WHY NEGLIGENCE DOMINATES TORT

James A. Henderson, Jr.*

The last several decades of tort scholarship in this country reflect enthusiasm favoring strict enterprise liability as the end position toward which American tort law, appropriately enough, is moving. This Article argues that no such trend is underway; negligence does now, and will in the future, dominate tort. Professor Gary Schwartz reached these same conclusions in a body of work spanning twenty-plus years, culminating in the Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles) *project on which he served as Reporter until his untimely death in 2001. This Article describes this work and supports its conclusions with two considerations that played only a minor role in Gary's scholarship: Strict enterprise liability would generate disputes that would be unadjudicable, and would assign to enterprises risks that would be uninsurable. Thus, even if broad-based strict liability were to be theoretically attractive, as a practical matter it would be manifestly unworkable. Regarding the continued dominance of negligence, Gary got it right.*

* Frank B. Ingersoll Professor of Law, Cornell Law School; A.B., 1959, Princeton University; LL.B., 1962, LL.M., 1964, Harvard University. I would like to thank Mary Coombs, University of Miami School of Law, and Ken Simons, Boston University School of Law, for reading the manuscript and making helpful suggestions.

INTRODUCTION

American torts scholarship divides along several lines of fundamental disagreement. One line separates those who view tort law as reflecting instrumental, mainly microefficiency, objectives from those who view tort as reflecting noninstrumental fairness values.[1] Another line separates those who view strict liability as the foundational tort principle from those who see negligence residing at tort's core.[2] Professor Gary Schwartz, to whom this symposium is dedicated, actively participated in both of these ongoing dialogues. In the efficiency-fairness context, Gary played the role of conciliator, refusing to align himself entirely with either side. Indeed, in one of his last published law review articles, he blends the two philosophical viewpoints in what he describes as "mixed theories of tort law" that achieve both deterrence and corrective justice.[3] Ernest Weinrib's contribution to this symposium assesses Gary's efforts in this regard.[4]

This Article focuses on the debate regarding the centrality of negligence versus strict liability. In contrast to Gary's role as conciliator in the efficiency-fairness context, here he takes sides. In a series of influential articles, he advances the thesis that negligence, not strict liability, is the cen-

1. *See* JAMES A. HENDERSON, JR., ET AL., THE TORTS PROCESS 30–32 (5th ed. 1999). For expositions of the efficiency perspective on tort, see RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 224–29 (5th ed. 1998); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 961 (2001). For treatments of the noninstrumental perspectives, see generally ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995), which explores corrective justice, and George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972), which discusses fairness based on nonreciprocal risk creation.

2. *See generally* Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285, 1335 (2001) ("[O]ur law of torts is torn between these two general principles [of strict enterprise liability and fault liability].") [hereinafter *Theory of Enterprise Liability*]. The seminal article supporting strict liability on noninstrumental fairness grounds is Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973). For a more recent argument that strict enterprise liability is justified on fairness grounds, see Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266 (1997) [hereinafter *Idea of Fairness*]. The seminal article advocating negligence on efficiency grounds is Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972). For a more recent analysis favoring negligence on both fairness and efficiency grounds, see Kenneth W. Simons, *The Hand Formula in the Draft Restatement (Third) of Torts: Encompassing Fairness As Well As Efficiency Values*, 54 VAND. L. REV. 901 (2001).

3. Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997).

4. *See* Ernest J. Weinrib, *Deterrence and Corrective Justice*, 50 UCLA L. REV. 621 (2002).

trally important tort principle.[5] In his view, negligence is not only ethically superior, but it also demonstrates remarkable resilience in spite of vigorous and vocal efforts to replace it with strict liability.[6] The *Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles)*[7] project on which Gary served as Reporter until his death reflects his philosophy. According to the new *Restatement*, the overarching and unifying normative principle of American tort law is fault, consisting of intentional wrongs and negligence.[8] Important examples of strict liability persist, here and there, each subject to its own special rules,[9] but no overarching principle unites them in an effective, coherent whole.[10]

In reaching its conclusion that negligence dominates tort, this Article brings into play process considerations that relate to how our legal system functions in the real world, including the conditions that must be satisfied for strict liability to achieve its objectives. In addition to the substantive reasons advanced by Gary and other writers, process considerations make clear why negligence predominates. To my knowledge, Gary recognized process considerations—"problems of administration" and "practical problems"—in his published work in the law reviews, and admonished legal scholars for generally ignoring them.[11] Thus, to the extent that this Article sheds light on why strict liability plays only a limited role in our tort system, it underscores the soundness of Gary's broader vision regarding the conceptual foundations of the American tort system.

5. Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601 (1992) [hereinafter *The Beginning and the Possible End*]; Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739 (1996) [hereinafter *Employer Vicarious Liability*]; Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963 (1981) [hereinafter *The Vitality of Negligence*].

6. *See infra* notes 51–53 and accompanying text.

7. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) (Tentative Draft No. 1, 2001) [hereinafter Draft No. 1].

8. *Id.* ch. 4 scope note, at 291–92 [hereinafter The Scope Note] explains that "fault" consists of intentional wrongs and negligence, and that each of these is subject to a general rule under which specific torts are organized.

9. *See id.* §§ 20–25.

10. The Scope Note, *supra* note 8, at 292, observes that "[j]ust as there is no single rule of strict liability in tort, but rather a range of specific strict-liability doctrines, so it is appropriate to observe that there is no single theory for strict liability in tort."

11. *See* Gary T. Schwartz, *Waste, Fraud, and Abuse in Workers' Compensation: The Recent California Experience*, 52 MD. L. REV. 983, 1011–12 (1993) ("[T]ort scholars . . . need to reckon with those problems of administration . . . ."); *The Beginning and the Possible End*, *supra* note 5, at 618–19 (discussing "practical problems").

I. THE NEGLIGENCE-STRICT LIABILITY DEBATE

A. A Brief Overview

As the term is used in this analysis, "strict liability" is liability in tort imposed on an actor (including a commercial enterprise) for the harms the actor causes, whether or not the actor is negligent.[12] "Enterprise liability" is synonymous with strict liability, except that the former phrase connotes a broader commitment to holding commercial enterprises strictly liable for the harm they cause—some would say "characteristically cause"[13]—as a matter of first principle.[14] "Negligence" refers to the failure of an actor (including a commercial enterprise) to take reasonable care to prevent harm caused by the actor's conduct.[15] "Fault" includes negligence and the intentional wrongful infliction of harm on others.[16] Because this Article does not include intentional torts, here "fault" is synonymous with negligence. An important difference between strict liability and negligence relates to the treatment of the residual accident losses that flow unavoidably even from reasonably careful conduct. Under negligence, residual losses are borne by the victims, innocent or otherwise, who suffer them. Strict liability shifts residual accident losses to the enterprises that cause them. Given that rational actors under a negligence regime will try to avoid being negligent, thereby avoiding tort liability,[17] negligence can be thought of as a form of "victim's liability" for enterprise-related harms.[18]

Strict liability, especially in its more ambitious enterprise liability iteration, began its rise to prominence among American legal theorists in the period following World War II.[19] By the early 1950s, a growing number of

12. *See* The Scope Note, *supra* note 8, at 291.

13. *See Idea of Fairness*, *supra* note 2, at 1361 (arguing that the conception of "characteristic risk" places a boundary on the liability of enterprises and prevents strict enterprise liability from being illimitable).

14. *See generally* George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 463 (1985) ("[E]nterprise liability provides . . . that business enterprises ought to be responsible for losses resulting from products they introduce into commerce.").

15. *See* Draft No. 1, *supra* note 7, § 3 cmt. d.

16. *See supra* note 8.

17. Efficiency analysts routinely assume that, under a negligence regime, rational actors will always invest adequately in care and thus will not act negligently. *See* A. MITCHELL POLINSKY, INTRODUCTION TO LAW AND ECONOMICS 42 (2d ed. 1989) ("In essence, the rule of negligence leads to the efficient outcome because the injurer is induced to meet the standard of care . . . .").

18. Under negligence, the enterprise is "liable" for the costs of care. The strictest form of victim's liability would be to grant enterprises total immunity from liability, thereby denying victims any recourse whatever in tort, even with respect to negligent actors. Under an immunity rule, enterprises would not even be required to invest in care.

19. *See, e.g.*, Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 506–19 (1948).

scholars viewed strict enterprise liability as an important unifying principle in American tort law.[20] In a landmark article, George Priest chronicles the intellectual history of strict enterprise liability, describing "a conceptual revolution that is among the most dramatic ever witnessed in the Anglo-American legal system."[21] From the early 1960s to the early 1980s, a period that Gary saw encompassing "the rise of modern American tort law,"[22] strict enterprise liability became the favorite of a fairly large number of torts writers.[23] In part, these writers reject—one recent pro-enterprise liability book suggests that enterprise liability scholars are "appalled" by[24]—the limitations that traditional negligence-based regimes impose. At the same time, those who favor strict liability emphasize the social insurance objectives of maximizing victim compensation and loss spreading.[25] In recent years, some scholars have recognized that the rise of strict enterprise liability has, somewhat surprisingly, stalled in its tracks.[26] However, several writers assume its continued potential for dominance, observing that it has merely "gone underground"[27] or is in temporary "eclipse."[28]

Underwhelmed by all of this rhetoric, Gary undertook, in several law review articles over a fifteen-year period, an objective examination of the American torts landscape and reached several conclusions. First, contrary to the view of many writers, he found that courts have vindicated the negligence principle in the last quarter-century, stating that it "prospered enor-

20. *See* Priest, *supra* note 14, at 463 ("By the mid-1950s, the theory of enterprise liability commanded almost complete support within the academic community.").

