Distributive and Corrective Justive
in the Tort Law of Accidents
(74 SO. CAL. LAW REV. 193 (2000))

Gregory C. Keating

USC Olin Research Paper No. 01-3

USC
THE LAW
SCHOOL

RESEARCH PAPER SERIES

Sponsored by the John M. Olin Foundation

University of Southern California Law School
Los Angeles, CA 90089-0071

This paper can be downloaded without charge from the Social Science Research Network electronic library at http://papers.ssrn.com/paper.taf?abstract_id=269347

ABSTRACT

Tort theory is torn between two competing conceptions. One of these—the justice conception—takes the tort law of accidents to be continuous with our ordinary notions of agency and responsibility, carelessness and wrongdoing, harm and reparation. The other—the economic conception—holds that tort accident law should express an appropriately scientific conception of human welfare. Theorists in the first camp have generally believed that justice in tort is a matter of corrective justice, that it is concerned all but exclusively with the rectification of losses wrongfully inflicted. This paper challenges that belief. It argues that we should understand tort law to be primarily a matter of distributive justice—a matter of the fair apportionment of the burdens and benefits of risky activities—and only secondarily a matter of corrective justice. Calling attention to the role that distributive justice plays in the law of torts has an interpretive advantage: it helps to explain and justify the existence of strict liability in tort, something which corrective justice conceptions have had difficulty doing. But focusing on the importance of distributive justice to the law of torts also has transformative implications for the law of torts: it implies that, other things equal, strict liability is to be favored over negligence.

DISTRIBUTIVE AND CORRECTIVE JUSTICE IN THE TORT LAW OF ACCIDENTS

GREGORY C. KEATING*

Tort scholarship on the law of negligence has long been torn between two competing conceptions. One of these conceptions—the justice conception—holds that negligence law is (and should be) an articulation of our ordinary moral conceptions of agency and responsibility, carelessness and wrongdoing, harm and reparation. The other conception—the economic conception—holds that the law of negligence embodies an appropriate public morality, but it takes that morality to be at best a distant echo of the morality of responsibility and reparation found in ordinary life. The law of accidents, on this conception, can and should promote human welfare, but it should do so not by elaborating and reconstructing ordinary moral thinking but by rigorously pursuing a suitably scientific conception of that welfare. Where ordinary morality links responsibility for harm done with the duty to repair that harm, for example, the scientific morality of the economic analysis of torts takes the two to be wholly separable and properly separated. Justice conceptions acknowledge a prima facie link between responsibility for having inflicted injury and responsibility for

* PROFESSOR OF LAW, UNIVERSITY OF SOUTHERN CALIFORNIA LAW SCHOOL. B.A., AMHERST COLLEGE; J.D., HARVARD LAW SCHOOL; PH.D., PRINCETON UNIVERSITY.

[1] . This aspect of conventional morality is central to corrective justice accounts of tort law. Interestingly, it figures prominently in wrongful death suits, where the harm done is beyond repair and plaintiffs seek acknowledgment of responsibility for irreparable injury, not the rectification of harm done. For an example, see GREGORY GIBSON, GONE BOY (1999), an autobiographical account of one father's efforts to come to grips with his son's death at the hands of a fellow student. When a college administrator refused to acknowledge some responsibility for the death, the father found it impossible to forgive the college and close that chapter in his struggle to accept his son's death. Gibson writes: "We were still unresolved. We needed to forgive them if we could. [They could have said] . . . 'We're sorry. How can we make it better for you?' [Instead] . . . [a]ll we saw . . . was a man trying to put the best face on things." *Id.* at 13. Gibson went on to bring a wrongful death suit against the college.

repairing the injury inflicted. Economic conceptions hold that prevention and compensation are distinct dimensions of human welfare, best treated separately. When we think about preventing harm, we should think about which harms we wish to deter, and how to deter them. When we think about reparation for harm done, we should think about which harms we wish to compensate and how best to compensate for them.

For the past thirty or so years, legal scholars who have taught at the University of Southern California Law School have figured prominently on both sides of this debate. Richard Epstein began his early, important work on corrective justice during his tenure as a USC Law School professor, and John Borgo produced his important critique of Epstein's theory during his time at USC. Catharine Wells contributed to the corrective justice tradition during her years on the USC faculty through an important analysis of the role of the jury in negligence adjudication. And Peggy Radin made an important contribution to the theory of corrective justice by developing a norm expressivist account of the role of money damages. Jennifer Arlen, Dick Craswell, and Alan Schwartz have all made substantial contributions to the economic side of the debate, contributions which have helped to establish and sustain the law school's position as a center of the law and economics movement.

The presence of talented legal scholars on both sides of this vast and deep conceptual divide is only one of many signs that the clash of justice and economic tort conceptions is with us, if not forever, at least for the foreseeable future. My aim in this essay is therefore a modest one. What I hope to do is to argue that, to the extent we are concerned with justice and fairness in tort law, we should be concerned more with matters of distributive justice—with the fair apportionment of the burdens and benefits of risky activities—and less concerned than we have been with

[2] . *See, e.g.*, Jennifer H. Arlen, *Reconsidering Efficient Tort Rules for Personal Injury: The Case of Single Activity Accidents*, 32 WM. & MARY L. REV. 41 (1990). Professor Arlen argues that we can arrive at Pareto-optimal tort rules in the context of "single activity accidents" by using damage awards "as a sanction for failing to exercise optimal care and not as a mechanism for compensating the victim," while achieving efficient risk-spreading by having individuals purchase "efficient insurance coverage against . . . [accident] loss[es]." *Id.* at 81, 85. "Single activity accidents are those accidents that occur between two individuals engaged in the same activity." *Id.* at 48.

[3] . *See* John Borgo, *Causal Paradigms in Tort Law*, 8 J. LEGAL STUD. 419 (1979).

[4] . *See, e.g.*, Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348 (1990).

[5] . *See, e.g.*, Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56 (1993).

[6] . *See* Arlen, *supra* note 2; Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J.L. ECON. & ORG. 279 (1986); Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 388–91 (1988).

matters of corrective justice—less preoccupied with questions of wrongdoing and rectification. For the past twenty or thirty years, scholars working the justice side of the divide have tended to assume that justice in tort law is a matter of corrective justice. This is an attractive position. Rectification or reparation is central to tort accident law and, at least since Aristotle distinguished among the forms of justice, the term corrective justice has seemed all but synonymous with "justice as rectification." The fact that justice theorists have spent the past several decades contending with economic conceptions of tort has only increased the attractiveness of a corrective justice conception. Economic conceptions radically devalue considerations of agency, responsibility and reparation. Those considerations loom large both in the law of torts and in theories of corrective justice. So the language of corrective justice has seemed especially suitable to making the case against economic conceptions of tort.

These advantages have come at a cost, however. For one thing, the rhetoric of tort law is rife with appeals to fairness, and arguments of fairness have been hard to fit into a corrective justice framework. For another, the emphasis on corrective justice has led justice theorists to place great weight on the concept of wrongdoing. This emphasis, in its turn, has made strict liability difficult to justify and has led to overemphasizing the importance and attractiveness of negligence liability. A conception of justice that places less weight on considerations of corrective justice and more on considerations of distributive justice can help us to make sense of strict liability and to put negligence in its proper place. The conception I shall sketch takes justice in general to be concerned with apportioning fairly the burdens and benefits of social life, and justice in tort law to be concerned with apportioning fairly the burdens and benefits of risky, yet valuable, activities. The fundamental precept of this conception is that the burdens and benefits of mutually advantageous but harmful activities should be structured so that those who reap the benefits also bear the

[7] . *See* ARISTOTLE, NICHOMACHEAN ETHICS bk. V, § 4, at 120–23 (Martin Ostwald trans., Bobbs-Merrill Co., Inc. 1962).

[8] . *See* James A. Henderson, Jr., *Judicial Reliance on Public Policy: An Empirical Analysis of Products Liability Decisions*, 59 GEO. WASH. L. REV. 1570, 1597 (1991) ("Measured by what judges say in their published opinions . . . fairness norms, not efficiency norms, [predominate]"; their predominance increases when they conflict with efficiency rationales.). Fairness justifications have been hard to fit into corrective justice theories, because they are, as this paper explains, arguments of distributive justice, not corrective justice.

burdens. It is unfair for an actor to foist the cost of its activity—the physical harm that is the price of its presence in the social world—on strangers to the activity, when the actor reaps the benefits of the activity. It is unfair to fix the terms on which an activity is conducted so that some participants reap the activity's benefits while others bear its burdens. It is unfair to concentrate the burdens of a mutually beneficial activity on a handful of participants when the benefits of the activity are widely dispersed. Burden and benefit should be proportional. Fairness demands that the burdens of mutually beneficial but harmful activities should be shared, ideally in proportion to the benefits reaped.

