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Recovering Rylands

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RECOVERING RYLANDS: AN ESSAY FOR ROBERT RABIN

Gregory C. Keating*

INTRODUCTION

Professor Robert Rabin's discussion of *Rylands v. Fletcher* appears as something of an aside in a lovely and influential article on the rise of fault liability. That article—*The Historical Development of the Fault Principle: A Reinterpretation*¹—is one among a number of influential, widely admired papers that Rabin has written on central topics in the law of torts.² This Festschrift has provided the pleasurable opportunity to revisit several of these papers and to discover that they are even richer and more instructive than I remembered. We—or at least I—remember important papers by recalling their fundamental claims and insights. There is much to be said for this form of mental indexing, but one of its costs is forgetting the enormous richness of genuinely distinguished papers. The best papers resist reduction even to their general lessons. When we return to them, they are always fresh and reward rereading. It is a mark of the distinction of Rabin's career that he has given us more than a few papers that have this eternal freshness. We are all in his debt, both for the learning and the pleasure.

The Fault Principle itself was slotted into my memory for persuasively advancing a large and important claim about the emergence of modern negligence law in the latter part of the nineteenth century. The then-prevailing scholarly wisdom summarized this age of tort law

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1. Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981) [hereinafter Rabin, *The Fault Principle*].

2. Themes in *The Fault Principle* play out in a number of Rabin's classic articles. A partial list of these articles includes Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435 (1999) [hereinafter Rabin, *Enabling Torts*]; Robert L. Rabin, *Respecting Boundaries and the Economic Loss Rule in Tort*, 48 ARIZ. L. REV. 857 (2006); Robert L. Rabin, *Some Thoughts on the Ideology of Enterprise Liability*, 55 MD. L. REV. 1190 (1996) [hereinafter Rabin, *Some Thoughts*]; Robert L. Rabin, *The Fault of Not Knowing: A Comment*, 4 THEORETICAL INQUIRIES L. 427 (2003); and Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513 (1985).

with phrases like the “emergence of *universal* fault liability” or the “rise of *general* fault liability.” Usually, some incarnation of Oliver Wendell Holmes comes to mind. Fault, we were taught, emerged in the latter half of the nineteenth century out of, and in dialectical opposition to, strict liability. *The Fault Principle* teaches that we seriously misunderstand this moment, and the historical process working itself out, unless we set the transformation of tort law’s internal logic in the larger context of the landscape of liability for unintentional harm. And when we take that broader view, we see that *nonliability*—not strict liability—was the dominant feature of the legal landscape of the time. “[F]ault liability emerged out of a world-view dominated largely by no-liability thinking.”³ This makes a difference: if fault liability overthrew strict liability, it represents a contraction of civil liability; if it emerged out of a world of no liability, it represents an expansion.

The fault principle, Rabin shows, is hedged in by three insufficiently appreciated limits. First, the fault principle—and tort law more generally—yields to property law when the liability of landowners is at issue.⁴ The ancient status categories of property law determined the obligations that landowners owed to entrants of their property and “[o]nly in the case of an ‘invitee’ did the courts regard landowners as owing a duty of due care.”⁵ Second, tort yields to contract in both the workplace and product contexts.⁶ Third, even when the fault principle holds sway over liability for unintended harm, it is hemmed in by large domains of *damnum absque injuria*.⁷ Liability for economic or emotional harm, no matter how severe, was not yet even in its infancy.

The realm of the fault principle is a relatively small patch in the legal landscape; namely, accidents among strangers arising out of the activities distinctive to an industrializing society.⁸ Fault is not overthrowing a prior regime of strict liability; it is the answer to questions of first impression. From the point of view of the cases, there is no preexisting doctrine to overthrow.⁹ Because both property and contract trump tort and because both emotional and economic harm go unrecognized, “no liability” (or “no duty”) is far more common than fault liability. “The fault theory maintains its pervasive character by largely ignoring the fact that a variety of *prima facie* negligent activi-

3. Rabin, *The Fault Principle*, *supra* note 1, at 928.

4. *Id.* at 933–36.

5. *Id.* at 933.

6. *Id.* at 936–42, 946–47.

7. *Id.* at 948–52.

8. *See id.* at 947.

9. *See* Rabin, *The Fault Principle*, *supra* note 1, at 937.

ties systematically were treated as outside the ambit of negligence law.”¹⁰ All of this lends itself to a certain sort of easy summary: the article is indexed in my memory under “no duty.” I want to thank Rabin for that. Not every article can be epitomized so pithily.

My memory was not faulty. *The Fault Principle* does make the argument that I just summarized. The argument, moreover, is fundamentally sound and well worth remembering. *The Fault Principle* teaches us something essential about the character and structure of modern tort law at the time of its genesis, and it reminds us of the even more general truth that what the law does not cover is at least as important as what it does cover.

But my memory did not do justice to the richness or the sophistication of the piece either. For one thing, the article is constructed around a simple but powerful distinction between fault (or negligence) as breach of duty and fault (or negligence) as a cause of action. That felicitous distinction enables Rabin to explain the error of traditional tort history in this tidy way: fault emerges as the cornerstone of liability for unintended harm in tort, but the negligence cause of action does not emerge as the dominant legal regime governing unintended harm.¹¹ Duty determinations are prior to, and more important than, breach determinations,¹² and when we inquire into determinations of duty, we see that property, contract, and *damnum absque injuria* dominate fault-based liability. The simplicity and elegance of this thesis are as appealing as its accuracy.

For another, the article is a powerful critique of the still-influential argument that negligence, in its formative era, was economically efficient.¹³ Here, Rabin is sensitive to doctrine, to contemporaneous perceptions of the nature and basis of tort liability, and to the limitations on what formal doctrine and case law can teach us. Starting with negligence liability itself, Rabin challenges William Landes and Richard Posner’s claim that Holmes’s account of negligence prefigures the modern economic conception.¹⁴ That challenge begins by pointing

10. *Id.* at 949.

11. *See id.* at 933–54.

12. *See id.* at 932 (“The great failure of tort historians has been the tendency to ignore [the] fundamental distinction [between negligence as breach of duty and negligence as cause of action]. . . . The fault principle is thus robbed of any sensible meaning, because key elements in a negligence case having nothing to do with breach of due care—particularly, the duty question—frequently are determinative of major categories of injury claims.” (footnotes omitted)).

13. This thesis is identified preeminently with the early work of Richard Posner, and Rabin’s work criticizes the thesis as Posner develops it, both individually and in conjunction with William Landes.

14. Rabin, *The Fault Principle*, *supra* note 1, at 929–32.

out that Holmes's argument for negligence liability and against strict liability is based on a "policy" of preferring freedom of action. Holmes's argument does *not* prefigure the economic case for negligence both because it is based on freedom, not efficiency, and because—as an abstract matter—negligence is not superior to strict liability when it comes to inducing efficient precaution.¹⁵

At its most general, the choice between negligence and strict liability "only goes to the initial allocation of injury costs" and *not* to "the total resource activity."¹⁶ Strict liability and negligence differ with respect to who bears the cost of accidental harm that should not be prevented. Negligence leaves those harms on the victims who happen to suffer them, whereas strict liability shifts them back to the injurers who inflict them. But economically rational actors take the same precautions under either regime. Under negligence, they take cost-justified precautions in order to avoid liability. Under strict liability, they take only cost-justified precautions and no more because it is cheaper to pay for accidents that cost-justified precautions would not have prevented than it is to avoid those accidents by taking more than cost-justified precaution. Holmes's case for negligence liability, moreover, is a moral case, rooted in individual freedom. The economic case denies that fault liability finds its justification in morality, except insofar as we are morally averse to squandering resources. The link between Holmes's moral argument and Landes and Posner's economic argument is therefore asserted but not shown.

The gap between Holmes's thought and economic theory persists when we move from the case for negligence liability to the character of negligent conduct. Rabin reminds us that negligence law in its formative period did not identify fault with economic inefficiency.¹⁷ The "due care standard" was tied "to community expectations of *reasonable* behavior, rather than to the economist's perception of *rational* behavior."¹⁸ Rationality is a matter of prudence, whereas reasonableness is a matter of morality. Rational behavior pursues one's own interests intelligently, whereas reasonable behavior takes due account of the interests of other people. In practice, tort law's commitment to reasonableness, not rationality, meant "holding the actor responsible to the standards of expected behavior in the community," and in the-

15. *Id.* at 929–31 & n.15.

16. *Id.* at 929 n.15.

17. Perhaps I should confess that this point is independently important to me. See generally Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311 (1996).

18. Rabin, *The Fault Principle*, *supra* note 1, at 931.

ory, it “suggest[ed] a moral basis for the fault principle.”¹⁹ Evidence that fault liability implicitly and intuitively embodied economic efficiency hangs mostly by the slender thread of the later-articulated Learned Hand Formula.

Next, Rabin points out that Posner’s identification of economic efficiency with fault liability undermines his larger claim for the efficiency of the common law because “no duty” dominates “duty” in the larger structure of late nineteenth-century law. The *categorical exclusion* of fault considerations from both product and industrial accidents precludes the tailoring of precaution to cost. The sparse historical evidence that we have, moreover, suggests that these exclusions were not based in efficiency considerations. Courts embraced privity of contract in the product accident context primarily out of a wholesale fear of unbounded liability.²⁰ In the workplace-accident context, assumption of risk and the fellow-servant rule were perceived to run counter to the wishes and economic interests of workers, and the preconditions for efficient market allocation of risk appear to have been absent.²¹

In short, tort liability—fault liability—retreats whenever contract is capable of taking hold of a domain of accidental injury. It retreats both in the presence of contractual relations in the workplace context and in the absence of contractual relations in the product context. The trigger is not what contract *does* but what contract is in a position to do. In the workplace context, contract is in a position to govern the legal relations between employers and employees. In the product context, the only relations susceptible to contractual governance—and the only relations that are therefore candidates for legal duties—are the relations between sellers and buyers. Furthermore, just as tort is trumped by contract, so too it is trumped by property. In the case of landowner liability, tort yields to the status categories of real property law. These categorical limitations on fault liability foreclose the calculation of cost and benefit by fault liability. That is no small problem for a theory that identifies economic efficiency with the *operation* of fault liability.

Last, *The Fault Principle* makes brilliant use of the well-taken Realist point that decisions are written to justify conclusions and predicate

19. *Id.* at 930. See generally Keating, *supra* note 17 (offering an account of the negligence principle based on reasonableness as a moral norm).

20. Rabin, *The Fault Principle*, *supra* note 1, at 936–37 (quoting 10 M.&W. 109, 152 Eng. Rep. 402 (Ex. 1842)).

21. *Id.* at 939–43. In particular, the autonomy and mobility to effect trade offs between safety and wages appear to have been absent, and what little evidence there is casts doubt on the existence of a wage premium for unusually hazardous work.

their arguments on the facts as the decision narrates those facts.²² The result is that judicial rhetoric alone cannot settle the question of whether it was, or was not, efficient to prevent an accident. Judicial opinions may well show that it was inefficient to prevent the accident as described by the court, but that is not the same as showing that it was actually inefficient to prevent the accident. *Adams v. Bullock* is one of Rabin's well-chosen cases in point.²³ Landes and Posner assert that *Adams* made "as clear a statement as one might ask of the proposition that the optimal level of care is a function of its cost."²⁴ This claim, however, "depends on the circularity of taking the court's story of the case at face value" and ignores "the trivial cost of a warning sign at the overpass."²⁵ Showing the efficiency of common law legal decisions requires critically examining their facts, not accepting what courts have to say about the facts in the course of concluding that they do not support a finding of fault. This cautionary reminder of the complexities involved in finding fault is, moreover, as timely today as it was in 1981, when *The Fault Principle* was first published.

Taken together, Rabin's observations constitute a *tour de force* critique of the thesis that the common law of negligence circa 1870 through 1905 was economically efficient. *The Fault Principle's* larger point that duty and "no duty" are anterior to breach and determine the size of the domain that the fault principle governs is a lesson that every tort scholar should absorb. Negligence as breach of duty must indeed be distinguished from negligence as cause of action if we are to avoid conflating the law's character with its scope. Put differently, negligence as a cause of action is an *institution*—an organized system

22. See *id.* at 954–55.

23. See *id.* at 955 (citing *Adams v. Bullock*, 125 N.E. 93 (N.Y. 1919)). *Palsgraf v. Long Island Railroad*, 162 N.E. 99 (N.Y. 1928), and *In re Kinsman Transit Co.*, 338 F.2d 708 (2d Cir. 1964), are two other cases discussed. See *id.* at 957.

24. William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851, 894 (1981). Rabin also discusses *Adams* in *The Fault Principle*. Rabin, *The Fault Principle*, *supra* note 1, at 955 ("Judge Cardozo asserted that plaintiff, who was electrocuted when a long wire he was carrying touched the defendant's uninsulated trolley line beneath an overpass, had failed to demonstrate negligence—because the injury was highly unlikely and the defendant would have been put to considerable expense abandoning the overhead system of electricity."). Put slightly differently, Judge Cardozo's point is that generalizing the precaution that he assumed was necessary to prevent this injury (no overhead electrification of trolleys) is unacceptably high, an unacceptable general practice. Plaintiff's case for negligence therefore fails. But if sparing use of well-placed warnings would prevent the accident, the matter would be entirely different. Plaintiff's failure is a failure to articulate the correct untaken precaution, the precaution that would have been worth taking.

25. Rabin, *The Fault Principle*, *supra* note 1, at 955.

of norms, concepts, and roles.²⁶ To understand negligence law, large legal norms such as duty, breach, cause in fact, and proximate cause and large concepts such as risk, reasonableness, and harm must be understood in relation to one another. And we must also understand the distinction between law and fact, the nature of mixed questions of law and fact, and the relation of these to the respective roles of judge and jury and attend to negligence law's famous affinity for standards over rules.

When we think about the pervasiveness of negligence law—that is, about whether some asserted historical moment lies within an era when fault liability predominates or not—we must place the scope of the *institution's* application front and center. When we think of negligence as an institution, even at the close of the historical period that is supposed to have been the heyday of fault liability, the era of universal fault liability had yet to come.²⁷ In 1905, the extension of fault liability to product accidents was still more than a decade away; the extension of fault liability to landowner liability was more than a half century away; and the expansion of liability for emotional and economic injury had barely begun. In 1905, contract still controlled product accidents; property categories still controlled landowner liability; and “no duty” was the near-universal norm with respect to emotional and economic injury. At the turn of the twentieth century, the era of “universal fault liability” was a future prospect, not a present achievement.²⁸

26. The idea of an institution is, I think, intuitive and is implicitly invoked in an intuitive sense by Rabin when he distinguishes between negligence as a cause of action and negligence as a breach of a duty of care. Negligence as a cause of action implies an institution. The intuitive idea of an institution was, however, developed by enduringly famous philosophical writings in the 1950s and early 1960s. These writings bear on the point in the text because they help to clarify why it is important to understand a legal regime as an organized normative whole, even if it is far from perfectly coherent. The preeminent writings are John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955), and H. L. A. HART, *THE CONCEPT OF LAW* (1961). Rawls distinguishes between rules of thumb (or “summary” rules) and “practice” (or “constitutive” rules). The latter enables people to do things that they would not otherwise be able to do; games are a canonical case in point. Hart explicates the character of law by developing the idea of a “social rule” and arguing that this idea is at the center of law. Negligence is an institution in the sense that it is an integrated system of concepts and norms. Those concepts and norms as a whole determine the care that persons owe to one another with respect to a large domain of accidental harms.

