
THE HEROIC ENTERPRISE OF THE ASBESTOS CASES

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The American legal system has been heavily criticized for its handling of the asbestos cases. Much of this criticism is, no doubt, well founded. The asbestos crisis pushed our adjudicative institutions to the brink of failure and exposed the extraordinary difficulty of managing mass tort litigation on a vast scale. Even so, the asbestos saga is a remarkable chapter in the history of common law creativity, and there is much to praise in the efforts of courts to come to grips with this, the greatest of all mass accidents. The asbestos cases are a heroic effort to construct a product specific form of industry-wide enterprise liability, a system of liability tailored to the distinctive features of a mass disaster of unprecedented scope and duration. If these efforts did not end in complete success, they did not end in complete failure, either. Flawed as it is and was, the judicial response to the greatest episode of accidental injury in our history deserves as much praise as criticism.

My aim in this comment is to sketch a background against which the heroic enterprise of the asbestos cases can be grasped and to offer a brief account of why the situation that courts confronted was so daunting. To do this, I shall offer a particular but compressed description of the theory and practice of enterprise liability, both within and beyond the law of torts. The particularity of my account has especially to do with the emphasis that I shall place on a particular conception of fairness—namely, fairness in the distribution of the financial costs of accidental injury—in both justifying and forming enterprise liability law. Enterprise liability has played an

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enormous role in the history of twentieth century tort law,¹ but its role has lately been forgotten, repudiated and ignored. Political and academic currents alike have combined to push enterprise liability into the margins of tort law and tort theory, though the influence of enterprise liability conceptions is still evident throughout the contemporary law of torts.² Politically, the tort reform movement has made retrenchment not expansion the hallmark of transformation in tort law, and one fundamental retrenchment has been the retreat of strict enterprise liability and the resurgence of individualized, fault liability.

In academia, the emergence of a theoretical debate between “corrective justice” theorists and “instrumentalists” has largely eclipsed debates about the justice of various tort regimes. Indeed, insofar as corrective justice has come to be identified with liability predicated on the commission of a wrong, it has also become identified with an individualistic form of fault liability. For the most part it has simply been *assumed* that the relevant kind of wrongdoing is individual wrongdoing.³ Corrective justice’s preoccupation with wrongful agency has simply become a preoccupation with wrongful *individual* agency.⁴ Enterprise liability, by contrast, is a form of *collective* responsibility and it tends towards strict liability.

Enterprise liability is not incompatible with fault liability and, indeed,

1. Not so very long ago, enterprise liability was thought to be consuming the law of torts wholesale. See, e.g., George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 461-62 (1985) (arguing that enterprise liability radically reshaped the law of torts in the mid-twentieth century); G. EDWARD WHITE, TORT LAW IN AMERICA 161-72 (1980) (describing the triumph of enterprise liability in mid-twentieth century products liability law).

2. See Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND L. REV. 1285, 1285-87 (2001).

3. See, e.g., Matthew D. Adler, *Corrective Justice and Liability for Global Warming*, 155 U. PA. L. REV. 1859 (2007) (“A standard suggestion [of corrective justice] is this: CJ imposes a duty on the agent who has acted wrongfully, and thereby caused loss to some individual, to repair the loss,” citing Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO L.J. 695, 699-700 (2003)). Professor Zipursky’s “civil recourse” conception of tort is a cousin of corrective justice theory, and itself has strong affinities for an individualistic form of fault liability. See *id.*

4. Ernest J. Weinrib’s influential statement of a corrective justice conception of tort—*The Idea of Private Law* (1995)—for example, construes vicarious responsibility as a special form of personal responsibility. See *id.* at 185-87. There is nothing formally wrong with reading vicarious liability as a doctrine which imputes the torts of one person to another “person,” so long as one observes that the second “person” may be an artificial legal person such as a corporation. There is, however, something substantively misleading about presenting vicarious liability as a special form of personal responsibility. In the modern world, the primary role of vicarious liability is to hold firms responsible for the torts of their employees. This is quintessentially a form of collective or enterprise responsibility. Presenting vicarious liability as an extended form of personal responsibility, moreover, utterly obscures the fact that vicarious liability is the principal common-law source of enterprise liability as a general conception of responsibility in tort. See Keating, *supra*, note 2 at 1303-08.

often finds expression in forms of fault liability.⁵ Nonetheless, enterprise liability was born as a form of strict liability and its basic commitments press towards strict liability. Strict liability, in turn, involves a form of wrongdoing but not the kind of wrongful *conduct* that fault liability involves. Strict liability involves an unreasonable failure to make reparation for harm arising out of *reasonable* conduct. The wrong lies in foisting the costs of one's reasonable—that is faultless—conduct on a victim who has both done nothing wrong and does not stand to profit from your activity. Corrective justice theorists have often been unfavorably disposed to liability without fault and this has predisposed them to disapprove of enterprise liability.⁶ This predisposition against enterprise liability is reinforced by the fact that the deepest commitment of enterprise liability is to collective responsibility. For enterprise liability the fundamental unit of responsibility is an ongoing activity or enterprise, variously defined as a firm (vicarious liability and workers' compensation), a product (strict products liability), an industry (nuclear power), or even society itself (the New Zealand accident compensation scheme).

The most essential feature of enterprise liability, then, is not that it is a form of strict liability, but that it is a *collective* conception of responsibility. As such, it is capable of incorporating both fault and strict doctrines. But even when it expresses itself in fault liability, enterprise liability expresses a collective conception of responsibility for harm done. The turn in both practice and theory toward individualistic conceptions of responsibility is thus a turn away from the foundational commitment of enterprise liability. And the turn away from strict liability is a turn away from the form of liability through which enterprise liability flowers most fully.

Both of these turns have impaired our understanding of the asbestos cases. The asbestos cases may well involve egregious individual wrongdoing and that misconduct must surely be given its due in any assessment of them. At bottom, though, the asbestos cases are not about individual mistakes or individual misconduct, however glaring. Asbestos is the greatest of modern mass accidents. As such, it is the expression of a nightmarishly well-organized world of systematically imposed risk. Private, profit-seeking firms—not individuals—are the central actors in the asbestos saga. Enduring practices of risk imposition—not isolated acts—are responsible for the harm unleashed by asbestos. Unsurprisingly then,

5. Keating, *supra* note 2, at 1329-33.

6. For this account of strict liability see Gregory C. Keating, *Property Rights and Tortious Wrong in Vincent v. Lake Erie*, ISSUES IN LEGAL SCHOLARSHIP, Symposium on "Vincent v. Lake Erie Transportation Co. and Doctrine of Necessity," Article 6 (2005). For a particularly critical view of strict liability from a corrective justice perspective see WEINRIB, *supra* note 4, at 171-83.

enterprise liability and its animating ideals of fairness, loss-prevention and loss-spreading inform and infuse the asbestos cases. Only when we understand that—and why—the mass risk that materialized in the asbestos mass accident both required an enterprise liability response and threatened to burst the framework of enterprise liability itself, will we be in a position to appraise the asbestos cases accurately.

I. THE THEORY AND PRACTICE OF ENTERPRISE LIABILITY⁷

Our law of torts now is and long has been divided between the competing principles of fault and strict liability. Whereas the fault principle holds actors accountable for injuries issuing from risks whose imposition they should have prevented *ab initio*, strict liability holds actors accountable for injuries which flow from their agency. Strict liability expresses “the notion that losses should be borne by the doer, the enterprise, rather than distributed on the basis of fault.”⁸ Strict liability takes agency—not wrongdoing—to be the fundamental basis of responsibility for accidental injury.

Enterprise liability emerges as a distinctively modern form of strict liability and embodies a particular articulation of what it means to make agency the basis of responsibility. Two propositions form the core of enterprise liability. First, enterprise liability insists that activities should bear the costs of those accidents that issue from their characteristic risks.⁹ Accident costs should be absorbed by the enterprises whose costs they are, not left on the random victims of the enterprise’s risky activity. Second, enterprise liability prescribes that an activity’s accident costs should be distributed across the members of the enterprise. The costs of accidental injury should be shared by those who profit from the activity responsible for the injury, instead of being concentrated on the injured party, and instead of being dispersed across unrelated activities by first-party loss-insurance.

Enterprise liability case rhetoric links these two ideas—that financial responsibility for harm accidentally done should be borne by the activities

7. For elaboration of the points in the following two paragraphs see Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, *supra* note 2, and Gregory C. Keating, *Rawlsian Fairness and Regime Choice in the Law of Accidents*, 72 *FORDHAM L. REV.* 1857 (2004).

