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The Theory of Enterprise Liability and Common Law Strict Liability

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The fundamental claim that the *Restatement (Third) of Torts: General Principles* makes about strict liability is striking and bold.¹ The *Restatement (Third)* claims that there are only special instances of strict liability. Negligence is a general legal principle, but strict

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1. RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 18 (Preliminary Draft No. 2) [hereinafter Preliminary Draft No. 2].

liability is a set of particular doctrines.² Curiously, however, the *Restatement (Third)* also takes the position that strict liability is a unified *form* of liability; it characterizes strict liability as liability for the characteristic risks of an activity.³ So the *Restatement (Third)*'s claim that strict liability is a set of special cases seems to be a claim that strict liability is not a coherent general conception of responsibility for accidental physical injury in the way that fault liability is. This claim strikes me as mistaken. The idea of liability for characteristic risk expresses a conception of responsibility for accidental physical injury that is as coherent and as general as the conception embodied by the fault principle. Whereas the fault principle holds actors accountable for injuries issuing from risks whose imposition should have been prevented *ab initio*, the strict liability principle holds actors accountable for injuries that flow from their agency. Strict liability expresses "the notion that losses should be borne by the doer, the enterprise, rather than distributed on the basis of fault."⁴ Fault liability makes *wrongful agency* the fundamental basis of responsibility for harm accidentally done; strict liability makes *agency* itself the fundamental basis of responsibility.

The distinctive modern form of strict liability—enterprise liability—is a particular articulation of what it means to make agency the basis of responsibility. Two propositions form the core of enterprise liability. First, activities should bear their characteristic accident costs.⁵ Fault liability pins the costs of the nonnegligent accidents that are the long-run price of an activity's presence in the world on the random victims of the activity. Enterprise liability pins those accident costs on the activity—the enterprise—which imposed the nonnegligent risks responsible for the injuries at issue. Second, enterprise liability holds that an enterprise's accident costs should be distributed among the members of the enterprise. The costs of an injury should be shared by those who profit from the activity responsible for the injury; they should not be concentrated on the injured party, or be dispersed across unrelated activities.⁶ These two propositions are often linked to a particular conception of fairness. Fairness requires a just distribution of burdens and benefits. It

2. *Id.*

3. *Id.*

4. Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 500 (1961). Calabresi is epitomizing the modern idea of enterprise liability.

5. *Id.*

6. There are ways of dispersing losses without dispersing them across those responsible for the losses in question. First-party loss insurance tends to disperse losses in just this way.

therefore gives rise to a presumption that the costs of the accidental physical injuries characteristic of an activity should be borne by those who benefit from the activity, whether or not they are culpably responsible for precipitating the injuries at issue.⁷ These propositions are also frequently linked to economic ideas of allocative efficiency and loss-spreading.⁸

Enterprise liability is a general and distinctively modern theory of strict liability. Whereas traditional strict liability expressed the maxim that those who act do so at their peril,⁹ enterprise liability expresses the maxim that those who profit from the imposition of risk should bear the costs of the accidents that are a price of their profits. Indeed, the theory of enterprise liability originated outside the law of torts, in a distinctively modern piece of legislation—the Workers' Compensation schemes enacted in England and the United States around the turn of the twentieth century. From its stronghold in these acts, the theory of enterprise liability spread back through the common law of torts, making its presence felt in traditional common law fields of strict liability such as vicarious liability¹⁰ and abnormally

7. See Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266, 1269 (1997).

8. The work of Guido Calabresi is preeminent here. See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970) [hereinafter CALABRESI, *COSTS OF ACCIDENTS*]; Calabresi, *supra* note 4, at 500-07; Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1067-69 (1972) [hereinafter Calabresi & Hirschoff, *Strict Liability*]. More recently, the theory has been developed by Jon Hanson, Kyle Logue, and Steven Croley. See e.g., Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain and Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1896-97 (1995); Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683, 710-12 (1993); Jon D. Hanson & Kyle D. Logue, *The First-Party Insurance Externalities: An Economic Justification for Enterprise Liability*, 76 CORNELL L. REV. 129, 172-73 (1990). See also William K. Jones, *Strict Liability for Hazardous Enterprise*, 92 COLUM. L. REV. 1705, 1775-77 (1992). Finally, some important views do not fit neatly into either the fairness or the efficiency camps. See, e.g., VIRGINIA E. NOLAN & EDMUND URSIN, *UNDERSTANDING ENTERPRISE LIABILITY: RETHINKING TORT REFORM FOR THE TWENTY-FIRST CENTURY* (1995) [hereinafter NOLAN & URSIN, *UNDERSTANDING ENTERPRISE LIABILITY*]; Virginia E. Nolan & Edmund Ursin, *The Deacademification of Tort Theory*, 48 U. KAN. L. REV. 59, 59-60 (1999).

9. The distinction is recognized in both case law and scholarship. See, e.g., *Chavez v. S. Pac. Transp. Co.*, 413 F. Supp. 1203, 1211 (E.D. Cal. 1976) (distinguishing between strict liability "imposed on the innocent but dangerous actor because his conduct is anti-social" and "strict liability [imposed] because certain activity is so dangerous that such a standard is thought necessary to distribute the loss among the general public"); Robert L. Rabin, *Some Thoughts on the Ideology of Enterprise Liability*, 55 MD. L. REV. 1190, 1194-99 (1996).

10. See, e.g., *Taber v. Maine*, 45 F.3d 598, 603 (2d Cir. 1995) (Calabresi, J.) (noting that "as early as 1961, commentators noted that California had taken the lead in equating the scope of respondeat superior liability to the traditionally broader coverage mandated by worker's compensation statutes," and citing Calabresi, *supra* note 4, at 545) *opinion replaced by, remanded by*, 67 F.3d 598 (2d Cir. 1995); *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 171 (2d Cir. 1968) (Friendly, J.) ("The proper test here bears far more resemblance to that

dangerous activity liability, and influenced the rise of products liability.¹¹ Indeed, over the course of the twentieth century, enterprise liability came to unify and infuse much of traditional, common law strict liability.

It is therefore surprising and disturbing that the theory of enterprise liability does not make any appearance *at all* in the *Restatement (Third): General Principles*. It is surprising because enterprise liability has been and remains a prominent part of the law of torts; it therefore deserves to be included in any *Restatement* of the law of torts. It is disturbing because silently excluding enterprise liability from the law of torts converts strict liability from a principle of accountability that is as general as—and competitive with—the fault principle into a set of discrete doctrines. Two general principles of responsibility exist in the law of torts, vying for control of its various domains; yet only one is being acknowledged by the *Restatement (Third)*.

This decision to treat strict liability doctrines as a set of isolated exceptions is a fateful one. What we make of a tort principle or a tort doctrine depends, to an important extent, on how we conceive it. If we deny strict liability the status of a general principle, we thereby bless fault liability. Fault liability becomes the preferred form of tort liability simply because it is the only general ground of tort liability. Special circumstances will have to be present before strict liability even comes to mind.

On the one hand, conceiving of fault as the only general principle of responsibility for injury accidentally inflicted tends to make the sphere of fault liability expand and the sphere of strict liability contract. If fault is the only general principle of liability, we should prefer fault to strict liability unless special circumstances counsel otherwise. On the other hand, conceiving of particular strict

which limits liability for workmen's compensation than to the test for negligence."); *Fruit v. Schreiner*, 502 P.2d 133, 141 (Alaska 1972) ("The basis of *respondeat superior* has been correctly stated as 'the desire to include in the costs of operation inevitable losses to third persons incident to carrying on an enterprise, and thus distribute the burden among those benefited by the enterprise' The principle has been recognized by every state in the enactment of women's compensation laws . . .") (quoting Smith, *Frolic and Detour*, 23 COLUM. L. REV. 717, 718 (1923)); *Mary M. v. City of Los Angeles*, 814 P.2d 1341, 1349 (Cal. 1991) (costs issuing from the abuse of police authority "should be borne by the community, because of the substantial benefits that the community derives from the lawful exercise of police power").

11. 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) offers one influential but controversial account of the influence of enterprise liability on product liability law. For criticism, see Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 602 (1992).

liability doctrines as a set of anomalous exceptions to tort law's general preference for fault liability tends to induce the contraction of those doctrines whose strictness is both undeniable and beyond uprooting. We will be inclined to construe strict liability doctrines more narrowly when we conceive of them as anomalous exceptions to the fault principle, and more broadly when we conceive them as principled expressions of enterprise liability. We might tend, for example, to classify activities as abnormally dangerous only when imposing strict liability seems likely to achieve the primary aim of negligence liability-inducing actors to conduct their risky activities more safely.¹² Or we might tend to construe the "scope of employment" rule in vicarious liability law as a kind of surrogate negligence liability, imposing liability only when we can imagine inducing some kind of increased precaution.¹³

If we conceive of strict liability as a competing general principle of responsibility, our law will tend to be different. We will not be reflexively inclined to prefer fault to strict liability; indeed we may be inclined in the opposite direction. If we believe that activities should generally bear their characteristic accident costs, we will tend to press for stricter forms of liability, and we will be inclined to interpret strict doctrines expansively. We might tend, for example, to classify activities as abnormally dangerous whenever subjecting them to strict liability will distribute the burdens and benefits of their inevitable accidents more fairly, and even if subjecting these activities to strict liability is not likely to induce greater precaution. We may also tend to find acts within the scope of an employee's employment whenever holding employers liable for those acts will align the burdens and benefits of some activity more fairly, and even if including these acts within the scope of employment is not likely to induce greater precaution.¹⁴

Our law, in short, is theory laden and reflexive. What it is and what it becomes depend, in important part, on what we think it is and what we think it should be. Because our law is shaped by our conceptions of it, our conceptions of it—and our *Restatements* of it—matter. My aim in this Paper is to illustrate the way in which enterprise liability has influenced and might continue to influence the shape of tort law. First, I shall trace the course of enterprise liability

12. See *Konradi v. United States*, 919 F.2d 1207, 1210 (7th Cir. 1990) (Posner, J.); see also *infra* Part III.

13. See *Indiana Harbor Belt R.R. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1177 (7th Cir. 1990) (Posner, J.); see also *infra* Part III.

14. See *infra* Part III.

through three pieces of twentieth century tort scholarship. Second, I shall show how the acceptance or rejection of enterprise liability conceptions influenced the interpretation of familiar strict liability doctrines. Third, I shall consider the subterranean influence of enterprise liability conceptions on negligence doctrines. Finally, I shall consider how these varying conceptions of strict liability should affect the approach that the *Restatement (Third): General Principles* adopts towards strict liability.

The articles that I consider—Jeremiah Smith's *Sequel to Workmen's Compensation Acts*,¹⁵ Young B. Smith's *Frolic and Detour*,¹⁶ and Guido Calabresi's *Some Thoughts on Risk Distribution and the Law of Torts*¹⁷—document the birth of enterprise liability in the Workers' Compensation Acts enacted around the turn of the twentieth century and its subsequent spread into the common law of torts. Jeremiah Smith's article argues that, by repudiating the fault liability around which the common law of torts had been constructed in the latter half of the eighteenth century and embracing strict liability, the Workers' Compensation Acts made the law of accidents a house divided against itself. The Acts were therefore bound, in Smith's view, to initiate a revolution in the common law of torts. Jeremiah Smith's predictions were eerily prescient. Many of the doctrinal developments he foresaw came to pass. Young B. Smith's article argues that the enterprise liability theory of the Workers' Compensation Acts justifies the otherwise anomalous doctrine of *respondeat superior* and enables us to give a principled interpretation of the scope of that liability. With that theory in hand, *respondeat superior* ceases to be an archaic oddity and becomes the principal common law expression of a distinctively modern sense of justice. Building quite self-consciously on their pioneering work, Guido Calabresi's article fashions a general economic theory of enterprise liability and applies that theory to the leading strict liability tort doctrines. Over the course of the three articles, enterprise liability receives ever more bold, and ever more general, expression.

The cases and doctrines I discuss in the second and third sections are selected more or less ahistorically. They are chosen with an eye to showing that the choice between enterprise and fault justifications for strict liability doctrines is an important one. Because my doctrinal examples are not chosen to illustrate an historical

15. Jeremiah Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 235, 344 (1914).

16. Young B. Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444, 716 (1923).

17. Calabresi, *supra* note 4.

progression, it may be worth noting, at the outset, the historical fact that enterprise liability flowered both in legal scholarship and legal doctrine over the course of the twentieth century. It flowered, not because it generated wholly new doctrines, but because it enabled the reconceptualization of old ones. The legal historian G. Edward White illustrates enterprise liability's influence on the conceptual structure of tort law when he observes that "[b]y the 1930's scholars had begun to treat cases imposing strict liability as a separate category of Torts rather than as a 'peculiar' set of exceptions."¹⁸ The shift from "peculiar exceptions" to cohesive category is not a shift in doctrinal coverage, but rather it is a shift in doctrinal conceptualization. As enterprise liability ideas seeped into the law of torts, strict liability was seen and thought of as a coherent general alternative to negligence liability.

The development White describes was hardly an isolated one. In the thirties, forties, and fifties, prominent legal scholars, including Charles Gregory, Fleming James, Friedrich Kessler, and William Prosser, were favorably disposed to enterprise liability.¹⁹ In the 1960s and 1970s, Guido Calabresi set out to develop a systematic economic articulation and defense of enterprise liability.²⁰ Enterprise liability conceptions found their way into numerous legal opinions—opinions dealing with the scope of employment doctrine in vicarious liability law, with abnormally dangerous activities, and with product defects.²¹ Although enterprise liability's precise influence on important fields of law such as product liability is hotly contested,²² and although enterprise liability has come under sustained attack during the past twenty years, it continues to attract the support of influential legal scholars and it continues to crop up in cases. Enterprise liability, in short, could not credibly be omitted from a history of twentieth century tort law and scholarship.

18. G. EDWARD WHITE, *TORT LAW IN AMERICA* 109 (1980).

19. See generally CHARLES GREGORY, *LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS* (1936); WHITE, *supra* note 18, at 109-10, 168-73, 198-200 (1980); Fleming James, Jr., *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948); William Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966); William Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960).

20. See generally CALABRESI, *COSTS OF ACCIDENTS*, *supra* note 8; Calabresi, *supra* note 4; Calabresi & Hirschhoff, *Strict Liability*, *supra* note 8.

