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Products Liability As Enterprise Liability

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Abstract

The prevailing wisdom about the rise of modern products liability law is framed by a debate which took place more than a generation ago. George Priest argued that modern American products liability law was born as enterprise liability incarnate and consequently ran amok in a nightmare of unlimited liability. Gary Schwartz countered that product liability law strict in name but fault-based in fact. Strict products liability was a revolution in rhetoric alone. To this day, these positions dominate our understanding of products liability law in its formative moment. We are long overdue for a fresh look. This paper argues that Priest was right to argue that modern American product liability law exploded when it was crystallized as a form of enterprise liability in §402A of the Second Restatement of Torts. But he loses the thread of the narrative when he claims that strict products liability self-destructed because enterprise liability is inherently limitless. Enterprise liability is liability for the characteristic risks of an activity and it is as preoccupied with identifying those risks of activities as fault liability is preoccupied with determining the presence or absence of fault. Professor Schwartz, for his part, is right that conceptions of balancing, duties of care, and comparative fault all find their ways into product liability law in its formative period. But Schwartz's identification of products liability with negligence is fundamentally mistaken. In products liability's formative moment these elements of negligence law were deliberately refashioned to construct a form of liability more strict than ordinary negligence liability.

This paper proceeds as follows. Part I briefly traces the long common law pre-history of modern product liability law as it passes through four phases: freedom of contract, negligence liability, warranty liability and strict enterprise liability. Part II explains the idea of enterprise liability as a distinctive conception of tort liability, focused on activities not actions and finding its fullest incarnation in strict

liability. Part III explains the liability rules that constituted products liability as enterprise liability with a particular eye to showing how they articulated a distinctive regime consciously designed to be more stringent than ordinary negligence liability. Part IV takes stock of the Priest and Schwartz theses in light of the regime described in Part III. Very briefly, Part IV also suggests why enterprise liability should be considered a valid alternative to negligence liability in the emerging world of autonomous vehicles.

Products Liability As Enterprise Liability

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INTRODUCTION

In the American legal academy, the prevailing wisdom about the rise of modern products liability law is framed by a debate which took place more than a generation ago. George Priest's brilliant 1985 paper *The Invention of Enterprise Liability*, asserted that modern American products liability law in its formative moment was enterprise liability incarnate, but condemned this commitment to enterprise liability as a profound defect in products liability law.² With rhetoric worthy of a Biblical Jeremiad, Priest argued that the "unavoidable implication of the three presuppositions of [enterprise liability] is absolute liability. The presuppositions themselves do not incorporate any conceptual limit to manufacturer liability."³ Priest's work was immensely influential, but it was also sharply contested—especially by Gary Schwartz, who countered that products liability law was really fault liability all along.⁴ According to Schwartz, the "vitality of negligence" was the driving force behind the expansion of tort liability over the course of the 20th century. In products liability law, Professor Schwartz found negligence conceptions lurking beneath the law's surface embrace of strict liability. He argued, for example, that defect liability was strict liability in name, but the risk-utility test of product defectiveness was in fact an aggressive application of negligence liability.⁵

¹ William T. Dalessi Professor of Law and Philosophy, USC Gould School of Law. This paper was originally written for the Obligations VIII Conference held at Downing College, Cambridge on July 19-22, 2016. The subject of the conference was revolutions in private law. I am grateful to the audience at that conference for helpful comments. I would also like to thank the audience at a Wake Forest University School of Law Faculty Workshop—especially Jonathan Cardi, Michael Green, Sid Shapiro and Andrew Verstein—for valuable comments. I am indebted to Daniel Gherardi for research assistance.

² George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985). If we had to pick a precise year to bookend products liability's enterprise liability moment, 1985 is as good a choice as any and Priest's article is one reason why. In decrying the triumph of enterprise liability, Priest was sounding a clarion call for a counter-revolution.

³ *Id.*, at 527. The three presuppositions referred to are manufacturer power, manufacturer insurance, and internalization. Priest argues that the twin policies of preventing accidents whose costs outweigh their benefits and dispersing the costs of those accidents that are not worth preventing coalesced into these three propositions because they were linked to empirical assumptions about the characteristics of modern consumer markets. To wit: first, manufacturers had "vastly greater power" with respect to "all relevant aspects of the product defect problem." Second, manufacturers had commensurately superior ability to spread risks. 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. *Id.* at 520.

⁴ Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*. 15 GA. L. REV. 963 (1981). See also Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law* 26 GA. L. REV. 601, 602 (1992).

⁵ Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, *supra* note 4, at 606.

To this day, the poles defined by the positions of Professors Priest and Schwartz fix the points from which subsequent discussion must begin. My aim in this paper is to build upon their work and challenge it at the same time. Priest is right to argue that modern American products liability law exploded when it was crystallized as a form of enterprise liability in §402A of the Second Restatement of Torts. But he loses the thread of the narrative when he claims that enterprise liability is inherently limitless. The difficulty that products liability law in its enterprise liability moment faced was not that its internal logic points to unlimited liability, but that—when product design decisions are at issue—the attribution of accidents to activities is a formidably difficult task. Enterprise liability is liability for the characteristic risks of an activity and it comes to an end when “the activities of the enterprise’ do not . . . create risks different from those attendant on activities of the community in general.”⁶ Indeed, enterprise liability is as preoccupied with identifying the characteristic risks of activities as fault liability is preoccupied with determining the presence or absence of fault. Unsurprisingly, products liability in its enterprise liability moment was utterly preoccupied with articulating the boundaries between the activities of product manufacturers and users and identifying their respective spheres of characteristic risk. Defect rules and defenses are *all about* delineating zones of responsibility.

The difficulty of determining the boundaries of strict products liability has its roots not in the supposed defects of enterprise liability as theory, but in the complexities of product manufacture and use as practices. The activities of product design, manufacture and marketing on the one hand, and product purchase and use on the other, are mutually dependent and mutually aware. Products are designed with product users in mind and product users are aware of at least some product design choices. Determining whether a product risk is characteristic of the manufacturer’s activity or characteristic of the user’s activity requires non-fault criteria of defectiveness. When design choices are at issue these criteria are not easy to devise. This is the problem that bedevils products liability as enterprise liability, not the untoward consequences of an internal logic which leads to limitless liability.

Professor Schwartz, for his part, is right that conceptions of balancing, duties of care, and comparative fault all find their ways into products liability law in its formative period. But Schwartz’ thesis is mistaken in three ways. First, in products liability’s enterprise liability moment these elements of negligence law were reworked to construct a form of liability more strict than ordinary negligence liability. Risk-benefit balancing, for example, is undertaken with hindsight, not foresight. This reworking of negligence conceptions was guided by an implicit commitment to product safety and consumer security as the fundamental values of products liability law. Courts and commentators alike assumed that product safety and personal security required a liability regime more stringent than normal negligence liability. True negligence liability did not rear its head until the Third Restatement, and it arose as a reaction against enterprise liability.

Second, insofar as Professor Schwartz can be read to endorse a negligence conception of products liability—not just to discern its presence—he points us toward a cure that is worse than

⁶ *Ira S. Bushey & Sons v. United States*, 398 F.2d 167, 172 (1968) (Friendly, J.).

the disease. Negligence criteria make the attribution of accidents to products more, not less, difficult. The application of negligence criteria requires juries to undertake wholesale review of product design decisions and opens up such questions as whether the defendant should have undertaken more research decades ago. These questions are difficult for anyone to answer and lay juries have no special qualifications when it comes to answering them. As Guido Calabresi argued many years ago, strict liability requires determining only who should be held responsible for an accident, whereas negligence liability requires deciding both who should be held responsible and whether they should have avoided the accident.⁷ The move from strict enterprise liability to negligence liability compounds the challenges that design defect liability must overcome.

This paper proceeds as follows. Part I briefly traces the long common law pre-history of modern products liability law as it passes through four phases: freedom of contract, negligence liability, warranty liability and strict enterprise liability. Part II explains the idea of enterprise liability as a distinctive conception of tort liability, focused on activities not actions and finding its fullest incarnation in strict liability. Part III explains the liability rules that constituted products liability as enterprise liability with a particular eye to showing how they articulated a distinctive regime consciously designed to be more stringent than ordinary negligence liability. Part IV takes stock of the Priest and Schwartz theses in light of the regime described in Part III. Very briefly, Part IV also suggests why enterprise liability should be considered a valid alternative to negligence liability in the emerging world of autonomous vehicles.

I. GESTATION AND CONCEPTION

A. Transfiguring Doctrine

The crystallization of products liability as strict enterprise liability in tort was itself the product of a long history of common law development. In the course of that history, contract and tort, negligence and strict liability, struggled for supremacy. The core products liability suit arises when: (1) a manufacturer sells a defective product to a distributor; who (2) resells it to a consumer; who (3) is injured in the course of using the product. A chain of contracts thus links the parties. If the injured victim sues the manufacturer of the defective product the question is whether the manufacturer is liable to the victim and, if so, on what basis. Beginning in the late 19th century—and ending with the adoption of §402A in the mid-1960s—the American law of products liability gave four distinct answers to this question. The first answer, epitomized by Thomas v. Winchester, was that only those who stood in privity of contract with the manufacturer of the product could sue for an injury caused by defect.⁸ The second answer was that ordinary negligence liability in tort governed product injury lawsuits. Here, MacPherson v. Buick is canonical.⁹

⁷ Guido Calabresi & Jon Hirschoff, *Toward a Test for Strict Liability in Tort*, 81 YALE L. J. 1055 (1972).

⁸ *Thomas v. Winchester*, 6 N.Y. 397 (1852).

⁹ *MacPherson v. Buick*, 217 N.Y. 382 (1916).

The third answer (the third stage) returned us to contract, but to a very different contractual regime. In this phase, products liability was warranty liability. Warranty liability, for its part, was embedded in a highly regulated consumer contract regime. Henningsen v. Bloomfield Motors and the Uniform Commercial Code are the representative texts of this stage.¹⁰ The fourth answer was strict liability in tort, proposed in Roger Traynor's prophetic concurrence in Escola v. Coca Cola Bottling Co. and adopted by §402A of the Second Restatement.¹¹ This fourth phase partially preserves the prior phases. For example, even when products liability is strict liability in tort, contract law governs cases of pure economic loss, and warning liability institutes a kind of contractual choice within a tort framework.¹² Similarly, strict liability in tort incorporates the strictness of warranty liability in the consumer expectation test for product defect and retains the MacPherson idea that the prospect of physical harm (harm to persons and their property) ousts contract and brings a non-disclaimable responsibility in tort into play. Even so, the fourth state was products liability as strict enterprise liability.

The move from the third stage to the fourth was accomplished by accepting the simplifications implicit in Judge Traynor's Escola concurrence. First, the fiction that products liability was fault-based—a fiction created by the liberal use of *res ipsa* and other devices—was dispatched with the observation that *res ipsa* was negligence in theory, but strict liability in fact. Next, the contract strand of products liability law was assimilated to tort by adopting the strictness of warranty liability as articulated in Henningsen. Last, the convoluted fictions that contract categories require in order to spread the protections of strict liability beyond immediate product purchasers were scuttled by asserting that products liability law belongs to tort. Strict liability without privity distills out of these simplifications. Thus, even as elements of prior phases were secreted into the products liability regime instituted by §402A, they were synthesized into a new liability regime whose overarching conception was one of strict enterprise liability in tort. Section 402A imposes liability that is: (1) strict; (2) independent of contract; (3) for defective products; that (4) harm ultimate users or consumers or their property, if “(a) the seller is engaged in the business of selling such a product and (b) [the product] is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.”¹³ This is products liability as strict enterprise liability.

B. *Justifications*

In embracing this doctrinal framework, §402A also adopts the theory of liability espoused in Judge Traynor's famous concurrence written twenty years earlier. And that theory is a theory of enterprise liability. *Comment c* explains:

. . . [T]he seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it . . . public policy demands that the burden of accidental injuries caused by

¹⁰ Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358 (1960); *See generally* U.C.C.

¹¹ Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453 (1944) (Traynor, J., concurring).

¹² *See, e.g., Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 875, 879–80 (1997).

¹³ RESTATEMENT (SECOND) TORTS § 402A (1997).

products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum protection at the hands of someone, and the proper people to afford it are those who market the products.¹⁴

This passage is a succinct endorsement of the two basic premises that define strict enterprise liability as a distinctive conception of tort liability. At the base is the idea that enterprises, not individual actors, ought to be basic unit of legal responsibility.¹⁵ Two premises are then attached to this foundation. The first is that enterprises ought to internalize the costs of the accidents that they cause without regard to their fault in precipitating that harm. The second is that enterprises ought to disperse the costs of their characteristic harms across all those who participate in the enterprise, ideally in proportion to the extent of their participation. The participants in an enterprise are ultimately answerable—collectively—for the harm that the enterprise does.

Section 402A's twin theses—that costs should be internalized and losses distributed—are buttressed by two policies and one principle. Accident-avoidance, loss-spreading, and fairness all support strict liability. In turn:

- *Accident avoidance.* By placing the responsibility for product safety in the hands of those who manufacture, distribute, and market products, strict liability secures maximum protection against unsafe products. Why is this maximum protection? Because the firms that make up the “enterprise” are in a better position to identify and execute risk-reducing measures than courts applying negligence liability are.¹⁶ Making those firms bear the costs of all the physical injuries caused by their defective products provides a stronger incentive to make their products safe than negligence liability does.
- *Loss-Spreading.* Those in the chain of distribution—especially the manufacturer—are in the best position to spread the costs of product accidents. Why? Because, in a world where product defects are conceptualized as more or less manufacturing defects, product users are all exposed to the same product risks. The imposition of strict liability creates a relatively large and homogeneous risk pool and makes product manufacturers excellent insurers of product risks.
- *Fairness.* Strict liability will spread the costs of product accidents across all those who benefit from the product: consumers, producers, distributors. Strict (enterprise) liability disperses the costs of product accidents across all those who benefit from the manufacture, sale and use of the product. Negligence liability concentrates the costs of many such accidents on those unlucky enough to suffer them.

¹⁴ RESTATEMENT (SECOND) OF TORTS § 402A *cm. c* (1997).

¹⁵ See *infra* note 18 and accompanying text.

¹⁶ The idea of accident avoidance at work here is the idea explicated by Calabresi and Hirschhoff, *supra* note 7.

C. Responsibility

Comment c to §402A prefaces its invocation of these three justifications for strict enterprise liability with the remark that “the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it.”¹⁷ This remark attracts little attention, but it asserts something important, namely, that strict liability is a form of responsibility, not just an instrument through which desirable social ends such as loss-spreading can be achieved. The import of this prefatory remark is that firms are responsible for the harms inflicted by defective products not because loss-spreading and deterrence are socially valuable objectives, but because they design, manufacture and market those products. The harms inflicted by products are attributable to the firms responsible for manufacturing and marketing them.¹⁸ Those firms bring responsibility upon themselves by their actions—they assume “special responsibility” by virtue of the fact that they seek to induce consumers to buy and use their products. They are not strangers to the safety of their customers. Presumptively, manufacturers are expected to market safe products. The imposition of strict products liability builds upon antecedent responsibility for product safety and consumer security.¹⁹

Because it is concerned with responsibility for avoiding and repairing harm, products liability as enterprise liability is part of the law of torts, not just a bizarre regulatory or insurance scheme. Section 402A imposes liability on enterprises which harm others by marketing defective products to those others, and it imposes liability for the harm that those products inflict. Conceptually, the liability embraced by §402A is strict liability because it does not require wrongful conduct, just a product which is defective in some way. Normatively, §402A embraces strict liability because it seeks to provide consumers with as much protection as it can against harm at the hands of defective products. There is a large lesson here. Products liability and enterprise liability are misunderstood when they are understood as simply the expression of insurance conceptions wrongly imported into the law of torts.²⁰ They are in fact stringent forms of responsibility for harm done.

