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SOME THOUGHTS ON THE IDEOLOGY OF ENTERPRISE LIABILITY

ROBERT L. RABIN*

INTRODUCTION

Writing in the mid-1980s, George Priest identified the theory of enterprise liability as the energizing force that created a sea change in civil law—in his words, a revolution in the law “[t]he dimensions . . . [of which] are comparable only with those of Realism and *Brown v. Board of Education*.”¹ A strong claim, to say the least. Priest went on to spell out a core definition of enterprise liability in the context of product-related injuries. In particular, he examined the twin notion that an enterprise should bear the risks of accidents it produces because (1) an enterprise has superior risk-spreading capacity compared to victims who would otherwise bear the costs of accidents, and (2) an enterprise is generally better placed to respond to the safety incentives created by liability rules than is the party suffering harm.²

Priest attributed this two-pronged justification, which beginning in 1960 had proven so influential in the courts, to the torts scholarship of Fleming James and the contracts writings of Fritz Kessler.³ Throughout a long and influential academic career, James advocated a risk-distribution perspective as a justification for judicial reform of tort doctrine.⁴ Kessler developed the notion of the adhesion contract, a manifestation of the power of market-dominant producers to im-

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1. George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 461 (1985).

2. *Id.* at 466. With the continuing growth of first-party health insurance coverage, the gap in risk-spreading capacity between injury victims and injurers closes to some extent. Nonetheless, health insurance remains far from universal, and income loss—let alone pain and suffering—clearly continues to track assumptions about superior risk-spreading capacity underlying enterprise liability ideology.

3. *Id.* at 464-65.

4. James's philosophy is evident throughout his distinguished treatise, FOWLER V. HARPER & FLEMING JAMES, JR., *THE LAW OF TORTS* (1956). See also Fleming James, Jr., *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704, 721-23 (1938) (advocating a principle of comparative or proportional fault); Fleming James, Jr., *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156, 1158-59 (1941) (arguing for a view of tort liability as a means of distributing losses over society as a whole).

pose socially undesirable terms on relatively helpless consumers.⁵ Priest posited a synthesis of Kessler's delegitimization of contract and James's advocacy of tort-driven risk distribution that culminated in strict products liability constructed on an enterprise liability foundation.⁶

The ideology of enterprise liability has continued to intrigue torts scholars in the decade since Priest's essay was first published. In 1992 Gary Schwartz attempted to trace and explain the doctrinal patterns of expansion and subsidence in the products liability field.⁷ Schwartz analyzed the period that Priest's essay had covered, 1960 to 1985, as well as the ensuing years, and was highly critical both of Priest's conclusions about the "strictness" of enterprise liability and its intellectual heritage.⁸ In line with much of his earlier work,⁹ Schwartz found far more evidence of fault-based principles in the framework of products liability law than Priest did, and suggested that enterprise liability itself may serve as a justification for fault as well as strict liability-based tort rules.¹⁰

But Schwartz took a cautious approach. Because there is an inherent tension between liability based on fault and unqualified commitment to loss-distribution, Schwartz ended his discussion of enterprise liability—which in any event was tangential to his main concerns—with some speculative comments on the extent of "disingenuity" to be found in judicial administration of a negligence-centered system.¹¹

In 1993 Steven Croley and Jon Hanson published a lengthy essay in which they assessed an earlier generation of scholarship on enter-

5. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 *passim* (1943).

6. Priest, *supra* note 1, at 505. Note that neither James's nor Kessler's scholarship addresses the safety incentives theme in enterprise liability. While Priest recognized this gap, he never explained the relationship between the dominant role that incentives thinking was to play in subsequent developments and the preeminence that he accords to the influence of James and Kessler.

7. Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 602-04 (1992).

8. *Id.* at 634-37.

9. See, e.g., Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641 (1989); Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717 (1981); Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963 (1981).

10. Schwartz, *supra* note 7, at 640-42.

11. *Id.* at 642-47. By "disingenuity" Schwartz meant paying lip service to negligence while at the same time using negligence doctrine instrumentally to achieve loss-serving ends irrespective of fault. *Id.* at 643-44. In his view, judicial disingenuity has been limited. *Id.* at 646-47.

prise liability for product injuries that was premised on imperfect consumer information, exploitative market power, and superior risk-spreading capacity—characteristics somewhat different from those discussed by Priest.¹² Croley and Hanson then attempted to revive these underpinnings through a new look at the developing literature on each characteristic.¹³ While both Priest and Schwartz aimed at identifying the influence of the enterprise liability phenomenon on the tort system, Croley and Hanson showed greater concern for whether the concept of enterprise liability in fact rests on a solid economic foundation.

More recently, Virginia Nolan and Edmund Ursin attempted to expand the intellectual boundaries of the field of debate by arguing that previous scholarship, Priest in particular, has been excessively myopic in examining the enterprise liability phenomenon in the context of products liability.¹⁴ The authors traced enterprise liability-based tort reform back to the workers' compensation movement, which replaced the tort system with a no-fault scheme.¹⁵ They found strong evidence of risk-spreading thinking, which is Nolan and Ursin's underpinning for enterprise liability, in the other major area of no-fault reform, auto accident compensation legislation.¹⁶

If this recent scholarship indicates that the idea of enterprise liability is alive and well in the torts literature, it nonetheless creates a somewhat blurred image. Priest's focus on James and Kessler as sources of the "revolution," as some have called it,¹⁷ seems unduly narrow—as does his confinement of the revolution to products liability. At the same time, Nolan and Ursin's near-exclusive focus on the loss-spreading theme in enterprise liability seems excessively restrictive. Finally, Schwartz's references to the connection between fault and enterprise liability remain undeveloped. There are more loose ends than one brief essay can gather together, but I would like to make a start.

In this essay, I will focus on the contribution of the ideology of enterprise liability to the evolving system of tort liability rules. In my view, the "revolution," or whatever one chooses to call it, brought about by enterprise liability thinking has had a more pervasive influ-

12. Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683, 695-712 (1993).

13. *Id.* at 767-95.