21. Some such decisions are discussed *infra* Part II.

22. Compare, for example, the accounts of product liability law found in Priest, *supra* note 11, with Schwartz, *supra* note 11, at 605-20 and WHITE, *supra* note 18, at 168-72.

I. THE THEORY OF ENTERPRISE LIABILITY: FROM THE
WORKERS' COMPENSATION ACTS TO COMMON LAW STRICT
LIABILITY²³

*A. Jeremiah Smith: the Workers' Compensation Acts as a Challenge to
the Common Law of Torts*

1. Jeremiah Smith's Theory and Prophecy

Writing in 1914, Jeremiah Smith asserted that "[t]he fundamental principle of the modern common law of torts is, that fault is requisite to liability."²⁴ Strict liability was confined to "a number of well-recognized exceptions," albeit exceptions "covering a good deal of ground."²⁵ Most of these exceptions rested on "distinct and sufficient reasons, founded on considerations of public policy,"²⁶ and none constituted a general challenge to the primacy of fault liability. To prove his point, Smith singled out three of these exceptions for discussion: the doctrine of *respondeat superior*; the " 'halfway' doctrine of the maritime law . . . [that] if a seaman is taken sick or is hurt while in service of the vessel, the ship is held for the expense of his care and cure, irrespective of fault on the part of those controlling the vessel;"²⁷ and the doctrine of strict liability for extra-hazardous activities.

Smith's discussion of vicarious liability illustrates both his general method and his reasons for thinking that common law instances of strict liability, no matter how numerous, did not constitute a general challenge to the primacy of the fault principle. Smith conceded that the doctrine of *respondeat superior*, "though exceptional, is no doubt firmly established and not likely to be overthrown."²⁸ Smith argued, however, that *respondeat superior* was not a general threat to the primacy of the fault principle. For one thing, the doctrine of *respondeat superior* does not dispense with all

23. NOLAN & URSIN, UNDERSTANDING ENTERPRISE LIABILITY, *supra* note 8, also trace enterprise liability back to the Worker's Compensation Acts. See *id.* at 5. George Priest's influential article *The Invention of Enterprise Liability*, *supra* note 11, however, does not recognize the significance of these Acts.

24. Smith, *supra* note 15, at 344.

25. *Id.* at 240 (citing J.P. Hall, 19 J. POL. ECON. 698-700 for a "condensed summary of exceptions").

26. *Id.*

27. *Id.* at 256-57.

28. *Id.* at 256.

fault. It is a hybrid doctrine in that it dispenses only with fault on the part of the master. This undercuts any argument for generalized strict liability on the basis of *respondeat superior*:

Because the law holds an owner responsible for harm due to faults committed by his servants in the conduct of his business, it does not follow that the law should also hold him responsible for harm happening without any fault on the part of any person whatever. In the first case an existing fault of his subordinate is, whether justly or unjustly, imputed to the owner. In the second case there is no fault of anyone to be imputed to him.²⁹

Second, Smith argued that *respondeat superior* "is admittedly a harsh doctrine; and it is doubtful whether the arguments in its favor would have prevailed, if servants in general had had the pecuniary ability of their employers."³⁰ *Respondeat superior* is, in short, an anomaly, "not a doctrine to be extended by analogy."³¹ The same was true of the "halfway" doctrine of the maritime law" requiring those in charge of vessels to take care of seamen who are injured or fall ill in the course of their service³² and of common law strict liability for extra-hazardous activities. Each of these rested on special reasons and special histories. Neither was capable of generalization, and neither, therefore, threatened the supremacy of fault within the common law of torts.

The Workmen's Compensation Acts, however, were different. They did constitute a radical challenge to the authority of the fault principle:

There is a movement now going on in this country for the enactment of legislation based upon the principle of the English Workmen's Compensation Act. This legislation is founded largely upon a theory inconsistent with the fundamental principle of the modern common law of torts. As to a considerable number of the accidents covered by some of the recent statutes, the results reached under the statute would be absolutely irreconcilable with results reached at common law in cases outside the scope of the statute. This incongruity must inevitably provoke discussion as to the intrinsic correctness of the common law of torts; and is likely to lead, either to a movement in favor of repealing the statutes, or to a movement in favor of making radical changes in the common law.³³

What made these acts special? Why couldn't they be separated from the general common law of torts and treated as their own special case? Smith was, after all, perfectly comfortable with treating *respondeat superior* and strict liability for extra-hazardous activities as special cases. In one of his other writings, he shows himself very sympathetic

29. *Id.* at 255 (footnote omitted).

30. *Id.* at 256-57.

31. *Id.* at 257.

32. *Id.*

33. *Id.* at 235 (footnotes omitted).

to the idea of identifying tort with fault and treating strict liability as its own separate field.³⁴ Legal scholars were already arguing that the strict liability principle of the Workmen's Compensation Acts should be confined in just this way:

It is sometimes alleged that a Workmen's Compensation Act does not make any change in the law of torts. Eminent jurists have said that "in strictness it stands outside the law of torts altogether"; that it "is a law of compulsory insurance, and quite beyond the region of actionable wrongs"; that it creates (or, in effect, is) "a statutory term of the contract of service"; and that the liability thus created is "quasi-contractual" rather than "delictual". Again, it is said: "It is not a regulation of any substantive duty, nor does it change the substantive law or the duty of the employer in any way. It is exclusively an economic readjustment of the burdens of industrial accident." It is "idle to try to borrow tort analogies, either for or against this legislation." This legislation is "not founded on tort, but is founded on the supposed economic shift of a burden from shoulders which are believed unable to bear it, to the employer, who is supposed to be better able to bear it and to be able to get back that cost from the public." Such "compensation" is not "damages" nor meant in principle to be half damages. Neither is it based upon the idea of a tort, or meant to be reparation for a wrong. In principle it is the payment of the employer's share of a common undertaking.³⁵

Why did Jeremiah Smith reject all of these ways of limiting the general import of the Workmen's Compensation Acts? Here is what he says:

But, notwithstanding these modes of characterizing this kind of legislation, two stubborn facts remain. First: the statute imposes upon an employer a duty of compensation, which did not exist under the modern common law of torts. The statute shows "a distinct revulsion from the conception that fault is essential to liability." It is "a distinct reversion to the earlier conceptions that he who causes harm, however innocently, is, as its author, bound to make it good." This legislation "has taken a wholly new departure as regards the cases within it." The magnitude of the change thus effected and its radical nature have been recognized by many jurists.³⁶

The repudiation of "fault" as the basis of liability unifies the Workmen's Compensation Acts in all their diverse statutory forms and constitutes a radical challenge to the common law of torts:

The point to be made here is: that all these various forms of legislation (a direct payment by employer to workman, or payment through an insurance fund; a 'compulsory' statute, or an 'elective' statute) are all alike intended to bring about one and the same ultimate result; and all are alike based upon one and the same general theory. They are all intended to accomplish a result entirely incongruous with that which would be reached under the modern common law of torts. And they are all alike based upon a theory (that fault is not requisite to liability) which is utterly inconsistent with the fundamental principle of the modern common law of torts.³⁷

34. See Jeremiah Smith, *Tort and Absolute Liability: Suggested Changes in Classification*, 30 HARV. L. REV. 241, 319, 409 (1917).

35. Smith, *supra* note 15, at 245 (footnotes omitted).

36. *Id.* at 245-46 (footnotes omitted).

37. *Id.* at 249-50 (footnote omitted).

The Workmen's Compensation Acts, in short, cannot be cordoned off from the general law of torts as some kind of special case because they (1) reach results that conflict directly with those that the common law of torts would reach but for the Acts, and (2) rest on a theory of responsibility for accidental injury directly opposed to the theory on which the common law of torts rests.

More is involved here than just rejecting fault liability and embracing strict liability. The Workmen's Compensation Acts, Smith believes, rest on a conception of fairness:

As to considerations of justice and expediency urged in support of the statute. . . . It is argued that a part (at least) of the damage, happening to workmen in a business without fault on the part of any one, should be borne by the owner of the business, because the latter initiated the undertaking with a view to his own benefit, and because he will reap the net profit of the business if any should accrue.³⁸

This passage expresses one half of the enterprise liability idea—the idea that nonnegligent losses should be borne by the enterprise, the actor whose activity precipitates them. The other half of the enterprise liability idea holds that those who benefit from an enterprise's risky activities should bear the burdens of its accidents. Employment related accident costs should not remain concentrated on employers. They should be dispersed across all those—owners, managers, customers, suppliers, employees—who benefit from the imposition of the enterprise's characteristic risks.

This enterprise liability idea of fairness condemns the common law of torts, as it existed in Smith's time, because it suggests that other domains of fault liability should also be supplanted by strict liability. Fairness favors granting *outsiders*—strangers to an enterprise—the benefits of strict liability even more than it favors granting the benefits of strict liability to employees:

The employee is himself a part of the undertaking. He has, in one sense voluntarily participated in it; and is deriving benefits from it. Whereas outsiders have nothing to do with the undertaking. Frequently they "are exposed, without any choice on their side, to more or less risk of injury arising from what is done in the conduct of it by the owner or his servants." An outsider is not a participant in the business and "derives no direct benefit from its carrying on."³⁹

38. *Id.* at 252. Smith goes on to express some reservations about this argument, because the argument seems to imply that only owners benefit from the operation of a business. He expresses these reservations, in part, I think, because he does not see the second half of the idea of fairness at work here, which calls for the dispersion of the costs of enterprise related accidents across the enterprise, and hence across all those who benefit from its risk impositions. The objection assumes that all accident costs will be shouldered by the employer. In fact, employers—firms—will shift much of the cost onto to suppliers, customers, shareholders and employees themselves. *See id.*

39. *Id.* at 252-53 (footnote omitted).

Strangers to an enterprise thus have an even stronger argument for strict liability than employees do. Employees benefit directly from the enterprises that injure them; strangers do not.

Fairness likewise favors granting the *customers* of an enterprise the benefits of strict liability even more than it favors granting those benefits to employees:

If it is just to grant partial compensation to a workman in the undertaking and also to an outsider, why may not the claim of a paying customer of the business, who is damaged without fault on the part of any one (e.g., a paying passenger in a trolley car) stand on at least equally strong ground? The fares paid by passengers to the common carrier in the trolley business constitute the fund out of which the motorman is compensated [in the event of injury].⁴⁰

The rationale of the Workmen's Compensation Acts thus suggests that the common law of torts is fundamentally mistaken. Fault was a prerequisite to tort liability under the common law of torts in the early twentieth century. Measured by the idea of fairness that informs the Workers' Compensation Acts, however, fault liability is less fair—less just—than strict liability. Jeremiah Smith, therefore, concluded his paper with these thoughts:

At the outset [of this paper], it was assumed . . . that the basic principle of the Workmen's Compensation Act is just

We have now attempted to show that, if justice to workmen requires such an enactment, then justice to certain persons other than workmen must also require similar legislation for their benefit; in other words, that the benefit of legislation on this basic principle cannot justly be confined to workmen.

We have also attempted to show that, if the above propositions are correct, then the common law of A.D. 1900 is wrong in principle and ought to be repudiated.⁴¹

The "repudiation" of "the common law of A.D. 1900" could, Smith thought, be effected by reformulating a handful of key doctrines:

By a very liberal construction of the *res ipsa loquitur* doctrine; by a broad view of as to what constitutes *prima facie* evidence of negligence; and by inverting the burden of proof (putting on defendant the burden of proving that he was not negligent),—the court could go far towards practically reversing the common law of A.D. 1900 in a large proportion of cases.⁴²

40. *Id.* at 253.

41. *Id.* at 367.

42. *Id.*

2. The Fulfillment of Smith's Prophecies in the Common Law of California

Smith's apocalyptic vision has not been fully realized, of course. Fault liability is alive and well in the law of torts. The prescience of Smith's vision, however, remains astonishing. Much of what he prophesied came to pass in important parts of California's common law of torts. *Res ipsa* has been reconfigured from a rule of negligence liability into a *de facto* form of strict liability. Product users have received the protections of enterprise liability in part because the California Supreme Court concluded that customers had especially strong claims to the protections of strict liability. Strangers to product accidents have received the protections of enterprise liability in part because the Court concluded that their failure to derive any benefit from the enterprises whose products injured them made the fairness argument in favor of granting them the benefits of enterprise liability especially compelling. And when the California Supreme Court tackled the thorny problem of making liability for design defect stricter than ordinary negligence liability, it did so in part by "inverting" the burden of proof—by shifting to defendants the burden of proving that their products were *not* defectively designed. By the end of the 1960s, enterprise liability had emerged as a conception of responsibility for accidental injury as general as, and competitive with, fault liability. By the end of the 1960s, Smith's insight that enterprise liability required remaking the tort law of accidents was being widely (if implicitly) acknowledged and widely acted upon by courts.

The doctrine of *res ipsa loquitur* was the first to fall in line with Smith's prophecies. Thirty years after Smith observed that *res ipsa loquitur* might be turned, by "liberal construction," from a rule of negligence liability to a form of strict liability, Roger Traynor penned his famous dissent in *Escola v. Coca Cola*,⁴³ arguing that *res ipsa loquitur* was being construed so liberally that it had become "in reality liability without negligence,"⁴⁴ and that the courts should cease to disguise that fact:

In leaving it to the jury to decide whether the inference of negligence has been dispelled, regardless of the evidence against it, the negligence rule approaches the rule of strict liability. It is needlessly circular to make negligence the basis of recovery and impose what is in reality liability without negligence. If public policy demands that a

43. *Escola v. Coca Cola*, 150 P.2d 436 (Cal. 1944).

