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A Watershed Moment: Reversals of Tort Theory in the Nineteenth Century*

Jed Handelsman Shugerman

Abstract

This article offers a new assessment of the stages in the development of fault and strict liability and their justifications in American history. Building from the evidence that a wide majority of state courts adopted *Fletcher v. Rylands* and strict liability for unnatural or hazardous activities in the late nineteenth century, a watershed moment turns to the surprising reversals in tort ideology in the wake of flooding disasters.

An established view of American tort law is that the fault rule supposedly prevailed over strict liability in the nineteenth century, with some arguing that it was based on instrumental arguments to subsidize industry, while others claim that its basis was in the moral condemnation of wrongdoing as a principle of corrective justice. Courts supposedly did not embrace strict liability until the mid-twentieth century, driven by efficiency arguments. This article challenges the established view by setting forth three periods.

In the first period from 1810 to 1860, instrumental and moral arguments were rare or non-existent, and instead, courts relied on simple assertions or minimalist citations to precedent in establishing a general negligence rule. In the second period (the 1870s and 1880s), American courts defended the general negligence rule with economic arguments not as a primary justification, but as a defense against the English challenge in *Rylands*. In the third period around the turn of the century, state judges, partly reacting in horror to the disastrous Johnstown Flood of 1889 and other unnatural modern threats, turned to strict liability with moralistic corrective justice arguments, not instrumental arguments. The cases from this last period illustrate a number of moral arguments in favor of strict liability: choice and duties; fairness (those who profit from an activity should pay those they hurt); a social contract argument of reciprocity; and a rights argument in favor of the natural user over the unnatural innovator. Instead of enterprise liability emerging from post-Great

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*Assistant Professor, Harvard Law School. This article was selected in the junior faculty competition for the conference "Tort Law and the Modern State" at Columbia Law School, inaugurating the *Journal of Tort Law*. I could not have produced it without the help of Bruce Ackerman, Jennifer Arlen, Guido Calabresi, Morris Cohen, Kris Collins, Bob Ellickson, Dan Ernst, Mark Geistfeld, John Goldberg, Morton Horwitz, Gregory Keating, John Langbein, William Nelson, Susan Rose-Ackerman, Burden Walker, Ted White, Kenji Yoshino, and especially Bob Gordon and John Witt. Ronen Perry was a superb and patient editor. I received generous support from the Olin Summer Fellowship in Law and Economics at Yale Law School, the Golieb Fellowship at New York University, and Dean Elena Kagan at Harvard Law School.

Depression/New Deal politics, from twentieth-century academics, or from engineers overlooking the factory floor, it gained significant ground in the late nineteenth century from the murky depths of a flooded Pennsylvania valley. This historical study of the dramatic twists and turns on *Rylands* suggests that tort doctrine and tort theory are contingent upon events and context.

INTRODUCTION

The Johnstown Flood was the Hurricane Katrina of the nineteenth century. Johnstown, Pennsylvania did not have the culture, history, or population of New Orleans, but both cities were destroyed by a mix of natural disaster and man-made disaster, and both tragedies dominated national and international media for a long time. The Johnstown Flood killed 2,000 people, the deadliest flood in American history. Dams and reservoirs no longer looked so innocent to a generation of Americans, more of whom lived downstream from them. The Flood devastated a region of Pennsylvania, and, less dramatically, it wreaked havoc in a corner of the American common law: the liability standard for unnatural or hazardous activities. This article suggests that American tort law was shaped as much in the hills of western Pennsylvania as in the ivory tower of the legal academy.

In the mountains east of Pittsburgh, the South Fork Fishing and Hunting Club owned a 450-acre artificial recreational lake, one of the largest reservoirs in the country.[1] The club was known as "The Bosses Club" because of its titans-of-industry membership, most notably Andrew Carnegie, Andrew Mellon, and Henry Clay Frick. On May 31, 1889, the dam in the mountains collapsed during a torrential storm and unleashed 20 million tons of water, tearing through the valley at one hundred miles per hour.[2] In one of the most devastating man-made disasters in American history, the flood completely destroyed Johnstown, killing two thousand people and causing $17 million in property damage.[3] One day later, reporters from New York to Chicago flocked to the town, and newspapers around the country issued daily reports of the death toll and damage.[4] The Flood turned into "the biggest news story since the murder of Abraham Lincoln."[5] On June 3, President Harrison called upon the nation to assist Johnstown, and the governors of Pennsylvania and New York also pleaded for support.[6] The journalists' horrific tales of death and destruction,[7] also recounted in several books within two years of the flood,[8] evoked sympathy and charity from every region of the country and

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[1] DISASTER, DISASTER, DISASTER 17 (Dougles Newton ed., 1961) [hereinafter DISASTER].

[2] *See id.* at 18.

[3] *Id.* at 36; DAVID MCCOLLOUGH, THE JOHNSTOWN FLOOD 264 (1968).

[4] *Id.* at 205-08, 215, 218 (listing the *Philadelphia Press* and *Record*, five Pittsburgh papers, six New York papers, the *Chicago Inter-Ocean*, the Associated Press, and national magazines, including *Harper's Weekly*).

[5] *Id.* at 203.

[6] WILLIS FLETCHER JOHNSON, HISTORY OF THE JOHNSTOWN FLOOD 249, 260-61 (1889).

[7] *See, e.g.*, articles published in the N.Y. SUN, June 1-2, 1889, and N.Y. WORLD, June 2, 1889, which are reprinted in DISASTER, *supra* note 1, at 18-36.

[8] *E.g.*, DAVID J. BEALE, THROUGH THE JOHNSTOWN FLOOD (1890); HERMAN DIECK, THE JOHNSTOWN FLOOD (1889); JOHNSON, *supra* note 6; J.J. MCLAURIN, THE STORY OF JOHNSTOWN (1890).

around the world: "the greatest outpouring of popular charity the country had ever seen."[9] After the flood, newspapers reported that the club's owners and employees had ignored obvious signs of instability and structural problems.[10] However, not one Johnstown resident or family member recovered a penny through the legal system.[11]

In the standard historical interpretation of American tort law, pro-industry fault liability dominated the nineteenth and early twentieth centuries,[12] and the mid-twentieth century marked the gradual rise of strict liability.[13] In constructing this narrative, legal scholars and judges over the last century have focused on the reception of *Fletcher v. Rylands*,[14] an English case decided in the 1860s. In one of the most significant and controversial precedents in the strict liability canon,[15] the English courts held that proof of negligence was not required for "non-natural" or potentially "mischievous" activities.[16] Scholars point to a series of decisions

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[9] MCCULLOUGH, *supra* note 3, at 224-25; *see also* JOHNSON, *supra* note 6, at 266-80 (noting donations from twenty-five states, and from London, Germany, Belfast, and Turkey). The donations totaled almost $4 million in cash, plus food and other necessities. *Id.* at 225.

[10] MCCULLOUGH, *supra* note 3.

[11] NATHAN SHAPPEE, A HISTORY OF JOHNSTOWN AND THE GREAT FLOOD OF 1889 (unpublished dissertation, University of Pittsburgh, 1940). In a forthcoming piece, I discuss these cases. See "The Twist of Long Terms."

[12] *E.g.*, LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 409-27 (1973); MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 85-108 (1977); BERNARD SCHWARTZ, THE LAW IN AMERICA 55-59 (1974); G. EDWARD WHITE, TORT LAW IN AMERICA 3-19 (1980); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 515-17 (1961); Albert A. Ehrenzweig, *Negligence Without Fault*, 54 CAL. L. REV. 1422, 1425-43 (1966); Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951); A.W.B. Simpson, *Legal Liability for Bursting Reservoirs: The Historical Context of* Rylands v. Fletcher, 13 J. LEGAL STUD. 209, 209, 214-16 (1984); *cf.* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972) (examining the era of fault and arguing that fault prevailed as the most economically efficient doctrine). *Contra* JOHN WITT, THE ACCIDENTAL REPUBLIC (2004) (contending that there were fluctuations back and forth between fault and strict liability over the nineteenth century); Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 927 (1981) (positing that the nineteenth century expanded liability, from narrow relational or contractual liability to a broader tort liability); Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1720 (1981) (finding that courts applied fault rules broadly in practice, expanding liability).

[13] *See* Gregory, *supra* note 12; William K. Jones, *Strict Liability for Hazardous Enterprise*, 92 COLUM. L. REV. 1705, 1706-11 (1992); Virginia E. Nolan & Edmund Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. REV. 257 (1987); Rabin, *supra* note 12, at 961.

[14] 159 Eng. Rep. 737 (Ex. 1865), *rev'd*, 1 L.R.-Ex. 265 (Ex. Ch. 1866), *aff'd*, 3 L.R.-E & I. App. 330 (H.L. 1868).

[15] *See* WILLIAM PROSSER, *The Principle of* Rylands v. Fletcher, *in* SELECTED TOPICS ON THE LAW OF TORTS 135, 135 (1953).

[16] Fletcher v. Rylands, 1 L.R.-Ex. 265, 279-80 (Ex. Ch. 1866); Rylands v. Fletcher, 3 L.R.- E. & I. App. 330, 338-39 (H.L. 1868).

rejecting *Rylands* to conclude that American courts adhered to the fault doctrine and repudiated strict liability in the late nineteenth century, and the consensus has been that *Rylands* was not accepted until the mid-twentieth century. Many prominent works on American legal history feature this supposed rejection of *Rylands* as a centerpiece for their historical claims about the dominance of the fault doctrine as a subsidy for emerging industry.[17]

In fact, a significant majority of the states actually accepted *Rylands* at the turn of the twentieth century, the height of the "era of fault." A few states split on the validity of *Rylands* in the 1870s, but, coinciding with the Johnstown Flood and several other dam disasters, a wave of states from the mid-1880s to the early 1910s adopted *Rylands*. By the turn of the century, a majority of states had adopted *Rylands*, and only three states consistently rejected it. Even with some states shifting against *Rylands* in the twentieth century, a strong majority of states has approved of *Rylands* ever since the Johnstown Flood. .

In an earlier student note, I focused first on demonstrating that *Rylands* in fact had been adopted in late-nineteenth century America, and that, while many background conditions set the stage (such as industrialization side-by-side with urbanization; business cycles; and the rise of Populism and regulation of industry), the triggers of *Rylands*'s adoption were reservoir disasters in California, Pennsylvania, and Texas. [18] In this article, I build on this story and present several arguments about the theories and style used in the development of fault and strict liability in this period.

In Parts I, II, and III, I offer a new assessment of the stages in the development of fault and strict liability in American history. In explaining how the fault rule supposedly prevailed over strict liability in the nineteenth century, some claim that its foundation was as an instrumental rule to subsidize industry,[19] while others claim that its basis was in the moral condemnation of wrongdoing, as a principle of corrective justice, justifying the state's intervention.[20] Part I shows

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[17] FRIEDMAN, *supra* note 12; HORWITZ, *supra* note 12; SCHWARTZ, *supra* note 12; WHITE, *supra* note 12; Gregory, *supra* note 12; *see also* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 134-36 (1995).

[18] For my argument about the factors shaping the acceptance, see my note on this subject, *The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of* Fletcher v. Rylands *in the Gilded Age*, 110 YALE L.J. 333 (2000). While urbanization, economic trends, and politics played a role, I concluded that a series of tragic dam failures, particularly the Johnstown Flood of 1889, was the most direct and substantial cause. This interpretation questions the notions that long-term socioeconomic changes or academics triggered this change, and focuses on how tragic events made risks and legal issues more salient to the public and to the courts.

[19] *See* HORWITZ, *supra* note 12; Gregory, *supra* note 12.

[20] In 1908, James Barr Ames celebrated the rise of the fault rule as the triumph of morality: "The ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril." James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 99 (1908). One contemporary torts scholar offers a similar perspective on the problem of "political legitimacy" in tort law in the

that, in the era of the rule's emergence from 1810 to 1850, judges relied neither upon instrumental arguments of efficiency or subsidy, nor did they offer moral arguments. Instead, they just asserted the rule, at first with no citation to precedent, and later, relying solely on precedent. These judges seemed to be assuming a consensus opinion that needed little justification.

Next, the conventional wisdom holds that, after the proponents of the fault rule prevailed with moral arguments in the nineteenth century, mid-twentieth-century judges established large zones of strict liability building upon instrumental policy arguments.[21] Parts II and III reverse this account and shift the timeframe back significantly. Part II demonstrates that, in initially rejecting *Rylands* in the 1870s and 1880s, some American judges offered explicitly instrumental arguments that the fault rule subsidized economic growth for everyone's shared benefit. Courts offered a trickle-down economics of "the industrial social contract." I also describe these economic arguments as utilitarian, consequentialist, and collectivist.