14. VIRGINIA E. NOLAN & EDMUND URSIN, *UNDERSTANDING ENTERPRISE LIABILITY: RE-THINKING TORT REFORM FOR THE TWENTY-FIRST CENTURY* 5 (1995).

15. *Id.* at 21-29.

16. *Id.* at 45-60.

17. *See, e.g.*, Croley & Hanson, *supra* note 12, at 683.

ence on the tort system than has been explicitly recognized by even its strongest proponents. At the same time, the intrinsic tension between the strands in the most widely influential version of enterprise liability—the strands of risk-spreading and deterrence—has led inexorably to a pattern of retreat once the full implications of the theory have been revealed.¹⁸

In the next section, I will discuss the expansive influence of enterprise liability thinking and how it came about. In the section that follows, I will turn to countervailing and limiting influences—the intrinsic tensions just mentioned and fairness concerns—as manifested in products liability law. Finally, I will offer a brief comment on the future of enterprise liability ideology.

I. STRICT LIABILITY AND BEYOND: THE PERVASIVE INFLUENCE OF ENTERPRISE LIABILITY IDEOLOGY

The ideology of enterprise liability could not really take hold until a new paradigm arose for thinking about the underpinnings of responsibility for accidental harm. This shift is often equated with the movement from negligence to strict liability.¹⁹ But this is incorrect, in my view, on two counts. First, strict liability themes were identifiable in tort law well into the industrial era, and in prominent instances had nothing to do with the ideology of enterprise liability.²⁰ At the same time, negligence themes are strongly evident in tort law throughout the twentieth century in those categories of accidental harm cases in which the influence of enterprise liability ideology seems powerful.²¹ The confusion resides in a failure to identify adequately and to trace out the underlying dynamic of the paradigm shift—more precisely, the movement from a *corrective* justice perspective on responsibility in tort law to a *collective* justice approach.²² This shift simply does not

18. By "intrinsic tension" I do not mean to suggest that the two strands *necessarily* pull in different directions; rather, I mean to suggest that under certain circumstances, discussed *infra* in text accompanying notes 102-109, they are at odds.

19. See generally Priest, *supra* note 1. See also Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 388-97 (1951) (equating the twentieth century movement from negligence to "absolute liability," which he detected in abnormally dangerous activity cases, with loss-spreading and insurance considerations). Gregory also traced an earlier mid-nineteenth century doctrinal shift from trespass to negligence to what could be regarded as a generally collectivist spirit—the desire to promote the growth of infant industry. *Id.* at 365-79.

20. See, e.g., *infra* notes 23-34 and accompanying text.

21. See, e.g., *infra* text accompanying notes 61-85.

22. More specifically, I refer to a shift from a framework in which considerations of interpersonal justice are paramount to one in which notions of what is best for society are dominant.

track neatly with doctrinal change linked to negligence and strict liability. Rather, it reflects an underlying transformation in the socio-legal culture that gave new meaning to established concepts. Consider the following examples.

A. *Traditional Strict Liability*

In the nineteenth century, strict liability for accidental harm is generally identified with two sources—*Rylands v. Fletcher*²³ and the blasting cases.²⁴ Neither reflects a different perspective on the ideological source of rights and duties in tort, as I see it, from the principles of fault liability that were developing contemporaneously. The point is nicely illustrated by the opinion of Justice Blackburn in *Rylands*, as he attempted to reconcile his position that fault was irrelevant in that case with cases involving “traffic on the highways,” in which he observed that a showing of fault was a necessary condition to liability.²⁵ “Traffic on the highways” became a metaphor for situations in which individuals are injured while pursuing their daily lives in public rather than enjoying the privacy of their own domicile. To the

One could push the inquiry a step further by seeking the sources of a collective justice perspective. This is beyond the scope of the present paper, but I offer a general observation. In my view, the twentieth century growth of liability insurance was undoubtedly a crucial factor in the development of the risk-spreading rationale, as was the increasing capacity to self-insure associated with the growth in scale of industry. The ideological foundations of internalization of accident costs, or incentives to safety thinking, are less evident. In the literature one can point to the powerful influence of R.H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960) (exploring the relationship between liability rules, transaction costs, and incentives to invest in safety) and the writing of Guido Calabresi culminating in *THE COSTS OF ACCIDENTS* (1970) (developing the theory of general, or market, deterrence). Yet, Justice Traynor afforded prominence both to safety incentives and loss-spreading rationales as early as *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440 (Cal. 1944) (stating that “[e]ven if there is no negligence, . . . public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health,” and that “the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business”). The intellectual heritage of collective justice thinking in tort law deserves further attention.

In describing a “shift” in the text, I do not mean to suggest a “replacement” of one ideological commitment by another. While I regard collective justice as the dominant present-day judicial mind-set in resolving accidental harm cases, corrective justice themes remain strongly evident in tort decisions. See discussion *infra* part II.A. See also Robert L. Rabin, *Continuing Tensions in the Resolution of Mass Toxic Harm Cases: A Comment*, 80 CORNELL L. REV. 1037 (1995).

23. [1866] L.R. 1 Ex. 265, *aff'd*, [1868] L.R. 3 H.L. 330.

24. See, e.g., *Hay v. Cohoes Co.*, 2 N.Y. 159, 162-63 (1849). For a general discussion, see Gregory, *supra* note 19, at 370-76. A more expansive treatment of traditional strict liability, including the earlier cases involving animals and fire, can be found in W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* ch. 13 (5th ed. 1984).

25. *Rylands*, L.R. 1 Ex. at 286.

nineteenth century judicial mind, still dominated by interpersonal notions of neighborliness rooted in property rights, one's domicile remained sacrosanct:

The person whose grass or corn is eaten down by the escaping cattle of his *neighbour*, or whose mine is flooded by the water from his *neighbour's* reservoir, or whose cellar is invaded by the filth of his *neighbour's* privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his *neighbour's* alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the *neighbour*, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his *neighbour's*, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property.²⁶

Blackburn's emphasis on "doing right" by one's neighbor is just as focused on moralistic judgment about appropriate private behavior as is the code of personal conduct at the foundation of the fault principle.