44. *Id.* at 463.

manufacturer of goods be responsible for their quality regardless of negligence there is no reason not to fix that responsibility openly.⁴⁵

In 1963, in *Greenman v. Yuba Power Products*,⁴⁶ Traynor wrote for the majority and adopted the rationale of his *Escola* dissent, rejecting both negligence liability and contract (warranty) liability, and subjecting defective products to strict liability in tort. The enterprise liability character of his position could not have been clearer: "The purpose of such liability," Traynor wrote, "is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."⁴⁷

Products liability in *Greenman* is, in large part,⁴⁸ an instance of strict liability in favor of customers. As such, it is the very kind of extension of strict liability that the logic of the Workers' Compensation Acts, in Smith's opinion, required. Indeed, Traynor's arguments for the imposition of enterprise liability in *Escola* and *Greenman* tracked the enterprise liability logic Smith had mapped even more tightly than the extension of enterprise liability to customers suggests. Traynor, like Smith before him, concluded that customers are related to the firms whose products they consume in a way that strengthens the case for imposing enterprise liability. In *Escola*, Traynor asserts that technological progress has diminished the customer's capacity to protect herself at the very same time that sophisticated marketing strategies have induced consumers to let down their guard. These two facts strengthen the case for subjecting defective products to a rule of enterprise liability.⁴⁹

In *Greenman*, Traynor reiterates his arguments in *Escola's* and adds a new argument: manufacturers assume special responsibility for the safety of customers because products themselves implicitly

45. *Id.*

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

47. *Id.* at 901.

48. "In large part," but not exclusively, because *Greenman* establishes strict liability in favor of product users, and not all product users are purchasers of the product that injured them. See *id.* at 900-01.

49.

Manufacturing processes, frequently valuable secrets, are ordinarily either inaccessible to or beyond the ken of the general public. The consumer no longer has the means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade-mark.

Escola, 150 P.2d at 467.

represent that they will "safely do the jobs for which [they are] built."⁵⁰ The California Supreme Court thus justified extending enterprise liability to product purchasers in part because it came to the same conclusion as Smith—that special features of the relationship between firms and their customers made the case for adopting enterprise liability even more compelling.

Neither the enterprise liability logic of Traynor's *Greenman* opinion, nor the expansiveness of that logic, was lost on Traynor's contemporaries. Hesitating to follow Traynor's lead, the Oregon Supreme Court echoed Smith's fear that the logic of enterprise liability called for the wholesale displacement of fault liability. Enterprise liability gave the Oregon court pause precisely because it *was* a general theory of responsibility for accidental injury, a theory every bit as encompassing as the fault principle and competitive with it. If enterprise liability was the correct form of liability for product defects, it was also the correct form of liability in a wide range of other cases:

Substantially the same reasons for imposing strict liability upon sellers of defective chattels have been advanced in several other cases and in various texts and articles. Summarized, the thesis is that a loss resulting from the use of the defendant's defective goods is a "casualty produced by the hazards of defendant's enterprise, so that the risk of loss is properly a risk of that enterprise," a view commonly described as the theory of enterprise liability. . . .

. . . The reasoning would seem to apply not only in cases involving personal injuries arising from the sale of defective goods, but equally to any case where an injury results from the risk creating conduct of the seller in any stage of the production and distribution of goods It seems to us that the enterprise liability rationale employed in the *Escola* case proves too much and that if adopted would compel us to apply the principle of strict liability in all future cases where the loss could be distributed.⁵¹

In the 1969 case, *Elmore v. American Motors Corporation*,⁵² the California Supreme Court extended strict products liability to bystanders. In so doing, the court explicitly echoed Smith's point that the case for extending strict liability to strangers to an enterprise is even stronger than the case for extending strict liability to participants in an enterprise:

If anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable. Consumers

50. *Greenman*, 377 P.2d at 901.

51. *Wights v. Staff Jennings, Inc.*, 405 P.2d 624 (Or. 1965) (emphasis in original, citing EHRENZWEIG, NEGLIGENCE WITHOUT FAULT 4 (1951)); Fleming James, Jr., *General Products—Should Manufacturers be Liable Without Negligence?*, 24 TENN. L. REV. 923, 926 (1957). These passages are excerpted in FRANKLIN & RABIN EDS. TORT LAW AND ALTERNATIVES 558 (6th ed., 1996).

52. *Elmore v. Am. Motors Corp.*, 451 P.2d 84 (Cal. 1969).

and users, at least, have the opportunity to inspect for defects and to limit their purchases to articles manufactured by reputable manufacturers and sold by reputable retailers, whereas the bystander ordinarily has no such opportunities. In short, the bystander is in greater need of protection from defective products which are dangerous, and if any distinction should be made between bystanders and users, it should be made, contrary to the position of defendants, to extend greater liability in favor of bystanders.⁵³

Smith had made the same basic point, some fifty-five years earlier. Strangers to an enterprise have a stronger claim to the protections of strict liability than participants do because—unlike participants—strangers neither choose to expose themselves to enterprise related risks nor receive any direct benefits from their exposure to enterprise related risks.⁵⁴

In 1978, when the California Supreme Court took up the problem of articulating standards for determining when a product *design* was defective, it bore out more of Smith's prophesy. Design defects pose special problems for enterprise liability. Enterprise liability—like all strict liability—requires attributing accidents to activities. Product accidents arise at the intersection of several activities. On the one hand, the paradigmatic victim of a product related accident both purchases and uses the instrument of her injury, thereby participating in the enterprise that injures her in two ways. On the other hand, the firm whose product injures her typically participates in the enterprise that issues an injury in two ways as well. The product manufacturer usually designs and manufactures the instrument of injury and markets and sells that instrument to the victim. Matching accidents to activities is thus a challenging task, a task which taxes the ingenuity of products liability law in its enterprise liability incarnation. The particular problem of attribution facing design defect law is to decide which product risks among those plausibly attributable to product design should be treated as costs of the manufacturer's activity, rather than as costs of the user's activity.

It will not do to count all accidents in which design features play a prominent role as costs of the manufacturer's activity and to attribute those accident costs to the manufacturer. It will not do, for example, to charge all accidents attributable to the sharpness of steak knives to the manufacturers of those knives. Sharpness is the very property that enables steak knives to serve their purpose. The sharpness of a well-designed steak knife may precipitate an accident that might otherwise have been avoided, but attributing all accidental

53. *Id.* at 89. *Cf.* Smith, *supra* note 34.

54. *Id.*

injuries in which the sharpness of steak knives plays a prominent role to the manufacturers of those knives will have perverse effects. Building the costs of knife-related accidents into the costs of steak knives will tend to favor careless over careful users by making the careful pay for the harms the careless inflict on themselves. Worse yet, if liability actually induces manufacturers to dull their knives, it will seriously impair the product's utility. Sharpness is not a defect of a steak knife. Accidents attributable to the sharpness of steak knives should be counted as costs of the user's activity and left to lie where they fall.

In other cases, however, it seems right to attribute an accident to the product's design. When a passenger in an automobile suffers a severe injury because the automobile manufacturer chose to design the car with a soft, collapsible body frame rather than with a more rigid one, the product manufacturer's design choice seems responsible for the harm.⁵⁵ Unlike the sharpness of steak knives, the crashworthiness of car frames is not essential to a car's usefulness. It therefore seems wrong to attribute the harm to the user's activity and right to attribute it to the producer's activity. The difficult task confronting design defect law is to distinguish cases that are like the sharpness of steak knives from cases that are like the crashworthiness of car frames.

*Barker v. Lull Engineering*⁵⁶ is the leading California case on product design defects. *Barker* assumes an enterprise liability framework for product liability law as a whole, and it addresses the problem of devising design defect tests that sort injurer and victim activity appropriately by adopting a twofold test of design defect. Liability is imposed if a design fails to pass muster under either test. One test—the expectation test—has its roots in contract (warranty) law and measures defectiveness from the perspective of a product consumer. This test is strict, not fault-based, because it imposes liability on products whose designs disappoint consumer expectations, even if those designs are, from a fault perspective, reasonable.⁵⁷ The second test—the risk-utility test—sounds in negligence. It is, however, stricter than ordinary negligence liability in two ways. First, it judges design defectiveness in light of knowledge available at trial and not, as negligence liability does, in light of knowledge available or

55. This design feature was at issue in *Dawson v. Chrysler Corp.*, 630 F.2d 950, 954 (3d Cir. 1980).

56. *Barker v. Lull Eng'g Co.*, 573 P.2d 443 (Cal. 1978).

57. For a clear example of a design that disappoints reasonable consumer expectations even though it passes muster under risk-utility (a negligence) test, see *Denny v. Ford Motor Co.*, 662 N.E.2d 730 (N. Y. 1995).

reasonably obtainable at the time the product was sold. Second, it relaxes the requirements of plaintiff's prima facie case and makes defendants bear the burden of proving that a challenged design is not defective.

Under *Barker*, plaintiffs are not required to identify the "untaken precaution"—the alternative, feasible design—that would have prevented the injury at issue and then make out a prima facie case that this alternative feasible design is superior to the actual design of the product. Under *Barker*, plaintiffs are required to show only that the product's design played an important causal role in the genesis of their injuries. "[O]nce the plaintiff makes a prima facie showing that the injury was proximately caused by the defendant's design, the burden . . . shift[s] to the defendant to prove, in light of the relevant factors, that the product is not defective."⁵⁸ *Barker*, in short, dispenses with the "untaken precaution" requirement that is the core of the traditional prima facie case of negligence and places on the defendant the burden of proving that the product design at issue passes muster under the risk-utility test.⁵⁹

Barker's modifications of the risk-utility test are important. By judging design defect with hindsight not foresight, by relaxing the plaintiff's prima facie case, and by shifting the burden of proving that the product's design meets the risk-utility test, *Barker* effects a form of liability substantially stricter than ordinary negligence, even though it speaks the negligence language of the risk-utility test. The last two of the doctrinal devices that it uses—relaxing the plaintiff's prima facie case and shifting the burden of proof to the defendant—are devices that Jeremiah Smith anticipated. By taking "a broad view of as to what constitutes prima facie evidence of negligence," and "by inverting the burden of proof," courts could, Smith wrote, convert ordinary negligence liability into something much stricter.⁶⁰ Without citing Smith, the California Supreme Court pays tribute in *Barker* to the accuracy of his insight.

58. *Barker*, 573 P.2d at 431. The court adds "the defendant's burden is one affecting the burden of proof, rather than simply the burden of producing evidence." *Id.* at 455. By permitting "the imposition of liability under strict liability principles if, upon hindsight, the trier of fact concludes that the product's design is unsafe to consumers, users, or bystanders." *Id.* at 457. *Barker* takes another step towards the strict liability that Smith foresaw.

59. This requirement, along with the use of foresight, not hindsight, to measure the adequacy of the design at issue is insisted upon by the *Restatement Third: Products Liabilities* test of design defect. The contrast between the *Restatement Third's* defect tests and the *Barker* tests is a contrast between a pure form of negligence liability and a form of stricter liability which incorporates elements of negligence balancing.

60. Smith, *supra* note 15, at 367.

The prescience of Jeremiah Smith's predictions is evidence that this committed advocate of fault liability saw deeply into the logic and power of enterprise liability. First, Smith saw that the appearance of the Workers' Compensation Acts introduced a deep conflict into the law of accidents. The strict liability of the Workers' Compensation Acts could not be dismissed either as a special case or as an historical anomaly. On the contrary, the Workers' Compensation Acts embodied a fully general principle of responsibility—the enterprise liability principle—which was competitive with the fault principle. The Acts thereby precipitated a conflict between two general but competitive principles of responsibility for accidental injury. Second, Smith saw that the logic of enterprise liability was powerfully expansive. If workers had a just claim to the benefits of enterprise liability, so too did customers and strangers. Third, Smith saw that the common law of torts might well be reconstructed by the logic of enterprise liability. That reconstruction could be effected as much by reworking negligence liability as by imposing strict liability outright.

Most importantly, however, the prescience of Jeremiah Smith's prophecies is powerful evidence that enterprise liability did enter the common law of torts in the twentieth century, exerting considerable influence over its contours.

B. Young B. Smith: the Theory of Workers' Compensation and the Doctrine of Respondeat Superior

Young B. Smith's *Frolic and Detour*⁶¹ looks, at first glance, far removed from the domain of Workers' compensation law. The paper's principal topic is the interpretation of the "frolic and detour" doctrine in the law of vicarious liability. Its account of *respondeat superior* begins by concurring with Jeremiah Smith's argument that *respondeat superior* doctrine itself lacks general significance. This first appearance, though, is deceptive. The article represents a second stage in the rise of enterprise liability. *Frolic and Detour* takes the theory of enterprise liability and uses it to reconceptualize the law of vicarious liability.

Jeremiah Smith had written that the law of vicarious liability was not "a doctrine to be extended by analogy."⁶² It was, instead, an historical curiosity. On the one hand, the doctrine was firmly entrenched, too firmly entrenched to be uprooted by the fault principle, no matter how dominant that principle might be. On the

61. *Id.* at 716.

62. *Id.* at 257.

other hand, no convincing justification for the doctrine could be found or fashioned. *Respondeat superior* could not serve, therefore, as the basis for any coherent theory of strict liability capable of contesting the supremacy of the fault principle. On these two points, Young B. Smith appeared to agree with Jeremiah Smith:

No legal doctrine has been so generally criticized and yet so generally adhered to by courts as the doctrine of *respondeat superior*. Not only is it now irretrievably rooted in the law of the English speaking countries but it also exists to some extent in the law of Scotland, France, Italy, Germany, Spain, Portugal, Switzerland and other countries

Is there any rational justification for the doctrine?

If one turns to the opinions of judges or books upon the subject, seeking a justification, disappointment is almost inevitable. True it is that many reasons have been given, but none of them are satisfying. Perhaps this may account for the fact that most legal scholars who have written about the doctrine have disapproved of it; or, it may be that the cause is deeper than this.

Our tort law as it has developed during the past four hundred years does not, in the main, impose liability without fault. In this respect the law undoubtedly reflects the common current of thought which has prevailed during this period [Because it makes fault essential to liability that current of thought it] is opposed to the fundamental theory of agency [embodied by the doctrine of *respondeat superior*].⁶³

The fact that vicarious liability was so deeply entrenched in this and other countries suggested to Young B. Smith, however, that there might be something wrong with the then current, fault-based, disdain for it.⁶⁴ It suggested, in fact, that vicarious liability might rest on a general conception of responsibility, albeit one competitive with the fault principle. *Repondeat superior*, Smith wrote, might be "the forerunner of a different way, perhaps a more intelligent way" of assigning responsibility for accidental injuries.⁶⁵

This "different . . . more intelligent" way of dealing with inevitable injuries to third persons occasioned by servants pursuing their master's business is to hold the master liable for those injuries without regard to fault, and then to distribute the cost of the injuries across the master's enterprise. The enterprise liability rationale of the

63. *Id.*, Smith, *supra* note 16, at 452-53, 454 (quoting Oliver Wendell Holmes, Jr., *Agency*, 5 HARV. L. REV. 1, 14 (1891), in part).