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nineteenth century and tort law now: "The question at the heart of this debate focuses on the fundamental concept of individual responsibility that courts invoke to justify the imposition of tort liability. Should the power to coerce a defendant to bear a plaintiff's loss depend on the reasonableness of the defendant's conduct? In other words, is the threshold basis for recovery in tort negligence, or is it liability without negligence?" DAVID ROSENBERG, HIDDEN HOLMES 1 (1995). According to this understanding, the fault rule was the answer that struck a moral balance and achieved legitimacy in the Victorian legal world. Many others have argued that this rhetoric was merely a façade for an *unstated* economic agenda of industrial development and capitalism. FRIEDMAN, *supra* note 12; HORWITZ, *supra* note 12; Gregory, *supra* note 12; *see also* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 134-36 (1995).

[21] George Priest argues that strict liability and enterprise liability prevailed later in the twentieth century once academics (mainly liberal scholars in early law and economics from 1930 to 1950) led to the ideas of the most efficient cost avoider and the internalization of costs, the best insurer, cost-spreading, and deep pockets. George Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985); *see also* Steven Shavell, *Strict Liability versus Negligence*, 9 J. LEGAL STUD. 1, 24-25 (1980); William M. Landes & Richard Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 871-77, 905-08 (1981). John Witt identifies earlier advances by turn-of-the-century engineers and the scientific management movement in American industry, laying the groundwork for the notion that industrial management could efficiently control risks on the workplace, which eventually led to courts deciding that industry should internalize those risks in the mid-twentieth century. John Witt, *Speedy Fred Taylor and the Ironies of Enterprise Liability*, 103 COLUM. L. REV. 1 (2003). Others attribute enterprise liability to larger events in the twentieth century. The New Deal's emphasis on the redistribution of risk and cost spreading had a major impact on legal thought – and in particular the Restatement of Torts in 1938. *See* Virginia E. Nolan & Edmund Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. Rev. 257 (1987). William Nelson links enterprise liability to World War II and military efficiency ideas. William Nelson, *From Fairness to Efficiency: The Transformation of Tort Law in New York, 1920-1980*, 47 BUFFALO L. REV. 117 (1999).

Then Part III demonstrates that the Johnstown Flood of 1889 brought in a series of pro-*Rylands* decisions with moralistic reasoning, offering arguments about rights, moral choices, duties, guilt, and innocence. Rather than efficiency, deterrence, or analysis of the best cost avoider, courts focused on moral responsibility for choices that caused harm, with or without negligent acts. As an extension of this line of moral thinking, these judges and writers also emphasized the categories of naturalness versus unnaturalness and public versus private. Occasionally, these courts showed sympathy for the victims, contrasted with condemnation of the defendants.[22] These cases illustrate a number of moral arguments in favor of strict liability: an argument from choices that create higher duties; an argument from fairness (those who profit from an activity should pay those they hurt); a social contract argument of reciprocity; and a rights argument in favor of the natural user over the unnatural innovator. Instead of enterprise liability emerging from twentieth-century academics in the ivory tower[23] or from engineers overlooking the factory floor,[24] it gained significant ground in the late nineteenth century from the murky depths of a flooded Pennsylvania valley.

Torts scholarship has posited two competing schools: "corrective" justice, which focuses on the relationship between the two parties and their moral claims; and "collective" justice, which focuses on broader claims of distributive justice, efficiency, utility, and social goods.[25] This article highlights the significance of corrective justice and moral rhetoric in shaping modern tort law.[26] However,

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[22] The influence of moralism and sympathy in these cases is roughly consistent with Peter Karsten's general interpretations. See PATER KARSTEN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA (1997). Surveying vast fields of torts, contracts, property law, and civil procedure, Karsten argues that American judges followed a common law jurisprudence of the "head" in favoring precedent, but often altered precedents to favor sympathetic victims in a jurisprudence of the "heart." Karsten does not suggest that American courts adopted *Rylands* or a similar rule of strict liability for hazardous activities. He argues instead that American courts broadened products liability, id. at 85-95, and limited the defenses of contributory negligence, assumption of risk, the fellow-servant rule, and proximate cause, id. at 95-127.

[23] *See* Priest, *supra* note 21; Nolan and Ursin, *supra* note 21.

[24] *See* Witt, *supra* note 21.

[25] ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995); JULES L. COLEMAN, RISKS AND WRONGS (1992); Jules L. Coleman, *The Practice of Corrective Justice*, 37 ARIZ. L. REV. 15, 30 (1995); John C.P. Goldberg and Benjamin C. Zipursky, *The Moral of McPherson*, 146 U. PENN. L. REV. 1733 (1998); Stephen R. Perry, *Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992); Gary Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997); William E. Nelson, *From Fairness to Efficiency: The Transformation of Tort Law in New York*, 1920-1980, 47 BUFFALO L. REV. 117 (1999).

[26] Robert Rabin, *Some Thoughts on the Ideology of Enterprise Liaiblity*, 55 MD. L. REV. 1190 (1996). Rabin argued that the enterprise liability and strict liability are founded not only upon modern collective justice concepts of risk-spreading and efficient cost-avoiding, but also upon corrective justice norms of moral duty and ethics. George Fletcher, in his article "Fairness and

corrective justice scholars, as well as torts scholars of other stripes, generally tend to find their theory "immanent" in tort law – an inherent foundation of tort law revealing itself over time.[27] For example, Ernest Weinreb has claimed that corrective justice "provides the immanent critical standpoint informing the law's efforts to work itself pure."[28] This historical study of the dramatic twists and turns of tort doctrine and tort theory suggest instead that tort law and judges' underlying theories for its rules – including its theories of corrective justice -- are contingent upon events and context.

A caveat on rhetoric is important: in many cases, the language I cite as "instrumentalist" could be rephrased in moralistic terms, and vice versa. Indeed, there is fluidity between instrumental and moral arguments. However, I emphasize how judges chose phrases and theories of one reasoning style over another. This fluidity creates an irony in this story: strict liability is ostensibly (and even literally) an amoral doctrine, and yet it gains traction in American law through moralism.

To clarify the chronology and ideological turns, I provide the following chart, first with the conventional wisdom and then my revision:

Utility in Tort Theory," suggests that "the paradigm of reciprocity" -- the shared risks and mutual duties between two individuals -- established a foundation for both fault and strict liability. George Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972). Similarly, Ernest Weinrib explains that strict liability for abnormally dangerous activities and is consistent with the logic of fault, "correlativity," and corrective justice because the activity's extraordinary riskiness in itself creates a general duty to be extraordinarily careful. WEINRIB, supra note 25, at 187-90.

[27] *See* John Witt, *Contingency, Immanence, and Inevitability in the Law of Accidents*, 1 J. TORT. L., Iss. 2, Art. 1, 4-16 (2007), *available at*

[28] Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 356 (2002) (paraphrasing Lord Mansfield in *Omychund v. Barker*, 1 Atk. 17, 23 (1744)).

The Traditional Account

Nineteenth Century	Twentieth Century
FAULT: *CORRECTIVE JUSTICE/FAIRNESS* Moral basis (w/unstated industrial subsidy)	**FAULT**: New law & economics basis (Learned Hand test)
	STRICT LIABILITY: *COLLECTIVE JUSTICE/UTILITY* Enterprise liability based on efficiency Legal realism and law & economics: "Social engineering" Best cost avoider, best insurer Risk spreading/deep pockets

A Revision

Early-Nineteenth	Mid-Nineteenth	Late-Nineteenth	Twentieth
FAULT: FORMALISM -- Ad hoc common law -- Lack of instrumentalism or moralism	**FAULT**: *COLLECTIVE JUSTICE/UTILITY* Efficiency; Explicit subsidy for industry; "industrial social contract" (Post-*Rylands*, 1870-early 1880s)		(Same as above)
		STRICT: *CORRECTIVE JUSTICE/FAIRNESS* Enterprise liability based upon moralism; Norms of natural /unnatural; public/private; Rights and duties (Post-floods, mid-1880s-1900, and mostly in elected state courts)	(Same as above)

I. THE RISE OF THE NEGLIGENCE REQUIREMENT, 1810-1860

Torts casebooks tend to focus chiefly on Chief Justice Lemuel Shaw's opinion in *Brown v. Kendall*[29] as establishing a broad fault rule in torts, but in fact the rule developed gradually over the first half of the nineteenth century. Morton Horwitz identified this era as the "emergence of an instrumental conception of law," in which judges were "declaring their freedom from strict eighteenth century conceptions of precedent" and offered arguments based upon the consequences of legal rules upon society and a commercial economy.[30] Horwitz supported this concept with some particularly interesting passages from takings, commercial paper, property and labor "conspiracy" cases. For example, in one riparian property rights case in 1805, New York's high court rejected the common law rule allowing a downstream owner to recover from any river obstruction because the rule's effect was that "the public, whose advantage is always to be regarded, would be deprived of the benefit which always attends competition and rivalry."[31] Other scholars have suggested in a similar vein that the fault rule in torts was evidence of early nineteenth century instrumentalism, favoring industry.[32] These observations were true of another famous Shaw tort opinion: *Farwell v. Boston & Worcester R.R.*, adopting the pro-employer fellow-servant defense.[33] However, it is a mistake to project Shaw's efficiency reasoning in Farwell onto the simple formalism of *Brown v. Kendall* and its antecedents.

The early torts cases support Horwitz's claim that early nineteenth century courts had declared their independence from precedent, but these courts did not offer instrumental arguments. In two definitive works on tort law in this period, Horwitz and G. Edward White (two rather different torts scholars) cite a number of antecedents to *Brown v. Kendall*, but I have found no such instrumentalist arguments in those cases.[34] Instead, these cases follow a simple formalist style, with few citations at first, if at all. The authors of these decisions seem to be drawing on negligence as the taught tradition, or pulling negligence out of the ether or the ethos, or simply constructing the common law *ad hoc*. Over time, some opinions cited more cases, probably as court reporters increased access to American cases. Judges generally authored a relatively short, terse opinion

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[29] 60 Mass. 292 (1850).

[30] HORWITZ, *supra* note 12, at 26.

[31] 3 Cai. R. 307, 314 (N.Y. 1805).

[32] Gregory, *supra* note 12, at 382-88, 395-97. Some attribute the instrumentalist theory to Roscoe Pound. See DAVID ROSENBERG, THE HIDDEN HOLMES 8, 179 n.35 (1995) (citing ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 19 (rev. ed. 1954)). Brian Simpson has questioned this interpretation. A.W.B. Simpson, *The Elusive Truth About Holmes*, 95 MICH. L. REV. 2031 n.22 (book review of ROSENBERG, THE HIDDEN HOLMES).

[33] 45 Mass (4 Met.) 49 (1842).

[34] HORWITZ, *supra* note 12, at 85-97, WHITE, *supra* note 12, at 14-18.

relying on assertions of basic common law concepts, but offering few or no citations to support those assertions. When they do cite cases, they generally offer no quotations from those cited authorities and little to no analysis of those cases.

For example, one of the earliest decisions cited for establishing the American fault rule, *Clark v. Foot*, consisted of only five sentences and two opaque citations – without quotations – to establish a requirement that the plaintiff prove "neglect."[35] Horwitz specifies *Foot v. Wiswall*[36] as a "significant turning point," in which New York's highest court "clearly indicat[ed] for the first time it was for the plaintiff to prove … whether the defendant had violated some standard of care."[37] Despite announcing such a groundbreaking rule, the court cited no cases and offered just one short paragraph on the facts of the case, followed by one short paragraph of its legal reasoning (containing nine sentences). The negligence rule is cursorily asserted, not constructed. Similarly, *Panton v. Holland*, another short decision by New York's highest court, cited only one precedent in the opinion -- *Clark v. Foot* – and later offered the following rationale with no further citations:

> On reviewing the cases, I am of opinion that no man is answerable in damages for the reasonable exercise of a right, when it is accompanied by a cautious regard for the rights of others, when there is no just ground for the charge of negligence or unskillfulness, and when the act is not done maliciously.[38]

The phrase "on reviewing the cases" suggests that the judge was embracing a broad conventional wisdom with no need for explicit authorities. One year later, *Percival v. Hickey* actually reviewed a substantial number of cases (particularly *Leame v. Bray*) over four pages, making the tort forms of trespass and case more flexible, and setting forth a general negligence rule.[39] But despite this unusually lengthy effort to establish the rule, the court added no instrumentalist argument. In discussing whether to extend jurisdiction to a "maritime trespass," the court did mention "reasons of public policy." [40] If the court was willing to note such considerations for jurisdiction, it is all the more striking that it declined to do so in favor of the fault rule.

In other decisions in the 1820s and 1830s cited by historians for the development of the fault rule, courts continued to apply a broader negligence rule

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[35] Clark v. Foot, 8 Johns. 421 (N.Y. 1811) (citing 3 Bl. Com., 43; 1 Noy's Max., ch. 44.)
[36] Foot v. Wiswall, 14 Johns. 304 (1817).
[37] HORWITZ, *supra* note 12, at 297-98 n.146.
[38] Panton v. Holland, 17 Johns. 92, 99 (N.Y. 1819).
[39] Percival v. Hickey, 18 Johns. 257, 285-89 (1820)
[40] *Id.* at 294.

without reliance on any precedent and without policy arguments.[41] In the early fault cases, the negligence requirement was treated as common knowledge, ostensibly so common that no further support or justification was necessary.

