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## The Strict Liability in Fault and the Fault in Strict Liability

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# THE STRICT LIABILITY IN FAULT AND THE FAULT IN STRICT LIABILITY

John C.P. Goldberg\* & Benjamin C. Zipursky\*\*

*Tort scholars have long been obsessed with the dichotomy between strict liability and liability based on fault or wrongdoing. We argue that this is a false dichotomy. Torts such as battery, libel, negligence, and nuisance are wrongs, yet all are “strictly” defined in the sense of setting objective and thus quite demanding standards of conduct. We explain this basic insight under the heading of “the strict liability in fault.” We then turn to the special case of liability for abnormally dangerous activities, which at times really does involve liability without wrongdoing. Through an examination of this odd corner of tort law, we isolate “the fault in strict liability”—that is, the fault line between the wrongs-based form of strict liability that is frequently an aspect of tort liability and the wrongs-free form of strict liability that is found only within the very narrow domain of liability for abnormally dangerous activities. We conclude by defending these two features of the common law of tort: the strictness of the terms on which it defines wrongdoing and its begrudging willingness to recognize, in one special kind of case, liability without wrongdoing.*

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#### INTRODUCTION

No topic has received more attention in modern torts scholarship than the distinction between strict liability and fault-based liability. Legal historians have debated the provenance and significance of each.<sup>1</sup> Doctrinalists have fought over whether negligence liability is actually strict and whether strict products liability is actually fault-based.<sup>2</sup> Economists have argued about the incentive effects of these different modes of liability.<sup>3</sup> Philosophers have pondered the extent to which strict or fault-based liability is compatible with, or required by, moral principles.<sup>4</sup>

In this Article, we argue that, notwithstanding all the attention it has received, standard invocations of the fault v. strict liability distinction badly mischaracterize it, which in turn has caused a great deal of needless confusion. We aim to clear up the confusion by providing a more careful

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1. See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 70, 74–75 (1977) (arguing that, in the mid-nineteenth century, courts in the United States moved from a regime of strict tort liability to a regime of fault-based liability as a means of promoting nascent industry); Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 *YALE L.J.* 1717 (1981) (responding to Horwitz).

2. See, e.g., Mark F. Grady, *Res Ipsa Loquitur and Compliance Error*, 142 *U. PA. L. REV.* 887, 897–98 (1994) (arguing that, as applied in particular instances, negligence generates strict forms of liability); James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 *N.Y.U. L. REV.* 265, 272 (1990) (arguing that liability for injuries caused by dangerous products, even though nominally strict, is actually fault based).

3. See, e.g., Steven Shavell, *Strict Liability Versus Negligence*, 9 *J. LEGAL STUD.* 1, 2–3 (1980) (discussing the issue).

4. See, e.g., ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 177–79 (1995) (arguing that strict liability is unprincipled); Tony Honoré, *Responsibility and Luck: The Moral Basis of Strict Liability*, 104 *LAW Q. REV.* 530, 539–52 (1988) (arguing for the morality of strict liability).

analysis of the role of fault-based liability and strict liability in the law of torts.

According to prevailing academic usage, strict liability is liability *without wrongdoing*. A defendant subject to strict liability must pay damages irrespective of whether she has met, or failed to meet, an applicable standard of conduct. Action that causes harm is all that is required. By contrast, fault-based liability is conceived as liability predicated on some sort of wrongdoing. The defendant's liability rests on the defendant having been "at fault," i.e., having failed to act as required.

This treatment of strict and fault-based liability as opposites is a monumental mistake. In fact, tort liability is almost always *simultaneously* fault-based *and* strict. For torts ranging from battery to negligence, and from libel to trespass, liability is imposed on the basis of wrongdoing. Yet, it is also imposed strictly—that is, in a demanding or unforgiving manner. As the first half of our title suggests, there is *strict liability in fault*.

While we insist that strict liability appears throughout tort law because of the manner in which courts have defined the various torts, we also acknowledge that there are marginal instances in which courts recognize tort liability without any wrongdoing. This form of liability can fairly—though not uncontroversially—be traced to the old English case of *Rylands v. Fletcher*<sup>5</sup> and today can be found in applications of the "abnormally dangerous activities" doctrine that grew out of *Rylands*. Conventional wisdom errs in large part because it treats every instance of strict tort liability as an instance of the type of liability commonly associated with *Rylands*, when in fact that type is quite distinct from what we have just described as "the strict liability in fault." Thus, to invoke the second half of our title, it is critical to appreciate the *fault in strict liability*—that is, the difference between two very different kinds of strict liability, one of which is pervasive and the other of which is an outlier in tort law. The former, noted above, is an attribute of the standards of conduct contained within the various torts. The latter imposes liability without regard to whether a standard of conduct has been met or violated.

Our analysis proceeds as follows. Part I discusses the strict liability in fault. Specifically, it demonstrates that there are common instances of strict liability in negligence, battery, trespass, nuisance, libel, and other torts. Because the standards of conduct built into these torts are defined objectively, they are often quite demanding or unforgiving. Nonetheless, as we explain, *objectivity-based strict liability* of this sort is still wrongs-based. To say the same thing: demanding standards of conduct are still standards of conduct, and violations of them are still cogently described as wrongs.

