criticisms voiced by Epstein, Priest, Schwartz, and others. These scholars argue that third-party insurance is generally more efficient than first-party insurance, especially in the case of product-related accidents, and especially at sorting insureds into suitably narrow risk pools. See Steven P. Croley & Jon D. Hanson, *What Liability Crisis? An Alternative Explanation for Recent Events in Products Liability*, 8 *YALE J. ON REG.* 1, 109-10 (1991) [hereinafter Croley & Hanson, *What Liability Crisis?*] (arguing that enterprise liability is stimulating the rise of mutual insurance companies, which are constructing more homogeneous and thus more efficient risk pools); Jon D. Hanson & Kyle D. Logue, *The First-Party Insurance Externality: An Economic Justification for Enterprise Liability*, 76 *CORNELL L. REV.* 129, 137 (1990) (arguing that first-party insurers fail to adjust premiums according to consumption choices and that a negligence regime therefore induces manufacturers to make suboptimal investments in product safety, whereas enterprise liability optimizes manufacture care and activity levels). Croley and Hanson have also challenged the argument that the award of nonpecuniary damages is inefficient. See Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 *HARV. L. REV.* 1787, 1791-93 (1995) [hereinafter Croley & Hanson, *The Nonpecuniary Costs of Accidents*] (arguing that proposals to reform the tort system by reducing compensation are not efficient from a deterrence perspective and that tort law may show the existence of otherwise unmet consumer demand for insurance against pain and suffering).

8. *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 171 (2d Cir. 1968) (Friendly, J.).

9. *Beshada v. Johns-Manville Prod. Corp.*, 447 A.2d 539, 547 (N.J. 1982).

10. *Beshada*, 447 A.2d at 547.

11. *Wright v. Newman*, 735 F.2d 1073 (8th Cir. 1984), is a nice example of a case in which fairness and efficiency norms worked cooperatively. See James A. Henderson, Jr., *Judicial Reliance on Public Policy: An Empirical Analysis of Products Liability Decisions*, 59 *GEO. WASH. L. REV.* 1570, 1580 n.55 (1991) (discussing *Wright*). The court invoked both loss-spreading and fairness in support of its ruling. See *Wright*, 735 F.2d at 1077 (“The seller is also generally better able to bear and distribute the costs resulting from injury due to a defective product.”); *Wright*, 735 F.2d at 1077 (“[T]hose who reap a profit . . . [should] pay for any

The absence of this conception of fairness from recent academic writing on enterprise liability is partially explained by the economic cast of that scholarship. Policies of deterrence and loss distribution lend themselves to economic explication whereas principles of fairness generally do not. The ascendance of law and economics, however, is only half of the story. The other half of the story is the recent renaissance of moral theorizing about tort liability and the reluctance of these moral theorists to embrace the fairness justification for enterprise liability. For the most part, recent moral theories of tort have been organized around the idea of corrective justice, and this orientation has led them to view enterprise liability with suspicion. The guiding idea of corrective justice theories is that the proper end of tort law is the restoration of a preexisting equilibrium between victim and injurer, an equilibrium wrongly disrupted by injurer's accidental infliction of harm on the victim.<sup>12</sup> Moral theorists gripped by this idea have thought that enterprise liability violates the institutional integrity of tort law because it rests either on the ideal of loss spreading, which smacks of distributive justice, or on the goal of optimal deterrence, which is instrumentalism incarnate. On a corrective justice conception of tort, neither criteria of distributive justice, however right, nor instrumentalist goals, however good, are legitimate grounds for the imposition of tort liability.

In his influential account of the role of fairness in tort law, for instance, George Fletcher takes loss spreading to be the principal justification for enterprise liability, and asserts that this justification has no place in a fairness conception of tort liability because it "is an argument of distributive rather than corrective justice."<sup>13</sup> Tort liability, Fletcher rightly insists, must turn on what people have *done*, not on who they *are*.<sup>14</sup> Writing around the same time,

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harm caused."). *Bushey*, 398 F.2d 167, discussed in detail in Part III, is a fine example of case law involving competition between fairness and efficiency.

12. This claim is a very rough generalization, and it does considerable violence to the variety of corrective justice theories in the field. The reason why it remains the best brief summary of such theories is that it captures the essence of Aristotle's conception of corrective justice. Contemporary tort theory has appropriated both the concept of corrective justice and the distinction between it and distributive justice from Aristotle. See ARISTOTLE, *NICHOMACHEAN ETHICS* bk. V., ch. 4, at 114-17 (David Ross trans., Oxford Univ. Press 1980).

13. George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 547 n.40 (1972).

14. See *id.* Fletcher amplifies his objection in GEORGE P. FLETCHER, *BASIC CONCEPTS OF LEGAL THOUGHT* 87-93 (1996). I agree with Fletcher's claim that tort liability must be grounded in principles of moral responsibility that connect the actions of injurers to the injuries of victims in a defensible way. I disagree with Fletcher, however, in believing that the

Charles Fried articulated a fairness conception of tort liability similar to Fletcher's in its reliance on social contract ideals of equal freedom and mutual benefit,<sup>15</sup> but that work, too, provided no support for the conception of fairness invoked by enterprise liability case law. Like Fletcher's work, Fried's account of fairness focused on the criterion of reciprocal risk imposition. That criterion does little to justify enterprise liability, and as a consequence Fried's own arguments only grapple with negligence law.<sup>16</sup>

Not long after Fletcher and Fried's work, Richard Epstein proposed a libertarian theory of strict liability that also claimed the mantle of corrective justice.<sup>17</sup> Epstein's theory assumed a starkly individualistic vision of the social world within which accidental injuries arose. Its only reference to a form of enterprise liability occurred in the course of a causation discussion. Even that reference was incidental. Product defects, Epstein explained, are one of the three most common instances of the "dangerous conditions" paradigm of causation,<sup>18</sup> and this, not any distinctive characteristic of enterprise-related accidents, supports the imposition of strict liability on them. Ernest Weinrib, another important corrective justice theorist, has pressed the argument that enterprise liability rests on instrumentalist ideals of loss spreading and deterrence that are wholly alien to private law.<sup>19</sup> The principle of fairness invoked by

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enterprise liability principle of fairness is a principle rooted in what enterprises have done and not who they are.

15. See CHARLES FRIED, *AN ANATOMY OF VALUES: PROBLEMS OF PERSONAL AND SOCIAL CHOICE* ch. 11 (1970).

16. Unlike Fried, Fletcher explicitly justifies some strict liability doctrines on fairness grounds, arguing that the risks covered by those doctrines are nonreciprocal. See Fletcher, *supra* note 13, at 543-49, 570-71. However, the only *enterprise* liability doctrine justified by Fletcher on this ground is the liability of product manufacturers to bystanders injured by the use of their products.

17. See Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973) [hereinafter Epstein, *Strict Liability*]; see also Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974); Richard A. Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391 (1975); Richard A. Epstein, *Nuisance Law: Corrective Justice and its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979).

18. See Epstein, *Strict Liability*, *supra* note 17, at 178-79. There is, to be sure, something starkly individualistic about libertarianism. But the stark individualism of Epstein's theory is remarkable even in comparison with Robert Nozick's treatment of tort issues in chapter four of his *Anarchy, State and Utopia*. Nozick's treatment makes a place for enterprise liability and the principle of fairness that justifies it. See ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 79-81 (1974).

19. See, e.g., Ernest J. Weinrib, *The Insurance Justification and Private Law*, 14 J. LEGAL STUD. 681 (1985) (arguing that insurance or cost-shifting rationales have no place in the justification of liability rules because they do not grow out of the parties' relationship as doer and sufferer of the same harm); Ernest Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. 403 (1989) (arguing that tort adjudication may consider only material that is inherent in the defendant's doing and the plaintiff's suffering of the same harm and that this forbids the invocation of insurance and deterrence justifications). Weinrib develops his views in ERNEST

Friendly as the master principle of vicarious liability, and cited in cases as a cornerstone of enterprise liability, is an academic orphan.<sup>20</sup>

Its orphanage is all the more remarkable in light of the attractiveness of the fairness justification to judges. James Henderson's careful empirical study of judicial justification in products liability cases discovered that "[m]easured by what judges say in their published opinions . . . fairness norms, not efficiency norms, [predominate]," and their predominance increases when they conflict with efficiency rationales.<sup>21</sup> The prominence of fairness arguments alone ought to spark academic interest. That interest seems all the more warranted in light of Henderson's observation that judges who relied on fairness rationales apparently "found it comparatively more difficult [than judges who relied on efficiency did] to explain why fairness supported a given resolution of a legal issue."<sup>22</sup> When judges are confident that certain decisions are correct *because* they are fair, but are unable to explain precisely *why* those decisions are fair, scholars have their work cut out for them.

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J. WEINRIB, *THE IDEA OF PRIVATE LAW* 36-38, 74-75 (1995). Ultimately, Weinrib's objections are very close to Fletcher's. See Fletcher, *supra* note 13 and accompanying text; FLETCHER, *supra* note 14 and accompanying text.

20. The treatment of vicarious liability in the latest edition of Richard Epstein's torts casebook supplies a striking illustration. The first case in the newly reorganized section on vicarious liability is *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167 (2d Cir. 1968). *Bushey* is followed by two pages of notes trying to identify its rationale. Nowhere in those notes is Friendly's principle of fairness even mentioned. See RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 450-56 (6th ed. 1995). To be sure, the principle has its supporters, but their voices have not been heard much of late. See, e.g., JOEL FEINBERG, *DOING AND DESERVING* 221, 221 n.21 (1970) (noting that "schemes of nonfault liability are supported by strong reasons of their own, principles both of justice and economy," and citing "the *benefit principle* (of commutative justice) that accidental losses should be borne according to the degree to which people benefit from an enterprise or form of activity"); ROBERT E. KEETON, *VENTURING TO DO JUSTICE* 158-62 (1969) (citing the principle as a basis of strict liability doctrine); NOZICK, *supra* note 18, at 80 (advocating placing the costs of airport noise "pollution," and pollution more generally, on "those who benefit from the activity: in our example, airports, airlines, and ultimately the air passenger. [This], if feasible, seems fairest."). Implicitly, the principle is embraced by the selection of materials in PAGE KEETON ET AL., *TORT AND ACCIDENT LAW* 551-63 (2d ed. 1989); see also HENRY J. STEINER, *MORAL ARGUMENT AND SOCIAL VISION IN THE COURTS* 70-72 (1987) (discussing the principle as one of three main fairness justifications for tort liability).

21. Henderson, *supra* note 11, at 1597. Henderson concludes that "[c]ourts explicitly developed and relied upon public policy reasoning in fifteen percent of the products liability decision[s] . . ." *Id.* at 1589. In those cases, "fairness was developed 18% more frequently than efficiency, and fairness controlled in the decision 24% more frequently." *Id.* at 1595 n.131. Henderson identifies fairness and efficiency as the two most prominent substantive policy justifications relied upon in products liability cases. His third category of policy reasons, "process" justifications, speaks to questions of institutional role and the sources of legitimate institutional authority. "Only 12% of the decisions developing policy referred to policies other than" these three. *Id.* at 1586 n.90.

22. *Id.* at 1592.



In this article I propose to develop the “fairness” rationale for enterprise liability and to explore how its implications differ from efficiency rationales. I hope to show that the fairness rationale invoked by the cases is ripe for adoption into a family of principles embraced by a social contract conception of accident law as a realm of equal freedom and mutual benefit. When risks are recurrent and related, enterprise liability distributes the burdens and benefits of accidental risk imposition more fairly and reconciles the competing claims of security and liberty more adequately than negligence liability. Enterprise liability thereby establishes more favorable conditions for free and equal persons to pursue their conceptions of the good on mutually beneficial terms. When the enterprise liability principle of fairness reconciles the competing claims of liberty and security more fairly and favorably than negligence liability, social contract theory calls for its adoption in place of the reciprocity of risk criterion traditionally embraced by social contract scholars.<sup>23</sup>

To clear the space for this argument, we must first work our way through a tangle of problems. For starters, tort scholars disagree both about the nature of enterprise liability and about its pervasiveness as a phenomenon in black-letter law. So much controversy swirls around enterprise liability that there is deep dispute over where the law draws its boundaries, and what defenses to it are characteristically recognized. There is equally deep disagreement about whether product liability law, Priest’s preferred example of the phenomenon, actually incarnates it.<sup>24</sup> For our purposes, however, one part of this controversy — the issue of how pervasive en-

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23. The social contract theories of Fletcher and Fried take the presence of reciprocity of risk to justify the imposition of negligence liability, and Fletcher takes the absence of reciprocity to justify the imposition of strict liability. See FRIED, *supra* note 15; Fletcher, *supra* note 13.

24. Priest argues that after *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960), and *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1962), the battle shifted to the details of enterprise liability and the benefits were accepted virtually unanimously. See Priest, *supra* note 5, at 511-12. Section 402A of the *Restatement (Second) of Torts* expanded strict liability to sellers of all defective and unreasonably dangerous products without regard to the seller’s fault. See RESTATEMENT (SECOND) OF TORTS § 402A (1966). By 1976, 41 of 50 jurisdictions had adopted this rule of “strict liability.” Priest concludes that “although the theory [of enterprise liability] developed in most detail in the products liability field, the presuppositions of enterprise liability have been extended to engulf the larger part of modern tort law itself.” Priest, *supra* note 5, at 520. By contrast, Gary Schwartz thinks that products liability law is driven primarily by negligence concepts. See Schwartz, *supra* note 6, at 633-34. Similarly, the tentative draft of the *Restatement (Third) of Torts: Products Liability* takes the position that “very substantial [case law] authority supports the proposition that plaintiff must establish a reasonable alternative design in order for a product to be adjudged defective in design.” RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. c (Tentative Draft No. 2, 1995). It thus takes the view that design defect liability is paradigmatically a kind of negligence liability.

terprise liability is in our law and just how much its presence is felt in product liability law — can be disposed of relatively quickly. To isolate both the forms of doctrine that interest us, and the theoretical issues that those doctrines raise, we shall not take product warning or design defect law as our examples of enterprise liability. Instead, we shall work with less contested instances of the phenomenon, namely, the modern expansions of vicarious liability and abnormally dangerous activity liability, and the law of manufacturing defects, the strictest form of product liability.

The other part of the doctrinal controversy — the debate over where the law locates the boundaries of enterprise liability, and what defenses to it are and generally should be allowed — cannot be set aside so quickly. In the thicket of the law, the boundary of enterprise liability is entangled with the justifications for such liability. The principle of fairness and the policies of optimal deterrence and optimal insurance draw that boundary in different places. In order to locate the boundaries of enterprise liability, we must examine, in a preliminary way, the basic contrasts between fairness and efficiency rationales that shall occupy us throughout this paper. Part II of this article turns to Judge Friendly's widely admired opinion in *Ira S. Bushey & Sons, Inc. v. United States*<sup>25</sup> to fix these contrasts and their implications for the scope of enterprise liability.

Part III takes up another preliminary problem — the prevailing assumption that the black-letter law of enterprise liability is hospitable to economic conceptions of tort liability, and inhospitable to noneconomic conceptions. Part III argues that this assumption is unwarranted. The structure of enterprise liability, like strict liability more generally, pays scant attention to victim precautions and frequently fixes the boundaries of injurer liability in ways that seem only loosely tied to considerations of efficiency. It defines domains within which victims are free of any responsibility for their own protection against injury inflicted by injurers, and injurers are responsible for any harm that they inflict.<sup>26</sup> The conventional wisdom notwithstanding, this structure of legal entitlements is troubling from an efficiency perspective, but heartening from a social contract one.

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25. 398 F.2d 167 (2d Cir. 1968).

26. This contrast is the same as the one drawn by Professor Rose-Ackerman. See Susan Rose-Ackerman, *Dikes, Dams and Vicious Hogs: Entitlement and Efficiency in Tort Law*, 18 J. LEGAL STUD. 25, 26 (1989). Professor Rose-Ackerman finds the structure troubling from an efficiency perspective.

Part IV takes up the obstacles put in our path by prior writings in the social contract tradition. Prior writings have taken nonreciprocity of risk imposition to be the exclusive ground for the imposition of strict liability and have generally supposed that strict liability must recede in the presence of contractual relationships between victims and injurers. Part IV rejects both of these claims. On the one hand, it argues that the fields of enterprise liability law are *not* marked by nonreciprocity of risk, and that reciprocity theory thus fails to “fit” the law that it purports to explain and justify. On the other hand, Part IV argues that social contract theory must understand tort law as a matter of justice and so cannot countenance the wholesale surrender of tort to contract. Risks must be imposed on reasonable terms, and the contours of reasonableness cannot be fixed by private contractual agreements.

Principles of justice protect our most fundamental interests and establish the framework within which we may order our lives as we choose. On a social contract conception, the interests in liberty and security that are at stake in questions of accidental injury are matters of justice because they are fundamental to our well-being. Questions of justice involve the reconciliation of competing claims of public right, not the balancing of competing private preferences for personal well-being. They must therefore be settled by the “peculiar compulsion of the better argument,”<sup>27</sup> not by the antecedent distribution of market power and bargaining strength among the affected parties.

It follows that the fundamental terms of reasonable risk imposition must be fixed not by market mechanisms or private agreements, but by common reason and public argument. Prior writings notwithstanding, social contract theory cannot simply cede authority over the terms of reasonable risk imposition to the institution of contract law in either its market or its bargaining form. Ceding these matters to contract law makes matters of justice into questions of preference, and turns matters of right into questions of power. Because it aspires to reconcile the competing claims of liberty and security in accordance with the persuasiveness of the relevant reasons, tort must be the institutional mechanism for fixing the terms of reasonable risk imposition.

Part V begins the constructive part of the article. This Part takes its basic interpretive task to be fixed by two features of activ-

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27. RAYMOND GEUSS, *THE IDEA OF A CRITICAL THEORY* 72 (1981) (quoting JÜRGEN HABERMAS, *Wahrheitstheorien*, in *WIRKLICHKEIT UND REFLEXION: Festschrift für Walter Schulz* 240 (1973)).

ity liability: (1) the structure of enterprise liability entitlements, with its relative indifference to matters of optimal precaution; and (2) the basic distinction between negligence and strict liability themselves. Negligence liability is liability for wrongful — that is *unreasonable* — risk imposition. Strict liability, by contrast, is liability *not for unreasonably imposing a risk, but for unreasonably failing to accept financial responsibility for a harm that issued from a reasonable risk*. Thus, a primary task for an interpretively sound account of enterprise liability is to show why, under certain conditions, it is unfair (that is unreasonable) for enterprises not to accept financial responsibility for personal injuries issuing from their activities.

Part V also lays out the basic apparatus of social contract theory, and argues that the theory has identified itself too closely with the idea of reciprocity of risk imposition. That idea specifies the most reasonable reconciliation of liberty and security when injurers and victims face each other solely as free and equal persons, persons whose relationships with one another are uncluttered by special relationships and property rights, in a social world where the costs of nonnegligent accidents must be concentrated on either victims or injurers. Its authority is thus both presumptive of and relative to a particular social world, namely, Holmes's old world of "isolated, ungeneralized harms."

Part VI examines the elements of the enterprise liability rhetoric of fairness, and the *prima facie* case that they make for enterprise liability, and sets forth the grounds for doubting that it is either fair or efficient to hold entities liable for the financial costs of accidents that are neither reasonable nor efficient to prevent.

Part VII contains the heart of the article's constructive argument. It seeks to buttress the *prima facie* case for the fairness of enterprise liability, and to quiet doubts about its reasonableness and rationality. The gist of its argument is that the enterprise liability principle of fairness reconciles the competing claims of liberty and security more fairly, and more favorably, than the reciprocity of risk criterion when risks are the incidental by-products of large and well-organized activities. Losses of life, limb and property disrupt the lives of victims even when they issue from risk impositions that are themselves justified. We therefore have reason to minimize the financial hardship that they cause, and to distribute their financial costs as fairly as possible. In Holmes's new world of interrelated and generalized risks, the imposition of enterprise liability is often able to effect these ends. When it can do so, it is reasonable for

enterprises to impose the nonnegligent risks characteristic of their activities, but unreasonable of them not to accept responsibility for the financial costs of those risks.

Part VIII explores the boundaries of enterprise liability once its principal justification is taken to be a particular conception of fairness, considers the defenses appropriate to such liability, and examines the tide of sentiment currently running against such liability. It argues, *contra* George Priest's influential thesis that enterprise liability tends to become absolute liability, that the fairness account of enterprise liability fixes the boundaries of such liability at the point where an enterprise ceases to create risks different from those occasioned by the ordinary life of the community. Part VIII also argues that enterprise liability doctrine's relative indifference to optimal precaution and insurance concerns is frequently (though not always) justified by the presumptive freedom of persons to lead normal lives and use their property as they see fit. Lastly, Part VIII asserts that the tide of opinion running against enterprise liability is unconvincing because it rests on the implicit premise that persons are always and everywhere obligated to arrange their lives in ways that maximize overall social wealth.

Finally, Part IX summarizes the interpretive case that social contract theory makes for the enterprise liability principle of fairness. In doing so, this Part argues that the social contract conception "fits and justifies" aspects of enterprise liability law that perplex the prevailing economic accounts, and vindicates Judge Friendly's confident assertion that the structure of vicarious liability law rests ultimately on a sense of fairness, not on policies of optimal deterrence and insurance.

Let us set out on the long path to this conclusion by unpacking Friendly's argument.

## II. THE MISADVENTURE OF SEAMAN LANE: OF FAIRNESS, EFFICIENCY AND DRUNKEN SAILORS

"[A] little after midnight" on March 14, 1963, Seaman Lane returned from shore leave "in the condition for which seamen are famed" to the U.S. Coast Guard vessel *Tamaroa*.<sup>28</sup> The *Tamaroa* was undergoing repairs in a floating drydock in Brooklyn.<sup>29</sup> Pursuant to a provision in the contract between the government and Bushey (the drydock owner), members of the *Tamaroa*'s crew had

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28. *Bushey*, 398 F.2d at 169, 168.

29. *See* 398 F.2d at 168.

been granted access to her while she was being overhauled.<sup>30</sup> As Lane made his way along a drydock wall, “he took it into his head . . . to turn each of three large wheels some twenty times,” for reasons “not apparent to [the court] or very likely to Lane.”<sup>31</sup> These wheels controlled “the flooding of the tanks on one side of the drydock.”<sup>32</sup> By turning them Lane flooded the drydock, causing the ship to list, slide off its blocks, and fall against the wall. “Parts of the drydock sank, and the ship partially did — fortunately without loss of life or personal injury.”<sup>33</sup>

Bushey sought, and was awarded, damages in federal district court on the theory that the government, as Lane’s employer, was vicariously liable for his trespass. When it is clear, as it was here, that a tortfeasor is an employee of a particular enterprise, vicarious liability hinges on whether the employee’s tortious acts were committed within the “scope” of her employment. The United States appealed the district court’s ruling, arguing that Lane’s actions were beyond the scope of his employment, and staking its appeal on the “motive test” for determining that scope. As formulated by section 228(1) of the *Restatement (Second) of Agency*, the motive test provides that “[c]onduct of a servant is within the scope of employment if, but only if . . . (c) it is actuated, at least in part, by a purpose to serve the master . . . .”<sup>34</sup> The circuit court conceded that “[i]t would be going too far to find such a purpose here,” but agreed with the district court that this fact was not dispositive: “In light of the highly artificial way in which the motive test has been applied, the district judge believed himself obliged to test the doctrine’s continuing vitality by referring to the larger purposes *respondeat superior* is supposed to serve.”<sup>35</sup> After examining those purposes, the district court relied on allocative efficiency grounds to find Lane’s conduct within the scope of his employment.

Judge Friendly affirmed the result but not the rationale. Citing both Calabresi and Coase, he explained:

It is not at all clear, as the court below suggested, that expansion of liability . . . will lead to a more efficient allocation of resources. . . .

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30. See 398 F.2d at 169 (“[P]rovision shall be made so that personnel assigned shall have access to the vessel at all times, it being understood that such personnel will not interfere with the work or the contractor’s workmen.” (quoting the contract between the government and Bushey)).

31. 398 F.2d at 169-70.

32. 398 F.2d at 168.

33. 398 F.2d at 168.

34. RESTATEMENT (SECOND) OF AGENCY § 228(1) (1958).

35. 398 F.2d at 170.

[A] more efficient allocation can only be expected if there is some reason to believe that imposing a particular cost on the enterprise will lead it to consider whether steps should be taken to prevent a recurrence of the accident. . . . And the suggestion that imposition of liability here will lead to more intensive screening of employees rests on highly questionable premises . . . . It could well be that application of the traditional rule [finding Lane's conduct to be outside the scope of his employment] might induce drydock owners, prodded by their insurance companies, to install locks on their valves to avoid similar incidents in the future, while placing the burden on shipowners is much less likely to lead to accident prevention.<sup>36</sup>

Indeed, the record "reveal[ed] that most modern drydocks have automatic locks to guard against unauthorized use of valves."<sup>37</sup> Optimal precaution concerns thus favored locking valves over screening sailors, and so supported a restrictive reading of "scope of employment" doctrine.

Friendly gave even shorter shrift to the loss-spreading justification for enterprise liability:

It is true, of course, that in many cases the plaintiff will not be in a position to insure, and so expansion of liability will, at the very least, serve *respondeat superior's* loss spreading function. But the fact that the defendant is better able to afford damages is not alone sufficient to justify legal responsibility, and this overarching principle must be taken into account in deciding whether to expand the reach of *respondeat superior*.<sup>38</sup>

Turning away from efficiency rationales, Friendly staked his claim that the deepest ground of vicarious liability was *fairness*, not efficiency. Our sense of justice calls for holding business enterprises liable for "accidents which may fairly be said to be characteristic of [their] activities."<sup>39</sup> "Characteristic" accidents are those that "flow from [an enterprise's] long-run activity in spite of all reasonable precautions on [its] part."<sup>40</sup> The proper domain of enterprise liability consists of *both* those risks that prudent injurers would prevent by taking appropriate precautions, because the benefits exceed

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36. 398 F.2d at 170-71 (citations omitted). Friendly cites Calabresi in connection with his observation that improvements in allocative efficiency will result only if the imposition of liability induces improved precautions. He cites Coase in connection with his observation that placing liability on shipowners is much less likely to lead to accident prevention, because drydock owners are the ones in the position to take the cost-effective precaution, and shipowners are unlikely to insist upon drydock owners taking that precaution.

37. 398 F.2d at 171 n.6.

38. 398 F.2d at 171 (citations omitted); cf. Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959) (arguing that loss-spreading concerns almost never account for the imposition of tort liability and distinguishing such concerns from the fair apportionment of burdens and benefits).

39. 398 F.2d at 171.

40. 398 F.2d at 171.

the burdens of so doing, *and* those risks that are increased over their background level by an activity, but which are not worth preventing because the burdens exceed the benefits of so doing. The harm inflicted by Seaman Lane was “characteristic” of the Coast Guard’s activity in this sense:

[I]t was foreseeable that crew members crossing the drydock might do damage, negligently or even intentionally, such as pushing a Bushey employee or kicking property into the water. Moreover, the proclivity of seamen to find solace for solitude by copious resort to the bottle while ashore has been noted in opinions too numerous to warrant citation. Once all this is granted, it is immaterial that Lane’s precise action was not to be foreseen.<sup>41</sup>

The boundary of this sort of liability is fixed at the point where “the activities of the ‘enterprise’ do not . . . create risks different from those attendant on the activities of the community in general.”<sup>42</sup> For example:

If Lane had set fire to the bar where he had been imbibing or had caused an accident on the street while returning to the drydock, the Government would not be liable . . . . Here Lane had come within the closed-off area where his ship lay, to occupy a berth to which the Government insisted he have access, and while his act is not readily explicable, at least it was not shown to be due entirely to facets of his personal life. The risk that seamen going and coming from the Tamaroa might cause damage to the drydock is enough to make it fair that the enterprise bear the loss.<sup>43</sup>

Put otherwise, some accidents caused by drunken sailors are “characteristic risks” of the Coast Guard’s activity because the Coast Guard increases the level of drunkenness among its sailors above the ordinary background level of drunkenness. *Some* level of drunkenness is not attributable either to the “long run activity” of *any* distinct enterprise or to the negligence of anyone except, perhaps, the drunk. It is the outgrowth of innumerable activities comingling, the inevitable side effect of the legal availability of alcohol itself. This residual level is the background level. The activity of the bar eclipses the activity of the Coast Guard because the bar’s activity not only increases the level of drunkenness over and above the background level, but also increases the level of drunkenness over and above the level characteristic of the Coast Guard’s activity.

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41. 398 F.2d at 172.

42. 398 F.2d at 172.

43. 398 F.2d at 172 (citations omitted) (citing RESTATEMENT (SECOND) OF AGENCY § 267 (1958)).



### III. EFFICIENCY AND THE STRUCTURE OF STRICT LIABILITY

The test for vicarious liability that Friendly formulates here, and the general account of enterprise liability that it implies, instantiate a pervasive difference between the way that fairness- and efficiency-based theories conceive of enterprise liability. To unpack that difference we need to refine our understanding of Friendly's position. His claim that policies of efficient deterrence and loss spreading will not lead to an interpretation of the "scope of employment" rule that encompasses Seaman Lane's misadventure needs to be interpreted carefully. That claim should not be mistaken for the claim that economic analysis cannot justify holding the Coast Guard liable for that misadventure. Economics supplies us with a complex and indeterminate framework, and it permits a variety of approaches to any particular problem. It is therefore likely that a credible economic argument can be constructed for the specific result reached by Friendly's opinion.

For instance, one might argue that refusing to recognize a defense of contributory negligence to a claim of trespass induces optimal investment in private property,<sup>44</sup> and that using a criterion of "enterprise causation" to allocate the costs of those accidents that occur once all cost-justified precautions have been taken will lead firms to regulate their activity levels efficiently.<sup>45</sup> Taken together, these arguments yield a perfectly plausible economic case for holding the Coast Guard liable for Seaman Lane's trespass under the "scope of employment" rule.<sup>46</sup>

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44. See David D. Haddock et al., *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 CAL. L. REV. 1 (1990).

45. See Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 572 (1988) (offering definitions of "full" and "partial" "enterprise causation"). Sykes defines partial enterprise causation as follows: "An enterprise 'partially causes' the wrong of an employee if the dissolution of the enterprise and subsequent unemployment of the employee would reduce the probability of the wrong but not eliminate it." *Id.* This definition is very similar to Friendly's characteristic risk criterion, and Sykes interprets *Bushey* as "implicitly resting on notions of enterprise causation." *Id.* at 589 n.70. Sykes describes the activity level distortions that will be created by failing to make businesses "bear the full cost of the compensable wrongs attendant upon [their] operation." *Id.* at 567.

46. Other economic arguments are also plausible. One might, for example, agree that the "scope of employment" rule should be interpreted in the manner that Friendly proposes, but argue that victim negligence should be recognized as a defense to trespass in order to induce optimal precautions by property owners. Here, as elsewhere, one cannot tie economics definitively to one particular account of the proper outcome and the reasons for it. Economically-oriented scholarship can draw even closer to Friendly's perspective, and to the perspective of this article, when it accepts the idea that it is often unreasonable to insist on victim precautions, because doing so is inconsistent with the victim's property rights (e.g., her right to plant whatever crops she pleases so long as she does not interfere with others' use of their property) or her right to a normal life off of her property (e.g., her right to stroll the sidewalks without having to take precautions against stray cricket balls). William Jones

Friendly's point, however, is both narrower and broader than the claim that it is inefficient to impose liability on the Coast Guard for Seaman Lane's trespass. It is narrower in that the precise point of law at stake is the interpretation of the "scope of the employment" rule. Here Friendly's point is that efficiency considerations support an interpretation of that rule that excludes Seaman Lane's trespass from the scope of the Coast Guard's enterprise. Excluding that trespass gives the cheapest cost avoider (the drydock owner) a better incentive to take the optimal precaution (installing automatic locks on its drydock valves) than including that trespass within the scope of Lane's employment does. Friendly's point is also broader than the claim that it is inefficient to hold the Coast Guard liable for Seaman Lane's trespass, in that the clash between efficiency and fairness that he pinpoints is a clash between two approaches to tort liability. The efficiency approach takes the task of tort law to be encouraging the optimal coordination of injurer and victim activity, whereas the fairness approach takes the task of tort to be the reconciliation of conflicting claims of liberty and security on mutually beneficial terms.