A few cases in the 1830s and 1840s cited a handful of precedents, but these decisions were still relatively short and devoid of instrumentalist arguments.[42] This progression leads to Justice Lemuel Shaw's landmark *Brown v. Kendall* in 1850.[43] Shaw's opinion earned its status as a landmark in part because of its thorough citations to English and American precedent for the negligence requirement, distinguishing it from its less rigorous predecessors. This decision reflects the formalism that Horwitz identified in the mid- to late- nineteenth century, a formalism that embraced precedent as dictating certain outcomes, and in Horwitz's view, shut down further innovation. *Brown v. Kendall* signifies a shift from simplistic formalism to a more elaborate analysis of doctrine and past precedent. However, in the middle of the opinion, Justice Shaw no longer relies on precedent explicitly when discussing the standard for ordinary care: "[W]hat constitutes ordinary care will vary with the circumstances of cases. In general, it means that kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger."[44] For the next several paragraphs, Shaw reasons almost entirely from general explanations and assertions, rather than from precedent. And like its predecessors, this decision did not turn to instrumental or moralistic reasoning to bolster its simple common law explanations.[45] In 1842, Shaw had

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[41] Livingston v. Adams, 8 Cow. 175 (N.Y. 1828), Sproul v. Hemmingway, 31 Mass. 1 (1833); Worster v. Prop. of Canal Bridge, 16 Pick. 541 (Mass. 1835); Barnard v. Poor, 21 Pick. 378 (Mass. 1838); Another case cited, Hooker v. New-Haven & Northampton Co., 14 Conn. 146 (1841), focuses whether damage inflicted by public utilities is a "taking"or an exercise of eminent domain, or violates the scope of corporate power. It mentions "negligence," but does not clearly articulate a negligence requirement, and its most clearly established rule seems to be a strict liability rule: "And the reason of all these cases is, because he that is damaged ought to be recompensed." 1841 WL 343, *7. Its citation to *Weaver v. Ward* mentions "fault," but with a different meaning: as a defense against trespass's strict liability, one can claim to be "utterly without fault," a different order of liability. 1841 WL 343, *7.

[42] Lehigh Bridge v. Lehigh Coal & Navig. Co., 4 Rawle. 8 (Pa. 1833); Howland v. Vincent, 10 Met. 371 (Mass. 1845); Tourtellot v. Rosebrook, 11 Met. 460 (Mass. 1846). *See* HORWITZ, *supra* note 12, at 304 n.202-03.

[43] Brown v. Kendall, 60 Mass. 292 (1850).

[44] *Id.* at 296.

[45] *Brown v. Kendall* does contain aspects of moral reasoning, or at least a signal of weighing moral duties: the defendant unintentionally injured the plaintiff while separating his dog from a fight with another dog. Thus, Judge Shaw emphasizes that this intervention "was a lawful and proper act" aiming to prevent injury, and he signaled the moral worth of the defendant and a reluctance to penalize his dutiful behavior. However, Shaw did not dwell on the moral purpose or the courage of the action, and his main point is that the act was legal and committed without negligence, relying more on common law logic than on moral sentiment. Justice Shaw was not

engaged in instrumental reasoning in a different area of tort law – the fellow-servant rule. In *Farwell v. Boston & Worcester R.R.*, he constructed two economic arguments: the employer and employee bargain in wages for risk-assumption, and the worker was the more efficient cost avoider.[46] But when it came to establishing the fault rule, he curiously abandoned the instrumental style. The architects of the negligence requirement in antebellum America presented their rule as an organic and obvious development in the common law - no assembly required, no instruments needed. The arrival of *Fletcher v. Rylands* from England would disrupt that conventional wisdom after the Civil War.

II. THE EXPEDIENT REJECTION OF *RYLANDS*

A. Fletcher v. Rylands: The Case

Rylands is perhaps as renowned for its bizarre series of events as for its sweeping declaration of strict liability. John Rylands, perhaps the wealthiest entrepreneur in England,[47] needed to provide an additional source of water for his huge steam-powered textile mill, so he hired a contractor to dig a large ditch and create a reservoir. In 1860, the reservoir burst through an abandoned coal-mining shaft, which connected with neighboring active coal mines owned by Thomas Fletcher.[48] The reservoir water flooded the interlocking maze of mines, causing Fletcher to abandon his coal mines permanently.[49]

Fletcher sued Rylands in the Court of the Exchequer, but this trial court relied on the common law's limitation of recovery to trespass, negligence, and nuisance, and ruled that Fletcher's case met none of these causes of action.[50] Fletcher then appealed to the Exchequer Chamber and won. Justice Blackburn announced a broad statement of liability, beyond the established grounds of trespass, nuisance, or negligence:

> [T]he person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in

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attempting to build a rationale from the defendant's dutiful action, but rather, from his lack of negligence in a lawful act.

[46] 45 Mass (4 Met.) 49 (1842).

[47] Simpson, *supra* note 12, at 239 n.117.

[48] Fletcher v. Rylands, 159 Eng. Rep. 737, 740 (Ex. 1865).

[49] Simpson, *supra* note 12, at 241-42.

[50] *Rylands*, 159 Eng. Rep. at 744-47. At the time of the accident, the doctrine of respondeat superior did not make an employer legally responsible for independent contractors. *See* WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS § 70, at 480 (1964). This rule applies today, although there are many exceptions, including one for "inherently dangerous activities." *Id.*; *see also* JOHN W. WADE ET AL., PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS 666 (10th ed. 2000).

> at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.[51]

Blackburn then qualified this sweeping doctrine of strict liability by focusing on what is "naturally there," in an apparent defense of traditional uses of land, such as agriculture and mining.[52]

On July 17, 1868, the House of Lords upheld the Exchequer Chamber's ruling in favor of strict liability and elaborated upon Justice Blackburn's opinion. Lord Cairns emphasized the difference between natural use and non-natural use. A "non-natural use" is one "likely to do mischief." Natural uses, by contrast, are those expected "in the ordinary course of the enjoyment of the land."[53] The decision shifted the burden from the plaintiff, who would otherwise have to prove that the defendant was negligent, to the defendant, who would now have to prove that either the plaintiff had "defaulted," or that the accident was an "act of God."[54] The burden-shift was liability without fault, i.e., strict liability.

B. The Rise of Legal Science and Negligence

Torts emerged as a defined legal category in the nineteenth century, a late development in the common law. The first torts treatise was authored in 1859,[55] the first torts class was taught in 1870,[56] and the first torts casebook appeared in 1874.[57] As the nineteenth century progressed, more and more legal treatises appeared as an effort to synthesize, reorganize, and reconstruct the common law from an archaic, inefficient, and confusing writ system into a more modern and rational system, reflecting the best qualities of codification. What emerged after the Civil War was "legal science," a scientific/philosophical study of the common law with the aim of deriving general principles of law.[58] The legal science scholars found that the unifying principle in torts was negligence,[59] and Oliver Wendell Holmes was a principal author of this synthesis. It is true that legal science embraced formalism and doctrinalism, but it added a dose of instrumentalism and policy. In legal science, the common law was a source of legal principles which, in the hands of these thinkers, could adapt to "the dictates of society." In response to industrialization's rise in accidents, legal science

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[51] Fletcher v. Rylands, 1 L.R.-Ex. 265, 279 (Ex. Ch. 1866).
[52] *Id.* at 280.
[53] Rylands v. Fletcher, 3 L.R.-E. & I. App. 330, 338-39 (H.L. 1868).
[54] Rylands v. Fletcher, 35 L.J.-Ex. 154, 156 (1866).
[55] FRANCIS HILLIARD, THE LAW OF TORTS (1859).
[56] Harvard Law School. *See* WHITE, *supra* note 12, at 3.
[57] AMES, A SELECTION OF CASE ON THE LAW OF TORTS (1874).
[58] *See generally* WHITE, *supra* note 12.
[59] Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850).

balanced interests of the individual victim against "socially useful activities," and ultimately, reduced legal liability to protect those activities.[60] .

While Holmes is credited with producing the most influential writings in favor of the fault rule, he consistently endorsed *Rylands*, first in 1873 as a valid policy exception to "culpability" (fault), [61] and again with a more nuanced approach in *The Common Law* in 1881.[62] In 1902, Judge Holmes, then on the Massachusetts Supreme Court, extended liability without fault for an icy sidewalk, and cited *Rylands*: "When knowledge of the damage done or threatened to the public is established, the strict rule of *Rylands v. Fletcher* is not in question."[63]

Whether arguing for the negligence rule or the *Rylands* exception for hazardous activities, Holmes turned to instrumental arguments. He embraced the entrepreneurial spirit of the industrial age with one famous rationale for the fault doctrine in *The Common Law*:

> [T]he public generally profits by individual activity. As action cannot be avoided, and tends to the public good, there is obviously no policy in throwing the hazard of what is at once desirable and inevitable upon the actor.[64]

Holmes did not want tort law to create any disincentives for economic activity. Entrepreneurial freedom produced economic growth as a benefit to the public as a whole, and it should be encouraged by the legal system. Holmes framed the negligence rule with utilitarian arguments, and he carved out exceptions with utilitarian arguments. In the *Common Law*, he returned to the same notions in support of strict liability for dangerous activities: "It may even be very much for the public good that the dangerous accumulation [of water] should be made . . . ; but as there is a limit to the nicety of inquiry which is possible in a trial, it may be considered that the safest way to secure care is to throw the risk upon the person who decides what precautions shall be taken."[65] Here we have an inkling of the best cost avoider theory, an early sign of economically oriented arguments on behalf of strict liability. However, other proponents of strict liability

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[60] WHITE, *supra* note 12, at 60-61. *But see* Rabin, *supra* note 12.

[61] Oliver Wendell Holmes, *Theory of Torts*, 7 AM. L. REV. 652, 653 (1873). While Holmes does not sound enthusiastic about *Rylands* at this stage, he is fairly clear about his acceptance of its rule. Nevertheless, prominent scholars have mysteriously interpreted this article as a rejection of *Rylands*. *See, e.g.*, W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 548 n.54 (5th ed. 1984).

[62] See OLIVER WENDELL HOLMES, THE COMMON LAW 88, 116-19, 156-57 (1881). *See also* CLARE DALTON, LOSING HISTORY 53-58 (1987) (unpublished manuscript, on file with the author).

[63] Davis v. Rich, 180 Mass. 235, 237, 62 N.E. 375, 377 (1902). Holmes also concurred in Judge Knowlton's majority opinion in Ainsworth v. Lakin, 180 Mass. 397, 62 N.E. 746 (1902), which also endorsed *Rylands*.

[64] HOLMES, THE COMMON LAW 95 (1881).

[65] *Id.* at 117.

would develop this idea in a distinctly moral direction, while his pro-fault contemporaries in the courts would embrace economics and entrepreneurialism.

C. The Courts

In 1911, Francis Bohlen commented on why Americans had rejected strict liability: "[T]he intense antagonism of the majority of the American courts appears to be, at bottom, based on their belief that such a [strict liability] rule would be economically harmful . . . . [I]n America the principal attack upon the decision has been on the score of its inexpediency. . . ."[66] While Bohlen was wrong about whether American courts detested *Rylands*, he was right about the instrumentalist reasons offered by the courts and academics that did reject it.

Two state courts, Massachusetts and Minnesota, did not find *Rylands* so terrible at all, and in fact, immediately adopted *Rylands*. In 1868, just two months after Lord Cairns delivered the final *Rylands* decision, the Massachusetts Supreme Court relied upon his ruling in imposing liability without fault.[67] Both Massachusetts and Minnesota, which adopted *Rylands* in 1872,[68] consistently expanded their application of its doctrine,[69] most notably in a decision by Holmes.[70]

This initially open reception ended in New York in 1873. In the case of *Losee v. Buchanan*,[71] a steam boiler exploded because of a manufacturer's defect, without any negligence by the owner. New York's highest court unanimously held that liability for such damage required proof of negligence. The court methodically distinguished a series of New York's strict liability precedents, limiting their scope to "direct and immediate" damage of trespass (such as blasting),[72] interference with "the natural flow of water,"[73] nuisance,[74] and

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[66] Francis Bohlen, *The Rule in* Fletcher v. Rylands (pt. 1), 59 U. PA. L. REV. 298, 304 (1911).

[67] Ball v. Nye, 99 Mass. 582 (1868).

[68] Cahill v. Eastman, 18 Minn. 324, 334-37, 344-46 (1872); *see also infra* Section II.B. Despite the apparent differences between Minnesota and Massachusetts, this Note suggests in Section II.B that these acceptances relate to the impact of urbanization.

[69] Shipley v. Fifty Assocs., 101 Mass. 251 (1869), *aff'd*, 106 Mass. 194 (1870).See *infra* Section II.B for other Massachusetts cases.