21. *Id.* at 461.

22. *The Beginning and the Possible End*, *supra* note 5, at 601.

23. *See, e.g.*, Mark Geistfeld, *Should Enterprise Liability Replace the Rule of Strict Liability for Abnormally Dangerous Activities?*, 45 UCLA L. REV. 611, 613 (1998) ("[Strict enterprise liability] has been the intellectual force behind the dramatic expansion in tort liability since midcentury . . . ."); *Theory of Enterprise Liability*, *supra* note 2, at 1333 ("[E]nterprise liability . . . has exerted a substantial influence on our law throughout the course of the twentieth century . . . .").

24. VIRGINIA E. NOLAN & EDMUND URSIN, UNDERSTANDING ENTERPRISE LIABILITY 15 (1995) ("[E]nterprise liability scholars were appalled by the 'harshness' of these [negligence] doctrines . . . .").

25. *See, e.g.*, Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring) ("The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.").

26. *See, e.g.*, Gerald W. Boston, *Strict Liability for Abnormally Dangerous Activity: The Negligence Barrier*, 36 SAN DIEGO L. REV. 597, 598 (1999) ("[S]trict liability for abnormally dangerous activity . . . has evolved to the point of near extinction . . . ."); Stephen D. Sugarman, *A Century of Change in Personal Injury Law*, 88 CAL. L. REV. 2405, 2407 (2000); G. Edward White, *The Unexpected Persistence of Negligence, 1980–2000*, 54 VAND. L. REV. 1337, 1344–46 (2001).

27. *Theory of Enterprise Liability*, *supra* note 2, at 1333 ("[C]lose examination [of recent developments] might prove that [enterprise liability] has merely gone underground and that it, in fact, shapes the most important tort phenomena of the 1990s . . . .").

28. Robert L. Rabin, *Some Thoughts on the Ideology of Enterprise Liability*, 55 MD. L. REV. 1190, 1208 (1996) ("For the present, [enterprise liability] is perhaps in a state of eclipse.").

mously" during that time.[29] Second, he concluded that the arguments in support of strict enterprise liability are not persuasive, observing that strict liability theories "have not really blossomed in the way that the literature has seemed to suggest."[30] And finally, he offered reasons, both theoretical and practical, to explain why this area has developed as it has.[31] A subsequent discussion in this Article describes in somewhat greater detail Gary's role in the negligence-strict liability debate. Suffice it to say that, while Gary is not the only scholar who rejects the idea that strict enterprise liability is centrally important to American tort law,[32] he stands out as the most persistent, articulate spokesman for that point of view.

B. Strict Liability Has Not Expanded over the Last Half-Century

It is understandable why so many legal academics find strict liability attractive. If one assumes for the sake of argument that a broad-based strict liability system could work, shifting residual accident costs to the commercial enterprises that cause them would optimize not only levels of care, but also levels of commercial activity.[33] And it seems only fair that enterprises operated for profit should pay innocent victims for the losses caused—quite deliberately, if not negligently or intentionally—by the activities in which those enterprises engage.[34] Whatever may be said for the merits of these positions, they are at least superficially plausible and, being essentially normative in nature, are not subject to empirical refutation. But the academic adherents of strict enterprise liability also maintain that, while it may in the short run be on temporary hold, in the longer run strict liability will expand in terms of its actual implementation and is emerging as the dominant form of tort liability in modern America.[35] These assertions, being essentially empirical in nature, can be tested.

When one examines the relevant facts, it is apparent that writers have exaggerated the expansion of strict liability. None of the examples to which these writers typically refer—workers' compensation, strict products liability, strict liability for abnormally dangerous activities—support the conclusion that strict liability represents the wave of the future. Moreover, this arrested growth characteristic of strict enterprise liability is neither a recent, nor an

29. *The Vitality of Negligence*, *supra* note 5, at 977.

30. *Id.*

31. *The Beginning and the Possible End*, *supra* note 5, at 605–620.

32. *See, e.g.*, Posner, *supra* note 2; Simons, *supra* note 2; White, *supra* note 26, at 1365 ("Traditional negligence theory has continued to flourish because it is far less distributive, and requires far less participation from governmental units, than enterprise liability alternatives.").

33. *See* POLINSKY, *supra* note 17, at 46–52, 98–100.

34. *See Idea of Fairness*, *supra* note 2, at 1327–28.

35. *See supra* notes 23, 27.

obviously temporary, phenomenon. For example, workers' compensation has been in existence for nearly one hundred years and has yet to spawn any significant extensions beyond work-related accidents. Attempts to extend this classic strict enterprise liability paradigm either have failed altogether[36] or cling tenuously to life in the minority of jurisdictions that have put them in place.[37] Even workers' compensation itself is problematic for a number of reasons.[38] Indeed, workers' compensation is so problematic as an alternative to fault-based tort that major efforts have been undertaken to undermine its exclusivity as the only civil remedy available to injured workers.[39] Workers' compensation exists in every American jurisdiction and is undeniably the best, albeit the only, example of a strict enterprise liability system in actual operation. But recent experience suggests that workers' comp is an idea going nowhere.[40]

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36. The American Bar Association conducted a study in the late 1970s inquiring into the feasibility of an enterprise liability system covering adverse medical outcomes. ABA COMMISSION ON MEDICAL PROFESSIONAL LIABILITY, DESIGNATED COMPENSABLE EVENT SYSTEM: A FEASIBILITY STUDY (1979). In the end, the ABA concluded the proposed system for medical accidents was too problematic to warrant implementation. Kirk B. Johnson et al., *A Fault-Based Administrative Alternative for Resolving Medical Malpractice Claims*, 42 VAND. L. REV. 1365, 1376–77 (1989) (stating that the ABA's Designated Compensable Event proposal was rejected because of "concern that either the costs of such a system would be excessive or it would be necessary to apply strictly scheduled benefits, and that such guaranteed but limited benefits would be widely perceived as inadequate compensation"). In the mid-1980s, the American Law Institute commissioned a study on the subject of enterprise liability. *See* AMERICAN LAW INSTITUTE, REPORTERS' STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY (1991). For a discussion of the portion of that study recommending medical no-fault compensation, see Kenneth S. Abraham et al., *Enterprise Responsibility for Personal Injury: Further Reflections*, 30 SAN DIEGO L. REV. 333, 361–63 (1993).

37. Strictly speaking, automobile no-fault plans, under which each automobile owner-operator receives immunity from negligence-based liability to third persons in exchange for an obligation to maintain first-party insurance coverage for the benefit of himself, occupants of his motor vehicles, and pedestrians injured by his motor vehicles, are not enterprise liability. *See The Vitality of Negligence*, *supra* note 5, at 973. Compared with tort liability, however, it is sufficiently analogous to be treated as an example of a statutory "compensation plan strategy" in a recent book on the subject of enterprise liability. *See* NOLAN & URSIN, *supra* note 24, at 38–60. The authors accurately present auto no-fault and proposals for extensions of no-fault into other areas of commercial and professional activity as examples of enterprise liability principles in action. The authors conclude: "Despite the optimism [in the 1960s and early 1970s] of . . . advocates of compensation plan alternatives to tort, the no-fault movement ground to a halt in 1975, only two years after [one vocal advocate's] call to expand no-fault insurance." *Id.* at 61. Regarding developments since 1975, one authority has observed:

> After an initial flush of success, no-fault has fallen on somewhat hard times. No state has enacted a no-fault statute since 1975, and several no-fault statutes have been repealed. Criticisms of no-fault have centered on costs, particularly in states with generous benefits, . . . and on the loss of the right of many victims of automobile accidents to recover in full for intangible harm.

HENDERSON ET AL., *supra* note 1, at 741.

38. *See, e.g.*, Schwartz, *supra* note 11.

39. *See* JAMES A. HENDERSON, JR. & AARON D. TWERSKI, PRODUCTS LIABILITY: PROBLEMS AND PROCESS 56–62 (4th ed. 2000).

40. *See supra* notes 36–37 and accompanying text.

Another example of strict liability to which writers often refer is products liability. Every American jurisdiction purports to hold manufacturers strictly liable for harm caused by their defective products.[41] With respect to manufacturing defects, courts do impose strict liability on manufacturers.[42] To that extent, American products liability represents (as it has for more than fifty years) a limited version of strict enterprise liability. But the real growth and development in products liability today, and into the indefinite future, concerns product design and marketing.[43] In the areas involving generic product risks, common law liability of manufacturers has always been, and will always be, based on fault.[44]

Another example relied on to support the thesis of strict liability's ascendancy is common law strict liability for abnormally dangerous activities.[45] Once again, the reality belies the rhetoric. In truth, courts have singled out very few activities for strict liability treatment, besides blasting and the storage and transportation of explosive materials.[46] One analyst has recently concluded that "strict liability for abnormally dangerous activity . . . has

41. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (1998). Some jurisdictions use warranty as the conceptual vehicle, but it is strict liability, nonetheless. *See, e.g.*, Swartz v. General Motors Corp., 378 N.E.2d 61, 62 (Mass. 1978).

42. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(a) (1998); *see also* Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 900 (Cal. 1963); HENDERSON & TWERSKI, *supra* note 39, at 81–91 (discussing the development of strict liability in the context of manufacturing defects).

43. *See* HENDERSON & TWERSKI, *supra* note 39, at 337–557. As I have elsewhere noted:

> The products in both [design and failure-to-warn cases] are generically dangerous because every product unit designed and marketed in the same way shares the same risk potential. Unlike manufacturing defects, if you condemn one unit as generically defective, you condemn them all. That, of course, is why litigation over the adequacy of product marketing and design provides the impetus for reforming the products liability system; a manufacturer can wake up one morning and find itself confronted with the real possibility that all the products it has sold for the last 20 years (all 450 billion of them) are legally defective.

Id. at 311.

44. *See, e.g.*, Olson v. Prosoco, Inc., 522 N.W.2d 284, 289 (Iowa 1994) ("In practice, the courts [purporting to apply strict liability] slip back into the type of analyses virtually identical to those employed in negligence cases. Inevitably the conduct of the defendant in a failure to warn case becomes the issue."); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d ("Assessment of a product design in most instances requires a comparison between an alternative design and the product design that caused the injury, undertaken from the viewpoint of a reasonable person. That approach is also used in administering the traditional reasonableness standard in negligence.").

45. *See* Geistfeld, *supra* note 23, at 617 ("[T]he rule of strict liability for abnormally dangerous activities, properly understood, allows courts to expand the role of strict liability to encompass activities that currently are not governed by that rule, but which should be.").

46. *See* 1 DAVID G. OWEN ET AL., MADDEN & OWEN ON PRODUCTS LIABILITY § 6:12, at 394 (3d ed. 2000) ("Many courts have refused to extend this principle of strict liability for abnormally dangerous activities beyond those associated with blasting or hazardous chemicals and substances."); *see also* Draft No. 1, *supra* note 7, § 20 reporters' note cmt. e, at 316 ("Indeed, in certain jurisdictions blasting is essentially the only activity that has been given strict-liability treatment . . . .").

evolved to the point of near extinction."[47] A subsequent discussion in this Article explains the process reasons underlying this trend away from strict liability.[48] That it has occurred suggests that something is fundamentally wrong with the thesis among some academics that trends favor strict liability.

Of course, all of the foregoing examples of how strict liability has failed to fulfill the promises made for it do, after all, represent instances in which legislatures and courts are imposing strict liability on commercial enterprises. Although these discrete areas of strict liability may not be expanding over time, it is unlikely that they will disappear any time soon. And other examples of strict liability, both statutory and court-made, are firmly in place, including several forms of vicarious liability.[49] But some writers have gone further and argued that these various examples of strict liability add up to an emerging jurisprudence of strict enterprise liability that will eventually replace fault as the core principle of American tort.[50] That is the more ambitious claim that Gary challenged so effectively and that this Article aims to put to rest once and for all.

C. Professor Gary Schwartz's Important Role in the Negligence-Strict Liability Debate

Gary's first major contribution to the negligence-strict liability debate was an article published in the *Georgia Law Review* in 1981.[51] He begins the piece by observing that the period from 1960 to 1980 witnessed an "explosion" of the negligence principle in this country,[52] notwithstanding considerable legal scholarship "eager to proclaim the wisdom of strict liability and the deficiencies of negligence."[53] Intrigued, he examines this apparent contradiction in his characteristically careful and objective manner. He concludes that the negligence principle retains remarkable vitality and that

47. Boston, *supra* note 26, at 598.

48. *See infra* notes 121–123 and accompanying text.

49. Regarding vicarious liability, see generally *Employer Vicarious Liability*, *supra* note 5. Another example of explicit common law strict liability is the rule imposing liability on possessors of wild animals for harm caused by the animals' unusually dangerous propensities. *See* RESTATEMENT (SECOND) OF TORTS § 507 (1965). As for legislatively created strict liability, Congress established one such system in the 1970s to cover negative side effects from the federal vaccine program launched in response to the swine flu epidemic. *See* National Swine Flu Immunization Program of 1976, Pub. L. No. 94-380, § 2, 90 Stat. 1113 (1976) (amending section 317 of the Public Health Service Act, 42 U.S.C. § 247b (1976) (repealed 1976)).

50. *See supra* notes 23, 45. Professor Gregory Keating observes: "As long as there are instances of strict liability, . . . enterprise liability will attract adherents." *Theory of Enterprise Liability*, *supra* note 2, at 1333.

51. *The Vitality of Negligence*, *supra* note 5.

52. *Id.* at 963.

53. *Id.* at 964.

American courts and legislatures have undertaken to dismantle a number of formal obstacles that previously had impeded the achievement of the negligence principle's full potential.[54] He also concludes that ethical considerations support retention, rather than replacement, of the revitalized negligence principle.[55] Only in a limited class of cases, those in which plaintiffs are completely passive victims of risky activities knowingly undertaken by commercial enterprises, are ethical arguments favoring strict liability persuasive.[56]

More than a decade later, Gary returned to the negligence-strict liability debate in another article in the *Georgia Law Review*.[57] In addition to reaffirming his earlier conclusions and observing that they had been "accepted as generally accurate by tort scholars,"[58] he acknowledges that the expansionary period of negligence law was coming to an end.[59] He also explores a subject not touched upon earlier, one of particular interest in the context of this Article: the reasons why the revitalized negligence principle appears to have secured its place as the centerpiece of American tort. Among these reasons, he notes first that the "resonance of tradition" supports fault-based liability—by 1960, the negligence standard had served as the primary basis of tort liability in this country for over a century.[60] Second, negligence reflects strong fairness values.[61] Third, the negligence principle's potential for discouraging improper harmful conduct is appealing.[62] Finally, especially in its modern, expanded version, negligence seems to judges to achieve "a substantial measure of loss distribution."[63]

In addition to these conceptual rationalizations, in his 1992 *Georgia Law Review* article Gary offers cultural explanations for the expansion, and hence the resilience, of the negligence principle since 1960. The social reforms implemented by the Warren Court, he argues, emboldened state judges to eliminate encumbrances operating on tort law.[64] Gary also offers

54. *Id.* at 964–70.

55. *Id.* at 1003. Thus, Gary wrote:

> Ethically regarded, the idea of liability for harm caused by one's unexcused errors and mistakes is both straightforward and intuitive. By comparison, the purely ethical arguments in favor of strict liability seem frequently to encounter difficulties of a sort that encourage their supporters to seek the assurance of negligence-like positions.

Id.

56. *Id.* at 1003–04.

57. *The Beginning and the Possible End*, *supra* note 5.

58. *Id.* at 602.

59. *Id.* at 603 ("[T]he expansion of modern tort law has essentially ended.").

60. *Id.* at 607.

61. *Id.* ("Negligence liability . . . is associated with strong fairness values.").

62. *Id.* ("An obvious safety advantage of negligence liability is that it can discourage improper harmful conduct . . . .").

63. *Id.* at 608.

64. *Id.* at 609–10.

hypotheses regarding the influence of general cultural shifts, from the relative complacency of the Eisenhower years to the public policy activism of the era commencing with John Kennedy's administration.[65] And for tort judges who were expanding negligence-based liabilities, corporate defendants appeared to be "colossi" who could readily bear the increased financial burdens involved.[66] Why did not these same cultural forces push American courts to the logically defensible conclusion that strict enterprise liability was the ideal tort regime? Gary suggests that only a loss-distribution rationale could justify moving from an expanded, revitalized negligence principle to broad-based strict liability, and concludes that "judges have intuited the fact that loss distribution standing alone does not provide an acceptable or legitimate basis for tort liability."[67]

Gary's third major foray into the thicket of the negligence-strict liability debate addresses the subject of employer vicarious liability.[68] Although some writers have attempted to place vicarious liability descriptively in the negligence camp, Gary classifies the doctrine as one of true strict liability.[69] In a 1996 article, he examines and critiques the rationales traditionally offered in support of employer vicarious liability. More than in Gary's other published work, this article takes the form of walking the reader through the pros and cons of each aspect of this subject, sharing his thought processes along the way.[70] He concludes that corrective justice rationales for vicarious liability are "not persuasive"[71] and that the efficiency rationales are "promising, yet incomplete."[72] To complete the efficiency rationales, Gary recognizes that courts may lack capacity to determine whether any given employer has negligently failed to exercise control over its employees who cause harm, or otherwise has failed to take adequate precautions.[73] He then suggests that imposing strict vicarious liability on employers is probably the only effective way to ensure that employers will adopt safety measures known by them (but not necessarily by the courts reviewing their conduct) to be cost-effective.[74] Describing himself as "open-minded"[75] regarding the more general fairness-versus-efficiency debate, he insists that, merely be-