### A. *The Structure of Strict Liability*

The structure of strict liability doctrine fits uneasily with the logic of the efficiency norm. Strict liability doctrines fix spheres of injurer responsibility and victim freedom in ways that seem unlikely to induce optimal joint precautions, and they pin full responsibility for accidental harms on one of the acts or activities whose collision engenders those harms. Prescriptive economic analysis generally seeks to induce the optimal combination of injurer and victim precautions, and insists that injurers and victims are jointly responsible, generally speaking, for the accidental harms that acts or activities occasion.<sup>47</sup>

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adopted this approach. See William K. Jones, *Strict Liability for Hazardous Enterprise*, 92 COLUM. L. REV. 1705, 1729, 1757, 1779 (1992). While I am deeply sympathetic to Jones's position, it marks a sharp, albeit subtle, departure from more traditional economic approaches and a partial embrace of the noneconomic view advanced here. Not surprisingly, Jones's argument has drawn fire for overlooking the superior efficiency of one critical and generally applicable victim precaution — first-party insurance against accidental harm. See Mark Geistfeld, *Should Strict Liability Apply to Hazardous Business Enterprises* (April, 1996) (unpublished draft, on file with author).

47. Coase forcefully argued that this is the path to efficiency. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960).

Not only do strict liability doctrines, both in their “enterprise” and “traditional” forms,<sup>48</sup> seem indifferent to the pursuit of efficiency, but strict liability case law appears to justify its articulation of duties by appealing directly to arguments about the legitimate boundaries of victim freedom and the fair reach of injurer responsibility. Injurer responsibility is predicated on the belief that it is legitimate to hold actors accountable for risks that they impose voluntarily and for their own benefit. Victim freedom is predicated on the belief that, within certain domains, persons may do what they wish with their persons and their property. That freedom includes the freedom *not* to take precautions for the protection of themselves and their property, even when so doing will prevent an accident at the lowest possible cost.

For example, the argument that those who choose to impose certain risks and presumably benefit from their imposition may fairly be held accountable for harms issuing from such risks is implicit in *Bushy* and explicit in other leading cases. *Lubin v. Iowa City*<sup>49</sup> invokes this argument to justify imposing strict liability on a waterworks for accidents arising out of a cost-justified decision to leave water pipes in place until they break:

It is neither just nor reasonable that [a] city . . . can deliberately and intentionally plan to leave a watermain underground beyond inspection and maintenance until a break occurs and escape liability. A city or corporation so operating knows that eventually a break will occur, water will escape and in all probability flow onto the premises of another with resulting damage. . . . The risks from such a method of operation should be borne by the water supplier who is in a position to spread the cost among the consumers who are in fact the true beneficiaries of this practice and of the resulting savings in inspection and maintenance costs. When the expected and inevitable occurs, they should bear the loss and not the unfortunate individual whose property is damaged . . . .<sup>50</sup>

The conviction that people may do as they wish with their persons and their property so long as they do not violate the rights of others is illustrated by *Marshall v. Ranne*,<sup>51</sup> a decision upholding a plaintiff’s right to recover for personal injuries inflicted by his

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48. I would classify strict liability for wild animals as a “traditional” form of strict liability and strict liability for burst waterworks pipes as an “enterprise” form of strict liability. This distinction, and the grounds for it, need not detain us here. My present point is that both forms have an entitlement cast to them.

49. 131 N.W.2d 765 (Iowa 1964).

50. 131 N.W.2d at 770.

51. 511 S.W.2d 255 (Tex. 1974).

neighbor's vicious hog.<sup>52</sup> Although the plaintiff was aware of the hog's viciousness and the dangers it presented — indeed, he had called that viciousness to his neighbor's attention — he took no steps to prevent the hog's entry onto his property, took no precautions to disable it in the event of its entry, and did not curtail his own activity to minimize the risks of harm to himself. In concluding that the plaintiff had not assumed the risk of the injury that befell him, the court had this to say:

He had . . . only a choice of evils, both of which were wrongfully imposed upon him by the defendant. He could remain a prisoner inside his own house or he could take the risk of reaching his car before defendant's hog attacked him. Plaintiff could have remained inside his house, but in doing so, he would have surrendered his legal right to proceed over his own property to his car so he could return to his home in Dallas. The latter alternative was forced upon him against his will and was a choice he was not legally required to accept. . . . The dilemma which defendant forced upon plaintiff was that of facing the danger or surrendering his rights with respect to his own real property, and that was not, as a matter of law the voluntary choice to which the law entitled him.<sup>53</sup>

This reasoning is sharply at odds with the logic of efficiency analysis, in which victim precautions are an eminently possible — and almost surely cost-justified — response to unwelcome intrusions on one's property by belligerent pigs. One might, for example, shoot pugnacious pigs. The facts of *Marshall* underscore the attractiveness of this solution. Marshall was aware that Ranne's boar had "gone bad"; he had only refrained from shooting it because "he did not consider that the neighborly thing to do, although he was an expert with a gun and had two available."<sup>54</sup> Shooting the hog would certainly seem to have been cost justified: the sort of severe injury that did in fact happen was to be expected, and that foreseeable cost exceeded the value of the pig. From an economic perspective, we might readily say that the plaintiff was responsible for his own harm by failing to take a cost-justified precaution.<sup>55</sup>

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52. Susan Rose-Ackerman discusses *Marshall* and related doctrines with an eye to highlighting the contrasts between efficiency and entitlement in accident and nuisance law. I am much indebted to her discussion. See Rose-Ackerman, *supra* note 26.

53. *Marshall*, 511 S.W.2d at 260. *Marshall* is consistent with prevailing doctrine. See RESTATEMENT (SECOND) OF TORTS § 496E (1965); W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS, 490-91 (5th ed. 1984).

54. 511 S.W.2d at 257.

55. The jury took this view of the matter, though perhaps without the economic animus. It found that Marshall's "failure to shoot the defendant's boar hog prior to the time the hog bit plaintiff was negligence." 511 S.W.2d at 257. The jury also found that Marshall was contributorily negligent because he had "failed to maintain a fence about his premises sufficiently close to prevent hogs passing through." 511 S.W.2d at 257.

The facts of *Marshall* underscore, but do not exhaust, the force of efficiency arguments. The attractiveness of victim precautions against “boars gone bad” does not turn on the prospective victim’s awareness that a *particular* boar has gone bad. The optimal set of standing precautions against the risk of *any* boar turning vicious and injuring a neighbor may also be bilateral. Suppose that “the animal owner can either build a wall around his property that reduces the chance of escape to 5 percent or erect a barbed wire fence that allows a one-third chance of escape. [It may be] more cost-effective overall for him to erect a barbed wire fence and for the potential victim to distribute traps about his pasture.”<sup>56</sup>

The general doctrinal implication of efficiency analysis in this kind of case is that victim negligence should be recognized as a defense.<sup>57</sup> Black-letter legal doctrine fails to heed this advice. The law permits victims to poison or shoot wild or vicious animals that come onto their property without compensating the owners of such animals, but does not limit the exercise of that right to circumstances where the value of the harm that those animals can be expected to cause exceeds the value of the animals themselves. Conversely, victims may recover fully for any actual damages that they suffer, even though they could have prevented all of those damages at lower cost by killing the trespassing animals. The law is inefficient in both directions: it does not discourage victims from killing animals that are worth more than the harm that they might

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56. See Rose-Ackerman, *supra* note 26, at 34.

57. I have elsewhere argued for a noneconomic understanding of negligence, but without specifically addressing the issue of victim negligence. See Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311 (1996). Here, I am using an economic understanding to bring out the conflict between the structure of strict liability doctrine and the thrust of the norm of efficiency. My use of economics in this regard should not be read to imply that only a theory that is concerned with the overall maximization of some value, such as wealth or utility, can justify the recognition of victim negligence as a defense to ordinary negligence. The history of tort theory suggests otherwise. See, e.g., Francis H. Bohlen, *The Basis of Affirmative Obligations in the Law of Torts*, 53 AM. L. REG. 209, 273, 337 (1905) (arguing that the attainment of benefit-burden proportionality generally requires a regime of negligence with a defense of contributory negligence). Bohlen explains: “Such duties [affirmative duties of care] are only imposed upon those who have voluntarily assumed a position or relation from which a benefit is derived by them.” *Id.* at 273-74. Mutuality of benefit is thus a necessary and sufficient condition of mutuality of duty (or mutuality of care). Whether this is the best way to justify victim duties of precaution against the carelessness of others, either within social contract theory or more generally, is not clear. For a recent, instructive discussion of the relevant issues and possibilities, see Kenneth W. Simons, *Contributory Negligence: Conceptual and Normative Issues*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 461 (David G. Owen ed., 1995). I suggest a slightly different view of the matter in the text accompanying notes 242-44, *infra*. For present purposes, however, I shall provisionally accept Bohlen’s position.

cause, and it allows victims to spare animals even when they will inflict harm that exceeds the value of the animals themselves.<sup>58</sup>

This rejection of efficiency concerns is carried even further by the defenses qualifying the rights of victims who fail to exercise their privilege to destroy wild or vicious animals. An owner is strictly liable for the torts of her wild animals, and her vicious domestic ones, unless the victim has waived her right to recover either by trespassing (and so violating the property entitlement of the animal's owner), or by voluntarily assuming the risk of injury.<sup>59</sup> Neither of these defenses encourages optimal precautions; neither invites justification in efficiency terms. The assumption of risk defense protects individual freedom; the trespass defense protects property rights (in particular the right of exclusion). Marshall had not assumed the risk of injury by Ranne's hog because he was entitled to move freely about his own property.<sup>60</sup>

In short, the victim's right to kill wild or vicious animals that enter her property is a privilege, rather than a duty; that privilege protects a property entitlement to be free from such invasions, and its existence is not conditioned on its efficient exercise.<sup>61</sup> Here, as elsewhere in the law of wild animals, minimizing the costs of acci-

58. See KEETON ET AL., *supra* note 53, §§ 21 & 89, at 642 (discussing the privileges of defending property and abating a nuisance). These privileges are not unqualified. If the value of a trespassing animal greatly exceeds the damage that it threatens, if there are efficacious alternatives to killing it, and if the harm is not imminent, then the property owner may not be privileged to kill it. The logic here is one of proportionality, with landowners being forbidden to kill trespassing animals when doing so would create a loss "greatly disproportionate to the threatened harm." *Id.* at 642; see also *id.* at 136-37.

59. See RESTATEMENT (SECOND) OF TORTS §§ 507, 508, 509, 511, 515, 517 (1977). Section 507 imposes strict liability on possessors of wild animals to everyone except trespassers, for harms caused by the wild and abnormally dangerous properties of the animals, respectively. See RESTATEMENT (SECOND) OF TORTS § 507 (1977). Sections 508 and 517 create partial exceptions to these rules. Section 508 applies to wild animals that escape and return to a natural state; the former owner is not liable once the animal returns to the wild. See RESTATEMENT (SECOND) OF TORTS § 508 (1977). Section 517 applies to animals kept in pursuance of a public duty. It provides that "[t]he rules as to strict liability for dangerous animals do not apply when the possession of the animal is in pursuance of a duty imposed upon the possessor as a public officer or employee or as a common carrier." RESTATEMENT (SECOND) OF TORTS § 517 (1977). Section 509 applies the rule of section 507 to possessors of abnormally dangerous domestic animals if the owner had reason to know that the animal had "dangerous propensities abnormal to its class." RESTATEMENT (SECOND) OF TORTS § 509 (1977). Section 515 provides that the plaintiff has no obligation to discover that he is in the vicinity of a wild or vicious animal. See RESTATEMENT (SECOND) OF TORTS § 515 (1977). Comment c to section 515(2) qualifies this rule: the plaintiff cannot recover if he "intentionally and unreasonably subjects himself to the risk of harm by the animal." RESTATEMENT (SECOND) OF TORTS § 515(2) cmt. c (1977).

60. See *supra* notes 51-53 and accompanying text. For a more general statement of the pertinent assumption of risk doctrine, see RESTATEMENT (SECOND) OF TORTS § 496E (1965).

61. See KEETON ET AL., *supra* note 53, at § 89 (referring to a plaintiff's "privilege" as opposed to "duty" of abatement); *Marshall*, 511 S.W.2d at 261; cf. the doctrines described *supra* note 59 (explaining that the right of a victim to recover for injury from a wild animal,

dents, and maximizing the value extracted from competing uses, simply do not enter into the law's delineation of rights and duties.

### B. *The Structure of Enterprise Liability*

Aspects of the law governing liability for wild animals are, no doubt, idiosyncratic. The general structure of that law, however, is not. By and large, the law of enterprise liability fails to heed the implications of efficiency analysis in the same ways that the particular decisions of *Bushey* and *Marshall* do: precaution concerns generally receive less emphasis than efficiency suggests that they should, and victim precautions are particularly de-emphasized.<sup>62</sup> The deeper ground of the economic criticism of enterprise liability doctrine is also the same. The conviction, voiced so powerfully by Coase,<sup>63</sup> that most harm is jointly caused by the collision between victim and injurer activities, leads economics to insist on the appropriateness of bilateral precautions when legal doctrine insists on unilateral responsibility.

Indeed, Friendly's claim in *Bushey* about the boundaries of the "scope of employment" rule is a general assertion about the character of enterprise (or modern strict) liability as distinguished from negligence liability.<sup>64</sup> Duty analysis in negligence law has two stages, although they rarely need to be distinguished. In the first stage, one must decide if the injury occasioned by the defendant's activity was "reasonably foreseeable." For "reasonable" foreseeability to be present, the defendant's act or activity must have increased the risk of the injury suffered by the plaintiff above the

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or a vicious one, is not structured to track efficiency concerns); Rose-Ackerman, *supra* note 26, at 34 (same).

62. See *supra* notes 24-25 and accompanying text (addressing the legal doctrines that I mean this claim to cover).

63. See Coase, *supra* note 47.

64. Robert Keeton has made essentially the same claim. See KEETON, *supra* note 20, at 162 ("It may be that most strict liabilities now recognized are illustrations of a single basis of liability — a principle that each activity is accountable for the distinctive risks it creates."). Some of Keeton's examples suggest that his "distinctive risk" criterion is slightly narrower than Friendly's "characteristic risk" criterion. For instance, Keeton goes on to distinguish the "distinctive risk" criterion of liability from the more economic criterion proposed by Albert Ehrenzweig. See *id.* at 163 n.25 (discussing ALBERT A. EHRENZWEIG, NEGLIGENCE WITHOUT FAULT (1951)). Keeton writes:

[Ehrenzweig proposes] using "typicality" of the loss to the enterprise as a guideline to scope of liability. It seems likely, however, that "enterprise liability for harm typically and insurably caused" (p. 32) would be a liability of much broader scope, with much more overlapping of liabilities among enterprises, than liability based on a principle of distinctive risk.

*Id.* Any difference between Keeton and Friendly is, at most, a variation of the same basic conception of liability, and I shall therefore use "distinctive" and "characteristic" risk interchangeably throughout this paper.

level of the mutually imposed background risks that all activities entail.<sup>65</sup> If the requirement of reasonable foreseeability is met, then a second inquiry must be undertaken. In this second stage, one must ask if the injury should have been prevented by an appropriate precaution, because the benefits of that precaution outweighed its burdens.<sup>66</sup> Friendly's point in *Bushey*<sup>67</sup> is that the imposition of enterprise liability requires *only* an affirmative answer to the first inquiry — only a determination that the accident at issue sprang from a risk whose incidence was increased above its background level by the defendant's enterprise. *Bushey* thus locates the conceptual boundaries of enterprise liability in contradistinction to both "absolute liability"<sup>68</sup> and negligence liability.

Conceived in this way, the very essence of enterprise liability seems to be out of sync with efficiency criteria. The boundary of such liability is expressly fixed beyond the point at which it is efficient for injurers to prevent the accidental harms issuing from their activities. Moreover, it is fixed at this point without any attention to the possibility that victims may be able to prevent the relevant harms efficiently, and without any obvious reliance on the superior capacity of activities to bear the costs of accidents that they cannot prevent more efficiently than the victims of those accidents. Indeed, Friendly explicitly dismisses such loss-spreading criteria, stat-

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65. See Keating, *supra* note 57, at 350-52.

66. *Van Skike v. Zussman*, 318 N.E.2d 244 (Ill. App. Ct. 1974), excerpted in KEETON ET AL., *supra* note 20, at 145-48, illustrates these two stages. The plaintiff, a child, had obtained a toy cigarette lighter from a gumball machine operated by Zussman in the store of Rivera, another defendant. The child then purchased lighter fluid from Rivera and "set himself on fire" when he tried to fill the toy lighter with lighter fluid. The trial court dismissed the complaint against both defendants for failing to state a cause of action.

The appellate court affirmed the dismissal as to both defendants, but on different grounds. With respect to Zussman, the appellate court found that the accident was not "reasonably foreseeable," and so saw no need to investigate whether Zussman should have taken precautions against it. See 318 N.E.2d at 247. In other words, the court found that selling a toy lighter in a gumball machine did not increase the risk of children setting fire to themselves — the relation of the accident to the sale was merely coincidental. With respect to Rivera, the court implicitly found the accident reasonably foreseeable but the burden of precaution too great to be required. See 318 N.E.2d at 247-48.

Under a realm of enterprise liability as Friendly defines it, Rivera, but not Zussman, would be liable for the injury to the plaintiff.

67. See *supra* text accompanying notes 39-43.

68. George Priest argues that enterprise liability is essentially absolute liability. See Priest, *supra* note 5, at 527 ("The unfolding of enterprise liability since 1964 might be given a different interpretation: as a struggle of courts to define some coherent conception of manufacturers' liability short of absolute liability. . . . But the distance between prevailing standards and a standard of absolute liability progressively narrows.")

Friendly's criterion of characteristic risk is clearly something other than absolute liability, just as it is clearly something other than negligence liability. As Friendly himself emphasizes, that criterion excludes certain risks from the enterprise's domain. See *supra* text accompanying note 43.



ing that they are “not alone sufficient to justify legal responsibility, and [that] this overarching principle must be taken into account in deciding whether to expand the reach of *respondeat superior*.”<sup>69</sup>

In *Bushey*, Friendly implies that the domain of the characteristic risk principle far exceeds the scope of the employment rule. He suggests that it underlies modern vicarious liability doctrine, other versions of modern enterprise liability such as abnormally dangerous activity liability and the then incipient field of products liability, and administrative schemes such as workers’ compensation law. While I suspect that Friendly is right about this, I shall settle here for pointing out that the law of abnormally dangerous activities, and the liability of product manufacturers for manufacturing defects, appear to embody the characteristic risk criterion.

As formulated by section 519(2) of the *Restatement (Second) of Torts*, the law of abnormally dangerous activities holds such activities liable for “the kind of harm, the possibility of which makes the activity abnormally dangerous.”<sup>70</sup> This criterion is tracked by the cases: gasoline tanker trailers are strictly liable for harms issuing from the escape of gasoline, but not for driving decisions that result in ordinary traffic accidents;<sup>71</sup> those who handle, transport, or use dynamite for blasting are strictly liable only for harms issuing from its explosion or concussion;<sup>72</sup> those who employ “field burning” as an agricultural technique are liable only for injuries attributable to those aspects of the technique that create “an effectively uncontrollable danger of serious harm beyond the ordinary risks associated with common uses of fire that are readily avoided by due care.”<sup>73</sup>

Plainly, “scope of the risk” liability is broader than negligence liability. The risks that make an activity abnormally dangerous include both those that should be eliminated by the exercise of due care, and those that cannot be so eliminated. Such liability is likewise narrower than “absolute” liability. The risks that make an ab-

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69. *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 171 (2d Cir. 1968) (citation omitted).

70. RESTATEMENT (SECOND) OF TORTS § 519(2) (1977). I shall call this the “scope of the risk” criterion.

71. See *Siegler v. Kuhlman*, 502 P.2d 1181, 1187 (Wash. 1972) (holding the owner of a gasoline tanker strictly liable); cf. *Yommer v. McKenzie*, 257 A.2d 138, 140 (Md. 1969) (holding that the storage of gasoline is an abnormally dangerous activity).

72. See *Exner v. Sherman Power Constr. Co.*, 54 F.2d 510, 513 (2d Cir. 1931); *Bedell v. Goulter*, 261 P.2d 842, 844 (Or. 1953); cf. ROBERT E. KEETON, *LEGAL CAUSE IN THE LAW OF TORTS* 105 (1963).

73. *Koos v. Roth*, 652 P.2d 1255, 1265 (Or. 1982) (Linde, J.). Linde lists “the spark-throwing steam locomotives whose incendiary propensities were a classic cost of industrial progress” among the forms of fire that are not abnormally dangerous. 652 P.2d at 1265.

normally dangerous activity abnormally dangerous are a subset of all the risks that such activities create. For example, the risks of transporting gasoline by tanker trailer include the risks of causing ordinary traffic accidents. In that respect, however, the transport of gasoline by tanker trailer does not "create risks different from those attendant on the activities of the community in general."<sup>74</sup> All trucks and cars increase the risk of ordinary traffic accidents by their activity. Thus, under the scope of the risk criterion, abnormally dangerous activities are liable for the risks that they create that are distinct from, and greater than, the background risks that persons mutually impose on each other in the course of their ordinary activity. These are the characteristic, or distinctive, risks of their activities.

The resemblance between the "scope of the risk" criterion for the imposition of abnormally dangerous activity liability and Friendly's criterion of "characteristic risk" is further underscored by the ultrasensitivity limit on the liability of abnormally dangerous activities. Section 524A of the *Restatement (Second) of Torts* provides that "[t]here is no strict liability for harm caused by an abnormally dangerous activity if the harm would not have resulted but for the abnormally sensitive character of the plaintiff's activity."<sup>75</sup> Those who engage in blasting, for example, are not liable for the harm that ensues when the noise and concussion from such blasting frightens mink into killing their young.<sup>76</sup>

Abnormal sensitivity is a natural boundary of liability for characteristic or distinctive risk: the harm suffered by the abnormally sensitive is distinctive to, or characteristic of, their unusual constitution. Consequently, just as enterprise liability ends when the enterprise ceases to "create risks different from those attendant on the activities of the community in general,"<sup>77</sup> so, too, enterprise liability ends when the special sensitivities of the victim render her so sensitive to harm from the injurer's activity that she is harmed when an ordinary victim would not be. In the first case, the increased risks imposed by an activity blend into the background risks imposed by the community's activities. In the second case, the increased risks

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74. See *Bushey*, 398 F.2d at 172.

75. RESTATEMENT (SECOND) OF TORTS § 524A (1977).

76. See *Madsen v. East Jordan Irr. Co.*, 125 P.2d 794 (Utah 1942); *Foster v. Preston Mill Co.*, 268 P.2d 645 (Wash. 1954).

77. *Bushey*, 398 F.2d at 172.

are eclipsed by the even greater risks created by the abnormal sensitivity of the victim.<sup>78</sup>

The liability of product manufacturers for manufacturing defects, the strictest form of product liability, is likewise consistent with Friendly's characteristic risk criterion. Manufacturers are held liable for injuries caused by a product's failure to conform to "the manufacturer's intended result or from other ostensibly identical units of the same product line"<sup>79</sup> "even though all possible care was exercised in the preparation and marketing of the product."<sup>80</sup> Accidents arising out of manufacturing defects are a "harm likely to flow from [a firm's] long-run activity in spite of all reasonable precautions on [its] part."<sup>81</sup> At least some, and perhaps most, manufacturing defects exist because it is cheaper to bear the costs of certain accidents than to prevent them. Thus, they are a "distinctive risk" of the manufacturer's activity: a risk deliberately created by its conscious investments in quality control, material inputs, human capital, equipment, and so on.<sup>82</sup>

Finally, the accuracy of Friendly's "characteristic risk" criterion as a general account of enterprise liability is underscored by the way that the concept of "cause in fact" applies to such liability. Cause in fact comes into play in the guise of the "act of God" or "vis major" doctrine: injurers are not liable for harms involving abnormally dangerous activities if they can show that the harm "was due exclusively to an overwhelming agency beyond [the defendant's] control and above human restraint."<sup>83</sup> Under these circum-

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78. While this limit on liability is a manifestation of the characteristic risk criterion, it is only fair to limit liability in this way if certain conditions are met. See *infra* text accompanying notes 227-32.

79. *Barker v. Lull Engg. Co.*, 573 P.2d 443, 454 (Cal. 1978).

80. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2A (Tentative Draft No. 2, 1995).

81. See *Bushey*, 398 F.2d at 171.

82. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (Tentative Draft No. 2, 1995); KEETON, *supra* note 20, at 163.

83. See *Bratton v. Rudnick*, 186 N.E. 669, 671 (Mass. 1933) (holding defendant not liable for harm caused by the collapse of a dam occasioned by rainfall, even though the defendant was negligent in its maintenance of the dam, because the rainstorm precipitating the collapse was "twice as great as any disclosed by easily available records in this part of the country"); see also *Golden v. Amory*, 109 N.E. 131 (Mass. 1952); *City of Tucson v. Wöndergem*, 435 P.2d 77 (Ariz. Ct. App. 1967). The doctrine finds its original articulation in *Nichols v. Marsland*, 2 Ex D. 1 (1876) (Court of Appeal, Exchequer Division). In *Nichols*, "artificial ornamental lakes" on the defendant's property burst, and the subsequent flood swept away four county bridges. The defendant was absolved of liability on the ground that the rain and flooding that precipitated the breakage of the dam were so extraordinary that they could not have been foreseen. The basis of the "Act of God" doctrine is not as clear as one might hope. On one interpretation, the defendant had no "duty" with respect to these risks because they were so abnormal as to be unforeseeable. This sounds suspiciously like a negligence doctrine. On

stances, the defendant's activity is not a "but for" cause of the plaintiff's injury because the injury would have happened even in the absence of that activity. This version of cause-in-fact doctrine is the natural expression of enterprise liability understood as liability for "characteristic" or "distinctive" risk. When an injury would have happened even without the defendant's abnormally dangerous activity, the distinctive risks of that activity have been eclipsed, and liability for such risks has come to an end. By contrast, negligence liability does not go so far, and absolute liability — to be absolute — would have to go further. Here, then, we see that the idea of fairness fixes the scope of enterprise liability in a distinctive way, thereby supplying an answer to one of the problems that bedeviled our inquiry at the outset.<sup>84</sup>

The defenses to abnormally dangerous activity liability likewise define zones of freedom and responsibility, rather than duties to undertake mutually beneficial precautions. For they are the defenses to liability for wild animals at large: other than abnormal sensitivity, the only defenses recognized are those of assumption of the risk and "knowingly and unreasonably subjecting [one]self to the risk of harm."<sup>85</sup> These defenses are construed in the manner of

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another interpretation, the relevant harms did not issue from the distinctive risks created by the presence of the abnormally dangerous activity. They issued from a natural phenomenon that eclipsed the risks of that activity by virtue of its enormous magnitude. This sounds more like a strict liability doctrine and is conceptually preferable to the first interpretation for that reason.

84. See *supra* notes 24-25 and accompanying text. To be sure, the answer given here is preliminary. A complete account of enterprise liability would have to discuss the process of attributing accidents to activities in more detail. Jules Coleman and Arthur Ripstein have shown that the "principle of fairness" that "each person should bear the costs of her activities" admits of both libertarian and liberal interpretations and that the principle can be applied in a defensible way only by making evaluative judgments about the importance of various liberty and security interests. Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 MCGILL L.J. 91, 94 (1995). I am in complete agreement with the general thrust of their argument. Space permitting, I would argue that the evaluative process that they and I believe characteristic of negligence law can be — and, in fact, is — adapted to enterprise liability. The key is that, to attribute accidents to activities under enterprise liability, we must evaluate not the importance of various liberty and security interests, but the "character" of the relevant enterprise. See Ronald Dworkin's discussion of the "character" of chess in RONALD DWORIN, *Hard Cases, in TAKING RIGHTS SERIOUSLY* 81, 101-05 (1978). For my view of how the evaluative process works in negligence law, see Keating, *supra* note 57, at 367-79.

85. See RESTATEMENT (SECOND) OF TORTS §§ 523, 524, & 524A (1977) (addressing assumption of risk, contributory negligence, and abnormal sensitivity, respectively). The contributory negligence defense of section 524 is narrower than normal contributory negligence because it requires that the plaintiff "knowingly and unreasonably" subjected himself to the risk of harm. RESTATEMENT (SECOND) OF TORTS § 524 (1977). There is more than a hint of gross negligence or recklessness here. My discussion here describes the traditional regime of defenses to strict liability. Of late, comparativization has affected defenses to strict liability as well as defenses to negligence. See, e.g., *Andrade v. Shiers*, 564 So. 2d 787 (La. Ct. App. 1990) (combining defense of comparative negligence with strict liability of animal owner). I

*Marshall*: the plaintiff's encounter with the risk must be knowing and free.<sup>86</sup> The defenses to manufacturing defect liability are equally few and equally narrow — misuse of the product, and assumption of the risk.<sup>87</sup>

Ironically, it is modern vicarious liability — the doctrine involved in *Bushey* — that presents the most ambiguous evidence for this conception of enterprise liability. One source of this ambiguity is the complexity of vicarious liability doctrine itself. Vicarious liability is a hybrid doctrine; it concerns the liability of principals for the torts of their agents. The part of the doctrine that concerns us speaks to the liability of employers (masters) for the torts of their employees (servants). The “scope of employment” rule for attributing the torts of employees to the employers (enterprises) they serve embodies a strict (not a negligent) principle of responsibility.

Whether the liability of employers for the torts of their employees is best understood as resting on efficiency or fairness depends almost entirely on how the “scope of employment” rule is interpreted. On Friendly's reading of the “scope of the employment” rule, the vicarious liability of masters for the torts of their servants is not tailored to the specifications of efficiency: it permits recovery even when the victim might be the cheaper precaution taker. While Friendly's claims about the grounds and character of vicarious liability find powerful support in the cases, and have the backing of his considerable authority, they are contestable. Here, then, I must claim only that a noneconomic conception may provide the best interpretation of vicarious liability — and even that claim requires further development.

Finally, there is a third leg to the disjunction between efficiency concerns and the structure of strict liability doctrine. Efficiency is concerned not only with optimal precaution and deterrence, but also with optimal compensation (or insurance). The socially optimal treatment of risk requires deterring those risks that should not be imposed, and compensating victims for those accidental injuries that optimal care will not prevent.<sup>88</sup> To induce optimal injurer precautions, damage awards must include the nonpecuniary dimensions of accidental injury and death. Even though money damages

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assess the appropriateness of a comparative negligence defense in the text accompanying notes 242-44, *infra*.

86. See *Yukon Equip., Inc. v. Fireman's Fund Ins. Co.*, 585 P.2d 1206, 1212 (Alaska 1978).

87. See RESTATEMENT (SECOND) OF TORTS § 402A cmts. h & n (1977); see also *Ellsworth v. Sheme Lingerie, Inc.*, 495 A.2d 348 (Md. 1984); *Treadway v. Uniroyal Tire Co.*, 766 P.2d 938 (Okla. 1988).

88. See STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 293 (1987).

cannot make victims truly whole for losses of limb and life, those losses are very real, and they must be included, *ex ante*, in damage awards in order to induce injurers to exercise optimal care. Once an injury occurs, however, monetary damages should be awarded only for those injuries that can be redressed by money — the level of damages that the victim would buy if she were to insure against the injury in question.<sup>89</sup>

In practice, this makes it all but impossible for the law of accidents to fix damage awards at the proper level, so long as victims receive the damages actually awarded by courts. If those damages are pitched at the level appropriate to the deterrence of wrongful risk imposition, victims will be overcompensated for their injuries. If they are pitched at the level appropriate to compensate victims for their injuries, injurers will be insufficiently deterred. In theory, however, this is a problem that negligence can solve, but strict liability cannot:

Under a perfectly functioning negligence rule . . . the socially ideal outcome can be achieved, since under that rule injurers will always take due care and never be found negligent; hence victims will bear their losses and can and will optimally insure for amounts less than what injurers would have to pay were they liable.<sup>90</sup>

There is a familiar lesson in all of this: just as optimal accident prevention requires joint victim and injurer precautions, so, too, optimal accident compensation requires coordinated victim and injurer activity. To achieve optimal accident prevention, injurers must be liable for the full costs of their carelessness. To achieve optimal loss spreading, victims must be responsible for insuring against any losses they might suffer. Even under ideal conditions, this delicate division of labor between, and coordination among, in-

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89. The statement in the text comes close to being a representative position in law and economics, but it may not represent anyone's views exactly. Professor Shavell, for example, argues that optimal compensation usually requires that damages be awarded only for pecuniary losses, but notes that nonpecuniary damages are desirable when injury increases the marginal utility of money and that injurers need to internalize both pecuniary and nonpecuniary losses to achieve optimal deterrence. *See id.* at 23-32. By contrast, Alan Schwartz argues that the tort system supplies more insurance than is optimal, because it awards compensation for pain and suffering even though consumers would not purchase insurance against these "losses" because "dollars cannot erase pain." Schwartz, *supra* note 7, at 825; *see also* George L. Priest, *The Modern Expansion of Tort Liability: Its Sources, Its Effects, and Its Reform*, J. ECON. PERSP., Summer 1991, at 31, 44-48. Steven Croley and Jon Hanson argue that the tort damages may be evidence of unmet market demand for pain-and-suffering insurance and advocate awarding compensation for all injuries that increase the victim's marginal utility for money. *See Croley & Hanson, The Nonpecuniary Costs of Accidents, supra* note 7.