27. Rabin suggests that the traditional view takes fault liability to come of age circa 1870 and to begin to wane circa 1905. These are very rough dates.

28. See, e.g., Rabin, *The Fault Principle*, *supra* note 1, at 934.

II. STRICT LIABILITY IN THE WORLD OF NO LIABILITY

Where, then, does *Rylands* fit in all of this? In the broad sweep of Rabin's narrative, *Rylands* is cast to the margin. There is no contest between fault and strict liability. The contest is between fault liability and no liability. In the more tailored telling of the story, *Rylands* fits in as the flip side of the "no duty" status categories:

In focusing on the common law classifications of entrants, one finds a categorical impulse to deny or limit liability. But where the landowner is victim rather than culprit, the rationale for limited liability—the primacy of land occupancy—is sufficiently powerful to embrace the counter-principle of strict liability as well.

In this regard, many of the early land-related categories of strict liability can be viewed as "reverse no-liability" situations. If landowners owed virtually no duty of care to entrants on their land, conversely those who in fact entered without permission and proceeded to cause physical damage, or interfered in some substantial way with the owner's unfettered enjoyment of his homestead, owed an absolute obligation to compensate for harm done. On this basis, a cluster of disparate cases, apparent anomalies in the fault era—wild animal, blasting and nuisance actions, for instance, as well as the doctrine of *Rylands v. Fletcher*—share a common heritage. To put it simply, virtually unlimited enjoyment of one's own land was a two-sided coin, at once supporting a conditional freedom to maintain land as one wished, and, at the same time, promoting a conditional freedom affirmatively to enjoy one's land without interference.²⁹

Speaking loosely, strict liability is the flip side of the coin of "no duty," just as contributory fault is the flip side of fault. Speaking strictly, Rabin is not making a claim about the rights and responsibilities of potential injurers and potential victims with a particular liability regime—a claim, say, that assumption of risk is the natural complement to strict liability in the *Restatement (Second) of Torts* regime for abnormally dangerous activities because assumption of risk is victim strict liability. Rabin is claiming a larger and looser kind of coherence. Real property conferred something quite close to Blackstone's "sole and despotic dominion" over a domain.³⁰ That dominion justified both limiting the obligations of persons in control of real property to entrants into that domain (because such responsibilities would diminish dominion) and holding people whose acts or activities did intrude into that domain strictly responsible for the harms they inflicted (so that harms flowing from the exercise of their agency did not impair that dominion).

29. *Id.* at 935–36 (footnotes omitted).

30. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1766).

A. Generalizing Strict Liability

My aim in this Article is not to challenge either this particular claim or the larger idea that fault liability emerged against a background in which no duty dominated the landscape of liability for accidental injury. Rather, my aim is to make a point parallel to one that scholars have made in the context of negligence liability. Even though negligence liability was not universal in the late nineteenth century, negligence liability itself emerged as a freestanding form of liability in tort.³¹ That emergence set the stage for the expansion of fault liability into the domains of product accidents, landowner liability, and pure economic and emotional harm. What happened in the latter part of the nineteenth century made widespread fault liability a possibility, not an actuality. To oversimplify, negligence was reconstructed from a subjective state of mind (inadvertence) necessary to commit various nominate torts into an objective norm of conduct (the care that a reasonable person would exercise in the circumstances). This reconstruction turned negligence into a general principle of responsibility for harm done, a principle around which a freestanding theory of liability for accidental harm could be constructed. The internal transformation of tort in the late nineteenth century put the principle that people should exercise the care appropriate in the circumstances to prevent reasonably foreseeable physical injury to others both on the map and at the conceptual center of tort. To be sure, tort's external relations underwent relatively little change. The law of tort as a whole remained hemmed in by property, contract, and "no duty" even as tort's internal affairs were radically reorganized. This internal reconstruction, however, was the necessary precondition for the later transformation of tort's external relations, a transformation effectuated by the projection of tort into the domains of product accidents and landowner liability.

Rylands represents the parallel development with respect to strict liability. It abstracts a general idea of strict liability from the particulars of liability for nuisance and trespass. That idea might be summarized as the idea of activity liability. People ought to be held responsible for harms properly attributable to their acts and activities

31. See Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1256–57, 1266–68 (2001) (explaining how Oliver Wendell Holmes's innovations helped negligence emerge during the late nineteenth century as an independent tort organized around a general duty of reasonable care). Oliver Wendell Holmes's proclamation that tort law imposes a duty "of all the world to all the world" is at the intellectual center of this emergence of negligence as an independent tort. *The Theory of Torts*, 7 AM. L. REV. 652, 660 (1873) (unsigned article universally attributed to Oliver Wendell Holmes); see also G. EDWARD WHITE, TORT LAW IN AMERICA 12–13, 343 n.63 (Expanded ed. 2003) (attributing *The Theory of Torts* to Holmes).

even if they conduct themselves carefully. To inflict serious injury on another is to do something that, by itself, creates some obligation of repair toward the person harmed. When (1) an actor inflicts harm in the course of pursuing their private benefit and (2) the actor expects to reap the rewards of the risks from which that harm resulted, then (3) it is only fair that the actor take the bitter with the sweet and bear responsibility for the harm that it does to others in the course of pursuing its own advantage. *Rylands* articulates, incarnates, and illustrates this strict idea of responsibility.

The orthodox view of late nineteenth-century tort law is thus essentially correct in one respect. Fault did blossom within tort as a free-standing principle of liability, around which the law of tort would center going forward.³² And as fault blossomed into a general principle of liability for harm inadvertently done, *Rylands* generalized the counterprinciple of strict liability as a full-blown principle of responsibility in its own right. Just as the fault revolution itself did not mark the triumph of general fault liability, so too *Rylands* did not mark the rise of general strict liability. But what it did was put strict liability on the table as a general alternative to negligence liability.³³ Without *Rylands*, strict liability is a set of isolated instances; no general conception of responsibility ties them together. On facts that powerfully support its inclinations, *Rylands* states strict liability as an intuitively powerful and, in principle, general conception of responsibility for harm done. Or so I shall argue.

This seems worth arguing not so much “even at this late date” as “especially now.” Fault liability ebbs and flows in the extent of its coverage, but the existence of a “negligence cause of action” and its standing as the default regime for accidental physical harm is widely accepted today. Strict liability is far more embattled. A generation ago, enterprise liability was thought to be swallowing whole the law of torts, and tort was thought to be swallowing contract and property.³⁴

32. See Grey, *supra* note 31, at 1262–63 & nn.108–15.

33. In this respect, I believe that I am in general agreement with Kenneth Abraham's view. See generally Kenneth S. Abraham, *Rylands v. Fletcher: Tort Law's Conscience*, in TORTS STORIES 207 (Robert L. Rabin & Stephen D. Sugarman eds., 2003).

34. See WHITE, *supra* note 31; see also George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985). For an alternative account of the rise of enterprise liability, see Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285 (2001). By “enterprise liability” I mean to identify a form of tort liability constructed around two premises: (1) that enterprises or activities should be held responsible for the harms that are characteristic of their activities and (2) that enterprises or activities should disperse the financial costs of those harms across those who benefit from their infliction—usually, all those who benefit from the enterprise. In the product context, for example, enterprise liability prescribes that the costs

Now tort is no more than holding its own vis-à-vis property and contract, and fault is triumphant within tort. In this landscape, *Rylands* itself is curiously embattled. Eminent courts and tort scholars rehearse long-standing doubts that it is no more than a garden-variety nuisance case or assimilate it into negligence of a *res ipsa loquitur* variety.³⁵ The *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* takes the position that there is no general principle of strict liability, just pockets of strict liability.³⁶ *Rylands* is counter-evidence to this claim.

Interpretations that either deny the strictness of *Rylands* or domesticate that strictness by presenting it as the routine application of ancient forms of land-based liability are wrong, I think, and it seems worth saying so—and why. *Rylands* is one of the principal common law fonts of both modern strict liability and enterprise liability. It occupies this role precisely because the liability it recognizes transcends the ancient doctrinal categories upon which the major opinions in the case draw and because those opinions synthesize the ancient authorities that they cite into a general conception of strict liability. We misunderstand the case when we absorb it into negligence liability or nuisance. Furthermore, we are unable to make much sense of its seminal role in American tort law when we interpret it as merely negligence or nuisance. At the very least, *Rylands* is the font and

of product-related accidents should be borne by the firms responsible for marketing the defective products responsible for the relevant harms and that those firms should disperse the costs of such accidents among shareholders, employees, suppliers, and other customers of the firm. Liability for manufacturing defects is a stable instance of enterprise liability. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 cmt. a (1998). Early products liability law is generally thought to have attempted to express enterprise liability ideas with respect to all categories of product defects. See Keating, *supra*; Priest, *supra*. By contrast, the *Restatement (Third) of Torts: Products Liability* conceptualizes design defects and failures to warn in negligence terms. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (1998).

35. F. H. Newark is the most distinguished legal historian to absorb *Rylands* to nuisance. See generally F. H. Newark, *The Boundaries of Nuisance*, 65 LAW Q. REV. 480 (1949). Alan Brudner classifies *Rylands* as a nuisance case and the abnormally dangerous activity liability that it has fathered as really a form of negligence liability. ALAN BRUDNER, THE UNITY OF THE COMMON LAW 327 n.87 (1995). Ernest Weinrib assimilates *Rylands* into a *res ipsa* version of negligence. ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 187–89 (1995). Arthur Ripstein, wrestles uneasily with *Rylands* and struggles to assimilate it into negligence liability on the theory that the choice of activity triggers a special duty of care; namely, to keep the water at the owner's peril. See ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW 70–71 (1999). English courts appear much more attracted than American ones to cabining *Rylands* as an instance of nuisance liability. See *Cambridge Water Co. v. E. Cntys. Leather PLC*, [1994] All E.R. 53 (H.L.) 58–59 (“Nuisance . . . is a congener of the rule in *Rylands v Fletcher*, but the former usually focuses on the acts of the defendant whilst the latter always focuses on the event of an escape of some mischievous thing which the defendant brought onto his land.” (citation omitted)).

36. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM ch. 4, scope note (2010).

inspiration of “abnormally dangerous activity liability,” and it seems fair to say that it is one of the two principal common law fonts (vicarious liability is the other) of enterprise liability.³⁷

In probing *Rylands*, moreover, we are probing interesting tensions in Rabin’s own work. As much as any prominent tort scholar of the past fifty years, Rabin has been sympathetic to the expansiveness of mid-twentieth-century American tort law as embodied in the jurisprudence of the California and New Jersey courts. *The Fault Principle* itself evidences, or at least prefigures, such sympathy in its receptivity to the idea that economic loss and emotional harm might both be proper subjects for tort liability.³⁸ Later writings develop this instinct, while other articles examine the expansive role of enterprise liability within negligence, both directly and in conjunction with enabling torts. By taking a broader view of the way that multiple actions and activities combine to inflict harms, enabling torts involve a retreat from the rigidly individualistic assumptions of late nineteenth-century fault liability and a corresponding embrace of a more collective conception of responsibility.³⁹

The upshot of this is that enterprise liability is a powerful theme in Rabin’s work, but it is a theme that is worked out largely with reference to negligence law. The lessons learned from inquiring into the often subterranean influence of enterprise liability conceptions within negligence law are invaluable, but they are also incomplete. Enterprise liability reaches its fullest flower within forms of strict liability. Indeed, it is arguable that the flowering of enterprise liability in strict liability forms—preeminently, in early products liability law—is the single feature that most distinguishes the tort regime constructed by the California and New Jersey Supreme Courts from the refined and powerful form of fault liability developed by Cardozo and the New York Court of Appeals earlier in the twentieth century.⁴⁰ *Rylands* matters to the rise of modern tort liability because it is a genuinely seminal case with respect to the articulation of strict liability as a general form of tort liability.

37. On the common law fonts of strict liability, see Keating, *supra* note 34, at 1303–08, 1317–29.

38. See Rabin, *The Fault Principle*, *supra* note 1, at 948–52.

39. See generally Rabin, *Enabling Torts*, *supra* note 2.

40. “Arguable” is the right word here because important developments, including the partial rejection of the status categories in landowner liability cases, are expressions of the extension of fault liability.

Recovering *Rylands* is, in short, worth our while, and the way to begin that endeavor is by rereading *Rylands*.⁴¹ The opinions themselves make the case that the liability imposed transcends the traditional forms of nuisance-based and trespassory liability that are the authority for *Rylands*'s rule of strict liability. Before we begin rereading *Rylands*, however, it may help to detour briefly and review just why and how it is that the principal property torts—trespass, nuisance, and conversion—are both intentional and strict.

B. Property and Strict Liability

Fault liability is liability that attaches to conduct that is unjustified or wrong. A judgment of fault criticizes the conduct responsible for the tort in question: a negligently caused accident, for example, is an accident caused by a risk that should *not* have been imposed. Strict liability, by contrast, attaches to conduct that is justified or innocent. This distinction has to do with the basis of liability—whether liability is based on the wrongfulness of the primary conduct responsible for the injury—and it therefore cuts across the tripartite classification of torts into intentional, negligent, and strict. Intentional torts can be strict, and as we shall see shortly, the property torts usually are both strict and intentional.

In modern American tort law, strict liability comes in two forms. One form is epitomized in the torts of conversion, trespass, and certain batteries.⁴² Here, the wrong is the violation of a right that assigns a power of control over some physical object or, in the case of battery,

41. This is not to deny the importance of the historical context. Interested readers should consult A.W.B. Simpson, *Legal Liability for Bursting Reservoirs: The Historical Context of Rylands v. Fletcher*, 13 J. LEGAL STUD. 209, 239 n.117 (1984).

42. Among batteries, medical batteries tend to provide the most vivid illustration of liability predicated on a boundary crossing to which consent has not been given. In *Mohr v. Williams*, for example, the defendant physician was liable for operating on one of plaintiff's ears without permission. See 104 N.W. 12, 13 (Minn. 1905). The defendant had permission to operate on the other ear. *Id.* After anesthetizing the patient, the defendant doctor discovered that the diseased condition was in the ear on which he did not have permission to operate. *Id.* He operated anyway and cured the condition, thereby benefitting the plaintiff. *Id.* Nonetheless, the doctor was liable for battery because he intentionally touched a part of plaintiff's person without permission, thereby denying her authority over her own body. *Id.* at 14–15. His intention in doing so was benign, not malevolent. See *id.* at 13.

For a vivid illustration of the same principle at work in trespass, see *Longenecker v. Zimmerman*, 267 P.2d 543 (Kan. 1954). Believing that cedar trees near the boundary of her property were on her side, the defendant had them topped, trimmed, and cleaned of bagworms. *Id.* at 544. In fact, they were on the plaintiff's property. *Id.* The defendant had trespassed and was liable for "at least nominal damages, even though [the plaintiff] was actually benefitted by the act of the defendant." *Id.* at 545. The defendant's trespass consisted, of course, in the intentional but innocent act of crossing the boundary of plaintiff's property without permission and thereby denying her sovereignty over her own land. See *id.*

control over some subject. The law's specification of various powers of control over one's person and physical objects gives rise to a form of strict liability predicated on the voluntary, but impermissible, crossing of a boundary. If you enter another's land, or appropriate another's pen, without permission, you have violated her right of exclusive control over these objects even if your entry is entirely reasonable and justified. The wrong consists of the failure to respect the right. Fault is simply irrelevant.⁴³ Put otherwise, liability for violation of a right of exclusive control is strict for the simple reason that the right itself would be fatally compromised by tolerating all reasonable (or justified) boundary crossings without regard to whether consent was given to those crossings. Rights of control are a species of autonomy rights. Those who hold such rights are entitled to forbid even reasonable boundary crossings, and they are presumptively wronged whenever their boundaries are crossed without permission. Their rights thus give rise to stringent "duties to succeed" on the part of others.⁴⁴ In this class of cases, the strictness of liability in tort is the consequence of the right being protected.