The blasting cases reveal similar origins in trespassory notions of protecting private rights in land.²⁷ As later cases, such as *Sullivan v. Dunham*,²⁸ shifted the focus to protection of those injured in public by blasting activities, these decisions also blurred the meaning of "trespass," drawing on still other venerable precedents of liability for "direct" acts.²⁹ But the critical point, in reading turn-of-the-century blasting cases like *Sullivan*, is that there is not the slightest evidence of attention to risk-bearing, creating incentives to safer conduct, or other utilitarian concerns. Instead, in these opinions, norms of interpersonal conduct remain deeply ingrained: "As the safety of the person is more sacred than the safety of property, the cases cited [recognizing that the use of land by the proprietor is not an absolute right, but limited by the higher right of others to lawfully possess their property] should govern our decision"³⁰

26. *Id.* at 280 (emphasis added).

27. *Hay*, 2 N.Y. at 161.

28. 55 N.E. 923 (N.Y. 1900).

29. *Id.* at 924-25 (citing early instances of liability without fault for damage caused by excavations).

30. *Id.* at 924. *But cf.* *Losee v. Buchanan*, 51 N.Y. 476, 479 (1873) (rejecting strict liability in a case involving explosion of a steam boiler on grounds that a growing industrialized society required a more limited foundation for responsibility than strict liability—namely, fault). Cases like *Losee* planted the seed for a collective-based notion of fault, but the ripening of utilitarian considerations in fault cases did not really become evident until the mid-

Rights qualified and rights absolute, *sic utere tuo*³¹ as a guiding principle, trespass as a buffer against invasive conduct—these are the touchstones of strict liability as traditionally conceived. It is a discourse grounded in ethical norms of interpersonal conduct.³² It is akin to Oliver Wendell Holmes's contemporaneous account in *The Common Law*,³³ forging a foreseeability-based rationale for fault liability in a pre-modern society free of industrial injuries, product mishaps, and impulses to view accidental harm as a collective concern.³⁴

Flash forward to 1973. A federal district court in California, in *Chavez v. Southern Pacific Transportation Co.*, entertained a number of lawsuits arising out of an explosion of eighteen boxcars filled with bombs in a railroad yard in Roseville, California.³⁵ The carrier argued a "public duty" defense—that it was required to accept the cargo by the federal government and consequently should not be strictly liable.³⁶ The court responded in terms revealing the paradigm shift that has occurred:

If California predicated liability solely upon the "fairness" rationale appearing in . . . [*Green v. General Petroleum Corp.*, 270 P. 952 (Cal. 1928)], it might well find that strict liability was inappropriate. Under the *Green* rationale strict liability is imposed because the ultrahazardous actor intentionally exposes others to a serious danger—an anti-social act is being redressed. Where the carrier has no choice but to accept dangerous cargo and engage in an ultrahazardous activity, it

twentieth century. Consider in particular the influence of what came to be known as the Learned Hand test for negligence, *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (establishing a calculus in which due care of a barge owner was to be assessed as "a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury if she does, (3) the burden of adequate precautions")—although it is far from clear that Judge Hand had present-day economic efficiency considerations in mind when he spelled out his formula.

31. The complete phrase is "*Sic utere tuo ut alienum non laedas*," or "use your own so as not to injure another's property." COCHRAN'S LAW LEXICON 271 (5th ed. 1973).

32. The ethical basis for these norms of interpersonal conduct has in fact taken a variety of forms. Compare, e.g., George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 546-51 (1972) [hereinafter Fletcher, *Fairness and Utility*] as amplified in George P. Fletcher, *Corrective Justice for Moderns*, 106 HARV. L. REV. 1658, 1677-78 (1993) [hereinafter Fletcher, *Corrective Justice*] (reviewing JULES COLEMAN, *RISKS AND WRONGS* (1992)) (emphasizing nonreciprocity of risk posed by intersecting activities) with Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 200-04 (1973) and Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165, 168-69 (1974) (articulating a causation-based theory).

33. OLIVER W. HOLMES, *THE COMMON LAW* 92-95 (1881).

34. *Id.* at 115-17.

35. *Chavez v. Southern Pac. Transp. Co.*, 413 F. Supp. 1203, 1205 (E.D. Cal. 1976).

36. *Id.* at 1206.

is the public which is requiring the carrier to engage in the anti-social activity. The carrier is innocent.

But, there is no logical reason for creating a "public duty" exception when the rationale for subjecting the carrier to absolute liability is the carrier's ability to distribute the loss to the public. Whether the carrier is free to reject or bound to take the explosive cargo, the plaintiffs are equally defenseless. Bound or not, Southern Pacific is in a position to pass along the loss to the public. Bound or not, the social and economic benefits which are ordinarily derived from imposing strict liability are achieved.³⁷

The federal district court in *Chavez* relied on *Smith v. Lockheed Propulsion Co.*,³⁸ a 1967 case involving reverberation damage from rocket testing, that had in turn relied on *Luthringer v. Moore*,³⁹ a 1948 case involving personal injuries from fumigation in an adjoining building. To complete the strict liability lineage, *Luthringer* relied on *Green*, cited in the passage above. In 1928, as the quote suggests, the *Green* court was still operating in a world of interpersonal ethical dictates. Significantly, the *Green* court relied on a California Civil Code provision that read "[o]ne must so use his own rights as not to infringe upon the rights of another."⁴⁰ Two decades later, the *Luthringer* court's opinion was wholly opaque, revealing not the slightest clue as to why—beyond the hazardous nature of the fumigant and the uncommon character of fumigation (satisfying the then-existing *Restatement* standards)⁴¹—liability was to be strict. Twenty-eight years later, however, *Chavez* clarified the reasoning and firmly anchored strict liability in collective justice/enterprise liability ideology.⁴²

Thus we find, well into the twentieth century, that there is no *necessary* connection between strict liability and an ideology of enterprise liability. That the recent enterprise liability literature suggests otherwise,⁴³ is explained by the near single-minded preoccupation with the dynamic development of products liability law beginning in the 1960s. That development, of course, explicitly turned on the

37. *Id.* at 1213-14.

38. 56 Cal. Rptr. 128, 132 (1967).