65. *See id.* at 610–11.
66. *See id.* at 615.
67. *Id.* at 640.
68. *Employer Vicarious Liability*, *supra* note 5.
69. *See id.* at 1741.
70. *See generally id.* "But pass that by, and focus on those cases . . . . In any event, turn now . . . . As one who himself lives in a public institution, I can tell you how extremely difficult it is for my institution to get rid of an incompetent administrator . . . ." *Id.* at 1757–59.
71. *Id.* at 1767.
72. *Id.*
73. *Id.* at 1760 ("[T]he employer's failure to adopt a cost-justified precaution might end up escaping the attention of the plaintiff and the court.").
74. *See id.*

cause a legal analyst cares about deterrence as a social goal, he should not automatically be classified as an economist.[76]

Interestingly, Gary does not explicitly connect his analysis of vicarious liability to his earlier *Georgia Law Review* articles comparing negligence and strict liability. Instead, he accepts employer vicarious liability as a legal fact of life and confines his inquiry to a search for the most satisfying theoretical justifications for its universal acceptance by both courts and commentators.[77] There is a broader lesson to be learned from this. To an extent not achieved by any other American legal writer in the last quarter of the twentieth century, Gary Schwartz examined the relevant data—mostly judicial decisions and statutes—open-mindedly and sought theoretical explanations that best fit those data. In doing this, he self-consciously avoided ideological commitments and refused to classify himself as belonging to either the fairness or the efficiency schools of legal analysis.[78] To put it bluntly, Gary had "no axe to grind." He especially enjoyed challenging the factual assumptions that more ideologically committed writers—especially efficiency theorists—typically make in their own analyses.[79]

At the risk of mischaracterizing a body of work by a writer who is unavailable to set the record straight, I would like to offer my own take on Gary's views regarding the negligence-strict liability debate. Rather than starting with rhetoric or abstract theory, Gary started with patterns of judicial decisionmaking in the decades following 1960. Rather than discovering a contraction of the traditional negligence principle, as strict enterprise liability theorists had been predicting since shortly after World War II, he observed a dramatic expansion and revitalization of that principle. And Gary observed that, during the same period, no expansion of strict liability had occurred—indeed, in a number of strict liability contexts, he discovered stagnation and retrenchment. Gary concluded that claims that the American tort system is moving toward strict enterprise liability are unfounded.

Regarding the question of why negligence dominates tort, he found the answer in a combination of ethical and practical considerations. Ethically, basing liability on wrongful conduct rather than on conduct that merely

75. *Id.* at 1749 ("I try to be open-minded, and look at what justifications each school of scholars might be able to offer on behalf of particular rules of the tort system.").

76. *Id.* at 1764.

77. *See id.* at 1745 ("[T]here is now a consensus among those Americans who think about tort law that vicarious liability is an essential element in the tort system. Any idea of repealing vicarious liability would seem to us preposterous, inconceivable.").

78. *See supra* notes 3, 75–76 and accompanying text.

79. *See Employer Vicarious Liability*, *supra* note 5, at 1764 ("There is no reason why all analysts who care about deterrence as an important social goal should be classified as economists or required to accept the complete methodology of an economic analysis, and all the arguably artificial assumptions tied to that analysis.").

causes harm appeals to the shared intuitions of American judges; practically, the revitalized negligence principle accomplishes most of what a workable regime of strict enterprise liability would accomplish. Gary recognized that courts and legislation have traditionally imposed strict liability here and there, apparently whenever defendants' commercial activities are inherently risky, causation is fairly straightforward, and plaintiffs are passive, helpless victims.[80] The savings in transaction costs in such instances warrant departures from the negligence principle. But these examples of strict liability represent relatively isolated exceptions to the traditional regime of fault-based liability. No general trend toward strict liability is discernible, he concluded, nor is such a trend likely to materialize in the foreseeable future.[81]

D. The Position of the New *Restatement (Third) of Torts* Regarding the Negligence-Strict Liability Debate

Gary Schwartz served, up until his death in the summer of 2001, as Reporter for the *Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles)* project.[82] Tentative Draft Number 1 of that project contains separate treatments of negligence and strict liability.[83] The Scope Note to the chapter on strict liability explains that, while separate black-letter provisions set forth general rules of fault that impose liability on a party who intentionally or negligently inflicts physical harm, no general rule of strict liability in tort exists.[84] Particular rules in the new Restatement recognize strict liability in certain circumstances, but each rule exists separate from the others and has its own unique elements.[85] The Scope Note goes on to observe that, just as there is no single rule of strict liability in tort, neither is there a single theory of strict liability.[86] The Note concludes that "[w]hile a number of rationales and policies are generally available in explaining both the coverage and the limits of strict-liability doctrines, each of the particular doctrines

80. *See supra* note 56 and accompanying text.

81. The second part of this assertion is probably my own projection rather than Gary's. Given his characteristically cautious approach to legal scholarship, he might balk at my putting words of prediction in his mouth. The last paragraph of his 1992 article in the *Georgia Law Review* is worth reading in this vein. The last sentence reads: "Most of modern tort law can hence be expected to persevere." *The Beginning and the Possible End*, *supra* note 5, at 702.

82. Professor Michael Green came onto the project as Co-Reporter before Gary became ill; after Gary's death, Dean William Powers came on as Co-Reporter with Green. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) xiii (Tentative Draft No. 2, 2002).

83. Chapter 3 covers negligence; Chapter 4 covers strict liability. Draft No. 1, *supra* note 7, at xvii–xviii.

84. The Scope Note, *supra* note 8, at 291 ("There is . . . no general rule of strict liability in tort.").

85. Draft No. 1, *supra* note 7, §§ 20–25.

86. *See supra* note 10 and accompanying text.

may balance or accommodate these rationales and policies in its own distinctive way."[87] That Gary would guide the Restatement project in this direction should surprise no one familiar with his scholarly work published prior to being appointed Reporter to the project. It should also not be surprising that the proposed new Restatement's treatment of strict liability would draw fire from those who view strict enterprise liability as an important unifying theory of tort.[88]

II. STRICT LIABILITY DOES NOT DOMINATE TORT BECAUSE, EXCEPT IN LIMITED CIRCUMSTANCES, IT IS NOT VIABLE

Most of the participants in the negligence-strict liability debate assume that their preferred approaches to tort are viable and argue that their theories are fairer or better promote allocative efficiency. These substantive arguments based on assumptions of viability are engaging and powerful. Resolving them is beyond the scope of the present inquiry. But apart from the substantive merits, the impact of limitations of legal process must still be considered. More specifically, it must be considered whether strict enterprise liability, as a broad-based theory of the sort envisioned by some tort scholars, is administratively viable—whether it could be made to function as intended. This part of the Article argues that broad-based strict liability would not be viable.

Thus, even if one were to assume that a widely applicable system of strict enterprise liability is preferable to negligence from the theoretical perspectives of promoting fairness and efficiency, the process difficulties that would be encountered in its implementation would be overwhelming. By contrast, the fault-based liability system works reasonably well, in large part because it places a greater portion of responsibility for risk management on the victims who suffer accidental harms rather than on the commercial enterprises that contribute to causing them. These process considerations regarding implementation, when coupled with Gary's theoretical substantive analysis, validate the fault-centered tort landscape that he portrays in his scholarship.

A. An Overview of the Necessary Conditions for Maintaining a System of Strict Liability

To be viable, a strict liability system must satisfy two necessary conditions: The liability disputes that it generates must be adjudicable, and the

87. The Scope Note, *supra* note 8, at 292.

88. *See Theory of Enterprise Liability*, *supra* note 2.

risks for which it holds commercial enterprises strictly responsible must be insurable. The first requirement of adjudicability reflects the fact that courts are called upon to resolve liability disputes in our torts system. Adjudicability is a matter of degree. It depends on the extent to which the applicable rules of decision allow the parties on both sides to work through the relevant issues at trial, insisting upon a favorable outcome as a matter of right.[89] For disputes under strict liability to be adjudicable, the boundaries of the liability system—the descriptions of harm-causing activities for which the system holds enterprises strictly responsible—must be relatively specific and must not depend on fact-sensitive risk-utility calculations.[90] The reasons why these boundary descriptions must be crisp rather than fuzzy relate in part to strict liability's self-proclaimed objective of achieving a non-fault-based liability regime at relatively low transaction costs.[91] But even if a strict liability system avoided self-defeating reliance on notions of fault, as long as the boundary descriptions are indeterminate, the disputes they present will defy rational, consistent resolution by means of adjudication.[92]

Moreover, even if the boundary descriptions of a proposed strict liability system adequately identify which activities of which enterprises are to be held strictly responsible, the system must include adequate causation triggers that define the harms for which subject enterprises are liable. But-for actual causation is insufficient by itself because, without further limitations, it allows an unmanageably large number of potential claims into the reparations system. Countless combinations of commercial activities are but-for causes of virtually every significant accidental loss in our society. Some further limitation, akin to the proximate causation limitation in fault-based liability systems, is necessary.[93] The problem, of course, is working out a viable proxi-

89. *See* James A. Henderson, Jr., *Process Constraints in Tort*, 67 CORNELL L. REV. 901, 905–11 (1982).