D. Risk in the Modern World

Beneath products liability law’s constitutive premises and justifications lies an unstated assumption about the nature of risk in modern society, namely, that enterprises engaged in activities on a recurring basis—not individuals undertaking isolated risky acts—are the most important source of accidental harm in the modern world. This premise accepts a famous observation of Oliver Wendell Holmes and makes it the basis for a distinctively modern form of responsibility. “Our law of torts,” wrote Holmes, “comes from the old days of isolated, ungeneralized wrongs, assaults,

¹⁷ RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (1997).

¹⁸ See Benjamin Ewing, *The Structure of Tort Law, Revisited: The Problem of Corporate Responsibility*, 8 J. TORT LAW 1 (2015) for an instructive account of “attributive responsibility” and the way that it figures in corporate responsibility.

¹⁹ Cf. Seana Shiffrin, *Enhancing Moral Relationships Through Strict Liability*, 66 UNIV. TORONTO L.J. 353 (2016).

²⁰ See the discussion in the text *infra*, at note 32.

slanders, and the like,” but the world that modern tort law addresses is a world of organized risk.²¹ In our social world, most tortious wrongs (and most harms) are the predictable byproducts of ongoing activities. Enterprises, therefore ought to be treated as the *fundamental units of responsibility* for the purposes of attributing accidental harm.

When we put these pieces together—the doctrine that takes shape in Escola and which is embraced by §402A; the propositions about internalization and distribution that form the core of enterprise liability; the principle and policies that support those two propositions; and the perception that enterprises or activities are the fundamental sources of harm in the modern world—we see that modern products liability law is the embodiment of a set of ideas slowly working themselves pure.

E. The Section 402A Regime

Section 402A’s embrace of enterprise liability set the agenda of American products liability law for the next several decades. In its formative period, the American law of products liability worked to turn §402A’s commitment to holding product manufacturers responsible for the physical harms to persons attributable to their defective products into a well-articulated liability regime. As domains for the imposition of enterprise liability go, product accidents are a challenging one. Enterprise liability is liability for the characteristic risks of an activity, and disentangling activities and their distinctive risks is especially difficult in the product accident context. Product accidents arise at the intersection of two interdependent activities: the design, manufacture, and marketing of the product, and the purchase and use of it. How do we charge some risks to product design or manufacturing, and others to product consumption or use, without deploying criteria of fault? How do we distinguish the activity of making and marketing a product from the activity of purchasing and using it when the two activities are conducted with each other in mind? These are the questions that products liability law struggles with in the wake of its embrace of enterprise liability through §402A. Strict enterprise liability for defective products was born in a context where distinguishing the “characteristic risks” of product manufacture from those of product use was relatively simple. But as the doctrine developed it confronted circumstances where distinguishing persuasively among the relevant activities was (and is) dauntingly difficult.

The great early cases of American products liability law—MacPherson, Escola and Henningsen—involved what came to be called “manufacturing defects.” Manufacturing defects turn out to be an ideal circumstance for the imposition of strict enterprise liability. To this day, liability for manufacturing defects remains strict, and uncontroversially so.²² The hospitality of manufacturing defects as a setting for strict enterprise liability has a great deal to do with the fact that a usable, reliable and persuasive concept of a product “defect” all but tumbles out of the facts of the cases. It was and is obvious that strict liability for defective products cannot be *absolute* liability for injuries caused by product *characteristics*. Perfectly designed and manufactured products can cause serious, even fatal, physical harm. This is obviously true of guns and knives, but it is also true of skis

²¹ OLIVER WENDELL HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 183 (1920). The paper itself was originally delivered in 1897.

²² RESTATEMENT (THIRD) OF TORTS: *Products Liability* § 2(A) *cm. a* (1998).

and bicycles. Holding knife manufacturers strictly liable for all of the intentional or accidental harm inflicted with knives in virtue of the fact that they are sharp is unattractive. Holding ski manufacturers liable for crashes which would not have happened had their skis not been effective at sliding rapidly down a slope is, perhaps equally, unattractive. People purchase and use knives to cut things, and they purchase and use skis to slide down snow-covered slopes. These users are responsible for the harms that result from the ways that they use their knives and their skis. The harms that result from normal and desirable product characteristics do not emerge from product defects. The kind of liability sought by the proponents of products liability was strict, not absolute, and for product *defects*. There must be some product disappointment, some failure of performance, manufacture or design. But how do we define defectiveness without falling back on fault criteria?

In the context of manufacturing defects, the solution is evident on the facts of the cases. Escola's exploding Coke bottle is a representative example. As Andrej Rapaczynski observes,

[T]here was something obviously 'wrong' with the bottle that exploded in Ms. Escola's hand. Indeed, the whole point of a Coke bottle is that it is supposed to allow the consumer to enjoy the drink without anyone ending up in the emergency room of a nearby hospital. So when the bottle exploded in the waitress's hand it was clearly 'defective': it did not work the way that such bottles were *supposed* to work. And this remained true even if the manufacturer had not *done* anything wrong: the bottle at issue was a useful product that had probably been produced and filled according to state-of-the-art technology . . . there was no evidence of any unreasonable failure in the inspection process or any other negligent action anywhere along the way of getting the bottle into the hands of Ms. Escola."²³

Although there was no evidence of negligent conduct, it was plain as day that the product failed because Coke bottles, normally used, are not supposed to explode. This Coke bottle, judged against the standard of the normal Coke bottle, performed defectively.

In manufacturing defects cases, the puzzles of strict products liability all but resolve themselves. Liability is strict, but it is for harm caused by defective products, not for harm caused by product characteristics full stop. And the test of product defectiveness is the product itself—the normal instance of a product is the measure of a manufacturing defect; the product with a manufacturing defect is a “lemon.” When the product sets its own standard of defectiveness in this way, the ensuing liability (1) is strict, (2) incorporates an idea of “wrongness,” and (3) is not a form of fault liability. Negligence is, to use the vocabulary of contemporary tort theory, a “conduct-based wrong.”²⁴ Negligence norms are action-guiding. They govern the conduct of natural and artificial persons, enjoining the exercise of due care and imposing liability when due care is not exercised. The

²³ Andrej Rapaczynski, “Driverless Cars and the Much Delayed Tort Law Revolution,” 9-10 Columbia Law and Economics Working Paper, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2764686.

²⁴ The characterization of torts as “conduct-based wrongs” is prominent in the work of John Goldberg and Ben Zipursky, and before them in Jules Coleman’s work. *See* John Goldberg & Ben Zipursky, *The Strict Liability in Fault and the Fault in Strict Liability*, 85 *FORDHAM L. REV.* 1 (forthcoming, 2016); *see also*, JULES COLEMAN, *RISKS AND WRONGS* (Oxford University Press 2002). Products liability poses a problem for this characterization because it targets products not conduct. Many of its liability rules are not directly action-governing. *See, infra* note 92, and accompanying text.

test of (or “norm for”) a manufacturing defect is not action-guiding in this way. Both the presence and the absence of faulty conduct are irrelevant to the imposition of liability for a manufacturing defect. Assuming harm, normal use and other conditions are not of interest here, liability turns simply on whether or not the product is flawed. The concept of a product defect has a coherent, workable meaning wholly independent of fault as negligence law understands it. Whether or not the defendant’s conduct was deficient is immaterial. The ensuing liability is strict but not absolute, and targeted on the product. Strict enterprise liability works and very well.

The subsequent development of products liability law shows that other kinds of defects—design defects and failures to warn—are much less congenial contexts for the imposition of strict enterprise liability.²⁵ The concept of defectiveness at work in early product defect cases is governed by the thought that a product is defective whenever it fails in a way that disappoints secure and reasonable expectations about product performance. This idea, however, is not always applicable to engineering choices made in the course of product design. When such decisions are at issue, the assessment of product design appears to require negligence-like balancing. Similar puzzles arise with respect to the conceptual architecture of a “strict” duty to warn. In the decades following the adoption of §402A the American law of products liability struggled with these issues. The regime to which §402A gave birth contains important elements of fault liability, though those elements are often reworked to impose a liability more stringent than ordinary negligence liability. Moreover, products liability law’s efforts to answer these questions are abruptly disrupted by a political and legal counter-revolution. That counter-revolution is hostile to strict liability; sympathetic to the reintroduction of fault into design defect and warning liability; and receptive to the revival of contractual limitations on products liability. This counter-revolution begins to reshape American products liability law before that law is fully formed by enterprise liability. The result is that our present products liability law is formed by revolution and counter-revolution, and is caught in the undertow of two powerful but conflicting traditions of thought. Even so, enterprise liability gets deeper into American products liability law than is commonly thought. A fairly well articulated products liability regime develops over the course of products liability law’s enterprise liability moment. Large chunks of that regime are with us today, either explicitly or in submerged form. We cannot fully understand either the past or the present of products liability law without understanding the influence of enterprise liability on its development.

Before we explore the ways in which American products liability law of the 1960s, ‘70s and ‘80s went quite far towards developing a plausible liability regime expressing a strict enterprise conception of responsibility for harm done even with respect to design defects and product warnings, however, we need to explore the idea of enterprise liability itself. Unless “enterprise liability” really should be counted as a “paradigm” then it does not much matter whether or not it was present at the creation of modern American products liability law.

²⁵ The claim that early products liability law as crystallized in §402A was *only* about manufacturing defect is, in my view, an overstatement. For that claim, see George L. Priest, *Strict Products Liability: The Original Intent*, 10 CARDOZO L. REV. 2301, 2301-05 (1989). The pertinent concept of defectiveness was broader. Its focus was product failure causing physical harm.

II. THE IDEA OF ENTERPRISE LIABILITY

The “notion that losses should be borne by the doer, the enterprise, rather than distributed on the basis of fault”²⁶ is not heard often these days,²⁷ but not long ago it was said to have dominated American tort law in the middle third of the twentieth century.²⁸ Indeed, the idea of enterprise liability is often thought of as a distinctively American idea which has since spread to other jurisdictions.²⁹ Be that as it may, enterprise liability ideas are now embattled in the United States though enterprise liability itself may be surging elsewhere.³⁰ If enterprise liability is embattled in practice, it is also contested in theory. In the legal academy, there is at least an undercurrent of

²⁶ Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 500 (1961). Calabresi is epitomizing the idea of enterprise liability; he is also one of its most intellectually powerful and influential proponents.

²⁷ It may, however, be due for reawakening, precipitated by emerging technology which makes too plain to ignore the fact that modern risk is both the product of human agency embodied in technology and systematic. See Rapaczynski, *supra*, note 23.

²⁸ See, e.g., George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUDS. 461 (1985).

²⁹ For example, in discussing the recent enterprise liability turn in English vicarious liability law, Paula Giliker traces the idea of enterprise liability at work in English cases back through Canadian law and to American academic commentary. Paula Giliker, “A Revolution in Vicarious Liability,” p. 11, paper presented to the Obligations VIII Conference co-hosted by the University of Cambridge Faculty of Law and Melbourne Law School and held at Cambridge University July, 19-22 2016. Whatever their origin, enterprise liability ideas can now be found in the case rhetoric of England. See, e.g., Lord Drummond Young in *Cairns v Northern Lighthouse Board* [2013] CSOH 22; 2013 SLT 645 at [37], commenting on the policy that underlies European Union legislation in the field of health and safety at work, which is generally founded on strict liability.

There are important economic reasons for taking such an approach, and indeed for making the protection afforded by such legislation applicable to all employees, whether or not they are employees of the person in breach of the legislation. The underlying economic theory is that the cost of workplace accidents is part of the cost of production of a good or service, and the most efficient way of absorbing that cost is by passing it to the ultimate consumer as part of the price of the product. In this way the cost can be insured against efficiently by the employer, with the premiums being reflected in the price. This is much more efficient than expecting employees to insure against the possible cost of injury through an accident at work; such a course would require a multiplicity of policies, and would not cater well for employees on short-term contracts, or who simply chose to spend their income on other things. Moreover, strict liability has a further advantage over fault-based liability in that it acts as an incentive to reduce the incidence of hazardous activities; the employer knows that if the risk of injury eventuates he will be liable, and thus he is encouraged to take steps to reduce the frequency with which the risk is incurred. Strict liability also encourages employers to do their utmost to ensure the least possible risk to employees’ health and safety. These economic reasons can perhaps be supplemented by the moral argument that those who consume a good or service should pay a proper price for it, including the cost of compensating those injured in the production of the good or service in question. For all these reasons, strict liability has become the norm in European Union-inspired legislation governing health and safety at work.

See generally, DOUGLAS BRODIE, *ENTERPRISE LIABILITY AND THE COMMON LAW* (Cambridge University Press 2010).

³⁰ In the past generation, for example, enterprise liability ideas have come to dominate the English law of vicarious liability. See, e.g., *Lister v. Hesley Hall*, [2001] UKHL, 22 [2002] 1 AC 215; *Cox v. Ministry of Justice*, [2016] UKSC 10, [2016] 2 WLR 806; *Mohamud v. WM Morrison Supermarkets plc* [2016] UKSC 10, [2016] 2 WLR 821. English law is following the lead of Canadian law here. See P. Cane, *Vicarious Liability for Sexual Abuse*, 116 L.Q.R. 21 (2000). The leading Canadian case is *Bazley v. Curry*, (1999) 174 DLR (4th) 45.

doubt as to whether enterprise liability is a form, or a rejection, of common law tort liability.³¹ Broadly speaking, there are two kinds of reasons for this skepticism. One is the identification of enterprise liability with insurance. Scholars as diverse as Jane Stapleton and Ernest Weinrib have sharply contrasted insurance and tort liability, with good reason. In an enduringly influential paper, Stapleton puts it this way: insurance (like the socialization of risk) requires a “pooling” or “collectivization of risk” while tort liability restores victims.³² Insurance and reparation systems are governed by different principles. The general source of skepticism about enterprise liability’s place in tort is that enterprise liability is distinctive in at least two ways. First, enterprise liability is an alternative to traditional fault liability, and it is often embodied in administrative alternatives to the private law of torts. Worker’s compensation is the original, but not the only, example. No-fault automobile insurance is another as are administrative schemes addressing vaccination related injuries, black lung disease, and nuclear accidents.³³ Enterprise liability in law of torts may be, at least in part, the colonization of the common law by ideas whose native habitat is statute. Second, enterprise liability’s popularity in mid-twentieth century tort theory almost surely owes something to peculiarities of the American context—to the comparative underdevelopment of social insurance in America, for example.

Even so, it is a mistake to think that enterprise liability is alien to the common law. Vicarious liability in the law of torts is one of enterprise liability’s two principal fonts;³⁴ the modern common law of products liability in its formative period (roughly 1963-1985) is widely recognized as one of its principal incarnations;³⁵ and enterprise liability represents the fullest development of the idea of responsibility found in harm-based common law strict liability.³⁶ Enterprise liability is entangled with the institution of insurance, but it is also an expression of a principle of responsibility with deep roots in the common law. Indeed, instead of being an alien phenomenon, enterprise liability may have been the most important common law innovation of the twentieth century. Its significance for American private law has been compared to the significance of the Warren Court for American public law, and justifiably so.³⁷ Whether or not enterprise liability is a coherent, overarching conception of responsibility in tort, it is now and has long been an important idea.

³¹ See e.g., Robert Stevens’ discussion of enterprise liability as a justification for vicarious liability in ROBERT STEVENS, *TORTS AND RIGHTS*, 258-59 (2007). The worry that enterprise liability can only make hash of the law of vicarious liability, present in Stevens’ work, also permeates contemporary commentary on the enterprise liability turn in English vicarious liability law. See e.g., Giliker, *supra* note 29; Rachael Leow, “A Misguided Revolution in Vicarious Liability?” paper presented to the Obligations VIII Conference co-hosted by the University of Cambridge Faculty of Law and Melbourne Law School and held at Cambridge University July 19-22, 2016.