[70] Davis v. Rich, 62 N.E. 375 (Mass. 1902).

[71] 51 N.Y. 476 (1873).

[72] Losee v. Buchanan, 51 N.Y. 476 (1873) (distinguishing the blasting damage in *Hay v. Cohoes Co.*, 2 N.Y. 159 (1849) as "direct and immediate," and thus qualifies for trespass vi et armis, according to Blackstone).

[73] *Losee*, 51 N.Y. at 476 (distinguishing the water damage in Bellinger v. New York City Railroad Co., 23 N.Y. 47 (1861), and Pixley v. Clark, 35 N.Y. 520 (1866) as an "immediate and direct violation of the right of the other riparian owners")

[74] *Id.* (distinguishing water damage in Selden v. Delaware and Hudson Canal Co., 24 Barb. 362, and the machinery vibrations in McKeon v. Lee, 4 Rob. Superior Court R. 449, as nuisance).

ferocious animals.[75] Then the court offered its industrialist social contract theory, that civilization requires individuals to sacrifice some rights for demands of economic and industrial development:

> By becoming a member of civilized society, I am compelled to give up many of my natural rights, but I receive more than a compensation from the surrender by every other man of the same rights, and the security, advantage and protection which the laws give me. So, too, the general rules that I may have the exclusive and undisturbed use and possession of my real estate, and that I must so use my real estate as not to injure my neighbor, are much modified by the exigencies of the social state. We must have factories, machinery, dams, canals and railroads. They are demanded by the manifold wants of mankind, and lay at the basis of all our civilization. If I have any of these upon my lands, and they are not a nuisance, . . . I am not responsible for any damage they accidentally and unavoidably do my neighbor. He receives his compensation for such damage by the general good, in which he shares, and the right which he has to place the same things on his land.[76]

This broad principle reflects a laissez-faire policy preference for industrial development over protection of personal property rights, and accordingly, a style of consequentialism. Of course, one might also identify the tropes of moralism in the social contract notion of rights balanced against duties, but the justification for this balance is distinctly economic and instrumental, with much less emphasis on moral commitments separate from utility. Rather than arguing that individuals have a natural right to use their land as they so choose, *Losee* emphasizes the mutual economic benefits, which justify the curtailing of natural rights.

After *Losee*, the second most widely cited rejection of *Rylands* is *Brown v. Collins*, [77] written by the revered Judge Charles Doe of New Hampshire six months after *Losee*. *Rylands* seems to be irrelevant to *Brown v. Collins*'s fact pattern: Brown's horses were frightened by a train, became unruly, and broke Collins's light post. There is no apparent unnatural or unusually hazardous activity, and the ample precedents covering wild and domesticated animals would have sufficed. But Judge Doe was determined to address the *Rylands* problem. Doe criticized Lord Cairns's distinction of natural and unnatural uses as a framework better suited for a "primitive condition of mankind, whatever that may have been."[78] Such a rule would be an impediment to economic growth:

> [The rule in *Rylands*] would impose a penalty on the efforts, made in reasonable, skilful, and careful manner, to rise above a condition of

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[75] *Id.*
[76] *Id.*
[77] 53 N.H. 442 (1873).
[78] *Id.* at 448.

> barbarism. It is impossible that legal principle can throw so serious an obstacle in the way of progress and improvement.[79]

Doe then cites Earl's conclusion in *Losee* following his social contract theory about industrial growth: "Most of the rights of property . . . in the social state, are not absolute, but relative."[80] Doe returned again to the theme of strict liability as a vestige of a primitive time, inconsistent with modern industrial growth, and introduced the themes of legal science:

> [T]he rules of [strict] liability for damage done by brutes or by fire . . . . were certainly introduced in England at an immature stage of English jurisprudence, and an undeveloped state of agriculture, manufacturers and commerce, when the nation had not settled down to those modern, progressive, industrial pursuits which the spirit of the common law, adapted to all conditions of society, encourages and defends. They were introduced when the development of many of the rational rules now universally recognized as principles of the common law had not been demanded by the growth of intelligence, trade, and productive enterprise,--when the common law had not been set forth in the precedents, as a coherent and logical system on many subjects other than the tenures of real estate. . . [W]hatever may be said of the origins of those rules, to extend them, as they were extended in *Rylands v. Fletcher*, seems to us contrary to the analogies and the general principles of the common law, as now established. To extend them to the current case would be contrary to American authority, as well as to our understanding of legal principles.[81]

For Judge Doe, the negligence rule was a "modern," "rational," "coherent and logical system" and was more compatible with the industrial age.[82] Judge Doe believed that the common law was an evolving, logical system responding to new social and economic norms. At the same time, he praised the common law's "general principles," reflecting the values of legal science. Doe also emphasizes America's divergence from "ancient English authorities"[83] as American legal science marked its own path separate from England's common law. At times, Doe invoked moral rhetoric about the defendant's "innocence," [84] but overall, the

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[79] *Id.*

[80] *Id.* (citing *Losee*, 51 N.Y. at 485).

[81] Brown v. Collins, 53 N.H. at 449-50.

[82] *Id.* at 449-50; *see also* Garland v. Towne, 55 N.H. 55 (1874) (rejecting *Rylands* again).

[83] *Id.* at 444.

[84] *Id.* at 451. "[T]he occurrence complained of in this case was one for which the defendant is not liable, unless every one is liable for all damage done by superior force overpowering him, and using him or his property an an instrument of violence. The defendant, being without fault, was as innocent as if the pole of his wagon had been hurled on the plaintiff's land by a whirlwind, or he himself, by a stronger man, had been thrown through the plaintiff's window."

opinion emphasizes utility, the necessities of modern industrial society, and legal science's core principle of negligence.

The New Jersey Supreme Court joined in the condemnation of strict liability in *Marshall v. Welwood*,[85] which became the third most widely cited rejection of *Rylands*. This opinion made only one relatively oblique economic/instrumental argument: that the law followed "what is highly convenient,"[86] implicitly in the sense of social or economic convenience. *Marshall*'s arguments employed the buzzwords of legal science more than *Losee* and *Brown* did: "theoretical principle"; "comprehensive . . . general principle"; "The rule should be made absolute."[87]

Pennsylvania initially approved of *Rylands* in *Pennsylvania Coal Co. v. Sanderson* [88] in 1878 and 1880, but it reversed itself in a new appeal of the same case in 1886, producing the last of the major *Rylands* rejections of the nineteenth century.[89] The Sanderson family had purchased land and a residence outside Scranton, induced in part by a "perfectly pure" [90] stream running through the tract. After the Sandersons built a dam and cistern to use the stream for fishing, washing and drinking water, the Pennsylvania Coal Company began mining coal along the stream above the Sandersons' land. The mine-water, both pumped out of the shafts and trickling naturally out of the shafts, ran to the stream, "corrupt[ing] the water of the stream, and . . . render[ing] it worse than worthless for any domestic or household use."[91]

In a 6-1 decision reversing the trial court's requirement of negligence for recovery, the Pennsylvania Supreme Court relied upon the language of natural vs. unnatural use in *Rylands*.[92] The court held that the defendants had created "an *artificial* watercourse from their mine to Meadow Brook"[93] and that the jury should be the one to decide if it damaged the plaintiff's land. While the court was clear that in cases of "material and appreciable injury," the plaintiffs have a right to recover, it also emphasized that "[t]he proprietors of large and useful interests should not be hampered or hindered for frivolous or trifling causes."[94] The court specified that anthracite coal mining was an "immense public and private interest[]" which required pumping of water, and "should not be crippled and

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[85] 38 N.J.L. 339 (1876).
[86] *Id.* at 341.
[87] *Id.*
[88] 86 Pa. 401 (1878) [hereinafter *Sanderson I*], *aff'd*, 94 Pa. 302 (1880) [hereinafter *Sanderson II*].
[89] 6 A. 453 (Pa. 1886) [hereinafter *Sanderson III*].
[90] *Id.* at 401.
[91] *Id.*
[92] *Id.* at 406.
[93] *Id.* (emphasis added).
[94] *Id.* at 408.

endangered by adopting a rule that would make colliers answerable in damages for corrupting a stream into which mine-water would naturally run."[95] Despite this qualification, the Pennsylvania Supreme Court had clearly adopted *Rylands* and applied it on behalf of a small homeowner against coal mining—a truly groundbreaking ruling (so to speak). *Sanderson I* conceded the economic consequentialist points, demonstrating how much the fault doctrine supporters had appropriated such arguments. This opinion presents some of the themes of pro-*Rylands* cases: an emphasis on a hierarchy of rights (the right to be free from "appreciable" or significant injury above the right of land development), and a focus on natural vs. artificial.

Two years later, in *Sanderson II*, the court upheld *Sanderson I* by a vote of four to two.[96] *Sanderson II* returned to the issue of how to balance property rights, between industry and its neighbors. The court again conceded to industry, writing that "all lawful industries result in the general good." However, this time the court noted that they are still "instituted and conducted for private gain, and are used and enjoyed as private rights."[97] As private rights and not public goods, industry cannot "justly claim the right to take and use the property of [other] citizens without compensation."[98] In this round, the court attacked the defendant's economic argument with moralist trump cards.

However, after a jury found for the Sandersons, the Pennsylvania Coal Company won its appeal to the Pennsylvania Supreme Court in 1886, with three dissents.[99] Judge Woodward, the author of the 1878 opinion, had died, and a new member of the court, Judge Silas Clark, authored a complete reversal with the narrowest of majorities. Taking up the moralist debate, his opinion primarily emphasized that coal mining and its resulting water leakage were natural uses of land. Judge Clark's opinion referred to mine-water runoff or mining in general as "natural" an unmistakable twenty-six times. One example:

> [T]he defendants have done nothing to change the character of the water, or to diminish its purity, save what results from the natural use and enjoyment of their own property. They have brought nothing onto the land artificially. The water as it is poured into the Meadow brook is the water which the mine naturally discharged. Its impurity arises from natural, not artificial, causes. The mine cannot, of course, be operated

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[95] *Id.*

[96] *See* Sanderson v. Pennsylvania Coal Co., 94 Pa. 302 (1880). Judge Woodward, the author of the 1878 opinion, had died. The 1880 opinion emphasized that the coal company's public benefits did not exempt them from liability for damage to private property.

[97] *Sanderson II*, 94 Pa. 302, 307.

[98] *Id.*

[99] Pennsylvania Coal Co. v. Sanderson, 6 A. 453, 113 Pa. 126 (1886).

> elsewhere than where the coal is naturally found, and the discharge is a necessary incident to the mining of it.
>
> It must be conceded, we think, that every man is entitled to the ordinary and natural use and enjoyment of his property.[100]

The court then distinguished Pennsylvania Coal's natural use from *Rylands*'s imposing liability for unnatural use.[101] In its repeated discussions of "natural" flow of water and the "mere force of gravity,"[102] the court ignored its own statement of the facts: "The water which percolated into the shaft was by *powerful engines* pumped therefrom, and as it was brought to the surface, it passed . . . by an *artificial* water-course . . . ."[103] The opinion was thus inconsistent about how natural the mine-water damage was, but the purpose of the opinion was to vindicate the coal mining interests as natural, and thus not liable for damages without fault.

After noting that *Rylands* "has not been generally received in this country,"[104] citing *Losee*, *Marshall*, and another New Hampshire case, *Garland*, Judge Clark moved on to his most significant argument about the economic importance of mining to the state. He noted early in his opinion that Pennsylvania annually produces 30 million tons of anthracite and 70 million tons of bituminous coal, [105] of vast importance to the state economy and "the entire community."[106] Judge Clark turned to the reasoning in the court's 1878 decision that trifling damages should not impede important industries, but he now characterized the Sandersons' case as trifling:

> The plaintiff's grievance is for a mere personal inconvenience; and we are of opinion that mere private personal inconveniences, arising in this way and under such circumstances, must yield to the necessities of a great public industry, which, although in the hands of a private corporation, subserves a great public interest. To encourage the development of the great natural resources of a country trifling inconveniences to particular persons must sometimes give way to the necessities of a great community.[107]

Clark concluded his opinion with a quotation raising the consequentialist stakes: "[t]he population, wealth, and improvements are the result of mining, and

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[100] *Id.* at 456.

[101] Id. at 460 ("The distinction is obvious; and we cannot see how *Rylands v. Fletcher* can be supposed to have any application in the consideration of this case.")

[102] *See e.g.*, *id.* at 457.

[103] *Id.* at 454.

[104] *Id.* at 460.

[105] *Id.* at 455.

[106] *Id.* at 457.

[107] *Id.* at 459.

of that alone."[108] His take-home message was that imposing liability on basic mining activities would risk too much harm to the community and its economy.