I. FAIRNESS AND JUSTICE

Normative economic conceptions of tort law typically take the point of tort to be the promotion of some socially desirable end, say, wealth or welfare maximization. They thus adopt an external and collective approach to the subject. Justice conceptions tend, implicitly or explicitly, to adopt a more internal perspective on the subject. They view the law of torts from the point of view of those affected by it and ask what they might reasonably expect of each other in the way of precaution and reparation. The particular justice conception that I am concerned to explicate has its roots in the social contract tradition; it therefore adopts this internal perspective in an explicit and self-conscious way. It asks: "What terms would free and equal persons, concerned to cooperate fairly with each other, agree upon to govern the risks of accidental injury created by beneficial activities?" This is the basic question of social contract theory, applied to the tort law of accidents, and it is a question of justice. Why is it a question of justice? In part because it is a question about the distribution of the burdens and benefits of risky activities, and in part because it brings to the fore and seeks to protect the fundamental interests of those—potential injurers and potential victims—whom the tort law of accidents affects.

As potential injurers, we each have a fundamental interest in liberty. As potential victims, we each have a fundamental interest in security. We have a fundamental interest in liberty because, without a substantial measure of freedom to impose risks upon others, we would each be unable

[9] . Rawls emphasizes that the social role of principles of justice is to distribute the burdens and benefits of social life. *See* JOHN RAWLS, A THEORY OF JUSTICE 3–6 (rev. ed. 1999). Mill connects justice with the protection of fundamental individual interests. *See, e.g.*, JOHN STUART MILL, UTILITARIANISM 41–43, 52–53 (Hacket Publ'g Co., Inc. 1979) (1861).

to pursue the ends and aspirations that give our lives meaning. We have a fundamental interest in security because, without a substantial measure of freedom from accidental injury and death, our chances of pursuing those ends and aspirations over the course of a complete and normal life span are in jeopardy. Because there are many of us, and because our ends and aspirations diverge, these interests conflict. The task of tort accident law is thus to reconcile our competing interests in liberty and security in terms that secure for each the most favorable circumstances to pursue her ends or aspirations, consistent with a like freedom for others. The problem of justice, in other words, is to reconcile these competing fundamental interests favorably and fairly.

Situating the fairness conception as a justice conception brings us back to the question "What kind of justice?" and so to the distinction between distributive and corrective justice that figures so prominently in contemporary tort theory. Most of the prominent contemporary tort theorists who assert that the tort law of accidents is and should be a matter of justice—Jules Coleman, Richard Epstein, George Fletcher, Arthur Ripstein, and Ernest Weinrib among them—have concluded, in different ways, that tort law is and should be a matter of corrective justice. Does a social contract approach—a "fairness" approach—to the law of torts also lead to the conclusion that tort law is a matter of corrective justice, not distributive justice? To answer that question, we must examine the distinctive features of corrective justice.

There is, for better or for worse, no single agreed-upon account of corrective justice. It thus seems reasonable to take one prominent account as our touchstone. I shall therefore proceed by taking Jules Coleman's conception of corrective justice as my touchstone. Following Coleman's lead, we can say that corrective justice has four elements. First, it applies to human agency, not, say, to natural misfortunes. Second, it is concerned with repair or rectification. Third, it is concerned with rectifying some kind of wrongdoing—with "wrongful losses" in Coleman's case. Fourth, it

[10] . *See* JULES L. COLEMAN, RISKS AND WRONGS 303–28 (1992); ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW 24 (1999); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 56–83 (1995); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 547 (1972).

[11] . In particular, I shall rely on Jules L. Coleman, *The Practice of Corrective Justice*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 53 (David G. Owen ed., 1995).

involves correlativity: "The claims of corrective justice are limited or restricted to parties who bear some normatively important relationship to one another. A person does not . . . have a claim in corrective justice to repair *in the air*, against no one in particular."

Because the idea of injury wrongly inflicted is central to corrective justice, as most of its advocates conceive it, corrective justice conceptions of tort law have tended to favor fault over strict liability. Harms or losses negligently inflicted are more easily characterized as wrongful than are harms or losses inflicted by the faultless conduct of those responsible for their infliction. When a negligent injurer inflicts a loss on a victim, the requirements of agency and wrongdoing are present, and the injurer stands in a "normatively important relationship" to the victim—she and she alone has wrongfully caused him harm. A duty of rectification therefore falls on her shoulders, and on her shoulders alone. When a nonnegligent injurer inflicts a loss on a victim, by contrast, the requirement of agency is met and there is a distinctive relationship between injurer and victim—she and she alone has harmed him—but the element of wrongdoing appears absent. The injurer's conduct is faultless.

Corrective justice theorists advance two lines of argument to explain just what is wrong with imposing liability on a faultless injurer. The first line of argument holds that injuries issuing from faultless conduct ought to be viewed more as misfortune than as mischief, asserting or implying that it would be *normatively* wrong to hold injurers financially responsible for the nonnegligent injuries that they inflict. The idea here seems to be that the harms occasioned by blameless human agency are morally equivalent to those caused by natural forces. Responsibility for rectifying injuries that arise out of pure natural misfortune—out of floods, fires, earthquakes and other natural disasters, when those disasters are neither caused nor aggravated by deliberate or careless human actions—does not fall on particular persons, because no particular persons stand in any "normatively important" relationship to the injuries at hand. We have neither causal nor moral reasons for attributing responsibility to particular persons. The untoward consequences of blameless human agency ought, this line of argument claims, to be treated in the same way. The fact that an injury is a consequence of some human agency instead of some natural cause should

12 . *Id.* at 66–67.

13 . The views of Weinrib, Coleman, and Ripstein, cited *supra* note 10, are examples of this tendency. Richard Epstein's early work on strict liability, also cited *supra* note 10, is an exception to this generalization.

only make a *normative* difference if there is something normatively wrong with the agency at issue.

The second line of argument rejects strict liability on conceptual grounds, asserting that it is impossible, impracticable, or incoherent to attribute accidents to activities without the help of the fault criterion. The underlying thought here is that all (or virtually all) accidents arise at the intersection of several human activities—at the intersection of the victim's and the injurer's actions, in the simple bipolar case—and this prevents us from attributing accidental injuries to particular injurers without employing some normative criterion. Insofar as strict liability purports to rest on causal criteria, then, it is "impossible." Insofar as strict liability purports to rest on normative criteria, it tends to collapse into fault liability. Strict liability is normatively appropriate only when we have some reason to find fault with the very act of imposing some risk, no matter how carefully the actor imposing the risk proceeds. Or so corrective justice theory argues.

Both the causal and the normative objections to strict liability raise issues that cannot be pursued here. For our purposes, it will do to observe that the aversion of corrective justice theories to strict liability marks a sharp divide between these theories and the fairness conception. The fairness conception tends to favor strict liability over negligence. This divergence points us toward the fundamental difference between the two approaches. That fundamental difference might be expressed in several different ways. We might, for instance, decline to connect fairness with any particular form of justice and simply say that fairness and corrective justice conflict. Or we might say that the failure to repair harms that issue from reasonable risk impositions is itself a form of wrongdoing, thereby

[14] . Ripstein takes the causal tack, while Weinrib takes the normative tack. *Compare* RIPSTEIN, *supra* note 11, at 32–42 (arguing that strict liability must fail for causal reasons), *with* WEINRIB, *supra* note 10, at 74–75 (arguing that strict liability introduces "incoherence" into tort law, because "the introduction of loss-spreading . . . mixes corrective and distributive justice").

[15] . Alan Brudner expresses this idea when he writes that "[s]trict liability for ultrahazardous activities is really liability for activities that are negligent regardless of care because the product of risk [and] harm is so great that no feasible precaution can reduce it to the ordinary." ALAN BRUDNER, THE UNITY OF THE COMMON LAW 183 n.* (1995).

[16] . *See* Jeremy Waldron, *Moments of Carelessness and Massive Loss*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 387, 396–97 (David G. Owen ed., 1995).

absorbing fairness into corrective justice. Or we might adopt yet a third tack and say that fairness in tort accident law is a matter of what Aristotle calls "commutative justice."

It seems most fruitful, however, to understand the difference between the fairness and corrective justice conceptions in terms of the distinction between distributive and corrective justice. On the fairness conception, the tort law of accidents is primarily a matter of distributive justice and only secondarily a matter of corrective justice. The idea of fairness implies that the tort law of accidents is and should be concerned with the fair distribution of the burdens and benefits of mutually beneficial but harmful activities. Fairness requires—presumptively—that those who impose risks bear the accident costs that issue from those risk impositions. In the normal course of events, those who choose to impose risks on others generally do so for their own benefit and generally reap the rewards of so doing; they should therefore be charged with the costs that their projects inflict on others. This principle of fairness is a principle of distributive justice: It asserts that the burdens and benefits of risky activities are fairly apportioned when those who reap the benefits of those activities also bear their burdens.

This conception of fairness gives rise to a presumption in favor of strict liability. Because those who impose risks normally reap the benefits that flow from their risk impositions, injurers should generally be strictly liable to those they accidentally injure unless those they injure are already compensated "in kind" for bearing their losses. Victims are compensated "in kind" for bearing the financial costs of some injury when they and the injurers who have harmed them are (1) both members of the same community of risk; and (2) stand to inflict a similar injury on another member of the community within a short period of time. But unless reparation is made—either in the form of money damages or "in

[17] . This seems to be the view expressed in Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 MCGILL L.J. 91 (1996).