64. Smith wrote, "This phenomenon alone [the widespread entrenchment of the principle of *respondeat superior*] suggests that there is, perhaps, more justification for the doctrine than its critics have perceived." *Id.* at 453.

65. "It is not inconceivable," Smith explains, "that *respondeat superior* is but the forerunner of a different way, perhaps a more intelligent way of dealing with a social problem. The widespread enactment in recent times of workmen's compensation laws and similar statutes points in this direction." *Id.*

Workers' Compensation Acts, in short, supplied the justification that the doctrine of *respondeat superior* so sorely needed:

Why, then, should the master be responsible?

A reason which occurs to the writer is that which has been offered in justification of workmen's compensation statutes. In substance it is the belief that it is socially more expedient to spread or distribute among a large group of the community the losses which experience has taught are inevitable in the carrying on of industry, than to cast the loss upon a few.

A workman's leg is broken. If the master is not responsible, the loss falls on the workman alone. He has no way of spreading it or passing it on either wholly or in part. On the other hand if the master is made responsible he does not bear the loss alone because he is in a position to spread the loss among employers of his class and include his proportionate part in the cost of production. The employer may spread the loss among employers of his class by carrying insurance to cover his liability, and his part of the burden is represented by the amount of the insurance premium which is relatively small. By slightly enhancing the price of his product he can thus distribute his part of losses occurring in his line of industry among the consumers. The net result is that the losses occasioned by injuries to employees engaged in industry generally are spread and distributed among a large number of the community.

If it is socially expedient to spread and distribute throughout the community the inevitable losses occasioned by injuries to employees engaged in industry, is it not also socially expedient to spread and distribute the losses due to injuries to third persons which are equally inevitable? Surprising as it may seem, by means of the doctrine of *respondeat superior* the common law has partially accomplished in the latter case what workmen's compensation statutes have accomplished in the former.⁶³

When *respondeat superior* is viewed through an enterprise liability lens, it is a logical complement to Workers' Compensation law. "[T]he justification for one [is] a justification for the other."⁶⁷ Absent any general theory of strict liability, *respondeat superior* is a derelict doctrine. Find the right general theory, though, and the doctrine falls into place. The Workers' Compensation Acts provided that theory, because they brought the idea of enterprise responsibility for accidental injury into the law. *Respondeat superior* could be then seen as the common-law locus of that theory of responsibility. It was strict in nature. It was poorly justified by the fault principle. And it extended the reach of enterprise liability, because it held enterprises accountable for the injuries that their agents tortiously inflicted on persons unconnected to the enterprise in the course of carrying out the enterprise's business.

By supplying vicarious liability law with a convincing justification, Smith was also able to devise a solution to the specific

66. *Id.* at 456-57 (footnotes omitted).

67. *Id.* at 457 n.39.

problem that troubled him—the interpretation of “frolic and detour” doctrine.⁶⁸ “[F]rolic and detour” doctrine was in disarray, Smith argued, because courts had been unable to come up with a compelling rationale for *respondeat superior*.

... [I]t would seem proper to suggest that the way in which a rule is applied depends more or less upon what the particular court conceives to be the reason for the rule. If a court doubts the wisdom of a rule, a narrow and restricted application is to be expected. On the other hand if the court approves the policy underlying a rule, a broad and liberal application generally follows. Then again, if the court entertains no convictions about a rule, a more or less mechanical application ensues, often leading to inconsistencies and confusion.

The rule of *respondeat superior* has been applied by courts of all three classes. One should not expect, therefore, to be able to harmonize all of the decisions involving the responsibility of the master for his servant's unauthorized torts. However, . . . if some common understanding can be reached as to what is the supposed object and justification of the rule, there will be greater uniformity in its application, or at least more intelligent disagreement, than has heretofore been the case.⁶⁹

Reconceiving *respondeat superior* doctrine in light of the enterprise liability rationale of the Workers' Compensation Act leads to a distinctive interpretation of the scope of the employer's liability. If the justification for the doctrine is “the desire to include in the costs of operation inevitable losses to third persons incident to carrying on an enterprise, and thus distribute the burden among those benefited by the enterprise,”⁷⁰ then the scope of liability should turn not upon the motives or intentions of the servant, but upon whether the conduct of the business tends to expose third parties to the kind of risk that issued in the injury at hand. Liability, in other words, should depend on whether the enterprise increases the risk of the injury that occurred sufficiently that the injury may be said to be “characteristic” of the enterprise. For example:

[I]t may be argued that it is a matter of common knowledge that servants employed to drive automobiles frequently do make short excursions on errands of their own which they would not have made but for the fact that they had been sent on an errand for the master. Such conduct on the part of servants must, therefore, be regarded as a probable result of employing servants to drive automobiles: just as probable as that they will drive at a reckless speed. Accordingly the undertaking of an enterprise involving the employment of chauffeurs must necessarily expose third parties to a risk of injury from such excursions as well as expressly authorized acts and should, therefore, be borne by the enterprise which caused the risk.⁷¹

68. The problem, Smith complained, was that although “nine decades [had] elapsed . . . the law today is in about the same nebulous condition as in 1834 when Baron Parke” first formulated the doctrine. *Id.* at 444.

69. *Id.* at 463.

70. *Id.* at 718.

71. *Id.* at 724.

There is a general lesson latent in this example:

In deciding whether the master is responsible in a particular case, the court should consider first, whether the conduct of the master's business was a contributing cause of the servant's act . . . If not, the master is not liable. If so, the court should next inquire whether, in view of what the servant was actually employed to do, it was probable that he would do what he did, instead of inquiring into whether the particular act, when separated from its setting was an act done in furtherance of the particular work the servant was employed to do.⁷²

This approach, Smith concluded, "will harmonize most of the deviation cases."⁷³

Smith's argument is simple, but powerful. First, the doctrine of *respondeat superior* holds employers strictly liable for the torts of their servants, committed within the scope of their employment. Second, the doctrine is too important, and too entrenched, to be overruled or dismissed as a mistake. Third, fault theorists have been unable either to justify the doctrine or to devise general guidelines for interpreting it. Fourth, by taking our cue from the Workers' Compensation Acts and the theory of enterprise liability that informs them, we can make sense of the doctrine—we can justify it and we can give it a principled and coherent application. Fifth, taking our cue from the Workers' Compensation Acts is a perfectly sensible thing to do because the theory of those acts implies that the inevitable injuries an enterprise inflicts on strangers are every bit as much costs of an enterprise's business as are injuries to participants. If the former should be borne as costs of an enterprise's business, without regard to fault, the latter should be borne in the same way. *Respondeat superior* is thus not a vestigial and anomalous doctrine, but a prescient and principled one. *Respondeat superior* is the common law's discovery of enterprise liability before its time. Like the Workers' Compensation Acts, *respondeat superior* rests on an enterprise conception of responsibility for accidental injury—"on a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may be fairly said to be characteristic of its activities."⁷⁴

One part of this bears further repetition. Smith's arguments link a particular claim about the scope of vicarious liability to a particular justification for the doctrine. *Respondeat superior* liability is—and should be—liability for the "characteristic risks" of an activity. The justification for enterprise liability is "the desire to include in the costs of operation inevitable losses to third persons incident to

72. *Id.*

73. *Id.*

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

carrying on an enterprise, and thus distribute the burden among those benefitted by the enterprise.”⁷⁵ The scope of vicarious liability, therefore, should turn not upon the motives or intentions of the servant, but upon whether the conduct of the business tends to expose third parties to the kind of risk that materialized in injury in the case at hand. Liability, in short, should turn on whether the risk at issue is “characteristic” of the enterprise involved. When courts and commentators describe strict liability as liability for “characteristic risk,” they are thus embracing, implicitly or explicitly, an enterprise conception of strict liability. The *Restatement (Third): General Principles*’ acknowledgment that strict liability is liability for “characteristic risk”⁷⁶ is thus a tacit recognition of enterprise liability’s influence on common law strict liability.

C. Guido Calabresi: Workers’ Compensation and the Theory of Enterprise Liability

Guido Calabresi’s name is identified with enterprise liability more, perhaps, than any other name in modern torts scholarship. When Calabresi first sketched his theory, he took the connections among enterprise liability, workers’ compensation, and *respondeat superior* for granted. He used these doctrines and the theory that linked them as the cornerstone on which he built both his own theory of enterprise liability and his account of other forms of common law strict liability. *Risk Distribution in the Law of Torts*⁷⁷ thus illustrates another stage in the rise of enterprise liability, a stage in which the theory of enterprise liability radiates out from the Workers’ Compensation Acts and the doctrine of *respondeat superior* to become an ambitious general theory of responsibility for accidental injury.

Calabresi’s paper confirms the lessons of Jeremiah and Young B. Smith because it, too, takes the Workers’ Compensation Acts to be the initial locus of enterprise liability and *respondeat superior* to be the principal common law site of the conception. Yet, *Risk Distribution in the Law of Torts* also complicates and enriches our understanding of enterprise liability’s relation to common law strict liabilities because its common law reach is more ambitious. Jeremiah Smith had confined himself to showing (1) that the enterprise liability theory of the Workers’ Compensation Acts was at odds with the fault liability of

75. Smith, *supra* note 16, at 718.

76. See *infra* text accompanying note 3.

77. Calabresi, *supra* note 4.

the common law of torts, and (2) that the inconsistency would likely lead to a resurgence of strict liability in tort. Young B. Smith had confined himself to showing (1) the very theory of enterprise liability that justified the Workers' Compensation Acts was also capable of justifying *respondeat superior* doctrine, and (2) that extending enterprise liability in this way supplied a better justification for, and interpretation of, the doctrine of *respondeat superior* than any justification that the fault theorists had been able to devise.

Calabresi's enterprise is more ambitious. He sets out to see just how far common law strict liability can be understood to express enterprise liability ideas as he conceives them. His work enriches our understanding of enterprise liability's relation to common law strict liabilities both because it shows that enterprise liability ideas provide compelling justification for aspects of those liabilities and because it shows that common law strict liabilities express enterprise liability ideas imperfectly at best. On the one hand, these imperfections are grist for enterprise liability's mill. The drive to eliminate them gives enterprise liability its transformative power, its capacity to remake the common law in the manner prophesied by Jeremiah Smith. On the other hand, the inconsistencies between what enterprise liability calls for and what the common law actually achieves underscore common law resistance to enterprise liability ideas.

Our common law of torts is torn among competing conceptions of responsibility for accidental injury, and enterprise liability is only one of those conceptions. Fault liability is, of course, its principal competitor, but not its only competitor. Enterprise liability ideas are sometimes compromised not by the competing claims of fault liability but by competition from other norms such as property rights. It would be a grave mistake, however, to think that this shows that common law strict liabilities do not, in fact, express enterprise liability ideas. What it shows is that our common law of torts is torn both between competing principles of responsibility *and* between competing justifications for those principles. What it shows is that our tort law of accidents must be understood not as the expression of one form of liability to the exclusion of the other but as the expression of conflict between these forms of liability and the justifications that can be advanced for them.

Calabresi's assumption that Workers' Compensation law is the canonical instance of enterprise liability crops up on the second page of his paper. In the first sentence of a section summarizing enterprise liability he writes:

"Activities should bear the costs they engender"; "it is only fair that an industry should pay for the injuries it causes. "Enterprise liability"—the notion that losses should be

borne by the doer, the enterprise, rather than distributed on the basis of fault—is usually explained in such terms.⁷⁸

In the first clause of the footnote supporting this claim, Calabresi also cites to and quotes from Harper & James torts treatise: "The basic philosophy of [the Workers' Compensation Acts] is that [accidental injuries are] a cost of the enterprises that entail them, and should be borne by the enterprises or their beneficiaries."⁷⁹

When Calabresi takes up the use of the theory of enterprise liability to interpret the doctrine of *respondeat superior*, he begins by noting that tort scholars have long recognized the unity of Workers' Compensation and *respondeat superior*:

Respondeat superior—like workmen's compensation, to which it has often been analogized—was the forerunner of modern enterprise liability. As a result, both have been written about extensively, though usually with emphasis only on their "loss spreading" or "deep pocket" potentials. Both are based on the notion that no single employee deems the risk of injury arising out of his employment to be great enough to justify him either in insuring or in asking substantially higher wages because of it. The proposition is an empirical one which can be fairly readily accepted. *Respondeat superior* applies it to injuries to third parties, while workmen's compensation applies it to the worker himself.⁸⁰

The principal significance of Calabresi's paper, however, lies in its extension of an economic account of enterprise liability theory to common law forms of strict liability other than vicarious liability. Calabresi undertakes a detailed discussion of existing areas of common law strict liability, setting out to see just how far his conception can explain and justify existing areas of common law strict liability and just how well the common law fares in light of his theory of enterprise liability.⁸¹ He begins by investigating nuisance law, an intricate and perplexing mix of fault and nonfault liabilities. Here, he finds that his theory's explanatory concepts—allocative efficiency and loss distribution—fit poorly with certain doctrines, but well with others. The fact that nuisances are sometimes enjoined, for example, is a doctrinal detail which fits poorly with allocative efficiency and loss-spreading rationales. Allocative efficiency cannot explain the enjoinder of nuisances because:

78. *Id.* at 500.

79. *Id.* (quoting 2 FOWLER V. HARPER & FLEMING JAMES, JR., TORTS 731 (1956)).

80. *Id.* at 543 (citing CHARLES O. GREGORY & HARRY KALVEN JR., CASES ON TORTS 703-25 (1959) (collecting authorities) in support of the assertion that both worker's compensation and *respondeat superior* had "been written about extensively") (other citations omitted).

81. *See id.* at 534-53. Even the choice of areas to discuss seems theory dependent. Calabresi is, presumably, attracted to common law strict liability precisely because he believes in enterprise liability.

In the modern view enjoinability depends on the damage the nuisance causes compared to the cost of eliminating the nuisance, taking into account, however, the social benefits of the activity which causes the nuisance. Were courts to apply a pure "economists" allocation-of resources theory they would not go through all this rigamarole. They would charge the nuisance with the damages it caused and, if the nuisance could pay them and still stay in business, they would take this as a good "marketplace" indication that the benefits to be derived from the activity were sufficiently great to justify its existence. If it could not stay in business the same effect would be achieved as when a nuisance is enjoined.⁸²

Allocative efficiency, in short, would be better served by pricing the damage caused by the nuisance and by letting the market determine if the activity's social benefits outweigh its costs.