The other kind of strict liability in modern tort law applies to some torts that involve the infliction of harm, not the unauthorized crossing of a boundary. This kind of strict liability resembles the public law of eminent domain, not fault liability in tort. Eminent domain law holds that it is permissible for the government to take property for public use only if the government pays just compensation to those whose property it takes.⁴⁵ This is a two-part criterion. First, the taking must

The tort of conversion likewise requires only the intent to exercise dominion over a chattel, beyond one's right to do so—neither intent to injure nor intent to commit a wrong are necessary. See *Krusi v. Bear, Stearns & Co.*, 144 Cal. App. 3d 664, 672 (1983). One may be innocently and reasonably mistaken in thinking that one does own the property, or has permission to use or harm it, and still commit the tort. See *id.* (“[A]n action for conversion rests simply upon the interference with the plaintiff's dominion over his property. The action is a species of strict liability in which the defendant's good faith, due care, ignorance or mistake are irrelevant . . .”).

43. In the famous case of *Vosburg v. Putney*, the defendant child's battery (his kicking of the plaintiff) was innocent horseplay. 50 N.W. 403, 403 (Wis. 1891). It was nonetheless a battery because defendant crossed the boundary of plaintiff's person without permission. *Id.* “A battery . . . requires intentional bodily contact which is either harmful or offensive [but] that does not mean that the person has to intend that the contact be harmful or offensive.” *White v. Univ. of Idaho*, 797 P.2d 108, 109 (Idaho 1990) (citation omitted) (internal quotation marks omitted). Instructively, children can commit batteries even when they are too young to be “at fault” and therefore liable for negligence. See *Ellis v. D'Angelo*, 253 P.2d 675 (Cal. Dist. Ct. App. 1953). Liability in battery can thus be strict; it can be imposed on the basis of an innocent intention to commit the act that is the unauthorized contact.

44. The concept of “duties to succeed” is developed by John Gardner in *Obligations and Outcomes in the Law of Torts*, in *RELATING TO RESPONSIBILITY: ESSAYS FOR TONY HONORÉ ON HIS EIGHTIETH BIRTHDAY* 111 (Peter Cane & John Gardner eds., 2001).

45. *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231–32 (2003).

be justified; that is, it must be for a public use.⁴⁶ Second, compensation must be paid for the property taken.⁴⁷ In parallel fashion, the second kind of strict liability in tort holds that it is permissible to undertake certain actions and activities only when two conditions are met. First, the acts and activities must be conducted reasonably. Second, those who undertake those acts and activities must repair any physical harm done by their conduct.⁴⁸ Whereas negligence liability is predicated on primary criticism of conduct, strict liability is predicated on secondary criticism of conduct. In negligence, the infliction of the harm is wrongful; in strict liability, the failure to step forward and repair a harm faultlessly inflicted is wrongful. Strict liability asserts that the costs of necessary or justified harms should be borne by those who benefit from their infliction and not by those with the misfortune to find themselves in the path of valuable activity.

This second form of strict liability is embodied by a diverse set of doctrines: by private necessity cases such as *Vincent v. Lake Erie Transportation Co.*,⁴⁹ by liability for abnormally dangerous activities,⁵⁰ by some liability for intentional nuisance,⁵¹ by liability for manufacturing defects in products liability law, and by the liability of masters for the torts of their servants committed within the scope of their employment. The obligation imposed by these doctrines is an obligation to undertake an action (for example, saving your ship from destruction at the hands of a hurricane by bashing the dock to which the ship is moored) or conduct an activity (for example, operating a business firm) *only* on the condition that you will repair any physical harm for which your action or activity is responsible. The reciprocal right is a right to have any physical harm done to you undone by the party responsible for its infliction.

To be sure, the doctrine that has just been summarized is modern, but the point being made holds true about the law on which *Rylands* drew in its formulation of a general principle of strict liability. *Rylands* appealed to ancient land-based strict liabilities, some of which

46. *Id.*

47. *Id.*

48. This “private eminent domain” conception of strict liability may receive its first theoretical articulation in the writings (some famous and some obscure) of Oliver Wendell Holmes. These writings are cited and discussed in Grey, *supra* note 31, at 1275–81. Two other classic statements are Francis H. Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality*, 39 HARV. L. REV. 307 (1925), and Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959).

49. 124 N.W. 221, 222 (Minn. 1910).

50. See generally Ken Kress, *The Seriousness of Harm Thesis for Abnormally Dangerous Activities*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 277 (David G. Owen ed., 1995).

51. Gregory C. Keating, *Nuisance as a Strict Liability Wrong*, 4 J. TORT L. 1 (2012).

sounded in trespass and others of which sounded in nuisance. Then, as now, liability in trespass was strict because it was grounded on unauthorized entry of land, not on unjustified or faulty entry of land. Liability in nuisance was strict because it was founded on unreasonable *harm*, not on unreasonable *conduct*.⁵²

III. REREADING *RYLANDS*

The essential facts of *Rylands* are simple. A reservoir, which Rylands had constructed on his land, collapsed because it had been built on top of the partially silted shafts of an old mine.⁵³ Those shafts connected with Fletcher's mine.⁵⁴ Rylands had hired independent contractors to construct the reservoir, selecting competent ones who had nonetheless failed to detect and take proper account of the concealed shafts.⁵⁵ There was therefore negligence, but no negligence that could be imputed to Rylands.⁵⁶ Fletcher prevailed at a jury trial, and the court ordered the arbitrator not to make an award, but rather to state the case for the consideration of the Court of Exchequer. The Court of Exchequer gave judgment for Rylands.⁵⁷ Three opinions issued, two supporting the judgment for Rylands.⁵⁸

A. *The Opinions in the Exchequer Court*

Perhaps the most interesting feature of the opinions is that they agreed on the lack of a controlling rule and hence on the need to settle the matter by recourse to principle.⁵⁹ They also agreed on the nature of the issue it presented; namely, that it was a matter of liability for injury that was both unintentional and not negligent. Chief Baron Pollock stated the issue this way:

[F]or what acts done on his own land (and apparently quite lawful), is the owner of an estate liable, if it should turn out in the result that damage is thereby occasioned to the estate of another (who may be an immediate or a distant neighbour) on account of some circum-

52. That traditional nuisance law was concerned with unreasonable impact and not with unreasonable conduct in the negligence sense of the term is shown persuasively by Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 53-56 (1979).

53. *Fletcher v. Rylands*, (1865) 159 Eng. Rep. 737 (Ex. Div.).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. As Baron Bramwell put it, "[W]hile it is always desirable to ascertain the principle on which a case depends, it is especially so here." *Rylands*, 159 Eng. Rep. at 743 (Baron Bramwell). Baron Pollock concurred. *Id.* at 747 (Chief Baron Pollock concurring).

stance entirely unknown to the proprietor who causes the act to be done.⁶⁰

For his part, Chief Baron Pollock saw the case as a “water case” and concluded that there was insufficient authority to decide in favor of Fletcher.⁶¹ Baron Bramwell saw the case more or less the same way, but drew the opposite conclusion; namely, that Fletcher had a right against “water artificially brought or sent to him directly, or indirectly by its being sent to where it would flow to him.”⁶² Rylands, by contrast, had no right to engage in an activity that inflicted water on Fletcher. Fletcher’s right, Rylands’s lack of any right, and the harm inflicted were enough to support a finding of liability.⁶³ Baron Martin, for his part, thought that the case did not meet the technical requirements of either trespass or nuisance. There was no trespass because the damages were consequential, not direct: the filling of the reservoir was not continuous with the flooding of Fletcher’s mine.⁶⁴ There was no nuisance because nuisance required the creation of a continuous condition that injured Fletcher’s property or his enjoyment of it.⁶⁵ Consequently, the complaint was an action on the case and, though there was no direct authority on point, the collision cases were the appropriate analogy. The collision cases required negligence.⁶⁶

The opinions of the Exchequer Court have not had an enormous influence on subsequent understandings of the case, but they do powerfully illustrate one of its essential features; namely, that the facts did not fit into preexisting doctrinal pigeonholes and had to be de-

60. *Id.* at 747.

61. *Id.*

62. *Id.* at 743 (Baron Bramwell).

63. *Id.*

64. Had the reservoir collapsed instantaneously, Rylands’s innocent act of pouring water into his own reservoir would have been the trespass of pouring water directly into Fletcher’s mine. Innocent though Rylands’s intention would have been, it would nonetheless have been an intention to commit an act that was a trespass.

65. Though the matter is not free from doubt, Baron Martin appears to be correct about this. See Francis H. Bohlen, *The Rule in Rylands v. Fletcher* (pt. 1), 59 U. PA. L. REV. 298, 306 (1911), reprinted in FRANCIS H. BOHLEN, *STUDIES IN THE LAW OF TORTS* 344 (1926) (discussing the traditional action for the assize of nuisance).

66. *Rylands*, 159 Eng. Rep. 737 at 745–46 (Baron Bramwell). Of these three opinions in the Exchequer Court, only Baron Bramwell’s is enduringly important. It goes beyond the special context of rights with respect to water and supports its position by more general argument. Baron Bramwell asserts that the case could be viewed as trespass, as nuisance, or as an action on the case and that Rylands should lose on all three of these views. See *id.* at 744. The case, he thought, was governed by the nonfault principle of *sic utere tuo ut alienum non laedas*. *Id.* Negligence was required only in collision cases, in which strict liability does not work because it is impossible to assign responsibility for the harm to either party without deploying a fault criterion. See *id.* In other words, he saw highway accidents as a special case in which the kind of causal indeterminacy that Coase made famous precludes nonfault liability. See *id.*

cided on first principles of responsibility for harm done. Reaching a decision in *Rylands* thus required generalization.⁶⁷

B. *The Opinions in the Exchequer Chamber*

Rylands became a canonical case only when the Exchequer Chamber unanimously reversed the Exchequer Court.⁶⁸ Justice Blackburn's opinion for the Exchequer Chamber states a rule of strict liability for escaping things⁶⁹ defeasible only by a showing that the harm should be charged to something other than his agency in bringing it onto his property ("vis major, or the act of God").⁷⁰ Justice Blackburn's opinion is, along with Lord Cairn's opinion in the House of Lords, one of the most important opinions in the case and one of the primary pieces of evidence supporting the thesis that *Rylands* does indeed articulate a general principle of strict liability.⁷¹

The precedent that Justice Blackburn cites in support of his ruling consists of nuisance cases ("noisome vapors"), trespassing cattle, and other escaping things (for example, the invasion of one person's cellar by filth from another's privy).⁷² All of these are presented as instances of a general strict liability for escaping things; the rule of the case is thus stated broadly. Fault, the opinion firmly asserts, is no part of these forms of liability.⁷³ While nuisance cases figure prominently in the precedents cited, the harm is not the kind of continuous interference with another's use and enjoyment of her property with which the law of nuisance is concerned, but the kind of sudden explosion of a standing risk into injury with which the law of accidents proper is

67. Compare Bohlen, *supra* note 65, at 315–17 (explaining how American courts strongly resisted the articulation of general principles in cases that fell into preexisting pigeonholes), with Abraham, *supra* note 33, at 214 (explaining how the transition from the writ system to modern procedural law fueled the need for generalization).

68. *Fletcher v. Rylands*, (1866) 1 L.R. Exch. 265.

69. *Id.* at 279 (Blackburn J.) ("[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 at his peril . . .").

70. *Id.* at 280.

71. In an opinion in the House of Lords, Lord Cranworth's agreed that Justice Blackburn got the rule right, but made arguments of principle that add to the articulation of the morality that justifies the rule. *Rylands v. Fletcher*, (1868) 3 L.R.E. & I. App. 330 (H.L.) at 340–41 (Lord Cranworth). Lord Cranworth asserted that the infliction of injury itself gave rise to issues of responsibility, that justice called for holding someone who inflicts injury in the course of pursuing his own private benefit responsible for the injury done, and that the *sic utere* principle that figured so prominently in Baron Bramwell's opinion justified the imposition of liability. *Id.* I quote some of Lord Cranworth's rhetoric later in this Article. See *infra* note 109 and accompanying text.

72. *Rylands*, 1 L.R. Exch. at 280–86.

73. *Id.* at 287.

concerned. As Warren Seavey said half a century ago, “There was no nuisance in *Fletcher v. Rylands*.”⁷⁴ The building of a reservoir is not itself a nuisance, and when a reservoir collapses, what has transpired is an accident—a standing risk has exploded into harm. When a risk of harm gives rise to an interference with the reasonable use and enjoyment of land, nuisance and accident law overlap, formally speaking. Substantively, accident law eclipses nuisance and governs the rights of the parties. Nuisance, as a distinctive form of liability in tort, makes its presence felt only in a special class of intentional wrongs.⁷⁵ The law of nuisance, in short, is not about accidents, and *Rylands* was an accident.

There was also no trespass in *Rylands*, albeit by a narrow factual margin. The shaft did not give way at the very moment that the reservoir was filled, but a few days later. In older language, this delay interrupted the chain of causation and prevented the injury from being “direct.”⁷⁶ In more modern language, there was no act that was also

74. Warren A. Seavey, *Nuisance: Contributory Negligence and Other Mysteries*, 65 HARV. L. REV. 984, 986 (1952).

75. Compare *id.* at 986–87, 995, with Keating, *supra* note 51, at 12–13. As Seavey explains, intentional nuisance is a distinctive form of liability because it is *not* predicated on general negligence principles:

In cases where the conduct is wrongful either because the defendant is improperly causing noises, smells, vibrations or other harmful effects on the plaintiff’s land or in cases where the defendant by the continuance of his activity creates undue risk to structures or persons on the plaintiff’s land, it is clear that the activity is wrongful and cannot be made rightful by the fact that the utmost care is used in minimizing harm.

Seavey, *supra* note 74, at 986–87. Thus, when the mere continuance of an activity inflicts a tortious harm by virtue of its unreasonable impact, any sentient actor will have the minimum intention necessary to commit an intentional tort—namely, “substantial certainty” that harm will be inflicted. By contrast, “[w]here there is a nuisance because of risk of harm, nuisance overlaps negligence.” *Id.* at 995. Seavey was writing in 1952. English law has since at least attempted to absorb *Rylands* into nuisance law. See *Cambridge Water Co. v. E. Cntys. Leather PLC*, [1994] All L.R. (H.L.). This changes (or attempts to change) the law of nuisance. Seavey’s statement that “[t]here was no nuisance in *Fletcher v. Rylands*” was thus correct when it was written but is contestable now. For its part, *Cambridge Water Co.* is an attempt at revising the law of nuisance because it introduces a form of strict liability for accidentally inflicted harm into English nuisance law.