[18] . I adopted this characterization in Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266, 1330 n.160 (1997). Aristotle distinguishes "commutative" from "correlative" and "distributive" justice (albeit in slightly different language) in ARISTOTLE, *supra* note 7, bk. V, § 5, at 123–28. Joel Feinberg has used this terminology as well. *See* JOEL FEINBERG, DOING AND DESERVING 221 & n.21 (1970) (noting that "schemes of nonfault liability are supported by strong reasons of their own, principles of both justice and economy," and citing "the *benefit principle* (of commutative justice) that accidental losses should be borne according to the degree to which people benefit from an enterprise or form of activity"). While the term still seems entirely apt to me, it is not in common usage, so it seems best to explain the differences between fairness and corrective justice views by using the more familiar terminology of distributive justice.

kind"—the just distribution of the burdens and benefits of risky activities is upset. The corrective dimension of strict liability—reparation by the injurer to the victim for harm reasonably inflicted—is thus the offspring of a deeper distributive dimension. Harm reasonably risked must be repaired when the failure to do so would work a distributive injustice.

Matters are more complex when we turn to negligence liability. Here, considerations of corrective justice loom larger. Negligence is the failure to prevent a risk imposition that should have been prevented. Negligent risks are ones whose imposition it is fair to ask injurers to prevent; their prevention strikes a fair balance between the competing claims of liberty and security. The imposition of a negligent risk expresses inadequate respect for the security of the victim; it is an "affront to personality" in this sense. Those who negligently injure others are therefore guilty of a kind of *primary* wrongdoing not present when reasonable conduct issues in injury. This link between negligence and disrespect makes negligence liability an instance of corrective justice in a robust sense: The duty to repair a negligently inflicted injury is a duty to make right a harm wrongly inflicted. Even here, however, corrective justice is embedded in distributive justice, and doubly so: First, negligence liability is fully justified only when it is distributively fair—only when its failure to require reparation for harm nonnegligently inflicted leaves the burdens and benefits of nonnegligent losses fairly distributed. Second, when negligence liability is properly articulated, the norms of due care strike a fair balance between the competing claims of liberty and security. Negligence upsets this fair distribution of risk and precaution; unfair injuries are inflicted where fair precautions are owed.

[19] . Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 101 (N.Y. 1928).

[20] . When reasonable risk impositions issue in injury, those who impose the risks may be guilty of a kind of *secondary* wrongdoing, but they are not guilty of primary wrongdoing. Primary wrongdoing is present when the underlying conduct—the risky conduct—is flawed—when it is negligent or unreasonable. Secondary wrongdoing is present when the underlying conduct is beyond reproach, but the failure to make reparation is unjust. *See* Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 401 (1959) (distinguishing between "fault" and "conditional fault" as a way of capturing the distinction between negligence and strict liability). It is because the failure to make reparation in certain circumstances can be described as a kind of wrongdoing that strict liability can be absorbed into the paradigm of "wrongdoing" that lies at the center of corrective justice theory.

[21] . *See* discussion *infra* text accompanying notes 36–40.

The upshot of this is that—on the fairness view of the matter—victims' claims to reparation rest at bottom on a conception of distributive justice, even when those claims sound in corrective justice. This distribution-centered view differs from more familiar justice views in two fundamental ways. First, considerations of distributive justice figure only indirectly, if at all, in the views of corrective justice theorists like Coleman and Weinrib. Considerations of distributive justice are *not grounds for imposing liability*, as they are on the fairness conception. Second, these corrective justice views take the duty to repair to require *wrongdoing* by the injurer, where wrongdoing consists of something more than bringing about, by one's agency, a harm that will yield distributive injustice unless it is rectified. The fairness conception, by contrast, takes the view that the fact that a harm brought about by an injurer's agency will yield an unfair distribution of the burdens and benefits of some risky activity is sufficient, other things equal, to trigger a duty to repair.

These two differences exert enormous influence over the normative thrust of the theories. Because of the emphasis that they place on wrongdoing, corrective justice conceptions are attracted to negligence liability and uneasy with strict liability. Negligence liability is attractive to corrective justice conceptions because (and to the extent that) it grounds the injurer's duty to repair in wrongdoing by the injurer. Strict liability is unattractive because (and to the extent that) it relaxes the requirement of wrongdoing on which corrective justice theories pitch the duty to repair. The fairness conception, by contrast, favors strict liability over negligence—other things equal. Under modern conditions, strict liability in its enterprise form generally yields the fairest distribution of risk; it distributes the costs of activity-related accidents across all those who benefit from the activity. Negligence liability tends, by contrast, to be unfair in two directions. First, it leaves the costs of nonnegligent injuries on those whose misfortune it is to suffer them. Second, it tends to distribute costs unfairly among negligent injurers, concentrating substantial damages on those negligent injurers unlucky enough to have their carelessness issue in injury. To make these claims plausible, however, we need to sketch the substance of the fairness conception's approach to negligence and strict liability.

II. JUSTICE AS RECIPROCITY: NEGLIGENCE LIABILITY

[22] . *See* works cited *supra* note 10.

Fairness ideas—social contract ideas—in tort theory have long been associated with the idea and criterion of reciprocity of risk. The basic idea of the reciprocity-of-risk criterion is that negligence liability fairly apportions the burdens and benefits of risky activities within a community of reasonable risk imposition, whereas strict liability does so when risks are imposed by one community on another. A "community of risk," in its strongest form, is one whose members impose identical risks of harm on one another, thereby imposing and being exposed to equivalent risks. A community of *reasonable* risk imposition is one whose members impose only risks that confer more in the way of benefits on those who impose them than they inflict in the way of burdens on those who are exposed to them. When risks are reciprocal, then, each person relinquishes an equal amount of security and gains an equal amount of freedom. When *reasonable risks are reciprocal*, each member of the community that imposes and is exposed to these risks (1) relinquishes an equal amount of freedom; (2) gains an equal amount of security; and (3) gains more in the way of freedom than they lose in the way of security.

Reciprocity of risk once due care has been exercised thus (1) defines a community of equal freedom; (2) benefits each of its members; and (3) fairly apportions the burdens and benefits of the risks that it licenses. Subjecting reasonable reciprocal risks to strict liability increases neither freedom nor fairness. Strict liability does not increase either freedom or security because it bears only on the distribution of nonnegligent accident costs, not on the incidence of accidents in the first place. It does not improve the fairness of the distribution of the burdens and benefits of risk imposition because its adoption simply "substitute[s] one form of risk for another—the risk of liability for the risk of personal loss."

Matters are different when reasonable risks are nonreciprocal. Strict liability does and should apply to risks that are reasonable but nonreciprocal. The imposition of nonreciprocal risks is reasonable when

[23] . *See* CHARLES FRIED, AN ANATOMY OF VALUES: PROBLEMS OF PERSONAL AND SOCIAL CHOICE 183–206 (1970); Fletcher, *supra* note 10, at 539–42; Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 313–14 (1996).

[24] . Fletcher, *supra* note 10, at 543–51.

[25] . Or so Fletcher's article implies. In fact, there is reason to think that strict liability reduces the incidence of nonnegligent risk impositions. *See* Keating, *supra* note 18, at 1295.

[26] . Fletcher, *supra note* 10, at 547.

those risks are to the long-run advantage of the prospective victims that they imperil. Even when nonreciprocal risk impositions pass muster under this test of reasonableness, however, they are not mutually beneficial in the full sense that reciprocal risks are. For example, given the importance of driving to our daily lives, each of us may benefit from the transport of large quantities of gasoline over the roads, even though this method of transporting gasoline creates risks of massive explosions, and even though most of us never expect to make use of the legal right to transport vast quantities of gasoline in this manner. It follows that the prospective victims of nonreciprocal risk impositions are not fully compensated for bearing these risks by the right to impose equal risks in turn. The imposition of nonreciprocal risks is not part of a normal life, and the value of the right to impose such risks does not offset the disvalue of having to bear exposure to them.

Subjecting nonreciprocal risks to strict liability offsets this unfairness, insofar as ex post compensation can redress the harm victims suffer. By ensuring that those injured by nonreciprocal risk impositions are—so far as possible—fully compensated for their injuries, strict liability effects a more robust mutuality of benefit. Risk is unfairly distributed ex ante, but the costs of accidents issuing from those risks are fairly distributed ex post. The damages paid under strict liability are, then, not redress for wrongful infringement of another's security, but a way of making the distribution of the burdens and benefits of nonreciprocal risks more fair than it would otherwise be. The payment of damages makes reasonable nonreciprocal risk impositions work to the greatest advantage of those they most disadvantage—namely, the unlucky few whose lives, limbs, and property they injure. Prospective victims of nonreciprocal risks are better off bearing reasonable nonreciprocal risks than forbidding them, because reasonable nonreciprocal risks are to the long-run advantage of those they imperil. But the prospective victims of nonreciprocal risks are better off still if they are compensated in the event that the imposition of those risks injures them. Absent reparation by injurers, victims must, at best, draw on their own resources to repair the harm that they have suffered. Absent reparation, victims must not only bear financial loss, they must also bear a dignitary harm. They must live with the knowledge that the community is prepared to appropriate their physical well-being—their lives, limbs, and property—whenever so doing is to the community's advantage. They must

[27] . The transport of gasoline in this manner precipitated the death of the plaintiff in *Siegler v. Kuhlman*, 502 P.2d 1181 (Wash. 1972).

live with the devaluation of their lives that this implies. Reparation erases both the financial loss and the dignitary harm.