³² Jane Stapleton, *Tort, Insurance and Ideology*, 58 *MODERN L. REV.* 820 (1995). For recent discussion, see Jenny Steele, *Tort, Insurance and the Resources of Private Law* in *TORTS IN COMMERCIAL LAW* (Degeling, et al., eds. 2011).

³³ See Gregory C. Keating, *Rawlsian Fairness and Regime Choice in the Law of Accidents*, 7 *FORDHAM L. REV.* 1857, 1898-1908 (2004).

³⁴ See Young B. Smith, *Frolic and Detour*, 23 *COLUM. L. REV.* 444, 716 (1923); Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 *VAND. L. REV.* 1285 (2001). See also, P.S. Atiyah, *Vicarious Liability in the Law of Torts*, 26 *CAMBRIDGE L.J.* 150 (1968).

³⁵ See Priest, *supra* note 28, at 520–21.

³⁶ See *infra*, note 60, and accompanying text.

³⁷ G. EDWARD WHITE, *TORT LAW IN AMERICA* 168–73, 197–207, 208 (expanded ed. 2003).

Enterprise liability is usually explained in short slogans—“activities should bear the costs of those accidents that result from their characteristic risk impositions”; “it is only fair that an industry should pay for the injuries it causes”; “losses should be borne by the doer, the enterprise, rather than distributed on the basis of fault.”³⁸ These slogans are useful as epitomizations, but they are too terse to serve as satisfactory explications. They point us, however, towards the theses stated at the beginning of the paper. Enterprise liability is constituted as a distinctive regime of tort liability in part because it asserts:

- (1) That the costs of those accidents that are characteristic of an enterprise should be absorbed by the enterprise as an operating expense, not left on those whose bad luck it is to get in the enterprise’s way;
- (2) That the costs of enterprise-related accidents should not be concentrated either on the victim who originally suffered the injury, or on the particular agent who inflicted the injury; and
- (3) That the costs of such accidents should instead be distributed among those who benefit from the imposition of the enterprise’s risks.

In the case of private firms, the costs of enterprise-related harms should be distributed among customers, employees, suppliers, and shareholders, rather than concentrated either on the victim or on the particular agent responsible for the harm at issue.

Next, enterprise liability is most fully realized as a form of strict liability. As a form of strict liability, enterprise liability imposes liability on the “characteristic risks” of activities.³⁹ In the law of vicarious liability, for example, an enterprise liability approach holds firms accountable for “accidents which may fairly be said to be characteristic of [their activities].”⁴⁰ “Characteristic” accidents are those “that flow from [an enterprise’s] long-run activity in spite of all reasonable precautions on [its] part.”⁴¹ The characteristic risks of harm imposed by the structured, systematic activities that enterprise liability subjects to liability are thus *assumed to be reasonable, not unreasonable*. Enterprise liability presumes that the burden of avoiding “characteristic risks” is not worth the benefits of doing so. In a nutshell, enterprise liability supposes that it is reasonable to impose the risks that it governs, but unreasonable not to pay for the harms that issue from those risks. An “enterprise” conception of vicarious liability therefore has a distinctive cast. It asserts that in imposing strict liability on firms for the torts of their employees committed within the scope of employment the doctrine of *respondeat superior* expresses “the desire to include in the costs of [a firm’s] operation inevitable losses to third persons incident to carrying on an enterprise, and thus distribute the burden among those benefitted by the enterprise.”⁴² From an enterprise liability perspective, the scope of vicarious liability should turn not upon the motives or intentions of the

³⁸ See Calabresi, *supra* note 26, at 500 and the sources cited therein.

³⁹ See RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 18 (characterizing strict liability as liability for “characteristic risk.”) (1997).

⁴⁰ *Ira S. Bushey & Sons v. United States*, 398 F.2d 167, 171 (2d Cir. 1968).

⁴¹ *Id.*

⁴² Smith, *supra* note 34, at 718.

servant whose tort is at issue, but upon whether the activity of the firm involved tends to expose third parties to the kind of risk that materialized in injury in the case at hand.

We can generalize this example and say that fully realized strict enterprise liability imposes liability on activities for their “characteristic risks,” in order to distribute the costs of an activity across those who benefit from the harm it causes. Thus, enterprise liability’s two prescriptive theses—(1) that characteristic accident costs should be internalized; and (2) that they should be spread across the beneficiaries of the enterprise—are linked by a factual assumption. Enterprise liability assumes that when an enterprise is made liable for its characteristic toll in life, limb, and property damage, it will usually insure (or self-insure) against that liability and will factor the cost of such insurance into the cost of its products; the prices that it pays to its suppliers; the wages of its employees; and so on. For its part, the theory of enterprise liability also assumes, as strict liability generally does, that the activity it addresses is worthwhile and ought to continue, provided it pays its way. Enterprises should be held accountable for their characteristic risks because imposing liability for harm issuing from both reasonable and unreasonable risk impositions implements the principle that it is only fair for those who benefit from the imposition of an enterprise’s risks to take the bitter with the sweet and bear the accident costs that inevitably flow from those risks. But we are moving too quickly.

A. Liability for Characteristic Risk

The Restatement (Third) of Torts observes that “[s]trict liability is liability imposed without regard to the defendant’s negligence or intent to cause harm. In a strict-liability case, the plaintiff need not prove the defendant’s negligence or intent, and the defendant cannot escape liability by proving a lack of negligence or intent.”⁴³ One consequence of the fact that strict liability is not liability for harms flowing from wrongful conduct is that it is liability for the “characteristic risks” of an activity. Section 21 of the Restatement (Third) of Torts explains: “When conduct is identified as justifying strict liability, the rationale for strict liability generally relates to certain risks that are characteristic of the conduct. In light of this rationale, strict liability is typically limited to those harms that result from the risks justifying strict liability.”⁴⁴ This idea of “characteristic harm” is the same idea that Judge Friendly appeals to when he writes that an enterprise liability approach to vicarious liability holds firms accountable for “accidents which may fairly be said to be characteristic of [their activities].”⁴⁵ “Characteristic” accidents are those “that flow from [an enterprise’s] long-run activity in spite of all reasonable precautions on [its] part.”⁴⁶

⁴³ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, Ch.4, “Scope Note.”

Negligence liability, by contrast, is usually defined affirmatively, as liability predicated on a failure to take due care.

⁴⁴ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM §21, *Comment g Scope of liability*. See also § 22 *Comment f. Scope of liability*. (“Strict liability is justified because of the characteristic harms that are caused by wild animals. If the harm the plaintiff incurs is not a product of the risks posed by wild animals, then the strict liability set forth in this Section does not apply.”).

⁴⁵ *Ira S. Busbey & Sons v. United States*, 398 F.2d 167, 171 (2d Cir. 1968).

⁴⁶ *Id.*

Although strict liability seems to be as old as tort law itself, influential articles have challenged the very *possibility* of accurately attributing harms to activities without the use of a fault criterion. Although these articles rarely mention the “characteristic risk” criterion by name, they are written broadly enough to sweep it within the scope of their criticisms. Stephen Perry, for example, has argued that “general strict liability” is impossible, a thesis he develops largely by criticizing the theories of strict liability propounded by Richard Epstein and Robert Nozick.⁴⁷ Perry’s criticisms of Epstein and Nozick have considerable merit, in my view, but they have less force when they are directed against the strict liability doctrines. For one thing, even enterprise liability does not contemplate “general strict liability.” It contemplates a world in which there is strict liability for activities or enterprises and fault liability for individual actors.⁴⁸ For another, when Perry generalizes his arguments against Epstein and Nozick, he is really arguing that a purely causal criterion of liability is unworkable because all accidents arise at the intersection of activities. This is Coase’s argument. Unsurprisingly, when Perry makes this argument, he cites Coase.⁴⁹

If we think, with Coase, that all harms are jointly caused, then enterprise liability is a wildly implausible idea. Coase’s view, I suspect, flows from his normative framework. If all we care about is extracting maximum value out of clashing activities, then the question of who did what to whom is simply irrelevant. Be that as it may, the tort law of strict liability does not think either in Coasean terms or in purely causal terms. For tort law, the “pig in the parlor” circumstance where the only wrong is the incompatibility of two valuable activities is a special case, not the norm. And the criterion of characteristic risk is not purely causal. The criterion of characteristic risk is a normative, non-fault criterion. It mixes factual and evaluative judgment in the way that reasonable person judgments do, but without appealing to fault. When someone uses dynamite for blasting, and the dynamite accidentally detonates while in transit, courts have no trouble attributing the harm that results to the activity of blasting, not to the activity of living near construction of a hydroelectric plant.⁵⁰ The use of explosives in blasting increases the risk of an unintentional explosion above the normal, background level of such risk and it does so no matter how much care is exercised. So, too, the practice of shore leave as the Coast Guard conducts it increases the risk of drunken accidents in the vicinity of berthed Coast Guard ships.⁵¹ In saying this, Judge Friendly is invoking the factual thought that sailors on shore leave are more likely to get drunk than the normal person is, and to the evaluative judgment that the activities of the Coast Guard—cooping people up in confined physical spaces under strict authority and then turning them loose for short bursts of rest and recreation—tend to induce drunkenness. When Coke bottles explode in the course of normal use courts have no

⁴⁷ Stephen Perry, *The Impossibility of General Strict Liability*, 1 CANADIAN J. OF LAW AND JURIS. 147 (1988). RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM §21, *Cmt.f. The idea of strict liability for the causation of harm* struggles with the thought that the attribution of harm to activity in strict liability is a purely causal matter.

⁴⁸ James Henderson, a staunch critic of enterprise liability and a reporter for the Restatement (Third) of Torts: Products Liability, recognizes this point clearly. See James A Henderson, Jr. *The Boundary Problems of Enterprise Liability* 41 MARYLAND L. REV. 659, 659-60 (1982) (“For the enterprises singled out for the imposition of enterprise liability, strict liability will replace fault-based liability; . . . traditional negligence principles will continue to govern the tort liabilities of what might be termed ‘non-enterprises— that is, the noncommercial, nonprofessional, non-governmental activities of individuals and groups of individuals in our society.’”)

⁴⁹ Perry, *supra* note 47, at 157, citing Ronald Coase, *The Problem of Social Cost*, 3 J. OF LAW & ECON. 1, 12–13 (1960).

⁵⁰ See *Exner v. Sherman Power*, 54 F.2d 510 (2d. Cir. 1931).

⁵¹ See *Bushey*, 398 F.2d 167.

trouble saying that they are defective because they disappoint reasonable consumer expectations about product performance. That kind of normative, non-fault judgment—not a purely causal judgment—is the kind of judgment that strict liability regimes must make.

In some contexts, it is relatively easy to construct normative, non-fault criteria for attributing accidents to activities. Manufacturing defects are a case in point. When such criteria can be constructed effectively, the “characteristic risks” of an enterprise can be identified reliably and enterprise liability can be instituted with little difficulty. The example of manufacturing defect liability shows that strict enterprise liability is far from impossible. Whether or not strict enterprise liability can be implemented with respect to a particular activity is a question of whether or not non-fault criteria for attributing accidents to activities can be devised. If attribution rules are easy to devise in some contexts, they are hard to devise in others. Design defects, as we shall see, are a difficult case. Products are designed and marketed with users in mind and users choose products with some design features and uses in mind. Distinguishing the characteristic risks of designing and marketing products from the characteristic risks of consuming and using them can be very difficult. When the attribution of accidents to activities is difficult the “boundary problem in enterprise liability” looms large. But it looms large by virtue of the features of particular contexts, not because it is generally impossible to attribute accidents to activities without invoking fault.⁵² The only way to tell if satisfactory non-fault attribution rules can be devised for some domain is to try and devise them.

B. Elaborating the Rationales

If enterprise liability is defined by the theses that the costs of accidents that are characteristic of an enterprise’s activity should be absorbed by the enterprise and distributed across all those who benefit from its activities, enterprise liability is also supported by the three distinct justifications found in §402A. The first of these is that cost-internalization will induce an appropriate level of accident prevention. The second is that the dispersion of accident costs is desirable because it is easier for many people to bear a small fraction of some total cost than it is for any one of them to shoulder it alone. The third is that it is fairer to distribute the costs of enterprise-related accidents across those who benefit from the enterprise than it is to leave those costs concentrated on the random victims of the enterprise’s activity. Although these three rationales converge in support of enterprise liability, they have different implications and divergent origins.

The first rationale—accident prevention—has much in common with familiar (in America, anyway) economic rationales for negligence liability. Inducing appropriate precautions is, for legal economists, the fundamental point of negligence liability.⁵³ Enterprise liability, however, rests on a different idea from negligence liability of how accident prevention is to be effected. Where

⁵² James Henderson, *The Boundary Problems of Enterprise Liability*, *supra* note 48, both puts its finger on the problem and overstates it. Henderson’s introductory example at p. 666 of his paper overlooks the normative character of attribution criteria and therefore exaggerates the problem. Professor Henderson further develops his position in *James A. Henderson, Why Negligence Dominates Tort* 50 UCLA L. REV. 377 (2002).

⁵³ See, e.g., Richard Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33 (1985).

negligence law asks: “What precaution should have been taken to guard against this risk?” enterprise liability asks: “Who is in the best position to take precautions against this kind of risk?” Where negligence seeks to induce appropriate accident prevention by determining whether some untaken precaution should have been taken, enterprise liability seeks to induce appropriate accident prevention by determining who should make the choice between preventing an accident and letting it happen, and then holding the party that is in the best position to make that choice liable for all the accidents that it chooses not to prevent.⁵⁴

The second rationale—loss-spreading—has no real counterpart in negligence rhetoric. Negligence cases rarely speak about loss-spreading. Negligence theorists generally suppose that, if loss-spreading is appropriate, it can be accomplished by the purchase of first-party loss insurance by prospective victims. Enterprise liability theory supposes, on the contrary, that the dispersion of accident costs is plainly desirable and should be realized by the liability system. Loss-spreading is desirable for the same reason that insurance is desirable. Most people prefer bearing a small, certain cost to a large, but uncertain, one. This is especially true when the cost in question is potentially so large that its occurrence would be devastating. When this is the case, insurance is an important instrument of security: it sustains the integrity of our persons and our lives in the face of harm that would otherwise leave them shattered.⁵⁵ Insofar as it secures persons and property against serious harm, the institution of insurance is an institution which shares a mission with tort law. Insurance should be supplied *to* victims because it secures victims against harm that has not been or cannot be avoided. It should be supplied *by* the liability system because enterprises are generally the best insurers of the risks that characterize their activities.

These first two rationales are usually classified as policies. Accident-avoidance and loss-dispersion identify desirable ends and counsel in favor of using liability as an instrument well-suited to realize those ends. As policies, they are subject to an important objection. It is unacceptable to hold people (natural or artificial) responsible for accidental harms just because desirable deterrence and insurance effects will be realized if they are. In order to be held responsible for harms people have to act in such a way that we may justly attribute the harms to them. The mere fact that someone can disperse a loss effectively does not make them antecedently responsible for inflicting that loss.⁵⁶ Moreover, while the insurance rationale was unquestionably one of the main justifications

⁵⁴ This idea is famously developed in Calabresi & Hirschoff, *supra* note 7, at 1060 (1972).

⁵⁵ In JOHN STUART MILL, *UTILITARIANISM*, 67 (Oskar Piest ed., 1957), Mill writes “[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 . . . 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.” Neil MacCormick notes the fundamental connection between tort law and security in *The Obligation of Reparation*, 78 *PROCEEDINGS OF THE ARISTOTELIAN SOCIETY* 175 (1977).