76. This was, of course, Baron Martin’s view in the Exchequer Court. To be fair, it can be controverted. The principal authority for the view that trespass need not be direct and can be effected indirectly by a force set in motion by the defendant appears to be *Gregory v. Piper*, which itself cites ample ancient authority. See (1829) 109 Eng. Rep. 220 (K.B.) 221. Of course, disentangling our nominate tort of trespass from the ancient form of action complicates this question. Nonetheless, it is important to note two facts. First, the view of *Rylands* as trespass simply did not attract support among the opinions. Baron Bramwell’s opinion that the case could be thought of as trespass, as nuisance, or as a water rights case leans the most support to the view. The lesson of that view is really that *Rylands* transcends the standard doctrinal pigeonholes. Second, Bohlen’s classic article on the case persuasively argues that, although the factual line separating *Rylands* from a garden-variety trespass is slender, it is also real. See Bohlen, *supra* note 65, at 311.

an entry of the plaintiff's property, an unauthorized and intentional crossing of plaintiff's property line. The act was to fill the reservoir, and that act was not an unauthorized entry of the plaintiff's property because the water did not enter the plaintiff's property until several days later, after the act had been completed. Thus, had the water seeped out of the reservoir on a regular basis and substantially increased the existing percolation of water through Fletcher's mine, there would have been a nuisance (a continuous condition interfering with the use and enjoyment of the mine). Had the shaft collapsed at the time the reservoir was filled, there would have been a trespass. But neither of these happened. *Rylands* involved an accident, not an intentional wrong. Consequently, the case did not quite fit into the long-standing nominate tort boxes that Justice Blackburn cited as precedent, and the significance of that fact was not lost on Justice Blackburn. He articulated a "general rule" of strict liability precisely because the preexisting doctrinal pigeonholes did not cover the case at hand.⁷⁷

Justice Blackburn remarked that his "general rule" of strict liability for escaping things "seems on principle just."⁷⁸ Fletcher had been "damnified without any fault of his own."⁷⁹ It is a very short step from these observations—nothing more than a paraphrase of them, really—to the basic moral intuition behind strict liability. *Rylands* should bear the cost of the harm he inflicted on Fletcher, but *not* because he wrongly risked that harm. He did not. The negligence of his independent contractor was not imputable to him, and his own conduct was faultless. *Rylands* should bear the cost of the harm he inflicted on Fletcher because the risk issued from his activity, reasonable though his conduct may have been. People who choose to impose risks on others should not be entitled to cast the costs of their choices (their actions and activities) onto others. To borrow the language that *Losee v. Buchanan* quotes from Blackstone, this is the principle of "*meum and tuum*."⁸⁰ I must bear the costs of my activities, and you must bear the costs of yours. By putting the matter in general language, Justice Blackburn's opinion makes plain the fact that strict liability, like the fault principle with which it competes, is an intuitively plausible and *general* principle of responsibility.

77. *Rylands*, 1 L.R. Exch. at 279–80 (Blackburn J.).

78. *Id.* at 280.

79. *Id.*

80. *Losee v. Buchanan*, 51 N.Y. 476, 483 (1873) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 209 (1768)).

In Justice Blackburn's opinion, we thus find the first reason that the case has resonated down through tort history and is indelibly identified with strict liability. Justice Blackburn's opinion is formidably powerful on the facts. Fletcher *was* "damned without any fault of his own," and there *is* a devastating loss that must fall on someone.⁸¹ It seems only fair that it falls on Rylands. He risked the harm, he stood to gain from the imposition of the risk, and, though he had moral and legal license to put his own property at risk, it is difficult to explain why he had comparable license to put anyone else's property at risk. The principle that "I should bear the harms attributable to my activities and you should bear the harms attributable to yours" is an intuitively powerful principle of fairness. Unless we think that it is impossible to attribute harms to activities, this principle of fairness leads to strict, not fault, liability.⁸²

When the case for strict liability is stated in this intuitively powerful but fully general way, the question becomes, why is the whole of the law of accidents not governed by the principle of strict liability? If that thought arises immediately and naturally, it also invites immediate recoil. We are taught that no idea is more inimical to late nineteenth-century tort law than the idea that people generally act at their peril. Justice Blackburn's famous, incompletely developed distinction between the sphere of the highway and the sphere within which this accident falls gestures toward an answer to this question and so toward a limit on strict liability, but it does no more than stimulate possible answers.⁸³ One salient possibility is essentially the answer that Rabin gives when he suggests that "virtually unlimited enjoyment of one's own land was a two-sided coin, at once supporting a conditional freedom to maintain land as one wished, and, at the same time, promoting a conditional freedom affirmatively to enjoy one's land without interference."⁸⁴ *Rylands* is neither a nuisance case nor a trespass case, but property rights to the exclusive possession and quiet enjoyment of land bear on the case. One thought that arises quite immedi-

81. *Rylands*, 1 L.R. Exch. at 280 (Blackburn J.).

82. The idea that it is causally impossible to attribute harms to activities absent a fault criterion is, loosely speaking, Coasean, but it has attracted adherents among tort scholars whose views are not at all Coasean. See RIPSTEIN, *supra* note 35, at 49–51; Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 MCGILL L.J. 91, 94–95 (1995); Stephen R. Perry, *The Impossibility of General Strict Liability*, 1 CAN. J.L. & JURISPRUDENCE 147, 147–48 (1988).

83. Highway collision cases preoccupied the Exchequer Court. Justice Blackburn's discussion references Baron Martin's opinion.

84. Rabin, *The Fault Principle*, *supra* note 1, at 936. Francis Bohlen develops this idea. See Bohlen, *supra* note 65, at 317–25. Insofar as this view tends to imply a certain bias in favor of the landowning classes, it is not supported either by the facts of *Rylands* or the biographies of the judges who participated in its decisions. See Abraham, *supra* note 33, at 219–20.

ately is that these property rights justify both applying strict liability to accidental harms arising out of the use of land and limiting strict liability to accidental harms involving property.⁸⁵

A second salient interpretation (made famous by George Fletcher) invokes ideas of reciprocity by suggesting a distinction between spheres of reciprocal and nonreciprocal risk. The sphere of the highway is a sphere of reciprocal risk within which each of us is better off bearing the nonnegligent costs of *others'* activities because we are compensated by the right to impose "in-kind" risks on those others.⁸⁶ The sphere of land-based activities is a sphere of nonreciprocal risk within which the balance of burdens and benefits is more fairly struck if each party bears the nonnegligent costs of their own activities. Justice Blackburn's inchoate distinction invites both of these different interpretations, and they point in different directions. The first interpretation invokes property rights as its guiding idea; the second invokes interpersonal fairness. Reciprocal risks are *prima facie* fair whereas nonreciprocal risks are *prima facie* unfair.

These two interpretations, moreover, do not exhaust the possibilities. At least one other interpretation is salient as well. This third interpretation reads Justice Blackburn to intimate that people choose to bear the risk of highway accidents by venturing out onto the road, but do not choose to accept the risks of their neighbor's land use by staying quietly at home. This interpretation, however, begs the question it purports to answer. The claim that people choose to bear the risk of highway accidents is crippled by an unavoidable and vicious circularity: the rule of liability determines the risks that people do, in fact, bear. Once that rule is settled, people choose in light of it, but until that rule is settled, it is simply unclear what risks people are choosing to bear. The choice between negligence and strict liability thus determines the risks that people *choose* to bear by entering onto the highway, not the other way around. The right and reciprocity interpretations, by contrast, are not circular. We can speak about the distribution of risk—and about the property rights that people have to the use and enjoyment of their property—without assuming a rule that allocates the harms flowing from the risks under discussion. The reciprocity and property rights criteria are logically independent of the risk allocation at issue.

85. George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 543 (1972).

86. *Id.* at 542, 572.

C. *The Opinions in the House of Lords*

The case did not end in the Exchequer Chamber, of course, and we are not left with only Justice Blackburn's cryptic theorization. Rylands appealed and the case proceeded to the House of Lords, where the judgment of the Exchequer Chamber was affirmed.⁸⁷ The opinion of Lord Cairns in the House of Lords was the other great opinion in the case. It accepted the application of strict liability, holding that Rylands's liability hinges on the distinction between natural and non-natural use of the land.⁸⁸ Lord Cairns's distinction has been the subject of much debate.⁸⁹ Its interpretation has an enormous influence on the scope of the doctrine articulated by *Rylands* and even on whether that doctrine should be understood as a true strict liability doctrine or as a kind of covert negligence liability. On the more literal line of interpretation, the distinction marked is between "natural" and "artificial," between what is imputable to human agency or choice and what is not. This is strict liability, liability based on what the injurer has done, not on what the injurer has *wrongly* done. On the other, looser line of interpretation, the distinction is between customary and unusual, and this can be reconstructed as a distinction between reasonable and unreasonable, faulty and justified.⁹⁰ To recover *Rylands*, we must recover the meaning of this distinction.

In his classic article, *The Rule in Rylands v. Fletcher*, Francis H. Bohlen argued that a "natural" use of land referred to a small number of uses that were "permitted, even though they interfered with the extreme proprietary rights of neighboring owners."⁹¹ These uses were either nearly universal or especially suited to the particular piece of

87. See *Rylands v. Fletcher*, (1868) 3 L.R.E. & I. App. 330 (H.L.).

88. Lord Cairns uses the language "natural user" and "non-natural" use. *Id.* at 338–39. I shall continue with "natural" and "non-natural" use.

89. See John S. Brearley, *Public Welfare v 'Natural Use' of Land as the Basis for Liability in Environmental Damage Cases: Some Perspectives on the Past and Possible Future Roles of Tortious Remedies*, 7 J. ENVTL. L. 119, 121 (1995); F. H. Newark, *Non-Natural User and Rylands v. Fletcher*, 24 MOD. L. REV. 557 (1961).

90. This strategy is very clearly illustrated by Alan Brudner:

It has become customary to view [liability resulting from ultrahazardous activities] as strict, but it is really a form of negligence liability. Negligence consists in the imposition of socially abnormal risk on someone to whom one owes a duty of care. The crucial feature of ultrahazardous activities (including the keeping of dangerous animals) is that, if carried on in populated areas, no practicable precautionary steps can bring the risk down to the socially normal. Thus, neither *Rylands* itself nor the ultrahazardous activities rubric is exceptional.

BRUDNER, *supra* note 35, at 327 n.87. The strategy is part of the line of scholarship that reinterprets "natural" as customary or usual and "non-natural" as abnormal or unusual. See *infra* note 97 and accompanying text.

91. Bohlen, *supra* note 65, at 320.

land at issue. Dwellings are an example of a nearly universal use; occupied land must contain dwellings. A vein of rare minerals beneath a particular plot of land makes that property peculiarly suited to a particular use: mining. The set of “natural uses of land” identified a limited number of activities that could inflict harms on other property owners without running afoul of the normal baseline of property rights prescribing strict duties of non-interference. Bohlen explains:

The universally permitted uses were those to which mankind at the very beginning of private ownership had put land which, thus, by tradition based on immemorial usage, had come to be regarded as the uses for which nature had designed land for human enjoyment—or uses for which the physical nature of the land itself marked it as peculiarly adapted to satisfy the pressing needs of a primitive society. . . . They were uses which must be enjoyed, if at all, wherever the land was situated; the owner had no choice as to where he would use his land for these purposes. Land must be cultivated where it lay, homes built wherever man owned land, mines developed where nature had deposited minerals.

Land, as such, was marked out by tradition and immemorial usage as primarily fitted for homes and farming, land containing minerals was equally marked out by the most pressing needs of primitive society as appropriate for mining. Such uses were, therefore, regarded as “natural” the generic name given to them by Lord Cairns in *Rylands v. Fletcher*, as uses *determined not by the choice or needs of any individual owner, but by the very nature of the land*, as such, or by the particular nature of the particular land.⁹²

Thus, harms attributable to “natural” uses are not attributable to human agency; “natural” uses of land are not chosen by owners but forced upon them by the character of the land itself. Cairns’s principle is thus a principle of strict liability in the sense that it holds people responsible for harms flowing from their agency—their voluntary choices—whether or not they exercised reasonable care. The release of water in *Rylands* flowed from human agency, not from the very small set of “natural” uses of land. Therefore, for Bohlen, Justice Blackburn’s ruling is correct.

A substantial body of modern scholarship, however, rejects Bohlen’s interpretation of Lord Cairns’s distinction. This scholarship res-

92. *Id.* at 320–21 (emphasis added). In a footnote, Bohlen illustrates the principles with a riparian rights example:

So, in the appropriation of the water of a stream, an upper owner might take all he needed for the natural use of his land, for the needs of his household or of his farm, for drinking, washing and watering his cattle, even though he exhausted the supply and so prevented a similar appropriation by the lower owners; but he could not take any water for other purposes, even for manufacture, if the usual flow of the water was sensibly affected.

Id. at 321 n.25.

onates with (and perhaps even begins from) the strange sound that the expression “natural” use of land has to contemporary ears. “Uses” are, to the modern ear, inherently artificial; people use land, and “uses” are therefore the expression of human artifice. George Fletcher, among others, advances this alternative interpretation in *Fairness and Utility in Tort Theory*, claiming that “natural” means customary, usual, or normal and that “non-natural” means unusual or abnormal.⁹³ Landes and Posner make a nearly identical assertion in their book, *The Economic Structure of Tort Law*.⁹⁴

This interpretation of “non-natural” as “unusual” stands Bohlen’s reading of Cairns’s opinion on its head. According to Bohlen, Lord Cairns used the idea of natural uses to identify a small set of uses that cannot be said to have been “chosen.”⁹⁵ That small set of uses was not subject to strict liability, while departures from that set are so subject. Nonliability is an exception carved out of a general regime of strict liability, and a relatively small exception to boot. When “natural” is interpreted as “usual,” however, norm and exception are reversed. Negligence becomes the general rule governing “normal” uses and strict liability is reserved for uncommon—indeed “inappropriate”—uses.⁹⁶ This recasts *Rylands*’s embrace of strict liability in a much more restrictive way. Indeed, making customary usage the key to the imposition of liability in *Rylands* goes a great distance toward bringing the case within a fault framework. Custom might fix the appropriate level of risk imposition at both the negligence and activity levels. Those who impose abnormal risks are liable in both cases. Negligence liability attaches to negligent *acts* because they impose more risk than normal actions do. Strict liability applies to *activities* because they impose more risk than normal activities do.⁹⁷

93. See Fletcher, *supra* note 85, at 545 (“The fact was that the defendant sought to use his land for a purpose at odds with the use of land then prevailing in the community.”).

94. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 112 (1987) (“[T]he construction of a reservoir was . . . an unnatural land use in the sense of unusual . . .”).

95. Bohlen, *supra* note 65, at 321.

96. See Fletcher, *supra* note 85, at 545.

97. Fletcher’s and Landes and Posner’s views of *Rylands* are similar, but not wholly congruent. Preeminently, Landes and Posner conceive of negligence as inefficient risk, not as socially excessive risk. The point in the text comes much closer, therefore, to the kind of view that Brudner advances. Recall that he writes:

It has become customary to view [liability resulting from ultrahazardous activities] as strict, but it is really a form of negligence liability. Negligence consists in the imposition of socially abnormal risk on someone to whom one owes a duty of care. The crucial feature of ultrahazardous activities (including the keeping of dangerous animals) is that, if carried on in populated areas, no practicable precautionary steps can bring the

Bohlen, however, seems to have gotten the better of the historical argument. In *Non-Natural User and Rylands v. Fletcher*, F. H. Newark examines the original meaning of the phrase “natural” as used in Cairns’s opinion and the subsequent transformation of the phrase’s meaning.⁹⁸ Later interpreters of *Rylands*, Newark argues, have all but stood Cairns on his head by reinterpreting “artificial” to mean “not usual.”