The payment of compensation to the victims of accidents issuing from reasonable but not reciprocal risk impositions is thus a condition for the legitimate conduct of activities whose reasonable risks are nonreciprocal, not redress for harm wrongly inflicted. Reasonable nonreciprocal risks are not mutually beneficial—are not fair—in the strong sense that reasonable reciprocal risks are because their benefits are captured by many and their burdens borne by a few. Negligence liability does nothing to rectify this unfairness, because it leaves nonnegligent accident costs concentrated on those unfortunate enough to have suffered them. Strict liability does rectify this injustice, insofar as the payment of money damages can undo physical harm done. Strict liability shifts the financial costs of injuries that issue from nonreciprocal risks from victims who do not benefit from the right to impose equivalent risks to injurers who do benefit from the right to impose such risks. The reciprocity-of-risk criterion thus captures a fundamental moral distinction between negligence and strict liability. Damages for harm unreasonably inflicted are a way of redressing harm wrongly done. Damages for harm reasonably inflicted are a way of making the imposition of certain risks—risks whose imposition is not mutually beneficial in the fullest sense—legitimate. By bringing out this distinction, the reciprocity-of-risk criterion captures the distinction between primary wrongdoing and secondary wrongdoing, fault and conditional fault. By capturing this distinction, the reciprocity-of-risk criterion helps to explain both why we might sometimes prefer fault and other times prefer strict liability, and how these competing forms of liability embody different moral judgments.

The connection between reciprocity of risk and the ideals of equal freedom and fair risk imposition should be evident. For the particular package of risk impositions licensed by the law of accidents to secure fair and favorable conditions for equal persons to pursue their conceptions of the good, several conditions must be met. First, the gain conferred on our liberty by the right to impose certain risks must exceed the loss to our security from having to bear exposure to such risks. The requirement that

[28] . The description of strict liability as "conditional fault" is Robert Keeton's. *See* Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 401 (1959).

reciprocal risks be reasonable entails the satisfaction of this condition. Second, the terms of reasonable risk imposition must be terms of equal freedom. Reciprocity of risk defines a regime of equal freedom because reciprocity exists when risks are equal in probability and gravity. When risks are equal in these respects, persons relinquish equal amounts of security and gain equal amounts of liberty.

When risks are not reciprocal, losses of security and increases in liberty are not equally distributed, so a regime of reasonable but nonreciprocal risk impositions is not a regime of equal freedom. So long as nonreciprocal risks are reasonable and subject to strict liability, however, the inequalities of freedom in a regime of reasonable nonreciprocal risk imposition are—in comparison with other possible tort regimes—to the maximal long-run advantage of those who fare the worst under them. The actual victims of nonreciprocal risk imposition are, of course, those most disadvantaged by nonreciprocal risk impositions. Because they are harmed, they give up the most in the way of security; because the right to impose equivalent risks is not generally of significant value to them ex ante, they gain less than injurers in the way of liberty.

Indeed, the actual victims of nonreciprocal risks fare so badly that, were they to realize their fate at the time the right to impose the risks was being debated, they might well reject their imposition. But the permissibility of a practice of nonreciprocal risk imposition cannot be judged by asking about its benefit to actual victims. Practices of risk imposition must be judged in advance—when they are set up—and no one can identify in advance whether she will be the victim of a particular practice of risk imposition. We must ask instead, if the practice is, ex ante, to the long-run advantage of potential victims as a class. Nonreciprocal risk impositions are reasonable—are fair—when potential victims as a class are better off permitting those risks than forbidding their imposition. To put it differently, nonreciprocal risk impositions are reasonable when they are, ex ante, to the long-run advantage even of those who are made worst off by permitting the imposition of the risk in question. The worst off are those whose overall mix of prospective gain and loss is least favorable. When this criterion is met, even those worst off under a regime which permits the imposition of the risk would be worse off if the risk

[29] . For example, the use of gasoline is essential to so many activities in Manhattan—from taxicabs to the delivery of most goods and services—that the transport of gasoline by tanker truck benefits even Manhattanites. This is so even though Manhattanites generally do not benefit from the right to impose equivalent risks, and even though Manhattanites as a class benefit less than almost any other identifiable group of persons from the personal use of cars.

imposition were forbidden. These "worst-off" persons would also fare worse under a regime of negligence liability than under strict liability. Under a negligence regime they would both forego the benefits of compensation in the event that they were to be the victims of a nonnegligent accident and, most likely, be exposed to a higher level of risk. That those "worst off" would fare even worse under a regime of no liability should be clear without argument. A regime of strict liability for nonreciprocal risks is, then, the regime most advantageous to the freedom and security of those who fare worst under it.

The fair distribution of the burdens and benefits of risk is the third aspiration of social contract theory. (The imposition of risks whose benefits exceed their burdens, and that reconcile liberty and security in the most favorable way possible, are the first two aspirations.) Reciprocity of risk is connected to this third aspiration, as well as to the first two. When reciprocal risks are imposed for reasons that are both good (that is, sufficient to justify the threats to security that they involve) and *equally* good, reciprocity of risk defines a regime of mutual benefit. When these conditions are met, each person is benefited because, for each person, the loss of security occasioned by granting to others the right to expose her to risks of a certain probability and magnitude is more than offset by the freedom of action that a regime of reciprocal risk imposition grants to her, namely, the right to impose risks of equal probability and magnitude on others. When reasonable risks are reciprocal, each person's freedom of action is *equally* benefited and each person's security is *equally* burdened. Reciprocity of reasonable risk imposition thus defines a circumstance where risk is fairly distributed.

A regime where risks equal in probability and magnitude are imposed for reasons that are both sufficient and equally good thus acknowledges both the importance of leading our lives in accordance with our aims and aspirations, and the equal value of the aims, aspirations, and lives of others. We acknowledge the former by being willing to expose ourselves to reasonable risks in pursuit of our aims and aspirations. We acknowledge the latter by accepting equal risk impositions by others. The former is central to our status as free persons, the latter is central to our status as equal persons. The logic behind making reciprocity-of-risk imposition (once due care has been exercised) the master criterion for choosing between negligence and strict liability becomes evident when reciprocity is understood in this way. Taking reciprocity to require that

risks be equal in probability and magnitude, and be imposed for reasons that are both equally good and sufficient, makes reciprocity of risk a test for the fair reconciliation of liberty and security.

When risks are reasonable but not reciprocal, the benefits of their imposition are not equal. Indeed, the situation with respect to benefit is exactly parallel to the situation with respect to freedom: A regime of reasonable but nonreciprocal risks does not constitute a regime of equal benefit any more than it constitutes a regime of equal freedom. Those who impose nonreciprocal risks benefit more from them than those who must bear exposure to them. When reasonable nonreciprocal risks are subject to strict liability, however, even those who benefit the least fare better ex ante than they would under any alternative possible tort regime. The imposition of these nonreciprocal risks is reasonable precisely because the risks are to the long-run advantage of those who do not benefit substantially from the right to impose them. And the imposition of strict liability restores mutuality of benefit and burden, so far as reparation for harm done can do so.

A. RISK AND INJURY

Is the reciprocity-of-risk criterion's claim to fairness convincing? For a liability rule to be fair in the simplest sense, the rule must distribute the burdens of the risks that it regulates proportionately with the benefits of those risks. If, for example, every member of a community benefits equally from the right to impose a risk, every member of that community ought to bear an equal share of the burdens of that risk—the accidental injury and death it inflicts. Disproportionate distributions of burdens and benefits are presumptively unfair. That presumption can, however, be rebutted by showing that the departures from proportionality involved are to the long-run advantage of those that they disadvantage in the short run. Are fully reciprocal risks fair then? The answer is that perfect reciprocity of risk defines a fair situation with respect to the distribution of *risk*. When risks are fully reciprocal each member of the community of risk is equally benefited by the right to impose risks similar to those they must bear, and equally threatened by the risk impositions that they must bear. The reciprocity-of-risk criterion does not, however, define a fair distribution of *harm*, and the distribution of harm is more important than

30 . *See supra* text accompanying note 29.

the distribution of risk. It is the ripening of risk into harm—not the chance of such ripening—that is the real burden of risk.