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

9. *Id.*

responsible for them and then dispersed and distributed among the participants in those activities—to a particular conception of fairness. Fairness requires a just distribution of burdens and benefits. It therefore gives rise to a presumption that the costs of the accidental physical injuries characteristic of an activity should be borne by those who benefit from the activity, whether or not they are culpably responsible for precipitating the injuries at issue.¹⁰ Within the legal academy, less is made of fairness and more is made of efficiency. Within the academy, the twinned ideas of cost-internalization and loss-distribution are often linked to economic theories of allocative efficiency and loss-spreading.¹¹

Enterprise liability is a distinctively modern theory of strict liability. Traditional strict liability expressed the maxim that those who acted did so at their peril. Enterprise liability expresses the maxim that those who profit from the imposition of risk should bear the toll in life and limb that is the price of their profits. Unlike traditional strict liability, enterprise liability originated outside the law of torts—in the workers' compensation schemes enacted in England and the United States around the turn of the twentieth century. From there, it spread back through the common law of torts, making its presence felt in traditional common law fields of strict liability such as vicarious liability and abnormally dangerous activity liability, and influencing the rise of products liability. Within the law of torts, enterprise liability characteristically operates both as a basis for and as a form of strict liability. It has ebbed and flowed throughout the course of the twentieth century but, even when it ebbs, its influence can be found in vicarious liability cases, in abnormally dangerous activity liability cases, and in product liability cases. Indeed, over the course of the twentieth century, enterprise liability came to infuse and remake much of traditional common law strict liability.¹²

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

11. The work of Guido Calabresi is preeminent here, of course. See Calabresi *Risk Distribution*, *supra* note 8 at 501-02; GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 24-25 (1970); Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L. J. 1055, 1075 (1972). More recently, the theory has been developed by Jon Hanson, Kyle Logue, and Steven Croley. See, e.g., Jon D. Hanson & Kyle D. Logue, *The First-Party Insurance Externality: An Economic Justification for Enterprise Liability*, 76 CORNELL L. REV. 129, 135-36 (1990); Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH L. REV. 683, 690-91 (1993); Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain and Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1791-93 (1995). See also William K. Jones, *Strict Liability for Hazardous Enterprise*, 92 COLUM. L. REV. 1705, 1707-08 (1992).

12. The points in this paragraph are developed in Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, *supra* note 2, at 1287-88 and *passim*.

The idea of fairness embodied by enterprise liability is an idea of fairness in the distribution of harm—fairness in the distribution of the financial costs of accidents. Enterprise liability's emphasis on the fair distribution of the financial costs of physical harm may seem unexceptionable, but this focus on *harm* is a focus that George Fletcher's well-known theory of fairness in the law of torts rejects.¹³ Fletcher's theory begins by supposing that the tort law of accidents is about the reconciliation of competing individual interests in liberty and security. Liberty is the freedom to act in ways that impose risks of physical harm on others. Security is freedom from such harm. For Fletcher, fairness is fairness in the distribution of *risk* and the distribution of risk is the key to the division of labor between negligence and strict liability, both descriptively and prescriptively. Negligence is fair when risks are reciprocal between potential injurers and potential victims conceived as classes. Strict liability is fair when risks are not reciprocal. Risks are reciprocal when they are equal in magnitude and probability and imposed for equally good reason. Reciprocity of risk thus defines a circumstance where the competing claims of potential injurers to liberty and potential victims to security are fairly reconciled. When risks are reciprocal, risk is fairly distributed. People expose each other to—and bear—equivalent risks of harm. Strict liability restores fairness to unfair (that is non-reciprocal) risks, by requiring those who impose them to bear the financial costs of the harm they cause. For Fletcher, then, fairness is about risk—its reciprocal or non-reciprocal distribution.

The presuppositions of enterprise liability conflict sharply with Fletcher's claims; enterprise liability asserts that the imposition of strict liability will distribute the costs of accidents fairly by distributing the financial costs of an activity's characteristic injuries across those who benefit from the risks which issue in those accidents. Professor Fletcher asserts, to the contrary, that “[w]here the risks are reciprocal among the relevant parties, . . . a rule of strict liability does no more than substitute one form of risk for another—the risk of liability for the risk of personal loss.”¹⁴ According to Fletcher, the imposition of strict liability on reciprocal risks merely shifts a concentrated harm.¹⁵ Enterprise liability insists otherwise—that the imposition of strict liability distributes an otherwise concentrated loss across those who benefit from the risks which precipitated that loss.¹⁶

13. See George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 542-43 (1972).

14. *Id.* at 547.

15. See *id.*

16. See Keating, *supra* note 2, at 1286-87.

Addressing this disagreement is a precondition to understanding both the distinctively modern character of enterprise liability and the affinity between enterprise liability and the mass disaster that is asbestos. Enterprise liability is a form of liability tailored to just those properties that define the distinctive risks of modern life and that differentiate distinctively modern risks from the risks characteristic of the social world in which our law of torts blossomed.

A. *Two Social Worlds*

The seeds of reconciliation between Fletcher and enterprise liability lie in one of Oliver Wendell Holmes' more famous turns of phrase. Writing in 1897, Holmes observed that "[o]ur law of torts comes from the old days of isolated, ungeneralized wrongs, assaults, slanders and the like . . ." whereas ". . . the torts with which our courts are kept busy to-day are mainly the incidents of certain well-known businesses[,] . . . railroads, factories, and the like."¹⁷ Implicit in Holmes' remark is a distinction not just between two kinds of accidents, but between two kinds of social worlds. Stylizing and simplifying, we can call these two worlds the "world of acts" and the "world of activities," respectively. The "world of acts" is Holmes' world of "isolated, ungeneralized wrongs." The "world of activities" is the world in which accidents are the "incidents" of organized enterprises.

In the "world of acts," risks are discrete. The typical actor is an individual or a small firm which creates risk so infrequently that harm is not likely to materialize from any single actor's conduct. The typical accident materializes out of the activity of isolated, unrelated actors, acting independently (i.e., natural persons or small firms separately engaging in activities on an occasional basis). Taken as a whole the activities of these individual actors are diffuse and disorganized, and quite possibly actuarially small. The dogfight that precipitated *Brown v. Kendall*¹⁸ is a representative tort in this world: it arose out of a chance encounter between unrelated parties neither of whose activities were large enough to make such misfortunes commonplace and expected. In the "world of acts" risks are isolated, "one-shot" events. When it materializes, harm is a bad luck. Because actors are small, and risks independent and uncorrelated, liability rules shift, but do not spread, losses.

In the "world of acts," the imposition of strict liability on reciprocal

17. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897), reprinted in OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 167-183 (Harcourt Brace & Co. 1920).

18. 1560 Mass. (6 Cush.) 292 (1850).

risks merely “substitute[s] one form of risk for another—the risk of liability for the risk of personal loss,” as Fletcher says.¹⁹ A fair distribution of the costs of accidents—of the costs of physical harm—is beyond the reach of tort law. The possibility of distributing the financial costs of accidental physical injury across the activities that generate those injuries depends upon the accident generating activity satisfying basic criteria of insurability. Foremost among these criteria is the law of large numbers. “Under this law, the impossibility of predicting a happening in an individual case is replaced by the demonstrable ability to forecast collective losses when considering a number of cases.”²⁰ For the law of large numbers to apply risk impositions must be stable and recurring. “One-shot” risk impositions cannot be dispersed across the community of those who benefit from their imposition. In the purest form of the “world of acts,” however, both actors and activities are small, and risks are “one-shot.”

At the opposite pole from the “world of acts” is the “world of activities.” In the “world of activities” risks are generalized and systemic. Systemic risks arise out of a continuously repeated activity—the manufacture of coke bottles, the supplying of water by a utility, the transport of gasoline—that is actuarially large. “Accidental” harm is statistically certain to result from such risks: if you make enough coke bottles some are sure to rupture;²¹ if you transport enough gasoline, some tankers are sure to explode;²² if you leave water mains un-inspected in the ground long enough, some are sure to break;²³ if you turn enough sailors loose on shore leave, some of them are bound to return to their ships drunk and wreak havoc.²⁴ In the “world of activities,” both actors and activities are large. The financial cost of accidental physical injury can therefore be dispersed and distributed among all those who benefit from their

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

20. Robert I. Mehr, Emerson Cammack & Terry Rose, *Principles of Insurance*, in ROBERT E. KEETON ET AL., *TORT AND ACCIDENT LAW* 728-29 (4th ed. 2004) [hereinafter KEETON ET AL.].

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

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

23. See *Lubin v. Iowa City*, 131 N.W.2d 765, 770 (Iowa 1964) (finding water company liable for damages resulting from burst pipe where company’s policy was not to replace mains until they broke).

24. The suit in the celebrated case of *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167 (2d Cir. 1968), arose out of an incident in which a drunken sailor, returning from shore leave late at night to his Coast Guard ship, which was being overhauled in a floating drydock, opened the valves and flooded the drydock causing the drydock to sink and the ship to sink partially. *Id.* at 168. The court, in an opinion by Judge Friendly, affirmed that the conduct was within the scope of employment, because the risk of drunkenness was a risk increased by the Coast Guard’s “long-run activity in spite of all reasonable precautions” on its part, and hence was fairly charged to the Coast Guard. *Id.* at 171.

occurrence.