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5. (1868) 3 LRE & I App. 330 (HL). As explained below, there are reasons to believe that *Rylands* embraced the distinct form of strict liability that we refer to below as "licensing-based strict liability." See *infra* Part II. However, later English decisions have rejected this reading of *Rylands*, instead treating it as a nuisance case. Regardless, the abnormally dangerous activities doctrine that *Rylands* helped spawn, at least in some applications, involves the imposition of licensing-based strict liability.

Part II turns to the fault in strict liability. Specifically, it explains how liability for injuries resulting from abnormally dangerous activities can, at least sometimes, be understood as a distinctive form of strict liability that detaches liability from any notion of wrongdoing. We refer to this special, non-wrongs-based form of strict liability as *licensing-based strict liability*. This part concludes by rebutting arguments suggesting that licensing-based strict liability is, after all, a form of wrongs-based liability.

Part III identifies and responds to several challenges that might be raised against our map of the terrain of tort law. First, it explains why the recognition of “strict” products liability by U.S. courts in the second half of the twentieth century does nothing to undermine our contention that strict liability in tort is overwhelmingly wrongs-based and that licensing-based strict liability is anomalous. Second, it counters the suggestion that the strictness of tort law’s standards of conduct renders tort law normatively indefensible or unattractive. Third, it explains why, even granting that liability without any wrongdoing is imposed for injuries caused by abnormally dangerous activities, there are plausible reasons for categorizing this particular form of liability as “tort” liability. Finally, we consider whether, in recognizing licensing-based strict liability at the very margins of tort law, courts have drawn the fault line between the two forms of strict liability in a defensible place, or whether they would do well to recognize more instances of licensing-based strict liability.

We conclude with some thoughts about possible practical implications of our analysis.

## I. THE STRICT LIABILITY IN FAULT

Torts are wrongs, and tort suits turn on claims of wrongdoing. However, tort law defines wrongdoing in ways that allow for the imposition of liability even upon actors who act with reasonable care or diligence. This aspect of tort law is what we refer to as “the strict liability in fault.” This part demonstrates that this form of strict liability is pervasive in tort and explains its agency within a law of wrongs.

### A. *Tort Law’s Strict Liability Wrongs*

This section briefly surveys instances in which torts that condition liability on wrongdoing nonetheless operate strictly.

#### 1. Negligence and the Objectivity of the Standard of Care

Negligence has long been defined in a manner that is relatively insensitive to the ability of particular persons to act with ordinary prudence. Oliver Wendell Holmes Jr. famously focused on negligence law’s indifference to an actor’s actual ability to remain free of calamities.<sup>6</sup> The law, he rightly noted, applies the same standard to the competent and the

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6. OLIVER W. HOLMES, JR., *THE COMMON LAW* (The Lawbook Exch., Ltd. 2009) (1881).

incompetent, even though the latter will find it difficult or impossible to comply, or at least to comply consistently.<sup>7</sup>

Negligence law's indifference to an actor's capacity for prudence is not the only way in which it sets an unforgiving norm. As Mark Grady famously emphasized, courts apply the standard of care using a relatively narrow time horizon.<sup>8</sup> The breach question within a negligence claim concerns whether an actor has failed to meet the standard on a particular occasion—whether a driver who collides his car with another car failed to check his blind spot before changing lanes, or whether a surgeon properly performed a procedure on a particular patient. One's overall record for prudence—the fact that one is generally a very careful driver or surgeon—is irrelevant. Over a long enough stretch of time it may be nearly impossible for drivers, surgeons, and other actors to meet the standard on every occasion on which they are required to meet it.

Likewise, negligence law makes little to no room for excuses.<sup>9</sup> An actor whose actions fail to meet the standard of ordinary prudence will be subject to liability even if her carelessness results from pressures that would induce even a resilient person to act carelessly. Suppose, for example, a patient leaves her physician's office devastated over receiving a terrible diagnosis. Reeling, she fails to pay attention to her surroundings and takes a step out into a street against a "Don't Walk" sign, colliding with a bicycle that is proceeding lawfully down the street. If the cyclist is injured, he will have a claim against the patient. In this way, too, negligence law is quite demanding.

In sum, the standard of conduct built into the tort of negligence is *strict*. Holmes and others have pointed to this feature of negligence law as proof that tort law, for instrumental reasons, imposes liability beyond what would be permitted if the law were to insist on wrongdoing as a condition of liability.<sup>10</sup> But it is a mistake to infer from the demandingness of the reasonably prudent person standard to the conclusion that negligence law calls for liability without wrongdoing. The clumsy injurer, the physician with the otherwise spotless record, and the distracted patient can each point to a ground that might warrant a relatively lenient judgment of their actions. Yet it remains perfectly cogent to criticize their actions as substandard.

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7. *Id.*

If . . . a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.

*Id.* at 108.