⁵⁶ Judge Friendly recognizes this point in his *Bushey* opinion. He writes,

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*. . . . A policy analysis is thus not sufficient to justify [expanding] vicarious liability. This is not surprising since *respondeat superior*, 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

for enterprise liability at the time that modern products liability law took shape, its claim that the product manufacturer is almost always the best insurer has proven to be, at best, debatable. Sometimes victims are the best insurers of product accidents and sometimes loss insurance is superior to liability insurance as a mechanism for dispersing the costs of product accidents. These arguments, indeed, were central to the attack that Priest and others mounted on products liability doctrine in the late 1980's. The relative merits of first- and third-party insurance mechanisms as devices for mitigating the costs of product accidents turns out to be a much more complicated and uncertain matter than enterprise liability's early proponents realized.⁵⁷

The third rationale—that the burdens and benefits of enterprise-related accidents should be proportionally distributed—expresses an appropriate idea of justice or fairness. And in contrast to the loss-spreading rationale this rationale may have been underplayed in the literature. It is not, for example, one of the justifications for enterprise liability that George Priest considers important.⁵⁸ When an enterprise physically harms a random victim in the course of pursuing its own benefit, unless the enterprise repairs the harm it has done, it exploits the victim for its own gain. It enriches itself through impairing the physical integrity or the property of the victim. By requiring reparation enterprise liability rights the wrong that would otherwise occur, namely, the wrong of making the victim the involuntary instrument of the enterprise's self-enrichment. In so doing, it also distributes

enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities." *Bushey*, 398 F.2d at 171 (internal citation omitted).

⁵⁷Academic critics of enterprise liability, including Priest, are especially hard on enterprise 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) (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) (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 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).

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) (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 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) (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).

⁵⁸ See Priest, *supra* note 28.

fairly the burdens and benefits of risky activities. Those who reap the benefits also bear the burdens. This principle of fairness is the generalization of a principle found in all harm-based strict liability, and it is the fundamental link between enterprise liability and more familiar forms of strict liability in tort—or so the next section shall argue.

Enterprise liability sometimes finds expression in negligence guise, but it finds its fullest expression in strict liability, because negligence liability stops short of imposing liability on characteristic risk.⁵⁹ Understanding enterprise liability thus requires understanding harm-based strict liability in general. In American tort law, strict liability comes in at least two forms. One form of strict liability is harm-based. The other form is based on an impermissible interference with an autonomy right. The first, harm-based, form is found in corners of accident law and in nuisance law. The second, autonomy rights-based, form is found mostly in intentional wrongs to the person or to property. Different meanings of the slippery terms “fault” and “strict” are relevant in these two contexts. In general, liability is strict when one need not prove that the defendant’s conduct was faulty in order to establish liability. Fault, however, may be absent either because the conduct is justified or because it is excused. Harm-based strict liabilities are strict in that they are imposed on *justified* conduct. Rights-based strict liabilities are strict in that they are imposed on *innocent* conduct, conduct which—from a moral point of view—we would be inclined to *excuse*. Enterprise liability is a form of harm-based strict liability and the fullest expression of an idea of fairness found in all harm-based strict liabilities.

C. Harm-Based Strict Liability

In modern American tort law, harm-based strict liability is illustrated most clearly by the law of intentional nuisance when it distinguishes between unreasonable conduct and unreasonable harm, and imposes liability for the infliction of unreasonable harm. Unreasonable conduct is conduct which inflicts injury unjustifiably. Negligent conduct, or faulty conduct, is unreasonable conduct: It exposes others to a risk of harm that ought not to have been imposed. By contrast, unreasonable harm is harm which should not go unrepaired by the party responsible for its infliction, even though that harm issued from conduct which was beyond reproach. Unreasonable harm is harm for which an actor is strictly liable—liable even though the actor was not at fault in inflicting the harm at issue.

Modern American nuisance law imposes liability for the infliction of unreasonable harm when, as in the famous case of Boomer v. Atlantic Cement, it holds that damages should be paid for an unreasonable interference with plaintiffs’ rights to the reasonable use of their property, even though the conduct responsible for that interference is justified and ought to be continued.⁶⁰ By revising the normal remedy for the wrong of nuisance in New York—from an injunction as a matter of right to damages as a matter of right with injunctive relief available only on a showing of unreasonable conduct—Boomer revises the underlying rights. Reasonable conduct resulting in

⁵⁹ See Robert Rabin, *Some Thoughts on the Ideology of Enterprise Liability*, 55 MD. L. REV. 1190, 1193 (1996).

⁶⁰ Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970). See RESTATEMENT (SECOND) OF TORTS §822. See also, RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM §20 *cm. c* “*Relationship to Private Nuisance*”.

unreasonable interference with another's use and enjoyment of land is wrong only if the party inflicting the interference fails to make reparation for the harm that they inflict. Reparation transforms unreasonable harm into harm whose imposition is justifiable, and fairly reconciles competing, equal rights to the use and enjoyment of land. Boomer, and the distinctive modern American form of liability for intentional nuisance that it embodies, is thus a canonical instance of strict liability for unreasonable harm. Other entrenched instantiations include private necessity cases such as Vincent v. Lake Erie,⁶¹ liability for abnormally dangerous activities; liability for manufacturing defects in products liability law; and *respondeat superior*—the liability of masters for the torts committed by their servants within the scope of their employment.

The obligation imposed by all of these doctrines is an obligation to undertake an action (e.g., saving your ship from destruction at the hands of a hurricane by bashing the dock to which it is moored), or conduct an activity (e.g., operating a business firm) *only on the condition* that you will repair any physical harm for which your action or activity is responsible even though there is no fault in your infliction of the harm itself. The reciprocal right is a right to have any physical harm done to you undone by the party responsible for its infliction. All of these harm-based liabilities are strict in that they impose liability on *primary conduct which is not wrong*. The only thing wrong with the defendant's conduct is its failure to repair the harm it has inflicted.⁶² Stated affirmatively, these strict liabilities impose liability on conduct that is justified, on inflictions of harm that are reasonable. Negligence liability, of course, predicates liability on conduct which is unjustified, on conduct which is unreasonable because it does not show due regard for the property and physical integrity of those that it harms.

D. *The Internal Morality of Harm-Based Strict Liability*

At least in American tort theory, harm-based strict liabilities are a species of tort liability that now struggles for recognition. In part, this may be because harm-based strict liabilities do not fit easily in the conception of torts as “conduct-based wrongs,” which has become prominent in American tort theory.⁶³ Harm-based strict liabilities have the structure of modern intentional nuisance liability of the Boomer variety. They occupy a space which both negligence liability and contemporary tort theory tend to eclipse. In negligence, the obligation to repair arises from the infliction of harm that should have been avoided. In harm-based strict liability, the obligation to repair arises from the infliction of harm that should *not* have been avoided, but which should be borne by the party responsible for its infliction. In the circumstances where they govern, harm-based strict liabilities assert that it is wrong for an actor to do harm without stepping forward and repairing the harm done. The primary duty that harm-based strict liability institutes is *not* a duty not to harm; it

⁶¹ *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910).

⁶² This is sometimes expressed as the difference between “fault” and “conditional fault.” See Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959). Another way to express this difference is to say that negligence criticizes the primary conduct responsible for the harm in question; a finding of negligence asserts that the defendant's conduct was insufficiently careful and that careful conduct would have avoided the harm in question. Strict liability criticizes the secondary conduct of the defendant in failing to repair harm faultlessly inflicted. I owe this vocabulary to Lewis Sargentich. The discussion in the text adopts this vocabulary.

⁶³ See the sources cited *supra* note 24.

is a duty to harm only through reasonable, justified conduct, and to make reparation for any harm done even though due care has been exercised. Failing to make reparation evinces insufficient regard for the rights of the person harmed, even though the conduct responsible for inflicting that harm is beyond reproach.

A conduct-based wrong is one where a right is violated when an agent fails to conform her conduct to the standard required by the law. Fault liability is a canonical illustration; it predicates responsibility for physical injury on the judgment that the defendant failed to conform her conduct to the standard of reasonable care.⁶⁴ Conduct-based wrongs involve defective *primary* conduct. The law lodges its criticism against the infliction of harm in the first instance, on the ground that the conduct responsible for the harm was wrong. The harm, therefore, should never have occurred. Strict liability, by contrast, predicates responsibility on the judgment that the conduct at issue was justified (or reasonable) *in inflicting injury*, but unjustified (or unreasonable) *in failing to repair the injury done*. This is criticism of defective *secondary* conduct. The law lodges its criticism against harming justifiably without repairing. This kind of strict liability identifies a *conditional wrong*. It circumscribes a domain within which the infliction of harm is justifiable, but only on two conditions: (1) that the conduct-inflicting injury is justified or reasonable; and (2) that reparation is made for physical harm done by that reasonable conduct.

Conditional privilege in the law of private necessity—the doctrine of Vincent v. Lake Erie—illustrates the distinction between primary and secondary criticisms of conduct. The defendant ship owner’s conduct in lashing its ship to, and damaging, the plaintiff’s dock was reasonable not unreasonable, right not wrong.⁶⁵ The defendant had the right to use the dock to save its ship from destruction at the hands of the storm, even if using the dock involved damaging the dock. The defendant’s privilege to trespass was *not* conditioned on doing no harm to the dock, a requirement which would have been impossible to meet in the circumstances.⁶⁶ The defendant’s privilege was conditioned on making reparation for any harm done to the dock, *even though that harm was done rightly*

⁶⁴ The fundamental question in negligence law is whether conduct falls below “a standard established by the law for the protection of others against unreasonable harm.” Negligence law fixes that standard by the *conduct* of a “reasonable person in the circumstances.” RESTATEMENT (SECOND) OF TORTS § 283. *See, e.g., Ladd v. County of San Mateo*, 12 Cal.4th 913, 917 (1996).

⁶⁵ *Vincent v. Lake Erie Transp. Co.*, 124 N.W. at 221.

⁶⁶ Taxonomically, this is a complicated matter. In Hohfeldian terms, the ship’s privilege to enter is a right: the ship is entitled to enter, and the dock owner is under a duty not to resist. *See* Francis H. Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests in of Property and Personality*, 39 HARV L. REV. 307 (1926). This privilege is also a power in Hohfeld’s terms, because it enables the ship owner to alter its relations with the dock owner without the dock owner’s permission, as long as the ship enters the dock owner’s property for certain purposes (to save its own property), and conducts itself in certain ways (only does what is necessary to save its own property). Along with Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959), Bohlen’s article is a classic statement of the idea of strict liability I am developing in this paper. Similar positions have also been reached by others. *See, e.g.,* Howard Klepper, *Torts of Necessity: A Moral Theory of Compensation*, 9 LAW & PHIL. 223, 239 (1990) (“The need to compensate in the necessity cases is best explained by the wrongfulness of knowingly benefitting oneself by transferring a loss to another, however reasonably, and then letting the loss lie with one’s unwitting benefactor. Such a transfer of the loss or risk is wrongful in that it does not allow the innocent party to freely choose the risks she is willing to undertake.”).

and not wrongly. The wrong in Vincent lay not in the defendant's doing damage to the dock, but in the defendant's wrongful (or unreasonable) failure to step forward and volunteer in the aftermath of the storm to repair the damage done to the dock.

Put differently, Vincent's strict liability is liability for unreasonable harm, not liability for unreasonable conduct. In Vincent, making reparation for the harm done by docking prevents the injustice of shifting the cost of the ship's salvation from the ship owner who profits from it onto the dock owner who does not. The imposition of liability on the ship owner for failing to make such reparation rights the wrong of shifting the cost of the ship's salvation onto the dock owner whose property is the instrument of that salvation. The wrong in strict liability is thus "harming justifiably but unjustifiably failing to repair the harm justifiably done."⁶⁷ Generalizing from Vincent, we can say that the wrong involved in harm-based strict liabilities is akin to the wrong in restitution. In restitution cases, the basic wrong consists of retaining a benefit whose retention unjustly enriches its recipient at the expense of the party conferring the benefit. In harm-based strict liabilities, the basic wrong consists of *benefitting from the reasonable infliction of harm on another who merely suffers from its infliction*. The role of reparation is to undo that wrong by erasing the harm. When reparation is made, the injurer continues to benefit but no longer benefits by harming the victim.

Structurally, harm-based strict liability in tort resembles eminent domain in public law. Eminent domain law holds that it is permissible for the government to take property for public use only if the government pays just compensation to those whose property it takes. This is a two-part criterion. First, the taking must be justified; that is, it must be for a public use. Second, compensation must be paid for the property taken. Harm-based strict liability in tort has a parallel structure and a parallel justification.⁶⁸ The defendant acts justifiably in inflicting harm. Vincent has nothing to complain about when Lake Erie's ship bashes its dock. Lashing the ship to the dock is justifiable conduct and the harm it inflicts is justifiable harm. Vincent's ground of complaint is that it should not have to bear the cost of the ship's salvation. Lake Erie, who reaps that benefit, should bear the burden that is the price of that benefit. Strict liability asserts that the costs of necessary or justified harms should be borne by those who benefit from their infliction, and not by those whose misfortune it is to find themselves in the path of someone else's pursuit of their own benefit, however reasonable that pursuit may be.

⁶⁷ *Vincent* is thus a clear counter-example to the claims of some prominent tort scholars that strict liability involves a duty not to do harm, full stop. Jules Coleman and John Gardner hold views of this kind. John Gardner, *Obligations and Outcomes in the Law of Torts*, in *RELATING TO RESPONSIBILITY: ESSAYS FOR TONY HONORÉ* 111 (P. Cane & J. Gardner eds., 2001).

⁶⁸ This "private eminent domain" conception of strict liability may make its first appearance in American tort theory in the writings (some famous and some obscure) of Oliver Wendell Holmes. These writings are cited and discussed in Thomas C. Grey, *Accidental Torts*, *VAND L. REV.* 1225, 1275–1281 (2001), and at greater length in his unpublished manuscript *Holmes on Torts* (on file with author). Two other classic statements are Francis Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality*, 39 *HARV. L. REV.* 307 (1926) and Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 *HARV. L. REV.* 401 (1959).



Harm-based strict liability thus involves both fairness or justice, and wrong or rights-violation. To say that it is unfair for an injurer to thrust the cost of its activities onto a victim is not the same as saying that the victim's right is violated by so doing. It may, for example, be unfair for me to rebuild my house and block the passage of air through your chimney. The loss to you may be great and the gain to me may be trivial. Unless you have a right to that passage, however, what I have done is not a legal wrong.⁶⁹ Strict liability is, therefore, justified both by the principle of fairness that those who benefit from inflicting harm on others should also shoulder the cost of that harm, *and* by the further claim that the harm done is the invasion of a right so that failure to make reparation for harm done would be a wrong. Harm-based strict liabilities are justified in part by the claim that leaving the cost of the harm on the victim who suffers it shows insufficient respect for the victim's rights—rights of property in the case of both nuisance and the conditional privilege of private necessity.

Vincent is once again illustrative.⁷⁰ It would not only be unfair for the ship owner to shift the cost of saving its ship off onto the dock owner, it would also violate the dock owner's property rights. The dock owner's right to exclude the ship must yield to the dire emergency—the “necessity”—in which the ship found itself.⁷¹ But there is no reason why the dock owner's right to the integrity of its property should give way. Saving the ship requires damaging the dock, but it does not require that the cost of saving the ship be shifted onto the owner of the dock instead of being borne by the ship owner who profits from doing that damage. Harm-based strict liabilities define a particular class of *conditional wrongs* where the law lodges its criticism against defendant's failure to repair, not against defendant's primary, injury-inflicting conduct.⁷²

E. Enterprise Liability as a Harm-Based Strict Liability

Harm-based strict liabilities have a complex structure. They involve justified harmful conduct, whereas negligent torts do not. But they also involve wrongs—that is the violation of a right—and unfairness. The wrong, in brief, lies in failing to repair harm in circumstances where it is fair for the actor to inflict the injury, but unfair for the actor to leave the ensuing loss on the victim. The wrong involved in harm-based strict liabilities lies in *benefitting from the reasonable infliction of harm on another at the expense of that other—that is, without making reparation for the harm from which one has*

⁶⁹ *Bryant v. Lefever*, 4 C.P.D. 172 (1878-79).