In the “world of activities,” the typical injury arises not out of the diffuse and disorganized acts of unrelated individuals or small firms, but out of the organized activities of firms that are either large themselves, or small parts of relatively well-organized enterprises. The defendant in *Lubin v. Iowa City* was large in the first sense: a single entity was responsible for the piping of water through underground pipes, for laying and maintaining those pipes, and for charging consumers for the water that was transported through them.²⁵ The transportation of large quantities of gasoline in tractor trailers on highways is large in the second sense: the firms that do the transporting may or may not be small and specialized but they are enmeshed in contractual relationships with those who manufacture and refine the gasoline, those who operate gasoline stations, those who manufacture tractor trailers, and so on.²⁶ In the “world of activities,” accidental harms can be spread across the enterprises that engender those harms. When the law of large numbers is met, risks are not only certain to issue in harms, they will also issue in harms with predictable regularity. When activities are actuarially large, the accidents that they engender will be predictable and regular, and the costs of those accidents can be factored into the costs of conducting the enterprise. The costs of manufacturing and distributing Coke can include the costs of injuries from exploding Coke bottles; the costs of supplying water to households and businesses can include the costs of the damage caused by broken water mains.

The move from the “world of acts” to the “world of activities” thus changes the question of fairness presented by the imposition of strict liability on risks that are themselves fair, because reciprocal. In the “world of acts,” strict liability, as Fletcher says, merely substitutes the risk of liability for the risk of loss—it yields a different, but no fairer, distribution of the financial burdens and benefits of accidental harm.²⁷ Concentrated harm shifts from victim to injurer, but it remains concentrated. Negligence leaves the concentrated harm of non-negligent accidents on the victims of those accidents; strict liability shifts that concentrated harm onto the injurers who inflicted those harms. The distribution of financial cost is different but not fairer. Under negligence, non-negligent accidental injury

25. 131 N.W.2d at 770 (waterworks chose not to replace water mains until they ruptured because it was inefficient to inspect the mains for signs of wear and tear and replace them before they broke).

26. The perception that the separate actors form a connected enterprise surfaces very explicitly in *Siegler v. Kuhlman*, 502 P.2d at 1183.

27. See *supra* notes 13-16 and accompanying text.

strikes victims like lightning.²⁸ Under strict liability, non-negligent accidental injury bounces back on injurers like lightning.²⁹ Negligence and strict liability thus assign the costs of nonnegligent harms in opposite but equally fair or unfair ways.

In the “world of acts” negligence is preferable to strict liability because negligence reconciles the liberty of potential injurers and the security of potential victims equally fairly, and less expensively, than strict liability does. In the “world of activities,” strict enterprise liability is fairer than negligence. Under enterprise liability, those who benefit from the imposition of particular systemic risks—from the risks of selling Coke in pressurized bottles, or the risks of leaving water mains undisturbed until they break, or the risks of turning stressed out sailors loose on shore leave—also bear the financial burdens of the accidents that issue from these risks. In the “world of activities” the extra burdens that strict liability places on the liberty of injurers are both less than and more fair than the extra burdens than negligence places on the security of victims. Negligence leaves concentrated harms on injurers; enterprise liability disperses concentrated loss and distributes it across all those who benefit from the risk imposition responsible for that harm.

In the “world of acts” it is reasonable to impose negligence liability on reciprocal risks. Reasonable injurers may object that the move to strict liability imposes as great a burden on their freedom of action as negligence imposes on the security of victims. Under negligence, the concentrated costs of non-negligent accidents strike victims like lightning; under strict liability those costs strike injurers like lightning. Because strict liability yields a distribution of accident costs which is no fairer than the distribution under negligence liability, it is reasonable to maximize the size of the pie by preferring the cheaper liability regime (assuming that the regime which shifts fewer losses is cheaper). In the “world of activities,” by contrast, the burdens are asymmetrical. Enterprise liability distributes the costs of non-negligent accidents across those who benefit from the underlying risks. Negligence liability leaves the costs of those accidents concentrated on unlucky victims. It is surely fairer for those who benefit from the imposition of various risks on others to bear the burden of the harms that are the price of their benefits. This is all the more true when the burden to those injurers of bearing liability is less than the burden to victims being forced to bear concentrated harm.

28. *See supra* notes 13-16 and accompanying text.

29. *See supra* notes 13-16 and accompanying text.

B. The Facets of Fairness and the Relaxation of Causation

The fairness case for enterprise liability, however, is not fully captured by the statement that it distributes the costs of accidents across those who benefit from the underlying risks. Indeed, four distinct facets of the fairness case for enterprise liability can be distinguished. These four elements combine to relax the fairly stiff requirement of causation characteristic of negligence liability in tort. The moral logic of enterprise liability inside tort law sets the stage for recognizing that enterprise liability may also flourish outside of tort law—in non-fault accident plans—because it shows that enterprise liability in tort de-emphasizes one of the traditional elements of tort liability, namely, individual causation of harm. Indeed, because enterprise liability strains to shake free of one of the basic elements of tort liability, there is reason to believe that it flowers more fully when it is cut loose from law the of torts and recast in statutory schemes such as workers' compensation and no-fault automobile insurance.

The first of the four facets of enterprise liability fairness is fairness to victims. It is unfair to concentrate the costs of characteristic risk on those who simply happen to suffer injury at the hands of such risk, when those costs might be absorbed by those who impose the characteristic risk. Fairness prescribes proportionality of burden and benefit. Victims who are strangers to the enterprise derive no benefit from it and it is therefore unfair to ask them to bear a substantial loss when that loss might be dispersed across those who participate in the enterprise and so 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 bears a 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. Imposing risks whose expected costs

exceed their expected benefits is one species of negligence.

The conception of responsibility invoked in the last paragraph is a familiar and widely accepted one. We take it for granted, for example, that

the person to whom the income of property or a business will accrue if it does well has normally also to bear the risk of loss if it does badly. In the law of sales, when the right to income or fruits passes to the buyer, the risk of deterioration or destruction normally passes to him as well.³⁰

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

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 that 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.³¹

30. TONY HONORÉ, *RESPONSIBILITY AND FAULT* 79 (Hart 1999).

31. The ideas in this paragraph draw on Steven Shavell, *Negligence versus Strict Liability*, 9 J. LEG. STUD. 1 (1980), and Guido Calabresi and Jon T. Hirschoff, *supra* note 11.

In short, the freedom to imperil others when and as one sees fit is enormously valuable. Strict accountability for the harm that one does is a fair price to pay for that freedom, especially when paying that price helps to ensure that the power to imperil others is exercised with due regard for their safety. How do we know, though, that an appropriate level of safety—not an excessive one—is induced? Economists appeal to the idea of an optimal level of safety to answer such questions, but that idea is unavailable within a fairness framework.³² The answer it gives is comparative and a matter of educated conjecture. There is good reason to think that strict accountability induces potential injurers to conduct their activities more safely than negligence does, and no general reason to think that it induces too much safety. Tort damages do not even *attempt* to exact a price for all of the harm that accidents wreak—emotional, relational and economic as well as physical.³³ Indeed, the most grievous harm that accidents inflict goes uncompensated, because it is beyond compensation.³⁴ Tort law does not award wrongful death damages for the value to the victim of the life that he or she has lost. The price that strict tort liability exacts therefore seems unlikely, absent special circumstances, to induce excessive precaution. This seems all the truer when we take into account the fact that only a small fraction of the accident claims that might be pursued are pursued.³⁵

The fourth facet of fairness returns us to the general idea of burden-benefit proportionality: enterprise liability distributes accident costs *among actual and potential injurers* more fairly than negligence does. Negligence liability does not require that the costs of accidents—even negligent ones—

32. Much of the economic literature on the effects of enterprise liability is enormously relevant, however. It matters a great deal, for example, whether or not the expansion of liability under the influence of enterprise liability ideas triggered the insurance crisis of the late 1980s. The debate between scholars such as George Priest and Richard Epstein on the one hand, and scholars such as Jon Hanson, Kyle Logue, and Steven Croley on the other hand, is pertinent here. If enterprise liability precipitates uninsurability in some range of cases, and if the problem cannot be corrected by various revisions to enterprise liability schemes (e.g., by reformulating damages to make them lower and more manageable), then the argument that enterprise liability distributes the benefits and burdens of accidental injury more fairly than negligence does simply fails. See Keating, *supra* note 7, at 1892 n.76.

33. See KEETON ET AL., *supra* note 20, at 657-76 (on recovery for pure economic and pure emotional injury). See also W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 460-78 (5th ed. 1984) (on damages for relational harm) [hereinafter PROSSER AND KEETON ON TORTS]; see *id.* at 359-67 (on recovery for pure emotional and pure economic harm); see *id.* at 931-36 (on recovery for relational harm).