We must pay a tribute to Lord Cairns for making it quite clear what he meant. He contrasts “natural use” and “non-natural use”; he goes on to define “non-natural use” as “introducing into the close that which in its natural condition was not in or upon it,” and he relates the definition more precisely to the facts before him by saying “for the purpose of introducing water in quantities and in a manner not the result of any operation in or under the land.” . . . Lord Cairns’ non-natural user is therefore merely expression of the fact that the defendant has artificially introduced on to the land a new and dangerous agent.⁹⁹

Cairns’s clarity, however, could not save him from becoming misunderstood, in part because the word “natural” has a secondary, as well as a primary, meaning: “‘Natural’ means primarily that which exists in or by nature and is not artificial: but in the secondary sense it can mean that which is ordinary and usual, even though it may be artificial.”¹⁰⁰

Cairns’s fate, then, was to have the secondary meaning of “natural” displace the primary, drastically narrowing the scope of his principle of strict liability:

[W]hereas Lord Cairns asserted that bringing the dangerous agent on to the land was necessarily “non-natural use” we are now led to believe that it is only “non-natural” if it is “not ordinary.” And the result as applied in the modern cases is, we believe, one which would have surprised Lord Cairns and astounded Blackburn J.¹⁰¹

Newark’s article traces the history of this reversal of meaning in painstaking detail. Of particular interest is his assertion that “[t]he first clear equation of Lord Cairns’s ‘natural use’ with what is ordinary and usual may be traced to *Farrer v. Nelson* in 1885.”¹⁰² Lord Cairns’s

risk down to the socially normal. Thus, neither *Rylands* itself nor the ultrahazardous activities rubric is exceptional.

BRUDNER, *supra* note 35, at 327 n.87. Fletcher seems closer to Brudner than Landes and Posner. See Fletcher, *supra* note 85, at 545 (“The fact was that the defendant sought to use his land for a purpose at odds with the use of land then prevailing in the community.”).

98. See generally Newark, *supra* note 89.

99. *Id.* at 561.

100. *Id.* at 558.

101. *Id.* at 571.

102. *Id.* at 566 (footnote omitted).

contemporaries thus understood him correctly; misunderstanding did not even begin to take root for almost twenty years.

Correct understanding of Cairns's distinction was not, moreover, confined to England. At least some (and probably many) American courts also grasped the distinction. *Robb v. Carnegie Bros. & Co.*¹⁰³ is an instructive case in point. *Robb* applies Lord Cairns's ideas of natural use to impose liability for actual damages—but not exemplary damages—on the operation of coke ovens.¹⁰⁴ The distinction between natural and non-natural uses calls for this result:

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, but is the consequence of his election to devote his land to the establishment of a particular sort of manufacturing, having no natural connection with the soil or the subjacent strata.¹⁰⁵

On the one hand, the defendant enterprise must pay its own way; the defendant “is serving himself in his own way, and has no right to claim exemption from the natural consequences of his own act.”¹⁰⁶ Having acted voluntarily and for private advantage, the defendant cannot foist the costs of its activity onto the plaintiff, who is a stranger to the defendant's enterprise and will not profit from it. On the other hand, the defendant should not be treated as a willful wrongdoer. The plant is located on the defendant's own property, which the defendant is free to use as he sees fit, and the defendant has conducted his activity carefully. “The harm done thereby to others was the least in amount consistent with the natural and lawful use of its own.”¹⁰⁷

Correctly understood, Lord Cairns's opinion promotes an expansive version of strict liability. It holds that harms flowing from uses of property that are not necessary to the exercise of the legal right to use and develop one's property—either in general or in connection with the particular characteristics of the property at hand—ought to be borne by the party in possession of the property, whether or not they have exercised reasonable care.

D. Rylands and the Idea of Strict Liability

Strict liability in *Rylands* is tied to property rights to use and enjoy land, but it is not identifiable only with ancient forms of land-based

103. See 22 A. 649 (Pa. 1891).

104. See *id.*

105. *Id.* at 651.

106. *Id.*

107. *Id.* at 650.

liability that resist coherent generalization. *Rylands's* doctrine holds that landowners are free to use their land for those uses that are necessary to the exercise of their legal rights to enjoy and develop their land and are subject to liability for harms to others attributable to any other use of their land, even if they exercise reasonable care (or, for that matter, more than reasonable care). The opinions in *Rylands* thus state a general principle of strict liability in the way that canonical negligence opinions of the same period state a general principle of responsibility for harm done. Just how far that principle extends is debated by the judges themselves: Bramwell thinks that strict liability governs everything *except* the highway collision cases and that those cases are exempted only on causal grounds. Highway collision cases are Coasean and, for Bramwell, the only truly Coasean cases. We cannot attribute a collision on the highway to either party without some criterion of fault.¹⁰⁸ By contrast, in cases involving accidents among landowners, we can determine who inflicted harm and who suffered harm by appealing to the criterion of natural and non-natural use. That criterion determines responsibility for harm done without appealing to, or evaluating, the reasonableness of the injurer's conduct.

By transcending the categories of nuisance and trespass, *Rylands* states strict liability as a more general conception. The generality of that conception is shown by the fact that it readily covers an accident even though an accident is fundamentally different from an intentional harm. Accidents arise out of risks and from the loss of control over physical forces; intentional harms arise from physical forces under the control of those who inflict them. This fact about the generality of the law that *Rylands* articulates is essential to the significance of the case, but it may be less essential than the way in which the facts and the opinions flesh out the intuitive moral case for strict liability as a principle of liability competitive with fault and display the powerful moral pull of strict liability. Fault liability appeals to the moral intuition that people should be held responsible for the inadvertent harms attributable to their conduct only when they have acted wrongly. *Rylands* counters that the exercise of agency resulting in harm to someone else is morally significant—a reason that favors the imposition of responsibility for the harm done. The injurer is the author of the harm, and that authorship creates at least a *prima facie* reason to hold the injurer responsible.

108. "Where two carriages come in collision, if there is no negligence in either it is as much the act of the one driver as of the other that they meet." *Fletcher v. Rylands*, (1865) 159 Eng. Rep. 737 (Ex. Div.) 744 (Bramwell J. dissenting); *see also* *Hammontree v. Jenner*, 97 Cal. Rptr. 739, 742 (Ct. App. 1971).

Lord Cranworth voiced this intuition by writing: “when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer.”¹⁰⁹ Rylands’s conduct fell directly and immediately under this principle, even though it was wholly free of fault.¹¹⁰ But the intuitive morality of strict liability embodied in *Rylands* does not rest solely on the principle that the infliction of harm by one’s agency creates a reasoning favoring responsibility for the harm done to the victim of that harm. Though it is surely not an unjust enrichment or restitution case, *Rylands* also rests on a principle of fairness akin to unjust enrichment. When someone engages in an activity—constructing a reservoir for their cotton mill, say—for his own private benefit, it is unfair for him to reap the benefits of that activity but thrust its costs off onto those persons he happens to harm in the course of “effect[ing] an object of [his] own.” People who pursue their own advantage and expect to reap the rewards of the risks that they impose should take the bitter with the sweet. That is, they should bear the financial costs of the physical harms that issue from the risks they impose on others in pursuit of their own private gain.

The first of these two principles takes the exercise of agency resulting in the infliction of harm on another to be a reason counseling in favor of responsibility for that harm. The second takes the pursuit of one’s own benefit—when done with the expectation that any benefits that do accrue will accrue to one’s private benefit—to create a claim of fairness on the part of anyone harmed in the course of that pursuit. Fletcher was not only “damnified” without any fault of his own, he was also damnified without the exercise of any choice on his part to bear the risk of reservoir collapse that ruined his mine. Furthermore, Fletcher was damnified because Rylands exercised his agency to impose that risk, and he was damnified without any expectation of benefiting from the imposition of that risk. These are the intuitions that justify holding Fletcher strictly liable for the harm that he has inflicted.

109. *Rylands v. Fletcher*, (1868) 3 L.R.E. & I. App. 330 (H.L.) at 341.

110. *Id.* at 342 (“The Defendants, in order to effect an object of their own, brought . . . on to land which for this purpose may be treated as being theirs, a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage to the Plaintiff, and for that damage, however skillfully and carefully the accumulation was made, the Defendants . . . were certainly responsible.”). Note that this principle connects strict liability in *Rylands* with another ancient and enduring common law font of strict liability; namely, the vicarious responsibility of masters for the torts of their servants committed within the scope of their employment. Such torts are committed in the course of the master “managing his own affairs” and his responsibility for those torts is predicated on this fact. Faulty management of the masters own affairs is not necessary.

Like the intuitive moral case for fault liability, the intuitions expressed by these premises are readily accessible and only presumptively persuasive. But their simplicity and directness are part of their power. They resonate deeply with basic intuitions about responsibility and fairness. To do harm *is* to be responsible in some way for the harm that one has done, and the moral intuition that it is unfair to inflict serious harms on others just because one stands to gain from doing so is powerful. Harm to others is the kind of thing that moral agents strenuously try to avoid. There is something morally wrong with anyone who regards the infliction of serious harm on someone else as a matter of no moral significance so long as the advantage they gain from inflicting the harm outweighs the disadvantage that the victim suffers. There is something quite wrong with the moral makeup of anyone who is not deeply invested in not harming others. Even unavoidable harm, then, has moral significance. It is the kind of thing that one would prefer never to do. *Rylands's* encapsulation of these intuitions, and the immediate inference from them to strict liability, frames the contest between negligence and strict liability as a standing issue for the field of tort. We do both tort law and tort theory a disservice when we obscure *Rylands's* distinctive ideas in a mistaken attempt to absorb the case into fault liability. The cause of clarity is better served by recognizing that *Rylands* really does extract a relatively general conception of strict liability from ancient nuisance and trespass cases and makes out a powerful *prima facie* case for the justice of such liability.

To be sure, tort scholars firmly committed to the fault principle are not always persuaded of the power of these intuitions. Many of them find the contrary intuition that harm faultlessly done is no different from natural misfortune entirely persuasive.¹¹¹ It is far from clear whether there is little or much to say about this impasse. One observation worth making, however, is that vast moral literature on moral luck takes as one of its originating examples the regret that a truck driver who—through no fault of his own—runs over a child will feel simply because his agency is involved in the infliction of serious harm. The truck driver will feel a remorse not shared by equally faultless spectators to the event:

111. See, e.g., Coleman & Ripstein, *supra* note 82, at 113 (“For the agent who follows the moral law, his agency—for which consequences of his or her actions he or she is responsible or owns—pretty much ends with the intended consequences of his or her action. . . . Simply substitute fault for the moral law. The person who is at fault opens himself or herself up to liability for unintended consequences of his conduct, including some that would not have occurred but for the conduct of others. . . . Fault, far from rendering causation and agency otiose, actually defines the scope of their relevance.”).

The sentiment of agent-regret is by no means restricted to *voluntary agency*. . . . [E]ven at deeply accidental or non-voluntary levels of agency, sentiments of agent-regret are different from regret in general, such as might be felt by a spectator, and are acknowledged in our practice as being different. The lorry driver who, through no fault of his, runs over a child, will feel differently from any spectator, even a spectator next to him in the cab, except perhaps to the extent that the spectator takes on the thought that he himself might have prevented it, an agent's thought. . . . We feel sorry for the driver, but that sentiment co-exists with, indeed presupposes, that there is something special about his relation to this happening, something which cannot merely be eliminated by the consideration that it was not his fault.¹¹²

Agent-regret is not the topic here, but the regret that an agent who inflicts inadvertent, faultless harm rightly feels about what he has done is testament to the moral power of the intuition that the mere doing of harm is a reason favoring responsibility. Faultless agency is not morally the same as misfortune. It is a source of responsibility as well as regret. There is all the more reason to favor responsibility when harm is foreseeably risked and pursued for the agent's own benefit.

In short, the basic moral intuitions that *Rylands* elicits from the courts that wrestled with the case resonate with something deep in our moral makeup. That is reason to take the strictness of *Rylands* both at face value and seriously.

E. *Fault Lines in Rylands*

Scholars who deny the strictness of *Rylands* by reversing the primary and secondary meanings of the terms "natural" and "non-natural" nonetheless have a point to make and a lesson to teach. Limiting *Rylands* "to unusual and extraordinary uses which are fraught with exceptional peril to others"¹¹³ is generally taken to be the prevalent practice in American jurisdictions in the half century or so following the case. This wisdom may stand in need of some revision, but it

112. BERNARD WILLIAMS, *MORAL LUCK* 27–28 (1981). Williams regards the regret appropriate here as not a form of moral self-criticism because the agent has not done anything wrong. I am not so sure. The regret is justifiable because doing harm is in itself morally significant and the kind of thing that a moral agent strives to avoid inflicting. It is appropriate to reproach oneself for killing a child, even faultlessly. See Jeffrey Helmreich, *Regret, Remorse and Accidents* (June 5–6, 2011) (paper presented to the Ctr. for Law History & Culture Junior Scholars Conference at the Univ. of So. Cal. Gould Sch. of Law).

113. See, e.g., Francis H. Bohlen, *The Rule in Rylands v. Fletcher* (pt. 2), 59 U. PA. L. REV. 423, 440 (1911).

contains a substantial measure of truth.¹¹⁴ This truth, however, should not cause us to forget one of Bohlen's primary points; namely, that this recasting of *Rylands* was a strategy for confining its highly general principle of strict liability. It is this revisionary American practice that Fletcher's (and Landes and Posner's) interpretation of natural use as ordinary, customary, normal use captures, not Lord Cairns's own usage. Cairns himself articulated a principle that made strict liability predominant.

That *Rylands* endorsed a genuinely strict form of liability was not lost, moreover, in *Losee v. Buchanan*, the greatest of the American cases to reject *Rylands*'s holding and strict liability more generally.¹¹⁵ The heights to which *Losee v. Buchanan*'s justificatory argument soars help us to recognize that the power of *Rylands*'s position was not lost even on those courts that rejected its ruling. *Losee v. Buchanan* adopted fault liability for an "escaping thing"—parts of a steam boiler that exploded and were cast onto the plaintiff's property, where they damaged buildings and personal property.¹¹⁶ Doctrinally, the opinion proceeds by distinguishing the adverse precedents in both trespass and nuisance.¹¹⁷ The court distinguishes the closest trespass precedent (one involving blasting) on the ground that the injury to the plaintiff's land was direct and immediate, an end of the action so to speak.¹¹⁸ The nuisance cases are distinguished on the ground that the type of injury involved in nuisance (a continuous invasion) differs from the kind of accidental harm involved here (a sudden intrusion).¹¹⁹ All of this is consistent with *Rylands*'s own analysis of pertinent doctrine, but this analysis does not itself supply a governing tort norm.

Perhaps sensing that these arguments are not sufficient responses to *Rylands*, the opinion explodes into justificatory argument of the grandest sort before coming back to doctrine and arguing that the rule

114. On the case for revision, see Jed Handelsman Shugerman, Note, *The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of Fletcher v. Rylands in the Gilded Age*, 110 *YALE L.J.* 333 (2000). Shugerman argues that, contrary to the prevailing consensus in the American legal academy, "a significant majority of the states actually accepted *Rylands* in the late nineteenth and early twentieth centuries, at the height of the 'era of fault.'" *Id.* at 334.

115. *Losee v. Buchanan*, 51 N.Y. 476, 486–87 (1873) ("[T]he law, as laid down in [*Rylands* and another case], is in direct conflict with the law as settled in this country. Here, if one builds a dam upon his own premises and thus holds back and accumulates the water for his benefit, or if he brings water upon his premises into a reservoir, in case the dam or the banks of the reservoir give away and the lands of a neighbor are thus flooded, he is not liable for the damage without proof of some fault or negligence on his part.").