39. 190 P.2d 1, 3 (Cal. 1948).

40. *Green v. General Petroleum Corp.*, 270 P. 952, 954-55 (Cal. 1928) (quoting CAL. CIV. CODE § 3514).

41. RESTATEMENT (FIRST) OF TORTS § 520 (1938) ("An activity is ultrahazardous if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage.").

42. See *supra* text accompanying note 37.

43. See Priest, *supra* note 1, at 505.

“revolution” of enthroning strict liability as a replacement for liability based on fault.⁴⁴ But, as developments in the more prosaic domain of *traditional* strict liability reveal, the relational nexus rather is between enterprise liability and a radically different way of thinking about the social function of the tort system—in particular, viewing tort as a redistributive and regulatory mechanism—that has evolved independently of doctrinal change.⁴⁵

In a similar vein, consider that most ancient and ubiquitous form of strict liability—vicarious liability. In earlier times, before vicarious liability came to be taken for granted, scholars debated the origins of this imperfection in the design of responsibility based on fault.⁴⁶ Baty, a staunch opponent of the concept, identified nine separate justifications for vicarious liability, which he then proceeded to annihilate with relish.⁴⁷ Without reciting his litany, it is interesting to note the singular commitment to corrective justice embodied in the various pre-modern explanations for the concept. To name just a few: a control theory, emphasizing responsibility for close personal supervision over the work of an employee;⁴⁸ a retribution theory, an explanation offered by Holmes in *The Common Law*,⁴⁹ based on vicarious liability as a form of payment in place of forfeiting entitlement to the services of a wrongdoing servant;⁵⁰ an identification theory, a somewhat mystical (and conclusory) conception of the master and servant as a single entity for legal purposes;⁵¹ an evidentiary theory, serving as a kind of offshoot of *res ipsa loquitur* that emphasizes the master’s superior ability to identify the wrongful actor responsible for a victim’s injury;⁵² a profit-based theory, turning on the fairness of linking the burdens of a vagrant employee’s labors with the correlative benefits derived from his services;⁵³ and others.⁵⁴

44. The extent to which strict liability has, in fact, replaced fault in the world of products liability is another matter entirely. See *infra* part II; see also Gary T. Schwartz, *Foreword: Understanding Products Liability*, 67 CAL. L. REV. 435, 436 (1979) (arguing that substantial elements of fault liability remain in the modern approach in products liability cases).

45. There is a strong tendency in tort theory to view fault and strict liability as independent doctrinal categories that have a fixed and unchanging theoretical foundation over time. See, e.g., Fletcher, *Fairness and Utility*, *supra* note 32, at 543-51 (equating strict liability with the imposition of nonreciprocal risks or dominance relationships, and negligence with reciprocal risks or collaborative relationships).

46. See *infra* text accompanying notes 47-54.

47. T. BATY, VICARIOUS LIABILITY 148-54 (1916).

48. *Id.* at 74.

49. HOLMES, *supra* note 33, at 45.

50. BATY, *supra* note 47, at 147.

51. *Id.* at 153.

52. *Id.* at 147.

53. *Id.*

By contrast, in the more modern writers such as Atiyah and Harper and James, one finds clear reference to the ideology of enterprise liability as the contemporaneous underpinning for vicarious liability.⁵⁵ Summarizing the early writing of Guido Calabresi,⁵⁶ Atiyah's treatise on vicarious liability, published at the dawn of the modern products liability era, offers both risk-spreading and safety incentives rationales for holding employers responsible for the tortious acts of their employees.⁵⁷ In like fashion, Calabresi's mentor, Fleming James, offered an explicitly distributional justification a decade earlier.⁵⁸ Old wine, it seems, had been poured into new bottles.

Viewed in the context of a sea change in thinking about the foundations of responsibility in tort, the doctrinal shift in products liability, which in reality turns out to be largely illusory,⁵⁹ offers only a limited perspective on the ideology of enterprise liability. But the other examples from the domain of strict liability just discussed⁶⁰ only hint at the pervasive influence of this modern way of thinking about responsibility in tort. Next I turn to the fault principle itself.

B. *Fault Liability Revisited*

In 1976 the California Supreme Court decided *Tarasoff v. Regents of the University of California*,⁶¹ holding that a therapist had a duty to warn a potential victim of death threats revealed by a patient in the course of therapy.⁶² At first blush, the justification for this duty seems clear. The court observed that whatever the potential encumbrances on therapist-patient relations occasioned by a confidentiality-breaching duty to warn, the dire risk to an identified and unknowing victim must be treated as an overriding concern.⁶³

54. See generally P.S. ATIYAH, *VICARIOUS LIABILITY* 15-22 (1967).

55. *Id.* at 22-28; 2 HARPER & JAMES, *supra* note 4, at 1370-74.

56. See, e.g., Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 499-500 (1961) (examining the theoretical justifications for loss allocation).

57. ATIYAH, *supra* note 54, at 22-28.

58. 2 HARPER & JAMES, *supra* note 4, at 1364-74. A collective justice lineage in fact can be traced back still further to the pioneering essay of William O. Douglas, *Vicarious Liability and Administration of Risk I*, 38 YALE L.J. 584 (1929).

59. See RESTATEMENT (THIRD) OF PRODUCTS LIABILITY § 2 (Tentative Draft No. 2, 1995), which studiously avoids reference to "strict liability" in articulating a general framework for products cases, and premises both design defect and failure to warn doctrines on a negligence-type standard. See also Schwartz, *supra* note 7, at 653-56; Kenneth S. Abraham et al., *Enterprise Responsibility for Personal Injury: Further Reflections*, 30 SAN DIEGO L. REV. 333, 347-53 (1993).

60. See *supra* notes 23-34 and accompanying text.

61. 551 P.2d 334 (Cal. 1976).

62. *Id.* at 340.

63. *Id.* at 345-47.

On closer analysis, however, this explanation takes us only so far. Suppose the patient in *Tarasoff* had made his revelation to a bartender with whom he had a long-standing, intimate relationship, or to his dentist. Surely, the same concern for the dire risk to the potential victim would exist. And in either of these cases there would be no competing public policy concern about protecting the confidentiality of the counseling relationship. Yet, despite the influence *Tarasoff* has had on other courts in therapist-patient cases,⁶⁴ no court has extended this obligation to non-therapists, and it seems safe to say that bartenders and dentists need not be concerned that their day in court is coming.