Risk alone rarely impairs the ability to pursue a conception of the good over the course of a complete life. Risk can be fairly distributed while harm is unfairly concentrated, and the distribution of harm matters more than the distribution of risk. Fairness requires that those who benefit equally from the imposition of a risk share equally in the burden of that risk—the loss of life, limb, and property that is its cost. The presence of reciprocal risk thus does not establish the fairness of negligence liability. Negligence liability fairly distributes the burdens and benefits of risky activities only when reciprocity of *harm*, as well as reciprocity of *risk*, is present. This is the lesson of Baron Bramwell's famous "live and let live" rule:

> The instances put during the argument, of burning weeds, emptying cess-pools, making noises during repairs, and other instances which be nuisances if done wantonly or maliciously, nevertheless may be lawfully done. It cannot be said that such acts are not nuisances, because, by the hypothesis, they are; and it cannot be doubted that, if a person maliciously and without cause made close to a dwelling-house the same offensive smells as may be made in emptying a cesspool, an action would lie. Nor can these cases be got rid of as extreme cases, because such cases properly test a principle. Nor can it be said that the jury settle such questions by finding there is no nuisance, though there is. . . . There must be, then, some principle on which such cases must be excepted. It seems to me that that principle may be deduced from the character of these cases, and is this, viz., that those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action. . . . There is an obvious necessity for such a principle as

[31] . To be sure, there are special cases where exposure to risk is itself a kind of harm. Exposure to carcinogenic toxins and radiation can result in risks of harm that persist long after the exposure ends, and this may count as a harm in itself. *See, e.g.*, *In re* TMI Gen. Pub. Utils. Corp., 67 F.3d 1103, 1119 (3d Cir. 1995) (holding that exposure to radiation beyond a certain threshold fixed by regulation constitutes a harm regardless of subsequent personal injury). But these are exceptional (and distinctively modern) cases. Fletcher clearly has more typical (and traditional) cases in mind. *See generally* Fletcher, *supra* note 10.

> I have mentioned. It is as much for the advantage of one owner as of another; for the very nuisance the one complains of, as the result of the ordinary use of his neighbour's land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live.

When, in "the common and ordinary use and occupation" of land and houses, neighbors expose each other to modest interferences with each other's use and enjoyment of property, harm is fairly distributed. When, however, in the ordinary use of the roads, drivers expose each other to similar risks of injury, harm is not likely to be fairly distributed. Serious automobile accidents are not—fortunately—so frequent that drivers can routinely expect to be the victims of a nonnegligent accident one month and to precipitate a nonnegligent accident the next month. The risks of the road may be fairly distributed—because they are (roughly) reciprocal—but the nonnegligent harms that issue from those risks are not fairly distributed under a regime of negligence liability. Negligence liability lets those losses lie where they fall, and they fall unevenly.

The relative infrequency of serious automobile accidents appears to be a typical feature of the activities governed by the tort law of accidents. (The subject matter of accident law proper differs fundamentally from the subject matter of nuisance law in this respect.) Tort accident law addresses sudden explosions of standing risks into substantial injuries. The collapse of Rylands' reservoir in *Rylands v. Fletcher*, is a typical example; the severing of the plaintiff's leg in *Davis v. Consolidated Rail Corp.* is another; the immolation of the plaintiff by the overturning of a gasoline tanker in *Siegler v. Kuhlman* is a third. This relative infrequency of injury—especially of nonnegligent injury—presents a challenge to negligence liability. When harm is infrequent, the ordinary conduct of an activity will not ensure that those who suffer nonnegligent injuries at one point will inflict nonnegligent injuries shortly thereafter, or vice-versa. Under what circumstances, then, will negligence liability fairly distribute the burdens and benefits of risky activities that yield nonnegligent accidents?

[32] . Bamford v. Turnley, 122 Eng. Rep. 27, 32–33 (Ex. 1862).

[33] . 3 L.R.-E. & I. App. 330 (1868).

[34] . 788 F.2d 1260 (7th Cir. 1986).

[35] . 502 P.2d 1181 (Wash. 1972).

The first circumstance in which negligence will distribute nonnegligent harms fairly is when the nonnegligent risks of an activity are so low that they simply merge into the general background risks of living. A very low level of standing risk of accidental injury is the price of freedom to act. That level of risk is the background level. With certain inescapable variations, ordinary activities, carefully conducted, produce mutually imposed and mutually beneficial risks. Because these risks are the price of ordinary activity, we are all better off bearing them rather than attempting to reduce them. This level of risk—the level that is the price of ordinary but necessary activities—is the background level of risk. The harms that background risk matures into are—to pour new meaning into an old tort concept—"inevitable accidents." We can only prevent them by eliminating ordinary activities which we cannot forego.

Equal background risk matures into unequal harm. Fate condemns a few of us to be victims and fortune spares the rest. This inequality of harm is unfair; the costs of inevitable accidents ought to be shared as costs of living. But the unfairness is beyond the rectification of tort accident law, which can only attribute accidents to particular activities. It is arbitrary and unfair, however, to attribute the inevitable accidents that are the fruit of background risk to *any particular* activity. The connection between any such accident and any particular activity is merely fortuitous, a matter of coincidence, not causation. It was merely bad luck, for example, that the child plaintiff in *Van Skike v. Zussman* was inspired to play with fire by winning a toy lighter as a prize in a gumball machine. The risk that children will take an interest in fire is a standing risk of having lighters, matches, ovens, stoves, water heaters, barbecues, candles, chimneys, cigarettes, and countless other ordinary products and activities. Even if we conduct these activities with the utmost care, one of them will someday inspire some child to play with fire.

[36] . *Cf.* FRIED, *supra* note 23, at 191–93. Some variation in the risks "ordinarily" created by different activities seems inevitable. Driving endangers bystanders more than skateboarding, if only because cars are larger, heavier, and faster than people on skateboards. The upshot of this is that, although it makes sense to speak of "background risks" as a class of risks, the class of background risks itself includes various smaller communities of background risk. Background risks are greater with respect to some activities (driving) than others (skateboarding) so the level of background risk is not uniform.

[37] . 318 N.E.2d 244 (Ill. App. 1974).

Because accidents that issue from background risks cannot be attributed to any particular activity, tort accident law must let the losses that flow from background risks lie where they fall. For tort law, the unfairness of the unequal harm that issues from background risk is an inevitable one. When the nonnegligent risks of an activity are so low that they disappear into the standing level of background risk, then, negligence liability is at least as fair as strict liability, and more practicable. Strict liability is at least as unfair as negligence because it can only connect injuries to activities in an arbitrary way. And there is no reason that any particular activity should bear any particular background risk. It is less practicable than negligence because there is no distinctive risk for strict liability to attach itself to, so the attribution of accidents to activities must, inevitably, be erratic.

The distinction here is between enterprises whose long-run activities create increased risks—characteristic risks—of nonnegligent injury, and those that do not. "Characteristic risks" are reasonable, "extra risks" of injury created by an activity. These risks are reasonable because we are better off bearing them than preventing them—the cost of prevention exceeds the benefit. They "flow from [an enterprise's] long-run activity in spite of all reasonable precautions on [its] part," and the enterprise is one worth having. They are "extra risks" characteristic of an enterprise because the enterprise's presence in the world increases the incidence of the risk above its normal, background level. The ill-fated drunken sailor whose trespass precipitated the flooding of the drydock in *Ira S. Bushey & Sons, Inc. v. United States* is one famous case of characteristic risk. Drunkenness, Judge Friendly remarked, is "the condition for which seamen are famed," and increased drunkenness in the vicinity of berthed Coast Guard vessels is something that reasonable people might take to be characteristic of the Coast Guard's enterprise. The long-run effect of turning sailors loose on shore leave is to increase the incidence of drunkenness in the vicinity of the vessels from which they are dispatched.

Not all activities create characteristic risks of drunkenness, however. Much, perhaps even most, of the drunkenness in the world may just be the price of permitting the consumption of alcohol, attributable to the party who consumes too much but not to any well-demarcated practice or

[38] . Arguably, strict liability is more unfair than negligence in this circumstance. If there is no justice done by shifting a loss it may be more unfair to shift it than to let it lie.

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

[40] . *Id.* at 168.

activity akin to the practice of shore leave. When this is indeed the case, negligence is the fair liability rule because, once reasonable precautions are taken, an activity creates no characteristic risks of injury. The nonnegligent risks of the activity merge into the pool of background risks. The harms that issue from background risks cannot be attributed to any particular activity. They are not fairly distributed in the fullest sense of fairness, but they are at least as fairly distributed by negligence liability as by strict liability.

If negligence liability is at least as fair as strict liability when an activity does not create any characteristic risks of injury, it is presumptively unfair when an activity does create characteristic risks of nonnegligent injury. Subjecting that activity to negligence liability leaves its characteristic accident costs on those unfortunate enough to suffer injury at the activity's hands. This is presumptively unfair; the costs of such accidents should be distributed among all those who benefit from the creation of nonnegligent risks. That presumption of unfairness can, however, be overcome: Negligence liability is fair, even though it leaves the nonnegligent accidents characteristic of the activity concentrated on the victims whose misfortune it is to suffer those accidents, when those victims fare better under a negligence regime than they would under a regime of strict liability. This is a second circumstance where negligence liability may be fair—in this case fairer than strict liability.