90. When courts and legislatures select categories of activities for strict enterprise liability treatment, they engage in a broad-based, legislative-type analysis. If courts attempt to perform this task on a case-by-case basis, it severely taxes the limits of traditional adjudication. *See generally* James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1301–08 (1992). Thus, by developing the categories of "abnormally dangerous activities" accretively over time, and making sure that the categories, once established, are described specifically and crisply, without reference to fuzzy reasonableness standards, disputes involving the dangerous activity rubric are rendered adjudicable. By contrast, the general negligence standard achieves adjudicability on a case-by-case basis by a combination of techniques peculiar to the negligence concept. *See infra* notes 172–174 and accompanying text.

91. For an explanation of the transaction cost-reduction objective of strict liability, see GUIDO CALABRESI, THE COSTS OF ACCIDENTS 225–26 (1970).

92. The "abnormally dangerous" standard is not the same as the negligence standard, and yet traditionally it has been assigned to judges to apply in building bright-line categories, over time, as a matter of law. *See* Draft No. 1, *supra* note 7, § 20 cmt. l.

93. *See generally* HENDERSON ET AL., *supra* note 1, at 297–344.

mate causation-type limitation to strict liability that does not rely, directly or indirectly, on the determination that a given defendant enterprise has been negligent. As with the requirement that boundary descriptions be sufficiently bright-line, the causation triggers in a strict liability system must not rely on the very fault concept from which the system seeks to escape.[94] As will be made clear in subsequent discussions of concrete examples, the problems of working out adequate causation triggers are among the most dauntingly difficult problems facing any strict liability system.

The second fundamental condition required for viability—insurability—reflects the reality that strict enterprise liability constitutes an insurance-compensation system whose primary objectives include loss shifting and spreading rather than risk management and control.[95] Enterprises held strictly liable function as insurers; victims who receive compensation are the insureds. For any insurance system to be viable, the risks insured against must be ascertainable and quantifiable ahead of time. Moreover, insureds must pay premiums—in connection with strict enterprise liability, by means of increments included in the prices of goods and services supplied by the enterprise—that proportionally reflect their contributions to the relevant risk pools. In connection with commercial insurance, insurers must classify risks to keep premiums proportional to insureds' contributions to the risk pools.[96] Risk classification reduces adverse selection, which otherwise occurs when high-risk insureds do not pay appropriately higher premiums—when they are undercharged relative to lower-risk insureds.[97] When lower-risk insureds are thus overcharged, they leave the insurance pools, forcing the insurer to raise premiums to cover the higher-risk insureds who remain. Such premium increases cause a new set of relatively lower-risk insureds to leave the pools, requiring further premium increases, and so on. Insurers protect against this unraveling of insurance pools by classifying risks—by requiring that insureds pay premiums that are proportional to the risks of loss those participants bring with them. If for any reason—as with most strict liability systems—the premiums charged are uniform across insureds,[98] either the risks contributed by insureds must also be uniform or the choice of whether

94. *See supra* note 55.

95. *See supra* note 25 and accompanying text.

96. *See* KENNETH S. ABRAHAM, INSURANCE LAW AND REGULATION 2 (3d ed. 2000).

97. *Id.* at 3–4.

98. For most commercially distributed products or services, the distributor cannot feasibly charge different prices according to risks presented by different purchasers. Some types of products are used and consumed by certain types of consumers. *See generally* Jon D. Hanson & Kyle D. Logue, *The First-Party Insurance Externality: An Economic Justification for Enterprise Liability*, 76 CORNELL L. REV. 129, 154–58 (1990). But within those broad categories, price discrimination is not possible.

to be covered must not be within individual insureds' control.[99] Without adequate classification, insurance pools will disproportionately attract high-risk insureds, threatening the viability of those pools. As a subsequent discussion makes clear, these conditions are difficult for a strict liability system to satisfy.

Another threat to the viability of any insurance scheme is moral hazard—the natural tendency for insureds to increase their risks of incurring covered losses by risky conduct after the insurance takes effect.[100] Like adverse selection, moral hazard threatens to allow higher-risk insureds to pay less than they should for coverage. Thus, it tends to drive lower-risk insureds, who pay more than they should, out of the insurance pools, thereby threatening the insurance scheme with crushing liabilities generated by the higher-risk insureds who remain. Commercial insurers combat moral hazard by excluding from coverage losses resulting from high-risk conduct by insureds.[101] When strict liability requires enterprises to function as insurers, it must somehow prevent those who are covered from significantly increasing the risk of covered losses once the enterprise's obligation to insure is in place. Putative victims, in other words, must play a generally passive role in a strict liability system.[102] When the insured can manipulate the risks, the insurance scheme is seriously threatened.[103]

B. Broad-Based Strict Liability Would Not Be Viable Because It Would Generate Unadjudicable Disputes

The issue here is whether a broad-based strict liability system could work. Isolated examples of strict liability currently exist and appear to function tolerably well.[104] It follows that these areas of strict liability presumably satisfy the necessary conditions for viability. To understand why broad-

99. *Cf. infra* notes 154–156 and accompanying text.

100. *See* ABRAHAM, *supra* note 96, at 4.

101. All commercial insurance contracts covering accidental loss exclude situations in which applicants know particular losses are likely to occur, or in which insureds knowingly or recklessly cause covered losses. *See, e.g.*, Unigard Mut. Ins. Co. v. Argonaut Ins. Co., 576 P.2d 1015–17 (Wash. Ct. App. 1978) (holding that a fire insurance policy excluded losses that were "either expected or intended from the standpoint of the insured"); *see also* Commercial Union Ins. Co. v. Taylor, 312 S.E.2d 177, 178–79 (Ga. Ct. App. 1983) (holding that a fire policy excluded losses when "the hazard was increased by any means within the control or knowledge of the insured").

102. *See generally* Richard A. Merrill, *Compensation for Prescription Drug Injuries*, 59 VA. L. REV. 1 (1973) (discussing this thesis in the drug context in light of the fact that drug consumers are in the worst position to reduce the risk of injury).

103. A fairly common form of cheating at roulette tables in gambling casinos is attempting by sleight-of-hand to increase the size of one's bet after one's number, or color, has come up a winner. *See* Peter G. Demos, Jr., *Roulette Game Protection*, *in* KATHRYN HASHIMOTO ET AL., CASINO MANAGEMENT: PAST, PRESENT, FUTURE 115, 117 (2d ed. 1998).

104. *See supra* note 85 and accompanying text *infra* Part II.D.

based strict liability would not be viable, it will be useful to consider how these limited examples of strict liability manage to function effectively. Recall that courts impose strict liability on product manufacturers for harm caused by manufacturing defects, but they rely on negligence principles to work out manufacturers' responsibilities for product design and marketing decisions.[105] The strict liability portion of our products liability system rests on relatively bright-line boundaries—"commercial sellers and other distributors of products containing manufacturing defects"—that courts have, over time, established with substantial formality.[106] While determining what is and is not a "product sold and distributed" is an ongoing project,[107] the definition of "manufacturing defect" is straightforwardly unambiguous and mechanical in nature, relying on the bright-line standard of physical departures from the manufacturer's intended design.[108] No case-by-case risk-utility calculus is involved in either instance,[109] and courts have borrowed the cause-in-fact and proximate causation triggers, with only minor adjustments, from traditional negligence analysis.[110]

To appreciate the unadjudicability of liability disputes under a broad-based strict liability system, consider the boundary and causation problems that would arise in connection with a system in which product manufacturers were held strictly liable for all the harm their products cause, whether or not those products were defective.[111] Indeed, the threshold policy question would be why courts should limit such a strict liability system to "products" in the first instance. Our existing products liability system maintains the boundary between products and services largely because commercial suppliers of services, in contrast to suppliers of products, are not held strictly liable.[112] Thus, the products boundary exists primarily in order to support a viable regime of strict liability for manufacturing defects.[113] If the decision were ever reached to abandon the defectiveness requirement and extend strict liability to all product-related risks, including the generic risks cur-

105. *See supra* notes 41–44 and accompanying text.

106. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(a) (1998).

107. *Id.* § 19 ("Product"); *id.* § 20 ("Sells or Otherwise Distributes"). While courts continue to develop these boundaries over time, the definitions are, as with abnormally dangerous activities, *see supra* note 92, for the courts to determine as a matter of law. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 19 cmt. a; § 20 cmt. l (1998).

108. *Id.* § 2(a).

109. *See id.*

110. *See generally* HENDERSON & TWERSKI, *supra* note 39, at 147–217.

111. *See generally* Henderson & Twerski, *supra* note 90.

112. *See* Ramos v. Silent Hoist & Crane Co., 607 A.2d 667 (N.J. Super. Ct. App. Div. 1992) (holding that an installer of electrical components is not subject to strict liability); Watts v. Rubber Tree, Inc., 853 P.2d 1365 (Or. Ct. App. 1993) (holding that tire recapper, a service provider, is not strictly liable).