⁷⁰ *Vincent*, 124 N.W. 221 (Minn. 1910).

⁷¹ “The situation was one in which the ordinary rules regulating property rights were suspended by forces beyond human control . . .” *Id.*

⁷² One way to manage the fact that harm-based strict liabilities do not properly fit the template of a conduct-based wrong is to restate the concept of a conduct-based wrong in a way which obliterates the distinction between primary and secondary conduct. Asserting, say, that any conduct which violates a right is wrongful conduct obliterates the distinction. Some tort scholars appear to use the notion or a wrong in just this way. See ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW* (1995); ARTHUR RIPSTEIN, *PRIVATE WRONGS* (2016). See also Goldberg & Zipursky, *supra* note 24. The fundamental reason to reject this understanding of “conduct-based wrong” is that obliterating the distinction between primary and secondary criticism of conduct impairs our ability to understand strict liability in tort. We want categories that enable comprehension instead of frustrating it.



benefitted. Harm-based strict liabilities are corrective in a fundamental way: they undo interactions which involve one actor who benefits herself by (justifiably) harming another. But they also go beyond corrective justice because they embody a principle of fairness. This principle of fairness is most evident in enterprise liability and enterprise liability is, in this respect, the most fully realized of the harm-based strict liabilities within the law of torts.⁷³

Enterprise liability considers activities, not individual actions, as the basic unit of responsibility in tort. In the law of vicarious liability—its most important common law application—enterprise liability applies to firms, through the risks created by their employees in the course of pursuing the firm’s business. In its most important administrative application, worker’s compensation, enterprise liability applies to the activities of firms insofar as those activities occasion harm to their employees. Within tort, strict enterprise liability is found primarily in vicarious liability, abnormally dangerous activity liability, and pockets of products liability.⁷⁴ The fairness case for enterprise liability is epitomized by saying that it distributes the costs of accidents across those who benefit from the underlying risks. This slogan can be unpacked into three components.

The first component is fairness to victims. It is unfair to concentrate the costs of characteristic risk on those who simply happen to suffer injury at the hands of such risk, when those costs might be absorbed by those who impose the characteristic risk. Fairness prescribes proportionality of burden and benefit. Victims who are strangers to the enterprise derive no benefit from it, and it is therefore unfair to ask them to bear a substantial loss when that loss might be dispersed across those who participate in the enterprise and therefore do benefit from it. Victims who are themselves participants in an enterprise share in its benefits, but not in proportion to the detriment they suffer when they are physically harmed by the enterprise. Here, enterprise liability is fairer than negligence. It disperses the costs of enterprise-related accidents and distributes them within the enterprise, so that each bears a proportionate share.

The second component is fairness to injurers. Enterprise liability is fair to injurers because it simply asks them to accept the costs of their choices. Those who create characteristic risks do so for their own advantage, fully expecting to reap the benefits that accrue from imposing those risks. If those who impose characteristic risks choose wisely—if they put others at risk only when they stand to gain more than those they put in peril stand to lose—even under enterprise liability they will normally benefit from the characteristic risks that they impose. If they do not, they have only their poor judgment to blame, and society as a whole has reason to penalize their choices. Consider the facts of *Ira S. Bushey and Sons v. United States*. A drunken sailor, returning from shore leave to the

⁷³ The fairness case for enterprise liability beyond tort is powerfully made by Jeremy Waldron in *Moments of Carelessness and Massive Loss*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 387 (David G. Owen ed., 1995).

⁷⁴ The proposition that the vicarious liability of a master for the torts of its servants is strict liability *in tort* is a contestable one. See ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW* 185-87 (1995) (arguing that vicarious liability is really agency law). There is little doubt, however, that it is the overwhelmingly dominant understanding of the doctrine in American law, even by those who are not proponents of strict liability. See, e.g., *Konradi v. United States*, 919 F.2d 1207, 1210 (7th Cir. 1990) (“The liability of an employer for torts committed by its employees—without any fault on his part—when they are acting within the scope of their employment, the liability that the law calls “*respondeat superior*,” is a form of strict liability.”).

dry-dock in which his ship was berthed, spun the wheel that controlled the dock's valves and flooded the dry-dock.⁷⁵ In upholding the imposition of liability, Judge Friendly asserted, in a nutshell, that the Coast Guard lets its sailors loose on shore leave for its own benefit (as well as for theirs) and it reaped the rewards of their shore leave.⁷⁶ It therefore had to take the bitter with the sweet. If the costs of shore leave are greater than the benefits, the Coast Guard has reason to reconsider the practice, and society has reason to discourage it.

The conception of responsibility invoked in this rationale is a familiar and widely accepted one. We take it for granted, for example, that:

[T]he person to whom the income of property or a business will accrue if it does well has normally also to bear the risk of loss if it does badly. In the law of sales, when the right to income or fruits normally passes to the buyer, the risk of deterioration or destruction normally passes to him as well.⁷⁷

The same point might be made about the purchase of stocks, or even lottery tickets. It is fair to ask agents who choose to act in pursuit of their own interests and stand to profit if things go well to bear the risk of loss when things go badly. Enterprise liability is fair to injurers.

The third component of fairness returns us to the general idea of burden-benefit proportionality: enterprise liability distributes accident costs among actual and potential injurers more fairly than negligence does. Negligence liability does not require that the costs of accidents—even negligent accidents—be spread among those who create similar risks of harm, whereas enterprise liability does. Enterprise liability asserts: (1) that accident costs should be internalized by the enterprise whose costs they are, and (2) that those costs should be dispersed and distributed among those who constitute the enterprise, and who therefore benefit from its risk impositions. Negligence liability, by contrast, holds that injurers have a duty to make reparation when they injure others through their own carelessness. Negligence liability justifies *shifting* concentrated losses, whereas enterprise liability justifies *dispersing and distributing* concentrated losses. To be sure, nothing in negligence liability forbids injurers from insuring against potential liability, but nothing in negligence liability requires it either. Insurance is not integral to negligence liability, even though insuring against negligence liability is standard modern practice.⁷⁸

F. *The World of Acts and the World of Activities*

The preceding two sections explicate the internal morality of harm-based strict liability and the internal morality of enterprise liability as an articulation of harm-based strict liability, respectively. Enterprise liability as a distinctive and coherent form of tort liability rests on one

⁷⁵ *Busbey & Sons v. United States*, 398 F.2d 167 (2d Cir. 1968) (Friendly, J.); *Compare Taber v. Maine*, 45 F.3d 598 (2d Cir. 1995) (Calabresi, J.).

⁷⁶ *Id.*

⁷⁷ TONY HONORÉ, RESPONSIBILITY AND FAULT 79 (1999).

⁷⁸ For discussion of how negligence liability with insurance stacks up against strict liability as an instantiation of the morality of fair distribution of harm see Keating, *supra* note 33, at 1894–98.

additional pillar. Enterprise liability emerges as a response to systemic risk, which it takes to be a distinguishing mark of risk in the modern world. Writing in 1897, Oliver Wendell Holmes observed 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 to-day are mainly the incidents of certain well known businesses . . . railroads, factories, and the like.”⁷⁹ Implicit in Holmes’s remark is a distinction not just between two kinds of actors, but between two kinds of social worlds. Stylizing and simplifying, we can call these two worlds the “world of acts” and the “world of activities.” The “world of acts” is Holmes’s world of “isolated, ungeneralized wrongs.” The “world of activities” is the world in which accidents are the “incidents” of organized enterprises.

In the “world of acts,” risks are discrete. The typical actor is an individual or a small firm which creates risk so infrequently that harm is not likely to materialize from any single actor’s conduct. The typical accident materializes out of the activity of isolated, unrelated actors, acting independently (i.e., natural persons or small firms separately engaging in activities on an occasional basis). Taken as a whole, the activities of these individual actors are diffuse and disorganized, and quite possibly actuarially small. The dogfight that precipitated *Brown v. Kendall* is a representative tort in this world: it arose out of a chance encounter between unrelated parties, neither of whose activities were large enough to make such misfortunes commonplace and expected.⁸⁰ In the “world of acts,” then, risks are isolated, “one-shot” events. Harm, when it materializes, is an accidental misfortune. Because actors are small, and risks independent and uncorrelated, liability rules shift losses, but do not spread them. In this world, the imposition of strict liability on reciprocal risks merely “substitut[e] one form of risk for another—the risk of liability for the risk of personal loss,” as George Fletcher says in his famous piece *Fairness and Utility in Tort Theory*.⁸¹ A fair distribution of the costs of accidents—of harm—is hard to come by because the distribution of the costs of accidents across the activities that generate them depends upon the underlying activity satisfying basic criteria of insurability. Foremost among these criteria is the law of large numbers.⁸² But, in the purest form of the “world of acts,” both actors and activities are small.

At the opposite pole from the “world of acts” is the “world of activities.” In the “world of activities,” risks are generalized and systemic. Systemic risks arise out of a continuously repeated activity (e.g., the manufacturing of Coke bottles, the transportation 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;⁸³ if you transport enough gasoline, some tankers are sure to explode;⁸⁴ if you leave water mains uninspected in the ground long enough,

⁷⁹ OLIVER WENDELL HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 183 (1920). The paper itself was originally delivered in 1897.

⁸⁰ *Brown v. Kendall*, 60 Mass. 292 (1850).

⁸¹ George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 547 (1972).

⁸² See BERNARD L. WEBB, ET AL., INSURANCE OPERATIONS AND REGULATION 116 (2d ed. 1992). In our world, though not in Holmes’, it is possible to transform the “world of acts” into the “world of activities” by knitting discrete actors into activities via insurance mechanisms. For our purposes, this complication can be ignored.

⁸³ See *Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944).

⁸⁴ See *Siegler v. Kuhlman*, 502 P.2d 1181 (Wash. 1972).

some are sure to break;⁸⁵ if you turn loose enough sailors on shore leave, some of them are bound to return to their ships drunk and wreak havoc.⁸⁶ In the “world of activities,” both actors and activities are large. The cost of accidents can therefore be dispersed and distributed.

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 are small parts of relatively well-organized enterprises. The defendant in Lubin v. Iowa City is large in the first sense.⁸⁷ A single entity is responsible for the piping of water through underground pipes throughout a city, 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 tanker trucks on highways is large in the second sense. 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 the gasoline, those who operate gasoline stations, those who manufacture tractor trailers, and so on.⁸⁸

In the “world of activities,” accidental harms can be spread across the enterprises that engender those harms. When the law of large numbers is met, risks are not only certain to issue in harms, they are also very likely to issue in harms with predictable regularity. When activities are actuarially large, the accidents that they engender will likewise be predictable and regular, and the costs of those accidents can be factored into the costs of conducting the enterprise. The costs of manufacturing and distributing Coca Cola 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. Enterprise liability becomes possible.

III. PRODUCTS LIABILITY AS ENTERPRISE LIABILITY

A. Products Liability as Negligence Liability: The Third Restatement Regime

Earlier, I observed that debate in the American legal academy over the internal morality of products liability was defined by two poles.⁸⁹ One pole, represented by George Priest, asserts that products liability is strict enterprise liability and deems enterprise liability itself to be profoundly defective. The other pole, represented by Gary Schwartz, asserts that negligence conceptions have

⁸⁵ See Lubin v. Iowa City, 131 N.W.2d 765 (Iowa 1964). The waterworks chose not to replace mains until they broke because it was inefficient to inspect the mains for signs of incipient breakage and replace them before they broke. *Id.*

⁸⁶ The suit in the Bushby case, 398 F.2d 167 (2d Cir. 1968), arose out of an incident in which a drunken sailor, returning from shore leave late at night to his Coast Guard ship, which was being overhauled in a floating dry dock, opened the valves and flooded the dry dock causing the dry dock to sink and the ship to partially sink. The court, in an opinion by Judge Friendly, affirmed that the conduct was within the scope of employment, because the risk of drunkenness was a risk increased by the Coast Guard’s “long-run activity in spite of all reasonable precautions” on its part, and hence was fairly charged to the Coast Guard. *Id.* at 171.

⁸⁷ See *Id.*

⁸⁸ The perception that the separate actors form a connected enterprise surfaces very explicitly in Siegler, 502 P.2d at 1181.

⁸⁹ See *supra*, the text accompanying notes 2 to 5.

been at work all along. One way of reconciling these apparently irreconcilable positions is to say that products liability fails as strict enterprise liability and becomes negligence liability by default. The products liability sections of the Restatement (Third) of Torts fit nicely into this story. The Third Restatement is conspicuously careful not to repudiate the general concept of strict products liability, but many of its important provisions adopt a view of products liability as negligence liability. The Third Restatement's rendering of products liability law confines strict liability to manufacturing defects, retaining an enterprise conception of responsibility for such defects.⁹⁰ It imposes a negligence framework on design defect liability, warning liability, and victim conduct.

Under the Third Restatement, the sole test for design defect is the risk-utility test. The consumer-expectation test, with its warranty heritage and strictness of liability, is banished as an independent, co-equal test of liability.⁹¹ The risk-utility test, for its part, is an instantiation of Hand Formula negligence, modified slightly to address the fact that—when products are involved—what we care about is how safe a product *is*, not how carefully those who designed the product conducted themselves.⁹² Normally, negligence liability targets conduct; the risk-utility test promulgated by the Third Restatement addresses the design of the product itself, not the conduct responsible for producing that design. With that important, but relatively modest, adjustment the risk-utility test is a straightforward Hand Formula negligence test. Liability is based on foresight, not hindsight—on the knowledge available at the time the product was marketed, not on the knowledge available at the time of trial. This can make a vast difference in the extent of liability when knowledge of product risks changes between the time of marketing and the time of trial, as it did most famously in the case of asbestos.⁹³

The Third Restatement's specification of burdens of proof also embodies orthodox negligence liability. As part of her *prima facie* case, plaintiff bears the burden of pleading and proving

⁹⁰ RESTATEMENT (THIRD) TORTS: PRODUCTS LIABILITY § 2 “Categories of Product Defect” *cmt. a* “Rationale” (“Strict liability without fault in [manufacturing defects] is generally believed to foster three objectives. . . . [It] encourages greater investment in product safety, . . . discourages the consumption of defective products by the market, [and] . . . reduces the transaction costs involved in litigating the issue.”).

⁹¹ RESTATEMENT (THIRD) TORTS: PRODUCTS LIABILITY § 2 “CATEGORIES OF PRODUCT DEFECT” provides that a product is “defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design . . .” *Comment g, Consumer Expectations: general considerations* states “Under Subsection (b), consumer expectations do not constitute an independent standard for judging the defectiveness of product designs. . . .” “Arguably, some of the expectation test is retained in RESTATEMENT (THIRD) TORTS: PRODUCTS LIABILITY § 3 “Circumstantial Evidence Supporting Inference of Product Defect.” The section licenses a *res ipsa* type approach to product defects. In theory, its reach extends to design defects and it is capable of establishing liability whenever a product fails in a way which disappoints secure expectations about product performance. *Comment b* explains: “The most frequent application of this Section is to cases involving manufacturing defects. When a product unit contains such a defect, and the defect affects product performance so as to cause a harmful incident, in most instances it will cause the product to malfunction in such a way that the inference of a product defect is clear.” *Id.* at *cmt. b*. For discussion of this comment, see Michael Green, *The Unappreciated Congruity of the Second and Third Torts Restatements on Design Defects*, 74 BROOKLYN L. REV. 807 (2007).