With New York, New Hampshire, and New Jersey rejecting *Rylands*, and with Pennsylvania reversing course to reject it, too, America's treatise writers wrote off *Rylands*.[109] The academics' dismissal of *Rylands* fit into a larger historical interpretation of American tort law: pro-industry fault liability dominated the nineteenth and early twentieth centuries,[110] and the mid-twentieth century marked the gradual rise of strict liability.[111] Many prominent works on American legal history feature this supposed rejection of *Rylands* as a centerpiece for their historical claims about the dominance of the fault doctrine as a subsidy for emerging industry.[112]

III. MORAL SUPPORT: *RYLANDS*'S ADOPTION IN MORALISTIC TERMS

The previous Part demonstrated that the fault rule advocates turned regularly to economic and other consequentialist arguments, as well as legal science and its buzzwords of "universal principle." This Part explores the ways in which the defenders of *Rylands* answered their opponents not with economic refutation, but with moral arguments and sometimes with a hint of moral outrage. They contended that industry was not a benefit to the entire public, but rather, a private enterprise no more privileged than any other private interest. This shift opened the door to rights arguments, and courts concluded, more or less, that the right to have one's land undisturbed trumped the right to develop one's own land. These judges offered arguments based upon duty, moral choices, fairness, guilt and innocence, and naturalness and unnaturalness. Perhaps most striking, judges often adopted *Rylands* and turned to moralistic justifications in the wake of man-made disasters. The arrival of *Rylands* from England disrupted an American jurisprudence of fault built upon simple formalism, and some state courts

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[108] *Id.* at 464. This decision also added moralistic anti-Rylands language by arguing that the law should not obligate an "innocent person" to be an insurer against accidents.

[109] *See* Shugerman, *supra* note 18, for a discussion of these treatises.

[110] *E.g.*, FRIEDMAN, *supra* note 12, at 409-27; HORWITZ, *supra* note 12, at 85-108; SCHWARTZ, *supra* note 12, at 55-59; WHITE, *supra* note 12, at 3-19; Calabresi, *supra* note 12, at 515-17; Ehrenzweig, *supra* note 12, at 1425-43; Gregory, *supra* note 12; Simpson, *supra* note 12, at 209, 214-16; *cf.* Posner, *supra* note 12 (examining the era of fault and arguing that fault prevailed as the most economically efficient doctrine). *Contra* Rabin, *supra* note 12, at 927; Schwartz, *supra* note 12, at 1720.

[111] *See* Gregory, *supra* note 12; William K. Jones, *Strict Liability for Hazardous Enterprise*, 92 COLUM. L. REV. 1705, 1706-11 (1992); Virginia E. Nolan & Edmund Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. REV. 257 (1987); Rabin, *supra* note 12, at 961.

[112] FRIEDMAN, *supra* note 12; HORWITZ, *supra* note 12; SCHWARTZ, *supra* note 12; WHITE, *supra* note 12; Gregory, *supra* note 12; *see also* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 134-36 (1995).

responded with instrumentalist economic arguments to bolster the fault rule. Then these tragedies cracked that instrumentalist foundation and undermined the fault rule, as states adopted *Rylands* based upon less defined moral reasoning.

Background social, economic, and political forces also set the stage for *Rylands*'s adoption.[113] First, the preconditions of rapid urbanization, industrialization, and population growth through the nineteenth century highlighted new fears in modern life, particularly as industry boomed side by side with urban residential neighborhoods. Second, the pattern of adoptions did not correlate the booms and busts of the 1870s, 1880s, and 1890s, but the rapid economic growth of the late nineteenth century established a secure enough economic foundation to decrease the importance of subsidization, and raised concerns about controlling industry and preserving the "natural." Third, in terms of politics, the adoption of *Rylands* corresponded with the rise of the Populist movement and an emerging national consensus to begin regulating industry. While populism as a general approach to politics shaped these cases, the direct influence of the Populist Party is questionable, because *Rylands* fared better in Republican states than in the more Populist-Democratic states.[114] Even if the political clout of Populism did not account for *Rylands*'s adoption, the ideology of Populism influenced the courts' turn to moralism and the language of public/private, natural/unnatural, and popular rights and duties, rather than pro-business economics. Speaking more generally, state courts adopted the populist perspective in this era. Each of these economic, social, and political trends played an underlying role in *Rylands*'s adoption, but they are more accurately described as necessary background conditions setting the stage, rather than as the direct triggers of the adoption.

A. Returning to Rylands

In his study of Rylands in England, A.W. Brian Simpson persuasively argued that a pair of bursting reservoirs elsewhere in England, with far more tragic results than Fletcher's flooded coal mines, were the underlying cause of the English courts' "anomalous" strict liability rulings.[115] The first, a dam collapse in Yorkshire in 1852 that killed seventy-eight people,[116] led Parliament to enact new safety precautions.[117] Then, in 1864, during the litigation of *Rylands*, another dam

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[113] *See* Shugerman, *supra* note 18.

[114] Among the states won by the Republican William McKinley over Democratic-Populist nominee William Jennings Bryan in 1896, fourteen adopted *Rylands*, and only three rejected it.

[115] Simpson, *supra* note 12, at 214.

[116] *Id.* at 219-21. The flood put about 7,00 people out of work, and "destroyed four mills, ten dye houses, ten drying stoves, twenty seven cottages, seven tradesman's houses, and seven shops." *Id.*

[117] *See* Act of 1853, 16 & 17 Vict., c. 138, cl. 64, 65 (cited in *supra* note 12, at 225 & n.55.

collapse killed 238 people, destroyed several villages, and also sparked a legislative response.[118] The House of Lords pressed for an amendment applying to reservoir accidents "to make it clear that in no case need negligence be proved."[119] Simpson demonstrates how these disasters and legislative responses, though never mentioned by any of the key actors, shaped the *Rylands* ruling.[120]

Rylands is a good example of tragedy provoking courts to break away from common law precedent and to turn to moralistic language in justifying a new and ambiguous path. The Exchequer Chamber and the House of Lords both emphasized the "naturalness" of the activity in question, so that "non-natural" activities would be subject to strict liability. The case itself illustrated how the *Rylands* "naturalness" rule gave judges broad discretion. The plaintiff's activity was coal mining, and the defendant's activity was harnessing river water to power a mill. The Exchequer Chamber privileged activities using what was "naturally there" on the land, but both the water and the coal were "naturally there," and in fact, the water on the surface, even when diverted, was arguably more 'naturally there' than coal extracted from deep in the earth to the surface. Coal mines and reservoirs were equally disruptive of nature. Today, with growing concerns about greenhouse gasses and with a search for alternative energy, many would argue that waterpower is fundamentally more natural than coal mining and production, even if hydroelectric dams dramatically change rivers into huge lakes and disrupt ecosystems. In 1860s England, coal mining was traditional and natural, while water-powered mills were not, and accordingly, the English courts in *Rylands* expressed their moral opinion.

B. The Johnstown Flood and Moral Arguments

Similarly tragic disasters occurred in California, Pennsylvania, and Texas with similar legal results. After a series of powerful floods and a long political and legal battle over destructive hydraulic gold-mining techniques, California adopted *Rylands* in 1886. Texas experienced a series of reservoir failures producing severe damage starting in the late 1890s, and at the same time it wavered on *Rylands*. I provide more detail on Pennsylvania's Johnstown Flood, on California, and on Texas in *The Floodgates of Strict Liability*, and I will return to this episode in a forthcoming piece. In summary, the Johnstown Flood began in the mountains east of Pittsburgh, where the South Fork Fishing and Hunting Club owned a 450-acre artificial recreational lake, one of the largest reservoirs in the country.[121] The club was known as "The Bosses Club" because of its titans-of-

[118] Simpson, *supra* note 12, at 225-26.
[119] *Id.* at 234.
[120] *Id.* at 243-51.
[121] DISASTER, *supra* note 1.

industry membership, most notably Andrew Carnegie, Andrew Mellon, and Henry Clay Frick. Despite the dam's history of instability, and despite multiple warnings of structural problems, the club's owners and employees disregarded the dam's leaks and crumbling foundation.[122]

On May 31, 1889, the dam in the mountains collapsed due to a torrential storm and unleashed 20 million tons of water, tearing through the valley at one hundred miles per hour.[123] In one of the most devastating disasters in American history, the flood completely destroyed Johnstown, killing two thousand people.[124] According to historian David McCollough, the Flood turned into "the biggest news story since the murder of Abraham Lincoln,"[125] and sparked "the greatest outpouring of popular charity the country had ever seen."[126] As the cause of the dam collapse above Johnstown became clearer, the public focused its anger on the South Fork Club and its wealthy members.[127] The national media turned its attention to the club's membership list of the fabulously wealthy, and the outrage grew.[128] *The New York Times*, a conservative pro-business paper at that time, reported that engineers found that the club had been negligent in maintaining the dam, and editorialized, "[J]ustice is inevitable even though the horror is attributable to men of wealth and station, and the majority of the victims the most downtrodden workers in any industry in the country."[129]

However, justice did not prevail. Not one victim recovered a penny through the legal system. Several families and businessmen sued the club, and even though some of these cases went to a jury, the juries did not award damages.[130] The reasons for these verdicts are not clear, but the public, the media, and an influential legal publication perceived that fault rule had prevented recovery.[131]

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[122] MCCULLOUGH, *supra* note 3.

[123] *See* DISASTER, *supra* note 1, at 18.

[124] *Id.* at 36; MCCULLOUGH, *supra* note 3, at 264.

[125] *Id.* at 203.

[126] MCCULLOUGH, *supra* note 3, at 224-25; *see also* JOHNSON, *supra* note 6, at 266-80 (noting donations from twenty-five states, and from London, Germany, Belfast, and Turkey). The donations totaled almost $4 million in cash, plus food and other necessities. MCCULLOUGH, *supra* note 3, at 225.

[127] *Id.* at 237.

[128] *See id.* at 241.

[129] *Id.* at 254.

[130] SHAPPEE, *supra* note 11 (unpublished dissertation, University of Pittsburgh, 1940); MCCULLOUGH, *supra* note 3, at 258. McCollough does explain that the club was insolvent and had no assets, and that "there is no account of how things went in court, as it was not the practice to record the proceedings of damage suits." *Id.* A follow-up article on the Johnstown Flood and elected judges, "The Twist of Long Terms," will add more historical research on these unsuccessful cases.

[131] MCCULLOUGH, *supra* note 3, at 258-59 (noting how the victims' lawyers and the media stressed the difficulty of proving individual negligence). See below for the *American Law Review's* account.

Just as the *Rylands* trial court in England had revealed the shortcoming of the negligence rule, the Johnstown Flood also focused attention on the faults of the fault doctrine.

C. Disasters and Moral Reasoning

1. Pennsylvania

Pennsylvania's switch against *Sanderson* and toward *Rylands* provides a good example of the role of moral argument in the adoption of strict liability. Just two months after the Johnstown Flood, a note in the *American Law Review* played up the sensationalistic horrors of the flood in support of *Rylands*. The *American Law Review* was a bimonthly publication regarded as "the most influential legal periodical of the nineteenth century,"[132] and its notes were not student pieces, but were legal comments written by perhaps the most "distinguished . . . group of working editors" in the history of legal publishing.[133] The *American Law Review* "earned . . . a large measure of influence, and its value to lawyers as an organ worthy to represent them, can hardly be over-estimated."[134]

The note opened with several pages describing the overwhelming power of collected waters and its potential for destruction. The prime example is the Johnstown Flood, which still left the writer's "legal mind . . . all in a whirl" two months afterward.[135] Commenting with understatement that "water can do a great deal of mischief," the writer refers to the Johnstown Flood's aftermath: a pile of "a great mass of earth, stones, trees, houses, railway locomotives, cars, human bodies, and what not . . . very deep and . . . very solid."[136] From this recounting of the disaster, the writer moves immediately to the legal question of negligence versus strict liability. He acknowledges that the jury would probably be able to negotiate around the negligence rule and find the defendants liable, if only a judge would let it actually hear the case. "But unfortunately we have judges who think that, on questions of ordinary care and questions of what is reasonable in practical life, one legal scholar (although a poor one) knows more than twelve practical

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[132] THOMAS A. WOXLAND & PATTI J. OGDEN, LANDMARKS IN AMERICAN LEGAL PUBLISHING 48 (1989).

[133] ERWIN C. SURRENCY, A HISTORY OF AMERICAN LAW PUBLISHING 192 (1990). In the *Review*'s early years, its editorial staff resembled an all-star team of legal scholars and practitioners, including Oliver Wendell Holmes, Arthur Sedgwick, John C. Ropes, and John C. Gray, *American Law Periodicals*, 2 ALBANY L.J. 445, 449 (1870). For a discussion of the significance of these editors, see SURRENCY, *supra* note at 192. Another publication described this group as "illustrious." WOXLAND & OGDEN, *supra* note 132, at 48.

[134] *American Law Periodicals*, *supra* note 133, at 447.

[135] Note, *The Law of Bursting Reservoirs*, 23 AM. L. REV. 643 (1889).

[136] *Id.* at 646.

men in the jury box."[137] According to the author, the problem of the negligence rule was less a doctrinal issue than a question of institutional abuse. He feared that trial judges had been manipulating the fault rule to enter summary judgments for defendants or to instruct juries unfairly against plaintiffs.