90. SHAVELL, *supra* note 88, at 232 n.4. In practice, of course, findings of negligence do occur, and thus the "optimal outcome cannot be achieved because victims will in fact receive awards." *Id.* Those awards will be too high for insurance purposes.

jurors and victims is incompatible with the structure of strict liability doctrine. The basic thrusts of the efficiency norm and the structure of strict liability entitlements sit uncomfortably with one another.

In short, there is reason to believe that the overall structure of enterprise liability doctrine, like strict liability generally, does not exhibit the features of an efficiency-driven doctrine. On their face, enterprise liability doctrines ignore optimal precaution concerns in *both* directions — that is, both in their definitions of the boundaries of liability and in their recognition of defenses. And strict liability cannot be reconciled, even in theory, with the pursuit of optimal loss spreading. This triple departure from the implications of efficiency, and the overall structure responsible for it, gives us reason to pause before subscribing to the economic justification of enterprise liability.

#### IV. MORAL THEORY AND ENTERPRISE LIABILITY

If the reigning economic theory of enterprise liability fails to fit the legal phenomenon hand and glove, the prevailing moral theories of tort liability fare even more poorly. These theories fit the structure of enterprise liability law even worse than economic theories do. The reigning version of social contract theory, for example, has made nonreciprocity of risk the touchstone for the imposition of strict liability, yet the risks to which such liability applies are more reciprocal than not.<sup>91</sup> So, too, the reciprocity criterion directs our attention to the distribution of *risk* between the affected parties, whereas the enterprise liability principle of fairness directs our attention to the distribution of (the financial costs of) *harm*. While these disjunctions between theory and doctrine are particular to Fletcher's version of social contract theory, the disjunction itself is general. Richard Epstein's corrective justice theory of strict liability is no more attuned to the logic of enterprise liability law than is Fletcher's social contract conception.<sup>92</sup>

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91. Although I believe that a detailed examination of the relevant cases and black-letter law would support this claim, I shall not undertake such an examination here. For present purposes, it will do to observe that neither George Fletcher nor Charles Fried, the primary proponents of reciprocity theory in the past thirty years, have argued that enterprise liability should be imposed in the areas of vicarious liability and manufacturing defects, and in certain cases involving abnormally dangerous activities, such as *Lubin v. Iowa City*, 131 N.W.2d 765, 770 (Iowa 1964), and *Siegler v. Kuhlman*, 502 P.2d 1181, 1186 (Wash. 1972), because those areas or cases are marked by the nonreciprocity of risk. The only exception to this generalization is product injuries to bystanders. See FLETCHER, *supra* note 14; FRIED, *supra* note 15, at 194-99.

92. See *supra* note 17 and accompanying text.

The fact that their theories fit enterprise liability doctrine poorly is not the sole, or perhaps even the primary, reason that moral theorists have been unable to exploit the interpretive weaknesses in the economic account of enterprise liability law. By and large, these theorists have been disinclined to exploit the opening. They have believed either that enterprise liability is normatively suspect, or that special economic principles apply to the domain of activity liability. Ernest Weinrib's work illustrates the suspicion that enterprise liability is normatively indefensible.<sup>93</sup> George Fletcher's important work in the social contract tradition, and Jules Coleman's influential work in the rational choice tradition, exemplify the conviction that noneconomic principles apply to enterprise liability.<sup>94</sup>

For the most part, I hope to address these doubts by showing that a powerful idea of fairness underlies enterprise liability law, an idea that looks to what enterprises have done and might do, not to who they are. I also hope to show that this conception of fairness, far from being alien to social contract theory, has a place in the family of principles that social contract theory takes to govern tort law. The belief that principles of contract law or economic efficiency should govern circumstances when the parties have preexisting contractual relationships with one another, even though fundamentally different principles should control accidents among strangers must, however, be addressed head on.<sup>95</sup> That view is both widespread and influential.<sup>96</sup> Taken seriously, it is capable of con-

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93. See *supra* note 19 and accompanying text.

94. Fletcher believes that either bargaining or market relationships make the application of social contract theory problematic and so conceives of his theory as one applicable to accidents among strangers. He writes that "the market relationship between the manufacturer and the consumer [in product accidents] . . . chang[es] the question of fairness posed by imposing liability." Fletcher, *supra* note 13, at 544 n.24. Fletcher's specific reason is that this market relationship makes "loss-shifting in products-liability cases . . . a mechanism of insurance." *Id.* Later, he says that *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910), is "not entirely apt for my theory. The existence of a bargaining relationship between the defendant and the plaintiff poses the market adjustment problems raised in note 24 *supra*." Fletcher, *supra* note 13, at 546 n.38. For his part, Coleman writes: "There seems to me to be a case for treating products liability on the contract model even if there isn't the same argument for treating all of tort law in that way." JULES L. COLEMAN, *RISKS AND WRONGS* 418-19 (1992).

95. As I have implied in passing, contractual relationships between victims and injurers might take either of two forms: they might be market relationships or bargaining relationships. The relationships between product manufacturers and consumers are market relationships; the relationship between the drydock and the Coast Guard, for example, was a bargaining one. For a succinct economic exposition of the differences between bargaining and markets, see Robert Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1 (1982). In one sense, Cooter's whole article is a commentary on this distinction. For a brief, clear statement of the distinction, however, see *id.* at 15-20.

96. Prominent proponents of the view, in addition to Coleman and Fletcher, include libertarians and several different kinds of economists. Richard Epstein endorses a regime of



suming enterprise liability law.<sup>97</sup> Market relationships are present in one of the core cases of enterprise liability (namely, manufacturing defects) and bargaining is a live alternative to tort liability in innumerable cases of strict liability. Some of those cases, including *Rylands* and *Bushey*, are central to enterprise liability. Kantian social contract theory firmly rejects the idea that contract law can be charged with fixing basic tort duties, because it takes the matters at hand to be matters of justice, properly settled *not* by the coercive power conferred by bargaining position, but by the “‘peculiar compulsion of the better argument.’”<sup>98</sup> The position adopted by Kantian social contract theory appears poorly understood in the

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strict liability for accidents among strangers and no liability (contract) for accidents among parties in bargaining or market relationships with one another. See RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 101 (1995); see also *id.* at 91-111. This is, I believe, a logical position for a libertarian to take. Robert Nozick's views have a roughly similar structure, although they make more room for the enterprise liability principle of fairness. See NOZICK, *supra* note 18; *supra* note 20 (quoting Nozick). Two different strands of law and economics endorse contract as an alternative to enterprise liability. One strand, represented by Alan Schwartz's work in product liability law, embraces contract for reasons rooted in its views of efficient markets. See Schwartz, *supra* note 7. Another strand, growing out of Coase's work on bargaining, embraces contract because it believes that private bargains are more likely to reach efficient results than governmentally-imposed solutions. See *infra* note 101 and accompanying text. Even Croley and Hanson, who specifically reject the claim that product accidents should be handled by a regime of free contract rather than a regime of enterprise liability, accept the proposition that, absent market failures, contract is generally more efficient than tort. See Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683, 688-89 (1993) (“Other things equal, legal economists typically prefer freedom of contract over immutable liability standards. By most accounts, an immutable liability rule is justified if and only if it prevents some significant negative externality or other market failure.” (citation omitted)). There may be less to this consensus than meets the eye, however. In another article, Croley and Hanson point out that advocates of a regime of “free contract” for product-related risks show explicit “distrust of unregulated product markets” in certain respects, Croley & Hanson, *The Nonpecuniary Costs of Accidents*, *supra* note 7, at 1808, and that these advocates are quite selective in their endorsements of disclaimability. See *id.* at 1807-09.

97. Fletcher lucidly explains how Coase's views led to a powerful assault on enterprise liability. See FLETCHER, *supra* note 14, at 162-68.

98. GEUSS, *supra* note 27, at 72 (quoting JÜRGEN HABERMAS, *Wahrheitstheorien*, in *WIRKLICHKEIT UND REFLEXION: FETSCHRIFT FÜR WALTER SCHULZ* 240 (1973)). The topic that we are touching on is deep and complicated, and I do not mean to imply that Kantian social contract theory embraces Habermas's ideal speech situation account of truth for purposes of practical reasoning. Rawls makes clear the substantial difference between his “political liberalism” and Habermas's more “metaphysical” doctrine in his *Reply to Habermas*. John Rawls, *Reply to Habermas*, 92 J. PHIL. 132 (1995). My point is simply that Kantian social contract theory accepts the proposition that something like the “weight of the relevant reasons” determines whether an arrangement is just, and this favors settling questions of justice by weighing the relevant reasons. In the context at hand, this recommends tort law over contract law. The idea that disagreements should be settled not by the balance of bargaining power, but by the balance of reasons, is not only recognized by economists, it is accepted by them as *the* ideal that should govern scholarly argument. See, e.g., Stephen Figlewski, *Remembering Fischer Black*, J. DERIVATIVES, Winter 1995, at 94, 96. Figlewski writes:

Fischer . . . was not “a political person” . . . and “refused to be swayed by sheer political power.” “Nobody had any bargaining power with Fischer,” one person told me. What he thought was important was to “build the most truthful model you could, even if you couldn't solve it analytically or accurately.” He “reinvigorated your sense that it was

contemporary legal academy, even though it is familiar in contemporary philosophy, and consistent with a long tradition of liberal political thought and practice, including the practice of modern tort law.

### A. *Why Not Contract?*

Stripped of its subtleties, the argument that different principles ought to apply to risks embedded in market or bargaining relationships among the affected parties is an argument for freedom of contract. Proponents of this view agree that the parties to particular risk impositions ought to be free to choose the terms on which those risks are imposed. Freedom of contract, pronounced dead not so very long ago,<sup>99</sup> is now very much alive and well. Newly powerful currents of libertarian and economic thought now converge in its support. Libertarians see the market as the institutional mechanism that builds individual consent into every arrangement. As buyers, sellers, and bargainers, persons are free to decide what risks to bear and what obligations to accept. Legal economists see the market as the best institutional mechanism for the optimization of welfare. In the absence of transaction costs, participants will trade with each other until there are no more mutually beneficial trades to make. There will, then, be no social state that is Pareto-superior to the one achieved through free market exchange. Freedom and utility, efficiency and consent, both converge on the desirability of freedom of contract.<sup>100</sup>

As this view is articulated in the language and conceptual framework of law and economics, it both subordinates tort to contract

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important to do the right thing and concentrate on quality even if people around you sometimes didn't appreciate it."

*Id.* What economics *denies* is that this ideal applies to the domain of what Kantians call "practical reason."

99. See, e.g., P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979); GRANT GILMORE, *THE DEATH OF CONTRACT* (1974).

100. For a representative statement of the convergence from a libertarian perspective, see RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS*, 25, 23 (1992) (arguing that, in a regime of freedom of contract, "the consent of both parties guarantees that the transaction works to their common benefit" and that "[t]here are powerful functional reasons to believe that the overall social consequences will be improved as well"). For a representative statement from a mainstream law and economics perspective, see Robert Cooter, *Torts As the Union of Liberty and Efficiency: An Essay on Causation*, 63 *CHI.-KENT L. REV.* 523, 544-50 (1987). For a typical invocation of both grounds in an applied economic analysis of tort rules, see Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 *YALE L.J.* 353, 357 (1988) ("The consumer sovereignty norm may govern cases of both actual and hypothetical consent. In the former case, well-informed, uncoerced consumers actually consent to particular contract clauses. The consumer sovereignty norm uncontroversially supports enforcement of these clauses; the various moral theories to which Americans adhere respect truly consensual arrangements.").

and makes tort parasitic on contract. The view subordinates tort to contract by asserting that, when bargaining is possible, the law should confine itself to specifying an initial allocation of property rights and tort duties — an allocation that minimizes transaction costs — and grant to the affected parties the authority to bargain to a different final allocation, if they so desire.<sup>101</sup> It makes tort parasitic on contract by asserting that, when transaction costs are high, the law should impose the solution that the parties would have agreed upon, had transaction costs been low.

The challenge mounted by this view is clear: Why impose strict liability in *Bushey*? Why do so in *Rylands*? Why not let these losses fall where they lie, unless the parties themselves agree otherwise? Why not stick with a contractual regime of no liability for product accidents? Why not, at the very least, permit the affected parties to alter the relevant liability rule by contractual agreement? This view raises a host of questions.<sup>102</sup> At present, what needs to be explained is why Kantian social contract theory rejects the liberta-

101. As Cooter asserts:

The basic idea of the [Coase] theorem is that the structure of the law which assigns property rights and liability does not matter so long as transaction costs are nil; bargaining will result in an efficient outcome no matter who bears the burden of liability. The conclusion may be drawn that the structure of law should be chosen so that transaction costs are minimized, because this will conserve resources used up by the bargaining process and also promote efficient outcomes in the bargaining itself.

Cooter, *supra* note 95, at 14. In the footnote to this passage, Cooter observes that this is “a theme in Richard Posner’s *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977).” *Id.* at 14 n.11. Coasean arguments appear to be one source of George Fletcher’s hesitation about the extension of social contract arguments to market and bargaining relationships. See *supra* note 94 and accompanying text. The other source of hesitation appears to be the essentially Aristotelian belief that when tort law uses market mechanisms to disperse the costs of accidents, it impermissibly mingles distributive justice with corrective justice. This belief is strongly and clearly expressed in WEINRIE, *supra* note 19, at 74-75 (“Expressed in the terms of Aristotle’s analysis, the difficulty is that the introduction of loss-spreading into tort law mixes corrective and distributive justice. . . . [S]ince coherence consists in having a legal relationship reflect one of the forms of justice, loss-spreading as a tort doctrine is incoherent.”).

102. For one thing, the surface clarity, and apparent simplicity, of these questions conceals a deep conceptual puzzle over the proper specification of initial entitlements. The thought that the decision should be left to the parties to resolve as they see fit does not explain which initial specification of rights and obligations is correct. Contract is a device for altering rights and obligations, and it therefore presupposes some initial assignment of entitlements — some specification of property rights, liability rules, and contractual norms for their alteration. Which initial specification of entitlements, if any, is correct? What is the ground on which it is correct? The efficiency norm seems to require an answer instead of supplying one. These issues are discussed in Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 *HOFSTRA L. REV.* 711 (1980). Their work follows Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 *COLUM. L. REV.* 603 (1943). From a slightly different angle, these issues are raised by Ronald Dworkin’s criticism of Richard Posner’s wealth-maximizing criterion for the assignment of legal entitlement. See RONALD DWORIN, *Is Wealth a Value?*, in *A MATTER OF PRINCIPLE* 237, 251-55 (1985). I am not sure that convincing economic answers can be given to the criticisms offered by Kennedy, Michelman, and Dworkin, but I am not pressing them here.

rian argument that respect for individual freedom requires freedom of contract, and endorses nondisclaimable tort duties as the appropriate institutional expression of such respect.<sup>103</sup>

Paradoxically, perhaps, Kantian social contract theory underwrites the nondisclaimability of tort duties because it believes that certain forms of liberty are the preeminent social and political good for persons concerned with leading their own lives in accordance with their aspirations. The forms of liberty necessary for each citizen of a modern industrial democracy to have reasonably favorable circumstances for leading her life in accordance with her aspirations are plural. Perhaps more importantly, these liberties conflict with one another: just as freedom of contract can conflict with preconditions of a free market by restraining trade, so, too, freedom of expression can conflict with privacy, and freedom of action can conflict with security.<sup>104</sup>

On a social contract conception, then, a basic task of principles of justice, and the institutions that they govern, is to reconcile conflicting liberties in a way that secures, for each person, the most favorable circumstances for her to realize her conception of the good over a complete life, consistent with a like freedom for others. To specify appropriate principles of justice, social contract theory introduces the idea of a social contract: an agreement among free and equal citizens governing their basic social and political relationships with one another. Because the parties to the social contract are represented solely as free and equal democratic citizens, they are uniquely well positioned to agree upon principles of justice that secure for such citizens the most favorable circumstances for realiz-

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103. I previously offered a different set of reasons in support of nondisclaimability. See Keating, *supra* note 57, at 342-46. The issue is approached from a slightly different angle here, and the reasons offered are commensurately different. The two sets of reasons are, however, complementary.

104. By enabling some transactions and foreclosing others, contracts both create and destroy market freedom. This paradox is the source of the famous "rule of reason" applied to the first section of the Sherman Antitrust Act. That section states that every contract in restraint of trade shall be void. See 15 U.S.C. § 1 (1994). Because virtually all contracts restrain trade, the courts have construed the provision to forbid only "unreasonable" restraints of trade. See *Standard Oil Co. v. United States*, 221 U.S. 1, 60, 64-65, 68 (1911). As Justice Brandeis noted:

Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

*Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918) (Brandeis, J.); see also WILLIAM R. ANDERSEN & C. PAUL ROGERS, III, *ANTITRUST ANALYSIS: POLICY AND PRACTICE* 19 (1992); PHILLIP AREEDA & LOUIS KAPLOW, *ANTITRUST ANALYSIS* 202-03 (1988). On the conflict between freedom of expression and privacy, see generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

ing their conceptions of the good. By contrast, the actual agreements and actual consent favored by libertarianism are far too likely to reflect not the freedom and equality of democratic citizens, but the vast inequalities of wealth, power and privilege that characterize existing institutions. Only a hypothetical agreement can hope to escape the distorting influence of these inequalities.<sup>105</sup>

To be sure, this paper does not attempt to use a device like Rawls' original position to select appropriate liability rules. It does not, for example, ask what liability rules the parties to an original position would adopt at the legislative stage of their deliberations.<sup>106</sup> The article's aims are "interpretive" in Ronald Dworkin's sense of the word — it proposes to "fit and justify" most aspects of existing legal doctrine (and to criticize some aspects of that doctrine as mistaken).<sup>107</sup> It thus uses the apparatus of social contract theory to guide its interpretive efforts.<sup>108</sup> When we bring the ideas explained in the preceding paragraphs to bear on our present concerns, the principal lesson that we take from them is that the basic questions of tort liability are matters of justice, properly settled by the persuasive force of the relevant reasons of justice.

Kantian social contract theory thus favors tort over contract because questions of justice are at stake. Freedom of action and security are essential liberties, central both to our interests and our status as free and equal persons. Their protection by concrete legal duties governing the imposition of risks of physical injury and death ought to reflect both their central importance to our personhood, and our fundamental equality as persons. The proper reconciliation of the conflicting claims of freedom of action and security for a plurality of persons is thus a question of justice. It is a question of what claims free and equal persons, engaged in mutually beneficial, but risky, activities, may assert against one another.

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105. See JOHN RAWLS, *The Basic Structure As Subject*, in *POLITICAL LIBERALISM* 257 (1993); Thomas Scanlon, *Nozick on Rights, Liberty, and Property*, in *READING NOZICK: ESSAYS ON ANARCHY, STATE, AND UTOPIA* 107 (Jeffrey Paul ed., 1981).

106. See JOHN RAWLS, *A THEORY OF JUSTICE* 198 (1971) [hereinafter RAWLS, *A THEORY OF JUSTICE*] (discussing the legislative stage of the parties' deliberation); RAWLS, *The Priority of Right and Ideas of the Good*, in *POLITICAL LIBERALISM*, *supra* note 105, at 184.

107. See RONALD DWORCKIN, *LAW'S EMPIRE* 139, 230-31, 239, 255, 257, 410-11 (1986) (discussing fit and justification in an interpretive conception of law). For a discussion of Dworkin's criteria of fit and justification and their connection with the principle of fidelity to preexisting law, see Gregory C. Keating, *Fidelity to Pre-existing Law and the Legitimacy of Legal Decision*, 69 *NOTRE DAME L. REV.* 1, 21-55 (1993).

108. For discussion of this use of Rawls' view, see Samuel Freeman, *Political Liberalism and the Possibility of a Just Democratic Constitution*, 69 *CHI.-KENT L. REV.* 619, 659-68 (1994).

Because the reconciliation of the claims of freedom of action and security is a question of justice, its proper resolution depends on the strength of the competing claims of freedom of action and security as a matter of public moral reason, not on the bargaining strengths of the affected parties, or on the comparative intensity of their preferences for their own welfare. The deepest wish of democracy, as Kantian social contract theory understands it, is to found political authority on the shared reason and public agreement of free and equal persons.<sup>109</sup> Contract in its bargaining form makes the balance between freedom of action and security far too dependent on shrewdness, negotiating skill, and the preexisting distribution of wealth, power, and legal entitlements. Contract in its market form also allows forms of market power to shape the contours of freedom of action and security. Perhaps more importantly, however, it makes the reconciliation of these two fundamental interests turn on the balance of consumers' preferences for their own welfare. In both forms, contract makes the balance of these liberties a private matter. Only tort makes the contours of those liberties both turn on the strength of the relevant reasons for or against their specification in certain ways, and a matter of public right.<sup>110</sup>

### B. *Liberty, Security, and Bargains*

In its endorsement of tort over contract, Kantian social contract theory displays its credentials as a distinctively "democratic" form of social contract theory. Following Rousseau, democratic social contract theory holds that the basic institutions of civil society — including the law of tort, contract and property — must be "part of the subject matter of the social contract, rather than . . . part of its background."<sup>111</sup> Those institutions must themselves embody the

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109. See Keating, *supra* note 107, at 55 & 19 n.46.

110. To say the least, tort does not perfectly realize the aim of making the reconciliation of freedom of action and security a matter of public reason, rather than power or preference. If nothing else, the requirement of fidelity to imperfectly just preexisting law ensures this. See Keating, *supra* note 107, at 21-25. But the issue is not the "absolute" merits of tort, but the comparative merits of tort — whether tort is to be preferred to contract as a device for specifying the balance between the competing claims of freedom of action and security. Speaking comparatively, the critical point is that tort has the correct aspirations, whereas contract does not. Tort aims to make the contours of freedom of action and security turn on the strength of the relevant moral reasons. Contract does not.

111. Joshua Cohen, *Structure, Choice, and Legitimacy: Locke's Theory of the State*, 15 PHIL. & PUB. AFF. 301, 323 (1986). Locke, by contrast, took the distribution of property entitlement as part of the background to the social contract. The connection between this understanding of one of Rousseau's central aims and Rawls' enterprise in *A Theory of Justice* should be clear. The parties in Rawls' original position are represented solely as free and equal democratic citizens, and they "bargain" about the basic structure of society. My aim in these remarks is not to assert the rightness of a particular reading of Rousseau, much less to

freedom and equality of democratic citizens. Because they must, their terms cannot be fixed by actual, as opposed to hypothetical, bargains. The outcomes achieved through bargaining depend on the relative positions of the bargainers outside — independent of and prior to — the bargain. Outcomes depend, among other things, on the antecedent distribution of wealth and legal entitlement, and on the relative skill and shrewdness of the parties. For example, if the parties in *Rylands* were to bargain over the liability rule governing their relationship, the initial assignment of the relevant legal entitlement — the initial choice of the liability rule governing non-negligent flooding of land — would profoundly affect the ultimate outcome. Permitting parties to bargain over the contours of security and freedom of action, then, would make the contours of those basic liberties turn, not on the freedom and equality of the parties as democratic citizens, but on the preexisting distribution of wealth, legal entitlement, shrewdness, skill, and so on.

Put differently, the contours of liberties such as freedom of action and security are not properly settled by bargaining, because the contours of those liberties should turn on *only* our best understanding of what the freedom and equality of democratic citizens requires them to be. The basic duties of care that citizens owe to one another are matters to be settled by “public deliberation among equals.”<sup>112</sup> Rather than being *determined by* bargains, properly specified tort rights and duties ought to be one of the things that democratic citizens *bring to* the bargaining table. The fair specification of rights and duties sets the background against which free bargaining among equals is legitimate. Within a just framework, persons are generally free to bargain with each other, so long as they respect the constraints of justice. The constraints themselves, however, must be the product of reason, not power.<sup>113</sup>

This view vindicates the position taken by Judge Friendly in *Bushey* against the kinds of criticisms that economists and libertarians might press. The precise ruling of *Bushey* offends freedom of contract because of the way that it fixes the boundaries of vicarious liability. Instead of setting the parties free to fix the boundaries of vicarious liability as they see fit, *Bushey* fixes those boundaries by appealing to an idea of fairness. That offense, however, is limited.

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argue for that reading. My aim is to explain one aspect of his significance for democratic social contract theory.

112. *Id.* at 324 (discussing Rousseau's approach to the features of the social order).

113. For development of the general framework of which these ideas are an extension, see RAWLS, *The Basic Structure as Subject*, in *POLITICAL LIBERALISM*, *supra* note 105, at 257.

*Bushey* allocates the costs of an accident that the parties did not foresee, and for which they did not expressly provide. In the absence of such agreement, Friendly takes the law to require that financial responsibility for that accident be allocated fairly. Whether or not this is the optimal solution from an economic perspective, it provides a default rule in a circumstance when one must be supplied. *Bushey's* deep offense to freedom of contract thus lies elsewhere. Under prevailing tort doctrine, the parties to the accident are *not* free to alter the boundaries of vicarious liability — to alter the default rule — by bargaining among themselves.

Expressed economically, the intuitive force of the case for free contract is this: drydocks and shipowners subject to the rule of *Bushey* have good reason to reallocate the burdens of precaution against such accidents by agreeing that drydock owners should install automatic locks on the valves that control the flooding of their docks. Making such agreements lowers their joint precaution costs, and the parties can pocket the money that they save. Because *both* parties stand to benefit from reallocating the burdens of precaution, economists bridle at the thought that such a deal might be forbidden.<sup>114</sup>

If this is the point of the argument, however, the view of nondisclaimable duties that it expresses is mistaken. Neither the law in general, nor the opinion in *Bushey*, forbids such a deal. Properly specified tort rights do not disable all contractual rearrangement of burdens of precaution. To the contrary, they leave parties presumptively free to reallocate burdens of precaution as they see fit. Unless we have reason to believe a particular reallocation substantively unreasonable, or unfair to third parties, there is no reason to object to it. No such unreasonableness or unfairness is apparent in the reallocation that we are now considering. Indeed, the efficiency advantages of such a reallocation provide a perfectly good reason for undertaking it.

What the law of accidents does by making its duties nondisclaimable is to *disable private parties from reallocating burdens of precaution by rewriting the law of torts*. With certain exceptions not relevant here, the power to alter tort rights is held by courts and legislatures, not by private parties. This is hardly tantamount to dis-

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114. See Richard Craswell, *Offer, Acceptance, and Efficient Reliance*, 48 STAN. L. REV. 481, 495 (1996) ("This is simply an instance of the general proposition that whenever a given rule would increase the total size of the 'pie' . . . both parties would benefit by adopting that rule." (citations omitted)). Craswell is discussing a different set of circumstances, of course, but that only underscores the general applicability of the proposition.



abling all mutually beneficial reallocations of duties. Although the parties are disabled from legislatively altering tort duties, they are free to bargain within the framework, and with the entitlements conferred upon them by such duties. Shipowners may not waive their liability for accidents occasioned by their sailors' drunkenness, but they may pay drydocks to install automatic locks. Rather than disabling bargains, the nondisclaimable character of tort duties enables them by fixing a definite framework within which bargaining can take place. Beyond that, nondisclaimability makes tort duties one of the things that determines the balance of bargaining power. By fixing tort duties fairly, the law distributes one kind of bargaining power fairly and acknowledges that considerations of fairness take priority over those of efficiency.

### C. *Liberty, Security, and Markets*

If contract in its bargaining form fails because it makes tort duties wrongly dependent on bargaining skill and power, contract in its market form fails in a related way. Markets make the contours of basic liberties depend on critical masses of expressed consumer taste and on various constraints of efficient production. The configurations of consumer preferences responded to by product markets and the constraints of efficient industrial organization, are, however, irrelevant to the basic liberties of democratic citizens and should not be allowed to determine their contours. This is so for at least three reasons. First, consumers' subjective preferences for their own welfare are not the proper metric of interpersonal comparison when the competing claims of freedom of action and security, for a plurality of persons who hold diverse and incommensurable conceptions of the good, are at stake. These competing claims must be reconciled in a way that reflects the objective importance of the interests at stake to the pursuit of conceptions of the good, not the balance of the affected parties' subjective preferences for their own welfare.<sup>115</sup> Second, consumers' preferences for the safety of the products that they purchase are generally imperfectly informed. Rarely, if ever, are consumers perfectly apprised of the risks of the products that they buy, the precautions that might reduce those risks, and the costs and benefits of those precautions. Under a regime of free contract, poor information not only undermines the freedom with which consumers subject them-

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115. The case for the objective valuation of the interests at stake in accidental risk imposition and against the subjective valuation of such interests is developed in Keating, *supra* note 57, at 367-73.

selves to risks, it also undermines the security of others. A regime of free contract puts the security and freedom of some consumers at the mercy of other consumers' knowledge of product risks. By making the freedom and security of some individuals dependent upon the chance that others will be well informed and rational, a regime of free contractual allocation of risk makes the protection of each person's basic interests largely a matter of luck.

The influence of luck cannot always be avoided, and tort law does not completely avoid it. Under a tort regime for product accidents, a particular plaintiff's chance of prevailing will be affected by the relative skills of the attorneys, the knowledge and preconceptions of the judge who hears the case, the luck of the draw in jury selection, and so on. Nonetheless, the choice of a tort regime over a contract one can nonetheless diminish the role of luck. By allowing the information of some consumers to affect the level of product safety available to others, compared with a tort regime, a regime of free contract increases the role of luck in the regulation of product accidents. Moreover, a regime of free contract makes luck a legitimate ground for the regulation of product safety. In such a regime, consumers are free to inform themselves only as much as they choose, and consumers and producers alike are free to disregard the effects that some poorly informed consumers may have on others.

Third, the particular configurations of expressed preferences to which producers respond are determined by the constraints of efficient industrial organization.<sup>116</sup> Many of these constraints must be accepted as limitations on the possibilities open to the common law in its efforts to control product risks. The law cannot, for example, simply insist on perfect customization. The particular constraint stressed above<sup>117</sup> — the way in which the expressed preferences of some consumers affect the level of safety available to other consumers — is not, however, unavoidable in this way. That effect is far more prominent under a contract regime for the allocation of product risks than it is under a tort regime. A tort regime *can* em-

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116. See *supra* text accompanying notes 109-110. It is not the case that *each* consumer's preferences will affect the level of safety available to others, because it will prove inefficient to satisfy certain preferences. See Schwartz, *supra* note 100, at 372 ("Some consumers probably want planes with couches and amphibious cars, and are the victims of unequal bargaining power in the sense that too few such consumers exist to make serving them in these ways profitable."). Preferences that are not part of a critical mass of like preferences therefore will not affect product design.

117. See *supra* section IV.C.

body and effect collective judgments about the appropriate level of product safety.

This is a difference that matters. It is undesirable for some people's subjective preferences for their own welfare to affect the security or freedom of others, especially if those preferences are poorly informed and imperfectly rational.<sup>118</sup> A regime of free contract, however, makes just that connection: if a critical mass of consumers is imperfectly informed, or if their preferences for product safety do not reflect the objective importance of the interests at stake, or if those consumers are imperfectly rational, actual products will not exhibit a level of safety appropriate to the magnitude and probability of the risks that they create. There is, moreover, nothing in a regime of free contract that will tend to make consumers' subjective preferences conform to the correct objective evaluation of the interests at stake. A regime of tort, by contrast, asks judges and juries to make that very evaluation.

In short, the risks of product accidents are not personal but interpersonal; the interests at stake are matters of justice and equal right; and the proper form of valuation for those interests is objective not subjective. Product accidents must therefore be governed by tort not contract, and by the principles of fairness or mutual benefit applicable to interpersonal risk impositions, not by the principles of individual freedom applicable to the risks that persons impose on themselves alone.

Put in a slightly different way, the point is that markets are institutions for the maximization of individual welfare. Within markets, persons may legitimately pursue their own individual welfare as they conceive it. The problems of product accidents are problems of freedom and responsibility — freedom to impose risks of injury and death on others, freedom from the infliction of accidental injury by others, and responsibility for accidental harm to others. The institutional task presented by the problem of product accidents is thus not how best to pursue our own welfare, but how to define our rights against, and responsibilities towards, each other with respect to risks of personal injury and death. This is a task for — indeed *the task of* — tort law.

The time has come to take our legal doctrine, and the rhetoric that justifies that doctrine, seriously. The time has come not to challenge them, but to accept the challenge that they present to us — the challenge of constructing, if we can, a theory that does justice

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118. See Keating, *supra* note 57, at 369-73.

to the complexity of our practices. To begin that task, we must reconstruct the social contract tradition in tort law. And to begin that reconstruction, we must first pin down the interpretive puzzle we face, and second explain how social contract theory conceives of problems of accidental harm.