34. KEETON ET AL., *supra* note 20, at 460-86; PROSSER AND KEETON ON TORTS, *supra* note 33, at 949-54.

35. DEBORAH R. HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 110 (1991) (“ . . . overall, about one injury in ten leads to an attempt to collect liability compensation.”).

be spread among those who create similar risks of harm, whereas enterprise liability does. Enterprise liability asserts: (1) that accident costs should be internalized by the enterprise whose costs they are; and (2) that those costs should be dispersed and distributed among those who constitute the enterprise, and who therefore benefit from its risk impositions. Negligence liability, by contrast, holds that injurers have a duty to make reparation when they injure others through their own carelessness. Negligence liability justifies *shifting* concentrated losses 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.

It is, moreover, important in this regard that insuring against negligence liability makes negligence liability fairer precisely because it moves negligence towards enterprise liability. Negligence liability is often harsh, and problematically so.³⁶ In part, 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 failure to foresee a risk clearly enough, calculate its probability accurately enough, concentrate well enough, or 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 catastrophic.

So long as we restrict our gaze to the assignment of responsibility 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

36. "Average reasonable person" doctrine shows this side of negligence liability most clearly. See KEETON ET AL., *supra* note 20, at 345-68; PROSSER AND KEETON ON TORTS, *supra* note 33, at 173-93. Comparative negligence tends to mitigate some of this harshness, because it takes the particularities of the parties into account in apportioning fault. See KEETON ET AL., *supra* note 20, at 345-68; PROSSER AND KEETON ON TORTS, *supra* note 33, at 173-93.

explode into serious injuries. Momentary lapses of attention behind the wheel of a car, at the helm of a ship, or the controls of a plane, can and do destroy human lives. The seriousness of the harm risked by ordinary negligence is 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 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.³⁷ 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 injury in issue. 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

37. Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 387 (David G. Owen ed., 1995) (making this point forcefully).

it wreak havoc with people's lives. The claims of fairness are especially strong when people's fundamental interests are at stake—when unfairness devastates lives and fairness transforms devastating loss into widely dispersed financial cost.

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 non-negligent accident costs of an activity on its 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 non-negligent accidents by purchasing loss insurance, but they are unable to distribute those costs across those who impose similar risks.

When reasonable risk results in accidental harm, chance and chance alone separates those who injure and are injured from those who do not and are not. To leave non-negligent 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. When the concentrated costs of non-negligent accidents might easily be dispersed and distributed across those who benefit from the creation of the relevant risks, the victims of such accidents might reasonably object to a principle of responsibility that leaves the costs of those non-negligent accidents concentrated on victims. Those who benefit from the imposition of the relevant risks but escape injury at the hand of those risks, by contrast, cannot reasonably object having non-negligent accident costs dispersed and distributed across all those who benefit from the imposition of the relevant risks.

Dispersing the non-negligent accident costs characteristic of an activity across pools of victims who are bound together only by their actuarial similarity—as loss insurance does—is likewise less reasonable than dispersing those accident costs across the injurers who create similar risks and benefit from doing so. People who do not benefit from an activity may reasonably object to bearing its costs by taking out insurance against harm at its hands, when those who do benefit might be made to bear its costs with equal ease. Fairness thus 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 the risks of negligent accidents but not the risks of non-negligent accidents is presumptively less fair than pooling both sets of risks.

This last argument of fairness highlights both the fact that enterprise liability relaxes the requirement of causation, and also the fact that the logic of fairness at work in enterprise liability criticizes—as arbitrary and unfair—the traditional tort insistence on a fairly rigid sort of causation. When cause and cause alone distinguishes those who injure from those who do not, luck and luck alone distinguishes those who bear liability from those who escape it. The requirement of causation cannot bear the weight of the justification that it must bear in these circumstances. There is no good reason why a person unfortunate enough to have her carelessness issue in massive injury should bear massive loss, while many others who have been identically culpable are spared all responsibility.³⁸

Within the law of torts, the basic thrust of enterprise liability is to press for the expansion of liability within traditional domains of strict liability, and to expand the domain of strict liability relative to negligence.³⁹ Just how far it does and should press in this direction are deeply contested matters in torts scholarship. But the matter cannot be said to be understudied.⁴⁰ The same cannot be said, however, for the way in which enterprise liability and its aspiration to distribute the costs of accidents fairly make themselves felt beyond the law of torts. It is to that subject, therefore, that we shall now turn.

II. ENTERPRISE LIABILITY BEYOND TORT

If considerations of fairness favor enterprise liability within tort, they also favor enterprise liability beyond tort. Administrative alternatives to the law of torts—workers' compensation schemes, no-fault automobile insurance, statutory schemes for the compensation of certain kinds of injuries (e.g., ones inflicted by vaccination)—are often thought to express loss-spreading or insurance ideas which have little or nothing in common with the law of torts.⁴¹ The claim that these schemes embody the idea that

38. With small numbers, this is the lesson of *Summers v. Tice*, 199 P.2d 1, 5 (Cal. 1948).

39. See Keating, *supra* note 2, at 1287-88. Enterprise liability also pushes negligence law toward more collective conceptions of responsibility. Keating, *supra* note 2, at 1329-33.

40. See Keating, *supra* note 7, at 1892 n.76.

41. Corrective justice theorists in particular often see these schemes as expressing an insurance ideal that losses should be distributed, and widely so. They see this ideal as alien to the idea of responsibility for harm wrongly inflicted that they take to be central to tort law. The claim

it is better to spread loss across many people than to leave it concentrated on one person seems correct. But the claim that these schemes embody loss-spreading aims *to the exclusion* of fairness concerns with the distribution of accident costs is unpersuasive. The idea of fairness that enterprise liability expresses is evident in the law of torts, but it also exists beyond that law, in administrative schemes that displace the law of torts proper. Indeed, the idea of enterprise liability found its first full expression not in the law of torts but in one of these schemes—namely, workers' compensation law.⁴²

Administrative versions of enterprise liability warrant our attention for four reasons. First, their continuity with the law of torts is worth establishing, in light of contemporary claims of radical discontinuity. Second, administrative schemes are important because they are capable of instituting the idea of fairness that animates enterprise liability in circumstances where tort law cannot. Third, administrative schemes shed light on the idea of fairness that animates enterprise liability. No-fault administrative schemes both accentuate the attenuation of causation—the de-emphasis of the causal connection between *this* injurer and *this* victim—that characterizes enterprise liability as a whole, and highlight the elasticity of the idea of “enterprise” itself. Fourth, and most importantly for present purposes, they provide a backdrop against which we can evaluate the predicament of common law courts struggling to master the asbestos mass accident.

A. *Advantages of Administrative Alternatives*

The most familiar administrative alternatives to tort are workers' compensation schemes and no-fault automobile insurance. The latter is a particularly illuminating case in point. First, the very idea that no-fault

here is not primarily that these administrative schemes are driven by insurance considerations, but that these schemes do not embody corrective justice conceptions of responsibility because they drastically de-emphasize causation of harm as a condition of liability. This point holds true even if we come to see the schemes as animated as much by the principle of fairness as by the policy of loss-spreading. See, e.g., WEINRIB, *supra* note 4, at 38-42; JULES L. COLEMAN, RISKS AND WRONGS 395-406 (1992). The attenuation of causation characteristic of these schemes and, indeed, of enterprise liability itself, thus highlights a fundamental difference in liability predicated on an ideal of fairness and the corrective justice conception of tort.

42. See, e.g., Young B. Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444, 456, 731 (1923) (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 20th century); Jeremiah Smith, *Sequel to the Workmen's Compensation Acts*, 27 HARV. L. REV. 235, 344 (1914).

automobile insurance institutes a form of enterprise liability may come as a surprise. Enterprise liability in tort is a form of strict injurer liability associated with liability insurance not loss insurance. No-fault automobile insurance, by contrast, is a form of loss insurance which displaces negligence liability in tort. And loss insurance itself is often thought of as an alternative to tort liability. Even within the tort law of accidents, the availability of loss insurance has long been conceived as a reason to bound tort liability.⁴³ Loss insurance disperses the costs of a loss that would otherwise be concentrated on its victim. That, indeed, is its very point. In tort cases, loss insurance is generally unable to disperse injury costs across 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 because efficient risk-pooling requires pooling injurers who impose similar risks of injury. This tends to disperse the costs of any given type of non-negligent accident across those who create similar risks of such accidents. Loss insurance does not have an equally strong tendency to disperse losses across those who benefit from the risks that cause those losses because efficient loss insurance only requires dispersing accident costs across some pool of actuarially similar victims. It pools victims who suffer similar injuries, not injurers who impose similar risks.

When injurers and victims are members of the same closed community of risk, however, loss insurance can distribute the costs of that community's characteristic risks as fairly as liability insurance. The idealized "community of drivers" of which reciprocity theorists have always been so fond is a case in point.⁴⁴ Under compulsory loss insurance, each member of such a community of risk bears his or her fair share of its characteristic accident costs in the form of a loss insurance premium. Under liability insurance they bear it in the form of a liability insurance premium. 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, using mandatory loss insurance to create a kind of enterprise liability.