⁹² Because it targets products—and not the conduct responsible for creating products—products liability law is another domain of tort law which presents problem for conceptions of tort law which identify it with conduct-based wrongs. See Goldberg & Zipursky, *supra* note 24.

⁹³ See, e.g., *In re Massachusetts Asbestos Cases*, 639 F. Supp. 1 (D. Mass. 1985).

the feasibility of an alternative design which would have avoided the harm at issue. This is Hand Formula “untaken precaution” analysis applied to product design.⁹⁴ And the test itself calls for balancing the advantages and disadvantages of the design to see if it is, all things considered, justified.⁹⁵ Warning liability is likewise an instantiation of negligence conceptions. It, too, is foresight-based and the duty of the manufacturer is a duty of due care—to give reasonable warnings.⁹⁶ Victim carelessness is recognized as a defense, and in the form of general comparative negligence.⁹⁷ The Third Restatement thus spells out plaintiff’s *prima facie* case, the criteria for determining defective product design, and defenses to liability in negligence terms. Only manufacturing defects are subject to strict liability.⁹⁸

In articulating products liability law as a special case of negligence liability, the Third Restatement departed from the law of products liability as it developed in the twenty or so years following California’s adoption of strict products liability in Greenman v. Yuba Power Products in 1963.⁹⁹ Following Escola, Greenman and §402A, products liability in this period aspired to be strict enterprise liability. Unsurprisingly, that aspiration led to a products liability regime markedly different from the regime of the Third Restatement. With respect to the law that it restated, the Third Restatement was revisionary.¹⁰⁰

B. Enterprise Responsibility and Product Accidents

Negligence liability is liability for harm which would have been avoided had reasonable care been exercised. When products are involved, negligence liability is liability for harms that would not have happened given reasonably safe product design and reasonable product warnings. By contrast,

⁹⁴ See Mark F. Grady, *Untaken Precautions*, 18 J. LEGAL STUD. 139 (1989).

⁹⁵ RESTATEMENT (THIRD) TORTS: PRODUCTS LIABILITY § 2 “Categories of Product Defect”; The test is applied instructively in *Banks v. ICI*, 450 S.E.2d 671 (Ga. 1994) (“We conclude that the better approach is to evaluate design defectiveness under a test balancing the risks inherent in a product design against the utility of the product as designed.” *Id.* at 674.).

⁹⁶ See RESTATEMENT (THIRD) TORTS: PRODUCTS LIABILITY § 2 (“A product is defective [because], at the time of sale or distribution, . . . [it includes] *inadequate instructions or warnings*.”) (emphasis added).

⁹⁷ See, e.g., Goldberg, John & Zipursky, Benjamin, *Intervening Wrongdoing in Tort: The Restatement (Third)’s Unfortunate Embrace of Negligence Enabling*, 44 WAKE FOREST L. REV. 1211 (2009).

⁹⁸ RESTATEMENT (THIRD) TORTS: PRODUCTS LIABILITY § 2 *cm. a.*

⁹⁹ *Greenman v. Yuba Power Products*, 377 P.2d 897 (Cal. 1963).

¹⁰⁰ As critics noted at the time of its promulgation. See, e.g., Frank Vandall, *The Restatement (Third) of Torts, Products Liability, Section 2(b): Design Defect*, 68 TEMPLE L.REV. 167 (1995). According to Vandall, the following propositions were true at the time the Third Restatement restated the law of products liability: “a majority of jurisdictions do not support the [exclusive] use of risk-utility balancing in design defect cases”; “a majority of the jurisdictions do not support the reasonable-alternative-design requirement”; “jurisdictions are split evenly on whether a seller should be charged with knowledge at the time of sale or the time of trial.” On the last point Vandall writes:

The issue whether the manufacturer should be held to know of a risk at the date of trial or the date of sale is a subject that is presently being debated in the courts. By selecting the date-of-sale approach the reporters [of the Third Restatement] essentially *rewrote strict liability law into negligence*

Id. at 180 (emphasis added).

enterprise liability is liability for harms which flow from an activity's (or an enterprise's) characteristic risks, whether or not those risks should have been eliminated through the exercise of reasonable care.¹⁰¹ The delineation of an activity's characteristic risks is at the heart of enterprise liability. Enterprise liability only works when risks can be reliably attributed to an enterprise. If risks cannot be reliably imputed to enterprises (or activities), enterprise liability becomes unbounded and erratic at best, and the nightmare of unlimited liability described by its critics at worst.¹⁰²

The attribution of accidents to activities thus requires distinguishing between (or among) activities. In vicarious liability law, for example, it is necessary to distinguish the activities of the enterprise from the “personal” adventures of the employee. In that context, risks are either characteristic of the firm's activity or characteristic of the employee's personal life.¹⁰³ When it comes to attributing accidents to activities, product accidents present special challenges. Product accidents arise at the intersection of two complex activities: designing, manufacturing, and marketing products on the one hand; and purchasing and using them on the other. Product accidents occur only in the course of product use but they may be characteristic of product manufacture. Or not. Risks which materialize in the course of product use might be “characteristic” of the activity of a product user, not of the product itself. Someone who uses their lawnmower to trim a hedge is misusing the product. Harms issuing from that misuse ought to be attributed to their activity, not to the design or manufacture of the product, even though it may be possible to use a lawnmower as a hedge trimmer. And Risks may move between these activities. Product risks might, for example, transfer from the manufacturer to the purchaser at the time of sale. Transferring them is indeed one of the primary responsibilities of warning law.

Distinguishing the activity of designing, manufacturing and marketing a product on the one hand, from the activity of purchasing and using it on the other—so that some accidental harms may be attributed to product manufacturers and others to product users—is often a daunting task. Manufacturing defects, around which modern American products liability law developed in MacPherson, Escola and Henningsen, are comparatively easy to handle. For one thing, manufacturing defects surprise and disappoint product users when those users are using the products for their normal and intended uses. Manufacturing defects are usually latent product flaws which manifest themselves only when the product fails in the course of normal use. Second, the incidence of manufacturing defects is a function of the quality of the manufacturer's manufacturing processes and of inputs to those processes.¹⁰⁴ This is true even when those processes are free of

¹⁰¹ See *Bushey*, 398 F.2d 167.

¹⁰² See Priest, *supra* note **Error! Bookmark not defined.**

¹⁰³ This can be hard to do. Some of the controversy now surrounding the enterprise liability turn in English law appears to involve courts struggling to locate the boundaries of the enterprise. See the cases cited in *supra*, note 30, and the articles cited in *supra*, note 31.

¹⁰⁴ See ROBERT KEETON, *VENTURING TO DO JUSTICE*, 163 (1969) (emphases mine):

At least in those cases in which harm results from an identifiable defect in the product, it is easy to grasp the idea that the harm is the fruition of a distinctive risk of the activity of making that product, or the activity of making and marketing it. For example, the risk of harm from defects in a woodworking machine such as the Shopsmith in *Greenman v. Yuba Products, Inc.* when the user is not aware of the defect, *is fairly to be treated as a distinctive risk of making Shopsmiths and not as a distinctive risk of using them.* Similarly, one might say that the risk of

fault—when the care necessary to reduce the incidence of product defects even further is not worth taking. Enterprise liability is not about fault, after all. As a matter of fairness, products should bear responsibility for the accidents which issue from product risks which should not have been avoided. And with respect to avoiding accidents which should be avoided, enterprise liability is about placing responsibility for avoiding accidents (or not) in the hands of the party best able to make that decision.¹⁰⁵ Product users do not contribute to the incidence of manufacturing defects. Indeed, short of continuing use of a product whose manufacturing defect has become manifest, the activity of product users does is not responsible for the materialization of manufacturing defects into accidental harms.

Distinguishing between manufacturer and user activities in the context of design defects and warning claims is considerably more difficult. Product injuries arise at the intersection of activities which are mutually dependent and aware of one another. Products are designed and marketed with users in mind, and product purchasers buy and use products with their designs in mind. Disentangling those activities can be difficult. In an enterprise liability regime, the challenge confronting design defect rules is to identify those injuries which are attributable to something untoward about the product which is itself rightly traced to the product's making and marketing. The trick is to do this without simply falling back into negligence liability. Similarly, the principal role of warnings is to transfer risks from the enterprise of the product's manufacture and marketing to the activity of the product purchaser and user. Warning rules specify the conditions under which risks are properly transmitted.

C. Products liability as Enterprise Liability

Perhaps because §402A emerged from case law which itself was formed in the course of responding to what we now call manufacturing defects, it left the development of criteria of defectiveness mostly to courts. The pertinent clause of §402A speaks only of selling a “product in a defective condition unreasonably dangerous to the user or consumer.”¹⁰⁶ Courts were charged with the task of developing tests of product defectiveness out of this cryptic language. Articulating rules appropriate to an enterprise conception of responsibility for product accidents was a (and perhaps “the”) fundamental project of American products liability law in the years immediately following the adoption of §402A. Courts approached this task first by formulating a tripartite division of product defects, distinguishing manufacturing, design and warning “defects.” It was, and is, easy to articulate a test for manufacturing defects and easy to apply that test. The normal instance of a product is the

harm from defective brakes in a new car being used by one not aware of the defect is fairly to be treated as a distinctive risk of making new cars and not as a distinctive risk of using them. *The risks are not to be described to the activity of use, as distinguished from that of making, because the defect arises during the making even though its fruition in harm comes about only during use.*

Importantly, Keeton's discussion contemplates defects which are latent and probably manufacturing defects. Distinguishing the activities of using and making is more difficult when design defects and product warnings are at issue.¹⁰⁵ This is the most important lesson of Guido Calabresi's & Jon Hirschoff's seminal article *Toward a Test for Strict Liability in Tort*, *supra* note 7.

¹⁰⁶ RESTATEMENT (SECOND) OF TORTS §402A(1).

measure of a manufacturing defect; the product with a manufacturing defect is a “lemon.” Articulating just what makes a design or a “warning” defective requires more work and more ingenuity. If, however, we juxtapose the California products liability law regime crystallized by the California Supreme Court in the leading case of Barker v. Lull to the highly negligence inflected regime of the Third Restatement we see a products liability regime which is both highly articulated and, by conscious design, stricter than negligence liability.¹⁰⁷

To be sure, the products liability regime to which §402A gave birth is not a regime of pure strict liability. In design defect and warning doctrine, fault conceptions and fault criteria intermingle with strict ones. Both design defect liability and warning liability have a strongly hybrid quality. One aspect of this hybrid quality comes out if we contrast the forward and backward looking aspects of tort liability. Looking backward, defect liability under the Second Restatement is strict. The imposition of liability does not require impugning the conduct of the manufacturer in making and marketing the product. The question is simply whether the product design itself is defective.¹⁰⁸ Looking forward, however, a finding of design defectiveness expresses a negligence-like judgment that the product ought to be redesigned and made safer. The second, and probably more important respect in which the Barker regime is a hybrid one is that its liability rules are more stringent than the negligence regime of the Third Restatement. Even when Barker deploys negligence criteria, its overarching ambition is to design liability rules which impose a more demanding form of responsibility on product manufacturers than ordinary negligence liability does. The Barker regime’s overriding concern is to secure for product users “maximum protection” from harm and to obtain that protection from firms that manufacture and market products. Section 402A *Comment c*’s remark that “the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it” gets concrete incarnation in a set of liability rules whose self-conscious stringency to stimulate

¹⁰⁷ *Barker v. Lull*, 573 P.2d 443 (Cal. 1978). In this period, the California Supreme Court was the most important state court in the country. It is only a slight overstatement to say that the common law of products liability in the United States at large followed the trail blazed by the California Supreme Court. Many states have cited *Barker* and adopted its products liability regime (courts in at least 8 states have cited and followed *Barker*). The consumer expectation test adopted in *Barker* has been modified by the court’s decision in *Soule v. General Motors Corp.*, 882 P.2d 298, 308 (1994) (affirming *Barker*’s two tests, but reserving the expectation test “for cases in which the everyday experience of the product’s users permits a conclusion” of defectiveness. “The crucial question in each individual case is whether the circumstances of the product’s failure permit an inference that the product’s design performed below the legitimate, commonly accepted minimum safety assumptions of its ordinary consumers.” *Id.* at 309. Design claims based on the consumer expectation test appeal to “the common knowledge of lay jurors”; therefore, expert testimony “may not be used to demonstrate what an ordinary consumer would or should expect.” *Id.* at 308.). *See also*, *Romine v. Johnson Controls, Inc.*, 224 Cal. App. 4th 990, 1004 (2014) (citing *Soule* when not allowing expert testimony on the risk-utility of the vehicle in question because the court had already allowed plaintiff to advance claims on a consumer-expectation test basis). *See also*, *Izzarelli v. R.J. Reynolds Tobacco Co.*, 321 Conn. 172, 203 (2016) (refusing to apply ordinary consumer-expectation test to cigarette case because, as *Soule* held, that test is reserved for cases involving everyday experiences of consumers). Finally, *see Scantlin v. GE*, 2014 U.S. Dist. LEXIS 177378 at *14 (citing to *Soule* in allowing expert testimony on consumer expectation of safety of an industrial switchboard because no ordinary consumer would be able to form a reasonable expectation of safety for this specialized product).

¹⁰⁸ Formally, the RESTATEMENT THIRD retains this strict aspect of design defect liability, *supra* note 91.

responsibility for manufacturing and marketing safe products—and for shouldering the harmful consequences of product failure when that failure issues in physical harm.¹⁰⁹

1. Design Defects

Barker synthesizes fifteen years of case law into a regime for analyzing design defects. In outline form, the elements of the Barker are:

1. *Two tests of defect.* The Barker opinion embraces two general, independent, and sufficient tests of design liability. These are the consumer-expectation test and the risk-utility test. The consumer-expectation test is rooted in contract law (specifically, in warranty) and evaluates product safety from the perspective of a product user. The risk-utility test is rooted in tort negligence law and takes the perspective of a product engineer. A design's failure to pass either of these tests leads to liability.
2. *Strict Liability.* The Barker regime for design defects is stricter than ordinary Hand Formula negligence in three ways. First, each of the two tests of defective design goes beyond negligence. This is clear in the case of the expectation test, but it is also true of the risk-utility test, even though that test has its roots in negligence. Second, Barker's articulation of the plaintiff's *prima facie* case, and its approach to the proof of product defectiveness, also go beyond negligence. Third, failing *either* test leads to liability. Barker makes clear that its adoption of two tests is designed to impose a form of liability more stringent than that imposed by either test alone.¹¹⁰
3. *The Expectation Test.* Asking whether a design disappoints consumer expectations about product safety does not require a negligence inquiry into either the product or the process that produced it. The costs and benefits of greater safety are beside the point. The expectation test is strict by nature, as is warranty obligation—the root of the expectation test. It asks questions such as “Would a normal consumer expect a SUV to be as stable as a normal sedan is on slick pavement?”¹¹¹ “Would a health care worker expect that wearing protective latex gloves would put them at significant risk of disabling physical harm?”¹¹² If “yes” is the answer to questions such as these then products that disappoint these expectations are defective, full stop. This is true even if the manufacturer of the gloves was not negligent in marketing them because the allergic reaction was not reasonably foreseeable at the time the product was placed on the market. And it is true even if the SUV's greater propensity to roll over on-road is justified because it enables the vehicle to be driven off-road.

¹⁰⁹ RESTATEMENT (SECOND) OF TORTS § 402A *cm. c.* The words “maximum protection” appear earlier in the same comment.