## V. RECONSTRUCTING SOCIAL CONTRACT THEORY

### A. *The Interpretive Challenge*

The gravamen of the complaint that I have lodged against the economic account of enterprise liability is that the thrust of the efficiency norm, with its emphasis on optimal coordination of injurer and victim conduct, sits uneasily with the structure of enterprise liability entitlements. Enterprise liability doctrine is out of step with optimal precaution concerns both in its definition of the boundaries of liability, and in its recognition of defenses to liability. It is even more out of step with optimal loss spreading concerns. For enterprise liability (or any other form of strict liability) to achieve optimal loss spreading, damage awards must be pitched at the deterrence level for negligently inflicted harms and at the insurance level for nonnegligently inflicted harms. Doing this, however, converts strict liability into an echo of negligence liability.

The structure of enterprise liability doctrine is one of three aspects of that body of law that frame the interpretive challenge facing Kantian social contract theory. The others are the contrast between negligence and enterprise liability and the location of enterprise liability within accident law as a whole. The fundamental contrast between enterprise and negligence liability is the contrast between "fault" and "conditional fault": Under enterprise liability, the payment of damages to those injured by the characteristic risks of an activity is a condition for the legitimate conduct of an activity.<sup>119</sup> Under negligence liability, the payment of damages is a mat-

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119. Legal doctrine and rhetoric often come very close to putting the matter this way. For example, a leading case on abnormally dangerous activity liability explains that under strict liability "the question is not whether the activity threatens such harm that it should not be continued. The question is who shall pay for harm that has been done." *Koos v. Roth*, 652 P.2d 1255, 1262 (Or. 1982) (footnote omitted). An earlier case explains the basis of abnormally dangerous activity liability in language that comes even closer to the language of conditional fault embraced in this article: "The element of fault, if it can be called that, lies in the deliberate choice by the defendant to inflict a high degree of risk upon his neighbor, even though utmost care is observed in so doing." *Loe v. Lenhardt*, 362 P.2d 312, 317 (Or. 1961). The *Restatement (Second) of Torts* observes that

[t]he utility of [the injurer's] conduct may be such that he is socially justified in proceeding with his activity, but the unavoidable risk of harm that is inherent in it requires that it be carried on at his peril, rather than at the expense of the innocent person who suffers harm as a result of it.

ter of redress for the wrongful infringement of the property and physical integrity of others.<sup>120</sup>

Enterprise liability thus attaches to risks whose imposition should not have been prevented. This is, in fact, the precise point of *Bushey*. The Coast Guard did not act wrongfully when it chose to use the *Tamaroa* as a berth, or when it granted Seamen Lane the freedom to go ashore. It acted wrongfully only when it refused to accept financial responsibility for the harm occasioned by Seaman Lane's misadventure. Thus the challenge presented by the contrast between negligence liability and enterprise liability is to explain why it is: (1) fair for certain kinds of actors (enterprises) to (2) impose certain kinds of risks (ones "characteristic" of their activities) only if (3) they compensate those injured by accidents issuing from the imposition of those risks, even though (4) the imposition of those risks is not itself wrongful.

The location of enterprise liability within accident law presents a different challenge. Here, the challenge is to show that the normative conceptions that justify negligence liability in some circum-

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RESTATEMENT (SECOND) OF TORTS § 520 cmt. h (1977) (discussing abnormally dangerous activities).

120. This characterization of the essential difference between negligence and enterprise liability owes much to both Robert Keeton and Jules Coleman. The debt to Keeton is straightforward — I think that enterprise liability is a kind of "conditional fault" in Keeton's sense of the term. See Keeton, *supra* note 38. The debt to Coleman is more complex. Coleman distinguishes "three ways in which the justifiability of an agent's conduct can relate to his victim's claim to repair." COLEMAN, *supra* note 94, at 291. The view of negligence damages taken in the text corresponds to the first of Coleman's "ways," as I understand it. The view of enterprise liability taken in the text is very close to Coleman's third "way." Coleman writes:

On [some] occasions, an injurer's conduct is justifiable only if the injurer pays compensation for whatever losses his conduct occasions. In such cases the rendering of compensation is a necessary condition of the justifiability or reasonableness of what the agent does. In that sense, it helps to right what in its absence would be a wrong.

COLEMAN, *supra* note 94, at 291. This is my view of strict liability in general and enterprise liability in particular, and this is my understanding of what Judge Keeton means by "conditional fault."

I am not entirely certain, however, that Coleman would agree that my view of enterprise liability fits into his third category. Coleman's second way in which the justifiability of an agent's conduct can relate to a victim's right to repair contemplates circumstances when liability protects an independent property right. Coleman takes *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910), to be a canonical example of this category. See COLEMAN, *supra* note 94, at 293. Because I believe that property rights are often among the reasons why the contours of both strict and enterprise liability take the shape that they do, Coleman might conclude that my view straddles his second and third categories. If so, I think that we disagree more about jurisprudence than about tort law. My views of law and legal reasoning are essentially Dworkinian, and I therefore think that property rights are often ingredients of liability rules — reasons whose "weight" tort law must assess. Coleman's jurisprudential views are essentially positivist, and he may therefore believe that tort deliberations take the weight of property rights as antecedently given by property law norms. These jurisprudential subtleties do not, I think, substantially muddy the view of enterprise liability taken in the text and amplified in the first paragraph of this footnote.

stances also justify enterprise liability in others. Why is it that the fair allocation of responsibility for accidental harm among free and equal persons requires negligence liability in some circumstances and enterprise liability in others?

George Fletcher's famous argument that the doctrinal division of labor between negligence and strict liability tracks reciprocity of risk imposition — and rightly so — provides the kind of explanation that we need. Fletcher argued that, when risks are reciprocal once due care is exercised, both tort law and social contract theory favor negligence liability; when they are not, both tort law and social contract theory favor strict liability. Reciprocity of risk draws its normative power from the fact that it defines a regime of equal freedom and mutual benefit. Reciprocity defines a regime of equal freedom because reciprocity exists when risks are equal in probability and magnitude.<sup>121</sup> When risks are equal in these respects, persons relinquish equal amounts of security and gain equal amounts of freedom of action.

As long as reciprocal risks are imposed for reasons that are both good (that is, sufficient to justify the diminutions of security that they involve) and equally good, reciprocity of risk also defines a regime of mutual benefit. Each person benefits when these two conditions are met because, for each person, the loss of security occasioned by granting to others the right to expose her to risks of a certain probability and magnitude is more than offset by the freedom of action that a regime of reciprocal risk imposition grants to her, namely, the right to impose risks of equal probability and magnitude on others. Perfect reciprocity of risk therefore defines a mutually beneficial regime of equal freedom. When risks are perfectly reciprocal, each person's freedom of action is equally benefitted, each person's security is equally burdened, and each person gains more in the way of freedom than she loses in the way of security.

When risks are nonreciprocal even if injurers exercise due care, Fletcher argues that strict liability does and should apply. The nonreciprocity of these risks prevents them from being mutually beneficial in the strong sense that the reciprocal risks subject to negligence liability are mutually beneficial. Those exposed to nonreciprocal risk impositions are not compensated for that exposure by the value of their right to impose equivalent risks. The imposition of such risks is not part of a normal life, and the value of

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121. This is my own reconstruction of Fletcher's argument. His account is somewhat different. See Keating, *supra* note 57, at 315. I endorse a version of this idea in the text following note 132, *infra*.

the right to impose such risks is consequently less than the cost of having to bear exposure to them. The imposition of those risks is nonetheless justified,<sup>122</sup> and by ensuring that those injured by them are fully compensated for their injuries so far as practicable, strict liability restores mutuality of benefit so far as practicable. The damages paid under strict liability are, thus, not redress for wrongful infringement of another's security, but a condition for the legitimate conduct of activities whose risks are not mutually beneficial even when due care is exercised.

Fletcher's argument meets all three of the interpretive challenges set forth at the start of this section. First, it shows why the ideals of equal freedom and mutual benefit sometimes lead to negligence liability, and sometimes to strict liability. Negligence is appropriate when risks are, on balance, more mutually beneficial than not, so that the freedom to impose such risks on others more than compensates for having to bear exposure to equivalent risk impositions by others. Second, it explains why it is, under certain conditions, wrong for injurers not to compensate the victims of justified risk impositions. Strict liability is appropriate when risk impositions are justified, but not mutually beneficial in the strong sense that the risks subject to negligence liability are. The payment of compensation for all harms issuing from such risk impositions restores mutuality, so far as practicable.

Third, Fletcher's account of strict liability explains why the boundaries of enterprise liability are properly pitched beyond the boundaries of negligence liability. The payment of compensation restores mutuality of benefit so far as practicable only if compensation is paid for *all* injuries issuing out of the "characteristic" risks of an activity. Indeed, in Fletcher's view, nonnegligent injuries are the paradigmatic case of injuries for which compensation must be paid. The precise problem that the payment of compensation is meant to rectify is the absence of mutuality of benefit once all reasonable precautions are taken.

The ideas of equal freedom and mutual benefit also suggest a justification for another aspect of strict liability doctrine — its tendency not to recognize the defense of victim negligence.<sup>123</sup> Relieving victims of the duty to take care for their own protection is justified by the fact that nonreciprocal risks are not mutually bene-

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122. As far as I can see, Fletcher's argument requires this assumption, although Fletcher does not explicitly state or justify it. Presumably risks that are not justified ought to be forbidden.

123. See *supra* Part III.

ficial in the strong sense that reciprocal risks are. Reciprocity theory, and the social contract ideal that it instantiates, grounds the victim's obligation to exercise care for her own protection in the mutually beneficial character of the risks subject to negligence liability.<sup>124</sup> When risks are not reciprocal even after due care has been taken, benefit is not mutual, and due care on the part of victims cannot fairly be demanded.

Within its domain, then, reciprocity theory supplies the kind of account that we need. It uses the ideals of equal freedom and mutual benefit, and it explains the structural features of strict liability that elude economic accounts. The catch is that the domain of reciprocity theory is not the domain of enterprise liability. If nothing else, this narrows and sharpens our challenge: we need to show that social contract theory can make room for a form of liability that is concerned not with the fair distribution of risk, but with the fair distribution of the financial costs of harm. To make that room, we must first set out the defining philosophical features of the social contract conception of accident law. So doing should allow us both to detach social contract theory from the reciprocity of risk criterion, and to grasp the proper place of that criterion within social contract theory.

### B. *A Fresh Start*

Kantian social contract theory is distinctive in that it understands the problem of accidental injury to be a problem of mutual freedom. It conceives of the problem of accidental harm as a problem of *freedom* because it takes the most important feature of human (moral) agency to be "the capacity for critically reflective, rational self-governance."<sup>125</sup> By virtue of this capacity, we have both the ability to, and a fundamental interest in, shaping our lives in accordance with some conception of its point. Freedom is the social condition that is most critical to the realization of this interest, and Kantian political morality therefore assigns lexical priority to those liberties that are essential to the "adequate development

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124. This is the thrust of Bohlen's thought. See Bohlen, *supra* note 57, at 220, 273-74; cf. Priest, *supra* note 5, at 467 ("Bohlen made clear [that] the legal implication of [his] benefit theory is the negligence standard with the contributory negligence and assumption of risk defenses." (citation omitted)).

125. T.M. Scanlon, Jr., *The Significance of Choice*, in 8 THE TANNER LECTURES ON HUMAN VALUES 149, 174 (Sterling M. McMurrin ed., 1988).



and full exercise"<sup>126</sup> of our power to make our lives answer to our aspirations for them. Social contract theory conceives of the problem of accidental harm as a problem of *mutual* freedom because the doctrines and principles of accident law reconcile the competing claims of a plurality of persons, whose aims and aspirations conflict.

The liberties at stake in accidental risk impositions are not part of the equal basic liberties of Rawls's first principle of justice — those are liberties against the state — but the liberties protected by accident law have an analogous priority over our interests in acquiring wealth and income. It is natural to think that their priority reflects the instrumental importance of physical and psychological integrity to our personhood. Serious bodily harm threatens the disintegration of our personality as well as, and sometimes more than, it threatens our physical integrity.<sup>127</sup> Speaking instrumentally, we might say, with John Stuart Mill, that tort law protects our individual security, and to that, "an extraordinarily important and impressive kind of utility" attaches. As Mill observed:

[S]ecurity no human being can possibly do without; on it we depend for all our immunity from evil and for the whole value of all and every good, beyond the passing moment, since nothing but the gratification of the instant could be of any worth to us if we could be deprived of everything the next instant by whoever was momentarily stronger than ourselves.<sup>128</sup>

The priority of tort liberties in Kantian social contract theory reflects, in part, the force of Mill's point. However, social contract theory explains the force of Mill's point in ways that are neither consequentialist, utilitarian, nor instrumentalist. It holds that security is, along with freedom of action, a precondition of effective rational agency. For Kantian social contract theory, the capacity to pursue a conception of the good — to act on and from a conception of what is worthwhile and valuable in life — is the central feature of human moral agency. A substantial measure of security is a precondition of such agency because, without it, persons cannot pursue the aims and aspirations whose pursuit gives form and meaning to their lives.

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126. RAWLS, *The Basic Liberties and Their Priority*, in *POLITICAL LIBERALISM*, *supra* note 105, at 289, 297. This criterion is one of two governing the identification of the list of equal basic liberties.

127. Cf. ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 35 (1985) ("World, self, and voice are lost, or nearly lost, through the intense pain of torture . . ."); *id.* at 294-304 (discussing accident law and a tort trial).

128. JOHN STUART MILL, *UTILITARIANISM* 50 (Samuel Gorovitz ed., The Bobbs-Merrill Co. 1971) (1861).

One aspect of this break with utilitarian accounts of the urgency of security is an insistence that the *independent value* of each individual human life is at stake in the physical and psychological integrity of our persons. Our equal capacity to affirm and pursue conceptions of the good makes us sources of claims in our own right — free, equal and purposive beings whose lives and aspirations are of value in their own right. The interests that ultimately count for purposes of political morality are the interests *of* persons.

Mill's ostensibly instrumental and utilitarian account of the importance of security fails to capture the *independent* value of human life. The value that it assigns to physical and psychological integrity is dependent upon the exceptional utility of security. By making individual liberty and integrity parasitic on the general good, Mill's account leaves open the possibility that someone might rightly be injured whenever others stand to gain more from her injury than she stands to lose, taking into account the special urgency of the utility on her side of the scales. This denies what Kantian political morality asserts — that persons are sources of value in their own right. Permitting violations of personal integrity whenever they promote overall welfare denies our status as independent sources of value. It asserts that our lives have no value except insofar as they serve the general good.

The danger here is not primarily that Mill's utilitarianism, or other forms of instrumentalism or consequentialism, will often countenance battering or assaulting persons, experimenting on them without their consent, or invading their privacy and inflicting emotional distress upon them. The harms here are too vivid, the conduct too offensive to our sense of justice, for us to acquiesce quickly in such conclusions. The danger is more subtle: if we conceive of our claims to freedom and security as dependent upon the balance of costs and benefits, we may erode our liberties in a thousand small steps.

To avoid such erosion, we must stake our freedoms on firmer ground. We must rest our claims to liberty, inviolability and primary authority over our lives on our status as free persons with our own ends and aspirations, as persons whose lives and projects have value quite apart from our contributions to the general good. It is our *independent* value that others must respect; it is that *respect* that rights and liberties express; and it is our *equal* possession of independent value that the equal provision of rights and liberties declares. So conceived, tort law's protection of the liberty and integrity of our persons protects an essential precondition of ra-

tional agency, expresses the independent value of each human life, and recognizes that each of us is equally and inalienably endowed with that independent value.<sup>129</sup>

The importance of the protections conferred by intentional torts, such as assault, battery, and intentional infliction of emotional distress to our capacity to determine the course of our own lives is plain. If others could gratuitously exercise control over our persons and psyches in the ways that these torts forbid, the scope of our security would be greatly diminished and our vulnerability would be commensurately increased. A legal regime that refused to recognize these torts would make each of us gratuitously usable by others. The significance of these torts for our moral status as beings of value in our own right is more subtle, but no less important. If the law granted people the right to invade the psychological and physical integrity of others at will — publicly denied the inviolability of persons — *everyone's* public moral status would be altered for the worse. Each and every one of us would be disvalued by being legitimately subjected to gratuitous physical and psychological violations because we would all suffer a diminution in our moral status, a denial of the value of our lives, and a denigration of the importance of our most urgent interests.<sup>130</sup>

The relevance of dignity and autonomy interests to accident law is less evident, but no less important. The law of accidents secures the preconditions of effective rational agency just so far as it adequately reconciles the competing claims of freedom and security. Sufficient security from accidental injury and death, and sufficient freedom to impose risk upon others, are both essential if we are to work our will upon the world. The law of accidents gives voice to the independent and equal value of our lives just so far as it does not license the sacrifice of our lives and limbs for the general welfare, but subjects us to risks of injury and death only on terms that we might reasonably accept as free and equal persons.

When we come to understand the problem of accidental harm as a problem of human freedom, we see that the chief task of its doctrines and principles is to reconcile two conflicting aspects of individual freedom. One of these is freedom of action — freedom to impose risks of accidental injury and death on others. The other is security — freedom from accidental injury and death. Our capacity

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129. See Keating, *supra* note 57, at 346-49 (contrasting social contract and economic theories based upon their differing views of individual autonomy).

130. See FRANCES M. KAMM, CREATION AND ABORTION 12 (1992); THOMAS NAGEL, EQUALITY AND PARTIALITY 148-49 (1991).

to shape our lives in accordance with our aspirations, and our fundamental interest in so doing, makes both of these forms of liberty precious.<sup>131</sup>

Freedom of action is precious because leading a worthwhile life requires exposing oneself and others to risks of injury and death. Without this freedom, we could not, for example, drive to work, fly airplanes, or buy products that are less than perfectly safe. The less free we are to impose risks on others, the more fettered we are in the pursuit of our own aims and aspirations. Security is precious because accidental death brings life to a premature close, while accidental injury may foreclose the pursuit of certain aspirations, severely impair the pursuit of others, and bring crushing financial burdens that are themselves deeply disruptive. Without a reasonable amount of freedom from accidental injury and death, we lack favorable conditions for working our will upon the world. The first task of accident law is thus to reconcile freedom of action and security in a way that provides the space we need to lead our lives in accordance with our aims and aspirations.

So conceived, the problem of accidental harm is a problem of *mutual* freedom because it governs the risks that persons may impose on *each other*. Social contract theory holds that principles of mutual freedom must differ from those of individual freedom because it supposes that persons embrace diverse and incommensurable aims and aspirations. These aims and aspirations are in natural, though not fatal, conflict. In the presence of diverse final ends, the circumstance when we voluntarily expose ourselves to risks in the pursuit of our own ends differs fundamentally from the circumstance when we expose others to risks in the pursuit of our separate ends. Social contract theory thus distinguishes between the canons of individual choice — the canons of rationality — and the canons of interpersonal choice — the canons of reasonableness.

We may rationally expose ourselves to risks that it would be unreasonable to impose on others. For a single person, the rationality of imposing a risk on herself depends on the importance that she assigns to the end advanced by bearing that risk and the efficacy with which the imposition furthers that end. For a plurality of free and equal persons, the reasonableness of imposing a risk on others

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131. Our sense of justice — our capacity to honor principles that reasonably reconcile the competing claims of freedom of action and security for a plurality of persons — makes a regime of mutual freedom possible. By enforcing our duties against one another, law backs justice with force and gives us an additional reason to honor fair principles of social cooperation.

depends on whether that imposition is consistent with the equal freedom and equal value of others. Reasonable risks are ones that answer to terms of mutual benefit: the right to impose them reconciles the conflicting claims of diverse persons on terms that all of them might reasonably accept. The canons of reasonableness thus set the boundaries of our freedom with respect to the risks that we may impose on each other.

### C. *Reciprocity and Reasonableness*

Within Kantian social contract theory, the concept of reciprocity blossoms out of the concept of reasonableness. "The reasonable leads to the idea of reciprocity [which] is a relation between equals who are acting on a fair principle of social cooperation that all of them would propose to the others as fair, and are willing to follow faithfully, provided the others did so as well."<sup>132</sup> Reasonable people "insist that reciprocity should hold within [their] world so that each benefits along with others."<sup>133</sup> Given the diversity of our aims and aspirations, the general justification that we have for bearing risks imposed by others lies in our reciprocal right to expose others to equal risks. The right to impose risks *on* others justifies bearing equal risk impositions *by* others because the right to impose risk secures the freedom of action essential to the pursuit of a conception of the good over the course of a complete life. When mutuality of benefit is fully realized, no one's life or limb is sacrificed to the greater good of others, and we each gain more from the right to impose certain risks than we lose from having to bear exposure to equivalent risks.

For mutuality of benefit to be fully realized, risks must, first, be reciprocal in a qualitative (not a quantitative) way: they must be equal in probability and magnitude, and be imposed for equally good reason. Equality in these respects, however, is not enough to ensure that each of us benefits from such a regime.<sup>134</sup> For each of us to profit from a regime in which risks equal in probability and magnitude are imposed for equally good reasons, the reasons must

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132. John Rawls, *The Law of Peoples* 24 (Nov. 3, 1993) (unpublished manuscript presented to the Program for the Study of Law, Philosophy & Social Theory, New York University, on file with author).

133. JOHN RAWLS, *Powers of Citizens and Their Representation*, in *POLITICAL LIBERALISM*, *supra* note 105, at 47, 50.

134. Indeed, equality in these respects is formally compatible with having no person gain from the imposition of the risks licensed by a particular regime. All of the risks might be imposed for inadequate reasons. Risks equal in magnitude and probability might be imposed for equally *bad* reasons.

also be *sufficiently* good — good enough to justify the balance that they strike between the competing claims of freedom of action and security. The aim of Kantian social contract theory is to secure the most favorable conditions for persons to pursue their conceptions of the good over complete lives. For the particular package of risk impositions licensed by the law of accidents to secure such conditions, the gain conferred on our freedom of action by the right to impose those risks must exceed the loss to our security from having to bear exposure to such risks. *Prima facie*, the fullest satisfaction of this condition requires that each licensed risk imposition benefits the freedom of action more than it burdens the security of a representative citizen.<sup>135</sup>

Under a regime where risks equal in probability and magnitude are imposed for sufficient and equally good reasons, we acknowledge both the importance of leading our lives in accordance with our aims and aspirations, and the equal value of the aims, aspirations, and lives of others. We acknowledge the former by willingly exposing ourselves to reasonable risks in pursuit of our aims and aspirations. We acknowledge the latter by accepting equal risk impositions by others. The former is central to our status as free persons, the latter is central to our status as equal persons. Moreover, when reciprocity is understood in this way, the logic behind making reciprocity of risk imposition (once due care has been exercised) the master criterion for choosing between negligence and strict liability becomes evident.<sup>136</sup> Taking reciprocity to require that risks be equal in probability and magnitude, and imposed for equally good *and sufficient* reasons, makes reciprocity of risk a test of equal freedom and mutual benefit.

Once reciprocity is understood in this way, it is not so much mistaken, as it is misleading, to assign reciprocity paramount importance. The first respect in which it is misleading is theoretical: prior writings in the social contract tradition have implied that reciprocity of risk stands alone as *the* master concept of social contract theory. Within Kantian social contract theory, however, the idea of reciprocity *of risk* neither stands alone, nor holds a position of preeminent importance. It is inseparable from, incomprehensible independent of, and subordinate in importance to, the concepts of equal freedom, mutual benefit, and reasonableness. The second re-

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135. In taking the liberties of a representative citizen as the touchstone, I am following JOHN RAWLS, *The Basic Liberties and Their Priority*, in *POLITICAL LIBERALISM*, *supra* note 105, at 289.

136. See, e.g., FRIED, *supra* note 15; Fletcher, *supra* note 13.

spect in which the assignment of paramount importance to reciprocity of risk is misleading is practical: prior writings in the social contract tradition have made the presence or absence of reciprocity of risk the master test for the choice between negligence and strict liability. Properly understood, however, reciprocity of risk should serve, not as the master test of the appropriate liability rule, but as an ideal capable of organizing our thoughts about the choice of an appropriate liability rule. Speaking loosely, reciprocity of risk imposition is a Kantian "idea of reason" — a concept whose role is to unify the elements of theoretical framework.<sup>137</sup> Reciprocity of risk links the ideals of equal freedom and mutual benefit, specifying a regime of risk impositions that realizes them perfectly.

The primary aim of a social contract conception of accident law is to secure the most favorable institutional conditions for free and equal persons to pursue their conceptions of the good over complete lives. This aim assigns theoretical pride of place to the concepts of equal freedom, mutual benefit, and reasonableness, because these concepts provide the framework for thinking both about risk imposition in general, and the choice between negligence and strict liability in particular. The choice between negligence and strict liability turns on the reasonableness of the different reconciliations that they effect between the freedom of action of injurers, and the security of victims. This, in turn, depends on comparing the absolute and relative burdens that the regimes place on the victim's security and the injurer's freedom of action. Compared to strict liability, negligence generally places lesser burdens on the injurer's freedom of action, but greater burdens on the victim's freedom. Strict liability reverses these relationships: it places greater burdens on the actor's freedom, and lesser burdens on the victim's security.

The overarching theoretical unity of social contract theory, then, is found not in the concept of reciprocity of risk, but in the concepts of equal freedom, mutual benefit, and reasonableness. Social contract theory asks the same question of the choice between negligence and strict liability that it asks of the decision to take or to forego a particular precaution: Which rule (in the case of the choice between negligence and strict liability) or ruling (in the case of due care) reconciles the competing claims of freedom of action and security in the most reasonable way?<sup>138</sup>

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137. For a discussion of "ideas of reason," see WEINRIB, *supra* note 19, at 87-92.

138. For application of this criterion to judgments of due care, see Keating, *supra* note 57, at 341-82.

If the theoretical significance of reciprocity of risk is less than it has generally been taken to be, so too is its practical significance. Reciprocity of risk cannot serve as a master test for the choice between negligence and strict liability. One reason why it cannot is that perfect reciprocity of risk is an ideal which can only be approximated in the real world. Even the risks of the road — the canonical case of reciprocal risk imposition<sup>139</sup> — are, in fact, imperfectly reciprocal. Vehicles vary in size, performance, and riskiness of cargo, and drivers vary in their native and acquired skills. The reasons why people drive are likewise not perfectly equivalent in a qualitative sense — they, too, vary in their absolute and relative urgency. The reciprocity found on the road is, thus, a rough and “normalized” one. Because the ideal of perfect reciprocity of risk can only be approximated, we should be wary of using the criterion of reciprocity of risk too facily, and too mechanically. It is neither precise enough, nor attainable enough, to serve as a master “test” for the appropriate liability rule.

A second reason why reciprocity of risk cannot serve as the master test of the appropriate liability rule is more theoretically significant. Considerations of reciprocity of risk do not capture *all* of the relevant grounds of responsibility for accidental harm. The idea of reciprocity of risk draws its considerable power from the fact that perfect reciprocity of risk (as I have specified it) defines a perfectly fair regime of equal freedom, with respect to risks of accidental injury and death, *between persons conceived solely as free and equal*. The error that social contract tort theory has fallen into here is subtle. Kantian social contract theory supposes that a person’s stand-

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139. Driving has served as the canonical example of reciprocal risk imposition at least since Judge Blackburn’s opinion in *Fletcher v. Rylands*, L.R. 1 Ex. 265, 286-87 (1866), raised it as an example and contrasted it with the circumstances in the case at hand:

Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway . . . may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger . . . . But there is no ground for saying that the plaintiff here took upon himself any risk arising from the uses to which the defendants should choose to apply their land. He neither knew what these might be, nor could he in any way control the defendants, or hinder their building what reservoirs they liked, and storing up in them what water they pleased, so long as the defendants succeeded in preventing the water which they there brought from interfering with the plaintiff’s property.

*Fletcher*, L.R. 1 Ex. at 286-87. Commentators have subsequently invoked the example. See, e.g., FRIED, *supra* note 15, at 196-200 (arguing that the risks of driving 50 miles per hour over a two week period are not reciprocal with the risks of driving 75 m.p.h. one week and 25 m.p.h. the next, because of the greater danger and uncertainty that the latter arrangement creates); Fletcher, *supra* note 13, at 543 (“If we all drive, we must suffer the costs of ordinary driving.”); *id.* at 549 (asserting that driving negligently is reciprocal within the community of such drivers).



ing as a free and equal individual is her fundamental status as a democratic citizen. It, therefore, also supposes that status should be the primary ground determining their basic rights and responsibilities, including those specified by the law of accidents. The ideal of reciprocity of risk is, therefore, profoundly right to take that status as fundamental for purposes of fixing the terms of which citizens may and may not expose each other to risks of physical injury and death.

The mistake lies in believing that persons' status as free and equal democratic citizens is the *sole* ground of their rights and responsibilities with respect to risks of accidental injury and death. Social contract theory acknowledges — indeed insists — that persons can acquire rights against and duties toward each other by virtue of the choices that they make, the property that they acquire, and the responsibilities that they assume. If securing the institutional rights and primary goods that citizens need to be effectively free and equal is one face of freedom, *respecting the uses* that citizens have made of their freedom is the other. By the exercise of their civil and political freedoms, free and equal citizens take special risks upon themselves, assume relationships of special trust and responsibility toward others, and acquire special rights toward and immunities against others.<sup>140</sup> The normative weight of these rights and responsibilities must be reflected in the specification of tort duties.

*Leroy Fibre, Co. v. Chicago, Milwaukee & St. Paul Railway*<sup>141</sup> nicely illustrates the relevance of property rights to the delineation of duties of due care. In *Leroy Fibre*:

[the plaintiff operated a] factory for the manufacture of tow from flax straw. Upon its land, adjoining its factory and abutting on the defendants' right of way, it stored flax straw in parallel rows of stacks, the nearest some seventy-five feet, the other eighty-five feet, from the center of the right of way. A live cinder was emitted by a negligently operated engine of the defendant and carried by a high wind, then prevailing, into contact with the farther row of stacks which, being highly inflammable, ignited.<sup>142</sup>

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140. In connection with these three categories, think, respectively, of the special duties of care placed upon experts by the law of negligence, of the special duties of care connected to special relationships, and of the impact of property rights on the delineation of duties of care.

141. 232 U.S. 340 (1914).

142. 232 U.S. at 342.

The defendant claimed that the plaintiff itself was negligent, because it “had placed its property of an inflammable character upon its own premises so near the railroad tracks.”<sup>143</sup>

The jury found the plaintiff to be contributorily negligent. The question before the Supreme Court was whether the defendant was entitled to raise that defense in the first place — whether the defendant had a duty to take reasonable protections on its own property, for its own protection, against the negligence of the railroad. Over a terse, powerful, and eloquent dissent by Justice Holmes, Justice McKenna’s majority opinion held that “[t]he doctrine of contributory negligence is entirely out of place” in this setting.<sup>144</sup> The correct rule is one drawn from nuisance law. “[E]very one must use his property so as not to injure others . . . .”<sup>145</sup> This rule does not condemn the operation of railroads — they are a “legitimate use of property” — but it specifies a particular division of the labor of precaution between railroad operators and adjacent owners and occupiers of land.<sup>146</sup> Owners and occupiers of land next to railroad rights of way take the risks inherent in the rightful operation of a railroad, but not those stemming from its “wrongful” operation.

This is not the place to explore the subtleties of *Leroy Fibre*, much less to settle the debate between McKenna and Holmes. For our purposes, the lesson to be learned is this: the embedding of the tort issue within a framework of property rights affects the specification of tort duties. The parties in *LeRoy Fibre* did not stand in the same relationship as do drivers on the highway. For the most part, drivers on the road face one another simply as prospective injurers and prospective victims. They take risks upon themselves and impose risks on each other; they benefit from the precautions of others, and the precautions that they take benefit others. The terms of their interaction are largely uncluttered by special relationships and property rights.

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143. 232 U.S. at 342. *Leroy Fibre* is thus the American counterpart to the case of the farmer and the railroad that Ronald Coase, following Pigou, made famous in *The Problem of Social Cost*, Coase, *supra* note 47, at 29. Coase used a large number of examples to develop his argument. All of the examples resemble the farmer and the railroad example in two ways: (1) the harm is “caused” by both activities; and (2) maximizing the total value of the two conflicting activities requires bilateral precautions. Nonetheless, the example of the railroad and the farmer has emerged as one of the more famous illustrations. See, e.g., Cooter, *supra* note 95, at 2-9. For a rare recognition by an economically inclined scholar of the significance of property rights in this context, see Jones, *supra* note 46, at 1729, 1757.

144. *Leroy Fibre, Co.*, 232 U.S. at 350.

145. 232 U.S. at 350.