The author then offers *Fletcher v. Rylands* as "[t]he best answer which has ever yet been given," and which had been "adopted by several American courts, though denied by some."[138] The note focuses not upon the question of strict liability, but on Justice Blackburn's ruling that the possession of mischievous or perilous things creates a prima facie case for damages.[139] The advantage of *Rylands* is that it shifts the power from judge to jury to apply its common sense and to decide what is the proper duty of care and what is an act of God. The author's language about the jury interpreting "reasonable care" suggests that he is not interpreting *Rylands* as a doctrine of truly strict liability, but, in a passage full of contempt for the club members, he explains how *Rylands* places the burden on the defendant and shifts the question more to causation:

> It is good enough for the practical purpose of charging with damages a company of gentlemen who have maintained a vast reservoir of water behind a rotten dam, for the mere pleasure of using it for a fishing pond, to the peril of thousands of honest people dwelling in the valley below. It is enough that they are *prima facie* answerable. That takes the question to the jury. The jury will do the rest. They can be safely trusted to say whether or not it was the plaintiff's default, that is the fault of some poor widow in Johnstown, whose husband and children were drowned while she was cast ashore and suffered to live.[140]

According to the note, once *Rylands* creates a prima facie case, the jury should recast the question as assigning moral and causal responsibility. The author then reformulates the defense of *vis major* or "act of God." While the judge may have a certain expansive notion of an act of God, the author recognizes that "a jury of Pennsylvania Lutherans, Reformed Dutch, Presbyterians, Methodists, Baptists, or Catholics[] will not take readily to the attempt to cast the responsibility of such a catastrophe from the shoulders of the fine rich gentlemen who owned the fish pond and the rotten dam, to the shoulders of God."[141] The author understands that a jury, if given a chance to hear these kinds of cases, will be guided by its own sense of outrage and morals, and will apply a standard that is effectively strict liability. The author concludes that if this case ever went to a jury, the members of the South Fork Fishing Club would be in serious trouble.

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[137] *Id.* at 646-47.
[138] *Id.* at 647.
[139] *Id.*
[140] *Id.*
[141] *Id.*

But this case never went to trial, and the *American Law Review* note seems to suggest that the fault doctrine thwarted justice. Just as no English court ever actually applied strict liability to the fatal reservoir failures of 1853 or 1864, we have record of a Pennsylvania court applying *Rylands* against the South Fork Fishing Club. However, courts in Pennsylvania and around the United States began applying *Rylands* to a wide range of other cases.

Soon after the Flood, courts across the country, particularly in the East, embraced *Rylands*. While the Pennsylvania courts never explicitly adopted *Rylands*, they adopted its rule on unnatural use very soon after the Johnstown Flood, and continued to expand the rule to new "unnatural" activities over the next three decades.[142] In 1886, the Pennsylvania Supreme Court strained itself in *Sanderson*[143] to repudiate *Rylands*. The court referred to mine-water runoff or to mining in general as "natural" twenty-six times,[144] a mantra used to distinguish Sanderson's case from *Rylands*, though it ignored the role of powerful engines and "an artificial water-course" in creating the runoff.[145] Even though the court ruled that *Rylands* was inapplicable to such "natural" activities, it still took the opportunity to attack *Rylands*, declaring that *Rylands* had been rejected in America and that its rule was "arbitrary."[146] Before the Flood, the court emphasized the "great public interest" of industry's unfettered development, and denigrated the "mere personal [and] trifling inconveniences" that were caused by industrial damage, and which must "give way to the necessities of a great community."

The Flood swept in a new attitude toward big industry and liability. In Robb v. Carnegie Bros.,[147] an 1891 case involving Andrew Carnegie, the most prominent figure connected to the Flood, the Pennsylvania Supreme Court applied strict liability to a basic and necessary function in the manufacturing of coal. The plaintiff's counsel cited *Fletcher v. Rylands* and argued that this damage, unlike the mine-water in Sanderson, was not from a "natural product," but rather was "brought" to the defendants' property.[148] The case was first argued on October 5, 1889, just five months after the Johnstown Flood.

The court applied strict liability in a unanimous decision, with three of the *Sanderson* judges changing their pre-Flood stance.[149] One of these judges was Judge Silas Clark, the author of *Sanderson* who had been so solicitous of

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[142] *See* Note, *The Absolute Nuisance Theory in Pennsylvania*, 95 U. PA. L. REV. 781, 783-85 (1947).

[143] *Sanderson III*, 6 A. 453 (Pa. 1886).

[144] *Id.* at 456.

[145] *Id.* at 454.

[146] *Id.* at 462-63.

[147] 22 A. 649 (Pa. 1891).

[148] Robb v. Carnegie Bros. & Co., 145 Pa. 324, 336 (1891).

[149] *Id.* The reversing judges were Clark, Green, and Paxson.

industry.[150] The *Robb* ruling limited "natural activities" to the natural "develop[ment of] the resources of his property," which sharply distinguished *Sanderson*.[151] The key distinction between *Sanderson* and *Robb* rested on the natural/unnatural dichotomy: Coal mining itself was natural, but any further development or manufacturing of the coal was not natural.[152] Again, this dispute over naturalness and non-naturalness was an implicit reference to *Rylands*.

Robb further eviscerated *Sanderson* in rejecting *Sanderson*'s reasoning about the supreme importance of industrial development. *Robb* first asserted, "It is a fundamental principle of our system of government that the interest of the public is higher than that of the individual."[153] Then the opinion moved on to the point that industry is private, not public, like roads, rails, highways, and canals.

> [T]he production of iron or steel or glass or coke, while of great public importance, stands on no different ground from any other branch of manufacturing, or from the cultivation of agricultural products. They are needed for use and consumption by the public, but they are the results of private enterprise, conducted for private profit and under the absolute control of the producer. He may increase his business at will, or diminish it. He may transfer it to another person, or place, or state, or abandon it. He may sell to whom he pleases, at such price as he pleases, or he may hoard his productions, and refuse to sell to any person or at any price. He is serving himself in his own way, and has no right to claim exemption from the natural consequences of his own act. The interests in conflict in this case are therefore not those of the public and of an individual, but those of two private owners who stand on equal ground as engaged in their own private business.[154]

The language here emphasizes the private and self-interested choices of the industrialist. On the one hand, one might argue that this reasoning is still consequentialist, and the change in Robb is that the Pennsylvania Supreme Court recognizes less social utility from the industrialist. However, the court does not make this argument on those terms. The language is distinctly about the privateness and the selfish orientation of the industrialist, rather than an economic analysis of his activities. An efficiency-oriented court might have offered some nineteenth-century version of a modern "internalizing negative externalities"

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[150] *See* SMULL'S LEGISLATIVE HANDBOOK 351 (Thomas B. Cochran ed., Harrisburg, E.K. Meyers 1887).

[151] *Robb*, 22 A. at 650-51.

[152] *Id.* ("But the defendants are not developing the minerals in their land or cultivating its surface. . . . The injury, if any, resulting from the manufacture of coke at this site, is in no sense the natural and necessary consequence of the exercise of the legal rights of the owner to develop the resources of his property . . . .").

[153] *Id.* at 651.

[154] *Id.*.

point, but this court did not attempt such an incentives-based argument. The court was not maximizing efficiency or recalculating of utility; rather it was redefining the moral claims. As private and self-interested, industry deserves no privileges for its services, but rather, it owes heightened duties because of the moral accountability for its choices. It is worth noting that in the torts context, the category of "private" enabled the courts to expand their "regulation" of risk by extending liability, while in other contexts, the category of "private" limited regulation.[155] Before and after the Flood, it appeared that some judges placed great significance on this distinction – a distinction that may have been important in other areas, but seemed out of place in torts cases. The category of public and private carried moral weight, but they also served as a moralistic stand-in for the scope of the social benefit. If the judge believed the activity was sufficiently beneficial to justify the risk, then he deemed it "public." Before the Flood, these activities seemed to be worth the risk, and thus they were "public," but after the Flood, the public and the judges felt these risks more acutely and altered their calculus. This intuition could have been a cost-benefit calculus, but the judges expressed it in the moralizing categories of private and public.

The unanimous court's depiction of the industrialist as tremendously powerful, capricious, and manipulative—and deserving of no special protection from the court—stands in remarkable contrast to the court's dicta in Sanderson extolling the public service of the capitalists. In Sanderson, Justice Clark wrote that mining was responsible for the region's prosperity and that the plaintiffs assumed the risks of coal mining by moving into coal country.[156] However, in Robb, the court gave the Carnegie Company no privileges for enriching the region. And interestingly, the Robb court easily could have applied the same "assumption of risk" rule to the plaintiff, who had knowingly bought land adjacent to the Carnegie coke ovens (albeit before they were expanded significantly). He had even helped construct some of the ovens as a paid contractor.[157] Surely, then, the Pennsylvania Supreme Court could have condemned him for turning around a few years later and suing the Carnegie Company for pollution he not only was aware of, but also helped to create. The most apparent cause for the sudden change in the justices' suppositions about industry and the individual homeowner was the Johnstown Flood.

Three months later, in Lentz v. Carnegie Bros.,[158] the Pennsylvania Supreme Court again ruled unanimously against the Carnegie Company, holding it liable without fault for damages caused by the same coke works. In 1893, the court similarly distinguished Sanderson by unanimously finding the storage of oil

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[155] *See, e.g.*, Munn v. Illinois, 94 U.S. 113 (1876).
[156] *Sanderson III*, 6 A. 453, 464-65 (Pa. 1886).
[157] *See Robb*, 145 Pa. at 324.
[158] 23 A. 219 (Pa. 1892).

unnatural and subject to strict liability.[159] The author of this opinion had been one of the Sanderson majority, but now he sharply limited Sanderson to the "necessary" and "essential" development of "the land itself."[160]

The Pennsylvania Supreme Court mixed utilitarian arguments with a moral approach in Russell. The court repeatedly emphasized the importance of clean water to the whole community, and argued from consequences that the public good limited the property rights of the few. But at the end of the opinion, the court drove home its conclusion with a distinct moral argument about duty and the social contract:

> It [would] seem that civil liberty required that other interests than those of the individual should be reckoned with, and that each person must be held to have surrendered such of his natural rights upon coming into society as could not be asserted consistently with a due respect for the rights of others and for the public good. For myself I can see no reason why our duty towards others ought not to place limits upon our rights of property similar to those which it has put upon our natural rights of person. 'Sic utere tuo non alienum laedas' expresses a moral obligation that grows out of the mere fact of membership in civil society. In many instances it has been applied as a measure of civil obligation, enforceable at law among those whose interests are conflicting.[161]

This passage turns the tables on the pro-industry social contract arguments of the anti-*Rylands* cases, *Losee*, *Brown v. Collins*, and *Sanderson*. Those cases conceived of the social contract as a bargain by all individuals to accept the benefits and costs of industrialization, but after the Johnstown Flood, the Pennsylvania Supreme Court rewrote that social contract. The new social compact was that all individuals surrendered their right to develop their property in ways hazardous to others. This argument was not premised upon a utilitarian calculus, but rather a sense of "moral obligation."[162]

Throughout the 1890s and the first two decades of the 1900s, the courts in more than a dozen cases continued to carve away at *Sanderson* and applied strict liability to more and more hazardous industries, based almost entirely on the natural vs. non-natural use distinction.[163] During this period, the Pennsylvania

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[159] Hauck v. Tidewater Pipe-Line Co., 26 A. 644, 644-45 (Pa. 1893); *see also* Gavigan v. Atl. Ref. Co., 40 A. 834, 835 (Pa. 1898).

[160] *Hauck*, 26 A. at 646.

[161] Commonwealth ex rel. Attorney General v. Russell, 33 A. 709, 711 (Pa. 1896).

[162] For modern application of social contract theory to enterprise liability and strict liability, *see* Gregory Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266 (1997).

[163] *See* Evans v. Reading Chem. Fertilizing Co., 28 A. 702 (Pa. 1894) (per curiam); Good v. City of Altoona, 29 A. 741 (Pa. 1894); Hindson v. Markle, 33 A. 74, 76 (Pa. 1895); Commonwealth v. Russell, 33 A. 709 (Pa. 1896); Robertson v. Youghiogheny River Coal Co., 33

Supreme Court declared and repeated that *Sanderson* "has never been and never ought to be extended beyond the limitations put upon it by its own facts."[164] Later decisions relied on *Robb*'s moralistic denigration of "private enterprise conducted for private profit," and repeated *Robb*'s rejecting industry's claim of serving the public interest.[165] In 1898, the Pennsylvania Supreme Court turned up the moral rhetoric, calling a defendant "selfish[]," while conceding that his storage of gas and oil was legal. Rather than focusing on particular actions, whether in terms of legality, due care, or social utility, the Court instead turned to general moral condemnation. This moment suggests that the court no longer categorized public and private in terms of economic benefits, but on moral judgments. The key struggle over the categories of natural and unnatural should be seen in a similar light, as they also took on a moral judgment of what activities were appropriate in which communities.