116. *Id.* at 476.

117. *Id.* at 479–85.

118. *Id.* at 479–80.

119. *Id.* at 482.

in *Rylands* is out of step with American cases on liability for fire and with one on flying rocks.¹²⁰ On the heels of its grand justificatory argument, the *Losee v. Buchanan* opinion interprets “use your property so as not to injure another” as a maxim of fault liability, enjoining nothing more than careful use.¹²¹ The opinion then ends by insisting on the universal applicability of the fault principle in this country.¹²² As Rabin rightly observed in *The Fault Principle*, this is misleading. When *Losee v. Buchanan* is paired with its companion case, *Losee v. Clute*,¹²³ the larger liability regime that it instantiates is one where “no duty”—not fault liability—governs most cases of accidental injury.¹²⁴ Fault reigns supreme only in the domain of accidents among strangers. In *Losee v. Buchanan* itself, there is no liability: the manufacturer of the steam boiler owed no duty to the plaintiff, and the neighbor did not breach any duty that it owed.¹²⁵

The point that I want to press is entirely consistent with Rabin’s correct claim that no liability, not even fault liability, dominates the private law landscape of the late nineteenth century. My point is that *Losee v. Buchanan*, like *Rylands*, has and deserves canonical status because it addresses the fundamental conflict between negligence and strict liability with the kind of lucidity and clarity that may only be possible in moments when the common law is being fundamentally reconfigured. *Losee v. Buchanan*’s interlude of justificatory argument is remarkable both in its frankness, its reach, and its invocation of a Lockean social-contract-style justification:

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 and are not so managed as to become such, I am not responsible for any damage they accidentally and unavoidably do my neighbor. He re-

120. *Id.* at 486–88.

121. *Buchanan*, 51 N.Y. at 488.

122. *Id.* at 491 (“[T]he rule is, at least in this country, a universal one, which, so far as I can discern, has no exceptions or limitations, that no one can be made liable for injuries to the person or property of another without some fault or negligence on his part.”).

123. See *Losee v. Clute*, 51 N.Y. 494 (1873).

124. Rabin, *The Fault Principle*, *supra* note 1, at 946.

125. *Buchanan*, 51 N.Y. at 491–93.

ceives his compensation for such damage by the general good, in which he shares, and the right which he has to place the same things upon his lands. I may not place or keep a nuisance upon my land to the damage of my neighbor, and I have my compensation for the surrender of this right to use my own as I will by the similar restriction imposed upon my neighbor for my benefit. I hold my property subject to the risk that it may be unavoidably or accidentally injured by those who live near me; and as I move about upon the public highways and in all places where other persons may lawfully be, I take the risk of being accidentally injured in my person by them without fault on their part. Most of the rights of property, as well as of person, in the social state, are not absolute but relative, and they must be so arranged and modified, not unnecessarily infringing upon natural rights, as upon the whole to promote the general welfare.¹²⁶

The court's first argument, then, is that a fault regime promotes the greater good of industrial progress; its second is that a fault regime makes each of us better off in two ways. First, as recompense for having to bear the nonnegligent accident costs of others' activities, we have the right to impose the nonnegligent costs of our activities on others ("the right . . . to place the same things upon his lands").¹²⁷ Second, fault liability fosters industrial progress; industrial progress promotes the general good, and we each share in that general good. Measured, apparently, against some pre-industrial historical baseline, industrial progress steadily improves each person's welfare. Fault liability is to everyone's long-run advantage.

Losee v. Buchanan thus invokes the language of reciprocity and mutual benefit against *Rylands*, claiming that as industry and technology advance over time, injurers and victims both benefit. Each person's share in the increasing wealth of an industrializing society helps to compensate her for increased risks of accidental injury and death incident to the introduction of industrial machinery. *Rylands*, however, gets the better of this argument. Fault liability is not really to the advantage of the luckless *Losee*, and *Rylands* shows how fault liability treats him unfairly. On the one hand, *Losee* cannot recover for the serious harm done to his property by *Buchanan's* exploding steam boiler because *Buchanan* was not culpably responsible for the explosion. On the other hand, *Losee* cannot recover from the manufacturer of the boiler because he and the manufacturer are not in privity of contract.¹²⁸ *Losee* is, to use Justice Blackburn's phrase, therefore "damnfied without any fault of his own," and the harm that he suf-

126. *Id.* at 484–85.

127. *Id.* at 485.

128. *Clute*, 51 N.Y. at 494–95.

ferred at the hands of Buchanan's milling is both greater than, and disproportionate to, the benefit he gained. His share of the increased prosperity, which is the general benefit of Buchanan's milling, is roughly the same as the share that every other member of society receives. Milling increases overall prosperity. Unlike other members of society, however, he suffers a great loss at the hands of Buchanan's enterprise.¹²⁹

Compared to strict liability, fault liability is neither fair to Losee *nor* to his advantage. Strict liability would improve Losee's lot because it would compensate him for the harm he has suffered and that harm exceeds his small share of the overall social gain. Strict liability is thus more to Losee's advantage than fault liability. Strict liability is also fairer than fault liability—it aligns burden with benefit, whereas fault liability severs the two. Shifting the cost of the accident back onto Buchanan, who is the principal beneficiary of his own mill, binds the bitter to the sweet. This, in a nutshell, is the rejoinder of *Rylands* to *Losee v. Buchanan*. It appeals not to a distant historical baseline lost in the mists of time, but to the relative burdens and benefits of strict liability and fault in comparison with one another. For *Rylands*, the possibilities of the present are decisive.

One of the charms of the debate between *Rylands* and *Losee v. Buchanan* is that it invites extension and elaboration, both in its own

129. Francis Bohlen comments on the unfairness of negligence liability in this context:

[I]t seems fair that one, who personally profits by the privilege to use his land in a particular way, may not complain of the result of the exercise of another's similar right; while if the defendant's use be merely for the benefit of the public generally, in which the adjacent owner shares merely as one of the public, it seems that the latter should bear no greater part of the damage done by that use than any other member of the public, who, as such, share equally the benefits derived from permitting it. To throw the whole of the loss upon one member of the public, simply because it is his misfortune that his property should be situated near to the place which the defendant selects to carry on the business, tending to increase the general prosperity, is, it seems to the writer, to throw upon him a loss altogether out of proportion to his share in the benefit derived from the encouragement of the industry.

If the public be interested, let the public as such bear the loss, but if the neighbors have such profit by the business by reason of the fact that the right to carry on such business adds value to their land . . . then, they being particularly benefited, may be properly singled out to bear the loss.

Bohlen, *supra* note 113, at 444–46 (footnote omitted). Bohlen goes on to assert that not requiring the enterprise to internalize the cost of the harm caused is presumptively inefficient as well as unfair. In a lengthy footnote, he comments, “Every burden which an individual is forced to bear for the benefit of the State is, in the last analysis, a species of taxation.” *Id.* at 444 n.136. Negligence liability is, in this context, an unfair form of taxation because the benefit of the defendant's enterprise is captured first by the defendant, next by the general public, and finally by the victim only insofar as he is a member of the general public. Yet the victim is singled out to bear the burden of the defendant's enterprise. The victim is therefore taxed in the name of the general good.

terms and in terms of competing social-contract frameworks. In its own terms, the debate frames sharply the question of in-kind compensation for bearing risk and brings to the fore the hard question of just what the acceptable level of risk is. For Losee, the in-kind compensation of having the right to purchase defective industrial machinery, which might unavoidably bomb his neighbors without subjecting Losee himself to liability, is almost surely of no value. There is no reason to think that he was putting his land to a use which made purchasing a steam boiler, or anything else comparably dangerous, attractive. Nor is it obvious that society as a whole is made better off by acting on *Losee v. Buchanan*'s apparent invitation to ramp up the permissible level of nonnegligent risk imposition.¹³⁰ Whether we should ratchet up the permissible level of nonnegligent risk imposition depends on whether increasing the overall level of risk in society is a game worth the candle, particularly when this standard may justify a kind of risk race. When harm and benefit are asymmetrical, however, the burden of persuasion lies, in the first instance, with *Losee v. Buchanan*. But *Losee v. Buchanan* is already burdened by its inability to explain how general benefits shared by all respond to plaintiff's claim that it is unfairly singled out to bear a devastating loss. *Rylands* has the better of the argument.

The debate between *Rylands* and *Losee v. Buchanan*, moreover, goes deeper than intuitive ideas of fairness. Both *Losee v. Buchanan* and *Rylands* implicitly deploy social-contract forms of justification. They are concerned primarily with interpersonal fairness and with the hypothetical bargain that potential victims and injurers might reach regarding the terms on which risks of physical harm are imposed. In social-contract terms, *Losee v. Buchanan*, with its appeal to a fixed historical baseline, is implicitly Lockean whereas *Rylands*, with its emphasis on how injurer and victim fare under alternative liability rules, is implicitly Kantian.¹³¹ One of *Rylands*'s enduring achievements, in-

130. *Losee v. Buchanan* invites those who suffer at the hands of nonnegligent risk to help themselves to compensation by imposing nonnegligent risks. Surely, we would not wish to approach the nonnegligent risks of nuclear power this way.

131. In Locke's formulation of the social contract, people start with various accumulated resources in hand—preeminently, property acquired in the state of nature. The agreement to exit the state of nature and enter civil society, where one will be subject to political authority, must be an improvement when measured against this baseline. Analogously, *Losee v. Buchanan*'s assertion that people are compensated by sharing in the increased wealth created by industrialization for accidental injuries inflicted by the technologies of an industrial civilization appeals implicitly to a pre-industrial baseline. Rousseau breaks with Locke by making property institutions themselves part of the social contract to which parties agree; Kant follows Rousseau in this respect. On this view, the relevant baseline is determined present possibilities. *Rylands* takes this kind of view by implicitly comparing the distribution of burden and benefit under alternative

deed, is to have embedded social-contract ideas into tort discourse.¹³² The considerations of fairness and equal rights that dominate its opinions introduce ideas that differ both from utilitarian and economic frameworks with their emphases on overall welfare and from corrective justice and civil recourse frameworks with their emphasis on wrongful conduct. Fletcher's conduct was not wrongful, but it was only fair that he answer for it. Only then are benefit and burden fairly aligned between injurer and victim. Strict liability in *Rylands* is not and does not claim to be liability for wrongful conduct in the sense that corrective justice and civil recourse theorists have in mind. What it is and claims to be is a fair way of reconciling the rights of potential injurers and victims with respect to nonnegligent risks of accidental physical harm.

F. *Is Rylands Nostalgic?*

To recover *Rylands* for tort theory—its fate in tort practice is a separate matter—we must rebut interpretations that deflate the case and deny that it articulates an attractive alternative to negligence liability. We have already considered one such interpretation, which absorbs *Rylands* into negligence by recasting “natural” as customary, usual, or normal and recasting “non-natural” as unusual or abnormal. We ought to consider another deflationary interpretation as well. This interpretation characterizes *Rylands*'s embrace of strict liability as a defense of an agrarian past against an industrial present. To a degree, Justice Blackburn's opinion lends itself to interpretation along these lines. His argument that strict liability is well suited to the sphere of real property can certainly be read as an endorsement of quiet repose and time-honored use. Phrases such as “strict liability in defense of the sanctity of land” and “strict liability in defense of preexisting use” do spring to mind when reading Justice Blackburn's opinion.¹³³ On

liability regimes; namely, strict liability and negligence. For a discussion on Locke and Rousseau, see Joshua Cohen, *Structure, Choice, and Legitimacy: Locke's Theory of the State*, 15 PHIL. & PUB. AFF. 301, 321–24 (1986). For my extended view on *Losee v. Buchanan* and *Rylands*, see Keating, *supra* note 17, at 313–25 (discussing *Losee v. Buchanan* and *Rylands* at greater length).

132. See, e.g., Fletcher, *supra* note 85, at 543. Bohlen's *The Rule in Rylands v. Fletcher* is not strictly a social-contract interpretation of *Rylands*, but it may do more than any other commentary on the case to bring out the idea of interpersonal fairness at the heart of *Rylands*'s case for strict liability. See Bohlen, *supra* note 113, at 444–46.

133. Rabin's discussion of *Rylands* in *The Fault Principle* may intimate this interpretation of the case. However, the interpretation is identified primarily with Francis Bohlen's great article on the case, however. See Bohlen, *supra* note 65, at 318–25. Bohlen's view appears to have been complex. On the one hand, he saw substantial evidence for the view of *Rylands* as strict liability in defense of hallowed uses of land. On the other hand, Bohlen, more than any other American commentator, saw in *Rylands* the essentials of a distinctively modern, fairness-based case for

this interpretation, *Rylands* is the record of a clash between an emerging industrial activity (coal mining) and an established agrarian society. Viewed through this prism, the opinions' preference for strict liability appears to favor the status quo and to disfavor dynamic economic change and industrial progress. *Rylands* and strict liability are on the wrong side of progress.

It is, to be sure, true that Cairns's embrace of the concept of "natural" uses exempts some long-standing uses of land from strict liability and subjects most new uses—ones that are not uniquely suited to their sites—to such liability. It is also true that Justice Blackburn's opinion looks back to ancient forms of strict liability embodied by the real property torts of trespass and nuisance. But we should not make too much of this latter point. Legal decision is decision in accordance with preexisting norms. It must look backwards for authority. Seminal fault cases look backwards as well, reconfiguring fault from a mental state necessary to the commission of certain nominate torts and into a basic principle of conduct governing risky acts and activities.¹³⁴ More importantly, nothing in *Rylands*'s facts lends much support either to the claim that reservoirs were unusual or to the claim that *Rylands*'s imposition of strict liability is guarding an agrarian past against industrial change. On the contrary, *Rylands* involved a contest between the two great enterprises of northern England—cotton mills and coal mines—in the first full flowering of the industrial revolution. *Rylands* occurred in the Silicon Valley of its age, and its age was the dawn of the industrial revolution.

Both coal mining and cotton milling were on the cutting edge of this industrial revolution, they coexisted in close proximity to each other, and they clashed over water. Water was "a resource for cotton milling, a liability for mining," and a standing source of friction between the two enterprises.¹³⁵ This is a classic case of accidental harm in an industrializing world: two beneficial, productive activities interact in a way that occasionally causes unintended injury. Strict liability is adopted as a liability rule appropriate to accidents between neighboring industries. The site of the dispute was just outside Manchester "in Lancashire, on the road between Bolton and Bury, in the two small

activity liability. See Bohlen, *supra* note 113, at 444–46. American case law rhetoric, including the rhetoric in *Losee v. Buchanan*, often reads *Rylands* in this way.