146. See 232 U.S. at 350.

By contrast, the property rights of the parties in *LeRoy Fibre* — their equal rights to the legitimate use and enjoyment of their properties — profoundly affected the terms of their relationship, and the law of torts must register the presence of those rights. Registering their presence, the definition of reasonable care is influenced by the concepts and categories of nuisance law. Put more generally, property rights alter the “normative field” within which tort law works. Moreover, the same can be said of “special relationships,” such as those of employers and employees, hotels and their guests, jailers and their prisoners, or schools and their pupils;<sup>147</sup> of the decision to assume certain roles, such as lifeguard, pilot, or captain of a ship;<sup>148</sup> and of voluntary choices to enter into activities whose intrinsic enjoyment is tied to the imposition of certain risks.<sup>149</sup>

In the case of “special relationships,” the assumption of positions of authority and trust extends the reach of responsibility. In the case of lifeguards, pilots and captains, the lives, safety, and property of many people depend on the skill and care of the occupants of those positions, thus providing a ground for the imposition of special duties of care. In the case of primary assumption of risk, the maintenance of a shared good requires the acceptance of distinctive risks. In all three of these cases, the acceptance of certain roles entails the acceptance of distinctive responsibilities. Such an emphasis on institutional roles is hardly surprising. We have good reason to want the delineation of pilots’ duties to be sensitive to the special risks and possibilities of their roles. For individuals and communities to flourish, those in positions of special trust and

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147. See, e.g., *Anderson v. Atchison, Topeka & Santa Fe Ry. Co.*, 333 U.S. 821 (1948) (holding an employer liable for the wrongful death of a missing employee because agents of the railroad failed to act reasonably in ascertaining his whereabouts); *Hutchinson v. Dickie*, 162 F.2d 103 (6th Cir. 1947) (holding that the defendant owed a duty of care to the decedent because the decedent was an invited guest on the defendant’s cruiser); *Pirkle v. Oakdale*, 253 P.2d 1 (Cal. 1953) (holding that school officials owed a duty of care in carefully supervising the physical activities of students); *Iglesia v. Wells*, 441 N.E.2d 1017 (Ind. 1982) (holding that a police officer owed a duty of care to a prisoner that the officer knew to be incapacitated by alcohol at the time of release). This list is merely illustrative. Cf. KEETON ET AL., *TORT AND ACCIDENT LAW*, *supra* note 20, at 236-52 (citing cases).

148. See, e.g., *Newing v. Cheatham*, 15 Cal. 3d 351 (1975) (holding the pilot/owner of private plane liable for its crash on a theory of *res ipsa loquitur*). *Newing’s* analysis rests heavily on federal regulations placing responsibility for the safe maintenance and flight of such aircraft squarely on their pilots and owners.

149. See, e.g., *Knight v. Jewett*, 834 P.2d 696 (Cal. 1992) (holding that ordinary careless conduct and incidental physical contact are essential to the enjoyment of a sport such as touch football and that the imposition of ordinary negligence liability on co-participants in “active sports” would impair their play); *Ford v. Gouin*, 834 P.2d 724 (Cal. 1992) (holding that an injury received while water-skiing was not actionable unless it resulted from conduct showing a reckless disregard for safety).

power must discharge their responsibilities in ways that do justice to our dependence upon them.

In all of these cases, liability regimes are not shaped exclusively by considerations of reciprocity. The majority opinion in *Leroy Fibre*, for example, refuses to recognize the defense of contributory negligence because it takes such reconciliation to be inconsistent with the fair reconciliation of the parties' property rights. Property conceptions play two roles in this conclusion. On the one hand, they flesh out the abstract ideal of reciprocity. The risks of railroading and farming are not reciprocal because farmers do not expose railroads to risks comparable to the risks to which railroads expose farmers. On the other hand, property conceptions alter tort judgments of reasonableness. One reason why the railroad is entitled to impose nonreciprocal risks of fire on "farmers" in the first place is that the railroad is entitled to the reasonable use of its right of way. It is not the dangerous use that is "unreasonable."

The unreasonableness of the railroad's use of its property lies in demanding that farmers, who do not impose comparable risks on railroads, take precautions against the risk that the railroad's negligence will damage their property. Put differently, the railroad's unreasonableness lay in demanding that the plaintiff forego the use of some of its property simply because so doing would minimize the railroad's private liability costs, and, perhaps, total social costs as well. Farmers are neither under a general duty to act in the best interests of railroads, nor under a general duty to use their property in wealth-maximizing ways. Their general duty is to respect the rights of others, and to act in accordance with fair principles of social cooperation. McKenna's claim is that the fair reconciliation of these conflicting claims calls for not imposing a duty of victim precaution against injurer negligence. Property rights are an *ingredient* in that conclusion. The judgment probably would not have been the same had property rights not been in play. We take it for granted that drivers on the *public* highway owe each other duties of victim precaution.

Property conceptions figure in a similar way in the best interpretation of the ruling and judicial rhetoric of *Rylands v. Fletcher*. On the one hand, the normal use of property in the region helped to specify which risks were reciprocal. One reason why the risks of reservoir building were not reciprocal was that the area was a mining district. Here, the customary use of property fleshed out the reciprocal risks of owning and occupying land. It poured content

into the tort norm of reasonableness.<sup>150</sup> On the other hand, property rights played an important role in justifying the construction of reservoirs in mining country. One reason why people were entitled to construct reservoirs, and so to impose nonreciprocal risks, was that people are, at common law, presumptively entitled to use their property as they see fit, so long as they do not use it in a way that injures other people.<sup>151</sup> Here, a property right does not flesh out a tort conception — it alters the application of tort conceptions. The right to use one's own property as one sees fit alters tort law's judgment of reasonableness.

The precise points illustrated by primary assumption of risk, "special relationships," and piloting are somewhat different. In these areas of the law, prior choices and the distinctive contours of various roles, rather than property conceptions, are ingredients in tort law's judgments of reasonableness. The broader point, however, is the same. In all of these areas, considerations of reciprocity *alone* do not determine liability rules and regimes. Property rights, prior choices, and particular relationships affect the normative field within which liability rules are constructed. Well-fashioned rules register the weight of those rights, choices, and relationships.

This puts us, finally, in a position to state the general relevance of considerations of reciprocity to Kantian social contract theory. Reciprocity of risk is a master organizing idea, but it is not a master test of the choice between negligence and strict liability for three reasons: first, reciprocity of risk is an ideal, and can only be approximated; second, reciprocity of risk is abstract, and can be given content only through the introduction of ancillary conceptions that flesh out the qualitative judgments of magnitude and reasonableness on which it depends; and third, its authority is not "all things considered," but "*prima facie*" or "presumptive." Its "all things considered" impact on the final shape of liability rules depends on its interaction with other normative materials. Those other materials carry their own authority and have their own presumptive implications. Considerations of reciprocity figure in judgments of reasonableness, but, so too do the prior choices of the parties, their institutional roles and responsibilities, and the property rights that they bring with them. Indeed, the list of relevant considerations is open ended.

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150. Custom plays a similar, if perhaps less authoritative, role in general negligence law.

151. See *supra* note 139 (quoting Judge Blackburn).

Notwithstanding these limitations, reciprocity of risk can serve as a master organizing idea, guiding our deliberations about the choice between negligence and strict liability. Indeed, the best way to understand the role of reciprocity of risk within traditional social contract theory is as *the* master organizing idea. The ideals of equal freedom and mutual benefit are the central ideals of social contract theory. The reciprocity of risk criterion articulates their bearing on problems of accidental injury and death. With respect to *risks* of accidental injury and death, perfect reciprocity of risk realizes the most favorable, and the most fair, conditions for free and equal persons to pursue their conceptions of the good over the course of complete lives.<sup>152</sup> Because Kantian social contract theory takes persons' status as free and equal to be their fundamental political status, reciprocity of risk can claim preeminence among the normative materials bearing on the choice of liability rules.

Property rights and prior choices have *some* normative authority because persons make choices and acquire property through the exercise of their civil freedoms, and in pursuit of their conceptions of the good. Within the bounds of justice, respecting the freedom of democratic citizens requires respect for the rights they create, and the duties they assume, through the exercise of those freedoms. When, through the exercise of their freedoms, democratic citizens acquire property, they acquire *rights* that other democratic citizens must respect. When, through the exercise of their freedoms, they assume positions of trust and responsibility, they acquire *duties* that they are not free to disclaim. *Prima facie*, we cannot appropriate the benefits of an office and shed its burdens.<sup>153</sup>

If property rights and prior choices have *some* normative authority because they flow from the exercise of the powers and liberties that we possess as free and equal democratic citizens, they generally have *less* authority than considerations of reciprocity do. The principle of responsibility embodied in the reciprocity of risk criterion flows directly from our status as free and equal citizens, whereas rights rooted in property interests, and the special role responsibilities that we assume, flow more indirectly from our freedom and equality. Our free and equal status is the ground on which

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152. See the discussion in the text *supra* at notes 135-37. See also Keating, *supra* note 57, at 324.

153. Cf. RAWLS, A THEORY OF JUSTICE, *supra* note 106, § 52, at 342-43 (1971) (stating the "principle of fairness"). This principle is also traced to H.L.A. HART, *Are There Any Natural Rights?*, in POLITICAL PHILOSOPHY 53, 61-63 (Anthony Quinton ed., 1967).

our more particular roles are built, and our more particular rights and interests acquired.

Finally, these are questions to be settled by deliberation, not bargaining, because they are questions of right and justice, not preference or power. Property interests and prior choices alter the claims that persons may rightly make against others, and the claims that others may rightly make against them. They do not free us from the requirements of justice, and transport us to a realm where power, shrewdness, negotiating skill, or intensity of desire settle questions of freedom and responsibility.

We are now in a position to understand the challenge presented by the enterprise liability principle of fairness. Like the reciprocity of risk criterion itself, the enterprise liability principle of fairness appeals directly to our fundamental status as free and equal citizens, not to the property interests that we acquire, or to the choices that we have made, through the exercise of those freedoms. It challenges the reciprocity of risk criterion by taking accidental *harm*, not *risk*, as the touchstone for thinking about mutuality of benefit. Because it appeals directly to our status as free and equal individuals, it challenges the claims of the reciprocity of risk criterion to primary normative authority. Implicitly, the principle of burden-benefit proportionality claims that the full realization of freedom and equality requires the fair apportionment, not just of risk, but of the financial costs of accidental harm as well.

## VI. THE RHETORIC OF FAIRNESS

To justify the enterprise liability principle of fairness within a Kantian social contract framework, then, we must show why reasonableness sometimes requires the fair distribution of the financial costs of accidental harm between an enterprise and its victims. To show that this framework makes sense of the pertinent law, we must connect it with relevant rhetoric and doctrine. The relevant rhetoric has three elements. The first is the principle of fairness itself, with its implicit insistence that harm, not risk, is what matters. The second is the conviction that the shift from a world of "isolated, ungeneralized wrongs," to a world in which "torts . . . are mainly the incidents" of large enterprises,<sup>154</sup> makes the fair distribution of harm between enterprises and their victims an issue, thereby changing the question of fairness presented by tort liability. The third is the claim that there is an intentional aspect to the infliction of "acci-

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154. HOLMES, *supra* note 1, at 183.

dental” harms by large enterprises, and this intentionality provides a ground for the imposition of liability.<sup>155</sup>

The argument that I shall develop is lengthy, but its gist is simple. When risks are the incidental by-products of large and well-organized activities, the enterprise liability principle of fairness reconciles the competing claims of liberty and security more fairly, and more favorably, than the reciprocity of risk criterion does. Losses of life, limb, and property disrupt the lives of victims even when they issue from risk impositions that are themselves justified. We therefore have reason to minimize the financial hardship that losses cause, and to distribute their financial costs as fairly as possible. In Holmes’s new world of interrelated and generalized risks, the imposition of enterprise liability is often able to effect these ends. When it can do so, it is reasonable for enterprises to impose the nonnegligent risks characteristic of their activities but unreasonable of them not to accept responsibility for the financial costs of those risks.

### A. *Risk and Harm*

Both Fried and Fletcher take risk — not harm — to be the component of, and threat to, human well-being governed by tort law. The equal freedom that concerns them is equal freedom to impose risks *on* others, and equal freedom from risk impositions *by* others. The fairness that concerns them is fairness in the distribution of risk, not fairness in the distribution of the (financial) burdens and benefits of accidental harm. On its face, this aspect of their thoughts is puzzling. They appear to count risk more important than harm, yet common sense and social contract theory alike suggest that risk is only threatening because it may issue in harm. By itself, risk rarely threatens fundamentally the ability to pursue a conception of the good over the course of a complete life.<sup>156</sup> The same cannot be said about the actual occurrence of physical injury and death. Because the avoidance of accidental injury and death, rather than the avoidance of risk, is fundamental to our well-being,

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155. The first and third of these elements of the enterprise liability rhetoric of fairness are identified as two of the major forms of fairness rhetoric by James Henderson, Jr. in his careful study of judicial justification in products liability law. See Henderson, *supra* note 11, at 1576-77.

156. Exposure to carcinogenic toxins and radiation are exceptions to this rule. In these cases, risk persists long after exposure ends, and this may count as a harm in itself. See, e.g., *In re TMI*, 67 F.3d 1103 (3d Cir. 1995) (holding that exposure to radiation beyond a certain threshold fixed by regulation constitutes a harm regardless of subsequent personal injury). But these are exceptional, and distinctively modern, cases. Fletcher and Fried clearly have more typical and traditional cases in mind.



Fletcher's and Fried's focus on risk instead of harm requires justification.

Neither Fletcher nor Fried has much to say about the reason why risk, rather than harm, should be the touchstone of tort theory. One of Fletcher's brief asides contains the germ of an answer, however. Fletcher remarks that, when risks are reciprocal, holding actors strictly liable for the harms that they cause would merely "substitute one form of risk for another — the risk of liability for the risk of personal loss."<sup>157</sup> Fletcher's thought, I take it, is this: strict liability has administrative costs, namely, the expense of using the judicial system to transfer the costs of an accident from the victim to the injurer. Because reciprocity defines a perfectly fair situation with respect to the distribution of risk, incurring those administrative costs does not lead to a fairer distribution of the costs of accidents. It leads to a different — but not fairer — distribution of those costs. There is, therefore, no point in imposing strict liability in cases of reciprocal risk imposition and no point in focusing on the distribution of harm as opposed to the distribution of risk.

The fairness argument that I have attributed to Fletcher would be sound if it were the case that, when risks are reciprocal, neither the victim nor the injurer could spread the costs of an accident across those who benefit from the activity that engenders it. Activity liability, however, supposes that the imposition of strict liability on reciprocal risks does not merely shift the financial costs of accidents from victims to injurers, but spreads the costs of accidental harm across the enterprise that engendered those harms. If enterprise liability is capable of spreading the costs of accidental harm *across those who benefit from the creation of the relevant risks*, then it may be fair and just — not just efficient or humane — to shift the costs of accidents arising out of reciprocal risks onto those who imposed the risks. Aristotle himself saw the proportional alignment of burdens and benefits as a distinctive form of justice, different from both distributive and corrective justice.<sup>158</sup>

Although the principle of proportionality is concerned with the *distribution* of the burdens and benefits of accidental risk imposition, it differs from distributive justice as Fletcher, following Aristotle, understands it. Distributive justice distributes goods on the

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157. Fletcher, *supra* note 13, at 547.

158. See ARISTOTLE, *supra* note 12, bk. V, ch. 5, at 117-22 (discussing justice as proportionality and distinguishing it from both corrective and distributive justice).

basis of status or virtue.<sup>159</sup> The principle of burden-benefit proportionality *attributes* responsibility on the basis of conduct. It assigns liability to the *activity* responsible for the accident, and so parcels out financial responsibility for harm on the basis of voluntary risk creation. Although the principle of proportionality is concerned, like corrective justice, with what has been done, it differs from corrective justice as much as it differs from distributive justice. Corrective justice seeks to restore a wrongfully disrupted preexisting equilibrium, whereas the principle of proportionality seeks to create a new equilibrium in which the burdens and benefits of accidental injury are aligned. The principle of proportionality is, in short, neither distributive nor corrective, but *commutative*.<sup>160</sup>

This principle of fairness is not at odds with, but rather is supported by, social contract theory. Social contract theory is, after all, concerned with the fair reconciliation of two conflicting liberties — freedom of action and security. Freedom from harm is more fundamental to security than freedom from risk, and the fair apportionment of the burdens and benefits of accidental harm is therefore more important than the fair apportionment of the burdens and benefits of accidental risk creation. Social contract theory thus counsels us, when possible, to attend to the fair apportionment of the costs of accidents, rather than to the fair distribution of risk. When the imposition of strict liability simply shifts a concentrated harm from victim to injurer, the balance that it strikes between the competing claims of freedom of action and security is different from, but no fairer than, the balance struck by negligence law. When strict liability spreads accidents across those who benefit from creating the risks that result in those accidents, rather than simply shifting concentrated harms from victims to injurers, strict liability strikes a fairer balance than negligence does between the competing claims of freedom of action and security. Or so I shall argue.

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159. See ARISTOTLE, *supra* note 12, bk. V, ch. 3, at 112-13 (“[F]or all men agree that what is just in distribution must be according to merit in some sense, though they do not all specify the same sort of merit, but democrats identify it with the status of freeman, supporters of oligarchy with wealth (or noble birth), and supporters of aristocracy with excellence.”). From a Kantian perspective, the principles of tort liability implicate distributive justice, insofar as they are aspects of a fundamental principle of equal right or equal liberty. For present purposes, these differences in Kantian and Aristotelian conceptions of distributive justice are beside the point. The point is that the enterprise liability principle of fairness is not “status” based in an objectionable way. It specifies conditions under which free and equal citizens will be held responsible for what they have *done*.

160. My usage of “commutative” follows that of FEINBERG, *supra* note 20, at 221 n.21. Feinberg uses “commutative” to describe the “justice as proportionality” that Aristotle distinguishes from both corrective and distributive justice. See ARISTOTLE, *supra* note 12.

This argument reconciles the apparently competitive conceptions of fairness expressed by the reciprocity of risk criterion and the principle of burden-benefit proportionality by granting them different spheres of application. For this reconciliation to be successful, we must identify the basic domains within which each of these principles of fairness applies. Here, the second element of the enterprise liability principle of fairness comes into play. Bearing in mind the caveat that each of these principles is a master organizing idea, not a master test, we can locate the essence of each conception's rightful sphere of operation in Holmes's distinction between a world of "isolated, ungeneralized wrongs," and a world where certain risks are the regular and routine "incidents of certain well known businesses."<sup>161</sup> When risks are isolated and ungeneralized, the reciprocity of risk principle fairly reconciles the competing claims of freedom of action and security for a plurality of persons. When risks are systemic and generalized, the principle of burden-benefit proportionality strikes a better balance.

### B. *Two Social Worlds*

In Holmes's world of "isolated, ungeneralized wrongs" (let us call this world the "world of acts"), risk impositions are *discrete* "one-shot" events. The actors who impose risks are independent of one another and actuarially small. In this world, nonnegligent harms are as haphazard and unpredictable as natural disasters. Just as one might have the bad luck to be struck by lightning, so too one might have the bad luck to be struck by a man raising a stick high behind him as he struggles to break up a dogfight.<sup>162</sup> In the world of acts, the typical actor is an individual or a small firm that creates risk so infrequently that harm is not likely to materialize from its actions alone, and the typical accident arises out of the independent actions of natural persons or small firms engaging in similar activities on an occasional basis. Viewed as a whole, the activities of these actors are diffuse and disorganized. Even in the aggregate, the activities of these actors may be actuarially small.

The random dogfight that precipitated *Brown v. Kendall* nicely typifies torts in the world of acts. Dog owners were then — and pretty much are now — a diffuse and unrelated group. The risks of physical injury and death that each dog owner imposed were too actuarially small to make the infliction of serious personal injury on

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161. HOLMES, *supra* note 1, at 183.

162. See *Brown v. Kendall*, 60 Mass. (6 Cush.) 292 (1850).

someone else an ordinary and predictable part of individual dog ownership. Each dog owner is an actuarially small actor, and the risks imposed by her are independent of, and uncorrelated with, the risks imposed by other dog owners. Under these circumstances, liability rules shift, but do not spread, the financial costs of accidental injury.<sup>163</sup> In the world of acts, the imposition of strict liability “substitute[s] one form of risk for another — the risk of liability for the risk of personal loss.”<sup>164</sup>

At the opposite pole from the “world of acts” is the “world of activities.” In the “world of activities” risks are *systemic*. Systemic risks arise out of a continuously repeated activity (for example, the manufacture of coke bottles, the transport of gasoline, the supplying of water by a utility) that is actuarially large. “Accidental” harm is statistically certain to result from such risks: if you make enough coke bottles, some are sure to rupture;<sup>165</sup> if you transport enough gasoline, some tankers are sure to explode;<sup>166</sup> if you never inspect water mains and leave them in the ground long enough, some are sure to break.<sup>167</sup>

In the world of activities, the typical injury arises not out of the diffuse and disorganized acts of unrelated individuals or small firms, but out of the organized activities of firms that are either large themselves, or small parts of relatively well-organized enterprises. The defendant in *Lubin* is large in the first sense: a single entity is responsible for the underground piping of water, for laying and maintaining those pipes, for charging consumers for the water so transported, and so on. The transportation of large quantities of gasoline in tractor trailers on highways is large in the second sense:

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163. This claim assumes that adequate liability insurance is unavailable in the world of acts. This assumption is only partly correct. Although liability insurance was certainly not widely available in the nineteenth century, contemporary homeowner’s insurance usually covers policyholders for liability arising out of damage that their domestic pets inflict on the persons and property of others. A standard California policy, for example, includes: “Personal liability protection,” which pays for bodily injuries to other people, or damage to their property if you are liable, resulting from the acts of your pets. See Farmer’s Insurance Group, Homeowner’s Package Policy; II. Liability; E. Personal Liability. There is an important general point here: liability insurance can convert the world of acts into the world of activities. I discuss this in the text *infra* at notes 170-78.

164. Fletcher, *supra* note 13, at 547. While the activity of dog owning itself might have been actuarially large, the independence of dog owners from each other effectively prevented insurance mechanisms from stitching these independent and unrelated actors together into a unified enterprise.

165. See, e.g., *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944).

166. See, e.g., *Siegler v. Kuhlman*, 502 P.2d 1181 (Wash. 1972).

167. See, e.g., *Lubin v. Iowa City*, 131 N.W.2d 765 (Iowa 1964) (observing that the waterworks chose not to inspect underground water mains and decided to replace them only after they broke).

the firms that do the transporting may (or may not) be small and specialized, but they are enmeshed in contractual relationships with those who manufacture and refine gasoline, those who operate gasoline stations, those who manufacture tractor trailers, and so on.<sup>168</sup>

In the world of activities, the financial costs of accidental injuries *can* be spread fairly across the enterprises that engender those harms. In this world, accidents arise out of circumstances that satisfy the basic criteria of insurability. Foremost among these criteria is the law of large numbers.<sup>169</sup> The more the law of large numbers is met, the more risks are certain not only to issue in harms, but also to issue in harms with predictable regularity. When an activity is large enough, the accidental harm associated with its conduct is predictable, and the cost of that harm can be foreseen and priced into the activity. In the purest version of the world of activities, actors (enterprises) themselves satisfy the requirements of the law of large numbers. When enterprises themselves are actuarially large, they tend to engender nonnegligent accidents in a regular and calculable way, and the costs of those accidents can be factored into the costs of conducting the enterprise. The costs of manufacturing and distributing Coke can include the costs of injuries from exploding Coke bottles; the costs of supplying water to households and businesses can include the costs of the damage caused by broken water mains.<sup>170</sup>

So far I have painted a picture of polar opposite worlds. In one world, not only are each actor's risk-creating acts infrequent and statistically small, but the aggregate risks created by all the actors who impose that risk are also actuarially small. Each dog owner's involvement with dogfights is rare, and the "enterprise of owning dogs" is itself an actuarially small one. In the other world, not only are each actor's risk-creating acts frequent to the point of being sta-

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168. This perception is fundamental to the cases. For example, the *Siegler* court writes: "the commercial transporter can spread the loss among his customers — who benefit from this extrahazardous use of the highways. Also, if the defect which caused the substance to escape was one of manufacture, the owner is in the best position to hold the manufacturer to account." *Siegler*, 502 P.2d at 1188.

169. See ROBERT I. MEHR ET AL., *PRINCIPLES OF INSURANCE* 32 (8th ed. 1985) (observing that the system of insurance is predicated on the law of large numbers, a theory under which the ability to predict collective losses supplants the impossibility of predicting individual losses).

170. See *Escota*, 150 P.2d at 441 ("The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."); *Lubin*, 131 N.W.2d at 770 ("The risks from such a method of operation [i.e., leaving water mains in the ground until they rupture] should be borne by the water supplier who is in a position to spread the cost among the consumers who are in fact the true beneficiaries of this practice and of the resulting savings in inspection and maintenance costs.").

tistically large, the aggregate risks created by all the actors who impose that risk are even larger actuarially. Coke alone manufactures millions of soda bottles, and the enterprise of manufacturing soda bottles is far more vast than Coke's own contributions to it. The Coast Guard alone regularly looses innumerable cooped-up sailors upon the world, and the enterprise of sending sailors on shore leave is far larger than the Coast Guard's contribution to it.

This picture has its charms, and one of them is a certain broad brush historical accuracy. As far as the genesis of accidental harm is concerned, the world of the nineteenth century really does seem to have differed from the world of the twentieth century in roughly the way that this picture suggests. But the picture is sweeping, and the contrast that it paints is crude and overdrawn. For example, the claim that dogfights were once isolated and rare events, because dog ownership was itself an actuarially small activity, invites skepticism. People have "owned" dogs since the beginning of human history. So long as we are prepared to take a reasonably broad view of the matter (both temporally and geographically), the nineteenth-century pool of dog owners and dogfights looks large indeed. Conversely, however vast the mid-twentieth-century shipping industry may have been, sailing is an ancient endeavor, and sailors on shore leave have been drinking their way into the "condition for which [they] are famed" for a very long time indeed.

These misgivings about the accuracy of the sharp contrast between the nineteenth-century "world of acts" and the twentieth-century "world of activities" are well founded. Given a sufficiently large pool of dog owners, the accidental harms characteristic of dog ownership should be predictable and therefore insurable. The expected incidence of dogfights should be calculable, and the actual incidence should tend to converge with the expected incidence. Problems associated with the organization and administration of insurance contracts aside,<sup>171</sup> it should be possible to write liability insurance covering the risks of personal injuries attributable to domesticated dogs. The imposition of strict liability should therefore be able to spread the costs of dogfights across all dog owners, thereby aligning the benefits and burdens of dog ownership as far as the infliction of accidental injuries on strangers is concerned.

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171. There are a range of problems here, and they can be quite formidable. The administrative costs of writing separate policies can make the offering of insurance infeasible; the cost of acquiring adequate information about each insured's riskiness can have the same effect; the cost of monitoring the behavior of insureds can be prohibitive; moral hazard problems may prove insuperable; asymmetric information can lead to cross-subsidization, adverse selection and unraveling, and so on. See *infra* text accompanying notes 173-81.

Thus, the picture that we have sketched of differing social worlds may leave out the most important difference between the social worlds of the nineteenth and twentieth centuries, namely the fact that, in the nineteenth century, the institution of liability insurance was in its infancy.<sup>172</sup>

The thrust of this objection is correct in two ways: first, the presence, and relative level of development, of the institution of liability insurance marks an essential distinction between the world of acts and the world of activities. Second, these two social worlds are not polar opposites, but points on a continuum. Indeed, the institution of liability insurance is important precisely because such insurance can go a long way towards converting a world of acts into one of activities. In the purest version of the world of acts, activities as well as actors fail to meet the requirements of the law of large numbers. Arguably, anyway, this version of the world of acts is an ideal type that exists nowhere.<sup>173</sup> Let us, then, consider a slightly less pure, but more realistic, version of the world of acts. In this world, activities are large — large enough to meet the law of large numbers — but actors are small and independent of each other.

In this intermediate world, each actor's activity is too infrequent to satisfy the law of large numbers, and the accidental harm associated with each actor's activity is therefore unlikely to occur with predictable regularity. In the absence of liability insurance, strict liability will not spread an activity's characteristic accident costs across those who benefit from the imposition of its characteristic risks. The presence of adequate liability insurance may, however, make a profound difference. If independent insurance firms are able to supply adequate liability insurance to actuarially small actors, then the imposition of strict liability *will* spread the costs of

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172. See KEETON ET AL., *supra* note 53, § 82, at 585.

173. Although this point is arguable, it is far from being obviously true. Judge John J. Francis describes the characteristics of the nineteenth-century world of accidental harm in the following way:

The limitations of privity in contracts for the sale of goods developed their place in the law when marketing conditions were simple, when maker and buyer frequently met face to face on an equal bargaining plane and when many of the products were relatively uncomplicated and conducive to inspection by a buyer competent to evaluate their quality. With the advent of mass marketing, the manufacturer became remote from the purchaser, sales were accomplished through intermediaries, and the demand for the product was created by advertising media.

Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 80 (N.J. 1960) (citation omitted). This description of the world in which privity of contract arose is a description of a craft economy. In such an economy, products are individualized and produced on a small scale. Acts as well as activities are likely to be small, especially given the individuation of products. This may well have been the social world of the nineteenth century.

nonnegligent harms across the class of those who benefit from the imposition of the relevant risks in the form of insurance premiums.<sup>174</sup> The institution of insurance can thus effect at least a partial transformation of the world of acts into the world of activities.<sup>175</sup>

Whether the institution of liability insurance can effect this kind of partial conversion depends on at least three things: the first is the extent to which the basic criteria of insurability — a large number of *homogeneous* exposures; losses that are each accidental; losses that are not correlated in the way that, say, property damage from earthquakes tends to be correlated; and so on — are met.<sup>176</sup> The second is whether the transaction costs of organizing and maintaining such a market — the costs of acquiring information both about the riskiness of the activity being insured in general and the riskiness of particular insureds in particular; the costs of writing and administering separate liability insurance contracts for each actor; the costs of monitoring the claims and behavior of insureds and of adjusting premiums accordingly; and so on — are low enough to make the offering of insurance profitable. The third is whether the collective action problem of organizing such markets can be overcome in a cost-efficient way.

The provision of liability insurance presents a collective action problem because the extent to which such insurance spreads the costs of an actuarially large activity composed of actuarially small actors *across that activity* depends on the extent to which those actors purchase insurance and so participate in the loss-spreading mechanism.<sup>177</sup> This means that liability insurance will spread the costs of accidents across the activity that generates those costs only if most or all of the relevant actors are persuaded or compelled to purchase such insurance.

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174. Insurance might spread costs in another way — it might spread them across unrelated risks. Whatever the merits of such insurance, it would not spread the costs of an activity's accidental harm only across the actors who participate in imposing the activity's distinctive risks.

175. The transformation is only partial because the availability of liability insurance does not, in general, establish the kind of relationships among insureds that is created by participation in a shared enterprise. For example, an insurance company does not generally have the kind of authority over its insureds that the Coast Guard has over its sailors.

176. See MEHR ET AL., *supra* note 169, at 35 (discussing criteria of insurability).

177. Substantial participation is, moreover, a condition of effective insurance, not only because it is necessary to construct a sufficiently large pool, but also because it is often necessary to overcome problems of adverse selection and cross-subsidization. Effective insurance depends on the insurer's ability to predict collective losses accurately. Other things being equal, the larger and more similar the risk pool, the more accurate the prediction of collective losses.



In general, whether the accidental harm associated with an activity that is actuarially large but composed of actuarially small actors can, in practice, be spread across the activity will depend not only on the extent to which basic criteria of insurability can be met, but also on whether these transaction costs and collective action problems can be overcome at a cost that is low enough to nurture a flourishing liability insurance industry. When the number of actors is high, and each actor is small, these costs will tend to be high.

Just as we might distinguish a slightly less pure and more realistic version of the world of acts, so too we might distinguish a slightly less pure and more realistic version of the world of activities. This version of the world of activities bears a superficial resemblance to the world of acts, because it contains actuarially large activities and nominally small actors. In this world, however, actors are only nominally small. They are engaged *not* in unrelated acts, but in relatively well-coordinated aspects of a common enterprise. Separate firms may, for example, handle different aspects of the refinement, transportation, and sale of gasoline, but their activities form a relatively well-organized whole. When actors are small, but their activities are related and the enterprise in which they participate is large, the costs of accidents may still be spread across those enterprises with relative ease. What counts here is not corporate form but economic substance — not whether activities are formally integrated, but whether they are functionally integrated.<sup>178</sup>

For example, the small size of each individual auto dealer does not preclude spreading the costs of auto defect-related accidents across the enterprise of manufacturing and selling automobiles; that spreading can be achieved simply by forbidding automobile manufacturers from limiting their liability for such accidents.<sup>179</sup> So too, the ability of firms that transport gasoline by tractor trailer to

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178. See, e.g., *Becker v. Interstate Properties*, 569 F.2d 1203, 1211 (3d Cir. 1977) (imposing liability on the general contractor for the tort of an underinsured, formally independent subcontractor because the general contractor, who had “negotiated at length regarding the insurance coverage” of the subcontractor, was in an “excellent position to assure the proper degree of financial responsibility”); see also Alan O. Sykes, *The Economics of Vicarious Liability*, 93 *YALE L.J.* 1231, 1261-71 (1984). Sykes analyzes the efficiency of the “control test” for the imposition of vicarious liability on independent contractors and criticizes some important lines of cases for paying too much attention to the “pertinent agreements” between the principals and the “independent” contractors and too little attention to “economically relevant factors” such as “the observability of loss-avoidance behavior, [and] the duration of the agency relation.”