Subjecting an activity that creates characteristic risks of nonnegligent injury to negligence liability may be to the long-run advantage of victims when (1) the relevant risks must be imposed within a community of reciprocal risk whose members are, in turn, prospective injurers and prospective victims; and (2) the accidents that arise out of these risks cannot be insured against by injurers. When injurers are unable to disperse the costs of nonnegligent injuries across a pool of actors who create similar risks of nonnegligent injury, strict liability merely shifts the costs of a nonnegligent injury from the victim who suffered it to the injurer who inflicted it. This is a different—but no fairer—distribution of the costs of nonnegligent accidents.

Fairness requires proportionality of benefit and burden. Within a community of reciprocal risk—the community of drivers, for instance—everyone benefits equally from the imposition of nonnegligent risks and should share equally in the costs of the accidents that issue from

those risks. If accident losses are not insurable, strict liability will simply concentrate the costs of nonnegligent accidents on those whose misfortune it is to have their activity inflict injury. Negligence concentrates those costs on a different class of persons—those whose misfortune it is to be injured. Neither brings burden and benefit into proportion. Strict liability simply substitutes the "risk of liability for the risk of loss." Either way, the cost of the harm is concentrated, not dispersed across the community that benefits from the freedom to create the kind of risk that has matured into harm in the case at hand.

In a world where liability cannot be insured against, either liability or loss may be devastating. If so, negligence liability may be to the long-run advantage of victims. A strict liability regime is probably more expensive to administer than a negligence regime. Strict liability requires cranking up the liability system for nonnegligent accidents as well as for negligent ones, with all the administrative costs that this entails. The benefit of this extra expense is not a fairer distribution of the costs of nonnegligent accidents—just a different distribution. The following three conditions thus obtain:

1. Each member of the community stands an equal chance of being either an injurer or a victim and of inflicting and bearing an equivalent accident.

2. Victims under negligence liability fare no worse than injurers under strict liability.

3. Both injurers and victims forego extra resources when strict liability is substituted for negligence.

[41] . *Compare* Fletcher, *supra* note 10, at 547, *with* Brown v. Collins, 53 N.H. 442, 446 (1873). According to the *Brown* court,

> It would seem that some of the early English decisions were based on a view as narrow as that which regards nothing but the hardship 'of the party suffering;' disregards the question whether, by transferring the hardship to the other party, anything more will be done than substitute one suffering party for another; and does not consider what legal reason can be given for relieving the party who has suffered, by making another suffer the expense of his relief.

[42] . On the other hand, strict liability may be cheaper to administer in each case because it dispenses with determinations of fault. Just how these offsetting tendencies play out is unclear. For purposes of the argument, I shall assume that negligence is cheaper because fewer cases will be brought.

[43] . This claim is contestable. Victims are at risk of death, whereas injurers are at risk only of bankruptcy. But this is irrelevant unless strict liability *reduces* the risk of death. I argue in the following footnote that, in the particular circumstances under discussion, there is no reason to think that it does.

Holding constant the incidence of injury, negligence liability is to the long-run advantage of the victims of nonnegligent accidents. They fare better bearing such losses and sharing in the extra resources saved by a system of negligence liability than they do under a system of strict liability. Under strict liability they stand an equal chance of bearing an equivalent loss (in the form of liability) and forego their share of the extra resources that negligence makes available.

The argument that negligence liability is fairer than strict liability in this second circumstance partially resuscitates the reciprocity-of-risk criterion. When strict liability simply shifts the costs of concentrated harm, it is reasonable for the division of tort liability between negligence and strict liability to proceed in accordance with the dictates of the reciprocity-of-risk criterion. The fair distribution of the costs of harm is unattainable, so we must settle for the fair distribution of risk. If it is generally true that the tort system cannot disperse the costs of nonnegligent accidents throughout the community that creates them, and if strict liability does not induce a significantly higher level of safety, then negligence liability is preferable to strict liability. The presumption that strict liability is fairer is rebutted.

The rise of liability insurance, however, undermines the case for dividing tort liability in accordance with the presence or absence of reciprocity of risk. When injurers are either in a position to purchase liability insurance or capable of self-insuring against liability, strict liability will be able to distribute the costs of nonnegligent accidents across the community of those who create similar risks. If negligence continues

[44] . Should we expect the incidence of injury to hold constant? Modern economic analysis argues convincingly that strict liability induces actors to undertake their activities at lower levels of intensity. That this will occur in the case of large enterprises seems clear, but these actors are not likely to be prominent in the circumstances that we have described. Large enterprises and insurability of risk go hand in hand so we should not expect to find them in a world whose chief feature is uninsurability. Among (1) members of a community of risk operating in (2) a social world where (3) strict liability strikes like lightning and merely substitutes one form of loss for another, there is no compelling reason to believe that strict liability will reduce the incidence of risk substantially more than negligence will. Indeed, we have good reason to come to the opposite conclusion. Strict liability and negligence have equivalent incentive effects, but they come to bear on different parties—the one on prospective injurers, the other on prospective victims. Strict liability encourages members of the community to reduce their activities as injurers; negligence encourages them to reduce their activities as victims. In a community of risk, injurers and victims are one and the same. Either reduction should have the same effect.

to concentrate those losses on victims, strict liability will be fairer than negligence. Suppose, however, that victims can disperse the costs of nonnegligent harms by purchasing loss insurance. Will the scales of fairness then tilt back in favor of negligence liability? Not exactly. Loss insurance by its very nature disperses the costs of a loss that would otherwise be concentrated on its victim. But it does not necessarily disperse those costs across the pool of those who benefit from the creation of the relevant risk. When victims and injurers are strangers to one another, strict liability coupled with liability insurance will tend to disperse the costs of characteristic risks across those who benefit from their creation, but loss insurance will not tend in this direction. Loss insurance will tend simply to disperse the accident costs across *some* insurable pool of actuarially similar victims.

When injurers and victims are members *of the same community of risk*, however, loss insurance may be able to distribute that community's accident costs as fairly as liability insurance. In the simplest version of this case, under loss insurance, each member of the community bears his or her proportionate share of the community's accident costs in the form of a loss-insurance premium. Under liability insurance each member of the community bears his or her proportionate share of the community's accident costs in the form of a liability-insurance premium. The net result is the same. No-fault automobile insurance exploits this fact, using mandatory loss insurance to create a kind of enterprise liability. This may seem paradoxical. No-fault automobile insurance is a kind of victim's strict liability. Strict victim liability seems quite different from strict injurer liability, and enterprise liability is a distinctively modern form of strict injurer liability. How, then, might no-fault automobile insurance create a regime of enterprise liability?

The answer lies in the nature of enterprise liability. The theory of enterprise liability asserts that (1) accident costs should be internalized by the activity responsible for them; and (2) accident costs should be dispersed and distributed among the participants in that activity. This idea can be incarnated by strict liability in tort, but it can also be incarnated in other ways. Indeed, enterprise liability first appears in the workers'

[45] . *See, e.g.*, Young B. Smith, *Frolic and Detour I*, 23 COLUM. L. REV. 444, 456 (1923) [hereinafter Smith I]; Young B. Smith, *Frolic and Detour II*, 23 COLUM. L. REV. 716, 731 (1923) [hereinafter Smith II] (addressing the idea that accident costs should be distributed among those who benefit from the enterprise that creates them as a distinctive conception of strict liability, and tracing that idea to the Workmen's Compensation Acts adopted around the turn of the twentieth century).

compen-sation schemes enacted early in the twentieth century. These schemes displace tort law. Enterprise liability in tort generally involves imposing strict liability on injurers, but its aims can also be effected by mandatory loss insurance. Compulsory loss insurance spreads an activity's accident costs among all the potential victims of an activity, each of whom pays a premium to spread his or her share of the risk. When potential victims are also and equally potential injurers, loss insurance internalizes accident costs as much as strict injurer liability does. No-fault automobile insurance exploits this fact.

Within a community of risk, then, the availability of loss insurance does not so much resuscitate the case for negligence liability as open up the possibility of implementing enterprise liability—strict liability—through nonfault administrative schemes. It may be possible to use either compulsory loss insurance or strict liability to institute enterprise liability and thereby distribute the costs of characteristic risk fairly—across those who benefit from its creation. When compulsory loss insurance and strict liability can both distribute accident costs fairly, the choice between them turns on considerations of administrability, cost, and risk reduction. In the automobile accident context, for instance, no-fault insurance appears cheaper and easier to administer. Cheaper, because it does not require transferring the costs of nonnegligent accidents from victims to injurers. Easier to administer because, in the absence of fault, it is hard to attribute automobile-related accidents to one party as the "injurer." This attribution problem is, in fact, so acute that strict liability is not a live alternative to negligence. By contrast, it is easy to identify an injury suffered in the course of such an accident, and so, easy to implement no-fault automobile insurance.