113. *See supra* note 42.

rently handled under a fault-based regime,[114] the primary reason for the system limiting itself to products would vanish.[115] And once the boundaries of strict liability were expanded to include all commercial activities, including the generic risks associated with products and services, the relevant causation triggers would be required to carry more weight conceptually than they can possibly bear. As noted earlier, most accidental losses in our society can be causally connected, on a but-for basis, to endless combinations of commercial activities.[116] The issue of "Which commercial activities caused which harms?" has long been recognized as the most difficult part of comprehensive strict liability.[117] Without the conceptual linchpins of "negligence" and "defect," courts administering a broad-based strict liability system could not possibly reach consistent, rational outcomes.[118]

Some writers suggest that the causation issue could work in a strict enterprise liability system by employing the concept of "characteristic risk" as the causation linchpin.[119] Each enterprise would be responsible only for those particular risks that are characteristic of that particular enterprise. This approach may work in connection with limited areas of strict liability, such as liability for abnormally dangerous activities, wherein discrete commercial activities like blasting are singled out ahead of time as a matter of law for special treatment.[120] Courts can rationally and consistently determine whether certain harmful results from blasting—for example, property damage caused from a distance by the vibrations from blasting[121]—are compensable by asking whether the risk of that sort of damage is among the risks that induced courts to classify blasting as abnormally dangerous in the first instance.[122] But when the threshold commitment is not limited to discrete activities, such as blasting, but extends to all commercial enterprises that are capable of harming others, the concept of characteristic risk is too ambiguous and inclusive to serve as an adequate analytical tool with which to sort out the relevant responsibilities.[123]

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114. *See supra* note 44 and accompanying text.

115. That is, once strict liability was extended to the generic risks associated with product design and marketing, no reason would remain for refusing to extend strict liability to the functionally similar generic risks associated with the commercial provision of services. Indeed, design and marketing can be said to comprise the services dimensions of manufactured products.

116. *See* text preceding *supra* note 93.

117. *See* CALABRESI, *supra* note 91, at 135–73.

118. *See generally* Henderson & Twerski, *supra* note 90, at 1279–86.

119. *See supra* note 13.

120. *See supra* notes 46, 92.

121. *See, e.g.*, Foster v. Preston Mill Co., 268 P.2d 645, 649 (Wash. 1954) (holding that a blaster was not liable for harm to sensitive mink caused by vibrations from distant blasting).

122. *Id.* at 648 ("Is the risk that any unusual vibration or noise may cause wild animals, which are being raised for commercial purposes, to kill their young, one of the things which make the activity of blasting ultrahazardous?").

123. *Cf. Employer Vicarious Liability*, *supra* note 5, at 1750. Thus, Gary wrote:

A concrete example will help to clarify this important point. Suppose that the plaintiff is at home in his basement, working on a wood lathe.[124] He has just finished a meal of pasta, washed down with two cold beers.[125] At a critical juncture, the light over his head suddenly goes out and, drowsy from lunch, he steps on a roller skate on the floor next to where he is standing and falls, injuring his hand in the turning lathe mechanism. The plaintiff brings a tort action against the contractor who built the home, the subcontractor who installed the lighting, and the manufacturers and distributors of the pasta, the beer, the roller skate, and the power lathe, joining them all as defendants. Assuming that the activities of all these defendants are but-for causes of the accident, how would the court under a broad-based strict enterprise liability system decide which defendants should be liable for which portions of the plaintiff's harm? Under existing law, the court would identify the responsible party by applying the limiting principles of fault, product defect, and proximate causation.[126] In connection with a broad strict liability system that has abandoned these limiting principles, the inherently ambiguous concept of characteristic risk would lead to conceptual chaos.[127]

> The ["characteristic risk"] rationale has never been accepted by the tort system as a whole. The harms of knife cuts are in some sense "characteristic" of the distribution of knives; adverse side effects are "characteristic" of the manufacture of prescription drugs; and injuries to passengers are evidently "characteristic" of the operation of a bus system. Yet our tort system shows no interest in imposing automatic liability on the companies that produce knives and drugs and that operate buses. Whatever our system's rules of strict liability, they exclude such results.

Id. Gary talks about the inadequacy of the "characteristic risk" concept when all dangerous commercial activities are included in a broad-based strict enterprise liability system. Under such a system, knife-related injuries would be included, as Gary suggests, under the "characteristic risk" approach to causation, and yet that result is intuitively objectionable. Consider the example in the text following this note.

124. Compare this with the facts in the landmark decision in *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 898 (Cal. 1962) (holding manufacturer strictly liable for defect in power tool).

125. Compare this with the example in Henderson & Twerski, *supra* note 90, at 1280 (illustrating the difficulty of "[but-for cause-in-fact under] defect-free strict liability" [in a hypothetical where plaintiff, after eating pasta and drinking two bottles of beer, trips on a roller skate, falls down stairs, crashes head through television set]).

126. The best, and probably the only, bet for the plaintiff would be the lighting system that suddenly failed, but only if it could be proven that the contractor's negligence somehow caused the failure. Or possibly the lathe manufacturer for failing to provide an adequate safety guard? None of the other products appear to have been defective in any way. And the contractor may get off, even if negligent, on a statutory repose provision common in many jurisdictions. *See, e.g.*, ALA. CODE § 6-5-221(a) (Supp. 2001). Under traditional tort law, in the absence of any product defect, this sort of accidental loss is borne by the clumsy homeowner.

127. It is difficult to see how any, or many, of the possible defendant enterprises could be excluded without analytical sleight-of-hand. What happened to our clumsy homeowner appears to have been a paradigmatic example of what characteristically flows from having beer, light bulbs,

Some tentative conclusions may be drawn from the analysis to this point. Discrete areas of strict liability under existing law are viable because courts and legislatures draw the boundaries of each area cleanly and crisply and rely, in selecting each area for strict liability treatment, on rationales that support coherent, consistent resolutions of the proximate causation issue. From the process perspective being developed here, these discrete areas of strict liability function effectively precisely because they are discrete and formally bounded. Once these boundaries are cast aside and strict liability expands to broad-based enterprise liability, rational, consistent allocations of responsibilities among enterprises become impossible, at least in a form reflecting concern for fairness and deterrence objectives. One might as well impose a wealth-based general tax and compensate accident victims—indeed, all victims of misfortune—out of the proceeds.[128]

C. Broad-Based Strict Liability Would Not Be Viable Because the Risks It Would Assign to Commercial Enterprises Would Be Uninsurable

An earlier discussion of the insurability requirement noted that, to achieve viability, a broad-based strict liability system must assure that the risks are ascertainable ahead of time and that the commercial enterprises held strictly liable as insurers are adequately protected from the potentially devastating effects of adverse selection and moral hazard.[129] It will now be demonstrated that even if a broad-based strict liability system could somehow surmount problems of adjudicability, it would not be able to surmount intractable problems of uninsurability. Such a system could fairly easily limit itself to ascertainable risks,[130] but even so, the risks assigned to defendant enterprises would be uninsurable. To understand why this conclusion is in-

power lathes, and roller skates around the house. If all of these activities are implicated, how will the liabilities get sorted out?

128. For a recent discussion of the development of tort liability, contrasted with the alternative of social insurance, see generally John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First-Party Insurance Movement*, 114 HARV. L. REV. 690 (2001). Witt argues:

> In most other Western nations, social insurance programs provide a much higher share of accident victim compensation than they do in the United States. The American accident law regime in the early twenty-first century, by contrast, is characterized by relatively greater reliance on costly tort litigation that leaves victims uncompensated, does a poor job of deterring accidents, and satisfies few of its constituencies other than the lawyers who profit from it.

Id. at 697.

129. *See supra* notes 97, 100 and accompanying text.

130. Again, this would move the system slightly toward fault, *cf. supra* text accompanying note 94, but the adjustment could be made without undermining completely the commitment to strict liability.

escapable, it is useful once again to consider how existing and more limited examples of strict liability have managed to achieve insurability. Recall that the key to protecting enterprises in this regard is to prevent those who obtain insurance coverage from significantly increasing the risk of covered losses once the enterprise's insurance obligation is in place.[131] Essentially, this means that, once a commercial enterprise is insuring the risk, the enterprise and not the putative victim who may suffer harm must control the risk.

Returning to the examples considered earlier, several features of the strict liability regime covering manufacturing defects combine to place post-sale control of the relevant risks exclusively in the hands of product distributors. Most importantly, courts require that the defect that eventually causes harm must have been present at the original time of distribution—and release of control—by the defendant.[132] Commercial distributors are not strictly liable for physical defects that occur after distribution,[133] and courts deny recovery to plaintiffs who discover defects and proceed to use or consume the defective product units.[134] With respect to the risks presented by manufacturing defects, the purchase of a new product unit resembles the placement of a wager on a toss of dice. No one knows whether the particular unit contains a defect, but the manufacturer knows the odds almost exactly. Once the purchase is made—once the dice are tossed—no player may deliberately affect the outcome without forfeiting the right to recover.[135] When a purchaser's number comes up—when an original defect causes accidental harm—a tort/insurance payout is due. Courts and commentators from the very start have understood the insurance implications of strict liability for manufacturing defects and have self-consciously explained and justified it in these terms.[136]

Regarding the common law rules imposing strict liability for abnormally dangerous activities, courts have been careful to limit liability so as to satisfy the requirement of insurability. Thus, the victims of abnormally dangerous commercial activities are typically passive bystanders who cannot control

131. *See supra* notes 102–103 and accompanying text.

132. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, at 14 (1998) ("A product is defective when, *at the time of sale or distribution*, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings . . . .") (emphasis added).

133. Manufacturers are liable for harm caused by their post-sale negligent failures to warn or recall. *See id.* §§ 10–11.

134. Prior to the comparative fault revolution, such conduct by plaintiffs constituted a bar to recovery. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965). With the coming of comparative fault, such conduct reduces, but does not automatically bar, recovery. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 17 (1998).

135. *Cf. supra* note 103.

136. *See supra* note 25 and accompanying text.

the risks of injury.[137] Courts limit the enterprises' exposures to liability when victims either deliberately place themselves at risk or refuse to engage reasonably in risk avoidance.[138] The instrumentalities in question are typically within the exclusive control of the enterprise; when they are not, responsibility for losses tends to fall on those outside the enterprise who are in control.[139] Given that blasting and other functionally similar commercial activities are the only ones that readily satisfy these prerequisites for maintaining insurability, it is no surprise that most American courts have limited the reach of the abnormally dangerous activities doctrine to those activities.[140]

To appreciate the uninsurability of the risks that a broad-based strict liability system would assign to enterprises, it is useful to consider, as before, the problems that would arise in a system that held product manufacturers strictly liable for all the harm their products cause, whether or not those products are defective. Even if the system limited liability to ascertainable risks,[141] manufacturers under such a liability regime could not hope to operate viable insurance systems covering all losses caused by their products. For one thing, product consumers could alter their general patterns of purchase, use, and consumption so as to take advantage of the flat-rate characteristics of insurance pricing in such a system.[142] Moreover, unlike a game of dice, which does not allow players to increase their chances of winning or the amounts of their wagers after the dice have been tossed,[143] under a broad-based strict liability regime, any product user or consumer could, after

137. *See* William K. Jones, *Strict Liability for Hazardous Enterprise*, 92 COLUM. L. REV. 1705, 1714 (1992) ("[I]t is difficult to imagine what precautions an ordinary person might take to guard against the harms inflicted by high explosives, radioactive emissions, bursting reservoirs, oil well 'blow outs,' or conflagrations of large accumulations of combustibles.").

138. *See* RESTATEMENT (SECOND) OF TORTS §§ 523–524 (1965).

139. *See generally* 1 OWEN ET AL., *supra* note 46, § 6.2, at 373 ("The plaintiff's abnormally dangerous activities cause of action will fail in the absence of a showing that the defendant directly controlled the activity.").

140. Courts have regularly refused to impose strict liability on large utility companies that collect and distribute great quantities of water, sewage, natural gas, and electricity posing significant risk to the public. *See, e.g.*, Moore v. Sharp Gas Inc., Civ. A. No. 90-504, 1992 WL 147930, at *2–*3 (D. Del. June 11, 1992) (holding that the operation of natural gas lines is not an abnormally dangerous activity); Voelker v. Delmarva Power & Light Co., 727 F. Supp. 991, 994–95 (D. Md. 1989) (holding that the transmission of electricity via high-voltage power lines is not an abnormally dangerous activity); Estate of Thompson v. Jump River Elec. Coop., 593 N.W.2d 901, 904–06 (Wis. Ct. App. 1999) (holding that an employee who works with high-voltage electricity is not engaged in an abnormally dangerous activity). In these situations, the courts apparently feel that the requisite exclusive control by the defendants is missing.

141. *See supra* note 130 and accompanying text.

142. Adverse selection could take the form of higher-risk consumers shifting their product purchases toward lower-risk, and therefore lower-priced, products. *See* Hanson & Logue, *supra* note 98, at 153–54.

143. *Cf. supra* note 103.

purchasing any given product, deliberately affect both variables with substantial impunity.[144] Even if defenses such as contributory fault, product misuse, product modification, and the like were available to defendants,[145] such rules could never adequately accommodate the variety of post-distribution product uses and modes of consumption that would dramatically affect an enterprise's exposure to liability.[146] Adverse selection and moral hazard would surely combine to destroy the integrity of a broad-based strict liability system for all product-caused harms.

D. More Limited Forms of Strict Liability Are Viable, Even If Broad-Based Strict Liability Is Not

As the foregoing analysis of the nonviability of broad-based strict liability makes clear, whenever opportunities present themselves for establishing and maintaining viable areas of strict liability, American courts and legislatures are inclined to consider, and frequently implement, limited strict liability regimes.[147] Well-known examples of strict liability include, as discussed above, manufacturers' strict liability for manufacturing defects[148] and commercial actors' strict liability for abnormally dangerous activities.[149] One important example mentioned earlier, but not yet discussed in this analysis, is workers' compensation, a legislatively established enclave of strict liability relied upon by many scholars as the best proof that strict enterprise liability is a viable, preferable alternative to fault-based tort liability.[150] Clearly, workers' compensation satisfies the criteria for process viability. The relevant statutes cover employers with precision sufficient to all but eliminate boundary disputes.[151] And the causation triggers rest on fairly specific time-and-space boundaries that manage, at least, to include all accidental injuries that occur at the workplace.[152]

144. Moral hazard could take the form not only of risky modes of product use and consumption but also extending use of durable products beyond their normal safe lives. *See* James A. Henderson, Jr. & Jeffrey J. Rachlinski, *Product-Related Risk and Cognitive Biases: The Shortcomings of Enterprise Liability*, 6 ROGER WILLIAMS U. L. REV. 213, 240–41 (2000).

145. *See generally* HENDERSON & TWERSKI, *supra* note 39, at 271–310, 633–43.

146. All of these affirmative defenses present highly contextual issues of fact to be determined on a case-by-case basis, in most instances by triers of fact. *Id.*

147. Persuasive normative arguments support implementation of strict liability in the limited contexts where it is viable. *See* Epstein, *supra* note 2, at 152–60, 203–04; *Idea of Fairness*, *supra* note 2, at 1266; *see also supra* text accompanying notes 33–34.

148. *See supra* notes 41–42, 106–110, 132–136 and accompanying text.

149. *See supra* notes 45, 137–138 and accompanying text.

150. *See, e.g.*, NOLAN & URSIN, *supra* note 24, at 23–26.

151. *See* JAMES A. HENDERSON, JR. & RICHARD N. PEARSON, THE TORTS PROCESS 845–50 (3d ed. 1988).

152. Typically, the claimant's injury must be "arising out of and in the course of [the] employment." MASS. ANN. LAWS ch. 152, § 26 (Law. Co-op. 2000).

Regarding insurability of the risks assigned to employers under workers' compensation statutes, the effects of adverse selection and moral hazard are reduced by the fact that coverage is available only in connection with claimants' full-time employment, assuring risk pools comprising mostly normal, healthy persons.[153] The ability of workers to shop among employers for more favorable workers' compensation coverage is limited because the terms of coverage are uniform across similarly situated employers within a given state.[154] And, presumably, employers are able to screen unhealthy, accident-prone job applicants who might be guided in their decisions regarding employment primarily by considerations of coverage.[155] To limit the capacity of workers to refuse to act reasonably to protect themselves and others from injury, workers' compensation systems exclude self-inflicted injuries.[156] Moreover, the fact that employers control the major hazards involved constrains other types of behavior by covered employees that might seriously threaten the insurance pools.

The other areas of strict liability that persist in American tort law conform to the process prerequisites outlined in this Article. Employers' vicarious liability, the focus of Gary Schwartz's last published article on the subject of common law strict liability,[157] is a good example. The concepts that constitute the boundaries of employer's liability—"master," "servant," and "scope of employment"—have been worked out over time to present adjudicable issues.[158] To be sure, the issue of the employee's underlying tort liability most often rests on an assessment of the employee's fault; but from the standpoint of the employer's strict liability, that element of fault-based liability can be dealt with conceptually as though it had come from a black box.[159] Moreover, once the elements of vicarious liability, including em-

153. This same built-in assurance of having a normal, viable risk pool is reflected in group insurance, for which pre-coverage screening is typically minimal. *See generally* JOHN F. DOBBIN, INSURANCE LAW IN A NUTSHELL 13–21 (2d ed. 1989).

154. *See* HENDERSON ET AL., *supra* note 1, at 723–24.

155. In any event, the employer controls the hiring of employees. *Cf.* ABRAHAM, *supra* note 96, at 2–3 (discussing protective measures taken by insurers).

156. *See, e.g.*, MASS. ANN. LAWS. ch. 152, § 27 (Law. Co-op. 2000).

157. *Employer Vicarious Liability*, *supra* note 5.

158. *See generally* RESTATEMENT (SECOND) OF AGENCY §§ 220–229 (1958); HENDERSON ET AL., *supra* note 1, at 149–59. The definitional sections provide checklists of factors that would seem to make the boundary issues relatively indeterminate. RESTATEMENT (SECOND) OF AGENCY § 151 (1958) ("The Restatement definition of servant is quite open-ended, and one might question whether it provides sufficient guidance to enable courts to reach consistent results."). But the factors are straightforwardly factual and do not call for reasonableness evaluations, and in most cases where an employee harms someone while using a vehicle or other dangerous implement on behalf of the employer, the employer's vicarious liability is so obviously clear that the legal issue it presents is assumed and thus hidden from view. *See Employer Vicarious Liability*, *supra* note 5, at 1741–42.