179. See, e.g., *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 83-84 (N.J. 1960) (arguing that the societal interest in consumer safety can be achieved by eliminating the requirement of privity between manufacturer and purchaser, thereby placing the costs of product-related accidents on the manufacturer, the entity in the best position to reduce the danger to the consumer and spread product-related accident costs).

spread the accident costs of gasoline explosions across the enterprise of refining, distributing, selling, and using gasoline depends not on the size of those firms themselves, but on the size and integration of the enterprise as a whole and on the connections among the actors who constitute the enterprise.<sup>180</sup>

These remarks only hint at the complexities of the topic they discuss. The connections between enterprise liability and insurance are both fundamental and intricate. Under some circumstances, the imposition of enterprise liability can further insurability by facilitating the construction of homogeneous risk pools.<sup>181</sup> Under other circumstances, the imposition of enterprise liability can undermine insurance mechanisms by unraveling homogeneous risk pools.<sup>182</sup> In some circumstances, enterprise liability may destabilize efficient insurance mechanisms; in others, it may destabilize inefficient insurance mechanisms and stimulate the growth of those that are more efficient. To complicate matters further, it can be extremely difficult to tell whether a particular disruption is efficient or inefficient. These are precisely the issues at stake in the debate between scholars such as Richard Epstein and George Priest on the one hand, and Steve Croley, Jon Hanson and Kyle Logue on the other, over the causes of, and policy cures for, the liability insurance crisis of the mid to late 1980s.<sup>183</sup>

For our purposes, however, the critical point is not that the ebb and flow of enterprise liability has been sensitive to the availability, and perceived efficacy, of liability insurance, though sensitive it has been. For our purposes, the critical point is that the fairness of imposing enterprise liability depends on its ability to connect the financial costs of accidental injury with the characteristic risk. The enterprise liability principle of fairness therefore makes questions of insurance fundamental. That insurance is important is not, to be sure, news. What *is* news is that the institution of insurance affects the extent of injurers' *moral* responsibility for the harms that they accidentally inflict. Morally oriented tort theorists have long assumed that, if responsibility for accidental harm must be predicated

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180. See *Siegler v. Kuhlman*, 502 P.2d 1181, 1188 (Wash. 1972).

181. See, e.g., Croley & Hanson, *What Liability Crisis?*, *supra* note 7, at 109-10.

182. See, e.g., Priest, *Insurance Crisis*, *supra* note 7, at 1550-63 (arguing that enterprise liability is causing liability insurance to unravel). Priest and Croley and Hanson are applying the model of asymmetric information and unraveling developed by George Akerlof. See George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970) (explaining how asymmetric information might lead the market for used cars to unravel and showing how strict liability in the guise of compulsory insurance can stop the unraveling).

183. See *supra* note 7.

on what people do, not on who they are, the institution of liability insurance must be essentially irrelevant to responsibility for accidental injury. Just as this principle should forbid holding people responsible for harm simply because their pockets are deep enough to pay for it, so too it should forbid holding them responsible just because they have enough insurance to cover it. The second element of the enterprise liability conception of fairness surprises us by showing us that this conviction is too sweeping. Whether or not it is fair to leave the financial costs of nonnegligent accidents concentrated on a few unlucky victims depends greatly on whether the costs of those accidents can be distributed across those who benefit by creating the risks that harm those unlucky few. The institution of insurance is intimately involved in the answer to that question. The surprise triggered by the third element of the enterprise liability rhetoric of fairness comes from a different direction. Moral criticism of the defendant's conduct is often thought to be largely absent from judgments that the imposition of some form of strict liability is warranted.<sup>184</sup> Judicial opinions stressing the deliberate quality of the nonnegligent accidents caused by large enterprises urge that point as a sharp moral condemnation of the enterprise's conduct.

This insistence on the deliberate character of certain nonnegligent harms subject to enterprise liability is a recurring, if poorly articulated, theme of enterprise liability case rhetoric and commentary. It is voiced, for instance, in the second tentative draft of the *Restatement (Third) of Torts: Products Liability*. Commenting on the rationale for strict liability for manufacturing defects preserved by its proposed section 2A, the reporters state: “[b]ecause manufacturers invest in quality control at consciously chosen levels, their knowledge that a predictable number of flawed products will enter the marketplace entails an element of deliberation about the

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184. For example, a striking concurrence in *Helling v. Carey*, 519 P.2d 981 (Wash. 1974) (en banc), argues that the imposition of strict liability on medical mishaps would be preferable to negligence liability because judgments of negligence impose “a stigma of moral blame” on doctors. 519 P.2d at 984 (Utter, J., concurring). The imposition of strict liability, by contrast, simply expresses a view about proper loss distribution — the view that “the plaintiff should not have to bear the risk of loss.” 519 P.2d at 984 (Utter, J., concurring). This view of strict liability distinguishes it sharply from both negligence and intentionally tortious conduct. The imposition of liability for intentional wrongdoing expresses moral criticism and disapproval, because it means that the defendant wrongfully invaded a protected interest of the plaintiff and did so deliberately. The imposition of negligence liability expresses at least a mild form of moral criticism and disapproval, because it means that the defendant failed to live up to a standard of care that establishes the level of respect owed to the lives, limbs, and property of others.

amount of injury that will result from their activity."<sup>185</sup> Similar remarks are occasionally found in cases themselves.<sup>186</sup>

This emphasis on deliberate action, however, will not bear the weight that remarks like this place upon it. Construed as a claim about the culpable self-consciousness with which manufacturing defect-related harms are inflicted, it is wholly unconvincing. For starters, the implicit empirical assumption on which the remark rests is shaky at best. While manufacturers may understand much more about the incidence and genesis of manufacturing defects than consumers do, there is no compelling reason to believe that manufacturers are a uniquely clairvoyant class with respect to this one narrow class of potentially dangerous product features. The precise consequences of various safety devices for automobile accident and injury rates may be highly predictable, for example. When manufacturers fail to install all technologically feasible safety

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185. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2A, cmt. a (Tentative Draft No. 2, 1995). James A. Henderson, one of the reporters for the *Restatement (Second) of Torts*, elaborates on this remark. See Henderson, *supra* note 11, at 1576 n.33 (observing that the producer of a defective product is like "an actor who shoots into a crowd; although the shooter may not know who will be injured, he commits an intentional wrong against the victim"). Unfortunately, this analogy begs the question it means to answer. We know that, if anything is wrong, gratuitously shooting a gun into a crowd is wrong. If anything exemplifies the sort of grave harm that cannot be gratuitously inflicted, this does. What we do not know is why investing in quality control at a reasonable (nonnegligent) level gives rise to a duty to compensate someone injured by an unprevented manufacturing defect.

186. To my knowledge, the most explicit case law assertion that the deliberateness with which a nonnegligent harm is inflicted is itself a basis for the imposition of strict liability occurs in *Lubin v. Iowa City*, 131 N.W.2d 765 (Iowa 1964), a case holding a waterworks strictly liable for property damage caused by the bursting of one of its underground pipes. The waterworks had a practice of leaving its pipes in the ground until they broke, and the court found this practice a ground for the imposition of strict liability. "It is," the court explained, "neither just nor reasonable that the city engaged in a proprietary activity can deliberately and intentionally plan to leave a watermain underground beyond inspection and maintenance until a break occurs and escape liability." 131 N.W.2d at 770; see also *Norfolk & W. Ry. Co. v. Amicon Fruit Co.*, 269 F. 559 (4th Cir. 1920) (holding a private company liable for recurring leaks that occurred without negligence because the court found "plainly untenable" the defendant's implicit claim that it was not liable because it could not keep its pipeline from leaking). Waterworks are not generally subject to strict liability. See KEETON ET AL., *supra* note 53, at 550. When defendants act in ways that are substantially certain to inflict harm on some (but yet unidentified) person, courts are prepared to find the elements of battery present. See, e.g., *Werlein v. United States*, 746 F. Supp. 887, 907 (D. Minn. 1990), *vacated in part* 793 F. Supp. 898 (D. Minn. 1992) (holding that the allegation of battery presented a triable issue in a pollution case when the defendant disposed of highly toxic substances into sandy ground directly above a regional aquifer, because there was sufficient evidence that the defendant "knew that its conduct was substantially certain to cause an offensive or harmful contact"); *Beauchamp v. Dow Chemical Co.*, 398 N.W.2d 882 (Mich. 1986) (adopting the "substantial certainty" test for determining what counts as intentional wrongdoing that is exempt from the exclusivity provisions of Michigan's worker's compensation statute). Such certain migration of hazardous materials may also establish a trespass. See *Scribner v. Summers*, 84 F.3d 554 (2d Cir. 1996); cf. *State Dept. of Env'tl. Protection v. Ventron Corp.*, 468 A.2d 150 (N.J. 1983) (subjecting disposal of hazardous wastes "that seeps onto the land of others" to strict liability on theory of *Rylands v. Fletcher*).

devices, they may therefore do so knowing the toll in life and limb that their decisions will exact. That fact alone, however, does not give rise to any special culpability.

Furthermore, even if the incidence of manufacturing defect-related injuries was foreseen with unique clairvoyance by product manufacturers, there is no reason to believe that such clairvoyance is, by itself, morally significant. Ignorance of the natural and probable consequences of one's actions may be bliss, but it does not exculpate those blessed with it from responsibility for harms that the reasonably clairvoyant would have foreseen. Accident law concluded long ago that responsibility cannot hinge on the clarity and self-consciousness with which one appreciates the results of one's actions.<sup>187</sup>

Construed as a claim that manufacturing defects are special because defects will persist at any level of investment in safety precautions, so that the residual defect rate is deliberately chosen, the point is equally unpersuasive. Innumerable risks are imposed in equally deliberate ways. For example, even if all reasonable precautions are taken, the transport of large quantities of gasoline by tractor trailer appears certain to issue in serious harm in the long run. Surely, the amount of harm in which this practice issues is sensitive to the level of precaution. Settling on a reasonable level of precaution is therefore tantamount to deliberately choosing, in an abstract and statistical way, to sacrifice a certain number of lives, and a certain amount of property. Essentially the same observation might be made about the construction and operation of reservoirs. These, too, will occasionally rupture, even if all reasonable precautions are taken. The frequency with which they rupture is almost certainly sensitive to the care with which they are constructed and operated.

In fact, *all* activities may involve the deliberate imposition of *some* risks. Negligence law explicitly contemplates the existence of a residual level of risk once all reasonable precautions have been taken and insists that it is more reasonable for victims to bear this level of risk than to try to reduce it further.<sup>188</sup> Unless this argument is *always* wrong, the fact that residual risks remain, and are deliberately imposed, cannot be enough to justify the imposition of strict liability.

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187. See *Vaughan v. Menlove*, 132 Eng. Rep. 490 (C.P. 1837).

188. See Keating, *supra* note 57, at 350-52.

Another line of thought shares the Restatement's conviction that certain kinds of enterprise-related harms are intentionally wrongful in some way, but it locates their wrongfulness in the statistical certainty of the harm associated with large enterprises.<sup>189</sup> Large public and private construction projects provide the canonical examples here. When we tunnel under the English channel, construct a highway, or build a skyscraper, the "cost" in lives lost and limbs crushed may be foreseeable with considerable actuarial precision. Decisions to commence and carry through such projects therefore involve intending the "accidental" injuries and deaths that the projects inevitably entail. When we will the realization of an end, we will the means necessary to its attainment. By virtue of the statistical certainty that accompanies their great size, large enterprises intend the accidental harms that their actions cause.

The claim that actors are subject to a special kind of culpability when they set in motion (or sustain) processes that are statistically certain to cause harm sweeps too broadly. Highway fatalities on Fourth of July weekends are actuarially predictable with great precision,<sup>190</sup> yet no one thinks that we are, as a society, collectively culpable for failing to forbid driving on Fourth of July weekends. So too, no one believes either that we collectively "intend" the accidents statistically certain to occur in the tunnels leading in and out of New York City, or that we are collectively responsible for those

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189. I have the impression that this kind of example is part of the oral culture of torts scholarship and that it owes its prominence to economically inclined writers, who use it to make two kinds of points. The first is that "we" as a society do not assign infinite value to human life. See, e.g., Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713, 716 (1965) ("Our society is not committed to preserving life at any cost. . . . Ventures are undertaken that, statistically at least, are certain to cost lives. Thus, we build a tunnel under Mont Blanc because it is essential to the Common Market and cuts down the traveling time from Rome to Paris, though we know that about a man per kilometer of tunnel will die."). The second is that our collective rationality is suspect because "in the uncustomary case of an individual — a known individual rather than a statistical unknown — in a position of life or death, we are apt to spend very much more to save him than in any conceivable money sense he is worth." *Id.* Rescues — for example, of trapped miners — are the canonical examples of the phenomenon Calabresi has in mind. Calabresi continues: "[W]hile I do not doubt this is as it should be, it seems odd that we should refuse to apply the same standards of 'value beyond any price' when we deal with the same man's life as part of a statistic." *Id.*

The charge of collective irrationality is rooted in economists' distinctively consequentialist view of social morality. "The economist's instinct in all such cases is to say that the only rational strategy is that which maximizes the numbers of lives saved at the least sacrifice of other ends." FRIED, *supra* note 15, at 208. My arguments here address only one aspect of the "problem of statistical lives."

190. The National Safety Council both estimates highway fatalities for major holidays and keeps actual statistics on the matter. In 1995 the NSC estimated that there would be 636 fatalities on the Fourth of July; there were 631. Telephone Interview between Charles Sewell, research assistant to Professor Gregory Keating, and Alan Hoskins, manager of the statistics department at the National Safety Council in Chicago, Illinois (Sept. 15, 1996).

accidents, simply because we choose to operate those tunnels. In all of these cases, the language of proximate cause — of directness and intervening acts — is necessary to mark morally relevant distinctions. In all of these cases, when actuarially foreseeable accidents issue in actual harm, that harm “will generally have been preventable, and its occurrence will be much more directly traceable to the wrongful agency of persons more immediately concerned.”<sup>191</sup> Attending, as this line of thought does, only to overall consequences and their statistical foreseeability leads us to ignore fundamental distinctions that affect both the grounds and the extent of responsibility for harm.

The language and concepts of proximate cause point us towards the relevant distinctions. Some instances of enterprise liability are marked by a distinctive and culpable kind of intentionality. In these instances, the enterprise’s acts or omissions are the *direct* (or if you prefer, proximate) cause of the plaintiff’s injury. The enterprise both controls the events causing the accident, and intends the actions or inactions that lead to the accident. In *Lubin v. Iowa City*,<sup>192</sup> for example, the waterworks had exclusive control over the maintenance of the pipes that ruptured, and intended the actions — leaving the pipes in place until they failed — that led to the plaintiff’s injury.

The kind of direct responsibility that is present in *Lubin* is morally significant. When enterprises are directly responsible for harms, their conduct stands in need of justification. This is not a special principle of enterprise liability, but a general principle of morality. If we know anything, we know that the gratuitous infliction of injury and death is unacceptable. The knowledge that such justification is required is a basic part of our moral sensibility, part of the perceptiveness and discernment that marks competent moral agents.<sup>193</sup> When the harm is inflicted deliberately, and when the

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191. Warren S. Quinn, *Actions, Intentions, and Consequences: The Doctrine of Doing and Allowing*, 48 PHIL. REV. 287, 304 (1989).

192. 131 N.W.2d 765 (Iowa 1965).

193. See, e.g., BARBARA HERMAN, *The Practice of Moral Judgment*, in THE PRACTICE OF MORAL JUDGMENT 73, 82 (1993) (citing the knowledge that the infliction of unnecessary hurt and pain is something that “must (morally) be avoided” as a canonical example of the kind of moral perception that competent moral agents possess). Herman stresses, I think rightly, that the acquisition of such knowledge is “the substantive core in a moral upbringing.” *Id.* at 82. This perception is one of the sources of the conviction, expressed by some courts, that strict liability is presumptively more just than negligence liability. See, e.g., *Green v. General Petroleum Corp.*, 270 P. 952, 955 (Cal. 1928). The *Green* court wrote:

[T]he rule that injury may exist without liability is, as has been so well stated by another court, “contrary to the general rule of liability where injury is caused; and since, in a sense, it is a preference of the rights of one property owner or user over that of another;

agent who inflicted the harm is directly responsible for doing so, the demand for justification is all the stronger.

Because action, not knowledge, is the fundamental ground of responsibility for accidental harm, mere knowledge of statistically certain harm, however actuarially precise, does not give rise to this demand for justification. When such knowledge is joined to action, in the form of a decision to initiate a large and complex project, the demand for justification arises, but it is also quite readily met. Those who initiate massive construction projects are rarely those in direct control of the circumstances that precipitate the accidents that their decision makes statistically inevitable. *Primary* responsibility for avoiding statistically certain accidents must be lodged with actors closer to the dangers that occasion those accidents.<sup>194</sup>

The core cases of enterprise liability — including manufacturing defects — are marked by direct control. Herein lies the force of the Restatement's observation about the deliberate and predictable character of manufacturing defects.<sup>195</sup> Manufacturers exercise direct and essentially exclusive control over the rate of manufacturing defects. The manufacturer's decisions about materials, production and inspection determine how often people's expectations for the products will be disappointed and how often their physical integrity will be violated. In *Bushey*, the Coast Guard controlled the risk that one of its sailors would tortiously damage the drydock's property. The drydock lacked the legal authority to supervise the Coast Guard's employees. In cases like *Rylands*, legal authority over the risk is likewise lodged in the hands of the injurer on whose property the danger is created. Even in a more complex, abnormally danger-

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and since the law is a jealous guardian of the right to lawfully use property without interference or diminution . . . the rule which allows such injury without liability therefor is an exception which is and should be narrowly limited and carefully confined."

*Green*, 270 P. at 955 (citation omitted). I am not making as strong a claim for the importance of this perception.

194. It must be said, however, that the placement of primary responsibility for accident prevention in the hands of other agents does not absolve those who initiate such projects of all responsibility for foreseeable harm. Several kinds of "secondary" responsibilities (or duties) may arise out of decisions to initiate complex projects when those decisions are made knowing that harm will probably result. Duties to hire competent personnel and supervise them adequately, duties to mitigate harms by providing for medical care, and duties to provide various forms of insurance (such as liability, worker's compensation, and disability) are all examples of secondary duties. While I believe that some forms of enterprise liability discharge such secondary duties, the proponents of the line of argument that I am considering write as if they think that statistical certainty of harm makes those who set large construction projects in motion primarily responsible for the accidental harm occasioned by those projects. The discussion in the text accompanying notes 210-215 *infra* illustrates aspects of enterprise liability that reflect "secondary duties."

195. See *supra* text accompanying note 185.



ous activity case like *Siegler*, the injurer is in a position to exert control over related entities in the overall enterprise.<sup>196</sup>

The rhetoric of enterprise liability is thus right to insist that intentionality matters, at least in some circumstances. The kind of intentionality that has attracted the attention of courts and commentators marks direct control over the circumstances leading up to an accident, and action that makes a particular kind of accident all but inevitable. When these circumstances hold, an enterprise may fairly be said to “intend the accident,” and its conduct gives rise to a demand for justification.

### C. *What's Wrong With Efficient Injuries?*

The presence of intentionality — and the control that it signals — only raises another question. Why is it wrong to intend an accident in this way, when everyone agrees that you are under no duty to take greater precautions to prevent that accident? Even if the waterworks in *Lubin* exercised direct control over the rate of watermain breakage, and deliberately chose to permit breaks rather than preventing them, what is wrong with its conduct?

Indeed, from a consequentialist perspective, the waterworks' conduct looks irreproachable.<sup>197</sup> There is good reason to believe that the practice of leaving pipes in the ground until they rupture minimizes the combined costs of preventing burst pipes and bearing

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196. If the cause of the accident turns out to be defective equipment, “the commercial transporter . . . is in the best position to hold the manufacturer to account.” *Siegler v. Kuhlman*, 502 P.2d 1181, 1188 (Wash. 1973).

197. By “consequentialist” I mean a view that “the chief point of morality is to make things go better overall — to increase average or total welfare within the human community.” Quinn, *supra* note 191, at 312. “Nonconsequentialism,” by contrast, takes the chief point of political morality to define the terms of free association among equal, self-governing persons. So conceived, the contrast between consequentialism and nonconsequentialism is simply the contrast between utilitarianism and Kantian social contract theory, expressed in a vocabulary slightly different from the one I favor. As long as we heed Rawls's caution that nonconsequentialism does not ignore consequences, this vocabulary should highlight the contrasts that presently interest me. See RAWLS, *A THEORY OF JUSTICE*, *supra* note 106, at 30 (“All ethical doctrines worth our attention take consequences into account in judging rightness. One which did not would simply be irrational, crazy.”). One obvious way in which nonconsequentialism attends to consequences is by examining how various arrangements affect the central interests of each person.

The general debate over consequentialism is broader than my focus here. For example, consequentialism has been taken to task for its inability to recognize and account for the expressive dimensions of morality. See, e.g., Richard H. Pildes, *The Unintended Consequences of Public Policy: A Comment on the Symposium*, 89 MICH. L. REV. 936, 954-66 (1991); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990). While these expressive concerns are not my primary focus here, Kantian social contract theory has an important expressive dimension — it insists that the status of citizens as free, equal, self-governing persons be publicly affirmed and manifested by democratic political practices.

the costs of the accidents occasioned by their bursting. So long as we are prepared to take wealth as the best general surrogate for utility or goodness, as law and economics increasingly does,<sup>198</sup> this practice produces the most good in the world. If consequentialism is correct in insisting that overall goodness is the ultimate touchstone of morality, then there is no basis for the *Lubin* court's indignation.

For the moral indignation expressed in the *Lubin* opinion to be well founded, the reasons and conclusions of consequentialism must deny something whose moral significance is substantial. On a Kantian view, consequentialism does just that. It denies that persons have legitimate claims that are neither derived from, nor ordinarily overridden by, considerations of the general good. Powerful as consequentialism is, its basic claim rejects one of our most cherished convictions. On a consequentialist view, the lives and property of individual persons have no independent moral significance. Society may do with them whatever is best for the whole — whatever promotes the general good.

Kantian social contract theory thinks otherwise. It takes as fundamental the conviction that any decent political morality must acknowledge our status as self-governing beings, and must grant to each of us fundamental authority over our own lives. Consequentialism turns that authority over to the community at large, and leases it back to us only to the extent that granting individual rights and liberties that we need to be the masters of our own destinies promotes the general good. It regards persons not as sources of moral claims that constrain the pursuit of general welfare, but as sources of the welfare that is to be maximized, and as lines along which it is to be parceled out.

The very consequentialism naturally invoked to justify leaving pipes in the ground until they rupture is therefore ground for moral

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198. Cost-benefit analysis as customarily practiced by legal economists generally takes wealth as a surrogate for utility. See Keating, *supra* note 57, at 334-36. The familiar argument that every legal institution other than the tax system should aim at efficiency, while the tax system addresses distributive concerns because redistribution is accomplished most cheaply via the tax system, has likewise seemed to rest implicitly on a utilitarian framework. Louis Kaplow, one of the principal proponents of this argument, recently made his utilitarianism explicit. Standard instances of the argument include, *inter alia*, A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 9-10, 113 (2d ed. 1989); Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient Than the Income Tax System in Redistributing Income*, 23 J. LEGAL STUD. 667, 669 (1994); Steven Shavell, *A Note on Efficiency vs. Distributional Equity in Legal Rulemaking: Should Distributional Equity Matter Given Optimal Income Taxation*, 71 AM. ECON. REV. 414, 417 (1981). Kaplow's utilitarianism is laid bare in Louis Kaplow, *A Fundamental Objection to Tax Equity Norms: A Call for Utilitarianism*, 48 NATL. TAX J. 497 (1995).

indignation. By asserting that the plaintiff has no claim for redress because the damage to the plaintiff's property maximizes the gain to society as a whole, the consequentialist justification of the waterworks' practice denies that the property really belongs to the plaintiff. By asserting that his physical integrity might be sacrificed on the same ground, consequentialism also denies that the plaintiff's life is really his. If the plaintiff's physical integrity may be sacrificed whenever so doing maximizes the gain to society as a whole, then the plaintiff holds his life and property in trust for the general good, and may assert only those claims on his own behalf that promote the general good.

If we think that people are free and equal — beings with purposes of their own to pursue and lives of their own to lead, and equally so — then we will believe that their legitimate claims do not derive exclusively from considerations of the general good. We will think that their most fundamental claims flow from, and express, their freedom and equality. We will regard the waterworks' practice as suspect, and we will view the consequentialist justification for that behavior as unacceptable.

#### D. *What's Unreasonable About Reasonable Injuries?*

The rejection of consequentialism sets the stage for the defense of *Lubin's* conclusion that the intentional, albeit nonnegligent, taking of the plaintiff's property is wrong, but it does not make out that defense. Even if we grant that considerations of fairness take priority over those of efficiency, and even if we grant that settling the question of a practice's social rationality does not settle the question of its reasonableness, we still have work to do. The problem is this: the conduct of the waterworks may be as reasonable as it is rational. When we turn our attention away from questions of efficiency and rationality, and towards questions of freedom and reasonableness, we confront a powerful argument that the waterworks acted in a reasonable manner.

The reasonableness of requiring a precaution to be taken turns on the balance between the benefit that the precaution bestows on the security of prospective victims, and the burden that it imposes on the freedom of action of prospective injurers. Reasonable precautions enhance the security of victims more than they impair the freedom of action of injurers. By so doing, they help to reconcile the competing claims of freedom of action and security in a way that provides the most favorable terms for persons to pursue their

conceptions of the good over complete lives.<sup>199</sup> Judged by this standard, the practice of the waterworks may well be eminently reasonable.

In order to reduce the risks of pipe rupture below their present level, the waterworks would either have to dig up and inspect its pipes, or replace them, at short and regular intervals. Pipe ruptures are relatively infrequent, and the harm that they inflict is relatively modest. The cost of unearthing and inspecting them regularly, by contrast, is likely to prove substantial, and not only financially. The disruption of daily life created by digging in densely populated areas is not likely to prove trivial. Because the benefits to the security of prospective victims are relatively modest, and the burdens to prospective injurers are substantial, it is probably unreasonable to insist on regular inspection of the pipes.

The relative burdens and benefits of regular replacement are a closer call. If deterioration — as opposed to latent defects or changed subsoil conditions — is the primary cause of rupture, and if the rate of deterioration is predictable, this precaution may be quite effective. If replacement can be done less frequently than regular inspection, the cost and disruption of this precaution may be significantly less than the cost and disruption of regular inspection. Even so, regular replacement still may not be warranted in light of the relatively infrequent and modest harm that water pipes inflict when they rupture. The balance of considerations is close, and the judgment of reasonableness is hard to make. Equally significant, the information necessary to make that judgment — information about the causes of rupture, the effectiveness of regular replacement, the appropriate interval, and so on — is not easy to come by. In light of the even balance of the relevant considerations, and our ignorance of the exact facts on which the judgment of due care turns, we cannot confidently claim that the waterworks' practice is unreasonable.

Because the waterworks' practice of leaving pipes in place until they rupture seems to be *both* socially rational and reasonable, the facts of *Lubin* vividly illustrate the principal challenge involved in justifying enterprise liability. Negligence law leaves the financial costs of nonnegligent accidents on victims, unless those accidents could have been prevented by the exercise of reasonable care. Enterprise liability shifts the costs of nonnegligent accidents to the activities that engender them. Even more strikingly, enterprise

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199. See Keating, *supra* note 57, at 349-60.

liability shifts those costs in circumstances when the benefits of the underlying risks are not asymmetrical in the way that they are when those risks are nonreciprocal.<sup>200</sup> Why is it reasonable to require that the costs of some nonreciprocal risk impositions be shifted in this way?

## VII. THE REASONABLENESS OF ENTERPRISE LIABILITY

From a Kantian perspective, the basic task of tort law is to reconcile liberty and security on fair (or reasonable) terms. Fair terms are mutually beneficial because they reconcile liberty and security in ways that supply each citizen with favorable circumstances for realizing her conception of the good. In accident law, the fairest — or most reasonable — terms reconcile the competing claims of freedom and security in a way that secures for citizens the most favorable conditions for the sustained pursuit of their conceptions of the good.<sup>201</sup> Such terms can rightly claim the allegiance of our sense of justice. They further the good of each of us on terms that acknowledge our equal freedom and value as citizens.

In choosing between enterprise and negligence liability, therefore, we must ask: Which liability regime reconciles more fairly the liberty of injurers and the security of victims? Which liability regime secures more favorable terms for persons to pursue their conceptions of the good over complete lives?

In answering these questions, we must recall the constraints imposed by the interpretive character of our endeavor. First, an interpretively adequate social contract theory must explain why the fair allocation of responsibility for accidental harm among free and equal persons requires negligence liability in some circumstances and enterprise liability in others. A fully adequate social contract theory will do more than this: it will explain why the choice of a liability regime should be governed by the reciprocity of risk criterion in some circumstances and by the principle of burden-benefit proportionality in others. Second, an adequate theory of enterprise liability must do justice to the fundamental contrast between enterprise and negligence liability, and must explain why it is reasonable for enterprises to impose the nonnegligent risks characteristic of their activities but unreasonable to ask victims to bear the financial costs of the accidents that issue from those reasonable risks. Third, a successful account of enterprise liability will illuminate and sup-

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200. See *supra* text accompanying note 91.

201. See *supra* notes 137-38 and accompanying text.

port the logic that drives its delineation of limits and defenses, particularly their indifference to optimal precaution and insurance concerns. Fourth and finally, a satisfactory social contract theory of enterprise liability will show why the elements of the enterprise liability rhetoric of fairness identify circumstances in which enterprise liability is, by social contract criteria, fairer than negligence. Such an account will throw the weight of social contract theory behind the *prima facie* force of the principle of burden-benefit proportionality.

With these interpretive constraints in place, we may return to the questions themselves. Which liability regime reconciles freedom and security more fairly? Which liability regime strikes a more favorable balance between these competing forms of liberty? These questions direct our attention to fundamental features of negligence liability. A regime of negligence liability confers three benefits on those who exercise reasonable care when they expose others to risks of injury and death. First, a negligence regime confers on injurers the right to impose certain risks — nonnegligent ones — without stigma or criticism. Second, it entitles injurers to save the precaution costs necessary to reduce or eliminate those risks. Third, negligence frees injurers from bearing the lesser cost of compensating those injured by their justified risk impositions. By conferring these benefits on prospective injurers, a negligence regime imposes corresponding burdens on prospective victims of nonnegligent accidents. Injurers capture the benefits of these aspects of negligence, and victims bear the burdens. Indeed, these asymmetries understate the apparent unfairness of negligence liability. Negligence liability concentrates the costs of nonnegligent risks on the unlucky few injured by accidents issuing out of those risks, and leaves the benefits of those accidents in the hands of those who impose the risks.

This asymmetry gives rise to a demand for justification. Because the exercise of reasonable care does not eliminate all risks, because negligence liability leaves the benefits of those risks on injurers and their burdens on victims, and because that asymmetry might be changed by imposing strict liability, the decision to insist only on the exercise of reasonable care requires justification.

### A. *Mutuality of Risk and Harm*

Social contract theory has traditionally met this burden by invoking the idea of reciprocal risk imposition: citizens imposing risks on each other that are equal in probability and magnitude,

imposed for equally good reason, and imposed for sufficiently good reason. When risks are imposed for good and sufficient reason, each citizen gains more from the right to impose risks than she loses from the exposure to risks legitimately imposed by others.<sup>202</sup> When risks are perfectly reciprocal, each citizen gains an equivalent amount in the way of freedom, loses an equivalent amount in the way of security (both for equivalently good reasons), and on balance gains more from her increased freedom than she loses from her decreased security. Perfect reciprocity of risk thus strikes the most favorable balance between the competing claims of security and freedom of action for citizens concerned to pursue their conceptions of the good over complete lives, so long as they are prepared to do so on fair terms.

These considerations establish that citizens should have the right to impose certain risks — those that further their liberty more than they threaten their security. They do not, however, establish that these risks should be imposed subject to negligence liability rather than to strict liability. Unless we believe, implausibly, that the exercise of due care eliminates all risk, the question of responsibility for residual risks remains an issue that must be addressed. Accidental property damage, personal injury, and death are no less disruptive of human lives just because they are inflicted without negligence. Victims still have an interest in minimizing these disruptions, and they still have a claim that those who impose and benefit from the risks that result in these harms should also be responsible for minimizing their effects.

Reciprocity theory rebuts the claim of the victims of nonnegligent accidents to impose strict liability only by arguing that the imposition of strict liability would disrupt the lives of injurers in an equally detrimental way, without apportioning the burdens and benefits of accidental injury any more fairly. In the world of acts, this argument is sound. Actors in the world of acts are actuarially small and independent of one another; they impose risk infrequently, and the incidence of nonnegligent harm issuing from their activities is unpredictable. In the world of acts, the risk of being held liable for an unpreventable accident is no more manageable than the risk of being injured or killed by a unpreventable risk. Strict liability is therefore as disruptive of freedom as negligence is — it just disrupts the freedom of action of injurers instead of disrupting the security of victims.