2. Other States

Many other courts also turned to moral distinctions and arguments in adopting *Rylands* long before the Johnstown Flood. In their early adoptions of *Rylands*, Massachusetts and Minnesota similarly deployed rhetoric about rights and responsibilities, often invoking the phrase, "the defendant had no right" to do X or Y.[166] The Minnesota Supreme Court linked the notion of natural property rights with community reciprocity: "The property of each in his soil is absolute. As it is, so, as against every one, he has the right to have it remain. Therefore his neighbor cannot alter the conditions of things, though by an improvement of his own land, for he thereby infringes upon an existing right."[167] This court's understanding of reciprocity in property rights meant that everyone agreed to leave each other's property alone, and if one violated this maxim, the price was liability. In Mears v. Dole, the Massachusetts Supreme Court emphasized that the defendant acted "for his own purposes," and condemned the defendant for "voluntarily introduc[ing]

A. 706 (Pa. 1896); *Gavigan*, 40 A. 834; Keppel v. Lehigh Coal & Navigation Co., 50 A. 302 (Pa. 1901); Campbell v. Bessemer Coke Co., 23 Pa. Super. 374, 380 (1903); Sullivan v. Jones & Laughlin Steel Co., 57 A. 1065 (Pa. 1904); Green v. Sun Co., 32 Pa. Super. 521 (1907); Vautier v. Atl. Ref. Co., 79 A. 814 (Pa. 1911); Welsh v. Kerr Coal Co., 82 A. 495 (Pa. 1912); Mulchanock v. Whitehall Cement Mfg., 98 A. 554 (Pa. 1916).

[164] *Sullivan*, 57 A. at 1068. *Contra* Harvey v. Susquehanna Co., 50 A. 770 (Pa. 1902). Pennsylvania eventually distanced itself from *Rylands* and reembraced *Sanderson* in the midst of World War I and the conservative 1920s. *See* Alexander v. Wilkes-Barre Anthracite Coal Co., 98 A. 794, 795-96 (Pa. 1916); Householder v. Quemahoning Coal Co., 116 A. 40, 41 (Pa. 1922).

[165] Campbell v. Bessemer Coke Co., 23 Pa. Super. 374, 380 (1903).

[166] Shipley v. Fifty Assocs., 106 Mass. 194 (1869); Wilson v. New Bedford (Mass.), Mears v. Dole, 135 Mass. 508, 511 (1883).; Cahill v. Eastman, 18 Minn. 324 (1872).

[167] Cahill v. Eastman, 18 Minn. 324, 339 (1872).

the enemy [sea water] upon his land, and allow[ing] it to escape from there to the injury of the plaintiff."[168] This language emphasized the selfish nature of the defendant's business enterprise, not its public benefits, and linked it to "the enemy," almost implying that the defendant had made a deal with the devil for profit—a good enough reason to impose liability.

After the Johnstown Flood, other courts continued this line of argument. The Vermont Supreme Court upheld a jury verdict against a canal company for diverting a stream and consequently flooding a marble quarry. The court emphasized the "wrongful[ness]" of the stream diversion (even though it recognized that the flooding was not foreseeable), and praised the *Rylands* decision in broad moral terms:

> [T]he [*Rylands*] doctrine is founded in good sense; for where one, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer; that he is bound so to use his own as not to injure another.[169]

Of course, causation in these cases is bilateral, meaning both parties, in a more general sense, "caused" the harm. But for the plaintiff building a marble quarry, the damage would not have happened – just as the defendant is also a "but for" cause of the damage. This problem of bilateral causation plagues any cause-based strict liability rule. For the Vermont court, the defendant's stream diversion was wrongful in itself (even if not negligent or foreseeably harmful), and thus the court could set aside the plaintiff's causal role. Despite the Vermont court's words, these strict liability cases are not strictly cause-based. They begin with a moral judgment of wrongfulness or unnaturalness, and then attribute causation to that actor.

The Ohio Supreme Court continued the theme of questioning the privileges and motivations of private industry. While conceding that these companies produce, "along with many evils, … valuable services … to the public," the Ohio court also observed that "they are not, in the eye of the law, public enterprises, but, on the contrary, are organized and maintained wholly and entirely for private gain; and so soon as gain ceases to follow their operation, just so soon do the operations themselves cease."[170] Maryland's highest court explicitly held that property rights trumped social utility. While this decision dealt with a nuisance case, the court wrote broadly about liability, in addition to adopting *Rylands*:

> No principle is better settled than that where a trade or business is carried on in such a manner as to interfere with the reasonable and comfortable enjoyment by another of his property, . . . a wrong is done to the neighbor, for which an action will lie, . . . although the business may be a lawful

[168] Mears v. Dole, 135 Mass. 508, 511 (1883).
[169] Gilson v. Delaware & H. Canal Co., 26 A. 70 (Vt. 1890).
[170] Columbus & H. Coal & Iron Co. v. Tucker, 26 N.E. 630, 632 (Ohio 1891).

> business, and one useful to the public, and although the best and most approved appliances may be used in the conduct and management of the business.[171]

This passage is an important articulation of strict liability (and enterprise liability) from a rights perspective and a rejection of the instrumental perspective. It does not matter if an activity is "useful to the public." A business enterprise must pay for the damage it creates, with or without fault. In modern efficiency terms, the court might have framed this passage (anachronistically) in terms of internalizing negative externalities. Instead, the court put the harm in terms of "wrongs" trumping "usefulness." Other courts around the country approvingly cited this particular passage from the Maryland Supreme Court.[172] The Maryland court continued with the questioning of industrial self-interest, and linked private interests and public duties: "Having brought this water upon its premises to be used by it for [the defendants'] own purposes, the defendant was bound to provide proper drains or means for its escape without injury to the property of others."[173] New York and New Jersey focused on the natural-unnatural distinction during their flirtation with *Rylands* in the 1890s. By finding a defendant's activities "unnatural," these decisions infused a moral dimension into their reasoning, and used this rhetoric to embrace the rights of the plaintiff over the defendant.[174]

None of these courts engaged in any sustained consequentialist arguments about the social costs of accidents or about efficiency, with just one exception, as far as I have found.[175] Their perspective was that those who engaged in non-natural uses of their land were transgressing the moral boundaries of the community. These courts often conceded that industry promoted the general welfare, but the moral superiority of the natural user prevailed.

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[171] Susquehana v. Malone, 20 A. 900, 900 (Md. 1890).

[172] The cases citing this passage at length are: Frost v. Berkeley Phosphate Co., 20 S.E. 280, 283 (S.C. 1894); Susquehana Fertilizer Co. v. Spangler, 39 A. 270, 271 (Md. 1898); Shelby Iron Co. v. Greenlea, 63 So. 470, 471 (Ala. 1913); United States v. Luce 141 F. 385, 417 (D.Del. 1905). This passage even found its way into Cooley's treatise on Torts. However, Cooley defended the fault rule, and applied this passage to nuisance law, rather than torts in general. 2 COOLEY ON TORTS 1243-45. This case has been cited approvingly by the Tenth Circuit and the supreme courts of Arizona, California, Indiana, Iowa, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, Tennessee, Utah, and Washington.

[173] Baltimore Breweries at 274 (emphasis added).

[174] Duerr v. Consolidated Gas Co., 83 N.Y.S. 714 (App. Div. 1903); Tucker v. Mack Paving Co., 70 N.Y.S. 688, 693 (App. Div. 1901); Grey v. Mayor of Paterson, 42 A. 749, 752 (N.J. Ch. 1899).

[175] Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co., 54 N.E. 528, 531 (Ohio 1899) (referring to "principles of public policy, which regards the interests of the great body of the people, that every owner of real property should be held to possess it subject to the right of his neighbor").

D. Torts Concepts in Moral Language

These cases illustrate a number of moral arguments in favor of strict liability: an argument from the non-natural user's choice and corresponding duties; an argument from fairness (those who profit from an activity should pay those they hurt); a social contract argument of reciprocity; and a rights argument in favor of the natural user/victim. These opinions also seem to have tapped into an inchoate notion of enterprise liability, articulated in moral terms, rather than in economic terms. One pillar of modern enterprise liability, the "best cost avoider" argument, posits that it is most efficient for the party with most direct control over risks and precautions to be liable for damages because that party can most effectively respond to legal disincentives and reduce the risks. In the 1890s, courts suggested a moral version of enterprise liability without the same language of efficiency. These judges relied on a moral sensibility that the party with direct control over the risks, precautions, and profits was morally responsible for damages. As the creator of risk, an enterprise has a moral duty to reduce those risks. The twentieth-century concept of enterprise liability is more complicated, less conclusory, and less subjective, insofar as efficiency can turn on quantitative criteria. "Moral" enterprise liability adds little analysis beyond the conclusion that one party is liable for less "moral" choices of unnatural use and risk creation.

Modern consequentialist arguments for strict liability:

1. Strict liability promotes deterrence and incentives to reduce risks on those with most control of the activity, so that the party will internalize negative externalities.
2. Strict liability places liability on the party best able to insure.
3. The party with deep pockets is the most efficient at planning and investing in precautions.
4. Companies may spread costs to consumers.

Many similar concepts were expressed in *Robb* and other adoptions of *Rylands*'s rule in Minnesota, Massachusetts, Maryland, and Ohio, but in a distinctly moralistic way:

1. Rights Discourse and Private Enterprise: Those engaged in "unnatural" uses or in industry had a right to use their own property, but that right did not extend to someone else's property as a privilege to damage them without paying for it. Here we have a version of liability rules vs. property rules. The "unnatural" user had a right to use his property unnaturally without automatically being labeled a nuisance (and thus no injunction), but the natural-use neighbor had a right to be compensated for the damage. This choice of liability rules over property rules has been

framed in economic terms in modern times,[176] but in these decisions, this choice was a balance of rights of conflicting private property owners. Private enterprise in the pro-fault cases was often described in terms of public benefits, but in the pro-strict liability cases, it was recast as private, with no special privileges against other private property rights.

2. Emphasis on Natural vs. Unnatural/Artificial: "Natural" use carries moral weight, while "artificial" use is morally suspect. The natural user – plaintiff or defendant – was privileged, while the artificial use created moral costs and was disfavored.
3. Choices and Duties: Choices mean moral responsibility and culpability, rather than efficiency, incentives, and deterrence. These cases emphasize duty, not efficiency, and express duties to act morally, rather than incentives to act efficiently.
4. Deep Pockets as Moral Duty: This is only an implicit concept, but courts suggest that producers who act for their own profit have a greater moral responsibility for the costs of their enterprise. There is no discussion of deep pockets as efficiency and greater access to insurance.

An example of this change in ideology is the courts' emphasis on the Latin maxim *Sic utere tuo ut alienum non laedas* ("So use what is yours so as not to harm what is others"), a phrase from nuisance law first reinterpreted to justify the fault rule (even though nuisance is strict), and then re-reinterpreted to justify strict liability. In nuisance law, judges had used the maxim to focus on the result of harm, not on the level of care in the use. Thus, the user who does harm must pay, regardless of fault. When later judges used the maxim to support a negligence rule, they were lifting it out of its strict liability connotation in nuisance, and they thus altered its meaning. In a strained reading, these judges shift the emphasis from "not to harm" to the first words, *sic utere*, "so use," as in the level of care in the use. Reasonable use is the level of care that would tend to avoid harm to others.[177] If one causes harm despite that level of care, one was not violating the maxim, because he was not "so using" what was his in a way that would tend to harm others. Indeed, it was a stretch to subtly slip in the implied "tendency" to this maxim, with its effect of eliminating the harm-based rule. Thus, the defendant was not negligent in his care. The victim was simply unlucky.

However, in cases adopting strict liability and *Rylands*, the maxim is re-reinterpreted (or unreinterpreted) back to its strict origins. These pro-strict liability judges focus on "so as not to harm others." In these decisions, the essence of the maxim was the result of the use – the harm -- and not the level of

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[176] Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972)

[177] *See* Losee v. Buchanan, 51 N.Y. at 488; *see also* Garland v. Towne, 55 N.H. at 58; *Sanderson*, 6 A. at 146.

care in the use. If one causes damage, then one has not used his property so as not to harm others, and is strictly liable on the formal basis of causation. This interpretation emphasizes the defendant's right to compensation and a strict degree of culpability on those whose activities cause harm, even without carelessness.

These various morality-based approaches shift focus from traditional negligence's emphasis on the defendant's behavior in a particular moment to the defendant's more general choice to engage in an activity. In the pro-*Rylands* cases, there was no discussion of cost-spreading or insurance, and the emphasis on foreseeability is related to moral accountability, rather than to the potential for deterrence and cost-avoidance. These opinions employ rights discourse, rather than efficiency discourse; duties, rather than incentives and deterrents. Those who controlled the risks and acted "unnaturally" had a moral duty to reduce those risks. The judges in these cases appear to be parrying the fault rule's claims of moral superiority. The advocates of the fault rule contended that it provided the only legitimate moral justification for the intervention of the state, allowable only for culpability and failure to uphold one's duties. These judges responded by shifting the notions of duties and responsibility to foreseeability and moral accountability for profit-motivated choices. Thus, these strict liability rulings used morality to achieve political and legal legitimacy.