There are other cases whose circumstances rebut any presumption in favor of strict liability. The *character of an activity*, for instance, can require a higher-than-normal level of risk. Risk is essential to the enjoyment of the activity; reduce the risk and you destroy the activity. Sports are the preeminent example here. Making every injury suffered by a participant an occasion for liability would undermine professional

[46] . *See* Jeremiah Smith, *Sequel to the Workmen's Compensation Acts*, 27 HARV. L. REV. 235 (1914); Smith I, *supra* note 45; Smith II, *supra* note 45.

[47] . See the quote from Baron Bramwell, *infra* note 52.

football. Indeed, making every injury inflicted in violation of the rules would cast a pall over the play of the game. Some retreat from our normal conceptions of responsibility to prevent and rectify harm done is necessary to the flourishing of these activities. In tort doctrine, this is the domain of "primary assumption of the risk" and "relaxed duty." "Relaxed duty" is to the advantage of all participants and that brings these cases within the scope of the second kind of case where the presumption in favor of strict liability is rebutted.

In yet other cases, accidents arise in settings where the presence of other legal rights and duties influences the articulation of accident law doctrines. In some circumstances, the presence of property rights increases the attractiveness of enterprise liability and facilitates its administration. Real property rights increase the attractiveness of enterprise liability when accidents arise from the overflow of one landowner's activities onto another's. Ownership of real property confers special freedom of action within the property's boundaries, and sharpens the boundaries between zones of activity. Within the boundaries of their properties, owners and occupiers are free to keep wild boars and to build reservoirs, even if these activities impose abnormally great risks of injury. When boars run wild and reservoirs burst, however, owners and occupiers are justly subject to enterprise liability. It is only fair that those who choose to impose such risks for their own advantage bear the accident costs attributable to them.

Property rights tend to diminish the attractiveness of enterprise liability, however, when victims suffer injury in the course of their entry onto injurers' land. The risks to which entrants on others' land are exposed do not arise out the voluntary agency of injurers in the straightforward way that normal accidents among strangers do. They arise, in important part, out of the agency—sometimes, indeed, the wrongful agency—of the victim in entering onto the landowner's land. This affects the distribution of burden and benefit. The entry of the victim onto the scene of the injurer's activity also makes it more difficult, both

[48] . *See, e.g.*, *Scott v. Pac. Mountain W. Resort*, 834 P.2d 6 (Wash. 1992) (applying the doctrine of "primary assumption of risk," which relieves prospective injurers of their duty of ordinary care, to skiing); *Crawn v. Campo*, 643 A.2d 600 (N.J. 1994) (suspending duty of ordinary care in the recreational sports context, and adopting a recklessness standard).

[49] . *See* discussion *supra* text accompanying note 41.

[50] . *See* Marshall v. Ranne, 511 S.W.2d 255 (Tex. 1974) (holding defendant strictly liable for injuries inflicted by his vicious hog when it escaped from his property and injured his neighbor); Rylands v. Fletcher, 3 L.R.-E. & I. App. 330 (1868) (holding Rylands strictly liable for harm to Fletcher's mines inflicted by the escape of water from his reservoir).

conceptually and practically, to locate the boundary between the injurer's and the victim's enterprises.

The practical failure of enterprise liability attribution rules is a fifth kind of circumstance where negligence liability is necessary, if not fair. All accidents arise at the intersection of two or more activities. In some circumstances, it is impossible to attribute responsibility for an accident to one of the parties to it without employing some criterion of fault. Highway accidents are the canonical case. In the absence of norms—usually statutes—specifying duties of precaution, rights of way, and so on—it is often impossible to attribute responsibility for accidental injury. In the absence of crosswalks, we may not be able to say if a pedestrian or a driver was responsible for an accident between the two. In the absence of rules ordering priorities among vehicles at four-way intersections, we may not be able to say whose activity is responsible for an accident between two cars at such an intersection.

The presumption that strict liability is preferable to negligence on fairness grounds is, in sum, a rebuttable one. In the five circumstances sketched here—when the nonnegligent risks of an activity merge into the realm of background risk; when negligence is to the long-run advantage of those victims it most disadvantages; when the character of an activity requires an unusually high level of risk; when property rights alter the

[51] . *See* Stephen R. Perry, *The Impossibility of a General Strict Liability*, 1 CANADIAN J.L. & JURISPRUDENCE 147, 166–68 (1988) (arguing that "general strict liability" is impossible because we cannot attribute accidents to activities without employing fault criteria). Jules Coleman and Arthur Ripstein essentially accept Perry's arguments in their *Mischief and Misfortune*, *supra* note 17. *See also* RIPSTEIN, *supra* note 10, at 32–53. If Perry means that there are no effective strict liability attribution rules, he is mistaken. Some strict liability attribution rules—the "scope of the employment" test in vicarious liability law, the "scope of the risk" test for abnormally dangerous activity liability, the test for manufacturing defects in product liability law, and the "out of and in the course of employment" test in worker's compensation law, come to mind—connect accidents and activities as effectively as fault criteria in many circumstances. Whether or not satisfactory strict attribution rules can be devised in a particular context depends on the features of the context.

[52] . *See, e.g.*, Fletcher v. Rylands, 159 Eng. Rep. 737, 744 (Ex. 1865) (Bramwell, B., dissenting) ("Where two carriages come in collision, if there is no negligence in either it is as much the act of the one driver as of the other that they meet."). Bramwell dissented from the Exchequer Chamber's judgment against liability "on the plain ground that the defendants have caused water to flow into the plaintiff's mines, which but for their, the defendants', act would not have gone there . . . ." *Id*. The thrust of Bramwell's opinion thus supports a regime of strict liability for accidents among strangers. The observation about liability accidents makes the point that a strict liability regime is not feasible in that context.

distribution of burdens and benefits among potential injurers and victims; and when it is impossible or impracticable to identify injurers and impute nonnegligent risks to them—the presumption is rebutted. This list must, moreover, be an open-ended one. The set of possible circumstances and legal norms that might affect the articulation of tort norms is open-ended. We cannot say in advance what fairness calls for when tort norms interact with an utterly novel circumstance.

The general lesson here is that the structure of tort doctrine is complex because the structure of the practical reasoning that produces tort doctrine is complex. Considerations of fairness, on the view of tort law taken here, have pride of place in our thinking about the design of tort liability. They stand in the center of our "deliberative field." But they are not the only considerations operating within that field, and other considerations, normative or practical, may lead to the displacement of the enterprise liability generally favored by considerations of fairness. The "all things considered" best liability regime for any particular context will depend on the interaction of general considerations of fairness with the special normative and practical considerations characteristic of that context. One consequence of this is that substantial domains of fault liability will persist even if we make the ideal of fairness the principal ideal of our tort accident law, and even if that ideal generally favors enterprise liability.

III. FAIRNESS AND ENTERPRISE LIABILITY

The resilience of negligence liability, however, should not cause us to lose sight of a truth of at least equal importance. In a world of insurable risk, fairness presses toward enterprise liability, both within and without the tort law of accidents. Its fundamental precept is that the toll beneficial activities exact in life, limb, and property damage should be fairly distributed. When risks are insurable, this leads to a presumption in favor of enterprise liability, because enterprise liability distributes the costs of characteristic risks among all those who benefit from the creation of those risks. Negligence liability concentrates those costs on victims, leaving it to them to disperse the costs if they can.

The conception of fairness at work here has four aspects. First, enterprise liability is fair to victims. It is unfair to concentrate the costs of

[53] . For the idea of a "deliberative field" within which all considerations of practical reason must be unified, see BARBARA HERMAN, THE PRACTICE OF MORAL JUDGMENT 152, 182–83, 196–202 (1993).

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

Second, enterprise liability is fair to injurers because it simply asks them to accept the costs of their choices. Those who create characteristic risks do so for their own advantage, fully expecting to reap the benefits that accrue from imposing those risks. If those who impose characteristic risk choose wisely—if they put others at risk only when they stand to gain more than those they put in peril stand to lose—even under enterprise liability they will normally benefit from the characteristic risks that they impose. If they do not, they have only their poor judgment to blame, and society as a whole has reason to penalize their choices. The Coast Guard lets its sailors loose on shore leave for its own benefit (as well as for theirs) and it reaps the rewards of their shore leave. If the costs of shore leave are greater than the benefits, the Coast Guard has only itself to blame for the practice and society has reason to discourage it.

The conception of responsibility at work here is a widely accepted one. We take it for granted, for example, that the person who stands to realize income from a "property or business . . . if it does well has normally also to bear the risk of loss if it does badly. In the law of sales, when the right to income or fruits normally passes to the buyer, the risk of deterioration or destruction normally passes to him as well." The same point might be made about the purchase of stocks or even lottery tickets. It is fair to ask agents who choose to act in pursuit of their own interests, and who stand to profit if things go well, to bear the risk of loss when things go badly. Enterprise liability is fair to injurers.

[54] . TONY HONORÉ, RESPONSIBILITY AND FAULT 79 (1999).