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202. See *supra* notes 134-35 and accompanying text.

Just as strict liability is no less disruptive of liberty than negligence liability, so too, it is no fairer. In the world of acts, the imposition of strict liability simply shifts those financial burdens of nonnegligent accidents from unlucky victims to unlucky injurers. Fairness calls not for loss shifting, but for distributing the costs of nonnegligent accidents across those who impose, or benefit from the imposition of, nonnegligent risks of the kind that issued in the injury at hand. This distribution requires not only that the incidence of nonnegligent harms issuing from particular risks be reasonably foreseeable, but also that those who impose risks of the same kind be linked in such a way that the imposition of strict liability spreads the costs of nonnegligent harms across them as a class. In the world of acts, nonnegligent accidents are unpredictable, and actors are small and independent. Strict liability shifts the costs of nonnegligent harms from particular victims to particular injurers, but it does not spread those costs across a class of injurers who generally benefit from the imposition of that risk.

In the world of acts, then, shifting the financial costs of a nonnegligent accident to the particular actor who occasioned it is no fairer than leaving it where it falls. So doing only shifts misfortune around, and arbitrarily so. In the absence of nonreciprocity of risk imposition, there is no reason to single out the particular injurer unlucky enough to have imposed the particular risk that issued in the victim's harm to bear its financial costs. The only difference between the injurer and countless others who imposed identical nonnegligent risks is luck. The only difference between the injurer and the victim is that the injurer had the misfortune to occasion the injury, whereas the victim had the misfortune to suffer it. The only difference between strict liability and negligence is that the former pins the bad luck on the unlucky injurer, the latter pins the bad luck on the unlucky victim. Moving the costs of her misery around may console the victim and discomfort the injurer, but the misery is equally great, and equally undeserved, in both cases.<sup>203</sup>

In sum, just as there is no improvement in the balance of security and liberty when strict liability disrupts the liberty of injurers as

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203. Nonreciprocal risks are a different matter. When risks are reciprocal, the preexisting distribution of risk — as opposed to harm — is fair. When risks are nonreciprocal, the preexisting distribution of risk is not so fair: prospective victims lose more in the way of security than they gain in the way of liberty. Nonreciprocal risks impair the security of victims more than they benefit their liberty, because nonreciprocal risks are ones whose imposition is not part of a normal life. For most people, then, the value of a right to impose a nonreciprocal risk is generally less than the disvalue of having to bear exposure to one. The payment of compensation to the victims of nonnegligent but nonreciprocal risk compensates for this underlying asymmetry of benefit and restores mutuality of benefit, so far as practicable.



much as negligence disrupts the security of victims, so too, there is no improvement in the fairness with which accident costs are distributed when strict liability merely shifts unpredictable and undeserved misfortune from the victim to the injurer. Fairness in the distribution of nonnegligent accident costs requires their apportionment across the class of those who impose, or benefit from the imposition of, risks of the relevant kind. The lucky, as well as the unlucky, must pay their share. In the world of acts, strict liability cannot reach them. Strict liability shifts, but does not spread, the costs of nonnegligent accidents. It is thus no fairer than negligence.

When we leave the world of acts and enter the world of activities, the character of nonnegligent accidents and the effects of strict — that is, enterprise — liability change markedly. Nonnegligent harm is no longer a matter of unpredictable misfortune. It is something foreseen with statistical precision, and inflicted with deliberation. Strict liability no longer shifts a concentrated misfortune from victim to injurer — it spreads that cost across those who benefit from the activity.

The move from the world of acts to the world of activities thus shifts the balance of reasons favoring negligence over strict liability. In the world of acts, when risks are reciprocal, negligence liability is more reasonable than enterprise liability because the financial costs of nonnegligent accidental harm cannot be fairly distributed. Strict liability thus incurs administrative costs without delivering substantive benefits. In the world of activities, strict liability distributes the financial costs of nonnegligent accidents across those who benefit from the imposition of the risks that inevitably issue in them, and who therefore deserve to bear them.<sup>204</sup> In the world of activities, strict liability is a more reasonable liability regime than negligence, even when the burdens and benefits of the underlying risk impositions are themselves fairly distributed, and even when licensing their imposition strikes a more reasonable balance between the competing claims of liberty and security than would be achieved by forbidding them.

Even in the world of activities, natural persons live in the world of acts. However certain highway fatalities are in the aggregate,

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204. Cf. Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 387, 396-408 (David G. Owen ed., 1995) (arguing that, in the automobile accident context, nonfault liability aligns financial responsibility with moral desert better than fault liability does, because fault liability concentrates massive losses on those momentarily careless drivers unfortunate enough to seriously injure someone, whereas nonfault liability distributes the financial costs of such accidents across all those who create similar risks).

and their incidence in each of our lives is highly uncertain. However certain explosions are when tractor trailers haul gasoline, our individual encounters with such explosions are utterly random.<sup>205</sup> However inevitable burst water pipes are, that it happens to any one of us is anything but inevitable. For victims, accidents are unpredictable and profoundly disruptive events. Both their incidence and their impact need to be minimized. For enterprises, by contrast, accidental injury and death are far more predictable and far less disruptive. Enterprises live in — indeed they constitute — the world of activities. Enterprises are therefore able to anticipate those accidents that issue from their characteristic risks, minimize their incidence in advance, and disperse their costs after the fact.<sup>206</sup>

In the world of activities, then, the choice between strict liability and negligence is no longer a choice between equally grave disruptions of security and liberty. In the world of activities, strict liability does not shatter the freedom of injurers by forcing them to bear the concentrated costs of accidents whose incidence they cannot anticipate any more accurately than victims. In the world of activities, strict liability forces enterprises to bear the eminently foreseeable costs of their characteristic risks — costs whose incidence they are in an excellent position to estimate and minimize *ex ante*, and to disperse *ex post*. Negligence liability places greater burdens on the security of victims. It asks them to bear the distinctive risks of others activities — risks that they either cannot control or cannot reasonably be asked to control,<sup>207</sup> risks whose materialization may well prove devastating, and risks whose incidence is, from their per-

205. For example:

Seventeen-year-old Carol J. House died in the flames of a gasoline explosion when her car encountered a pool of thousands of gallons of spilled gasoline. She was driving home from her after-school job in the early evening of November 22, 1967 . . . . [I]t was dark but dry; her car's headlamps were burning. There was a slight impact with some object, a muffled explosion, and then searing flames from gasoline pouring out of an overturned trailer tank engulfed her car.

Siegler v. Kuhlman, 502 P.2d 1181, 1182 (Wash. 1972). The phenomenon emphasized here is another facet of the disproportion between freedom and security that underlies the social contract case for the "disproportion test" in negligence law and Charles Fried's rejection of the standard of individual rationality for interpersonal risks. See FRIED, *supra* note 15, at 192; Keating, *supra* note 57, at 352-60.

206. As Justice Traynor noted:

[T]he manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.

Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440-41 (Cal. 1944) (Traynor, J., concurring).

207. See *infra* text following note 238.

spective, largely beyond meaningful prediction. As compensation for these threats to their security, a regime of negligence liability offers victims a boon to their freedom of action, namely the liberty to impose equivalent "characteristic risks" on others without the duty of redressing any ensuing harm to natural persons or property. The benefit to freedom here looks plainly less than the burden to security: few if any of us stand to benefit much from the right to expose others to the level of drunkenness characteristic of the Coast Guard's activity; to the risk of pipe breakage characteristic of the waterworks' activity; or to the risks of fire and explosion characteristic of transporting huge quantities of gasoline by tractor trailer. For victims to benefit in this way, they would have to be engaged in either the same, or an equivalent, activity.<sup>208</sup>

In the world of activities, then, the choice between strict liability and negligence is a choice between a grave disruption of security and a more modest disruption of liberty. Activity liability strikes a more favorable balance between the competing claims of liberty and security than negligence liability does, because activity liability disrupts the liberty of injurers less than negligence impairs the security of victims. Enterprise liability thus secures more favorable conditions than negligence liability for citizens concerned to pursue their conceptions of the good over complete lives.

Just as enterprise liability strikes a more reasonable balance than negligence liability between the competing claims of liberty and security, it also distributes the financial costs of nonnegligent harms more fairly than negligence liability. In the world of acts, the choice between negligence and strict liability is a choice between

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208. This requirement of participation in the same, or an equivalent, activity is tighter than Charles Fried's idea of reciprocity over time and across activities through the mechanism of a "risk pool." See FRIED, *supra* note 15, at 187-91.

There are circumstances when injurers and victims participate in the very same activity, and when they do the logic of enterprise liability may well be altered. Driving may be the most familiar such circumstance, and "No-Fault" automobile insurance may be the most familiar adaptation of the logic of enterprise liability. "No-Fault" insurance tailors enterprise liability to accommodate the fact that the prospective victims of the "characteristic risks" of driving gain a great deal from the freedom to impose the characteristic risks of driving, because those prospective victims are also and equally prospective injurers. "No-Fault" is a form of enterprise liability because it is a nonfault form of liability that seeks to make the activity of driving bear its "characteristic" (not just its negligent) costs. It is specially tailored to accommodate the participation of victims in the very same enterprise as injurers in two ways. First, and less important, "No-Fault" exploits the administrative efficiencies of first-party insurance. Second, and more important, "No-Fault" pitches damages at a relatively low level. This pitching acknowledges the fact that victims have more interest in imposing equivalent risks on injurers than in reducing and redressing injuries inflicted by injurers. I cannot pursue these matters here, except to note that other nonfault administrative schemes, such as worker's compensation, may have similar aims and justifications, either in whole or in part.

pinning equally grave and equally undeserved misery and misfortune on victims and injurers. In the world of activities, the choice between negligence and enterprise liability is a choice between leaving a grave and undeserved misfortune on the victim, and inflicting a far lesser burden on those who deserve to bear the costs. Because activity liability disperses the financial costs of nonnegligent accidents, and distributes them across those who benefit from the imposition of the underlying risks, it both minimizes the burdens of nonnegligent accidents and apportions those burdens fairly.

In short, the argument is this: for social contract theory, the choice between negligence and strict liability turns on whether strict liability burdens the freedom of injurers more than it benefits the security of victims. The point of Fletcher's argument, as I have reconstructed it, is that, in the world of acts, when risks are reciprocal strict liability disrupts the freedom of injurers as much as negligence disrupts the security of victims, and it does so without distributing the financial costs of nonnegligent accidents more fairly. Injurers are no more able than victims to bear the financial costs of nonnegligent accidents, and they are no more able than victims to disperse the costs of nonnegligent accidents across those who benefit from the imposition of the risks that issue in such accidents. In the world of activities, matters are different. Enterprise liability disrupts the freedom of injurers less than negligence disrupts the security of victims, and distributes the costs of nonnegligent accidents across the activities that engender them.

### B. *The Rhetoric of Intentionality Revisited*

This account of the reasonableness of enterprise liability explains and justifies the first two elements of its rhetoric of fairness — the principle of burden-benefit proportionality and the stress on the organized nature of enterprise-related risks — but it does not as obviously account for the third element, the emphasis on the “intentional” character of certain enterprise-related accidents. The “intentionality” characteristic of core cases of enterprise-related harm also connects with the principle of burden-benefit proportionality, but in a different way.

Earlier, I argued that the “intentionality” that attracts the attention of courts and commentators is, in fact, best understood as a mark of direct control over the circumstances issuing in certain kinds of harms (for example, manufacturing defect-related accidents). That kind of direct control matters, I argued, because the infliction of harm on other persons or their property requires justifi-

cation.<sup>209</sup> When the harm is inflicted deliberately, and when the agent inflicting it is directly responsible for doing so, the demand for justification is all the stronger. When we press the demand for justification further, we see that the kind of control characteristic of large, well-organized enterprises is itself a ground of elevated responsibility.

In this context, control is power — power over the lives, limbs, and property of others. When someone exercises heightened power over the fundamental interests of others, they are, for that reason alone, a candidate for heightened responsibility.<sup>210</sup> When someone is presumptively entitled to exercise that power over others as she sees fit, and for her own benefit, issues of fairness arise immediately. This is the circumstance of the Coast Guard in *Bushey*. Its broad authority over its sailors gives the Coast Guard a great deal of room to expose the drydock to risks of damage from drunken sailors roaming back and forth between their berths and Brooklyn. Having granted the *Tamaroa's* personnel access to her on condition that they not interfere with Bushey's work or workmen, Ira S. Bushey & Sons had exhausted its authority over the coming and going of the sailors. Bushey had no more authority over the sailors who shuffled back and forth on shore leave, and no more right to meddle in their superior officers' control of them, than Fletcher had authority over Rylands's use of his own land. Yet the safety of Bushey's property depended on the skill with which the Coast Guard supervised the comings and goings of sometimes drunken sailors.

Because sailors almost surely lack the assets or insurance necessary to be financially responsible for the wrongful harms that they may inflict during the course of their "employment,"<sup>211</sup> the financial burdens of their wrongdoing will be borne by the drydock. By contrast, the benefits of their use of the drydock will be captured by the Coast Guard. Under a regime of negligence liability, the Coast Guard will capture the savings that accrue from having to take only reasonable precautions to prevent wayward sailors from damaging the drydock. Direct control enables those in possession to reap the

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209. See *supra* note 193 and accompanying text.

210. This is one of the lessons of "special relationship" law. See *supra* note 147-49 and accompanying text.

211. This point is fundamental to the economic analysis of vicarious liability. See, e.g., Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 42-44 (1972) (discussing respondeat superior); Sykes, *supra* note 178, at 1241-42, 1244-47, 1254-58 (addressing the problem of agent insolvency).

benefits of a course of action and — in the absence of strict liability — to disclaim its burdens.

The immediate upshot of this is that the rhetoric of intentionality signals a different route to the same summit: direct control reliably marks circumstances when enterprises are in a position to capture the benefits of certain kinds of risk impositions without bearing the burdens unless strict liability is imposed. This interpretation is supported by language in *Lubin*, the case most concerned with emphasizing deliberateness. The court's observation that it is "neither just nor reasonable that the city engaged in a proprietary activity can deliberately and intentionally plan to leave a watermain underground beyond inspection and maintenance until a break occurs and escape liability" is quickly followed by the further observation that "[t]he risks from such a method of operation should be borne by the water supplier who is in a position to spread the cost among the consumers who are in fact the true beneficiaries of this practice and of the resulting savings in inspection and maintenance costs."<sup>212</sup>

This explanation tempts us to take the presence of direct control as simply a different marker of the circumstances when strict liability can spread the financial costs of accidents among those who benefit from the risks that issue in them. In part, the presence of direct control does accomplish this result. But, in part, control *enables* an enterprise to capture the benefits of a nonnegligent practice. The power to fix maintenance practices is what enabled Iowa City to capture the cost savings generated by leaving water pipes in the ground until they broke. The adoption of such a practice is therefore not just a marker of circumstances when burdens can be parceled out among beneficiaries — it is also a ground for insisting that injurers take the bitter with the sweet:

If the city accepts the advantages of lower maintenance costs and other benefits which result from its practice of burying long lasting cast iron pipe six feet underground beyond any reasonable opportunity to inspect and intentionally leaves them there until breaks began to occur, it should also expect to pay for the damages resulting from such practice as a cost of its doing business in this manner.<sup>213</sup>

The applicability of this point is quite general. It was his control over his own property that enabled Rylands to capture the benefits of a reservoir on his property, and control over their property is the power that generally enables landowners to reap the benefits of the

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212. *Lubin v. Iowa City*, 131 N.W.2d 765, 770 (Iowa 1964).

213. 131 N.W.2d at 771.

property's use. So too, it is the master's control over his servants that generally enables him to reap the benefits of their service.<sup>214</sup> The flip side of this control is that the lives, limbs, and property of prospective victims are subject to risks whose nonnegligent circumstances they have no power to control. Strict (or enterprise) liability rectifies this imbalance: it imposes responsibility on injurers commensurate with their power.<sup>215</sup>

#### VIII. THE LOGIC AND LIMITS OF THE ENTERPRISE LIABILITY PRINCIPLE OF FAIRNESS

Enterprise liability can be, and has been, justified on three grounds: the principle of fairness examined and embraced in this paper, the policy of pinning liability on the party in the best position to prevent accidents from happening, and the policy of placing the loss on the party best able to disperse and distribute it.<sup>216</sup> These are the three justifications that Friendly considers in *Bushey*, and these are the three justifications that have animated both case law and commentary. The argument of this paper — that we should follow Friendly's lead and grant pride of place to the principle of fairness — does not require us to reject the policies of accident reduction and insurance as justifications for enterprise liability. What it requires is that we give priority to the principle of responsibility for characteristic risk over the policies of accident reduction and loss dispersion. Conflicts among these principles are hardly endemic. On the contrary, there is good reason to believe that enterprises are generally in the best position to control the risks that are characteristic of their activities, and there is some reason to believe that they are usually in the best position to insure against those risks as well.<sup>217</sup>

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214. Vicarious liability law could not be more explicit about this. The critical distinction between "servants" and independent contractors turns on the master's capacity to control the agent. See generally KEETON ET AL., *supra* note 53, §§ 69-71, at 499-516; Sykes, *supra* note 178, at 1261-71.

215. Cf. Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060 (1972) ("[The strict liability test we suggest] requires . . . only a decision as to which of the parties to the accident is in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made." (emphasis omitted)).

216. See, e.g., *Becker v. Interstate Properties*, 569 F.2d 1203, 1209-15 (3d Cir. 1977) (entertaining all three justifications for enterprise liability); see also sources cited *supra* notes 5 and 7 (generally embracing the latter two justifications for enterprise liability, even when they reject enterprise liability itself).

217. Strong support for the proposition that enterprises are generally in the best position to control the characteristic risks of their activities is supplied both by the closing argument of the preceding section — that control enables enterprises to benefit from the imposition of certain risks — and by important economic arguments for enterprise liability. See, e.g., Jones,

Notwithstanding these overlaps among the three principal justifications for enterprise liability, resting the case for enterprise liability primarily on its principle of fairness leads both to a general argument *for* enterprise liability and to a particular conception of enterprise liability. Each of these is simple, and each is controversial. The general argument for enterprise liability is the argument that it is fair to make enterprises pay for the accidental injuries characteristic of their activities whenever doing so will distribute the financial burdens of those accidents among those who have benefitted from the underlying risk impositions. The particular conception is liability for the *distinctive* risks of an enterprise — those risks it creates that are “different from those attendant on the activities of the community in general.”<sup>218</sup>

The fairness *argument for* enterprise liability is controversial because, on its face, it sweeps broadly and goes against the grain of much contemporary tort thinking. Its basic thrust is that negligence liability should be the dominant form of liability in the world of acts and actors (with strict liability reserved for nonreciprocal risks), and that strict liability (in the guise of enterprise liability) should be the dominant form of liability in the world of enterprises and activities. While this aligns social contract theory with legal realism, and puts it in sync with the long ascendancy of enterprise liability in the first eighty-plus years of this century, it puts social contract theory at odds with the dominant position of the law and economics movement, and out of step with an emerging trend in favor of negligence liability.<sup>219</sup> The fairness *conception of* enterprise liability is contro-

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*supra* note 46. Support for the proposition that they are often in the best position to insure against those risks is provided by Calabresi and by Croley and Hanson. See Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 517-27 (1961); Croley & Hanson, *What Liability Crisis?*, *supra* note 7; Hanson & Logue, *supra* note 7. But see Geistfeld, *supra* note 46; Priest, *Insurance Crisis*, *supra* note 7; Priest, *Tort Reform*, *supra* note 7; Schwartz, *supra* note 7.

218. *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 172 (2d Cir. 1968).

219. The normative implications of social contract theory and economic analysis and the facts of legal history are more ambiguous and complex than this sentence's crude generalizations suggest. But crude generalizations can paint big pictures accurately, and these generalizations do just that. For a summary of, and a citation to, the views of legal realists, see Geistfeld, *supra* note 46, at 1. For evidence of the rise of enterprise liability in the twentieth century, consider worker's compensation statutes, “No-Fault” automobile insurance, early products liability law, and the expansion of vicarious and abnormally dangerous activity liability. Although both articles overlap their hands (or their fears), Smith's *Sequel to Workmen's Compensation Acts* and Priest's *The Invention of Enterprise Liability* nicely capture the sense of enterprise liability's ascendancy throughout most of the century. See Jeremiah Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV L. REV. 235, 344 (1917) (prophesying the triumph of enterprise liability); Priest, *supra* note 5 (proclaiming the fulfillment of Smith's prophesy). For the present consensus of law and economics scholars against enterprise liability, see *Indiana Harbor Belt R.R. v. American Cyanamid Co.*, 916 F.2d 1174, 1177 (7th Cir. 1990) (Posner, J.); Epstein, *supra* note 7; Geistfeld, *supra* note 46; Priest, *Insur-*



versial because, if it is correct, one of the most familiar and influential criticisms of enterprise liability is simply off the mark.

George Priest's famous and influential piece, *The Invention of Enterprise Liability*, concludes that *all* enterprise liability is deeply flawed because enterprise liability is inherently illimitable.<sup>220</sup> If the argument of this paper is correct, Priest's criticism is simply wrong. The principle of benefit-burden proportionality leads to a conception of enterprise liability as liability for characteristic risk, and this conception places a boundary on the liability of enterprises. Conceived as a matter of fairness, enterprise liability ceases at the point when "the activities of the 'enterprise' do not . . . create risks different from those attendant on the activities of the community in general."<sup>221</sup> As we have seen,<sup>222</sup> this boundary characterizes not only vicarious liability, at least when fairness is its principal justification, but also strict liability for wild animals, "vicious" domestic animals, and abnormally dangerous activities. This boundary defines a form of liability that is more extensive than negligence liability, but less extensive than absolute liability.

Notwithstanding Priest's assertions to the contrary, there is no reason to think that the boundary-drawing exercises to which the principle of liability for characteristic risk commits courts are inherently impossible. Indeed, there is no reason to think that identify-

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*ance Crisis*, *supra* note 7; Priest, *Tort Reform*, *supra* note 7; Schwartz, *supra* note 6; Schwartz, *supra* note 7. The works of Croley and Hanson, *supra* note 7, Hanson and Logue, *supra* note 7, and Jones, *supra* note 46, represent a powerful countertendency, but a countertendency nonetheless. The trend in "the law" is represented by the powerful opinions of Judge Posner and by the reconceptualization of products liability law around negligence norms in the *Restatement (Third) of Torts*. See *RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY* (Tentative Draft No. 2, 1995). Gary Schwartz's *Prospectus* looks likely to continue the trend. See *PROSPECTUS FOR RESTATEMENT (THIRD) OF TORTS: BASIC PRINCIPLES, REPORT TO THE AMERICAN LAW INSTITUTE* (Nov. 7, 1995).

220. This is George Priest's thesis in *The Invention of Enterprise Liability*, *supra* note 5, at 527. Its considerable influence is shown by the fact that both scholars and courts have backed away from imposing enterprise liability on insurance grounds. For example, William Jones, who strongly favors the expansion of enterprise liability, eschews insurance as a justification for such expansion. See Jones, *supra* note 46, at 1778 (acknowledging that "the tort system is an expensive, and generally unsuitable, mode of social insurance" and emphasizing that enterprise liability is justified on other grounds). For evidence that courts have done so as well, see Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 *UCLA L. REV.* 731, 791-92 (1992) (claiming that a more prodefendant attitude has emerged in products liability cases and arguing that the best explanation for the change is "[t]he combination of dramatic increases in insurance rates, widespread reporting of the insurance crisis, a multimillion dollar publicity campaign to link the insurance crisis to products liability rules, and such rules' effects on daily life" (footnote omitted)). Priest's paper was originally presented at a "Conference on Critical Issues in Tort Law Reform" supported by Aetna. See George L. Priest & Richard A. Epstein, *Introduction*, 14 *J. LEGAL STUD.* 459 (1985).

221. *Bushey*, 398 F.2d at 172.

222. See *supra* notes 64-84 and accompanying text.

ing zones of characteristic risk is any more difficult than deciding, as negligence liability requires, whether certain precautions should have been taken. On the whole, it seems likely that the boundary-drawing exercises required by enterprise liability are sometimes easier, and sometimes more difficult, than the judgments of due care required by negligence liability. Drawing the boundaries required by enterprise liability will be substantially easier than making the judgments of due care required by negligence liability when enterprises engaged in abnormally dangerous activities create risks that differ in kind from the ordinary risks of life. It will be more difficult when risks arise out of the mingling of multiple activities, as they do in the case of railroad crossing accidents. When multiple activities (for example, railroading, driving, designing automobiles, and regulating the flow of traffic) all contribute to a particular kind of accident (for example, automobile-train collisions), sorting out the distinctive contributions of each enterprise becomes exceedingly difficult. Proponents of enterprise liability understand this difficulty well.<sup>223</sup>

In fact, Priest's argument that enterprise liability is inherently illimitable speaks neither to the criterion of liability for characteristic risk nor to the idea of fairness that justifies that criterion. His argument concerns an entirely different set of justifications for enterprise liability, albeit ones that he finds animating the law. According to Priest, "the three presuppositions of manufacturer power, manufacturer insurance, and internalization" irresistibly imply "absolute liability,"<sup>224</sup> because these three "presuppositions do not incorporate any conceptual limit to manufacturer liability."<sup>225</sup> Whether or not Priest is right about the logic of these presuppositions, his argument simply does not speak to the distinctive conception of enterprise liability in which the idea of fairness issues.

The enterprise liability principle of fairness bounds the scope of liability in another way — it leads to the recognition of ultrasensitivity as a defense. As we have already seen,<sup>226</sup> abnormal sensitivity is a natural boundary of liability for characteristic risk because the harm suffered by the abnormally sensitive is characteristic of their unusual constitution. Consequently, just as enterprise liability ends when the increased risks characteristic of an activity blend into

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223. See, e.g., KEETON, *supra* note 20, at 163; Jones, *supra* note 46, at 1746, 1750-51, 1754, 1766 & n.308.

224. Priest, *supra* note 5, at 527.

225. *Id.*

226. See *supra* note 78 and accompanying text.

the background risks created by the community's ordinary activities, so too enterprise liability ends when the increased risks created by an enterprise are eclipsed by the even greater risks created by the abnormal sensitivity of the victim.<sup>227</sup> The conceptual logic behind this defense is thus clear. The link between this conceptual logic and the fairness justification for enterprise liability, however, is not so clear. There is nothing particularly fair, for example, about counting the costs of a rare skin disorder a cost of the victim's abnormal sensitivity to an antiperspirant, when the victim first learns of her hypersensitivity through an adverse reaction to a novel antiperspirant.<sup>228</sup>

This example reinforces the point that liability for characteristic risk makes sense only when it is linked to benefit and control. It seems fair to recognize hypersensitivity as a defense to liability only when the victim is or ought to be aware of her sensitivity, and when the victim is in a position to control her contact with the activity to which she is abnormally sensitive without unduly burdening her right to use her own property as she sees fit, or to lead a normal life in the world at large. If the victim's hypersensitivity is not a previously unknown allergy to a rare chemical, but a well-recognized allergy to a familiar food (strawberries, for instance), then it seems fair to make the victim bear the costs of her special sensitivity. So too, if minks who have recently given birth to kittens are easily frightened, and if blasting is only one of many disturbances that might prompt them to kill their kittens, then it seems fair to count the costs of their sensitivity as costs of mink farming. If, on the

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227. This argument is put clearly in *Foster v. Preston Mill Co.*, 268 P.2d 645 (Wash. 1954). The court stated that "strict liability should be confined to consequences which lie within the extraordinary risk whose existence calls for such responsibility," 268 P.2d at 647, and held that the harm caused when blasting prompted a mother mink to kill her young was attributable to "the plaintiff's extraordinary and unusual use of land" rather than the "risks inherent in blasting operations," 268 P.2d at 648. The court counted the effects of the blasting as "relatively moderate" and "no more than a usual incident of the ordinary life of the community" because the plaintiff was the only landowner injured by the blasting. 268 P.2d at 648.

228. Courts have split on how to handle such cases. One line of cases holds that warnings of allergic reactions are appropriate only if the manufacturer can foresee a risk of such reactions in a substantial number of persons. See *Griggs v. Combe, Inc.*, 456 So. 2d 790 (Ala. 1984); *Kaempfe v. Lehn & Fink Prods. Corp.*, 249 N.Y.S.2d 840 (App. Div. 1964), *affd.*, 231 N.E.2d 294 (N.Y. 1967); *Morris v. Pathmark Corp.*, 592 A.2d 331 (Pa. Super. Ct. 1991). This is a negligence position, and it is adopted by the proposed *Restatement (Third) of Torts*. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. j (Tentative Draft No. 2, 1995). Another line of cases imposes a duty to warn of any foreseeable allergy that may be serious and rejects, implicitly or explicitly, the defense of hypersensitivity. See *Kehm v. Procter & Gamble Mfg. Co.*, 724 F.2d 613 (8th Cir. 1983) (rejecting the defense of user's idiosyncratic reaction as inapplicable to strict liability claim); *Wright v. Carter Prods. Inc.*, 244 F.2d 53 (2d Cir. 1957) (applying Massachusetts law). This is essentially a strict liability position.

other hand, only blasting frightens mink sufficiently to prompt them to kill their kittens, it seems fair to count the costs of their sensitivity as costs of blasting.

What counts is not how atypical the victim's reaction is, but whether it is fair to ask the victim to change her way of life by either avoiding contact with, or bearing the costs of exposure to, the activity. Whether or not it is fair turns partly on the prominence of the sensitivity in the victim's life. The more prominent it is, the less the normal course of her life will be disrupted by being required to bear the characteristic costs of her ultrasensitivity.<sup>229</sup> If the sensitivity is prominent, she will already have adjusted the normal course of her life to the special risks of her sensitivity. The fairness of holding victims responsible for the characteristic costs of their hypersensitivity is, however, not only a matter of how much it will disrupt the normal course of their lives. Fairness is also a matter of comparison. We need to measure the disturbance in the victims' lives effected by counting their injuries a cost of their peculiar constitutions against the disturbance in the normal course of the enterprise's activity effected by holding it strictly liable for the harms that it inflicts on hypersensitive individuals.

The general upshot of this is simple enough: abnormal sensitivity should be recognized as a defense to liability when bearing the costs of such sensitivity will disrupt the normal course of the victim's life less than pinning those costs on the enterprise will disrupt the normal course of its activity. The particular implications are varied. In some contexts, counting the hypersensitive plaintiff's injuries a cost of the activity might prove enormously burdensome. Nuisance law may be such a context.<sup>230</sup> In other contexts, such as product liability and abnormally dangerous activity liability, counting the rare hypersensitive victim's injuries a cost of the enterprise's activity is likely to be substantially less burdensome to the enterprise. In these contexts, the defense should be narrowly construed. Abnormal sensitivity should absolve the enterprise of responsibility

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229. In *Madsen v. East Jordan Irr. Co.*, 125 P.2d 794 (Utah 1942), another case of a mother mink reacting to blasting by killing her young, the appellant alleged that "by nature, habit and disposition all mink, when with and attending their young, are highly excitable and, when disturbed, will become terrified and kill their young." 125 P.2d at 794. If this assertion is correct, then the ultrasensitivity of mink is prominent in the pertinent way.

230. See *Rogers v. Elliott*, 15 N.E. 768, 772 (Mass. 1888) (holding that ringing a church bell every day was not a nuisance even though it caused convulsions in the plaintiff, who was recovering from sunstroke, and stating the rule that what constitutes a nuisance must be determined by the standard of "ordinary people, as it is, in determining . . . negligence"). The court explained that failing to recognize hypersensitivity as a defense to a claim of nuisance might burden other activities excessively.

only when the unusual sensitivity of the victim's activity is central to her activity — central enough that requiring the victim to regulate her exposure to the offending product or abnormally dangerous activity does not interfere substantially with the normal course of her activities.<sup>231</sup> In still other contexts, the defense may have no applicability at all; other considerations may settle the victim's duties to the enterprise. Vicarious liability illustrates this possibility — the duties of the plaintiff are settled by the substantive law governing the underlying tort.<sup>232</sup>

Similar considerations support the recognition of assumption of the risk as a defense to enterprise liability.<sup>233</sup> It seems intuitively wrong to count the deliberate, unburdened encounters of strangers with enterprises as characteristic costs of the enterprise. The enterprise derives no benefit from such encounters, and is poorly positioned to control them. By contrast, strangers who freely choose to encounter the risks of an enterprise presumably do so because they deem the encounter beneficial, and are in the best position to control their own contacts with the enterprise. Their voluntary encounters are thus more "characteristic" of their own activities than they are of the activities of the enterprise.