If this is so, how does one explain *Tarasoff*? Despite the psychiatric profession's disavowal of its ability accurately to predict violence,⁶⁵ at bottom *Tarasoff* stands for an enterprise liability-based notion. In particular, even if the profession is only moderately successful at predicting violence, therapists are *in the business of* treating disturbed patients,⁶⁶ some subset of whom have violent propensities.⁶⁷ As such, psychiatrists are singularly positioned to take reasonable steps to warn when this occupational hazard arises.⁶⁸ Note that this proposition does not stand on a risk-spreading foundation; the dentist or bartender would similarly be a better risk-spreader than the unknowing victim. Rather there is a deterrence concern here,⁶⁹ grounded in the notion of intrinsic occupational risk that is perhaps in part aspirational: whatever the mental health professionals say, potential liability may lead them to take measures reducing the risks to unwitting individuals from psychopaths.⁷⁰

If the therapist's duty to warn is an especially vivid instance of enterprise liability thinking in the realm of fault liability, it is by no means an isolated example. Indeed, I would suggest that the discernible movement to a more robust principle of fault in medical malpractice cases, such as abandonment of the same locality rule, more expansive use of *res ipsa loquitur*, less restrictive standards for qualify-

64. See D.L. Rosenhan et al., *Warning Third Parties: The Ripple Effects of Tarasoff*, 24 PAC. L.J. 1165, 1167 n.5 (1993) (noting that Washington, Pennsylvania, Nebraska, and New Jersey have recognized this limited duty).

65. See *id.* at 1185-86; *Tarasoff*, 551 P.2d at 344-45.

66. *Tarasoff*, 551 P.2d at 345.

67. *Id.*

68. *Id.* at 344.

69. *Id.* at 346-47.

70. *Id.* at 347-48.

ing experts and establishing informed consent claims,⁷¹ is similarly motivated.

A paradigm shift has once again occurred, though it is less evident in the language of judicial opinions. In the era of the family doctor, tort law mediated injury claims from an interpersonal justice perspective. Just as claims were fewer when doctors were regarded as trusted family advisors, so were courts inclined to administer a highly constrained fault principle.⁷² Today, a growing proportion of medical malpractice is organizational liability—litigation involving hospital and corporate entity liability.⁷³ Moreover, medical practice is structured around clinical practice and HMO health coverage that distance the patient from any continuing relationship, and any sense of interpersonal ties, with the provider of health services. (Even the terminology of health care has taken on an abstract character in the sense that doctors have become “health care providers.”) In such a milieu, the two-pronged, collective-based justification for enterprise liability in the products sphere—superior risk-spreading ability and better risk-reducing capacity—creates pressures for more expansive implementation of liability rules in the health services sphere.⁷⁴

The resource allocation literature, dominated by law and economics scholars, has been overly preoccupied with the comparative merits of strict liability and negligence—and consequently has fixated on products liability, where the most apparent judicial action has taken place.⁷⁵ But incentives to safety are enhanced if doctrinal hurdles that lead to suboptimal investment in risk reduction—through the medium of summary judgments and directed verdicts—are eliminated from the framework of *negligence* liability. And risk-spreading is similarly promoted if barriers to a robust definition of negligence are perceived to be unwarranted and consequently are eliminated. If this is the purpose and effect of a more liberal version of *res ipsa loquitur* in the sphere of medical malpractice, or of who qualifies as an expert witness, then enterprise liability, to the extent that it is the engine of

71. See generally PAUL C. WEILER, *MEDICAL MALPRACTICE ON TRIAL* 19-26 (1991) (discussing the policy reasons behind recent changes in medical malpractice law).

72. On the rise in frequency and severity of claims, see *id.* at 2-3.

73. U.S. DEP'T OF JUSTICE, *CIVIL JUSTICE SURVEY OF STATE COURTS, 1992: CIVIL JUSTICE CASES AND VERDICTS IN LARGE COUNTIES* 7 (1995) (reporting that in 1992 64.4% of medical malpractice suits brought in state courts in the nation's 75 largest counties were brought against hospitals).

74. See generally WEILER, *supra* note 71, at 1-16.

75. See, e.g., Croley & Hanson, *supra* note 12; Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 *YALE L.J.* 353 (1988); Guido Calabresi & Jon T. Hirshoff, *Toward a Test for Strict Liability in Torts*, 81 *YALE L.J.* 1055, 1055-56 (1972).

change, exercises an influence similar in kind in the professional liability area to that in the products field.

Because the influence of enterprise liability ideology on professional negligence has been largely ignored, I offer one further instance, the liability of accountants and auditors for negligent misrepresentations. The leading opinion of Judge Cardozo in *Ultramares Corp. v. Touche*⁷⁶ took the position, almost universally followed in this country until relatively recently, that an auditor owed no duty to lenders or investors in cases in which a negligently performed audit led to substantial economic loss to the relying party.⁷⁷ As in so many other no-duty situations, the private perspective of contract dominated the potentially public (generalized duty) perspective of tort.⁷⁸

By the 1990s this position had been very substantially eroded. Judicial concern still exists over the potentially crushing liability of holding auditors responsible to any and all foreseeably injured third parties who rely on the auditor's representations about a client's solvency.⁷⁹ Scholars continue to assert that the nonliability of accountants and other providers of information to third parties can be justified on the ground that suppliers of information cannot capture the benefit of their "product" once it has entered the stream of commerce.⁸⁰ In recent years, however, the *Ultramares* position has been flatly rejected in a number of states that have adopted a constrained foreseeability approach—constrained only in the sense that at least some of these states would limit liability to those third parties acquiring the financial information directly from the auditor's client.⁸¹

The New Jersey Supreme Court spelled out its rationale for this approach in terms that leave no question about its debt to the ideology of enterprise liability. Quoting from *Rusch Factors, Inc. v. Levin*,⁸² a

76. 174 N.E. 441 (N.Y. 1931).