43. See, e.g., *Ryan v. N. Y. Cent. R.R. Co.*, 35 N.Y. 210, 217 (N.Y. 1866) (holding that negligence liability for starting a fire should not extend beyond the house immediately set afire by the defendant's negligence, to neighboring houses, in part because "each man" is "enabled to obtain a reasonable security" by insuring against loss). In the same vein, modern critics of enterprise liability in tort have often favored (victim) loss insurance as an alternative to (injurer) enterprise liability. See Keating, *supra* note 7, at 1892 n.76.

44. Both Professor Fletcher and *Rylands v. Fletcher*, (1868) L.R. 3 H.L. 330, make much of the risks of the road. See Fletcher, *supra* note 13, at 544-51.

Within a community of risk, then, 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 or strict liability can both distribute accident costs fairly, the choice between them turns on considerations of administrability, cost and comparative capacity to reduce risk. 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 non-negligent 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 in the tort law of automobile accidents strict liability in its usual form—holding injurers liable for all the physical harms that issue from the characteristic risks of their activity—is not a live alternative to negligence.⁴⁵ By contrast, it is easy to identify an injury suffered in the course of an automobile accident, and thus easy to implement no-fault automobile insurance.

No-fault automobile insurance illustrates two general advantages that non-tort administrative schemes have over enterprise liability in tort. First, such schemes are often able to solve attribution problems that bedevil efforts to construct common law forms of enterprise liability. Causal problems—the inability to distinguish injurer from victim in the absence of some fault criterion—prevent the law of torts from imposing strict liability in tort on highway accidents. No-fault insurance circumvents this problem. By requiring victims to insure against non-negligent losses (as well as negligent ones) no-fault insurance is capable of attributing the non-negligent accident costs of driving to the activity. Compulsory loss insurance attributes the costs of automobile accidents to the activity of driving without requiring us to sort injurers from victims in cases of non-negligent injury. Tort law is unable to tap the mechanism of compulsory first-party insurance against loss in a similar way.

Other administrative schemes solve attribution problems which would confound the common law of torts, by specifying in detail which injuries are to be attributed to a particular activity. The National Childhood Vaccine Injury Act,⁴⁶ for example, incorporates a “Vaccine Injury Table,”⁴⁷

45. As has long been recognized: “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.” *Fletcher v. Rylands*, 159 Eng. Rep. 737, 744 (Ex. 1865) (Bramwell, J., dissenting), *aff’d*, *Rylands v. Fletcher*, (1868) L.R. 3 H.L. 330.

46. See 42 U.S.C. §§ 300aa-1 to -34 (2000).

47. *Id.* § 300aa-14.

listing illnesses associated with various vaccines and time periods following the administration of a vaccination within which the first symptom or manifestation of an illness must occur. Proof that an illness occurred within a specific time period creates a rebuttable presumption that the vaccination was its cause. Aggregate statistical connections between exposure and illness establish causation.

The second advantage of administrative schemes is that they often can effect enterprise liability in circumstances where the common law cannot, because administrative schemes can exert more control over the mechanisms and institutions of insurance. Enterprise liability in tort must, for the most part, hope that the imposition of strict liability will stimulate the provision of appropriate self or third-party insurance against liability. Administrative schemes, by contrast, can compel the purchase of insurance.⁴⁸ Compelling insurance against some class of accidents both stimulates the demand for insurance and facilitates its provision—other things equal, the larger the pool of insureds the easier it is to spread risk among them.⁴⁹ Administrative schemes can also compel the use of particular insurance mechanisms, as no-fault automobile liability schemes compel the use of first-party insurance against loss. Indeed, administrative schemes can foster the provision of insurance even more directly. Legislatures and administrative agencies can construct appropriate insurance mechanisms, and require the provision of insurance to parties who are unable either to self-insure or to purchase private insurance in the marketplace. State sponsored insurance funds are a familiar part of workers' compensation law, for example, as is the practice of providing for assignment of rejected risks.⁵⁰

This capacity to compel the provision of insurance is itself an aspect of a more general feature of administrative schemes: they can set out comprehensive systems of rights and responsibilities and construct novel mechanisms to implement those rights. Administrative schemes can settle

48. Compelled insurance is a universal feature of workers' compensation schemes, for example. See ARTHUR LARSON & LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* 17-1 (1999) ("All states require that compensation liability be secured." (footnotes omitted)).

49. See KEETON ET AL., *supra* note 20, at 324-31 (listing "a large group of homogeneous exposure units" as the first of seven criteria that "need to be considered before attempting to operate a successful insurance plan"). Note that a pool of insureds that is larger but less homogenous is not necessarily easier to insure. It depends on whether size dominates homogeneity in the context at hand.

50. See LARSON, *supra* note 48, at 17-4 ("Six states require insurance in an exclusive state fund. Fourteen states have competitive state funds." (footnotes omitted)); LARSON, *supra* note 48, at 17-80 to -82 (§ 92.53 "Assigned Risk Practice"). In a similar vein, the National Childhood Vaccine Injury Act creates a trust fund to pay compensation to those eligible to recover under the Act. 42 U.S.C. §§ 300aa-10 to -34.

their own relation to other forms of liability—workers’ compensation displaces tort liability in a specified domain—and can set up their own courts and other enforcement mechanisms. Insofar as enterprise liability schemes confront essentially contestable choices about the constitution of an activity, the community of those who benefit from it, and the class of those who suffer injury at its hands—and insofar as those choices must be made in a coordinated way—this advantage of administrative schemes is a considerable one. Case by case adjudication is not an easy way to build a detailed and comprehensive system of coordinated rights and responsibilities.

Enterprise liability ideas flower more fully in non-tort administrative schemes in one other way as well. Administrative schemes sometimes reach beyond enterprise liability to industry-wide liability and even society-wide liability. In doing so, they raise questions about their connections to the law of torts. Do they take the logic of fairness found in common law forms of enterprise liability a step further, or do they stretch the elastic notion of “enterprise” so far that it snaps, leaving us with a different kind of liability? Even more importantly for our present purposes, they raise questions about the limits of the law of torts. Are there forms of systemic risk which can only be adequately addressed by abandoning the law of torts and adopting some administrative alternative to it? To think about these questions, even tentatively, we need to specify the distinctive features of these forms of liability.

B. Industry- and Society-Wide Liability

Industry-wide liability charges accident costs arising from the type of activity conducted by a particular industry to the industry as a whole. An industry-wide fund is established and financed by a flat assessment levied on all of the firms that are members of the industry. Someone injured by the pertinent type of activity recovers from the industry-wide fund—not from the particular enterprise that injured her—on a non-fault basis. The National Childhood Vaccine Injury Act imposes industry-wide liability, as does the federal scheme for compensating the victims of black-lung disease.⁵¹ Tort law itself reaches beyond enterprise liability toward industry-wide liability in the special case of market share liability. Under *Sindell v. Abbott Laboratories*,⁵² for example, victims whose injuries are

51. Title IV of the Federal Coal Mine Health and Safety Act of 1969 as amended by the Black Lung Benefits Act of 1972. 30 U.S.C. §§ 901-941 (2000).

52. 607 P.2d 924 (Cal. 1980).

caused by generic products may sue every producer of the generic product that injured them, and may recover from each firm in proportion to that firm's share of the product market. Under this form of market share liability, all the firms that manufacture a particular product share collective responsibility for the product's accident costs, and each firm pays its proportionate share of those costs.

Society-wide liability compensates victims out of general tax revenues: the whole society is the source of reparation. The New Zealand Accident Compensation Scheme is the most famous example, but administrative schemes such as the Price-Anderson Act⁵³—which governs the liability of licensed private operators of nuclear power plants for nuclear accidents—also embody the idea of societal responsibility. Under society-wide liability, reparation is made not by the firm and its insurer (as under enterprise liability), or by the industry as a whole (as under industry-wide liability), but by society as a whole.

From the perspective of moral and political theory, the fundamental question here is whether industry-wide and society-wide liability are simply expressions of the idea of social insurance, or if they also embody the idea of fairness that animates enterprise liability. Social insurance embodies the idea of loss-spreading writ large—the idea that it is better to disperse the costs of significant injuries as widely as possible rather than leave them concentrated on victims. Nothing in the idea of social insurance requires dispersing costs across those who benefit from their creation. Enterprise liability links loss-spreading to fairness: accident costs should be internalized by—and distributed across—the enterprises that generate them so that burdens and benefits are fairly proportioned.

In important part, industry-wide and society-wide liability embody the same idea of fairness as enterprise liability. Market share liability holds individual firms responsible for that portion of a product's accident costs that corresponds to the firm's share of the product market. By so doing it apportions financial responsibility in accordance not just with the harm caused by the firm, but in accordance with the benefit that firm derived from the sale of the product, on one plausible measure of benefit. Market share liability thus institutes the principle of burden-benefit proportionality within an entire product market—or industry. When industry-wide liability is instituted by administrative scheme, it has essentially the same effect, though the extent to which burden-benefit proportionality is realized depends in part on the way the assessment is levied within the industry.