The shift from traditional negligence's focus on the defendant's degree of care in a particular moment to his or her choices more generally is arguably a shift from corrective justice to collective justice, because the strict liability approach was partly motivated by increasing social welfare and protecting the community. However, these cases, when read carefully in text and context, are more corrective in their focus on the individual parties, their rights, and their personal moral duties. In terms of context, the pro-fault anti-*Rylands* cases had emphasized the publicness (or the "publicity") of industry, but the pro-*Rylands* cases shifted emphasis to the privateness of industry, back to corrective justice model of pitting two parties against each other on a moral scale. For example, the Pennsylvania Supreme Court (after the Johnstown Flood) emphasized that industry was private, not public: "The interests in conflict in this case are therefore not those of the public and of an individual, but those of two private owners who stand on equal ground as engaged in their own private business."[178] In terms of text, the pro-*Rylands* decisions focused not on the utility of the general activity, but its moral worth and naturalness, and the personal moral duty of the parties to their neighbors. There was no explicit argument about the activity's collective social impact, but instead, there was a broader corrective approach.

[178] *Robb v. Carnegie,* at 651.

The dearth of economic reasoning is a surprise. The defenders of the fault rule against *Rylands*'s threat in the 1870s and 1880s enthusiastically cited economic arguments. Why did the vanguards of strict liability think through a rebuttal on those terms? Political economy had been a growing field for decades (at least), and the populist and progressive movements emerging in this era turned to economics and efficiency. While some of these judges may not have been exposed to economic reasoning, certainly some were. Some of the most significant courts adopting *Rylands*, such as New York and Pennsylvania, had used economic arguments against *Rylands* just a few years earlier. Oliver Wendell Holmes himself had noted a "public policy" justification for *Rylands* soon after the English courts had announced it.[179]

Perhaps their moral sensibility was so overriding that they felt no need to add efficiency analysis. Or perhaps economic arguments for strict liability sounded too much like judicial redistribution and socialism in an era of growing fears about socialism. Old-fashioned American popular moralism was a politically safer route to enterprise liability. One explanation for why these judges adopted moral reasoning based on rights and duties – and recast industry as "private" and selfish – is that most of the judges adopting *Rylands* and strict liability were elected. As I argue in a forthcoming article, judicial elections made judges more responsive to public opinion. Elections may have drawn in more political lawyers with more direct connections to the public and to small towns, and may have discouraged more traditional and formalist judges from running for nominations and general elections.[180] Appointed judges knew that their base of support were more elite legislators, while elected judges had to balance elite and popular bases of support. After the moral outrage from the Johnstown Flood, these judges shifted to a moral register, perhaps because they faced re-election or because they were conditioned to be more attuned to popular sentiment.

E. Doctrinal Confusion and Ambiguity

After the Johnstown Flood, it would be too strong to say that tort law was in chaos, but to call it "unsettled" would not be strong enough. The American liability "rule" for hazardous industries was more of a flexible standard mixing notions of naturalness, appropriateness, commonness, and riskiness. Even William Prosser, the great consensus torts scholar who made a heroic effort to rationalize and synthesize these cases, conceded that state courts "misunderstood"

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[179] Oliver Wendell Holmes, *The Theory of Torts*, 7 AM. L. REV. 652, 653 (1873). Holmes explained, "It is politic to make those who go into extra-hazardous employments take the risk on their own shoulders." Arguably, the phrases "public policy" and "it is politic" had a connotation of moral politics or popular politics.

[180] *See* Shugerman, *The Twist of Long Terms*, and *The People's Courts* (forthcoming).

and misapplied *Rylands*, and often confused its place in the body of the common law.[181] After all, nineteenth-century judges also applied the fault rule itself with broad latitude. As Gary Schwartz powerfully demonstrated[182] (and re-demonstrated),[183] these judges interpreted fault flexibly and often bent the rule to favor sympathetic plaintiffs over deep-pocket defendants. And of course, the *Rylands* rule was already ambiguous. What things are "likely to do mischief" and what things aren't? What is natural and unnatural? However, as I noted above, the English courts narrowly cabined *Rylands* to reservoirs, while American courts broadened *Rylands* and liability for "unnatural" activities to cover a wide variety of cases. Even if the exact contours of *Rylands*'s rule in America were ambiguous, a majority of state courts had ruled that those who engaged in unnatural activities were liable without fault.

Ambiguous terminology led to confusing and inconsistent application to particular cases. The Pennsylvania cases in this period are incoherent as to which uses of land or water are natural and which are unnatural. Some states followed *Rylands* in privileging mining as natural, but others, like Ohio and New Jersey, declared it unnatural and destructive. New York judges used *Rylands* to establish strict liability for ice falling from a tower,[184] and, in a dissenting opinion, to argue for liability for the growth of poison ivy—even though the ivy *naturally* grew on the land.[185] Other courts deemed unnatural any human activity involving a building, water, and/or ice: ice and snow sliding off a steep roof[186] and a collapsing awning;[187] ice sliding off a hazardously steep roof;[188] a collapsing wall;[189] a collapsing chimney;[190] a slab of zinc falling from a roof;[191] and a leaking pipe creating an icy sidewalk.[192] State courts also extended *Rylands* to

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[181] Prosser, *supra* note 15, at 159, 170.

[182] Gary Schwartz, *Tort Law and the Economy in Nineteenth Century America: A Re-Interpretation*, 90 YALE L.J. 1717 (1981).

[183] Gary Schwartz, *The Character of Early American Tort Law*, 36 UCLA L.REV. 641 (1989).

[184] Davis v. Niagara Falls Tower Co., 64 N.E. 4, 5 (N.Y. 1902) (citing Shipley v. Fifty Assocs., 106 Mass. 194 (1869)). Counsel for the plaintiff had cited *Shipley* and *Rylands* jointly in his arguments. Davis v. Niagara Falls Tower Co., 171 N.Y. 336, 336 (1902).

[185] George v. Cypress Hills Cemetery, 52 N.Y.S. 1097, 1103 (App. Div. 1898) (Woodward, J., dissenting).

[186] Hannem v. Pence, 41 N.W. 657 (Minn. 1889).

[187] Waller v. Ross, 110 N.W. 252 (Minn. 1907).

[188] Shipley v. Fifty Assocs., 101 Mass. 251 (1869), *aff'd*, 106 Mass. 194 (1870). The Massachusetts cases that apply *Rylands* so broadly and confusingly demonstrate that appointed life-term judges also had difficulty interpreting its rule clearly.

[189] Gorham v. Gross, 125 Mass. 232, 238, 239 (1878).

[190] Gray v. Boston Gas Light Co., 114 Mass. 149 (1873) (citing *Shipley*, 101 Mass. 251).

[191] Khron v. Brock, 11 N.E. 748 (1887) (citing *Gray*, 114 Mass. 149).

[192] Davis v. Rich, 62 N.E. 375, 377 (Mass. 1902). Holmes was in the majority in Judge Knowlton's opinion in Ainsworth v. Lakin, 62 N.E. 746 (Mass. 1902), which also endorsed *Rylands*.

industrial activities and railroads,[193] but many states seemed more enthusiastic about applying *Rylands* to all kinds of seemingly natural uses of water (or even non-uses of water), rather than to much more unnatural and hazardous industries, as a common sense reading of *Rylands* might have suggested. In short, the states' application of *Rylands* hardly inspired confidence or established clarity. [194]

An additional distinction between the pro-fault and the pro-strict liability courts – and another source of dissonance -- was their reliance on different types of authorities. The major anti-*Rylands* opinions cited several treatises and about as many English cases as treatises. *Losee* cited two of each, *Marshall* cited two treatises and three English cases, and *Brown* cited nine treatises and eight English cases. By contrast, many pro-*Rylands* opinions cited many more English cases and rarely cited treatises. The Massachusetts cases cited between four and ten English cases each, and only one case cited a treatise (*Shipley* cited one). Minnesota's adoption in *Cahill* cited over twenty English cases and only one treatise, and Maryland's adoption in *Susquehana* cited fourteen English cases and no treatises. *Sanderson I*, which adopted *Rylands*, cited twelve English cases and no treatises, which perhaps explains the tally of *Sanderson III* as a rejoinder: thirteen English precedents and four treatises. Certainly, judges who approved of *Rylands* were likely to look for support in English precedent, and not treatises, and the converse would be true for anti-*Rylands* judges. Nevertheless, these different citation styles at least suggest that these judges had slightly different senses of legal authority and that they perhaps relied on different sources for their information about the common law. They also might tend to discount the validity of the other side's opinions because of the different appeals to authority. Many judges and academics surely noticed several cases adopting *Rylands*, but because they may have found their arguments obsolete, rudimentary, or mistaken, they were more likely to downplay these cases and not observe the trend.

Some scholars have suggested that one reason the United States achieved such industrial dominance in the nineteenth century was because the fault rule shielded

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[193] *See* Chi. & N.W. Ry. v. Hunerberg, 16 Ill. App. 387, 390-91 (1885); Susquehana Fertilizer Co. v. Malone, 73 Md. 268 (1890)..

[194] Two scholars worked through *Rylands*'s category of naturalness to find conceptual clarity to guide the application of strict liability. Francis Bohlen focused on the character of the land itself and its traditional use. Francis Bohlen, *The Rule in* Rylands v. Fletcher, 59 U. PENN. L. REV. 298, 373, 423 (1911) (Parts I-III). F.H. Newark interprets non-natural as unusual and not ordinary. F.H. Newark, *Non-The Natural User and* Rylands v. Fletcher, 24 MOD. L. REV. 557 (1961). Many of the American cases adopting *Rylands* are consistent with Bohlen's and Newark's interpretations, but, as cited in this paragraph, there are also a number of cases that treat Rylands as "water law," even when such uses are arguably a traditional part of the land and not so unusual, as well as other cases applying *Rylands* to seemingly traditional and common activities.

enterprise from liability.[195] One might interpret the adoption of *Rylands* as undermining that assumption, because economic growth happily co-existed with strict liability. However, state courts did not apply *Rylands* broadly or consistently enough to support such a claim. It is unclear in this study whether lower courts applied *Rylands* across the board to industry, or whether state courts applied it mainly to disfavored activities and protected more favored or powerful industries.

CONCLUSION

In his opening to his lectures on the common law, Oliver Wendell Holmes observed, "The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[196]

Holmes spoke these words in 1880, in the midst of the rejection of *Rylands* by a handful of prominent courts, and just a few years before the Johnstown Flood. By 1902, *Rylands* had become so widely accepted that Judge Holmes wrote for the Massachusetts Supreme Judicial Court that it was "not in question."[197] At various times, Holmes may have been a skeptic about moralism in the law, but moralism prevailed in this episode of American law, ironically through the ostensibly amoral doctrine of strict liability.

In the first part of this history (the first half of the nineteenth century), American judges established a general negligence rule also without question. With little fanfare and little justification, they offered up a broad rule as if it were uncontroversial and unremarkable. These judges very rarely offered hints of moral or efficiency reasoning, and even offered few citations. In the second stage, experience forced these judges to offer a logic: The English pronouncement of strict liability in *Rylands* provoked a reaction in some American courts to defend fault in relatively new economic terms in the 1870s and 1880s. They turned to a kind of industrial social contract, emphasizing that efficiency and subsidy would benefit society. In the third stage, a very different experience then forced judges to offer a different logic: The Johnstown Flood stirred many more American courts to embrace *Rylands* in moral terms around the turn of the century.

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[195] *See, e.g.*, Richard Posner, *A Theory of Negligence*, 1 JOURNAL OF LEGAL STUDIES 29 (1972).

[196] OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881).

[197] Davis v. Rich, 180 Mass. 235 (1902) (Holmes, J.).

A first lesson of this story is that the common law can reverse itself dramatically, or more accurately, events and backlashes can trigger reversals. Moreover, the common law's reasoning also can change suddenly, veering from economic efficiency to moralism within a few years, even within the same courts with the same judges. The moral and the economic approaches to strict liability are not mutually exclusive, but are complementary. The nineteenth-century perspective on strict liability may have emphasized moral responsibility, but it also had some unspoken understanding of economic choice and deterrence. Likewise, the modern economic perspective on strict liability emphasizes efficiency, but it, too, has moral commitments. Both fault and strict liability have moral and economic foundations, and contexts influence which theory judges and scholars highlight. Disaster led to moral outrage, which in turn delivered established strict liability in an important area of tort law. This experience gives us a better understanding of the logic – or rather, the contingent, competing, and complementary logics – of tort law.

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Three Models of Constitutional Torts

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