¹¹⁰ *Barker v. Lull Engineering Co.*, 573 P.2d at 455.

¹¹¹ *Denny v. Ford Motor Co.*, 662 N.E.2d 730 (N.Y. 1995).

¹¹² *Green v. Smith & Nephew AHP, Inc.*, 629 N.W.2d 727 (Wis. 2001).

4. *The Risk-Utility Test.* In Barker, the court explains that the “expectations of the ordinary consumer cannot be viewed as the exclusive yardstick for evaluating design defect because “[i]n many situations . . . the consumer would not know what to expect, because he would have no idea how safe the product could be made.”¹¹³ Because liability can be established under either test, coupling an expectation test to a risk-utility test is a way of constructing a liability regime more stringent than either test would be by itself. In some cases—patent defects is the obvious example—the expectation test will be more lax than the risk-utility test. In other cases, the expectation test will be more stringent. When latex gloves worn as protective equipment create severe, disabling allergic injuries in a significant percentage of their users, they disappoint the expectations of product users, even if the manufacturer was not negligent in marketing them because the risks were not reasonably known at the time of sale.¹¹⁴ When a SUV rolls over on a paved road because its high, narrow wheelbase makes it more prone than a normal sedan to doing so, the design may pass muster under the risk-utility test, but fail the expectation test.¹¹⁵ Moreover, the Barker risk-utility test is more stringent than normal Hand Formula negligence in several important ways.
- a. *Hindsight Balancing.* The court holds that the jury should determine whether the benefits of a design are outweighed by its risks “through hindsight.”¹¹⁶ This means that risk-utility balancing should be conducted with the benefit of knowledge available at the time of trial. By charging harms caused by risks which may not have been reasonably foreseeable to manufacturers, Barker’s version of the risk-utility test goes beyond normal negligence balance. Negligence balancing is foresight-based. Hindsight balancing institutes a stricter form of liability because it places the costs of unavoidable accidents to the manufacturer instead of leaving them on the victim. Negligence, of course, leaves accidents that should not have been avoided on those who suffer them.
 - b. *Relaxing and shifting the burden of proof.* In applying the risk-utility test, Barker (1) does not require the plaintiff to put on evidence of a feasible alternative design, and (2) shifts the burden of proof from the plaintiff to the defendant. The defendant must prove that the product’s utility is greater than its risks, or bear liability. Thus, even in those cases where hindsight and foresight are the same, the risk-utility balancing test is administered in a way which is more stringent than ordinary negligence liability.

All of this makes for a regime of liability stricter than normal negligence liability.

¹¹³ Barker, 573 P.2d at 455.

¹¹⁴ Green, 629 N.W.2d 727.

¹¹⁵ Denny, 662 N.E.2d 730. The design may pass muster under the risk-utility test because the very feature that make the SUV more prone to tipping over also makes it suited for off-road driving. The design feature is therefore justifiable.

¹¹⁶ Barker, 573 P.2d at 455.

2. Warning Liability

Warning doctrine under the Third Restatement is straightforward negligence doctrine. The duty to warn attaches to conduct and requires reasonable care. Like design defect doctrine, the warning law doctrine developed under §402A is more demanding than ordinary negligence liability. The key to understanding this is to recognize the distinctive role of warnings in an enterprise liability conception of products liability. Product accidents arise at the intersection of the activity of designing, manufacturing and marketing the product on the one hand, and the activity of purchasing and using the product on the other. Product manufacturers are liable only for those risks that are properly charged to their products—to their activity. Warnings are a way of transferring product risks from manufacturers and sellers to purchasers and users. Nonobvious risks of injury from products begin attributed to the product, but if they are adequately warned about, they may be assumed by the purchaser at the time of sale.¹¹⁷ This is the familiar pairing of strictness of liability with assumption of the risk as a defense.¹¹⁸ Assumption of the risk is, in fact, a kind of victim strict liability. Knowing and voluntary acceptance of product risks suffices to make the victim responsible for any harm that may befall her in the course of product consumption and use. Fully informed, the product purchaser is in the best position to decide whether or not to consume the product and how to use the product if they do purchase it. Reasonable care does not figure in the equation, on either the manufacturer's or the user's side.¹¹⁹ The manufacturer's duty is to inform and the consumer's responsibility is to decide.

i. “Unavoidably Unsafe” and “Unreasonably Dangerous” Products

To understand how enterprise liability conceptions shape warning law, we need to unpack the comparatively elaborate warning doctrine which developed under §402A. The first question that arises in connection with manufacturers' duties to warn is: when must a product manufacturer remedy excessive product risks by designing (or manufacturing) a safer product, and when may it remedy those risks merely by alerting purchasers and users to them? The framework of §402A of the Second Restatement permits manufacturers to discharge their duty to market a non-defective product by warning of the product's otherwise unacceptable risks when the product is: (1) “unavoidably unsafe”, but worth consuming nonetheless; or (2) “unreasonably dangerous” without a warning, but reasonably safe with one. An “unavoidably unsafe” product is one that cannot be made less risky, given the state of knowledge at the time that the product was placed on the market. The classic examples of “unavoidably unsafe” products are prescription drugs. At the time that §402A was drafted, the Pasteur vaccine for rabies was “unavoidably unsafe”; it “not uncommonly [led] to very serious and damaging consequences when it [was] injected.”¹²⁰ The vaccine was worth

¹¹⁷ Obvious risks are their own warning.

¹¹⁸ The classic and best account of this pairing is Guido Calabresi & Jon Hirschoff, *Toward a Test for Strict Liability in Tort*, *supra* note 7.

¹¹⁹ See the discussion of strict liability for failure to warn, *infra* Section III.C.2.B.

¹²⁰ RESTATEMENT (SECOND) OF TORTS § 402A *comment k*; see also, *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 254–55 (2011) (Sotomayor, J., dissenting).

consuming despite its grim side effects because “the disease itself invariably leads to a dreadful death . . .”¹²¹

Like “unavoidably unsafe” products, “unreasonably dangerous” products are also “dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.”¹²² Their excessive risks however, are present not because they are unavoidable, but because they are, in some way, desirable. Why would a product be “unreasonably dangerous,” yet desirable? Either because the dangers of the design *further the legitimate interests of at least some purchasers*, or *because users are in a better position than manufacturers to take suitable precautions against the risk involved*. Jeeps and SUVs illustrate “unreasonable danger” in the service of a legitimate, if special, interest. Their high and narrow wheelbase renders them less safe than passenger cars on paved roads—especially in slick road conditions—because that wheelbase makes them more prone to tip over.¹²³ Yet, that wheelbase also enables the off-road driving for which Jeeps were originally designed, and to which they are especially suited. Lowering and widening its wheelbase to make a Jeep safer on paved roads diminishes a Jeep’s fitness for off-road excursions.

The propane gas canisters at issue in *Cotton v. Buckeye* illustrate the circumstance where victims are the best precaution takers.¹²⁴ “Spent” gas canisters ignited when they were left too close to operating propane gas heaters. Redesigning the canisters so that the traces of gas left in spent ones cannot ignite might be prohibitively expensive. Careful handling of spent canisters by users may be the better precaution. Regardless of whether a product is “unreasonably dangerous” because (1) product users are the best precaution takers, or because (2) the relevant product risks are essential to some special use, warnings are called for when the product is “dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.”¹²⁵ In that overarching circumstance, a product manufacturer has a duty either to warn, or to face liability under the expectation test. The flip side of this coin is that an adequate warning transfers the product risk from the manufacturer to the purchaser and user.¹²⁶

ii. *Strict Liability and Negligence in Product Warning Law*

¹²¹ *Id.*

¹²² RESTATEMENT (SECOND) OF TORTS § 402A *cm. i.*

¹²³ See *Denny v. Ford Motor Co.*, 662 N.E.2d 730 (N.Y. 1995).

¹²⁴ *Cotton v. Buckeye Gas Prods. Co.*, 840 F.2d 935 (D.C. Cir. 1988).

¹²⁵ RESTATEMENT (SECOND) OF TORTS § 402A *cm. i.*

¹²⁶ Warnings perform two roles and speak to two social positions. The two roles are to promote informed consent and to enable careful use. In general, the first role speaks to product consumers as purchasers; the second role speaks to product consumers as users. Sometimes only one role is relevant (as with unavoidably unsafe products). Other times, users who are not purchasers must be informed so that they may make appropriate decisions about whether or not to use a product. In yet other circumstances, instructions as to careful use may be required in addition to warnings. Instructions are in order when product manufacturers and marketers are aware of nonobvious product risks, but product users are in the best position to reduce those risks by exercising appropriate care in the course of product use. These possibilities are touched on in the text following this footnote. A complete treatment of them, however, is beyond the scope of this paper.

The distinction between “unavoidably unsafe” and “unreasonably dangerous” products overlaps with the distinction between strict liability and negligence. A prospective consumer of the Pasteur vaccine for rabies is not in a position to reduce the risks of horrible side effects through careful consumption. The consumer faces only a choice: take the vaccine or not. The point of issuing warnings in connection with “unavoidably unsafe” products, then, is to enable *informed consumer choice*, not to enable *effective user precaution*. The value served by warnings which enable informed choice is not care, but *autonomy*. Adequate warnings enable consumers to exercise control of the risks they take. “Unreasonably dangerous” products, by contrast, are circumstances of bilateral precaution. Jeep owners (or, more exactly, Jeep drivers) can minimize the risks of rollover accidents by driving more cautiously, especially in slick conditions. The warnings issued in connection with “unreasonably dangerous” products thus serve two purposes. First, they enable informed consumer choice. Some people may decline to buy Jeeps once they realize that their off-road capabilities have an on-road cost. Second, warnings alert users to the need for special precautions.¹²⁷

The warning law of “unreasonably dangerous” products developed under §402A is essentially negligence law. This departure from strict liability has an obvious and plausible rationale: what the circumstance calls for coordinate precautions to minimize product risk. In circumstances where reducing product risks to an acceptable level requires manufacturers to (1) alert consumers to non-obvious product risks; and (2) instruct consumers on how to reduce those risks; but (3) requires product users themselves to implement the risk-reducing precautions, product safety is best served by dividing the labor of precaution among the parties.¹²⁸ Manufacturers must warn and instruct appropriately and consumers must choose and use safely. If manufacturers are strictly liable for failures of product users to take appropriate precautions even when manufacturers have given appropriate warnings and instructions, they will be held liable for accidents that others should have prevented. That is unfair and it leaves product users with less reason to take the precautions they should take. By contrast, the warning law governing “unavoidably unsafe” products under §402A is better understood as a kind of strict liability. This makes normative sense because “unavoidably unsafe” products involve only unilateral precaution. Product users can do nothing to reduce the risks of “unavoidably unsafe” products. Only product manufacturers can. The question confront prospective users is simply the question of whether it is worth their while to use the product in light of its risks. The only role of product warnings is to enable informed consent.

¹²⁷ When the appropriate precautions are not evident to untutored users, sellers are obligated to accompany their warnings with instructions, explaining how to minimize the otherwise unreasonable risks of using their products. Thus, when user precaution is essential, but not evident “[a] duty to warn actually consists of two duties: One is to give adequate instructions for safe use, and the other is to give a warning as to dangers.” *Ontai v. Straub Clinic & Hosp. Inc.*, 659 P.2d 734, 743 (Hawaii, 1983). The two duties involve the disclosure of different kinds of information. Warnings alert purchasers and users to the dangers of a product; instructions tell users how to avoid or reduce those dangers. Even the best of instructions will not necessarily discharge the duty to warn; even the best of warnings will not necessarily discharge the duty to instruct.

¹²⁸ See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS 187–88 (2004).

To understand how warning liability for “unavoidably unsafe” products is strict, we need to notice that the adequacy of a warning might be assessed from either of two perspectives. One perspective is the perspective of the product manufacturer; the other is the perspective of the product user. When we assess a warning from the manufacturer’s perspective, we ask: “Was this a reasonable attempt to convey the nonobvious risks of the product?” When we assess a warning from the consumer’s perspective, we ask, “Did this warning ‘make the nature of the risk reasonably comprehensible to the average consumer?’”¹²⁹ When we assess a warning from the perspective of a prospective consumer we are asking if it is adequate to serve the consumer’s interest in autonomy—in exercising control over the risks to which they are subject. When we assess a warning from the perspective of a manufacturer and seller we ask if the manufacture has done a decent job of alerting consumers to the product’s risks. These two perspectives overlap, but they are by no means perfectly congruent. *A warning can be adequate from the first perspective—because it ranks and warns about the relevant product risks in a reasonable way given their relative probabilities and magnitudes—but inadequate from the second perspective—because it fails to make some particular product risk comprehensible to the average reasonable consumer.* A reasonable warning may fail to convey to a reasonable consumer everything that the consumer might need to know to make an informed decision.

These two points of view underlie the difference between negligence and strict liability approaches to warning law. A negligence approach to product warnings leaves the consequences and costs of accidental harms that a reasonable warning would not have avoided on those who suffer them. A strict liability approach places responsibility on manufacturers for harms arising out of product risks whenever a warning is insufficiently clear to alert a normal consumer to some product risk. Unless the manufacturer gives a warning vivid enough to convey to a normal consumer the product risk at issue, product risks stay with products and accidents arising out of them are attributed to product manufacturers. And this is so even if the warning given by the manufacturer is reasonable. To this day, California takes the position that its warning law is strict. Product manufacturers must disclose known risks when they are essential to a “true choice judgment.”¹³⁰ Product risks must be disclosed whenever knowledge of those risks is essential to the exercise of a prospective user’s autonomy. The California Supreme Court explains:

‘[F]ailure to warn in strict liability differs markedly from failure to warn in the negligence context. Negligence law in a failure-to-warn case requires a plaintiff to prove that a manufacturer or distributor did not warn of a particular risk for reasons which fell below the acceptable standard of care, i.e., what a reasonably prudent manufacturer would have known and warned about. Strict liability is not concerned with the standard of due care or the reasonableness of a manufacturer’s conduct. The rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution. Thus, in strict liability, as opposed to negligence, the reasonableness of the defendant’s failure to warn is immaterial. . . . [U]nder strict liability principles the manufacturer . . . is liable if it failed to

¹²⁹ *MacDonald v. Ortho Pharmaceutical Corp.*, 475 N.E.2d 65, 71–72 (Mass. 1985).

¹³⁰ *Carlin v. Superior Court* 920 P.2d 1347, 1351 (Cal. 1996) (Mosk, Acting C. J.).

give warning of dangers that were known to the scientific community at the time it manufactured or distributed the product.’ (citation omitted).