53. Pub. L. No. 85-256, 71 Stat. 576 (1957) (codified as amended in scattered sections of 42 U.S.C.).

The Price-Anderson Act illustrates both the establishment of industry-wide liability by administrative act, and the movement beyond industry liability to society-wide liability. At the time that its constitutionality was litigated in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,⁵⁴ the Price-Anderson Act included an industry-wide fund, albeit one that may not have been large enough to cover the full cost of a major nuclear accident. The District Court opinion in the case explained the link between such a fund—between industry-wide liability—and the principle of burden-benefit proportionality.

[A] liability pool . . . requiring either contributions in advance, or liability for assessment on a unit basis or otherwise, of all power companies building or operating nuclear generators . . . would effectively place the responsibility upon the group most directly profiting from any improvement in the costs or usefulness of electric power[—]the power company stockholders and the customers themselves.⁵⁵

Can the idea of benefit-burden proportionality be linked to society-wide liability? The District Court thought so:

Another rational alternative [to industry-wide liability] would be to make such accidents a national loss and to pay those damaged out of the federal treasury. This would spread the loss among those who benefited indirectly by having the nation's power supply increased as well as among those who presumably benefited directly.⁵⁶

The force of this point—the fairness of society-wide liability—can be seen by considering the rationale of the Supreme Court decision upholding the constitutionality of the Price-Anderson Act, even though its ceiling on total recovery would leave some victims of a major nuclear accident unable to recover from the fund created by the Act. Liability limitation, the court said, “is an acceptable method for Congress to utilize in encouraging the private development of electric energy by atomic power” when Congress reasonably concludes that the development of such power plants is in the public interest.⁵⁷ If public benefit is the rationale for encouraging the private provision of nuclear power, it is fairer for society as whole to share the costs of a nuclear accident, than it is for the costs to be concentrated on those unlucky enough to be harmed by such an accident. Benefit-burden

54. 438 U.S. 59 (1978).

55. *Carolina Env'tl. Study Group, Inc. v. U.S. Atomic Energy Comm'n*, 431 F. Supp. 203, 225 (W.D.N.C. 1977).

56. *Id.*

57. *Duke Power Co.*, 438 U.S. at 86. The rationale under examination here does not support the proposition that some victims be denied recovery because the fund is inadequate as much as it supports the proposition that because society as a whole benefits, society as a whole should bear the burden, not the private party who happens to be pursuing the general good.

proportionality—fairness—favors joining limits on private liability to the creation of society-wide liability.

The widest scheme of society-wide liability is the New Zealand Accident scheme, which covers injuries arising from any and all of the risks of life. This scheme expresses a principle of “community responsibility.”⁵⁸ That principle involves a capacious interpretation of the idea of fairness as proportional sharing of burden and benefit.

[S]ince we all persist in following community activities, which year by year exact a predictable and inevitable price in bodily injury, so should we all share in sustaining those who become the random but statistically necessary victims. The inherent cost of these community purposes should be borne on a basis of equity by the community.⁵⁹

One lesson here is that industry-wide and society-wide liability are animated as much, or more, by the idea of fairness as by the idea of loss-spreading. The contemporary inclination to see all invocation of insurance considerations in tort law simply as an expression of the idea that losses should be dispersed, not concentrated,⁶⁰ appears to blind us to the role being played by considerations of fairness. The idea of fairness that informs enterprise liability makes its presence felt even in the most expansive of accident law’s administrative schemes—even in schemes which appear, at first blush, to be pure expressions of insurance ideas. A second lesson has more to tell us about the enterprise liability idea of fairness itself. A common—and well-taken—criticism of the rhetoric of burden-benefit proportionality is that it is analytically obscure or incomplete: how can we tell who benefits and in what proportion?⁶¹ Appeal to the economic notions of marginal and infra-marginal benefit is out of place here. The variety of forms of enterprise liability extant in our law provide an answer to these questions. That answer reveals an analytic idea, but it also displays the role of controversial, contestable and essentially political judgment.

Why do these schemes claim that the characteristic accident costs of an activity may be fairly distributed by industry- and society-wide liability as

58. THE ROYAL COMM’N OF INQUIRY, REPORT OF THE ROYAL COMM’N OF INQUIRY: COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND 39-40 (1967) (commonly referred to as “The Woodhouse Report”).

59. *Id.* at 40 para. 56 (1967).

60. Dispositions in both economically oriented and corrective justice approaches to tort combine to support this tendency. Within economics, there is a tendency to conceive of tort rules in terms of deterrence and insurance effects. Within corrective justice, there is a tendency to link tort law to wrongdoing of a sort not generally found in enterprise liability. Enterprise liability then comes to be animated by ideals of loss-spreading external to the law of torts. For discussion of these points see Keating, *supra* note 7, at 1860 n.10, and accompanying text.

61. I am grateful to Ken Abraham for urging on me the importance of this criticism.

well as by enterprise liability in tort? Two kinds of answers are on point. The first is that the idea of “characteristic risk” itself yields an answer. In some cases, a risk is characteristic of a firm. If the firm’s activity were to cease entirely a distinctive set of risks would disappear from the world. This is Henry Friendly’s view of the risks of drunkenness that manifested themselves in *Bushey*. If the Coast Guard were to cease operations, there would be a drop in the incidence of drunken sailors in the immediate vicinity of ports. In other cases, the idea of characteristic risk points towards an industry or a product sold by many firms. The disappearance of one coal mining firm may or may not diminish the incidence of black-lung disease (that depends on whether another firm appears to take its place), but the risks of black-lung disease will persist until coal mining is utterly transformed or disappears as an activity. In the case of asbestos, firms may come and go without altering significantly the risks of asbestos-related disease. The product is entirely generic—every firm in the industry sells an identical product. The risk is thus characteristic of the industry not of the firm and industry-wide enterprise liability is therefore more appropriate than firm-specific enterprise liability.

The second kind of answer appeals to the fact that the benefits of risky activities radiate outward in concentric circles. Nuclear power most benefits those who produce and consume it, but it also benefits those of us who merely happen to live in a society made wealthier by its presence. We might plausibly, therefore, pin enterprise responsibility on the nuclear power industry itself, or on society at large. This indeterminacy of benefit is not a peculiarity of nuclear power. The immediate benefits of transporting gasoline by tanker trailer accrue to those in the industry; less immediate but still substantial benefits accrue to those who use gasoline regularly; and still smaller benefits accrue to those who rarely or never drive themselves but benefit from the productive activity that driving enables. The benefits of activities radiate outwards until they diminish to the point where they are no longer identifiable. The determination of who benefits—of what the relevant community of benefit is or ought to be for purposes of attributing responsibility for harm accidentally done—is an essentially contestable matter which can only be settled by the exercise of normative and political judgment. Deciding what risks are sufficiently alike is partly a matter of direct perception, partly a matter of what counterfactual guesses about the disappearance of firms, products, and industries tell us, partly a matter of practical judgment about which risks can be effectively pooled, and partly a matter drawing lines because lines must be drawn. Judgments about communities of benefit are thus collective judgments

about how we should order our lives in common—and properly so.⁶²

Because risky activities radiate their benefits out across a variety of actors, and because the boundaries of communities of risk may be fixed in narrower and broader ways, the idea of fairness can give rise to industry-wide and society-wide liability as well as to enterprise liability in tort. Whether the idea of fairness that animates enterprise liability in tort is best expressed—either in general or in a particular instance—by tort liability, or by an administrative incarnation of enterprise liability, or by an administrative scheme of industry-wide or society-wide liability, is a matter that can only be settled by detailed examination of the possibilities at hand.

III. ENTERPRISE LIABILITY AND THE ASBESTOS CRISIS

The relation of enterprise liability to the asbestos cases is straightforward enough. The asbestos cases are, in large part, a serious and sustained effort on the part of common law courts to fashion a form of industry-wide enterprise liability. That such a form of liability is an appropriate response is evident when we consider just how much the risks of asbestos are characteristic risks of the world of activities. Enterprise liability applies to recurring risks generated by ongoing, enduring activities, and the risks of asbestos related harm are systematic risks par excellence. Like thalidomide and diethylstilbestrol (DES) the asbestos disaster is a horror born of the “world of activities”; harm on a scale that the “world of acts” could not beget. Like the DES cases (albeit in a less pronounced way) the asbestos cases relax strict standards of causation in pursuit of a form of industry-wide liability.⁶³ Asbestos liability, like market share liability in the DES cases, is a judicial attempt to construct a scheme of industry-wide liability.