77. *Id.* at 447.

78. *See id.* at 445-46. For a historical exposition of this thesis, see Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 933-45 (1981).

79. *See, e.g.*, *Bily v. Arthur Young & Co.*, 834 P.2d 745, 765-67 (Cal. 1992).

80. *See, e.g.*, William Bishop, *Negligent Misrepresentation Through Economists' Eyes*, 96 LAW Q. REV. 360, 373 (1980) (arguing liability should be limited when the producer of information cannot capture the benefits flowing to all users); *see also Greycas, Inc. v. Proud*, 826 F.2d 1560, 1565-66 (7th Cir. 1987) (holding attorney can be liable to nonclient third party only where primary purpose of attorney-client relationship was to benefit third party), *cert. denied*, 484 U.S. 1043 (1988).

81. *See, e.g.*, *H. Rosenblum, Inc. v. Adler*, 461 A.2d 138, 144-47 (N.J. 1983) (holding auditor had duty to all who might foreseeably rely on his opinion).

82. 284 F. Supp. 85, 91, 93 (D.R.I. 1968) (holding that an accountant should be liable in negligence for careless financial misrepresentations relied upon by foreseeable parties).

federal court opinion interpreting Rhode Island law, the New Jersey court asked:

Why should an innocent reliant party be forced to carry the weighty burden of an accountant's professional malpractice? Isn't the risk of loss more easily distributed and fairly spread by imposing it on the accounting profession, which can pass the cost of insuring against the risk onto its customers, who can in turn pass the cost onto the entire consuming public? Finally, wouldn't a rule of foreseeability elevate the cautionary techniques of the accounting profession?⁸³

Not all states have subscribed to the elusively expansive concept of foreseeability, fearing the "crushing burden" that might result from potential liability to broad categories of economically injured creditors and investors not identifiable in advance. But even New York, the home base of *Ultramares* and a continuing conservative voice in the tort field, has carved out a duty of due care to nonprivity plaintiffs "linked" through transactional activity in some fashion to auditors upon whose negligent misrepresentations they have relied.⁸⁴ And the *Restatement (Second) of Torts* creates a more expansive duty, one intermediate between foreseeability and the New York standard, to those relying parties "for whose benefit and guidance" the auditor has intended to supply the information.⁸⁵ Under this fairly widely accepted view, no linkage is required at all through explicit contacts with the auditor. While a concern about unlimited liability is clearly evident in each of these approaches, so too is the notion that ordinary business activity, in this third-party configuration, involves risks to outside parties that best can be borne by the enterprise responsible for creating the risks in the first instance.

Rather than tracing the expansion of professional liability in other fields, such as attorney malpractice, I will simply propose the thesis that enterprise liability has spread beyond the domain of "enterprises," and has established itself in the sphere of professional service liability as well.

83. *Rosenblum*, 461 A.2d at 153.

84. See *Credit Alliance Corp. v. Arthur Anderson & Co.*, 483 N.E.2d 110, 119 (N.Y. 1985) (imposing liability when accountant had direct contact with relying party); see also *Prudential Ins. Co. v. Dewey Ballantine, Bushby, Palmer & Wood*, 605 N.E.2d 318, 320 (N.Y. 1992) (holding attorneys liable for economic loss due to negligent creation of opinion letter because relationship between lender and law firm was sufficiently close as to approach privity).

85. See RESTATEMENT (SECOND) OF TORTS § 552(2)(a) (1977).

II. PRODUCTS LIABILITY REVISITED: LIMITATIONS AND TENSIONS IN ENTERPRISE LIABILITY IDEOLOGY

As I have indicated, the products liability area has been the main focal point of torts scholarship devoted to chronicling the post-1960s expansive influence of enterprise liability ideology on tort law.⁸⁶ In my view, products liability developments are at least as significant an indicator of the *limitations* of enterprise liability ideology. I say this because the evolution of the law of products liability reveals two significant restraining influences that converge: (1) the continuing vitality of corrective justice norms as a counterpoint to the dominant ethic of collective justice;⁸⁷ and (2) the intrinsic tension between the two strands of enterprise liability ideology—risk-spreading and safety-enhancement.⁸⁸ The result has been a gradual retreat from strict liability aspirations to a largely fault-based standard of responsibility.

A. *The Continuing Vitality of Corrective Justice Norms*

By the mid-1980s, the New Jersey Supreme Court had replaced the California Supreme Court as the leading proponent of an expansive vision of strict liability for product harms.⁸⁹ Among its most noted decisions in this period was *Beshada v. Johns-Manville Products Corp.*,⁹⁰ in which the court addressed the question of whether an asbestos manufacturer could be held responsible for failure to warn in situations where the information about risks associated with its product only came to light after the product had been marketed and caused harm.⁹¹ The *Beshada* court answered in the affirmative, setting off a

86. See *supra* note 75 and accompanying text.

87. See *infra* part II.A.

88. See *infra* part II.B.

89. A string of conservative judicial appointments and the much publicized rejection of incumbents in a public election dramatically altered the character of the California court. See Schwartz, *supra* note 7, at 686-87. The New Jersey court earlier had shown a willingness to break new ground in products liability. See, e.g., *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960) (establishing strict liability for product injuries on an implied warranty theory). But the New Jersey high court firmly established its pro-recovery credentials in such cases as *O'Brien v. Muskin Corp.*, 463 A.2d 298 (N.J. 1983) (adopting generic risk-utility analysis for "luxury" products), and *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539, 547-49 (N.J. 1982) (holding that inability to identify risks at time of marketing was not a defense in a products liability case).

90. 447 A.2d 539 (N.J. 1982).

91. *Id.* at 542. There is something of an irony involved in this question being litigated in asbestos cases, in view of the evidence that asbestos manufacturers consciously concealed information about product risks for a substantial period of time. See generally PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* (1985).

firestorm of criticism that led to a quick disavowal of the decision two years later by limiting it to asbestos cases.⁹²

Beshada, in fact, made perfectly good sense in enterprise liability terms. Surely asbestos manufacturers were better positioned than injured workers such as insulation installers to spread the costs of after-acquired information about risks that in fact came to fruition. And realistically, in dynamic deterrence terms, even if the information is after-acquired, a liability rule is more likely to keep the manufacturer, rather than the victim of unwitting exposure, sensitive to potential undiscovered byproduct risks.⁹³ From a collective justice perspective then, the court seemed on solid ground.