Third, enterprise liability is fair because it exacts a just price from injurers for the freedom tort law confers upon them. Tort law permits potential injurers to put others at risk, without their knowledge or consent, and for the private benefit of potential injurers. Indeed, tort law *requires* potential victims to entrust their lives and limbs to persons and entities who stand to profit by imperiling them. This power is of great value to potential injurers: They stand to reap rewards by imposing risks in part because they can choose to impose those risks in circumstances that maximize the benefit they gain from doing so. The price that enterprise liability exacts for this freedom and power is financial responsibility for physical harm, when that harm is either characteristic of the injurer's activity or occasioned by the injurer's careless exercise of its power. To induce potential injurers to exercise their power over others responsibly—and to safeguard the security of those others—enterprise liability taxes the exercise of the power to put others at risk when it goes awry and issues in physical harm.

Negligence liability taxes the exercise of the power to imperil others only when the injurer has exercised that power without sufficient care. Accidental harms attributable to activities that are conducted carefully but at an excessively high level of intensity, or without undertaking justified research that would yield safer ways of proceeding, tend to escape the reach of negligence liability. Strict accountability induces potential injurers—particularly large enterprises—to conduct their activities more carefully. By taxing every exercise of the power to imperil others that issues in an accident characteristic of the enterprise in question, enterprise liability induces injurers to comb through their activities in search of risk-reducing precautions. Worthwhile precautions whose omission escapes the eye of negligence law may be induced by the imposition of enterprise liability.

The fourth advantage of enterprise liability is that it distributes accident costs *among actual and potential injurers* more fairly than negligence does. Negligence liability does not require that the costs of accidents—even negligent ones—be spread among those who create similar risks of harm, whereas enterprise liability does. Enterprise liability asserts (1) that accident costs should be internalized by the enterprise whose costs they are; and (2) that those costs should be dispersed and

[55] . The ideas in this paragraph draw on Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1 (1980), and Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Tort*, 81 YALE L.J. 1055 (1972).

distributed among those who constitute the enterprise, and who therefore benefit from its risk impositions. Negligence liability, by contrast, holds that injurers have a duty to make reparation when they injure others through their own carelessness. Negligence liability justifies *shifting* concentrated losses where enterprise liability justifies *dispersing and distributing* concentrated losses. To be sure, nothing in negligence liability forbids injurers from insuring against potential liability, but nothing in negligence liability requires it, either. Insurance is not integral to negligence liability, even though insuring against negligence liability is standard modern practice.

IV. CORRECTIVE AND DISTRIBUTIVE JUSTICE REVISITED

Negligence is a kind of wrongdoing—the failure to act with sufficient respect for the security of those endangered by one's actions. Wrongdoing of this kind opens up those who commit it to claims of reparation that go beyond the claims generated by considerations of fairness. Negligent injurers must make good the harm they have done because they have wrongly injured those they have harmed. Considerations of corrective justice as well as considerations of fairness support requiring wrongdoers to repair the harm that their wrongdoing has wrought. The duty to repair under negligence liability thus has two sources. On the one hand, when negligence is the fair liability rule, norms of due care fairly reconcile the competing claims of liberty and security. Violations of those norms upset the fair balance and damages restore it, so far as the payment of monetary compensation can. Considerations of fairness thus support negligence law's duty of reparation. On the other hand, negligence is a form of wrongful conduct—a failure to exhibit sufficient respect for the physical integrity and property of others. Treating the lives, limbs, and property of others with insufficient respect is a form of mistreatment. Negligent injurers therefore cannot complain if they are made to repair the harm that their disrespect—their wrongdoing—has wrought. Considerations of corrective justice thus supply a second justification for the duty of reparation that negligence law imposes on careless injurers.

The twin roots of the duty to repair negligently inflicted injuries go a long way toward justifying the famous harshness of negligence law. Negligence law is harsh because it justifies shifting potentially devastating losses from injurers to victims on the basis of relatively modest acts of wrongdoing. A moment's carelessness behind the wheel of a car can inflict millions of dollars of harm, and that is enough to bankrupt most drivers. The price that negligence liability exacts can thus seem quite disproportionate to the wrongfulness of the conduct whose blameworthiness justifies the exaction. The ordinary negligence of natural persons is a relatively innocent sort of wrongdoing: The momentary lapse of concentration, the failure to foresee a risk clearly enough, to calculate its probability accurately enough, or to execute a course of action precisely enough, are all instances of ordinary negligence. We are all prone to such mistakes, human frailty being what it is. Yet negligence law is unforgiving. Failures to act as a reasonable person would act in similar circumstances are enough to support liability, even if those failures are the product of normal human frailty. And the extent of the ensuing liability can be devastating.

So long as we restrict our gaze to the apportionment of costs between a particular injurer and the victim of her negligence, negligence law is exacting and intolerant, but justifiably and fairly so. The activities that negligence liability regulates are unforgiving. Small mistakes can explode into serious injuries. Momentary lapses of attention behind the wheel of a car—or at the helm of a ship, or at the controls of a plane—can and do destroy human lives. The seriousness of the harm risked by ordinary negligence is a good reason to hold actors to strict standards of conduct. And the failure to conform to a norm of reasonable care is a kind of wrongdoing, even if not a particularly egregious one. Wrongdoing fairly exposes wrongdoers to responsibility to repair the harm that they have done. Forgiving wrongful lapses in concentration and failures of foresight would allocate the losses these frailties cause even more unfairly. Why should injured victims absorb the costs of the carelessness that harmed them? Shifting the costs of a negligent injury to the wrongdoer whose inadvertence caused it may be harsh, but it is fairer than letting the loss lie where it fell. Finally, forgiving lapses in concentration and failures of

[56] . "Average reasonable person" doctrine shows this side of negligence liability most clearly. *See* ROBERT E. KEETON, LEWIS D. SARGENTICH & GREGORY C. KEATING, TORT AND ACCIDENT LAW 176–195 (3d ed. 1998); PROSSER & KEETON ON THE LAW OF TORTS 173–193 (W. Page Keeton ed., 5th ed. 1984). Comparative negligence tends to mitigate some of this harshness, because it takes the particularities of the parties into account in apportioning fault.

foresight might well encourage carelessness. Forbearance tends to foster the objects of its indulgence.

Holding actors accountable for the harmful consequences of their understandable errors is, then, fairer than excusing them. But this does not settle all questions of fairness, nor undermine the argument that enterprise liability is fairer still. The small lapses that very occasionally precipitate large injuries are common indeed. Most of us occasionally let our minds wander behind the wheel, give some small risk insufficient consideration, or fail to execute some all too familiar precaution with the precision that it requires. Most of us also escape without injuring anyone else. Yet the luck of the draw is all that distinguishes those of us who get away without injuring anyone from those who do not. Fate singles an unlucky few out for liability—often massive liability—and fortune spares the rest.

Those unlucky few who inflict injury cannot, on balance, claim that they are unjustly held accountable for the harm that their wrongdoing has caused, but they might justly complain that a system under which they *alone* bear the costs of the injuries they inflict is less fair than one which pools those losses among all those who create similar negligent risks. Negligence mitigated by the institution of liability insurance is fairer than negligence detached from that institution. Liability insurance distributes the costs of negligence among all those who are, over the long run, similarly negligent, and that is fairer than leaving the costs of negligence on those whose misfortune it is to have their negligence issue an injury. Luck and luck alone separates the negligent who cause injury from the negligent who do not. It is fairer to neutralize the arbitrary effects of luck than to let it wreak havoc with people's lives.

Just as negligence with the institution of liability insurance is fairer among actual and potential victims than negligence liability without that institution is, so too enterprise liability is fairer than negligence liability with insurance. Once negligence liability operates against the background of liability insurance, all that divides it from enterprise liability is its treatment of those accident costs that flow from reasonable risk impositions. Both negligence liability and enterprise liability pool the accident costs that issue from negligent risk impositions among those who are similarly negligent. Negligence liability, however, leaves the

[57] . *See* Waldron, *supra* note 16, at 405–08 (making this point forcefully).

nonnegligent accident costs of an activity on the activity's victims whereas enterprise liability distributes those costs across the enterprise—across all those who impose the characteristic risks that lead to these accidents. Under negligence liability, victims may disperse the costs of an activity's nonnegligent accidents by purchasing loss insurance, but they will not distribute those costs across those who impose similar risks.

When reasonable risk issues in accidental harm, chance and chance alone separates those who injure and are injured from those who do not and are not. To leave nonnegligent losses on those whose misfortune it is to suffer them, when we might readily spread these losses among all those who create similar risks of injury, is unfair. Dispersing these losses across pools of victims who are bound together only by their actuarial similarity is likewise less fair than dispersing them across the injurers who create similar risks and benefit from doing so. Fairness favors dispersing the costs of blameless accidents among all those who create similar risks of such accidents, just as much as it favors dispersing the costs of accidents precipitated by wrongdoing among lucky and unlucky wrongdoers. Pooling one set of risks but not the other is presumptively less fair than pooling both sets. A law of accidents that attends to the distribution of the burdens and benefits of risky activities is therefore more just than one which attends only to the rectification of injuries wrongly inflicted. Put differently, a law of accidents that is distributively fair as well as correctively just is more just than a law of accidents which is only correctively just.