To situate asbestos more precisely within the “world or activities”—and to understand why the mass risk at work in asbestos threatens to exceed the capacities of enterprise liability as much as to bring enterprise liability into play—we need to distinguish among three different kinds of recurring risks, and dissect the opportunities they offer and the problems they pose for enterprise liability. Let us begin our dissection with the manufacturing

62. Compare HONORÉ, *supra* note 30, at 91.

One can argue that the distribution of risks should, for example as regards motoring, take place at the level not of the individual but of the vehicle-owning population or the whole community. The level at which risks should be distributed in a particular area of community life seems pre-eminently a matter of political judgment.

HONORÉ, *supra* note 30, at 91.

63. See, e.g., O'Brien v. Nat'l Gypsum Co., 944 F.2d 69 (2d Cir. 1991).

defects whose presence set the table for the blossoming of strict products liability in *Escola v. Coca-Cola Bottling Co. of Fresno*,⁶⁴ *Greenman v. Yuba Power Products, Inc.*,⁶⁵ and section 402(A) of the *Restatement (Second) of Torts*.⁶⁶ For its effective operation—though not for its *justification*—enterprise liability depends on risks meeting the law of large numbers and other more precise criteria of insurability. Ideally, individual risks should be members of a large group of homogeneous risks so that they can be pooled with other like risks into a well-functioning risk pool; claims for reparation should not be subject to moral hazard in the sense that victims of such risks should not be able to obtain reparation for harm unless the harm was actually suffered and at the hands of forces beyond their control; the chance of accidental injury should be small relative to the size of the activity so that the cost of bearing the risk is manageable; the chance of loss must be calculable so that it can be anticipated and priced into the activity; and losses must not be highly correlated, so that the materialization of the risk does not precipitate massive liability.⁶⁷

Manufacturing defects—the kind of defect epitomized by *Escola*'s exploding Coke bottle—fully satisfy these criteria of insurability. Such defects are rare but the pool out of which they appear is large: only one in thousands of otherwise indistinguishable coke bottles explodes because of a latent defect in its manufacturing. This makes manufacturing defect related accidents easy to disperse across the enterprise of manufacturing, distributing, selling, and consuming Coke. Manufacturing defect related accident costs are small relative to the activity that imposes them; regular enough to be at least roughly predictable; situated within a large and homogeneous pool of risks; and uncorrelated enough to be readily insurable. Manufacturing defects are, moreover, easy to identify and enterprise liability for manufacturing defects is therefore easily and effectively implemented. Products with manufacturing defects are “lemons,” malformed instances of their own product kind. The standard for identifying such defects is fixed by the normal case of the product at hand and by the evident intentions of the manufacturer for the product.

Design defects are much less easily subjected to enterprise liability. Design defects, too, are recurring risks of well-organized enterprises, but they issue in harm more frequently than manufacturing defects do, and

64. 150 P.2d 436 (Cal. 1944).

65. 377 P.2d 897, 901 (Cal. 1963) (adopting the strict enterprise liability of Traynor's *Escola* dissent as California law).

66. RESTATEMENT (SECOND) OF TORTS § 402(A) (1965).

67. These criteria are discussed in the excerpt from KEETON ET AL., *supra* note 20, at 724-31. I shall refer to these criteria without further citation.

therefore give rise not only to more liability but also to more highly correlated liability. Consider the “exploding” gas tank that famously plagued Ford Pintos.⁶⁸ Whereas a manufacturing defect is a “lemon”—the one bad Coke bottle in ten thousand—a design defect characterizes *every* instance of a product. Every Ford Pinto sold had the same flawed gas tank design. Every Ford Pinto was a devastating accident waiting to happen. When every instance of a product is an accident waiting to happen there will be more accidents than there will be when only the “lemons” are accidents waiting to happen. The accident costs associated with defective designs are thus greater in relation to the economic return from the product. They are also less calculable because the harm done by each accident is uncertain and this uncertainty is magnified by the possibility of many such accidents. Harm from design defects is thus more highly correlated than harm from manufacturing defects. Accident related losses from design defects are thus more likely to strain the insurance mechanisms on which the smooth functioning of a system of enterprise liability depends.

The difficulties of managing the sheer size, uncertainty, and correlation of design defect related accident costs are compounded by the fact that product related accidents arise at the intersection of two activities—the design, manufacture, and marketing of the product on the one hand, and the purchase, maintenance, and use of the product on the other hand. These activities are both purposive and self-consciously aware of one another. Products are designed with their use in mind and used with their design in mind. Because of this interpenetration of producer and user activity, determining when an accident should be attributed to the activity of the manufacturer and when it should be attributed to the activity of the user is a difficult task. Some product accidents are attributable to non-defective design features—knives can inflict severe and even fatal wounds because they are designed to cut, not because they are designed badly. Other product accidents are attributable to features of the users’ activity for which the user is properly held responsible—to misuse of the product, or insufficiently careful use of the product, or to failing to maintain the product properly. When design features are at issue, it is therefore often difficult to determine when to charge an accident to the product’s manufacturer on the ground that the accident flows from a flawed design feature, and when to charge an accident to the user’s activity because the challenged design feature furthers the usefulness of the product and further reduction of the risks engendered by that design would impair the usefulness of the product. Enterprise liability depends on being able to

68. *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Cal. Ct. App. 1981).

charge accidents to activities.⁶⁹ The more difficult that is to do, the less well enterprise liability effects its own aspirations and justifications.

Manufacturing and design defects are both instances of systemic risk, born of and existing only in, the “world of activities.” Yet the opportunities and problems that they pose for the operation of enterprise liability are starkly different. Design defects are far more difficult for an enterprise liability informed law of products liability to master. The systemic risks created by toxic substances such as asbestos ratchet up the challenge to enterprise liability several notches beyond the already high bar set by design defects. With a design defect like the Ford Pinto’s gas tank mere exposure to the risk is not harmful. Pinto users may have been driving rolling time bombs, but in the vast majority of cases those bombs never went off. Asbestos is very different. There may be a threshold level beneath which exposure is harmless, but that threshold appears to be quite low. Above that threshold, exposure to asbestos is a time bomb which never stops ticking until the person exposed dies of some other disease. Above some low threshold, it appears to be only a matter of time before exposure to asbestos manifests itself into a crippling or fatal disease—first in asbestosis and then in mesothelioma. Every exposure sows the seeds of future harm in a way which makes exposure itself an emotional and economic cross to bear. Every exposure opens a risk of devastating harm which does not close until the person exposed dies of some other cause. Harms are even more massive, even more correlated, and even more difficult to calculate than the harms associated with design defects. In these ways, asbestos typifies a third and very modern form of systemic risk, namely, the form of systemic risk generated by the mass production, distribution, and use of powerful *generic* toxic agents. With systemic risks of this kind every exposure may give rise to serious harm.

The vast scale, correlation, and uncertainty of harm *and* the forms of emotional injury and economic loss which characterize asbestos place great demands on enterprise liability. The emotional distress and economic loss that exposure to asbestos itself occasions are sufficiently urgent that a credible claim can be made that exposure to such risk is itself a form of harm. The fear associated with asbestos is not the typical emotional distress that tort law ignores—not the severe but fleeting fright of narrowly escaping serious physical injury at the hands of some harrowing accident. With asbestos, the fear is not momentary fright, however acute, but the enduring dread of serious physical impairment and then death to come. The fear begotten by exposure to asbestos dangles like a sword of Damocles

69. See Keating, *supra* note 7, at 1909-12.

over those who have been exposed. The risk that haunts them closes, and the fear it begets loses its bite, only when the person exposed dies of something else. Such closure brings tranquility too late and too completely.

The pure economic loss associated with exposure to asbestos is likewise special. That economic loss manifests itself, first and foremost, in the expense of special medical monitoring, necessary to manage declining health as best one can and to avoid seeing one's right to reparation slip through one's hands through failure to seek redress in a timely manner. This is not the garden-variety economic loss that comes out in the wash;⁷⁰ it is the specific and substantial burden of exposure to asbestos. For those who have inflicted that burden to wash their hands of responsibility for it under cover of the economic loss rule is all too much like tossing someone who cannot swim into the ocean and then citing the "no duty to rescue" rule as a reason not to extend a lifeline. There are thus compelling reasons to depart from the standard rules of tort law and to recognize claims of emotional distress and economic loss resulting from asbestos-related exposures.

Yet there are also powerful reasons not to award reparation for pure emotional and economic harm. Taken alone, the death and crippling injury inflicted by asbestos appear sufficient to bankrupt the asbestos producing enterprises responsible for those harms. This creates a quandary. It is *prima facie* unfair and unjustifiable for some to be denied recovery for severe physical harm so that others may recover for pure emotional distress and pure economic loss. The comparative damages recovered for asbestos-related injuries ought to be justifiable to all and to each of those injured, in light of the relative urgency of their claims, and the overall scarcity of the resources available to pay those claims. Fairness requires both that claims for reparation be honored in accordance with their relative urgency, and that there be a single comprehensive scheme of damages so that damages are awarded in a coordinated way and the insufficient resources available to make reparation for harm done are distributed as fairly as possible.