Loss spreading, if anything, fares worse. From a loss spreading perspective, the issuance of injunctions is likely to make things worse, not better:

Nor can a general justification for injunctions be found in loss spreading theory. If a nuisance affected a relatively wide area it would be hard to see how enjoining that nuisance could have a beneficial loss spreading effect. Indeed, in most cases injunction would seem to invite relative concentration of losses and, hence, undesirable secondary effects. If a nuisance affected only a limited number of people—and risk spreading was, therefore, indifferent to, or possibly even favored protecting the injured few—damages would be quite adequate to achieve the desired result with less risk of avoidable secondary effects. For damages would be less likely to force a company out of business; then, too, they could, in part, be spread to consumers through price changes.⁸³

The availability of injunctive relief must, therefore, be explained in ad hoc terms. Injunctions express the force of property rights; they do not reflect the general rationales of enterprise liability as Calabresi conceives them, but rather the particular stringency of special considerations applicable in this context.⁸⁴ In short, just as the whole of *respondeat superior* doctrine is, for fault theorists, an anomalous special case governed by other principles, this much smaller detail of nuisance law is an anomalous special case for Calabresi's conception of enterprise liability. The availability of injunctive relief in nuisance law is special for the same reason that *respondeat superior* is anomalous in the eyes of fault theorists. Just as *respondeat superior* cannot be seen as an application of the fault principle, so too the availability of injunctive relief in nuisance law cannot be seen as an application of enterprise liability principles. The

82. *Id.* at 534-35 (footnote omitted).

83. *Id.*

84. "Ultimately, I suppose, this analysis suggests that . . . other important factors may require injunctions in cases in which 'loss distribution' theories would not For example, the concept that private property is sacred and that the right to expropriate with compensation is a right that ought normally to be given only to the state and not be made available to any neighbor who wishes to manufacture rubber tires." *Id.* at 536 (footnote omitted).

availability of injunctive relief is grounded in property rights, not in policies of allocative efficiency and loss-spreading.

Enterprise liability is more in line with other aspects of nuisance law, however. For example, Calabresi's conception of enterprise liability can explain the requirements that (1) when a nuisance is not enjoined, the substantiality of the injury to the plaintiff must be taken into account in order to establish the existence of a nuisance and to justify the award of any damages and (2) the "usefulness" of the nuisance causing enterprise must be weighed before deciding if any nuisance exists:

The requirement of substantial injury is of course, justified in terms of loss spreading. If the costs of a nuisance are spread quite thin, by hypothesis excellent loss-spreading is achieved, and secondary effects are much less likely than where a firm is required to pay damages. "Substantial injury" is also justified by resource-allocation theory because of the high cost of justice . . . if the cost of requiring payments for small damages were greater than the benefits strict allocation of resources would bring, there would be no advantage in forcing such payments.⁸⁵

"It is a little more difficult to find a justification for weighing the social utility of an activity before determining whether it should pay 'nuisance' damages in those cases in which the harm caused by the nuisance was substantial."⁸⁶ In the end, however, loss-spreading considerations are the only ones that can justify this requirement, to the extent that it can be justified:

Unless the injuries to any individual were extremely large, courts might well hesitate to saddle an important enterprise with heavy damages. For damages might cause disruption in the industry, or perhaps even a closing down, with disastrous secondary consequences. [Thus] although allocation of resources might require the closing down of a firm, ensuing disruptions would be too great to justify the change.⁸⁷

Calabresi goes on to criticize the breadth of existing nuisance case law refusing relief on the ground that enterprise causing the nuisance is useful. Case law refuses relief too broadly. Relief should be granted against socially useful enterprises in those cases where the application of nuisance law would only involve "higher prices" in the long run rather than a "disaster to the industry."⁸⁸ So Calabresi's principled justification for the 'no damage doctrine' also functions to limit the scope of that doctrine, thereby allowing the general enterprise liability precept that "activities should bear their characteristic costs" to assert itself more fully.⁸⁹

85. *Id.* at 537 (footnotes omitted).

86. *Id.*

87. *Id.* at 539 (footnote omitted).

88. *Id.*

89. *Id.*

The situation with respect to extra-hazardous activity liability activity is similar. On the one hand, the theory of enterprise liability can explain—on both allocation of risk and loss-spreading grounds—why extra-hazardous risk liability, unlike nuisance liability, does not contain a “substantial damage” requirement:

On the basis of strict resource-allocation theory, industries should be liable for all their costs, large or small. Convenience, however, requires an exception in nuisance cases; the expense of meeting small damages is too great for the benefits derived. Besides, risk spreading is favored by letting small losses lie where they fall. This exception seems much less necessary in extra-hazardous activity cases, since a series of costly suits for minor damage is quite unlikely in these situations. The typical extra-hazardous activity is one in which a substantial chance of substantial damage exists If, however, activities such as driving were suddenly termed extra-hazardous activities, it would be highly likely that a requirement of substantial damage—similar to that existing in nuisances—would be required. Otherwise the game would not be worth the candle.⁹⁰

On the other hand, extra-hazardous activity liability has not expanded as far as enterprise liability theory suggests that it should. Indeed, the policies underlying enterprise liability, as Calabresi conceives it, are highly critical of the narrow scope of the existing doctrine. For example, extra-hazardous activities must occur “frequently” and not be a matter of “common usage.” The logic of enterprise liability favors restricting the “frequency” rule and sweeping away with the doctrine of common usage:

The “frequency” rule may find some support in allocation-of resources theory but it runs quite counter to loss-spreading notions. And the “common usage” notion runs counter to both. Thus, the argument can be made that if the expected loss, though significant to the party injured, occurs relatively infrequently, any readjustment of resources which would result from allocation of loss to the industry which caused it would be minimal. . . . On the other hand, the very fact that little readjustment would be required to meet the loss if it were placed on the enterprise suggests the strongest loss-spreading reason for liability since, by hypothesis, the loss was quite heavy when placed on the person injured.

It is clear, then, that the notion of extra-hazardous activities has not been brought to its logical conclusion in terms of risk-distribution theories Continuation of a narrow definition of extra-hazardous activities must necessarily find what justification it has in factors outside the scope of this article.⁹¹

Calabresi’s theory of enterprise liability thus functions as a two-edged sword. On the one hand, the theory can explain important aspects of existing “extra-hazardous” activity liability doctrine. On the other hand, the theory is deeply critical of that doctrine because it has yet to take enterprise liability ideas to their “logical conclusion.” Enterprise liability remains, as it was in Jeremiah Smith’s time,

90. *Id.* at 541-42.

91. *Id.* at 542-43 (footnotes omitted).

powerfully critical of existing tort doctrine. Turn it loose and it will transform the law of torts.

The double-edged character of enterprise liability reappears in Calabresi's discussion of *respondeat superior* and workmen's compensation. Considerations of allocative efficiency—the advantages of including in the price of every good and service the accident costs occasioned by its production—justify the “scope of employment” restrictions found in these doctrines:

Proper resource allocation militates strongly against allocating to an enterprise costs not closely associated with it—“liability should be limited to injuries arising out of or in the course of employment.” But it also militates for allocating to an enterprise all costs that are within the scope of that enterprise. “The enterprise is held liable even though no fault on its part can be shown.” Not charging an enterprise with a cost which arises from it leads to an understatement of the true cost of producing its goods; the result is that people purchase more of those goods than they would want if their true cost were reflected in price. On the other hand, placing a cost not related to the scope of an enterprise on that enterprise results in an overstatement of the cost of those goods, and leads to their underproduction.⁹²

So, Calabresi's theory can explain and justify both the strictness of Workers' compensation and *respondeat superior* liability and their confinement of *all* liability to injuries connected to the tortfeasor's employment. Yet, Calabresi's theory cannot explain or justify the fact that the master's liability is, for the most part, confined to injuries occasioned by the “faulty” conduct of its servants. This failure of explanation is an instance of the *general* inability of enterprise liability ideas to explain “why tort liability generally retains a semi-fault basis. The answer [to that question] must be found in the broad justification for the fault requirement. The inconsistency between these limitations based on fault and the philosophy of the workmen's compensation was long ago noted. It still remains.”⁹³

On the one hand, then, *respondeat superior* gives powerful expression to enterprise liability ideas. On the other hand, it does not fully realize those ideas. This happens, in part, because the enterprise liability principle contends with the fault principle for control of the law of torts. Tort doctrine reflects the contest between these two competing general conceptions of responsibility. Fault considerations seep into enterprise liability doctrines and enterprise liability conceptions seep into fault doctrines.⁹⁴

92. *Id.* at 514.

93. *Id.* at 545 (citing Smith, *supra* note 15, at 344).

94. On the latter point, see *infra* Part III.

Calabresi's application of his own theory of enterprise liability to nuisance law, ultra-hazardous activity liability and *respondeat superior* is important to us for a number of reasons. First, it shows enterprise liability theory being extended even further: The scholarly march of enterprise liability from Jeremiah Smith to Young B. Smith to Guido Calabresi is a march from Workers' compensation to *respondeat superior* to all of common law strict liability. Second, Calabresi's encounters with the doctrinal details of common law strict liability tell us much about how general theory shapes doctrine. Enterprise liability and fault liability treat the very same doctrines differently. Where one sees principle, the other sees exception. Where one sees something to criticize and contain, the other sees something to praise and expand. How we interpret black-letter legal doctrine—what we take to be general and justifiable and what we take to be anomalous and exceptional—depends, to an extraordinary degree, on the conception of responsibility to which we subscribe. Both fault and enterprise conceptions of liability are embedded in our law. If we take enterprise liability to be the superior conception, we will favor strict doctrines over fault ones, and we will tend to interpret fault doctrines narrowly and strict ones expansively. If we take fault liability to be the superior conception, we will favor fault doctrines over strict ones and we will tend to interpret strict doctrines narrowly and fault doctrines expansively. Our accounts of *respondeat superior*, nuisance law, and abnormally dangerous activity liability will turn out to be drastically different.

More generally, Calabresi's theory is capable of unifying, justifying and explaining many disparate fields of strict liability—but not perfectly. It cannot accommodate every detail of every doctrine, and it cannot explain the enormous continuing influence of fault liability. So it both fits the law of torts in substantial part and calls for its reconstruction in substantial part. In this respect, Calabresi's theory comes remarkably close to being a mirror image of the general theories of torts fashioned by fault theorists.⁹⁵ In those theories, fault doctrines express the correct general principle of responsibility for accidental injury, while strict doctrines are the exception. While Calabresi—like Young B. Smith before him—is inclined to characterize non-enterprise liability doctrines as special cases,⁹⁶ or as

95. In his later book, *The Costs of Accidents*, for example, Calabresi criticizes the fault system on the ground that it fares poorly as a mechanism for realizing enterprise liability ends. See CALABRESI, *COSTS OF ACCIDENTS*, *supra* note 8, at 239-87 ("[F]ault is not a good system . . . it is a very poor system of loss spreading.").

96. Recall Calabresi's discussion of the availability of injunctive relief in nuisance cases, a phenomenon which he attributes "to the concept that private property is sacred and that the

expressions of a now obsolete "19th century Weltanschauung,"⁹⁷ fault theorists are inclined to characterize strict doctrines as (1) the expression of even more outdated, pre-modern conceptions of responsibility, or (2) special cases either explicable by accidents of history, or (3) special circumstances where fault ideas lead to strict doctrines.⁹⁸

What are we to make of the fact that fault and enterprise liability theorists give very different accounts of the same body of law, reversing general principle and exception? Three tentative generalizations suggest themselves. The first is that both enterprise liability theorists and fault theorists are able to show that large parts, but not all, of the law of accidents can be squared with their preferred conception of responsibility. Proponents of each principle must contend with anomalous and exceptional doctrines. Each side can give powerful and convincing justifications of some doctrines and less convincing justifications for others. Unsurprisingly, the justifications that each side gives for its preferred principle are more compelling than the justifications it gives for its disfavored doctrine. Each camp can "fit and justify" central features of tort doctrine, but neither camp can make sense of and justify all tort doctrines more persuasively than its competitor.⁹⁹

The second lesson is an extension of the first. Enterprise liability theorists like Young B. Smith and Guido Calabresi explain and justify strict liability very powerfully—far more powerfully, in my view, than fault theorists like Jeremiah Smith or Richard Posner do. Young B. Smith and Calabresi provide unity and justification to

right to expropriate with compensation is a right that ought normally to be given only to the state and not be made available to any neighbor who wishes to manufacture rubber tires." See Calabresi, *supra* note 4.

97. See Calabresi, *supra* note 4, at 515-17, 538. The quoted phrase occurs on page 515. Young B. Smith expresses this criticism of fault liability implicitly, when he describes *respondeat superior* as "the forerunner of a different way, perhaps a more intelligent way of dealing with a social problem . . ." Smith, *supra* note 16.

98. The classic statement of strict liability as the embodiment of an ancient and discredited conception of responsibility is James B. Ames, *Law and Morals*, 22 HARV. L. REV. 92 (1928). The *Restatement Third: General Principles*, itself takes the peculiar historical circumstances tack. See *supra* note 3, and accompanying text. An excellent example of a fault theorist explaining strict liability doctrine as a special application of fault conceptions is the discussion of *respondeat superior* in Richard Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972). Gary Schwartz, the principal reporter for the *Restatement Third: General Principles* endorses the same idea. See Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1764-65 (1996). The idea that strict liability is sometimes justified for administrative or evidentiary reasons is recurring them in fault theories.

99. For the importance of this idea, see generally Gregory C. Keating, *Fidelity to Preexisting Law and the Legitimacy of Legal Decision*, 69 NOTRE DAME L. REV. 1 (1993).

doctrines that Jeremiah Smith took—in the manner of most fault theorists and the the *Restatement (Third): General Principles* itself—to be either special cases or historically anomalous exceptions to the fault liability. Young B. Smith and Guido Calabresi show that the principal common law strict liability doctrines can be conceived of, in large part, as expressions of the idea of enterprise liability embodied by the Workers' Compensation Acts. They make a powerful case that the disparate domains of common law strict liability can all be understood as embodiments of the same general, nonfault principle of responsibility.