Once again, the application of the defense will be shaped by ancillary considerations and particular contexts. For example, the substantive law governing the underlying tort will determine the applicability of the defense to vicarious liability, just as it determined the application of the abnormal sensitivity defense. And, like the abnormal sensitivity defense, assumption of the risk has its clearest application in the context of wild animals and abnormally dangerous activities. These enterprises wear their characteristic risks on their sleeves, and property rights usually fix the boundaries of their

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231. Jones argues in connection with "hazardous" activities that the ultrasensitivity defense is "sound if narrowly construed." Jones, *supra* note 46, at 1757-58. His conclusion rests on the premise that the "unusually vulnerable victim is the 'least cost avoider'" with respect to her peculiar vulnerabilities because she will be "acutely aware" of those vulnerabilities whereas injurers will not. *Id.* The similarity between my argument and Smith's argument underscores the close affinity between fairness arguments focused on characteristic risk and risk minimization arguments focused on the capacity to control risk. Victims, like injurers, are usually the "least cost avoiders" with respect to the "characteristic" risks of their activities.

232. These variations in the application of the ultrasensitivity defense are another reflection of the shaping influence of subordinate doctrines and particular contexts on generally applicable grounds of responsibility. See *supra* notes 140-52 and accompanying text (discussing the applicability of the reciprocity of risk criterion).

233. Assumption of the risk has a number of meanings in the law, including "no duty," perhaps its most common meaning in modern negligence law. The doctrine that I have in mind is a true affirmative defense. See, e.g., RESTATEMENT (SECOND) OF TORTS § 496E (1965); RESTATEMENT (SECOND) OF TORTS § 523 (1977).

legitimate activity with considerable clarity. Both of these features facilitate the application of assumption of the risk doctrine. The magnitude and distinctiveness of their characteristic risks makes it reasonable to expect victims to recognize those risks *ex ante*, and relatively easy, *ex post*, to determine if they did recognize those risks. The presence of property rights facilitates the judgments of burdensomeness on which the voluntariness aspect of the doctrine turns.<sup>234</sup>

The applicability of assumption of the risk to product liability law is more problematic. Misperception of product risks is one of the central problems, perhaps *the* central problem,<sup>235</sup> of product liability law, and its pervasiveness frustrates the application of assumption of the risk doctrine. Victims are in a poor position to control their encounters with risks that they do not perceive and cannot reasonably be expected to perceive. Historically, the defense has had its greatest formal recognition in connection with manufacturing defects, the strictest part of product liability law.<sup>236</sup> The pairing of the strict liability rule and the defense confirms the link between assumption of the risk and strict liability, but the properties of manufacturing defects severely limit the substantive significance of the defense. Manufacturing defects are generally latent, so opportunities to assume their risks are rare.

These remarks bring us face to face with a more difficult question: What role, if any, should victim negligence play as a defense to enterprise liability? Strict liability doctrines have traditionally limited the role of victim negligence. The provisions in the *Restatement (Second) of Torts* dealing with abnormally dangerous activity, for example, recognize victim negligence as a defense only in the form of the victim's "knowingly and unreasonably subjecting himself to the risk of harm from the activity."<sup>237</sup> Standing close enough to a caged bear to be mauled through the bars of the cage is an example of this kind of negligence,<sup>238</sup> but inadvertently straying across the median divider into an oncoming tractor trailer trans-

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234. See, e.g., *Marshall v. Ranne*, 511 S.W.2d 255 (Tex. 1974); see also *supra* notes 51-61 and accompanying text.

235. See SHAVELL, *supra* note 88, at 54-56; Schwartz, *supra* note 7, at 822, 827-32; Schwartz, *supra* note 100, at 374.

236. See *supra* note 87 and accompanying text. Design defect and warning law have generally been paired with the defense of victim negligence.

237. RESTATEMENT (SECOND) OF TORTS § 524(2) (1977). Section 524(1) states that this is the only kind of victim negligence that counts as a defense. See RESTATEMENT (SECOND) OF TORTS § 524(1) (1977).

238. See *Heidemann v. Wheaton*, 34 N.W.2d 492 (S.D. 1948).

porting gasoline, in a jurisdiction that counts the transport of gasoline in this way abnormally dangerous, is not.

The common law origins of enterprise liability are an important source of its deemphasis of victim negligence as a defense. The two chief common law sources of modern enterprise liability are vicarious liability law and the strict liability for hazardous "escaping things" emanating out of *Rylands v. Fletcher*. In both of these circumstances it is unreasonable even to demand victim precautions. In vicarious liability law, the duties of victims are fixed by the law governing the agent's wrongdoing. When that law does not demand victim precautions, it establishes the victim's prima facie right not to have to guard against the agent's wrongdoing. If vicarious liability law were to insist on victim precautions when the underlying law did not, it would be taking back the very rights granted by the underlying law. For example, requiring Ira S. Bushey & Sons to take precautions against unauthorized invasions of its drydock by Seaman Lane and his fellow sailors involves denying that they have the right to be free of such trespasses in the first place. That they do have that right is *precisely* what the pertinent tort law establishes.

Nothing in the doctrine or justification of vicarious liability suggests that it should alter the duties of victims by imposing duties of precaution when the underlying tort law does not do so. If vicarious liability law were to impose such duties, it would be in the anomalous position of discriminating *against* those who happened to be victimized by the servants of others, rather than by persons acting on their own behalf. Discriminating in this way would not only be puzzling, and apparently absurd, on its face. It would also be contrary to the entire thrust of *respondeat superior*. Vicarious liability exists to *enforce* the rights of those victimized by the agents of other principals, not to *diminish* their rights. No justification is more fundamental to the institution than the argument that servants will usually lack the financial resources or the insurance necessary for them to compensate the victims of their tortious acts.<sup>239</sup> The law of vicarious liability therefore does not spawn any independent duties of victim precaution.

The logic of *Rylands v. Fletcher* also minimizes the role of victim precautions, but for somewhat different reasons. *Rylands* supposes that people are free to do as they please with and on their own property. Their freedom comes to an end when they injure the per-

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239. See *supra* note 211 and accompanying text.

sons or property of others — when the dangerous things that they bring onto their property escape beyond its boundaries and cause harm. Victim negligence has no place in this framework. By virtue of the special freedoms conferred by the ownership of real property, injurers are free to impose risks that might otherwise be deemed unreasonable, but they must pay for this special freedom by compensating those injured when their unusually dangerous activities go awry. Victims must bear risks that might otherwise be deemed unreasonable, but they are compensated for this special burden not only by being assured of compensation if these risks issue in injury to them, but also by being relieved of the duty to adjust their lives, and their use of their property, in ways that minimize the harm that they might suffer at the hands of these unusual risks. Duties of victim precaution would unfairly burden both the freedom and property rights of victims. The reconciliation of competing rights effected by *Rylands* thus leaves duties of victim precaution out of its calculus.

This hereditary bias of enterprise liability law against defenses of victim negligence is bolstered by the difficulties of constructing attribution rules for circumstances when risks are the joint product of multiple activities, and by the administrative complexities introduced by combining defenses of victim negligence with enterprise liability. The case for negligence liability is most compelling when multiple parties are in a position to affect the level of the relevant risk, and can all be reasonably asked to guard against it.<sup>240</sup> These are precisely the circumstances when it is difficult to devise workable tests for identifying the characteristic risks of each of the different activities. Enterprise liability regimes have thus been hard to fashion in those situations when defenses of victim negligence seem most urgent. This fact has hindered the development of doctrines that combine enterprise liability with defenses of victim negligence.

The administrative complexities introduced by combining victim negligence with enterprise liability compound the problem. When adequate attribution rules can be devised, legal economists have argued persuasively that enterprise liability is easier to administer than negligence. Deciding who should make the choice between preventing an accident and letting it happen — whose risk it is that has occasioned an injury — is simpler and therefore cheaper than deciding not only whose risk it is, but also whether or not that risk

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240. Recall an earlier example: railroads, traffic agencies, and drivers can all affect the risks of railroad crossing accidents and can all be asked to take steps to reduce those risks.



should have been eliminated.<sup>241</sup> Combining a defense of victim negligence with strict (enterprise) liability not only partially compromises this administrative advantage by requiring a fuller inquiry into the victim's conduct, it also runs the risk of compromising this administrative advantage *entirely*. In at least some circumstances, it may not be possible to determine what precautions victims should take without first deciding what precautions injurers should take.

For example, we may not be able to decide just what precautions drivers should take to minimize the risks of harm threatened by car crashes without first deciding what precautions manufacturers should have taken. Whether drivers should wear seat belts, what kinds of seat belts they should wear, whether their passengers should use or avoid air bags, and whether they should lock their doors to minimize the risk of the doors popping open during collisions, or leave them unlocked to minimize the risk of being trapped in their cars after accidents, are all questions that cannot be answered independently of inquiries into correct car design and what it can accomplish in the way of risk reduction. When the content of duties of victim negligence is dependent in this way on the content of injurer duties of due care, the introduction of a defense of victim negligence will compromise the administrative advantages of a strict liability regime. To decide what precautions the victim should have taken for her own protection, we will first have to decide what precautions the injurer should have taken, and that is the very question that enterprise liability is supposed to enable us to ignore.<sup>242</sup>

For better or worse, the practical difficulties surrounding the integration of victim negligence as a defense do not render the defense irrelevant *in principle*. The issue of principle turns on

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241. This is perhaps the most fundamental insight of Calabresi & Hirschhoff, *supra* note 215. It has been widely accepted in the economic literature. See, e.g., SHAVELL, *supra* note 88, at 264; Geistfeld, *supra* note 46, at 11-12; Jones, *supra* note 46, at 1759. In this area, economics has confirmed and sharpened preexisting intuition.

242. Legal economists have made this point powerfully. See, e.g., Geistfeld, *supra* note 46, at 12. The problem is pervasive given the economic understanding of negligence. As Geistfeld explains, "[t]he negligence-contributory negligence approach, defined in marginal Hand Formula terms, yields optimal results so long as the law applies the Hand Formula to each party *on the assumption that the other party is exercising due care.*" Geistfeld, *supra* note 46, at 88 (quoting WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 88 (1987)). Under this approach, contributory negligence should not be recognized as a defense whenever the victim fails to take cost-justified precautions, but only when the victim fails to take precautions that she might have taken more cheaply than the injurer. See Calabresi & Hirschhoff, *supra* note 215, at 1058. I am not persuaded that *all* victim negligence fits this conceptualization of its structural relation to primary negligence. For example, the right of ways specified by traffic codes do not seem to fit this model. Some instances of victim negligence — for example, passenger precautions against increased injuries in car crashes — probably do fit this model. The fact that automobile manufacturers are not "injurers" in the standard sense of the term is irrelevant for our purposes.

whether insisting on victim precautions is incompatible with proper respect for the victim's autonomy. *Rylands v. Fletcher* and *respondent superior* identify circumstances when this is indeed the case. Insisting on duties of victim precaution in *Rylands* is incompatible with the right of victims to use their property as they see fit so long as they do not injure others. Insisting on special precautions by persons unfortunate enough to be injured by the servants of others is incompatible with the right of those victims to normal lives — to the same freedom from harm that they would have if they were injured by persons acting on their own behalf.

Other circumstances when the victim's right to a normal life is inconsistent with a duty to guard herself against the negligence of others can easily be imagined. Persons should be free to walk the public sidewalks without the burden of being on guard against stray cricket balls or snow cascading off adjacent rooftops. So too, persons should be free to stand in the doorways of their houses without bracing themselves against possible concussions from explosives stored at nearby mines, and should be free to live near a cricket field without being condemned to a lifetime of dodging cricket balls at their own peril.<sup>243</sup>

Nonetheless, the imposition of duties of victim negligence is not *always* inconsistent with proper respect for the victim's autonomy — her right to the free use of her property, or to a normal life. It is quite reasonable to ask that people exercise due care to keep themselves beyond the reach of caged bears, and equally fair to insist that they owe to those transporting huge quantities of gasoline by tractor trailer the same duties of due care that they owe to other drivers.<sup>244</sup> In principle, primary norms of enterprise liability are perfectly compatible with the defense of victim negligence. The chief justification for imposing enterprise liability — the ability of enterprises to spread the financial costs of their characteristic accidents across those who benefit from the creation of the risks that issue in those accidents — simply does not speak to the desirability

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243. These examples track the facts of *Bolton v. Stone*, [1951] App. Cas. 850 (addressing a claim brought by a plaintiff who was struck by cricket ball that escaped from a nearby cricket field while he was walking on the street); *Shipley v. Fifty Associates*, 106 Mass. 194, 199 (1870) (addressing a claim brought by a plaintiff who walked on a public sidewalk and was struck by falling ice and snow that had accumulated on defendant's peaked roof); and *Tuckashinsky v. Lehigh & Wilkesbarre Coal Co.*, 49 A. 308 (Pa. 1901) (addressing a claim brought by a plaintiff who was standing in the doorway of her father's house, 700 feet from defendant's mine, and was harmed by the concussion from a blast caused when lightning ignited explosives stored at the mine). The defendants in *Bolton* and *Tuckashinsky* were not held liable. My view here is in accord with Jones, *supra* note 46, at 1756-57.

244. See *Seigler v. Kuhlman*, 502 P.2d 1181 (Wash. 1972).

of victim negligence as a defense to enterprise-related risks. The appropriateness of asking victims to guard against the costs of the activities of others turns, rather, on whether the imposition of such a duty would wrongly diminish their autonomy. The answer to that question depends primarily on the contours of the normal life to which victims are presumptively entitled, and on the presence or absence of property rights incompatible with duties of victim negligence.

The upshot of all this is that what is desirable in principle, and what is possible in practice, may not align as well as one might hope. In some circumstances when enterprise liability is fairer than negligence liability, duties of victim negligence will be appropriate in principle, but difficult to administer in practice. Whether enterprise liability can be extended as far as the principle of fairness pushes it may depend on whether this practical difficulty can be overcome. It may be, for instance, that a regime of strict liability for "escaping things" can be widely and effectively extended from the world of *Rylands v. Fletcher* to the world of *Siegler v. Kuhlman* only if duties of victim precaution can be successfully combined with enterprise liability. The doctrine arising out of *Rylands* is tailored to a static sphere of landed uses, stationary enterprises, and sharp boundaries between the spheres of injurer and victim freedom. For enterprise liability to flourish as fully as the idea of fairness suggests that it should, it must be adapted to a more dynamic sphere of interpenetrating activities and fluid boundaries. Whether this can be done cannot be told in advance; it can only be told by testing practical ingenuity in the crucible of particular problems.

This exploration of the defenses and limits to enterprise liability put us in a position to consider the tide of sentiment currently opposing it. We have already argued that some of the arguments on which this sentiment rests are plainly wrong. Fault is not an obviously fairer principle of responsibility than strict liability, and enterprise liability is manifestly not absolute liability. Convictions to the contrary, however, are not the primary force behind the tide of sentiment against enterprise liability. Alan Schwartz's animus against strict liability does not depend in any important way on the argument that strict liability slides unavoidably down the slippery slope to absolute liability. The preferences for negligence liability expressed by Richard Posner and Gary Schwartz are no more dependent on that controversial piece of Priest's thesis.

First and foremost, the tide of sentiment running against strict liability is driven by the gravitational pull of prescriptive economic

analysis. Alan Schwartz, Gary Schwartz, George Priest, Richard Posner, Mark Geistfeld and other critics of enterprise liability are bound together by the conviction that victim precautions matter in myriad ways that enterprise liability ignores.<sup>245</sup> Efficiency can be achieved only if victims are encouraged to take appropriate precautions against injury at the hands of others, to adjust their activity levels in light of prospective injury, and to insure themselves against any harms that they might eventually suffer. In his discussion of *Bolton v. Stone*, for example, Gary Schwartz suggests that the negligence liability is appropriate because the victim should be expected to adjust both her use of the sidewalk and her choice of residential neighborhood in light of the risks imposed by cricket fields.<sup>246</sup> Writing with William Landes, Judge Posner similarly insists that victims are not presumptively entitled to stand in the doorways of their father's houses without guarding against the concussive effects of explosive blasts on nearby properties: people "do not have to live 700 feet from a mine shaft."<sup>247</sup> Individuals should be expected to adjust their housing choices — their activity levels as victims — in light of the risks presented by nearby properties.<sup>248</sup>

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245. See *supra* Part III.

246. See Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963, 993 n.156 (1981) (noting that the plaintiff helped to cause her own injury at the hand of the stray cricket ball because she "chose to live in a neighborhood near a pre-existing cricket field and chose to walk on a street adjacent to that field while a cricket match was in progress"). This objection to imposing liability on the cricket club must be distinguished from another, more plausible, objection. One might argue that the risk is so remote that it should be counted a background risk of living. I am not considering that objection here.

In a recent piece, Professor Schwartz makes a similar objection to Friendly's "characteristic risk" criterion and fairness justification for vicarious liability. See Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1750 (1996). Schwartz writes: "[I]n many cases, the accident's etiology also involves contributions by various third parties (including the plaintiff)." *Id.* at 1750. Schwartz's focus on "cause" misses the pertinent justification for ignoring victim contributions. Insisting on victim precautions above and beyond those required by the underlying tort law is inconsistent with the victim's entitlement to the same legal rights as everyone else. To insist that victims must waive their normal rights whenever the exercise of those rights would impede the pursuit of efficiency is to deny that they have any rights. This view implicitly asserts that victims are merely the keepers of their own lives and property, holding them in trust for the common good (conceived of as the maximization of wealth). This denies individual autonomy in an elemental, extreme, and unconvincing way.

247. LANDES & POSNER, *supra* note 242, at 117.

248. See *id.* at 117-18. Jones puts the case against the views of Schwartz and Posner very lucidly:

These arguments are similar to those made in connection with the railway spark cases, suggesting that farmers plant fire-resistant crops or allow some of their land to lie fallow to form a buffer zone adjacent to the railway tracks. All such arguments are unsound. The plaintiff in *Tuckashinsky* was standing in her home; the plaintiff in *Bolton* was standing on a public street. . . . To argue that they should not have been in this particular building or on this particular street is to give the defendants control over adjacent private and public properties to which they hold no entitlement. If the owner of the mine

Once the general superiority of first-party insurance over third-party insurance is added to the picture, the legitimate sphere of strict liability shrinks still further. As Mark Geistfeld explains, in a world where individuals perfectly comply with the negligence norm there will be no unjustified injuries:

Instead, all injuries [will be] “unavoidable” in the sense that they [will] occur despite the exercise of reasonable care by the injurer and victim. Victims will therefore be financially responsible for their own injuries and will self-insure or purchase first-party insurance to provide compensation in the event of injury. Strict liability would shift the injury cost to injurers, but due to the higher costs of third-party insurance, negligence is more desirable except for “extraordinary” cases in which strict liability significantly reduces the amount of risk-taking activity within the community.<sup>249</sup>

Thus, even in the nonideal world in which we live, the only legitimate role of strict liability is to reduce the intensity with which certain risks are imposed. Not surprisingly, the alleged superiority of first-party insurance is fundamental to Alan Schwartz’s case against strict liability and for a contract regime in products liability, and to George Priest’s case against enterprise liability and for a negligence regime in the same area.<sup>250</sup>

The obvious and strong tendency of emphasizing these three forms of victim precaution is to shrink the proper sphere of enterprise liability relative both to negligence liability and to contract. Less obvious, but perhaps more telling, is the fact that this conception of the relative roles of negligence and strict (or enterprise) liability makes no place *at all* for the idea of conditional fault. Strict liability is justified, when it *is* justified, by the fact that the advantages of inducing correct injurer care and activity levels outweigh the disadvantages of discouraging correct victim activity levels and supplying too much insurance against nonnegligent injuries. Conceptually speaking, these are all “precaution” concerns. The point

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or the cricket field felt that a buffer zone was needed to provide greater safety, the owner should have acquired, and paid for, additional land or additional rights in adjacent land.

Jones, *supra* note 46, at 1757 (footnote omitted). To this, I would add only that these boundaries protect autonomy — persons’ control over their lives and property — in vital ways.

249. See Geistfeld, *supra* note 46, at 46. Geistfeld emphasizes that the proper scope of strict liability is this narrow only when we make “unrealistic” assumptions about the deterrent efficacy of negligence law. Still, the main point of Geistfeld’s article is that even if we relax that unrealistic assumption, once we take account of the superiority of first-party insurance against nonnegligent harms, we will not embrace the “strict liability for hazardous business enterprises” proposed by Jones. See Jones, *supra* note 46. Thus, the proper sphere of strict liability expands under more realistic *assumptions*, but only so much. Geistfeld’s argument starts from Professor Shavell’s analysis. See *supra* text accompanying notes 88-90.

250. See Priest, *Insurance Crisis*, *supra* note 7; Schwartz, *supra* note 7. Croley and Hanson challenge the alleged superiority of first-party insurance. See sources cited *supra* note 7.

of strict liability is to get the optimal level of injurer precaution and activity — the level that would be achieved under a perfectly administered negligence standard. Strict liability is thus explained and justified without ever acknowledging that it expresses a *competing principle of responsibility*, namely the “conditional fault” principle that the legitimate conduct of an activity sometimes requires paying compensation to those injured by its nonnegligent risks.

Put differently, the claim of contemporary critics of enterprise liability is this: the imposition of strict liability implies that the defendant’s conduct is reasonably careful, but unreasonably intense. Viewed through the lens of this conception of strict liability, the point of *Rylands* is that, although there was nothing unreasonable about Fletcher’s selection of the contractor who constructed his reservoir, and nothing unreasonable about the way that he maintained and operated that reservoir, there was something unreasonable about his decision to construct a reservoir in the first place. That use of water was “unreasonably intense.” Applied to *Bushey*, this conception of strict liability implies that there was nothing unreasonable about the care that the Coast Guard took in supervising its sailors on shore leave, but something unreasonably intense about its unleashing of sailors on the unsuspecting borough of Brooklyn in the first place.

Kantian social contract theory holds that this account of strict liability is subtly, but fundamentally, mistaken. Although strict liability often realizes the aims of negligence liability more effectively than does negligence liability itself, these different forms of liability express different principles of responsibility. The unreasonableness of the conduct subject to strict (or enterprise) liability lies *not* in the imposition of the risk, but in the refusal to accept financial responsibility for the harms issuing from that risk. Fletcher is presumptively free to put his own property to whatever use he desires, and the Coast Guard is presumptively free to schedule its sailors’ shore leaves as it sees fit. There is, in fact, something a bit unreasonable — a bit officious or meddlesome — in our presuming to determine how Fletcher should use his property, or how the Coast Guard should run its own affairs. What is wrong with Fletcher’s conduct is not that he has made an unreasonable choice of activity, but that it is unreasonable for him to expect others to bear the costs of his unusually dangerous activity.

What is true about *Rylands v. Fletcher* is also true about abnormally dangerous activity law in general. The law of abnormally dangerous activities *does not condemn the use of explosives as un-*

*reasonable*, but rather holds those who use explosives liable for their miscarriage. What it condemns as unreasonable is the imposition of the characteristic costs of unusually dangerous activities on victims who are not parties to the abnormally dangerous activities themselves. And what is true of abnormally dangerous activity liability in general is also true of vicarious liability in general. That body of law does not condemn the daily decisions of employers to put their employees in positions where they may commit torts. It holds employers financially responsible for the torts that their employees commit. What it criticizes is not the decision to impose the risk, but the imposition of the costs of that decision on others.

If this interpretation of the character of enterprise liability is correct — if enterprise liability is a kind of “conditional fault” — then the economic case against enterprise liability is suspect simply because it fails to recognize the distinctive principle of responsibility that enterprise liability embodies. But the flaws in the economic case against enterprise liability are not merely interpretive, they are also normative. By placing so much weight on the superiority of first-party insurance, the economic critique betrays once more its implausible belief that victims must always and everywhere take precautions against injury at the hands of others. Not only must victims always exercise care in the conduct of their lives (for example, always be on guard against stray golf balls in the street or stunning concussions in their doorways) and in their choice of activities (for example, always adjust their lives in light of nearby cricket fields or mines), they must also always insure themselves against accidental injury and death at the hands of others. If they do not, society will not maximize total wealth.

Kantian social contract theory is unconvinced. We have no general duty to maximize total social wealth, and we therefore have no general duty to insure ourselves against the wrongdoing of others. Demanding that victims must insure themselves against accidental injury and death at the hands of others adds “institutional insult to personal injury.”<sup>251</sup> The imposition of strict (enterprise) liability expresses the conclusion that it is wrong for an enterprise to impose nonnegligent risks unless it compensates those whose lives, limbs, and property are injured by accidents issuing from those risks. Re-

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251. I owe this expression and a more general debt to Jules L. Coleman, *Adding Institutional Insult to Personal Injury*, 8 *YALE J. ON REG.* 223, 230 (1990); see also COLEMAN, *supra* note 94, at 427-28, 437-39; JULES L. COLEMAN, *Rethinking the Theory of Legal Rights, in MARKETS, MORALS AND THE LAW* 28, 49 (1988). I am also indebted to JUDITH J. THOMSON, *Remarks on Causation and Liability*, in *RIGHTS, RESTITUTION AND RISK* 192, 199 (1986).

quiring victims to insure against such injuries denies what the liability regime asserts — that the injurer's conduct is legitimate only if she *fully* compensates all those that she injures. The case for full compensation rests on two simple premises. The first is that injurers have a duty to repair the damage that they cause. The second is that people do not forfeit a share of their authority over their own lives and property simply because they suffer the misfortune of having those lives and that property violated by accidental injury. By compensating the plaintiff for *all* of the harm that she has suffered, the award of traditional tort damages expresses an appropriate respect for the plaintiff's authority over her own life and property. In insisting that victims should insure themselves against wrongful violations of their own lives, limbs, and property, economics denies that persons really are the legal masters of their own lives and the owners of their own property. Economics asserts, and liberalism denies, that persons hold their lives, limbs and property in trust from society, and on condition that they use both resources in ways that maximize overall social welfare. The assault on enterprise liability is an expression of that fundamental, and unconvincing, premise.<sup>252</sup>

The prevailing hostility to strict liability is thus ill-founded. In some circumstances, negligence liability will reconcile the freedom of injurers and the security of victims more fairly than enterprise liability. In other circumstances, the reverse will be true. In still other circumstances (product liability comes to mind), some hybrid regime will be most appropriate. The most that can be said independent of a particular context is that our world both favors and undercuts the spread of enterprise liability. It favors the spread of enterprise liability by generating social circumstances that enable enterprises to distribute the costs of nonnegligent accidents among those whose activities engender them, thereby triggering the application of the enterprise liability principle of fairness. It undercuts the spread of enterprise liability by pressing more and more activities into contact with one another, thereby blurring the boundaries

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252. I do not mean to suggest that enterprise liability regimes must always award normal tort damages or compromise autonomy. Nonfault administrative schemes, such as worker's compensation, for example, award lesser damages, and they are important instances of enterprise liability. These schemes, however, apply to *participants in enterprises*. The imposition of the relevant risks therefore furthers the autonomy of victims. The same is not true when the victims are strangers, which is usually the case in vicarious liability or abnormally dangerous activity liability cases. I believe that this difference in the relationship between victim and enterprise accounts for and legitimates the basic difference in damage measures, but I cannot pursue the matter here.



between them and making it difficult to sort out the distinctive risks of different activities.

### IX. THE PRIORITY OF FAIRNESS

At the outset of Part VII, I argued that an interpretively adequate Kantian justification for the enterprise liability principle of fairness would meet a number of constraints. Some of those constraints are fixed by Kantian social contract theory, others are fixed by the characteristics of enterprise liability law. In closing I wish to show both how the view presented in Parts VII and VIII meets those constraints, and that it vindicates and generalizes Judge Friendly's claim for the priority of fairness over efficiency. That priority is a local expression of the general priority, within our moral sensibility, of considerations of justice over those of utility.

A satisfactory social contract justification for enterprise liability must show why it reconciles the competing claims of liberty and security more reasonably than negligence. In doing so, it should also explain the force of the reciprocity of risk criterion that has for so long dominated social contract theory's account of the proper division of labor between negligence and strict liability. The defense of the enterprise liability principle of fairness offered in Part VII meets both of these constraints.

The defense shows that in the "world of activities" enterprise liability reconciles the competing claims of liberty and security more fairly and more favorably than negligence liability. Enterprise liability aligns the financial burdens and benefits of nonnegligent accidents, thereby satisfying the principle of benefit-burden proportionality with respect to the distribution of the financial costs of accidents, as well as the burdens and benefits of the underlying risks. Even when risks are reciprocal, negligence fairly apportions only the burdens and benefits of the underlying risks. Enterprise liability is thus fairer than negligence liability. Because harm is more threatening than risk is to persons' capacity to pursue their conceptions of the good over complete lives, other things being equal, a liability regime that diminishes the incidence of nonnegligent harm, and minimizes its impact on victims, reconciles the competing demands of freedom and security more favorably than a regime that only succeeds in apportioning the burdens and benefits of risk fairly. Because enterprise liability is capable of diminishing the disruptions of victim security occasioned by nonnegligent harms without imposing a correspondingly great disruption on the free-

dom of action of injurers, it succeeds in reconciling freedom and security more favorably than negligence does.

By drawing upon Holmes' implicit distinction between the "world of acts" and the "world of activities," the preceding defense of enterprise liability also captures the force of the "reciprocity of risk" criterion, and reconciles it with the principle of burden-benefit proportionality, with which it appears to compete. When the financial burdens of nonnegligent harms *cannot* be fairly apportioned, the "reciprocity of risk" criterion reconciles the competing claims of liberty and security as fairly as practicable. This is the general situation in the "world of acts." When those burdens *can* be fairly apportioned, the principle of benefit-burden proportionality reconciles the competing claims of liberty and security more fairly. This is the general situation in the "world of activities."

The account of enterprise liability proposed in Part VII also meets the interpretive constraints fixed by the features of enterprise liability doctrine. Enterprise liability requires injurers to bear the financial burdens of risks whose prevention it would be unreasonable to demand.<sup>253</sup> The payment of damages in enterprise liability is thus a condition for the legitimate conduct of an activity, whereas the payment of damages under negligence liability is redress for the wrongful infringement of the property and physical integrity of others. On the social contract view developed in this article, these differences are readily comprehended and readily justified. The conduct subject to negligence liability is unreasonable because the injurer's imposition of the underlying risk is wrongful. The conduct subject to strict liability is unreasonable because the injurer's failure to compensate the victim is wrongful. When an enterprise is in a position to minimize the financial impact of an accident characteristic of the enterprise's activities on the accident victim, and able to distribute the accident cost across the activity that engendered it by the same stroke, it is only reasonable that the enterprise do so. So doing reconciles the competing claims of freedom and security more favorably and more fairly than negligence liability does. This is the central constructive argument of the paper, and it justifies the imposition of financial responsibility on enterprises for harms that they should not have prevented.

Part VIII shows that the social contract account of the grounds of enterprise liability also "fits and justifies" enterprise liability doctrine's relative indifference to optimal precaution and insurance

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253. See text accompanying *supra* notes 119-20.

concerns. The imposition of duties of victim precaution is frequently inconsistent with the demands of equal freedom, fairly specified. Persons are presumptively entitled to lead normal lives, and to use their property as they see fit. Property rights and the eclectic conventions specifying the contours of a normal life are the concrete (if imperfect) incarnations of individual freedom. The imposition of duties of victim precaution and insurance is often inconsistent with adequate respect for those facets of freedom. When this is the case, the law of accidents rightly rejects duties of victim precaution and insurance. While persons are free to maximize their own wealth, and to take precautions for their own benefit, when the demand that they do so runs contrary to the claims of justice, the claims of justice override that demand.

This priority returns us to Judge Friendly, whose celebrated opinion in *Bushey* eloquently and precisely framed the conflict between fairness and efficiency with which this paper began, and to which it must now return. In his generous tribute to Friendly, Judge Posner calls him “the greatest federal appellate judge of his time — in analytic power, memory, and application perhaps of any time.”<sup>254</sup> The tribute that we have paid here is of a different kind, but, I hope, no less generous. This paper tries to provide the theoretical underpinning for Judge Friendly’s claim that the institution of vicarious liability “even within its traditional limits, rests not so much on policy grounds consistent with the governing principles of tort law as in a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities.”<sup>255</sup>

That “deeply rooted sentiment” is the conviction that “[e]ach person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override.”<sup>256</sup> The priority of fairness over efficiency that Judge Friendly discerned is nothing less than the priority of justice over utility — the acknowledgment that “the loss of freedom for some is [not] made right by a greater good shared by others.”<sup>257</sup> If “the concept and language of justice [are] the test . . . by which any area of law must be judged,”<sup>258</sup> then

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254. Richard A. Posner, *In Memoriam: Henry J. Friendly*, 99 HARV. L. REV. 1709, 1724 (1986).

255. *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 171 (2d Cir. 1968).

256. RAWLS, A THEORY OF JUSTICE, *supra* note 106, at 3.

257. *Id.* at 3-4.

258. Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 70 (1975).

within the law of enterprise liability, the principle of fairness must have priority over the policy of wealth-maximization.