But fairness considerations cut strongly the other way. To put it simply, there is a strong inherent perception of injustice in holding a company responsible for risks that it had no reason to know about at the time that it put a product on the market.⁹⁴ In essence, these considerations prevailed in *Feldman v. Lederle Laboratories*,⁹⁵ when the New Jersey court devised a duty-to-warn standard limited to those risks reasonably to be perceived by the product manufacturer.⁹⁶ *Beshada* fell into lasting and virtually universal disfavor.⁹⁷

The fairness concerns that led to the quick demise of *Beshada* track the considerations supporting the parallel "state-of-the-art" defense.⁹⁸ The latter defense insulates a product manufacturer from true strict liability for after-acquired technological advances—safety techniques unknown at the time of product marketing but in use at the time of trial. Just as in the case of after-acquired information about risk, if the courts took seriously the oft-stated homily that strict products liability is based on the "safety of the product, rather than

92. See *Feldman v. Lederle Labs.*, 479 A.2d 374, 385-86 (N.J. 1984) (limiting drug manufacturer's liability to cases where manufacturer had or should have had knowledge of defect or danger).

93. But see Alan Schwartz, *Products Liability, Corporate Structure, and Bankruptcy: Toxic Substances and the Remote Risk Relationship*, 14 J. LEGAL STUD. 689, 691 (1985) (arguing that firms should only be held liable for "knowable" risks that could have been discovered by cost-effective research).

94. *Id.* at 692-93.

95. 479 A.2d at 374.

96. *Id.* at 386.

97. See RESTATEMENT (THIRD) OF PRODUCTS LIABILITY 120-22 (Tentative Draft No. 2, 1995) (concluding that "the overwhelming majority of jurisdictions support the proposition that a manufacturer has a duty to warn only of risks that were known or should have been known to a reasonable person"). But see *In re Hawaii Federal Asbestos Cases*, 699 F. Supp. 233, 238 (D. Haw. 1988) (refusing to allow evidence of possibility of knowledge of defect in strict liability action), *aff'd*, 960 F.2d 806 (9th Cir. 1992).

98. See RESTATEMENT (THIRD) OF PRODUCTS LIABILITY 88-92 (Tentative Draft No. 2, 1995) (summarizing case law relating to the state-of-the-art defense).

the reasonableness of the manufacturer's conduct,"⁹⁹ there would be no such retreat to fault-based notions. But fairness considerations, grounded in norms of interpersonal wrongdoing, dictate otherwise. It is not that risk-spreading and deterrence considerations have fallen into disfavor; rather they have been tempered by a residual concern about doing individualized justice.

Ironically perhaps, the same point can be illustrated from the injury victim's perspective by reference to the checkered career of the consumer expectations test—a test that the California Supreme Court, in its influential period, regarded as an additional weapon in the armament of injured product users.¹⁰⁰ By contrast, later judicial proponents of consumer expectations often have regarded the test as a tool for expressing moral disapproval by barring product users who are oblivious to the "open and obvious" dangers of a product.¹⁰¹ The consumer expectations test thus turns out to be a double-edged sword with a limiting perspective that perhaps cuts deeper than its expansive side—a perspective grounded once again in an interparty focus. This latter observation, in turn, can serve as a bridge to further examination of the coherence of the principal strands of enterprise liability ideology.

B. *Intrinsic Tensions in Enterprise Liability Ideology*

It has long been recognized that risk-spreading and deterrence do not always support consistent approaches to the assignment of liability.¹⁰² The divergence is mainly evident in situations in which the injury victim is better-positioned to either avoid the risk or decide that the risk is worth taking. Consider individual tobacco tort claims. Without doubt the tobacco industry is the superior risk-spreader of the injury costs associated with smoking. Most lung cancer victims do not have first party coverage for all of their medical expenses and lost income,

99. *Feldman*, 479 A.2d at 385.

100. *See Barker v. Lull Engineering Co.*, 573 P.2d 443, 455-56 (Cal. 1978) (upholding consumer expectations test as one of two ways—along with risk-utility analysis—a product may be found defective in design). The test seems to have survived the California court's conservative shift. *See Soule v. General Motors Corp.*, 882 P.2d 298, 308 (Cal. 1994).

101. *See, e.g., Camacho v. Honda Motor Co.*, 741 P.2d 1240, 1251 (Colo. 1987) (Vollack, J., dissenting) (stating that although the ordinary consumer cannot assess the danger of products such as prescription drugs and gas tanks, "an ordinary consumer is necessarily aware that motorcycles can be dangerous"). Note, however, that the majority view in *Camacho*, rejecting the broad recognition of a plaintiff-fault defense, like the limited defenses for victim fault in workers' compensation and auto no-fault plans, illustrates the triumph of collective justice considerations over corrective justice norms of blameworthiness. *Id.* at 1246-48.

102. *See GUIDO CALABRESI, THE COSTS OF ACCIDENTS* 64-67 (1970).

and they certainly do not have first-party coverage for pain and suffering.

But if we put aside the addiction issue,¹⁰³ who is in the better position to decide whether the health risks of smoking are worth taking? In legal terms, one can pose this issue as assumed risk; in moral terms as freedom of choice. Whatever the characterization, the framework of tort liability rules creates leeway for assignment of responsibility to the injury victim, and juries consistently have decided in favor of the industry.¹⁰⁴ Indeed, in an earlier study of the tobacco tort litigation I referred to these cases as "morality" plays, in which the strategy on both sides has been to portray the opposition as the bad actor.¹⁰⁵ In the mid-1990s, as the litigation moved into a new phase of class action suits against the tobacco industry, the ultimate focal point remained blameworthiness.¹⁰⁶

If the tobacco litigation offers a particularly vivid illustration of the clash between the objectives of risk-spreading and encouraging precautionary behavior, that point can be made more generally—in the context of products liability—by reference to the most commonplace of everyday examples. Despite risk-spreading superiority, the

103. Ever since internal tobacco industry documents were leaked to Congress and the media in mid-1994, the addictive character of nicotine has in fact been at the center of tobacco tort litigation. See Philip J. Hiltz, *Lawsuits Against Tobacco Companies May Be Consolidated*, N.Y. TIMES, Nov. 6, 1994, at 42 (discussing *Castano v. American Tobacco Co.*, 160 F.R.D. 544, 548 (E.D. La. 1995), *rev'd*, 84 F.3d 734 (5th Cir. 1996)), a class action suit in the federal district court in New Orleans, in which the claims of tens of millions of smokers were filed on the grounds that the plaintiff class had become addicted to the nicotine in cigarettes).