The third lesson here is that the choice between fault and enterprise justifications for strict liability doctrines is an important one because it tends to shape the law. For fault theorists, negligence is the expression of general principle, and strict liability is the exception. For enterprise liability theorists, strict liability is the expression of general principle, and fault is the exception. Fault theorists, therefore, tend to confine strict doctrines and expand fault ones, whereas enterprise liability theorists tend to expand strict doctrines and confine fault ones.

II. THEORY IN CASES

Case rhetoric confirms the lessons of tort theory: opinions that invoke enterprise liability ideas to justify strict doctrines tend to interpret those doctrines more expansively than opinions that invoke fault ideas to justify those doctrines.¹⁰⁰ Taking the strictness of abnormally dangerous activity liability to be an attempt to achieve fault purposes leads to a relatively narrow interpretation of the scope of abnormally dangerous activity liability doctrine. Conversely, taking the strictness of *respondeat superior's* "scope of employment" rule to

100. Product liability cases might also be used to illustrate this point. Contrast, for example, the defect regime that the California Supreme Court adopts in *Barker* with the defect regime approved in the *Restatement Third: Product Liability*. The *Barker* regime, which expresses enterprise liability ideas, adopts alternative defects tests, both of which are stricter than ordinary negligence liability. *Barker's* expectation test is strict because liability under it does not turn on the amount of care exercised by the product manufacturer. *Barker's* risk-utility test is stricter than the ordinary negligence test because it relaxes plaintiff's *prima facie* case, quickly shifting the burden of proof to the defendant, and uses hindsight rather than foresight to evaluate the adequacy of a product design. The *Restatement Third* regime for design defect, by contrast, adopts only the risk-utility test and adopts a version of that test which makes it a standard instance of negligence liability. The *Restatement Third's* negligence test uses foresight balancing and requires plaintiff to prove, as part of its *prima facie* case, the superiority of an alternative feasible design in almost all cases. For an opinion explicitly rejecting the RESTATEMENT THIRD'S negligence version of the risk-utility test because it is inconsistent with enterprise liability ideas, see *Brooks v. Beech Aircraft Corporation*, 902 P.2d 54 (N.M. 1995).

express enterprise liability ends leads to a relatively broad interpretation of that doctrine's reach. Enterprise liability ideas justify the imposition of vicarious liability even when fault objectives would be better served by withholding liability. Consider the following examples.

A. Abnormally Dangerous Activity Liability

In a notable opinion,¹⁰¹ Judge Posner expounds a fault rationale for the strictness of abnormally dangerous activity liability. Abnormally dangerous activity liability, Posner argues, pursues the fault objective of reducing risk to its justified level through the special mechanism of holding those engaged in abnormally dangerous activities strictly liable, thereby inducing them not only to proceed carefully each time they engage in those activities but also to engage in those activities only at an appropriate level of intensity. Negligence liability, by contrast, encourages prospective injurers to exercise due care in conducting their activities, but it does not encourage prospective injurers to conduct their activities at the justified level.¹⁰² When the intensity with which an activity is carried on—not just the carefulness with which it is conducted—is essential to attaining the cost-justified level of risk imposition, fault liability's concern with inducing the correct level of precaution calls for the adoption of a rule of strict liability. When, for example, not only the carefulness, but also the frequency, with which hazardous materials are transported through densely populated areas matters to the attainment of the justified level of risk reduction, strict liability is preferable to fault liability.¹⁰³

101. *Indiana Harbor Belt R.R. v. American Cyanamid Co.*, 916 F.2d 1174 (1990).

102. The distinction between "levels of care" and "levels of activity" originates in a seminal article by Steven Shavell, *Strict Liability versus Negligence*, 9 J. LEGAL STUD. 1 (1980).

103. In Posner's own words:

The baseline common law regime of tort liability is negligence. When it is a workable regime, because the hazards of an activity can be avoided by being careful (which is to say, nonnegligent), there is no need to switch to strict liability. Sometimes, however, a particular type of accident cannot be prevented by taking care but can be avoided, or its consequences minimized, by shifting the activity in which the accident occurs to another locale, where the risk or harm of an accident will be less, or by reducing the scale of the activity in order to minimize the number of accidents caused by it. . . . By making the actor strictly liable—by denying him in other words an excuse based on his inability to avoid accidents by being more careful—we give him an incentive, missing in a negligence regime, to experiment with methods of preventing accidents that involve not greater exertions of care, assumed to be futile, but instead relocating, changing, or reducing (perhaps to the vanishing point) the activity giving rise to the accident.

The fundamental aim of strict liability, so conceived, is the fault aim of increased precaution. One distinctive aim of strict liability as enterprise liability conceives it—the aim of distributing the costs of an enterprise's inevitable accidents across those who benefit from the enterprise—is absent. In *Indiana Harbor Belt Railroad v. American Cyanamid Co.*, Posner concluded that this fault aim did not justify applying a rule of strict liability to the activity of transporting acrylonitrile.¹⁰⁴ On the one hand, Posner opined, exercising reasonable care would reduce the risk to an acceptable level; on the other hand, imposing strict liability would not induce any desirable changes in activity level.¹⁰⁵

Posner's opinion, with its fault justification for strict doctrine and its refusal to impose strict liability where it will not (in Posner's view) induce increased precaution, contrasts nicely with *Siegler v. Kuhlman*,¹⁰⁶ another notable abnormally dangerous activity liability opinion. *Siegler* imposes strict liability on the transport of large quantities of gasoline by tractor-trailer, notwithstanding the fact "[t]hat gasoline cannot be practicably transported except upon the public highways"¹⁰⁷ Why impose strict liability when it seems unlikely to induce greater precaution, because it is impossible to change the method by which gasoline is transported? The majority opinion places primary reliance on the magnitude of the risk that survives the exercise of reasonable care. Its appeal to enterprise

Indiana Harbor Belt R.R., 916 F.2d at 1177 (citations omitted).

104. *Id.*

105.

For all that appears from the record of the case or any other sources of information that we have found, if a tank car is carefully maintained the danger of a spill is negligible. If this is right, there is no compelling reason to move to a regime of strict liability, especially one that might embrace all other hazardous materials shipped by rail as well

The district court and the plaintiff's lawyer make much of the fact that the spill occurred in a densely inhabited metropolitan area. Only 4,000 gallons spilled; what if all 20,000 had done so? Isn't the risk that this might happen even if everybody were careful sufficient to warrant giving the shipper an incentive to explore alternative routes? Strict liability would supply that incentive. But this argument overlooks the fact that, like other transportation networks, the railroad network is a hub-and-spoke system. And the hubs are in metropolitan areas. Chicago is one of the nation's largest railroad hubs. In 1983, the latest year for which we have figures, Chicago's railroad yards handled the third highest volume of hazardous material shipments in the nation With most hazardous chemicals (by volume of shipments) being at least as hazardous as acrylonitrile, it is unlikely—and certainly not demonstrated by the plaintiff—that they can be rerouted around all the metropolitan areas of the country, except at prohibitive cost.

Id. at 1179-80.

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

107. *Id.*

liability ideas—to the ideas that cost-internalization may stimulate enterprises to push back the frontiers of reasonable precaution and that the costs of nonnegligent accidents should be borne by the enterprises whose accidents they are—remains just below the surface.¹⁰⁸ The concurrence, however, brings those enterprise liability rationales to the surface:

[A] good reason to apply [strict liability] principles, which is not mentioned in the majority opinion, is that the commercial transporter can spread the loss among his customers—who benefit from this extrahazardous use of the highways. Also, if the defect which caused the substance to escape was one of manufacture, the owner is in the best position to hold the manufacturer to account.¹⁰⁹

The first part of this passage makes the classic enterprise liability argument that strict liability will lead to a fairer distribution of the burdens and benefits of accidental risk impositions. The last sentence in the passage brings out a more subtle rationale for enterprise liability, a rationale which has more to do with risk reduction than with loss-distribution. Enterprise liability may induce increased risk reduction even when activity level improvements are not obvious to disinterested observers. Enterprise liability brings more cost-pressure to bear on risky activities than negligence liability does and places responsibility for risk reduction in the hands of the parties who impose the risks at issue. Negligence, on the other hand, places decisions about appropriate precaution in the hands of judges and juries. If enterprises are generally the preeminent experts with respect to the risks of their own activities, then strict liability places responsibility for risk-reduction in the hands of those best able to reduce risk and gives them maximal incentives to do so.¹¹⁰ When an enterprise is composed of independent entities linked to one another by a chain of contractual relationships, as the enterprise in *Siegler* is, enterprise liability places responsibility for reducing risks in the hands of those best situated to determine which independent entity should be charged with responsibility for reducing some particular

108.

Transporting gasoline as freight by truck along the public highways and streets is obviously an activity involving a high degree of risk; it is a risk of great harm and injury; it creates dangers that cannot be eliminated by exercise of reasonable care. . . . Nor will the exercise of due and reasonable care assure protection to the public from the disastrous consequences of concealed or latent defects in the carrier's equipment, from the negligence of third parties, from latent defects in the highways and streets, and from all the other hazards not generally disclosed or guarded against by reasonable care, prudence and foresight.

Id. at 1187.

109. *Id.* at 1188.

110. See generally Calabresi & Hirschoff, *Strict Liability*, *supra* note 8.

enterprise risk. Even when risk reduction, not loss distribution, is at stake, then, enterprise liability embodies a distinctive conception of risk reduction. Enterprise liability presses for the expansion of strict liability on risk-reduction grounds even when it is unclear just how strict liability will induce further risk reduction. This conception of risk reduction cannot fairly be described as the pursuit of fault objectives by other means. It tends to expand strict liability beyond the point called for by fault conceptions of strict doctrines.

*Lubin v. Iowa City*¹¹¹ provides an even more striking illustration of the tendency of enterprise liability ideas to expand the domain of strict liability. *Lubin* extends strict liability to the operation of a municipal waterworks. Interestingly, it does so without slotting the case into any existing doctrinal category of strict liability, such as abnormally dangerous activity, nuisance or trespass. *Lubin* extends enterprise liability to losses arising out of bursting water pipes simply because enterprise liability is, on the facts,¹¹² fairer than negligence liability. The Iowa City waterworks had adopted the practice of leaving water pipes in the ground until they burst instead of inspecting and replacing them at regular intervals. Under negligence liability, this cost-justified practice would concentrate the costs of inevitable pipe ruptures on those unlucky enough to suffer them. This distribution of burdens and benefits offended the court's sense of justice:

It is neither just nor reasonable that the city engaged in a proprietary activity can deliberately and intentionally plan to leave a watermain underground beyond inspection and maintenance until a break occurs and escape liability. . . .

If the city accepts the advantages of lower maintenance costs and other benefits which result from the practice of burying long lasting cast iron pipe six feet underground beyond any reasonable opportunity to inspect . . . , it should also expect to pay for the damages resulting from such practice as a cost of its doing business in this manner.¹¹³

In the court's eyes, enterprise liability was preferable to negligence liability because it would distribute the costs of inevitable accidents across all of those who benefit from the practice of leaving pipes buried until they burst:

The risks of such a method of operation should be borne by the water supplier who is in a position to spread the cost among the consumers who are in fact the true beneficiaries of this practice and of the resulting savings in inspection and maintenance costs. When the expected and inevitable occurs, they should bear the loss

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

112. "[W]e believe the facts in this case disclose a situation in which liability should be imposed upon the city without a showing of negligent conduct." *Id.* at 770.

113. *Id.* at 770-71.

and not the unfortunate individual whose property is damaged without fault of his own.¹¹⁴

The *Lubin* opinion assumes that these watermain ruptures are accidents which should *not* be prevented. Imposing strict liability will not—and is not intended to—induce the waterworks to exercise more precaution. In this circumstance, the contrast between enterprise and fault ideas is at its clearest. The fault aim of increased precaution does not support the imposition of strict liability on the Iowa City waterworks because the waterworks is already taking appropriate precautions. Enterprise liability ideas, by contrast, do lead to strict liability because strict liability spreads inevitable accident costs across those who benefit from them.

The acceptance of enterprise liability rationales tends to expand strict liabilities in other ways as well. It can, for example, undermine some defenses and promote others. *Chavez v. Southern Pacific Transportation Co.*,¹¹⁵ rejects a “public authorization” defense immunizing common carriers from strict liability for “the transportation of bombs the carrier was bound to ship”¹¹⁶ on the ground that such a defense is inconsistent with the logic of enterprise liability:

A public authorization exception does have some basis in reason when strict liability is imposed . . . on [an] innocent but dangerous actor because his conduct is anti-social, such liability would be inappropriate if specific public authorization is read to mean that the conduct is socially desirable.

However. . . [t]here is no logical basis for a public authorization exception when [a] risk distribution rationale is utilized to justify the strict liability standard. The need to distribute the risk and the benefits to be derived from the distributions do not vary according to whether the dangerous activity is authorized by the state in some manner.¹¹⁷

The “ultra-sensitivity” limit on abnormally dangerous activity liability illustrates another way in which enterprise liability ideas can shape tort doctrine.¹¹⁸ Ultra-sensitivity makes special sense as a limit

114. *Id.* at 770.

115. *Chavez v. S. Pac. Transp. Co.*, 413 F. Supp. 1203 (E.D. Cal. 1976).

116. *Id.* at 1209.

117. *Id.* at 1211.

118. *Restatement Second* § 524A “Plaintiff’s Abnormally Sensitive Activity,” provides “There is no strict liability for harm caused by an abnormally dangerous activity if the harm would not have resulted but for the abnormally sensitive character of the plaintiff’s activity.” The classic application of this limit is to mink farmers who sue for damages caused by blasting, which prompts mother minks to destroy their young. See *Madsen v. East Jordan Irrigation Co.*, 125 P.2d 794 (Utah 1942); *Foster v. Preston Mill Co.*, 268 P.2d 645 (Wash. 1954). But see *Langan v. Valicopters*, 567 P.2d 218 (Wash. 1977) (imposing strict liability on aerial spraying of pesticides

on abnormally dangerous activity liability when enterprise liability ideas are used to justify the imposition of abnormally dangerous activity liability. Some justification for this limit on liability is required; the plaintiff's hypersensitivity does not usually preclude liability. Tortfeasors usually take their victims as they find them.¹¹⁹ But ultra-sensitivity to an abnormally dangerous activity precludes recovery. Why? The answer lies in the logic of enterprise liability. Ultra-sensitivity to an activity is not a species of "fault," but it is a species of "characteristic risk." When a plaintiff's injury results from her hypersensitivity to the defendant's activity, it seems right to say that unusual susceptibility to the activity is one of her "characteristics." It therefore makes conceptual sense—it accords with the logic of enterprise liability—to exclude injuries attributable to the plaintiff's hypersensitivity from the scope of the defendant's strict liability.