We explained the policy behind our strict liability standard for failure to warn as follows: “‘When, in a particular case, the risk qualitatively (e.g., of death or major disability) as well as quantitatively, on balance with the end sought to be achieved, is such as to call for a true choice judgment, *medical* or *personal*, the warning must be given. . . .’ (citation omitted) Thus, the fact that a manufacturer acted as a reasonably prudent manufacturer in deciding not to warn, while perhaps absolving the manufacturer of liability under the negligence theory, will not preclude liability under strict liability principles if the trier of fact concludes that, based on the information scientifically available to the manufacturer, the manufacturer’s failure to warn rendered the product unsafe to its users.” (citations omitted).¹³¹

Liability under Carlin is true strict liability in the sense that risks that are not avoided through the exercise of reasonable care are charged to the party responsible for creating those risks. And liability is even stricter when manufacturers are held liable for risks which were not known by product manufacturers at the time a product was marketed, a position taken by many courts in the heyday of strict products liability.¹³² From an enterprise liability perspective, the logic here could not be simpler. Product risks which are not warned about stay with the product. They are not assumed by, and do not transfer to, the product user. The fact that they were not warned about because they were not known speaks to responsibility in negligence; it does not change the fact that the risks were not warned of and therefore did not transfer.

iii. *The Gap Between Strict Liability and Negligence*

The gap between the information elicited by a duty to give a reasonable warning and the information that may be needed to make an informed decision to consume a product is real and significant, at least in some cases. Juxtaposing MacDonald v. Ortho Pharmaceutical with Cotton v. Buckeye shows why.¹³³ In MacDonald, the plaintiff, a young woman, had suffered a disabling stroke as a result of consuming oral contraceptives.¹³⁴ At the time she was consuming them, oral contraceptives were understood to increase the risk of stroke from 1 in 500,000 to 1 in 66,000.¹³⁵ On the pill dispenser Ortho warned that “[t]he most serious known side effect is abnormal blood clotting which can be fatal.”¹³⁶ MacDonald brought suit alleging that the warning on the pill dispenser was inadequate, because it failed to use the word “stroke” or to mention that the “abnormal blood clotting” that it mentioned could lead to permanent disability as well as to death.¹³⁷ In upholding a jury verdict for the plaintiff, the court agreed that a reasonable jury could conclude

¹³¹ *Id.* at 1351–52.

¹³² Most famously, in the asbestos context. *See, e.g., Beshada v. Johns-Manville*, 447 A.2d 539 (N.J. 1982). For a nose count of cases, see Vandall, *supra* note 100.

¹³³ *MacDonald*, 475 N.E.2d 65; *Cotton*, 840 F.2d 935.

¹³⁴ *MacDonald*, 475 N.E. 2d at 66–67.

¹³⁵ *Id.* at 67 n.4.

¹³⁶ *Id.* at 66.

¹³⁷ *Id.* at 67.

(as the jury in fact did) that the warning given was inadequate to convey to a reasonable consumer the fact that they might suffer a disabling stroke. Warnings, the court observed, need to be suitably “urgent.”¹³⁸ “Abnormal blood clotting” is far less vivid than “heart attack or stroke;” “fatal” is less alarming than “death;” and “death” is less alarming and less informative than “death or permanent, severe disability.” The warning given does not grab the user by the lapels and focus her mind on the serious risk of disabling stroke.

MacDonald might, however, have come out very differently if the court had taken the perspective of the product manufacturer, instead of the product user. Consider what the D.C. Circuit Court of Appeals had to say in Cotton v. Buckeye. Cotton had been badly injured by the accidental explosion of spent gas canisters.¹³⁹ He had brought the harm on himself in the sense that he had stacked the spent cylinders close to an active heater, but he prevailed at trial because the jury agreed that the warnings given by Buckeye were inadequate.¹⁴⁰ The D.C. Circuit overturned the jury verdict, forcefully asserting that warnings must be selective if they are to be effective:

The cylinders supplied to plaintiff's employer by Buckeye bore labels clearly and conspicuously warning that the cylinders contained 'flammable' gas and should not be used or stored in 'living areas.' According to plaintiff, this warning was inadequate because it failed (1) to warn about the explosive properties of propane; (2) to instruct users to shut the valves on used cylinders; (3) to advise users not to use or store the cylinders in enclosed, unventilated areas; and (4) to warn that gas might escape from used cylinders believed to be empty.

Failure-to-warn cases have the curious property that, when the episode is examined in hindsight, it appears as though addition of warnings keyed to a particular accident would be virtually cost free. What could be simpler than for the manufacturer to add the few simple items noted above? The primary cost is, in fact, the increase in time and effort required for the user to grasp the message. The inclusion of each extra item dilutes the punch of every other item. Given short attention spans, items crowd each other out; they get lost in fine print. Here, in fact, Buckeye responded to the information-cost problem with a dual approach: a brief message on the canisters themselves and a more detailed one in [a] pamphlet delivered to [the construction company] (and posted on the bulletin board at the Leesburg Pike construction site where Cotton was employed.)

Plaintiff's analysis completely disregards the problem of information costs. He asserts that ‘it would have been neither difficult nor costly for Buckeye to have purchased or created for attachment to its propane cylinders a clearer more explicit label, such as the alternatives introduced at trial, warning of propane's dangers and instructing how to avoid them.’ But he

¹³⁸ “A reasonable warning not only conveys a fair indication of the dangers involved, but also warns with degree of intensity demanded by the nature of the risk. A warning may be found to be unreasonable in that it was unduly delayed, reluctant in tone or lacking in a sense of urgency.” *Id.* at 71 (quoting *Seeley v. G.D. Searle & Co.*, 67 Ohio St. 2d 192, 198, (1981)).

¹³⁹ *Cotton*, 840 F.2d at 936.

¹⁴⁰ *Id.*



[doesn't even consider] what the canister warning would have looked like if Buckeye had supplemented it not only with the special items he is personally interested in—in hindsight—but also with all other equally valuable items (i.e., 'equally' in terms of the scope and probability of the danger likely to be averted and the incremental impact of the information on user conduct.)¹⁴¹

For our purposes, the lesson here is simple: a suitably selective warning which adequately discharges the duty of due care may not tell a consumer what she needs to know in order to make an informed decision. The scope of liability under a strict liability duty to warn is broader than the scope of liability under a negligence duty.

3. Defenses

In contrast to the Third Restatement with its plenary recognition of user negligence in any form as a defense, §402A of Second Restatement does not recognize contributory negligence as a defense “when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence.”¹⁴² By contrast, §402A does recognize contributory negligence in the form of “voluntarily and unreasonably proceeding to encounter a known danger . . .”¹⁴³ This form of contributory negligence, however, is really assumption of risk, as the Second Restatement acknowledges. *Comment b* to §402A also recognizes misuse. Misuse differs from ordinary negligence in that it is “a use or handling so unusual that the average consumer could not reasonably expect the product to be designed against it.”¹⁴⁴ This conceptual framework guides the development of the original doctrine and remains the law in some jurisdictions to this day.¹⁴⁵ Consistent with the logic of this structure, case law adds the category of foreseeable misuse to this framework.

The choice of assumption of risk and misuse as the only defenses again reflects one of the basic ideas behind strict liability. Responsibility for avoiding a particular class of risks should be charged to the party in the best position to decide how to handle that class of risks. The decision of whether to avoid or encounter the risk is theirs to make, on the understanding that they will bear the costs of whatever harm ensues. The defenses of misuse and knowing unreasonable assumption of risk establish zones of user responsibility. The judgment that implicitly underpins the decision to recognize these two defenses (and only these two defenses) is that users are in the best position to decide if it is worth it to them to misuse products, or to deliberately and imprudently encounter known product defects, whereas manufacturers are in the best position to decide how to make products fit for their ordinary use (the expectation test), acceptably safe (the risk-utility test), and to

¹⁴¹ *Id.* at 937–38.

¹⁴² RESTATEMENT (SECOND) OF TORTS § 402A *cm. n.*

¹⁴³ *Id.* Section 402A was formulated just before the rise of comparative negligence.

¹⁴⁴ *Findlay v. Copeland Lumber Co.*, 509 P.2d 28, 31 (Ore. 1973). For circumstances where the choice between the adoption of the §402A defenses or ordinary comparative negligence impacts the result, compare *Hernandez* and *Huffman*. *Hernandez v. Barbo Machinery Co.*, 957 P.2d 147 (Ore. 1998); *Huffman v. Caterpillar Tractor Co.*, 908 F.2d 1470 (10th Cir. 1990).

¹⁴⁵ *See, e.g., Hernandez*, 957 P.2d 147.

guard against ordinary user carelessness in the course of normal product use.¹⁴⁶ Put differently, the defenses of assumption of risk and misuse identify zones where whatever harms occur are characteristic of the user's activity. The user assumes responsibility for their own harm by stepping forward and choosing to encounter a known product risk or by choosing to use the product improperly.

The "foreseeable misuse" doctrine subsequently developed by courts is a further extension of the same idea. Foreseeable misuse reestablishes the liability of the product manufacturer in circumstances where user negligence is present. It does so when product manufacturers are in a better position than product users to prevent product accidents, because durable precautions like safety guards, or kill switches, or air bags, or antilock brakes are the best way to prevent users from suffering harm at the hands of the product.¹⁴⁷ More precisely, it does so when the choice of installing a safety device or not is the salient issue. The manufacturer is the party in the best position to make that choice.

All of this is consistent with the aspiration of §402A: to establish a regime of strict enterprise liability. Defenses which identify zones of user responsibility are the normal and natural complement to liability rules which identify zones of manufacturer responsibility. But if the defenses recognized by §402A are unsurprising, they are also instructive. These are strict liability defenses not negligence ones. They charge accidents to product users not when they fail to exercise adequate care, but when they are in the best position either to prevent product accidents or let them happen. This is a way of distinguishing those risks which are characteristic of the user's activity from those which are characteristic of the product itself.

IV. TAKING STOCK

A. Priest and Schwartz

The products liability regime hatched by §402A does not match either Priest's or Schwartz's accounts. Priest is right to see products liability law in its formative moment as an expression of enterprise liability, but he is mistaken when he claims both that the internal logic of enterprise liability leads to liability without limit, and that products liability law in its formative moment is undone by this fatal flaw.¹⁴⁸ The logic of enterprise liability in fact states an internal limit. Enterprise liability is liability for the "characteristic risks" of an activity. It ends when "the activities of the 'enterprise' do not . . . create risks different from those attendant on the activities of the community in general."¹⁴⁹ Products liability law in its formative period was, in fact, intensely preoccupied with the problem of articulating boundaries. Section 402A itself left the job of articulating criteria of product defectiveness to common law development and courts spent the next several decades

¹⁴⁶ To be sure, this is controversial. It seems unproblematically true of latent defects (as manufacturing defects usually are), but less true of at least some design and warning "defects." Compare *Daly v. General Motors*, 575 P.2d 1162 (Cal. 1978), with *Findlay v. Copeland Lumber Co.*, 509 P.2d 28 (Ore. 1973).

¹⁴⁷ See *Micallef v. Miehle Co.*, 348 N.E.2d 571 (N.Y. 1976).

¹⁴⁸ See Priest, *supra* note 2.

¹⁴⁹ *Bushey*, 398 F.2d 167.

developing such criteria. The entire task of defect rules and defenses is to identify the boundaries of the manufacturer's responsibility by distinguishing the manufacturer's activities from those of purchasers and users, so that risks can be allocated to the activities of which they may rightly be said to be "characteristic."

The truth in Priest's thesis that products liability failed to fix satisfactory boundaries to liability is that courts struggled to do so, and were not always able to do so without falling back on fault criteria. The activities of designing, manufacturing and marketing products are deeply entangled with the activities of purchasing and using them. Both spheres of activity are purposive, mutually dependent and mutually aware. Disentangling them is often difficult, and it is not always possible to articulate non-fault attribution rules which distinguish these activities and their characteristic risks satisfactorily. This is Schwartz's insight. Even in products liability law's enterprise liability moment, design defect and warning liability rules incorporated negligence elements. The risk-utility test is the most prominent example, but hardly the only example. Schwartz's mistake is to equate the use of negligence concepts with ordinary fault liability. As cases like Barker, Carlin, MacDonald and many others show, products liability law bent fault tools to strict ends. Fault concepts were reworked in order to fashion a liability regime more stringent—more protective of the safety of users and consumers—than normal negligence liability.

Under both §402A and the Third Restatement, liability for manufacturing defects is strict enterprise liability.¹⁵⁰ Under the Third Restatement, liability for design defects and failures to warn is orthodox negligence liability, adjusted for the special case of products.¹⁵¹ Under §402A liability for design defects and failures to warn is a mix of strict and negligence liabilities. With respect to design defects, the §402A regime is more stringent because there are two independent tests of defect, the expectation test and the risk-utility test. Liability may be established under either test, making the regime's liability standard more stringent than either test by itself. The risk-utility test, for its part, sounds in negligence, but is carefully constructed to be more stringent than ordinary negligence liability. It incorporates hindsight balancing; relieves the plaintiff of the burden of proving a feasible alternative design as part of its *prima facie* case; and places the burden of proving that the product's design is safe on the defendant. With respect to warnings, the §402A regime is more stringent than normal negligence liability because it imposes a strict liability duty to warn in cases where important personal choices need to be made, and because it, too, imposes hindsight liability. And, as far as defenses are concerned, §402A does not recognize ordinary contributory negligence as a defense. Only misuse and knowing assumption of risk are recognized.

Normatively, the lessons of this development are different from the conclusions drawn by either Priest or Schwartz. *Contra* Priest, the lesson is that articulating no-fault attribution rules can be dauntingly difficult. When it cannot be done effectively, enterprise liability cannot be effectively instituted. *Contra* Schwartz, there is good reason to think that a negligence regime for design defects and warnings makes matters even more difficult, not less difficult. Rigorously implemented,

¹⁵⁰ See, *supra* note 22, and accompanying text.

¹⁵¹ See, *supra* note 91, and accompanying text.

negligence liability imposes immense demands on the competencies of juries. Laxly implemented, it is unlikely to promote product safety.¹⁵²

B. Is Enterprise Liability Still Relevant?

The products liability law that we now have spread across the fifty United States is the product both of §402A's strict enterprise liability revolution and a negligence counter-revolution. Consequently, products liability as it manifests itself across the fifty states is a complex and varied mix of strict and negligence liabilities. More importantly, the future trajectory of products liability law is not dictated by its past. It is ours, collectively, to shape. In thinking about how we might shape it we would do well to consider a future in which enterprise liability figures prominently. In comparison with negligence liability enterprise liability shifts the risks of accidents arising out of product failures to firms and away from individuals. This is most vividly evident when enterprise liability is articulated to impose hindsight liability, but it is true more generally.

In an age of burgeoning economic inequality and insecurity, shifting the financial costs of devastating harm away from individual persons who are often ill-equipped to bear it and onto firms has considerable attraction. Politically, it may be difficult to imagine reconstructing the law of products liability so that it socializes risk much more than it does today. Powerful forces are arrayed against such a reconstruction and those who might benefit from it are neither in a position to push for the reconstruction of the law of torts, nor likely to pursue an agenda which brings them more security. Intellectually, however, the case for such a shift is stronger than the conventional wisdom now holds. Reconstructing products liability in an enterprise liability direction would both tend to diminish the incidence of product accident-related harm and to distribute the costs of unavoidable harm more fairly. There is good reason to think today (as there was good reason to think in 1944) that "responsibility [should] be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market."¹⁵³ Manufacturers "can anticipate some hazards and guard against the recurrence of others, as the public cannot."¹⁵⁴ The "cost of an injury and the loss of time or health may [still] be an overwhelming misfortune for the person injured" and strict products liability may still secure a measure of protection against that misfortune.¹⁵⁵ Reconstructing products liability law in an enterprise liability direction would secure a measure of protection against the insecurities of the contemporary world.

Perhaps more importantly, enterprise liability *is* the form of tort liability which arises to address the world of organized risk, the world in which institutions not individuals are in charge of most of the activities which accidentally wreak havoc with people's lives. We are not returning to the "world of acts." More than ever we live in an age of systemic risk. The impending world of autonomous vehicles is a world in which risk is even more the organized product of large and highly systematized activities. Enterprise liability remains the form of tort liability most responsive to this

¹⁵² This point is forcefully developed by Rapaczynski, *supra* note 23. He follows Calabresi & Hirschhoff, *supra* note 7.

¹⁵³ *Escola*, 24 Cal.2d at 462 (Traynor, J., concurring).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*



social reality. For good and obvious reasons the prospect of Autonomous vehicles has prompted a call for the reviving enterprise liability.¹⁵⁶ The world of organized risk requires a liability regime constructed to address its distinctive features.

¹⁵⁶ See Rapaczynski, *supra* note 23.