These are classic and difficult challenges of enterprise liability. A circle must be drawn delineating those harms for which reparation will be made—thereby constituting a community of those the law recognizes as harmed—and a system must be set up to administer this choice fairly. Both

70. The thought that pure economic loss comes out in the wash contemplates such things as minor auto accidents, which delay many people on their way to work, for a few minutes. Delays of this sort are unfortunately all too common. To attribute particular economic losses like these to particular accidents threatens both to place enormous burdens on ordinary activities and to miss the fact that irksome delays are a characteristic of our transportation system, not the specific harm caused by accidents alone.

the choice of where to draw the line constituting the community of those with legally compensable claims and the choice of how to reconcile the competing claims of different victims with compensable claims are essentially contestable. In each case it is important not only that a reasonable choice be made, but that *one* reasonable choice be agreed upon and adopted. The coordination of rights to reparation matters almost as much as the soundness of the rights recognized. Both are matters of justice. This kind of demand for a comprehensive, coordinated system of rights and remedies is just the kind of demand that presses enterprise liability toward administrative schemes. The common law procedure of case-by-case adjudication is not a promising path to such comprehensiveness and coordination.

The enormous magnitude and extreme correlation of harm characteristic of the asbestos disaster also place enterprise liability under enormous strain. These aspects of the asbestos disaster give it strong resemblance to such classically hard to insure natural disasters as earthquakes, hurricanes, tsunamis, and floods. Enormous, highly correlated losses present extreme problems of insurability. When risks become so large and so correlated that they can no longer be pooled into manageable risk pools and priced into the activities responsible for them, enterprise liability ceases to distribute accident costs across ongoing, profitable enterprises. Instead, it drives those enterprises into bankruptcy. This is itself a partial vindication of enterprise liability. Enterprise liability operates in part as a rough test of whether the accidental injuries inflicted by an activity are worth the candle of benefits that the activity yields. But when the application of enterprise liability to an activity shows that the harm done by the activity so exceeds the good that the enterprise is driven into bankruptcy, one aim of enterprise liability is vindicated another is frustrated. Enterprise liability shows that the activity—here, the use of asbestos—ought to be abandoned but its bankrupting of the enterprises engaged in that activity leaves many of those devastated by it without redress for the devastating injuries that they have suffered. Shrinking the domain of compensable harm—denying recovery for pure emotional distress and economic loss—is one way to mitigate this evil.

The attribution of harm in the asbestos cases also creates daunting difficulties. The problem is not that it is hard to know whether the activity gives rise to the harm, or hard to know whether responsibility for that harm lies with the enterprise or with its victim. Asbestos issues in signature diseases—in asbestosis and mesothelioma. The presence of those diseases usually suffices to vouch for the activity's infliction of harm. The risk of suffering such harm was inflicted on unwitting victims. Whatever else

might be said about this, it surely makes those who bore the risk innocent of responsibility for exposing themselves to that risk. They were deprived by their ignorance of the very possibility of knowingly encountering the risks that came to cripple and kill them. The daunting difficulties, then, have another source: the long latency period of asbestos related disease. For decades, harm was under-attributed to the activity of producing and using asbestos and then—as massive disease and disability began both to manifest themselves and to be traced back to their source—decades of slow-brewing harm came crashing down on the firms responsible for inflicting it.

This “long tail” of claims is another enormous obstacle to the operation of insurance mechanism.⁷¹ It was essentially impossible to foresee, plan for, and price the characteristic harms of asbestos into the product at the time that it was sold and used. These insurability problems not only impair the practical operation of enterprise liability, they also create serious normative and conceptual difficulties for the design of an enterprise liability scheme. Just as the rules of enterprise liability constitute the community of the harmed by drawing a circle around the domain of compensable claims, so too the rules of enterprise liability constitute the enterprise itself, the community of those who imposed the risk and benefited from it. That this may be done in many ways is the principal lesson of the various forms of enterprise liability, common-law and statutory, that we canvassed earlier. When there is a long time lag between the imposition of systemic risk by an activity and the manifestation of that risk in devastating injury, the identification of the community collectively responsible for present harm becomes problematic. At some point, present enterprises whose past selves imposed the relevant risks cease to be plausible embodiments of the relevant community of benefit. This, too, is not only a difficult normative issue, it is also the kind of contestable decision that might be made in different ways, and a decision which needs to be made in a coordinated way.

This brief discussion only scratches the surface of an inexhaustible topic. I hope, however, at least to have suggested why enterprise liability is essential to understanding and appraising asbestos and the case law that it beget. Asbestos illustrates mass risk on the grandest of scales. Risk on this scale is a child of technological activity of a quintessentially modern sort, and of a highly organized kind. Asbestos is an accident of the “world of activities” and an impossibility in the “world of acts.” As a child of the “world of activities,” asbestos invites the application of enterprise liability,

71. In addition to the excerpt from KEETON ET AL., *supra* note 20, at 324-31, see also the Note “‘Occurrence’ and ‘Claims-Made’ Bases for Liability Insurance” which discusses the problems created by claims with “long tails.” KEETON ET AL., *supra* note 20, at 741-42.

the most distinctively modern of the forms of tort liability. Yet asbestos related risk is *so* systemic and *so* inexorably organized that it defeats a judicially wrought, common law species of enterprise liability as much as it is mastered by the construction of such a scheme of enterprise liability.

When a widely used substance is so toxic that every exposure to it above some low threshold sets in motion slow but inexorable mechanisms which yield disability and death decades later, the risk that it gives rise to is so massive that it disables the normal mechanisms of insurability on which enterprise liability depends. Risk this enormous and this extended in time breeds massive, highly correlated harm, unleashed years after it is set in motion, like a cascade of tidal waves. The distinctive features of this kind of systemic risk raise normative questions as hard as the practical ones they present. When exposure sets a sword of Damocles dangling over its victims, pure emotional and economic loss take on a specially urgent character. When the resources available to make reparation for harm done are woefully inadequate to the task, hard questions follow fast on one another's heels. Just what is it that makes some harms worthy of redress by those responsible for inflicting them? When is emotional distress sufficiently severe to demand redress? How should we constitute the community of those harmed in circumstances where the harm done exceeds the capacity of those who have done it to make reparation for the terrible suffering that they have wrought? When harm extends across decades and risk ripens into disease and death thirty or forty years after it is inflicted, equally hard questions about the existence of a coherent community of *benefit* must be faced. Last, but hardly least, the system of industry-wide enterprise liability required to respond to harm on this scale makes heroic demands on the institutional capacities of courts. Case-by-case common law adjudication is not a procedure well-suited to the constructions of the coordinated system of rights and remedies that asbestos cases demand.

IV. WHY PRAISE?

In closing, I want to invoke a theme of Mark Geistfeld's comments,⁷² and say why I have come to praise the asbestos cases, not to bury them. Mark observed that the common law of torts provided invaluable intellectual resources to courts confronting the asbestos disaster. I agree. Our inherited law of accidents, common law and statutory, is a rich and

72. Mark A. Geistfeld, *Moral and Economic Perspectives: Remarks of Professor Geistfeld* 74-84 (Jan. 18, 2008) (unpublished transcript on file with the Southwestern University Law Review).

indeed indispensable resource for thinking about even the most unprecedented sorts of accidents. It provided (and provides) us with the tools for framing and thinking through many of the issues raised by the mass disaster that was (and is) asbestos. The intellectual resources that we have inherited are remarkable. But the institutional resources available to courts are not as great, no matter how creative the courts are. The articulation of an appropriate scheme of enterprise liability requires the kind of coordinated, systematic articulation of rights that is better suited to legislation than adjudication.

Why, then, ought we praise the courts that waded into the asbestos mess? For two reasons: the first is that they did not turn a deaf ear towards the claims of those grievously harmed by asbestos, but responded, in good faith, with remarkable resourcefulness and long years of toil. The same cannot be said of legislatures or markets. These courts were right to respond, and for reasons which reach beyond the morality of enterprise liability. The asbestos “mess” is not just a massive “disaster,” an event of the same kind as a major earthquake. The asbestos “disaster” was—as courts have reasonably concluded—a great injustice, a terrible consequence of wrongful human agency in collective form. The firms that imposed the lion’s share of the risk in the middle third of the twentieth century were at best culpably ignorant of the devastating risks that they imposed on unknowing victims, and at best they preferred their own enrichment to taking steps which would have cost them profit but saved others from immeasurable suffering. At worst, the firms that imposes the lion’s share of the asbestos’ risk were guilty of knowingly inflicting premature death, severe disability, and terrible suffering on tens of thousands of people.⁷³ By the ordinary criteria of the common law of torts, those responsible for the main part of the asbestos risk did great wrong. Courts were right to go to heroic lengths to hold them to account.

73. See the account of the history of what firms knew about the risk of asbestos and when they knew it in *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353 (E.D. Tex. 1981), *rev’d in part by*, *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334 (5th Cir. 1982).