159. The underlying issue of employee fault is adjudicable, for reasons embedded in the negligence concept. *See infra* notes 168–170 and accompanying text. But the point here is that, once

ployee negligence and scope of employment, are established, causation is a nonissue in much the same way that causation is not an issue separate from coverage in a direct action against a proven tortfeasor's liability insurer.[160]

Regarding insurability in connection with employer vicarious liability, the major source of potential difficulty is the moral hazard that inheres in employees behaving in ways that increase their employers' exposure to vicarious liability.[161] As a practical matter, however, employers indemnify their employees from any personal liability, and employees are likely to be judgment-proof in any event. Indeed, without framing his discussion explicitly in terms of maintaining insurability, Gary's 1996 *Southern California Law Review* article recognizes the importance of maintaining incentives for employees to invest in care.[162] For present purposes, it will suffice to observe that the boundary concepts of master/servant and scope of employment focus on the employer's right to control the activities of the employee.[163] This element of control over employees' behavior, coupled with the employer's obvious but limited power over the employment relationship itself, renders insurable the employer's exposure under vicarious liability.

III. NEGLIGENCE DOMINATES TORT BECAUSE, IN CONTRAST TO BROAD-BASED STRICT LIABILITY, THE NEGLIGENCE SYSTEM IS VIABLE

Beyond the limited areas of strict liability described above, negligence dominates American tort law. Whatever else can be said for or against the negligence system, it works. Negligence avoids boundary problems, of course, by having no formal boundaries except for isolated exceptions, commonly referred to as "no-duty" rules, that impose strict liability on certain categories of accident victims.[164] In place of formal boundaries, the negligence system relies on a fact-sensitive risk-utility standard of reasonableness,

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the underlying fault-based liability of the servant is established, the issue of strict vicarious liability in the vast majority of instances is straightforwardly nonproblematic.

160. Just as the coverage issue resolves causation in the insurance context, so scope of employment resolves causation in the context of employer vicarious liability.

161. The problem stems from the fact that employees act as though they are fully insured against liability. At common law, the employer has a right of indemnity against the employee when the latter's negligence exposes the former to vicarious liability.

162. *See Employer Vicarious Liability*, *supra* note 5, at 1755–64.

163. *See* RESTATEMENT (SECOND) OF AGENCY § 401 cmt. d (1958); HENDERSON ET AL., *supra* note 1, at 150–51 ("[A] servant who, while acting within the scope of employment, negligently injures a third person . . . is also subject to liability to the principal if the principal is thereby required to pay damages.").

164. HENDERSON ET AL., *supra* note 1, at 267–97, 344–409.

which raises its own set of problems regarding adjudicability.[165] In the context of strict liability, relying on an open-ended reasonableness standard to set boundaries seriously threatens viability.[166] In the negligence context, however, it does not. When courts review the conduct of individual actors, the moral content of the fault principle, in combination with the traditional construct of the "reasonable person," allows triers of fact to reach rational, consistent outcomes.[167] And when courts review the conduct of commercial enterprises, judicial insistence on technically plausible proof of reasonably safer alternatives renders the negligence issue adjudicable.[168] Supplemented by judicial techniques that make the general reasonableness standard more specific in appropriate circumstances,[169] the negligence issue has maintained process viability over the century and a half that it has held sway.

The negligence system avoids uninsurability problems in the same way that it avoids boundary problems: by simply not requiring commercial enterprises, except in the special circumstances of limited strict liability described earlier,[170] to function as insurers for residual accident losses that are cheaper to incur than to avoid. Under negligence, the victims of enterprise-related accidents are the ones who bear primary responsibility for insuring against residual accident losses.[171] Thus, the commercial insurance policies that putative accident victims take out to cover residual losses contain a combination of coverages, limitations, exclusions, and copayment features that perform the same functions as do the legal rules governing areas of strict tort liability: They allocate to the insurers in each instance only those risks that will not fall prey excessively to the corrosive effects of adverse selection and moral hazard.[172] The point here is not that first-party insurance for accident victims provides optimal coverage from a social welfare standpoint, or that it achieves optimal levels of risk classification.[173] Rather, the point is that, compared with court-imposed strict enterprise liability, first-party victim's insurance works.

No clearer example of the dominance of negligence in American tort will be found than the liabilities of manufacturers for the generic risks presented by their products. Although many American courts talk as

165. *See* James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 *passim* (1973).

166. *See supra* note 90 and accompanying text.

167. *See* Henderson, *supra* note 165, at 1541.

168. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1998).

169. *See generally* James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867, 872–76 (1998).

170. *See supra* notes 148–150 and accompanying text.

171. *See supra* note 18 and accompanying text.

172. *See supra* note 101 and accompanying text.

173. For a critique of first-party insurance in these regards, see generally Hanson & Logue, *supra* note 98.

though strict liability applies in product design and warning litigation, in truth that part of our products liability system rests on negligence principles.[174] As with negligence more generally, this system of fault-based liability for defective design and failure to warn works comparatively well because it places the lion's share of responsibility for avoiding product-related losses on those who control the relevant risks: individuals who use, consume, and are otherwise affected by commercially distributed products.[175] The fault-based concepts of design and warning defects identify the important, but limited, aspects of product use and consumption that manufacturers can and should control through their design and marketing, and renders them adjudicable by insisting on credible, technically legitimate evidence regarding how the manufacturer could have reduced generic product risks at acceptable costs.[176] But accident victims, and those who negligently cause harm to the victims through product-related behavior, must bear responsibility for most of the harm caused by the use and consumption of products. Some tort scholars may envision a world in which strict enterprise liability for all product-related harms is viable.[177] But they are badly mistaken.

CONCLUSION

One of the major themes in Gary Schwartz's scholarship over a twenty-year period, beginning in the early 1980s and culminating in the *Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles)* project, is that negligence, not strict liability, is the core principle of American tort. A fair number of American torts scholars think otherwise, viewing strict enterprise liability as the ideal toward which our tort law is evolving. Gary politely but firmly disagreed with this view, both normatively and empirically. Normatively, he argued that the loss-distribution rationale underlying strict liability is unpersuasive when compared with the strong negligence ethic of requiring wrongdoers to pay their victims. Empirically, he argued that American courts actually revitalized the negligence principle in the period from 1960 to 1990, expanding rather than contracting its importance. Gary's scholarship comprises, without question, the most articulate voice in support of the fault principle in what I have described as the negligence-strict liability debate.

174. *See supra* note 44 and accompanying text.

175. The requirement that plaintiffs prove a defect at the time of sale shifts responsibility for inherent, unavoidable product risks, such as the potential for knives to inflict wounds. *See* Henderson & Twerski, *supra* note 90, at 1278 n.62 ("Because they have no cause of action against the makers and distributors of inherently and unavoidably dangerous products . . . consumers are held, in effect, strictly liable for the social costs generated by these products.").

176. *See supra* note 170 and accompanying text.

177. *See supra* note 33.

With this Article, I join ranks with Gary and the "fault brigade." In doing so, I bring to bear process considerations that support Gary's conclusions. Broad-based strict liability will never be implemented because, whether or not from a purely theoretical perspective it should be implemented, it cannot be implemented. Any attempt to hold commercial enterprises strictly liable for the physical harms they proximately cause would not be viable for two basic reasons: first, because the liability disputes under such a broad-based regime would be unadjudicable, and second, because the risks of loss that such a regime would assign to commercial enterprises would be uninsurable. Limited, bounded areas of strict liability work precisely because the limits and the boundaries ensure adjudicability and insurability. Within such boundaries, persuasive arguments are available that justify strict liability. Negligence functions on a much broader scale essentially because it rests on an intuitively compelling ethic of "let the wrongdoer pay" and because it places responsibility for insuring against residual accident losses on those actors who control the losses—the victims who suffer the losses, including the purchasers and consumers of commercially provided goods and services.

This last observation about victims bearing primary responsibility for insuring against residual accident losses is what sticks in the craw of those who favor strict enterprise liability over negligence. So be it. This Article demonstrates that they will have to live with their disappointment. To see the truth of this assessment, consider what happens when putative victims of residual accident losses seek to cover those losses in the commercial insurance market. They find that, as a general rule, commercial insurers refuse to cover risks over which insureds exert significant control. Were insurers to agree to cover such risks indiscriminately, adverse selection and moral hazard would combine to destroy the insurance pools so conceived. This Article has argued that these same threats to viability would destroy any attempt judicially or legislatively to assign similar risks to commercial enterprises under broad-based strict liability. It is naive for legal academics to believe otherwise, if any of them really do. Gary Schwartz may not have relied explicitly on considerations of insurability, but notions of comparative viability are clearly reflected in his work. This much is clear: Gary got it right. Negligence, not strict liability, is and will remain the dominant principle of American tort.

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