134. See WHITE, *supra* note 31, at 12–13.

135. Clare Dalton, *Losing History: Tort Liability in the Nineteenth Century and the Case of Rylands v. Fletcher* 10 (1987) (unpublished manuscript) (on file with author); see also Abraham, *supra* note 33, at 208–10 (discussing the facts of the case and the broader backgrounds of the parties in *Rylands*).

towns of Ainsworth and Radcliffe.”¹³⁶ John Rylands “was a second generation cotton master.”¹³⁷ The mill had been part of his family’s cotton business since 1839. “It was steam powered, supplied with coal from a small nearby colliery, and with water from two reservoirs.”¹³⁸ An 1865 report suggested that it was large, running roughly 600 looms and employing roughly 600 operators.¹³⁹ To improve the efficiency of the mill, the expansion of the reservoir was undertaken “on land rented from Lord Wilton” in 1860.¹⁴⁰

Fletcher had also leased his land from the Earl of Wilton, “the most prominent local landowner.”¹⁴¹ The mine that he worked, which was adjacent to Rylands’s property, was an existing one; “his operations were an extension of other earlier efforts.”¹⁴² When the reservoir burst and flooded his mine in December of 1860, Fletcher “did not see the damage as irreparable. Even before this inundation, the pumps in the colliery had worked sixteen hours a day in summer and twenty hours in winter to keep the mine clear; now pumping was increased and by March of the following year the water was exhausted.”¹⁴³ Indeed, water was so pervasive in the mine that the mill later acquired the mine for use as a water source.¹⁴⁴ Before Fletcher could reopen the mine, however, the boiler that drove his pump burst.¹⁴⁵ Shortly thereafter, he was paid a visit by an inspector of mines and advised “not to work the colliery while the reservoir was in use for storing water.”¹⁴⁶ Fletcher then retained solicitors and sued Rylands.¹⁴⁷

There is no reason to think this mixture of mines and reservoirs as unusual. None of the opinions suggests that Rylands’s construction of a reservoir was out of the ordinary. Reservoirs were commonly used to power cotton mills, and cotton mills had risen all over northern England by the middle of the nineteenth century.¹⁴⁸ Coal mines were

136. Dalton, *supra* note 135, at 10.

137. *Id.* at 11.

138. *Id.*

139. *Id.* at 11 n.9.

140. *Id.* at 10–12. Kenneth Abraham reports that John Rylands was “[t]he ‘Wellington of Commerce’” and that he was the “sole owner of . . . the largest employer in England, having 12,000 employees in seventeen separate mills.” Abraham, *supra* note 33, at 209 (citing Simpson, *supra* note 41, at 239 n.117).

141. Dalton, *supra* note 135, at 11.

142. *Id.*

143. *Id.* at 13 (footnote omitted).

144. *Id.* at 13 n.17.

145. *Id.* at 13–14.

146. *Id.* at 14.

147. Dalton, *supra* note 135, at 14.

148. “[T]he first three decades of the 19th century [saw] a great expansion in country mills” E. P. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* 336 (1963).

equally pervasive and equally a manifestation of the industrial revolution in its first full flowering. On the facts of this case, the entanglement of the two uses could not have been closer—coal powered Rylands's mill, and water being harnessed for use by Rylands's mill flooded Fletcher's mine.¹⁴⁹ Finally, Lord Wilton, who had leased land to both Rylands and Fletcher, was not a feudal lord bent on preserving an agrarian status quo; he was a man who had put his property to use on the cutting edge of the industrial revolution.

The facts of *Rylands*, then, do not bear out a story of an agrarian past embattled in an industrializing present. Nor do they support a concomitant view of strict liability as a bulwark of the old world against the emerging industrial order. What they reveal is a story of two modern industries colliding with one another. This is the standard story of the industrial age and the true social setting that led to the reconfiguration of tort itself around accidental harm. *Rylands* stakes the claim for reconfiguring the emerging, modern law of torts around strict liability, not fault. That did not happen. The reasons why it did not happen, however, cannot have anything to do with *Rylands*'s case for strict liability being a nostalgic effort to protect an agrarian past against an emerging industrial future. *Rylands*'s general principle of strict liability was forged in the crucible of the industrial revolution in its first bloom in order to fairly govern the pervasive friction between the two principal industries of the age. Modern strict liability is born as an answer to the canonical modern problem of tort law; namely, how to address the recurring harms that are the inescapable by-product of industrial activity.¹⁵⁰ It is incipiently modern.

IV. RYLANDS'S FATE

As a matter of legal doctrine, *Rylands*'s legacy is a study in twists and turns. Initially, it seems to have been resisted in the United States. Subsequently, it seems to have been widely accepted.¹⁵¹ In the middle of the twentieth century, the line of doctrine that *Rylands*

149. Abraham, *supra* note 33, at 209–10.

150.

Our law of torts comes from the old days of isolated, ungeneralized wrongs, assaults, slanders, and the like But the torts with which our courts are kept busy to-day are mainly the incidents of certain well known businesses. They are injuries to person or property by railroads, factories, and the like.

OLIVER WENDELL HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 183 (1920) (originally published in 1897).

151. The history here defies easy summary, but Kenneth Abraham does a good job in few pages. See Abraham, *supra* note 33, at 220–24; see also Shugerman, *supra* note 114 (the preeminent contemporary study of *Rylands*'s reception in America).

spawned had coalesced under the name of “abnormally dangerous activity” law, and that body of doctrine held out the promise of blossoming into a broad form of activity-based liability. With the waning of enterprise liability over the past generation, however, abnormally dangerous activity liability has turned out to be a relatively small domain of strict liability.¹⁵² In England, after early widespread acceptance, *Rylands* appears to have been absorbed into nuisance liability.¹⁵³ Measured in terms of present-day doctrine directly descended from the case, the contemporary impact of *Rylands* is remarkably modest. Strict liability has not exploded and conquered the law of torts; it is sovereign only in its native habitat of the property torts. Elsewhere, it is the road not taken and which might yet be taken.

Some of the misinterpretations examined in this Article have no doubt played a role in limiting *Rylands*’s doctrinal reach. Reinterpreting “natural” as “normal” and “non-natural” as “abnormal” radically restricts the scope of *Rylands*’s strict liability. Indeed, as Professor Kenneth Abraham shrewdly suggests, the very name “abnormally dangerous activity liability” has probably contributed to limiting *Rylands*-based strict liability:

The dangerousness requirement that is so central to strict liability doctrine depends for its content on both ordinary attitudes toward risky activities and on the technological state of the art. Given the direction in which both these phenomena have evolved over time, it is no surprise that there has been no growth in the number of activities considered abnormally dangerous. On the whole, life has been getting safer, both in the eyes of the public and in fact.¹⁵⁴

But it would be a mistake to attribute too much of *Rylands*’s fate to the intellectual particulars of its misinterpretation by American tort scholars. Academic commentary does not determine the history of

152. One careful, if dated, compilation of activities contained in the law of abnormally dangerous activities is contained in William K. Jones, *Strict Liability for Hazardous Enterprise*, 92 COLUM. L. REV. 1705, 1715–16 (1992). Because abnormally dangerous activity doctrine takes the form of a standard and not a rule, its application is both contextual and open-ended. Consequently, the doctrine has the capacity to cover an indefinite number of activities. That capacity is missed by a nose-counting of cases. If enterprise liability were suddenly to sweep our law of torts (an unlikely development to be sure), the formal doctrine of abnormally dangerous activity liability would prove receptive to much more expansive application than it now receives. For an example of such application, see *Lubin v. Iowa City*, 131 N.W.2d 765, 765–66 (Iowa 1964) (holding a waterworks strictly liable for damage done by the breakage of a water main and citing *Rylands*). A waterworks does not make abnormally dangerous use of water.

153. See *supra* note 151 for a discussion of *Rylands*’s early acceptance by early courts. For *Rylands*’s contemporary absorption into nuisance law in England, see *Cambridge Water Co. v. E. Cntys. Leather PLC*, [1994] All E.R. (H.L.) 53.

154. Abraham, *supra* note 33, at 224.

tort law. At most, it embeds certain conceptions in the consciousness of lawyers and judges. That is surely important, but it is only one factor affecting the scope of *Rylands's* application. *Rylands's* fate is bound up with the larger fate of strict and enterprise liability in American tort law and with 150 years of tort history. The story of *Rylands's* fate is in fact a number of distinct stories, each of them complex.

A. *Strict Liability in Tort*

One story about the fate of strict liability is a story about the subterranean presence of strict liability within negligence law. Doctrines such as the “reasonable person” standard, *res ipsa loquitur*, vicarious liability, doctrines of proximate cause that extend liability beyond the harm foreseeably risked, and various procedural devices and burdens of proof introduce a great deal of strict liability into negligence.¹⁵⁵ The presence of these strict liabilities in negligence law may represent negligence law’s covert subsummation of strict liability. Thus, they may be, as Abraham argues in his contribution to this Symposium, a subterranean triumph of strict liability and, by extension, a partial vindication of *Rylands*.¹⁵⁶ A slightly different story shows how enterprise liability—a form of liability which flowers most fully in its strict incarnation¹⁵⁷—has exerted a powerful influence within modern negligence law. Rabin’s *Some Thoughts on the Ideology of Enterprise Liability* is the path-breaking piece in this regard.¹⁵⁸

A second story has to do with the presence of strict liability in tort more generally. Intentional torts, such as trespass, conversion, nui-

155. Professor Kenneth Abraham’s illuminating contribution to this Symposium investigates this topic. See generally Kenneth S. Abraham, *Strict Liability in Negligence*, 61 DEPAUL L. REV. 271 (2012). For a different angle on this topic, see Keating, *supra* note 34, at 1292–303. Rabin emphasized the role of enterprise liability within negligence law and is, to my knowledge, the only one to do so. See generally Rabin, *Some Thoughts*, *supra* note 2. Francis Bohlen astutely observed that strict liability is actually carried furthest in some of the exceptions to the general nonliability of principals for the torts of independent agents. See Bohlen, *supra* note 113, at 448, 452 (“The principle [of liability without fault] is carried farthest in those cases which hold that one who lets out work, dangerous unless preventive measures be taken, liable for the independent contactor’s failure to take the necessary precautions. . . . The defendant, himself innocent, is held liable because, by causing, for his own purposes, dangerous work to be done, he is the author of the harm caused by its performance without the precautions necessary to secure the safety of others.” (footnote omitted)).

156. See Abraham, *supra* note 155.

157. This is because enterprise liability requires the internalization of the financial costs of accidental harm by the activities responsible for their infliction. See *supra* note 34. Strict liability realizes this objective more fully than negligence liability because, even perfectly applied, negligence liability leaves the costs of nonnegligent accidents on their victims.

158. See generally Rabin, *Some Thoughts*, *supra* note 2; see also Keating, *supra* note 34, at 1329–32 (discussing enterprise liability within negligence law).

sance, and battery (in some of its incarnations), and the doctrine of conditional private necessity in *Vincent v. Lake Erie* are all instances of strict liability.¹⁵⁹ Strict liability is therefore alive and well, even in this present era of resurgent negligence liability—though freestanding torts embracing strict liability are mostly property torts. That important fact is one to which I shall return.

Yet a third story has to do with how to understand nonfault administrative schemes such as workers' compensation and no-fault automobile insurance. Should these be grouped with strict liabilities in tort? Or should they be treated as radically distinct doctrines on the ground that they are administrative schemes, not private law? The question of whether tort is an autonomous field of law is a large one, but it is plain that the history of strict liability in tort cannot be understood without attending to the impact of these administrative schemes—especially workers' compensation—on tort law proper.¹⁶⁰ How we understand the relation of these schemes to tort law proper, moreover, has a profound impact on how we understand the shape of the relevant legal landscape and the amount of strict liability that we find in the field as a whole.

A fourth story concerns the ebb and flow of enterprise and strict liability within the tort realm of accident law. In broad outline, that story is one of expansion starting early in the twentieth century, ending in the 1980s, and reversing since the mid-1980s.¹⁶¹ The restricted

159. Some of these doctrines are discussed in Gregory C. Keating, *Is the Role of Tort to Repair Wrongful Losses?*, in *RIGHTS AND PRIVATE LAW* 367 (Donal Nolan & Andrew Robertson eds., 2011).

160. The classic article on the impact of workers' compensation on tort proper remains Jeremiah Smith, *Sequel to Workmen's Compensation Acts* (pts. 1 & 2), 27 *HARV. L. REV.* 235, (1914), 27 *HARV. L. REV.* 344 (1914). Smith did not believe that the two bodies of law were wholly independent:

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

Smith, *Sequel to Workmen's Compensation Acts* (pt. 1), *supra*, at 235 (footnote omitted). Apocryphally, Smith prophesied that the common law of torts would become stricter in diverse ways. Smith, *Sequel to Workmen's Compensation Acts* (pt. 2), *supra*, at 367. Over the course of the next sixty years, much of the transformation that Smith foretold came to pass in the common law of California at a time when California tort law blazed the way for the country as a whole. See Keating, *supra* note 34, at 1297–303.

161. See *supra* note 34.

law of abnormally dangerous activities that we now witness is partly a result of a generation of contraction. But even the broad outlines of this story of expansion and contraction are contestable. It is arguable that the expansion of tort liability in the middle third of the twentieth century was mostly attributable to an increasingly stringent and capacious negligence law.¹⁶² The persistence of this debate is a testament to the plasticity of tort law: the interrelations of negligence and strict liability are sufficiently intense and complex that first-rate scholars working in good faith can offer very different accounts of the law and its evolution. Last, this large story subsumes many smaller ones, such as Professor Nora Engstrom's history of no-fault automobile insurance, presented in this Symposium.¹⁶³

B. *Strict Liability and Property Rights*

In light of these complexities, the influence of *Rylands* on tort practice over the past 150 years is a topic we would be wise to leave for another occasion. The internal logic of the opinions and the doctrine to which the case gives birth are only one part of *Rylands*'s influence and may not by themselves do much to account for the vicissitudes of strict liability in American law. There is, however, one respect in which a distinctive characteristic of strict liability norms themselves probably have shaped the evolution of strict liability in American law. The relation of strict liability to property has been a recurring theme in discussions of *Rylands*, and it is a recurring feature of strict liabilities in law. The long-standing, well-settled strict liabilities in our law protect property rights, as trespass, conversion, and nuisance do. Of course these are the very strict liabilities from which *Rylands* extracts its general principle. The question naturally arises whether strict liability has an enduring affinity for property.

The normative implication of strict liability's entanglement with property rights is troubling and not easy to justify. Normatively, it is not easy to explain why property should receive more protection than the physical integrity of the person does. Indeed, it seems perverse: no rational person values their property more than their life. For the tort system to take the stand that property deserves more protection than physical integrity seems either perverse (if everyone's property is protected more than their physical integrity) or morally disturbing (if

162. Gary Schwartz developed this thesis in a number of important articles. See, e.g., Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601 (1992).

163. See Nora Freeman Engstrom, *An Alternative Explanation for No-Fault's "Demise,"* 61 DEPAUL L. REV. 303 (2012).

some people's property is protected more than other people's physical integrity).

Putting this thorny normative worry to the side, however, there is another reason why the internal logic of strict liability conceptions makes strict liability particularly well suited to the protection of property rights. Strict liability requires the attribution of harms to acts or activities. That is not always easy to do without a fault criterion and may sometimes be impossible to do without a fault criterion. One need not accept the radical Coasean premise that injurers and victims are equally responsible for all harms to appreciate the force of Bramwell's observation that "[w]here two carriages come in collision, if there is no negligence in either it is as much the act of the one driver as of the other that they meet."¹⁶⁴ In the automobile accident context, in fact, the attribution problem is so acute that strict liability in its usual form—holding injurers liable for all the physical harms that issue from the characteristic risks of their activity—is not a feasible alternative to negligence. Strict liability for automobile accidents can be instituted only by a non-tort administrative scheme.¹⁶⁵ It is well nigh impossible for common law adjudication to identify who is responsible for injuring whom in an automobile accident without deploying a fault criterion, but it is comparatively easy to identify an injury suffered in the course of an automobile accident and thus comparatively easy to implement no-fault automobile insurance.