B. Vicarious Liability

Vicarious liability cases interpreting the "scope of employment" rule often analogize that rule to the rule of Workers' compensation law authorizing recovery for injuries "arising out of and in the course of employment." This analogy signals the presence of an enterprise liability conception of *respondeat superior* doctrine. Cases that connect the two doctrines tend to interpret the scope of *respondeat superior* more broadly than opinions which attribute fault aims to vicarious liability.

The classic illustration of this point is Judge Friendly's famous opinion in *Ira S. Bushey & Sons v. United States*.¹²⁰ In *Bushey*, a drunken sailor (Seaman Lane) returning to his ship at night "took it into his head," for "reasons not apparent to [the court] or very likely to Lane . . . to turn each of three large wheels some twenty times."¹²¹ These wheels "controlled the flooding of the tanks on one side of the drydock."¹²² By turning them Lane flooded the drydock, causing the ship to list, slide off its blocks, and fall against the wall. "Parts of the drydock sank, and the ship partially did—fortunately without loss of life or personal injury."¹²³

when that spraying damaged crops being raised by organic farmers, even though the spraying was not harmful to conventional farmers).

119. See, e.g., *Vosburg v. Putney*, 56 N.W. 480 (Wisc. 1893).

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

121. *Id.*

122. *Id.*

123. *Id.* at 168.

Bushey sought and received damages in federal district court on the theory that the government, as Lane's employer, was vicariously liable for his trespass. Lane's conduct, the district court ruled, fell within the "scope of his employment" for policy reasons: the Coast Guard was the most efficient precaution taker against the kind of accident that had happened. On appeal, Judge Friendly affirmed the result, but not the rationale. Citing both Calabresi and Coase, he explained:

It is not at all clear, as the court below suggested, that expansion of liability . . . will lead to a more efficient allocation of resources . . . [A] more efficient allocation can only be expected if there is some reason to believe that imposing a particular cost on the enterprise will lead it to consider whether steps should be taken to prevent a recurrence of the accident And the suggestion that imposition of liability will lead to more intensive screening of employees rests on highly questionable premises It could well be that application of the traditional rule [finding Lane's conduct to be outside the scope of his employment] might induce drydock owners, prodded by their insurance companies, to install locks on their valves to avoid similar incidents in the future, while placing the burden on the shipowners is much less likely to lead to accident prevention.¹²⁴

Indeed, "[t]he record reveal[ed] that most modern drydocks have automatic locks to guard against unauthorized use of valves."¹²⁵ Optimal precaution concerns thus favored locking valves over screening sailors, and so supported a restrictive reading of "scope of employment" doctrine.

Friendly upheld the imposition of liability because fairness favored liability, even if efficiency did not. Our sense of justice calls for holding business enterprises liable for "accidents which may fairly be said to be characteristic of [their activities]."¹²⁶ "Characteristic" accidents are those "that flow from [an enterprise's] long-run activity in spite of all reasonable precautions on [its] part."¹²⁷ Enterprises should be held accountable for their characteristic risks because doing so distributes the burdens and benefits of inevitable enterprise accidents fairly. When enterprises are held liable for their "characteristic" risks, those who benefit from the imposition of an enterprise's risks will also bear the accident costs that flow from those risks. Friendly's interpretation of the "scope of employment" rule thus

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

125. *Id.* at 171 n.6.

126. *See id.*

127. *Id.* at 171.

turns on his imputation of a nonfault purpose to it. Had he taken fault concerns with inducing optimal precaution to be the fundamental justification for the rule, he would have construed the rule more narrowly and excluded Seaman Lane's trespass from the scope of his employment by the Coast Guard.

Has the enterprise liability conception of the scope of employment under *respondeat superior* law triumphed over fault conceptions? Hardly. No less articulate a proponent of fault liability than Richard Posner himself now makes the case for a fault conception of the doctrine. In *Konradi v. United States*,¹²⁸ he explains the strictness of vicarious liability law's scope of employment rule in the same way that he explains the strictness of abnormally dangerous activity liability—as an attempt to induce firms to conduct their activities at the cost-justified level. Judge Posner elaborates:

Often an employer can reduce the number of accidents caused by his employees not by being more careful—he may already be using as much care in hiring, supervising, monitoring, etc. his employees as can reasonably be demanded—but by altering the nature or extent of his operations: in a word by altering not his care but his activity. This possibility is a consideration in deciding whether to impose strict liability generally . . .¹²⁹

For Posner, the strictness of vicarious liability is an expression of the fundamental aim of fault liability. The end of vicarious liability is attainment of the cost-justified—or, if you prefer, the reasonable—level of precaution.

Extant in our law, then, is a contest between fault and enterprise conceptions of vicarious liability doctrine. The contest is most evident in the opinions of learned and sophisticated judges like Friendly, Posner, and Calabresi,¹³⁰ but it surfaces in less learned and sophisticated opinions as well. Consider two recent California Supreme Court decisions—*Mary M. v. City of Los Angeles*¹³¹ and *Lisa M. v. Henry Mayo Newhall Memorial Hospital*.¹³² The plaintiff in *Mary M.*, who had been drinking, was stopped for erratic driving by a police officer. After performing poorly on a sobriety test, she pleaded with the officer not to jail her. He drove her home and raped her.

Reversing the intermediate appellate court, the California Supreme Court ruled that, when “a police officer on duty misuses his official authority by raping a woman who he has detained, the public

128. *Konradi v. United States*, 919 F.2d 1207 (7th Cir. 1990).

129. *Id.* at 1210.

130. Calabresi's contribution is *Taber v. Maine*, 45 F.3d 598 (2d Cir. 1995).

131. *Mary M. v. City of Los Angeles*, 814 P.2d 1341 (Cal. 1991).

132. *Lisa M. v. Henry Mayo Newhall Mem'l Hosp.*, 907 P.2d 358 (Cal. 1995).

entity that employs him can be held vicariously liable.”¹³³ Although “sexual assaults by police officers are fortunately uncommon,” they are not so “unusual or startling” that they cannot “fairly be regarded as typical of or broadly incidental” to the “enterprise of law enforcement.”¹³⁴

The danger that an officer will commit a sexual assault while on duty arises from the considerable authority and control inherent in the responsibilities of an officer in enforcing the law. . . . An officer who detains an individual is acting as the official representative of the state, with all of its coercive power Inherent in this formidable power is the potential for abuse.¹³⁵

Writing for the majority, Justice Kennard concluded that “[t]he cost resulting from misuse of that power should be borne by the community, because of the substantial benefits that the community derives from the lawful exercise of police power.”¹³⁶ Kennard’s conclusion is, plainly, an expansive interpretation of the scope of employment under vicarious liability law, an interpretation justified by enterprise liability ideas.

Lisa M. involved similar facts, but a different outcome. The nineteen year old plaintiff, who was pregnant, sought treatment in a hospital emergency room for injuries suffered in a fall. An emergency room physician ordered an ultrasound examination to determine if the fetus had been injured. The ultrasound technician rejected plaintiff’s request that her mother and boyfriend be allowed to accompany her. After completing the prescribed examination, he asked the plaintiff if she would like to learn the gender of her baby. When she said that she would, he sexually molested her under the pretense of conducting an ultrasound examination. The Supreme Court once again reversed the intermediate appellate court, this time ruling that the technician’s conduct fell outside the scope of his employment as a matter of law. *Mary M.* was distinguished. While the technician “abused his position of trust” he “had no legal or coercive authority over plaintiff.”¹³⁷ Therefore, the court concluded, although “the hospital may have set the stage” for the technician’s conduct, “the script was entirely of his own independent invention.”¹³⁸ It would therefore “be unfair” to impose liability on the hospital.¹³⁹

133. *Mary M.*, 814 P.2d at 1352.

134. *Id.*

135. *Id.* at 1348.

136. *Id.* at 1349.

137. *Lisa M.*, 907 P.2d at 306.

138. *Id.*

139. *Id.*

Justice Kennard dissented. She would have affirmed the Court of Appeals and let the jury decide if the technician was acting within the scope of his employment. “[A] trier of fact might,” she explained:

reasonably conclude that Tripoli’s employment as an ultrasound technician did have certain “peculiar aspects” that played a not insignificant role in the sexual assault. To perform an ultrasound examination on a pregnant woman, a technician rubs a gel on the woman’s exposed lower abdomen. This intimate contact, inherent in the job, put plaintiff in a vulnerable position and permitted Tripoli to dupe plaintiff into believing that his sexual assault was actually part of a standard medical procedure, thereby giving Tripoli a basis to hope that his misconduct would remain undetected. Moreover, it is not unreasonable to infer that the intimate contact inherent in the job contributed to Tripoli’s sexual arousal and incited him to engage in the misconduct. In short, a reasonable trier of fact could conclude that this sexual assault . . . may fairly be attributed to risks arising from, and inherent in, the “peculiar aspects” of Tripoli’s employment.¹⁴⁰

Where *Mary M.* interprets the scope of employment rule expansively in accordance with enterprise liability ideas, *Lisa M.* interprets that rule narrowly—in a manner inconsistent with both the holding and the rationale of *Mary M.* The majority’s opinion in *Lisa M.* speaks the nonfault language of vicarious liability law, and it declines to overrule *Mary M.*, but it subverts the ends of enterprise liability. As Justice Kennard, the author of *Mary M.*, recognizes, the enterprise liability logic of *Mary M.* calls for upholding the intermediate appellate court’s ruling.

The position of the California Supreme Court as a whole brings to mind Young B. Smith’s remark that “the way in which a rule is applied depends more or less upon what the particular court conceives to be the reason for the rule.”¹⁴¹ California law concerning the “scope of employment” in vicarious liability law is “inconsisten[t] and confus[ed]” because the members of the California Supreme Court disagree about the justifications for *respondeat superior* liability. *Mary M.* expresses an enterprise liability conception of vicarious liability whereas *Lisa M.* “doubts the wisdom” of vicarious liability’s commitment to strict liability. Although the majority opinion in *Lisa M.* is scrupulously careful to speak the language of enterprise liability, it is equally careful not to adopt an enterprise liability interpretation of the scope of employment. The *Lisa M.* majority seems caught between dislike of vicarious liability law’s nonfault character and the doctrine’s deep entrenchment in our law. Unable to uproot the doctrine, the *Lisa M.* majority is reduced to interpreting “scope of employment” in a disingenuously narrow fashion.

140. *Id.* at 372.

141. Smith, *supra* note 16.

Chief Justice George's concurring opinion in *Lisa M.* supports a more specific conjecture that a preference for fault liability lies behind the majority's narrow interpretation of "scope of employment." George cites to his opinion in another sexual harassment case, *Farmer's Insurance Group v. County of Santa Clara*,¹⁴² interpreting scope of employment narrowly—along the lines of *Lisa M.* Indeed, George's concurrence in *Farmer's Insurance* argues for overruling *Mary M.* precisely because its broader, enterprise liability interpretation of the scope of vicarious liability doctrine is inconsistent both with the narrow interpretation of the doctrine given in *Farmer's Insurance* and with fault liability. George asks:

Why should the public bear the financial burden imposed as a result of such misconduct [rape by an on-duty police officer], in situations where there has been no showing that the public entity was negligent either in hiring or supervising its employee?¹⁴³

Absent fault, in other words, there should be no vicarious liability. George's fault sentiments are echoed by the *Lisa M.*¹⁴⁴ and *Farmer's Insurance* majority opinions.¹⁴⁵

We cannot, however, be sure that a partially submerged preference for fault liability underpins the narrow interpretations of "scope of employment" adopted by *Lisa M.* and *Farmer's Insurance*. The opinions insist—unconvincingly—that all of the rationales for vicarious liability support their narrow interpretations. What we can say is that fault arguments justify the rulings of these cases whereas

142. *Farmer's Ins. Group v. County of Santa Clara*, 906 P.2d 440 (Cal.1995).

143. *Id.* at 461.

144.

Although imposition of vicarious liability would likely lead to adoption of some further precautionary measures, we are unable to say whether the overall impact would be beneficial to or destructive of the quality of medical care. Hospital and its amici curiae predict imposition of *respondeat superior* liability would lead health care providers to overreact by monitoring, for possible sexual misconduct, every interaction between patient and health care worker.

Lisa M., 907 P.2d at 304.

145. The *Farmers Insurance* majority, for example, wrote:

[W]e find it significant that public entities such as the County are already required by FEHA to "take all reasonable steps to prevent harassment from occurring." FEHA makes it unlawful for public entities and any persons acting as their agents to sexually harass any employee or applicant, and for public entities to fail to take immediate and appropriate corrective action if they know or should know of sexual harassment by employees other than agents or supervisors . . .

Farmers Ins., 906 P.2d at 1014.

Because this potential for direct liability already furnishes powerful motivation for the County to establish and maintain programs and procedures designed to eliminate sexual harassment at jail, the imposition of vicarious liability is not essential to "create [] a strong incentive for vigilance by those in a position 'to guard substantially against the evil to be prevented.'" *Id.* at 456 (quoting *Mary M. v. City of Los Angeles*, 814 P.2d 1341 (Cal. 1991)).

enterprise liability rationales do not. For our purposes, that is all we need to say. Our point, after all, is simply that the scope of vicarious liability is sensitive to the choice between fault and enterprise justifications for the doctrine. And the conflict between *Mary M.* and *Lisa M.* amply supports that point.

III. ENTERPRISE LIABILITY WITHIN NEGLIGENCE LAW

The basic argument of this Paper is that the *Restatement (Third): General Principles* is mistaken in its argument that there is no general theory of strict liability, just particular instances of it. The paper argues that there is indeed a general conception of strict liability, and a distinctively modern general conception at that, namely, the conception of strict liability found in the theory of enterprise liability. That theory originates in the Workers' Compensation Acts enacted around the turn of the twentieth century. From its stronghold in those Acts, the theory of enterprise liability penetrates into the law of torts, enabling legal scholars and judges to reconceive and reconfigure the common law of torts. At the turn of the twenty-first century, enterprise liability conceptions compete with fault conceptions for control over various domains of the common law of torts.