104. See Robert L. Rabin, *Institutional and Historical Perspectives on Tobacco Tort Litigation*, in *SMOKING POLICY: LAW, POLITICS, AND CULTURE* 110, 124-25 (Robert L. Rabin & Stephen D. Sugarman eds., 1993) (noting that during 40 years of litigation, the tobacco industry "had not paid out a cent in tort awards"); Gary T. Schwartz, *Tobacco Liability in the Courts*, in *SMOKING POLICY*, *supra*, at 131, 156-57 (discussing the reasons for failure of law suits).

105. Rabin, *supra* note 104, at 122.

106. See, e.g., *Castano*, 160 F.R.D., at 548. In *Castano*, Judge Jones certified the class, *id.* at 560, but the court of appeals overturned that decision. *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).

Blameworthiness does not play a similar role in the current secondhand smoke class action litigation, because the plaintiff class was involuntarily exposed to cigarette smoke. See *Broin v. Philip Morris Cos.*, 641 So. 2d 888, 889 (Fla. Dist. Ct. App. 1994) (involving claims of nonsmoking flight attendants). In the state reimbursement suits, blameworthiness will play a similar role to the direct harm cases only if the state action is viewed as tantamount to a subrogation suit. See, e.g., Junda Woo, *Mississippi Wants Tobacco Firms to Pay Its Cost of Treating Welfare Patients*, WALL ST. J., May 24, 1994, at A2; cf. *Florida v. American Tobacco Co.*, Civ. No. 95-1466 (Fla. Cir. Ct. 1995) (involving a reimbursement suit in which the claims are based on state-enabling legislation explicitly eliminating use of the assumed risk defense against the state). Nonetheless, even in these latter cases, blameworthiness considerations could be of considerable import in assessing the responsibility of the tobacco industry.

courts do not hold carving knife manufacturers responsible for typical kitchen mishaps, bicycle manufacturers responsible for ordinary (but serious) riding injuries, or ladder manufacturers for routine accidental falls. In these and more problematic design examples—such as a microbus, with its passenger compartment at the very front of the vehicle—the concept of “defect” functions as a limiting device: the superior risk-spreading capacity of the manufacturer is often trumped by the countervailing consideration that, in individual cases, consumers can more readily safeguard against injury.¹⁰⁷

It is possible to frame these countervailing considerations in collective justice terms—that is, allocative efficiency terms—as Guido Calabresi did in his systematic exposition of the cheapest cost-avoider concept and in his treatment of the what-is-a-cost-of-what question.¹⁰⁸ But this is an unduly narrow frame of reference, in my view. Collective justice and corrective justice paradigms merge at this point,¹⁰⁹ and a notion of fundamental fairness, associated with the latter, is a dominant consideration; namely, that product users have to take individual responsibility for risks that they can readily avoid.

III. CONCLUDING THOUGHTS

In the mid-1990s has the ideology of enterprise liability lost its generative force? For the present, it is perhaps in a state of eclipse. The impulse to recast tort rules remains strong, but has taken on a different character. For one thing, commencing in the mid-1980s, legislative activity has replaced judicial activism as the central forum for what is now commonly referred to as tort reform.¹¹⁰ Correspondingly, the recasting of tort rules has become different in kind: it is now aimed principally at tort remedies. Thus, one finds an unprecedented assault on long-accepted judicial treatment of pain and suffering, punitive damages, joint and several liability, and the collateral source rule.¹¹¹

The newly enacted limitations in each of these areas pose a very substantial indirect challenge to the ideology of enterprise liability.

107. See, e.g., *Driesenstock v. Volkswagenwerk, A.G.*, 489 F.2d 1066 (4th Cir. 1974).

108. CALABRESI, *supra* note 102, at 133-40. These considerations, which in Calabresi's framework fall under “primary accidents costs,” *id.* at 21, are salient to only one of the two principal strands of collective justice—incentives to safety.

109. See discussion at end of the preceding section, *supra* part II.A.

110. See generally Joseph Sanders & Craig Joyce, “Off to the Races”: *The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207 (1990).

111. See *id.* at 218-23 (charting reform statutes passed in the states between 1985 and 1988). For developments through the mid-1990s, see Barbara Franklin, *Learning Curve: Lawyers Must Confront Impact of Changes on Litigation Strategies*, 81 A.B.A. J. 62 (Aug. 1995).

To the extent that caps on pain and suffering arbitrarily limit the full recovery of intangible loss, a portion of the cost of accidents is borne in its entirety by individual injury victims—at least those subject to the cap—rather than being distributed widely through the pricing system. At the same time, precautionary behavior is under-encouraged by this suboptimal allocation of accident costs. To the extent that limitations on the collateral source rule redistribute liability from third-party to first-party sources, incentives to safety are understated. To the extent that joint and several liability is eliminated, broad distribution to superior risk distributors is underachieved. In a like vein, mandated ceilings on the contingency fee create barriers to full realization of the claiming behavior animated by the ideology of enterprise liability.

In each instance, these effects are not so much an outright challenge to the notion that industry, service providers, and merchants ought to bear the costs of their activities as they are an erosion of the edifice of enterprise liability in the name of unduly high maintenance costs. The question for the future is whether disrepair will be allowed—or encouraged—to progress to the point at which this once-admired structure collapses. The interesting question then would be: What will be built in its place?