On the one hand, this explains the affinity of common law strict liability for property conceptions and property rights. Property norms enable drawing boundaries between activities without recourse to any criterion of fault. On the other hand, the vulnerability of common law strict liability to attribution problems explains the allure of administrative schemes for strict liability in general and the resilience of negligence liability as the common law's default norm.¹⁶⁶ No-fault automobile insurance shows how non-tort administrative schemes are often able to solve attribution problems that common law incarnations of enterprise liability cannot solve.¹⁶⁷ By requiring victims to insure against nonnegligent losses (as well as negligent ones), no-fault insurance is capable of attributing the nonnegligent accident costs of driving to the activity of driving along with the costs of negligent

164. *Fletcher v. Rylands*, (1865) 159 Eng. Rep. 737 (Ex. Div.) 744 (Bramwell J. dissenting).

165. *Hammontree v. Jenner*, 97 Cal. Rptr. 739, 742 (Ct. App. 1971), is instructive in this regard.

166. Gregory C. Keating, *Rawlsian Fairness and Regime Choice in the Law of Accidents*, 72 *FORDHAM L. REV.* 1857, 1861–62, 1899–903 (2004).

167. *Id.* at 1901.

accidents.¹⁶⁸ Compulsory loss insurance attributes the costs of automobile accidents to the activity of driving without requiring us to sort injurers from victims in cases of nonnegligent injury.¹⁶⁹ This way of surmounting the attribution problem is not available to the common law.

Other administrative schemes solve attribution problems which would bedevil, if not defeat, the common law of torts by specifying in detail which injuries are to be attributed to a particular activity. The National Childhood Vaccine Injury Act, for example, incorporates a Vaccine Injury Table, listing illnesses associated with various vaccines and time periods following the administration of a vaccination within which the first symptom or manifestation of an illness must occur.¹⁷⁰ Proof that an illness occurred within a specific time period creates a rebuttable presumption that the vaccination was its cause.¹⁷¹ The aggregate statistical connections between exposure and illness establish causation.¹⁷²

The second advantage of administrative schemes over the common law is that they can often affect enterprise liability more effectively than the common law because they can exert more control over the mechanisms and institutions of insurance. Enterprise liability in tort must, for the most part, hope that the imposition of strict liability will stimulate the provision of appropriate self or third-party insurance against liability. Administrative schemes, by contrast, can compel the purchase of insurance.¹⁷³ Compelling insurance against some class of accidents both stimulates the demand for insurance and facilitates its provision—other things equal, the larger the pool of insureds the easier it is to spread risk among them.¹⁷⁴ Administrative schemes can also compel the use of particular insurance mechanisms, as no-fault automobile liability schemes compel the use of first-party insurance against loss. Indeed, administrative schemes can foster the provision of insurance even more directly. Legislatures and administrative

168. *Id.*

169. *Id.*

170. 42 U.S.C. § 300aa-14 (2006).

171. *Id.* § 300aa-13.

172. *Id.* § 300aa-14.

173. For example, compelled insurance is a universal feature of workers' compensation schemes. See ARTHUR LARSON & LEX K. LARSON, 9 LARSON'S WORKERS' COMPENSATION LAW § 150.01 (2011) ("All states require that compensation liability be secured.").

174. See ROBERT I. MEHR ET AL., PRINCIPLES OF INSURANCE (8th ed. 1985) (listing "a large group of homogeneous exposure units" as the first of seven criteria that "need to be considered before attempting to operate a successful insurance plan"). Note that a larger but less homogeneous pool of insureds is not necessarily easier to insure. It depends on whether size dominates homogeneity in the context at hand.

agencies can construct appropriate insurance mechanisms and require the provision of insurance to parties who are unable either to self-insure or to purchase private insurance in the marketplace. State-sponsored insurance funds are a familiar part of workers' compensation law, for example, as is the practice of providing for assignment of rejected risks.¹⁷⁵

A fundamental conceptual requirement of strict liability—that accidents be attributable to activities without recourse to a fault criterion—may thus help to explain (1) the affinity of common law strict liability for property rights; (2) the tendency to institute strict liability through non-tort administrative schemes; and (3) the correlative resilience of negligence liability as the default regime of the common law of torts.¹⁷⁶ The conceptual demands of strict liability may prevent it from becoming the dominant common law liability norm, quite apart from other considerations.

Doctrinally, the fate of *Rylands* is curious in the following way. *Rylands* sought to generalize an abstract principle of strict liability from the particular strict liabilities of the property torts. Intellectually, the opinions succeeded: the principle that people should bear the costs of the harms that they inflict on others in the course of pursuing their own private ends is as general and as intuitively appealing as the fault principle with which it competes. Practically, *Rylands* has been a disappointment: strict liability has not expanded very far beyond its secure home in the property torts. One reason why (there are no doubt others as well) is that it is far easier to attribute harms to activities when richly articulated property rights are in play than it is in the sphere of life where activities tend to collide like cars on a highway. In this latter sphere, negligence law's criterion of fault has proven far easier for common law courts to wield.

V. LESSONS FOR TORT THEORY

The fundamental lessons that *Rylands* itself can teach, however, are lessons for tort theory. The fundamental responsibility of tort scholars is to get tort law right. Tort scholars are not responsible for shaping the history or the politics of the subject, but they are specially responsible for getting tort law right. Paramount here is the responsi-

175. See LARSON & LARSON, *supra* note 173, § 150.01[1] (“Six states require insurance in an exclusive state fund. Fourteen states have competitive state funds.” (footnote omitted)); see also *id.* § 150.05[3] (“Assigned Risk Practice”). In a similar vein, the National Childhood Vaccine Injury Act of 1986, codified principally at 42 U.S.C. §§ 300aa-10 to -34, creates a trust fund to pay compensation to those eligible to recover under the Act.

176. Keating, *supra* note 166, at 1860, 1912, 1917.

bility to get tort's fundamental ideas right. In this respect, tort scholars have not acquitted themselves as well as they might have. *Rylands* in fact makes its ideas remarkably clear. It earns its standing as a great common law case by ascending from the gnarly details of ancient doctrines to the general moral conceptions which give them sense and justification. The case that the opinions in *Rylands* make for strict liability is in fact clear, coherent, and intuitively powerful. To be sure, the opinions hardly settle the case for strict liability (what case could meet that burden?) but they do as much as any single set of opinions can to make the character of, and prima facie case for, strict liability clear and vivid. Tort scholars have not always done as well in their efforts to transmit *Rylands's* lessons across time. For whatever reason, the exemplary achievements of those such as Newark and Bohlen, who have gotten the case right, have competed with far less-sound interpretations, and those interpretations have sown confusion. This is unfortunate because the lessons of *Rylands* should be permanently available to tort scholarship.

At present, the understanding of *Rylands* by the tort theorists who would seem to be its natural audience is impeded by a particular burden; namely, the burden of the idea that tort law is a realm of "conduct-based wrongs."¹⁷⁷ Sometimes, this leads to conceptualizing strict liability of the sort found in *Rylands* as a kind of ramped up negligence liability that flatly imposes a duty not to harm:

Strict and fault liability are different ways of articulating the content of one's duty to others.

. . . .

In torts, blasting is governed by strict liability and motoring by fault liability. The way to understand the difference is as follows. In the case of motoring, my duty of care is a duty to exercise reasonable care; it is a duty-not-to-harm-you through carelessness, recklessness, or intention. The law demands that I take reasonable precautions not to harm you In the case of blasting, however, the law imposes on me the duty-not-to-harm-you. The way I am to take your interests into account is to make sure that I don't harm you by blasting.

The difference between fault and strict liability is a difference in the content of the duty of care I owe to you. . . . If my duty to you is a duty-not-to-harm-you, then the only way that I can discharge that duty is by not harming you.

177. See John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 917-18, 935-36 (2010); Christopher Kutz, *Pragmatism Regained*, 100 MICH. L. REV. 1639, 1641 (2002) (book review).

If my duty to you is a duty-not-to-harm-you-faultily . . . , then I can discharge that duty either by not harming you or by not being at fault—whether or not I harm you.¹⁷⁸

When strict liability is conceived as a duty not to harm, it becomes a conduct-based wrong and so conforms to the demands of corrective justice theory as Professor Jules Coleman conceives them. Unfortunately, the duty in *Rylands* is *not* a duty to do no harm. The defendant's conduct in imposing the risk responsible for the damage was wholly unobjectionable, as the court says. The defendant's wrong lies in failing to repair harm reasonably inflicted. Strict liability in *Rylands* simply does not fit the mold of a conduct-based wrong.

Other tort theorists, equally attached to the idea of tort as a law of conduct-based wrongs, conceptualize *Rylands* as not really tort at all. The law of torts is a law of wrongs, and *Rylands* is an example of courts imposing liability on harms caused “through conduct that the courts themselves are at pains to say is entirely permissible.”¹⁷⁹ This conception misses the mark too. The harm in *Rylands* is not a matter of moral indifference just because the conduct responsible for inflicting the harm was free of fault. The infliction of harm is morally significant in itself and the message of *Rylands* is that it is wrong for the defendant to have failed to repair the harm that it inflicted on the plaintiff. It is wrong because it is unfair. Plaintiff and defendant have equal claims—equal rights to use their property as they see fit. Their rights must therefore be reconciled fairly; that is, on terms that reflect their equality. It is wrong and unfair to sacrifice the plaintiff's rights simply because the defendant's pursuit of its own interest was rational and careful. *Rylands* is, then, an example of a particular kind of wrong, one which is distinctive in part because it is not conduct based.

Rylands is thus presently important in part because it illustrates a kind of wrong that does not match the template promoted by many contemporary tort theorists. For these tort theorists, torts are wrongs, and wrongs are conduct based in the sense that the primary conduct responsible for the infliction of injury is wrong (as is the case in negligence liability). This template is too narrow. Wrong is a violation of rights and not all violations of rights are conduct based. In some cases, the wrong lies *not* in inflicting injury in the first instance but in

178. Jules L. Coleman, *Facts, Fictions, and the Grounds of Law*, in *LAW AND SOCIAL JUSTICE* 327, 329 (Joseph Keim Campbell et al. eds., 2005); see also JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE* 35 n.19 (2001) (“The concept of a duty in tort law is central both to strict and fault liability. In strict liability, the generic form of the first-order duty is a ‘duty not to harm someone’, while in fault, the generic form of a duty is a ‘duty not to harm someone negligently or carelessly’.”).

179. Goldberg & Zipursky, *supra* note 177, at 951.

failing to step forward and make reparation for harm reasonably inflicted. *Rylands* is one of those cases. Its moral message is that moral responsibility does not come to an end because harm is unavoidable. Even unavoidable harm can trigger moral responsibility; even unavoidable harm can trigger a duty of repair. That moral message is, indeed, *Rylands*'s most provocative lesson.

At a deeper level, fault theorists who assert that the limit of responsibility is reached when unintended harm is inflicted by unreasonable conduct and that harm inflicted by reasonable conduct is no different from suffering misfortune at the hands of Mother Nature are evading a challenge that they should confront.¹⁸⁰ *Rylands* stands for the thesis that harm issuing from human agency is always significant and always subject to legal and moral assessment. Even harm reasonably done may require reparation for reasons that the facts and the opinions make clear. Natural misfortune is categorically different. It is anthropomorphic nonsense to speak seriously of holding natural forces responsible for the mischief that they do. Agency is an inescapable condition of responsibility for harm done. *Faulty* agency, however, may not be a necessary condition of such responsibility. That, indeed, may be the deepest lesson of *Rylands*.

VI. RYLANDS AND RABIN

We have traveled a long way from Rabin's illuminating history of the emergence of fault liability. It is time to find our way back. The argument of this Article has been that *Rylands* really does articulate strict liability as a general idea at a formative moment in the history of the common law and that it should be so understood in the tort canon. If this argument is correct, does it bear on the large and enduring contributions that Rabin has made to our thinking about tort law? There is reason, I think, to believe that the answer to this question is yes. *Rylands* is a principal common law font of enterprise liability. With the exception of Guido Calabresi, Rabin has been more interested in—and more sympathetic to—enterprise liability than any other tort scholar of his generation. I am surely not the only tort scholar of my generation to have benefited greatly from his work on the subject,

180. See, e.g., Coleman & Ripstein, *supra* note 82, at 113 ("For the agent who follows the moral law, his agency—for which consequences of his or her actions he or she is responsible or owns—pretty much ends with the intended consequences of his or her action. . . . Simply substitute fault for the moral law. The person who is at fault opens himself or herself up to liability for unintended consequences of his conduct, including some that would not have occurred but for the conduct of others. . . . Fault, far from rendering causation and agency otiose, actually defines the scope of their relevance.").

especially his excavation of enterprise liability themes and conceptions within the modern law of negligence.¹⁸¹

The significance of Rabin's work on enterprise liability, moreover, extends beyond excavating enterprise liability influences in negligence law in two ways. First, Rabin has been sensitive to the importance of institutions for modern tort law. This manifests itself in part in *The Fault Principle's* emphasis on negligence as an institution, not just a single norm commanding due care. But Rabin's awareness of institutions also manifests itself in sensitivity to the way in which the modern law of torts must grapple with systemic risks imposed by large firms, government agencies, and enduring, highly structured activities. His work rightly embraces enterprise liability conceptions in order to address these institutional realities. This aspect of his work is evident not only in his article *Some Thoughts on the Ideology of Enterprise Liability*, but also in his seminal article *Enabling Torts*.¹⁸²

Strict enterprise (or activity) liability is tort law's most robust attempt to come to grips with the fact that we live, to paraphrase Holmes, in a "world of activities," even though our law of torts comes from a "world of acts." For all its intellectual power and practical resilience, negligence liability is not entirely at home in our "world of activities." Its quest for individual fault feels too much like the pursuit of the wrong target. "It is well known among insurance professionals," for example, "that there are no 'safe' drivers because even 'at fault' accidents and traffic convictions are mostly random events—the luck of conditions existing when a mistake is made."¹⁸³ Figuring out how to govern the risks of the activity of driving and make it reasonably safe ought to be, therefore, more important than figuring out when to classify individual actions within the activity as wrong. Enterprise liability turns our attention toward institutions more than negligence liability does and so is better suited to this task. In this respect, enterprise liability may actually be *more* modern than we have yet become. Rabin's work gently nudges us toward this future.

Second, Rabin's work has been set apart from almost all other work on enterprise liability by its sensitivity to the moral considerations that support holding activities responsible for the harms that issue from their characteristic risks. Most work on enterprise liability—for and against—is informed by economic ideas. These ideas have proven to

181. See generally Rabin, *Some Thoughts on the Ideology of Enterprise Liability*, *supra* note 2.

182. See generally Rabin, *Enabling Torts*, *supra* note 2.

183. Engstrom, *supra* note 163, at 330 n.129 (quoting Patrick Butler & Twiss Butler, *Driver Record: A Political Red Herring that Reveals the Basic Flaw in Automobile Insurance Pricing*, 8 J. INS. REG. 200, 201 (1989)).

be both powerful and fertile. But they have tended to eclipse discussion of the moral reasons and conceptions that bear on enterprise liability, just as they have tended to eclipse the truth that torts are wrongs. This is unfortunate. Enterprise liability is concerned with preventing and repairing serious physical harm. Serious physical harm, its prevention, and its repair are topics of intrinsic moral significance. They can never be matters of moral indifference and are presumptively matters of moral right and responsibility. Strict enterprise liability cannot be fully understood and appraised until the moral reasons in its favor are unearthed and assessed. In this respect, Rabin and *Rylands* are colleagues and allies. What they have to say is part of the enduring conversation of tort law on its basic questions. It falls to us to hear their voices and to dedicate ourselves to moving forward in dialog with them.