The domains that we have examined so far are mostly domains of strict liability. It is a mistake, however, to suppose that enterprise liability conceptions *only* influence strict liability doctrines. Enterprise liability conceptions can also permeate fault-based doctrines, a point that Robert Rabin has recently stressed.¹⁴⁶ The argument that enterprise liability conceptions shape fault doctrines as well as strict doctrines is, in fact, an old one. Jeremiah Smith's prophetic claim that the enterprise liability theory of the Workers' Compensation Acts would come to exert a powerful influence on the common law of torts rested in part on the observation that negligence liability itself could be recast as a much stricter form of liability by relaxing the requirements of the prima facie case, construing *res ipsa loquitur* liberally and inverting the burden of proof.¹⁴⁷ Upon reflection, moreover, it seems logical that, just as there are fault conceptions of strict doctrines, so too there should be enterprise conceptions of fault doctrines. If instances of strict liability might be seen as cases where fault ideas call for strict doctrines, why might not some instances of

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

147. See generally Smith, *supra* note 15.

fault liability be seen as the expression of enterprise liability ideas? This, after all, is one aspect of the *Barker* regime for product defects. That regime is animated by enterprise liability ideas, but *Barker* adopts a modified risk-utility test as one of its two tests of product defectiveness. Risk-utility balancing, performed with hindsight and coupled to a relaxed prima facie case, was used both as a way of setting strict liability off from negligence, and as a device for identifying the "characteristic risks" of a product's design.

Rabin's insight is related, but different. He asserts that the idea of enterprise liability expresses a shift "from a *corrective* justice perspective on responsibility in tort law to a *collective* justice approach."¹⁴⁸ "More specifically," he argues that enterprise liability ideas express "a shift from a framework in which considerations of interpersonal justice are paramount to one in which notions of what is best for society are dominant."¹⁴⁹ I would put the point a bit differently. Enterprise liability can be justified on grounds of interpersonal fairness as well as social welfare—that, in fact, is what the enterprise liability idea of fairness does.¹⁵⁰ But even so—even if I am correct that enterprise liability can be justified by an idea of interpersonal fairness—the enterprise liability conception of tort still differs from the corrective justice conception, and in a way which has much to do with the distinction that Rabin posits between corrective and collective justice. Enterprise liability expresses a *distributive*—as opposed to a *corrective*—conception of justice.¹⁵¹ It seeks to distribute the burdens and benefits of risky, but beneficial, *activities* fairly.

Enterprise liability's focus on distributive justice is thus closely tied to its focus on activities as opposed to acts.¹⁵² Enterprise liability is an effort to make activities bear their characteristic accident costs. It is, then, no coincidence that Oliver Wendell Holmes noted the distinction between acts and activities, and its importance to the future of tort law, around the time that enterprise liability burst full-blown upon the law of accidents. "Our law of torts," Holmes wrote, "comes from the old days of isolated, ungeneralized wrongs, assaults, slanders, and the like" but,

the torts with which our courts are kept busy today are mainly the incidents of certain

148. Rabin, *supra* note 146, at 1193.

149. *Id.* at 1193 n.22.

150. See Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266 (1997).

151. See Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193 (2000).

152. See Keating, *supra* note 150, at 1287-95.

well known businesses. . . . railroads, factories, and the like. The liability for them is estimated, and sooner or later goes into the price paid by the public. The public really pays the damages, and the question of liability, if pressed far enough, is really the question how far it is desirable that the public should insure the safety of those whose work it uses.¹⁵³

Shift the target of tort law from acts to activities and you shift from a framework where corrective justice is done to one where a species of distributive justice is done.¹⁵⁴

Even with these adjustments, though, Rabin's insight is substantially correct: enterprise liability is trained on activities as opposed to acts, and it therefore has a more "collective" character in an important sense. It takes organized practices, not isolated acts, as its prey. But how is this insight related to negligence liability? Enterprise liability's concern with distributive justice is one of the things that leads it to favor strict liability over negligence. Enterprise liability seeks to disperse an activity's accident costs across the activity, and that aspiration is more fully realized by strict liability than by negligence.¹⁵⁵

The fact that enterprise liability is most fully realized by strict liability does not, however, undermine Rabin's point. Rabin's point is that modern tort law absorbs much of enterprise liability's logic even when it adopts fault rules. For example, when courts single out psychiatrists for special duties to warn potential victims of dangerous patients, courts are relying on the character of the psychiatric *enterprise* to justify moving from a regime of "no duty" to a regime of fault.¹⁵⁶ The *Tarasoff* duty to warn rests on the premise that psychiatrists engage in a special kind of enterprise, an enterprise which makes them uniquely well situated to identify those persons who are especially likely to inflict violent injury on others.¹⁵⁷ Psychiatrists are, moreover, in a decent position to dispose the costs of harms inflicted by dangerous patients across the psychiatric enterprise.

Conversely, when a court relies on the amateur status of a man who constructed a home for his own use to justify refusing to impose a duty of careful construction to a subsequent purchaser—to justify

153. OLIVER WENDELL HOLMES JR., *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 183 (Peter Smith ed., 1952). Holmes originally delivered the paper on January 8, 1897, at the dedication of a new hall at the Boston University School of Law.

154. See Keating, *supra* note 151.

155. For an argument to this effect see Gregory C. Keating, *Distributive and Corrective Justice in Tort Theory*, 75 S. CAL. L. REV. (forthcoming Southern California Law Review) (on file with author).

156. See Rabin, *supra* note 149, at 1200-01.

157. *Id.* at 1200.

moving from a fault regime to a regime of “no-duty”—the court is also acting on enterprise liability logic. Individual, amateur masons, who are neither trained nor engaged in the enterprise of masonry, cannot reduce the risks of defective construction or disperse those risks across the enterprise of homebuilding in the way that professional masons and real estate developers can. So too, when courts move “to a more robust principle of fault in medical malpractice cases”¹⁵⁸ by abandoning the same locality rule, using *res ipsa* more expansively, and adopting less restrictive standards for qualifying experts and establishing informed consent claims, they are effecting enterprise liability ends by negligence means. They are expanding the liability of the “medical enterprise” and they are doing so in part because they are aware of the risk-reducing and risk-spreading capacities of those organizations that provide health care.¹⁵⁹ Other examples come readily to mind. Enterprise liability ends are being effected, for example, when courts abolish charitable immunities on the ground that they are no longer needed to induce the provision of important services because the charitable institutions involved can insure against any liability.¹⁶⁰

In a wide range of cases where the applicability of strict liability is not on the table, then, decisions about the imposition and character of negligence liability are made on enterprise liability grounds. This underscores two important facts. First, enterprise liability and strict liability are distinct phenomena, however much the former invites the latter. Second—and perhaps more importantly—enterprise liability’s entrenchment in the common law of accidents is even greater than its influence on common law strict liabilities suggests. Enterprise liability ideas permeate contemporary examples of fault liability so thoroughly that their influence would continue to be substantial even if we could, somehow, purge the law of accidents of those strict liabilities that are the natural habitats of enterprise liability.

158. *Id.*

159. *Id.* Note that this is the use of *res ipsa* anticipated by Jeremiah Smith.

160. See, e.g., *Pierce v. Yakima Valley Mem’l. Hosp. Ass’n*, 260 P.2d 765, 771 (Wash. 1953) (abolishing the charitable immunity of hospitals, in part because liability insurance is now available to distribute the cost of malpractice liability, and quoting *Georgetown College v. Hughes*, 130 F.2d 810, 824 (D.C. 1942) (“What is at stake, so far as the charity is concerned, is the cost of reasonable protection, the amount of the insurance premium as an added burden on its finances, not the awarding over in damages of its entire assets.”)).

IV. ENTERPRISE LIABILITY AND THE THIRD RESTATEMENT

To recapitulate: The *Restatement (Third)* makes the striking and bold claim that existing areas of strict liability are simply a set of special cases. That claim writes a huge chunk of tort history and tort theory out of the law. There is a general and distinctively modern theory of strict liability—namely, enterprise liability—and it has exerted a substantial influence on our law throughout the course of the twentieth century. The theory of enterprise liability burst full-blown onto the legal landscape in the Workers' Compensation Acts of the early twentieth century and spread from those acts back into the law of torts, reshaping our understanding of various common law strict liabilities. To be sure, enterprise liability has waned during the past twenty years, as G. Edward White argues in his contribution to this conference,¹⁶¹ but it has hardly disappeared from our tort law entirely. Indeed, close examination might prove that it has merely gone underground and that it, in fact, shapes the most important tort phenomena of the 1990s, namely, the tobacco cases. Be that as it may, however, enterprise liability conceptions of strict liability are alive and well today, both in the rulings and rhetoric of courts across the country and in contemporary legal scholarship.¹⁶²

Indeed, as long as instances of strict liability are extant in our law, it seems safe to say that it is all but impossible to purge enterprise liability ideas from the law of torts. Enterprise liability spread from the Workers' Compensation Acts into the law of torts in the first place by supplying a unifying theory capable of justifying preexisting forms of strict liability as expressions of a defensible, general theory of responsibility for accidental harm. The very act of characterizing all instances of strict liability as special cases paves the way for the success of a general theory that shows those areas to express a coherent general conception. As long as there are instances of strict liability, and as long as the fault principle can only explain each such instance as a special case, enterprise liability will attract adherents. It will do so simply because the unity that it finds makes

161. See G. Edward White, *The Unexpected Persistence of Negligence, 1980-2000*, 54 VAND. L. REV. 1337, 1344-46 (2001).

162. See, e.g., *Taber v. Maine*, 45 F.3d 598 (2d Cir. 1995) (adopting enterprise liability view of the scope of employment under vicarious liability law); *Brooks v. Beech Aircraft Corp.*, 902 P.2d 54 (N.M. 1995) (adopting enterprise liability view of design defect law); *Danny v. Ford Motor Co.*, 662 N.E.2d 730 (N.Y. 1995) (approving use of consumer expectation test in design defect litigation and describing liability under this test as "true 'strict' liability"). Important recent scholarship favoring enterprise liability in tort include the works by Logue, Croley & Hanson, and Nolan & Ursin, *supra* note 8.

better sense of various strict liabilities than the various ad hoc explanations offered by the adherents of fault liability.

By ignoring the history and theory of enterprise liability and claiming that existing areas of strict liability are a set of special cases, the *Restatement (Third)* begs the question it purports to answer. Existing areas of strict liability are special cases only so long as we assume the supremacy of the fault principle and ignore the existence of enterprise liability. That assumption, however, ignores the history and rhetoric of our tort law, and the scholarship that has characterized and influenced it. History, rhetoric and scholarship show that the law of torts is torn between two competitive principles of responsibility. One conception—the fault conception—asserts that actors should be held responsible for accidental harm only when they should have prevented that harm from occurring. The other conception—the enterprise liability conception—asserts that actors should bear the costs of those accidents that are “characteristic” of their activities and then distribute those costs among all those who benefit from the imposition of the risks at issue. The choice between these competing conceptions matters. Conceive of strict liability as a set of anomalous exceptions to an otherwise dominant fault principle and the domain of fault liability will tend to expand while the domain of strict liability contracts. Conceive of those very same “pockets” of strict liability as expressions of a general principle of responsibility for accidental injury and the domain of strict liability will tend to expand while the domain of fault liability contracts.

More importantly, the choice between these two competing general conceptions of responsibility is not forced upon us by the details of the black-letter law. Our law is elastic enough to be made more strict under the influence of enterprise liability ideas, just as it is elastic enough to be made more negligence oriented under the influence of fault ideas. The general outlines of tort history prove as much. Enterprise liability ideas reshaped the law throughout much of the twentieth century; fault ideas appear to be reshaping the law now.¹⁶³ The choice between these two competing conceptions—or, more accurately, the choice about how to reconcile these two competing conceptions, giving each its proper sphere—is not one that law or history makes for us. It is one that we must make ourselves. We must make it by appealing to the justifications we have for holding people

163. Compare Priest, *supra* note 11 (arguing that enterprise liability reshaped the law of torts in the mid-twentieth century) and WHITE, *supra* note 18, at 168-72 (describing triumph of enterprise liability in products liability law) with White, *supra* note 161 (describing resurgence of negligence liability in the past twenty years).

accountable for the injuries that they accidentally inflict upon others. We must make the choice by appealing to the considerations of agency and responsibility, fairness and efficiency, that might justify preferring one conception of responsibility to another.

Our tort law of accidents is, in short, torn. Strict enterprise liability and fault liability coexist uneasily with one another; the justifications for the one are criticisms of the other. Because our law of torts is torn between these two general principles, any effort to “restate” the “general principles” of our law must acknowledge that fact or risk being nothing more than a partisan brief for one party to the debate. Yet, this is the very risk that *Restatement (Third)* runs. It denies that there is any general conception of responsibility capable of justifying tort law’s various instances of strict liability, and it writes enterprise liability out of the law of torts. The problem here is equal parts politics, history, and jurisprudence. Politically, the problem is one of falsely characterizing the law as it is to promote a particular conception of the law as it should be. The *Restatement (Third)* reads all too much like a document which proposes to increase the future prominence of fault liability in tort by overstating the present prominence of fault liability in tort. This is an illicit sleight of hand.

Historically, the problem is that the *Restatement (Third)*’s description of our tort law of accidents writes the past century out of our law. In describing strict liability as a set of exceptional special cases, the *Restatement (Third)* eerily repeats Jeremiah Smith’s description of the common law of torts prior to the passage of the Workers’ Compensation Acts. Even Smith himself, however, foresaw that the appearance of the Workers’ Compensation Acts would make this account of the common law untenable. We, who have seen many of his prophecies come to pass, can hardly credit the account of law he found incredible eighty long years ago.

Jurisprudentially, the problem is that the *Restatement (Third)* takes a position in an ongoing controversy instead of acknowledging that controversy and finding a way to perch atop it. Before we can restate the law we must state it. A statement of tort law’s general principles of responsibility for harm done should acknowledge that our common law recognizes two competing conceptions. At the level of general principle, the common law of torts does not speak with a single voice; it is a debate between two different voices. A *Restatement of General Principles* needs both to acknowledge the existence of this debate and to take a position *on* it—not a position *in* it.