8. Grady, *supra* note 2, at 900 (noting that judges do not take into account the cost to actors of consistently meeting the standard of care, thereby in effect "assess[ing] a penalty for every miss").

9. See John C.P. Goldberg, *Inexcusable Wrongs*, 103 CALIF. L. REV. 467, 467 (2015).

10. See, e.g., Kenneth S. Abraham, *Strict Liability in Negligence*, 61 DEPAUL L. REV. 271, 273 (2012) (arguing that negligence law's pockets of strict liability indicate that negligence liability extends past cases of genuine wrongdoing).

Each of these envisioned cases of “strict” negligence liability stands in contrast to a case in which a person causes injury through conduct that fully complies with the applicable standard and hence is in no sense wrongful.<sup>11</sup> Negligence, in many standard iterations, is a strict liability wrong.

## 2. Trespass, Battery, and Defamation: Rights and Act-Types

For centuries the term “trespass” was used to refer to the branch of law now known as “tort.” Trespass to land was one instantiation of the general idea. Trespass to the person (battery) was another. The idea of crossing another’s boundaries—of touching another inappropriately, or of “breaking the close”—powerfully conveys the notion of one person wrongfully injuring another. Yet the old trespassory torts were defined, and their modern descendants are still defined, in a way that allows for the imposition of liability notwithstanding the defendant’s diligence or prudence.

To take a well-worn example: one who takes extraordinary care to build a fence on her property but who nonetheless ends up building it on a neighbor’s property commits trespass to land.<sup>12</sup> That she took every reasonable precaution against invading her neighbor’s land (short of not building) does not defeat the neighbor’s claim. Indeed, the neighbor typically is entitled to have the fence taken down and to recover damages for any harm incurred as a result of its being built.

The tort of trespass is rights driven in an unusually conspicuous way. The possessor’s right to exclude persons and objects goes a long way toward defining what constitutes wrongful conduct in relation to that right. So long as there has been the requisite invasion, the wrong has been committed. In other words, the plaintiff’s property rights generate a wrong that is defined in terms of a certain *act-type*. It is enough that, (a) the defendant actually enters (or remains on) land that is possessed by the plaintiff and (b) that the defendant intended to occupy the physical space that, when occupied, constituted the entry (or the remaining on). One who intends to make contact with, or pass through or over, a particular physical space that happens to be another’s, and who does so, has trespassed. This is so even if she did not know, and had no reason to know, that the land was possessed by another.

As our pairing of trespass to land with battery is meant to suggest, the former is hardly an outlier. Today, battery is categorized as an intentional tort. This unfortunate bit of taxonomy—a misguided outgrowth of efforts after the collapse of the writ system to reorganize tort law on something akin to a mens rea spectrum—is misleading.<sup>13</sup> In particular, it invites one

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11. For example, a pedestrian who, despite proceeding with due care for those around her, knocks down another pedestrian.

12. *Burns Philp Food, Inc. v. Cavalea Cont’l Freight, Inc.*, 135 F.3d 526, 529 (7th Cir. 1998) (“Trespass is a strict liability tort . . .”).

13. John C.P. Goldberg, *Ten Half-Truths About Tort Law*, 42 VAL. L. REV. 1221, 1259 (2008).

to think of battery as a high-culpability tort: the civil analogue to a criminal assault. Of course, criminal assaults *are* tortious batteries. But shootings and beatings hardly exhaust the reach of the tort.

To commit battery is to touch another person in an impermissible manner. So defined, battery allows for liability despite the defendant's having taken care not to injure the plaintiff. The right in battery is closely akin to the right in trespass. Each of us is entitled to be free from certain touchings; this entitlement corresponds with a legal directive to others in the form of "Don't touch!" (or "Keep off!").

To be sure, the wrong of battery is defined slightly more narrowly than the wrong of trespass. In the latter, the relevant act-type is the intentional touching of land. In battery, the relevant act-type is the intentional touching of another person *in an unacceptable manner*. Unintentional contact cannot be a battery. Nor is it a battery for one person intentionally to touch another in an acceptable manner—the proverbial tap on the shoulder to ask for directions. But so long as one intends a touching of an unacceptable sort and then performs it, one has committed a battery—irrespective of whether one appreciates the impermissibility of the touching and, much less, whether one intends harm.

Perhaps the leading American battery decision—*Vosburg v. Putney*<sup>14</sup>—speaks to the potential strictness of battery liability. A schoolboy reached his leg across the classroom aisle and struck his classmate's shin with his foot, possibly to get the classmate's attention. The kick left no mark. Indeed, Vosburg, the victim, initially did not feel its impact. However, moments later he experienced severe pain; apparently the kick aggravated an underlying condition in his leg.<sup>15</sup> The defendant, Putney, denied any intent to cause harm and the Wisconsin Supreme Court accepted his denial for purposes of analysis.<sup>16</sup>

Vosburg's battery suit alleged that Putney's kick, in combination with the preexisting condition, caused permanent damage. Although the court had some doubts about the plaintiff's efforts to prove a link between the kick and the permanent injury, it had no trouble concluding that the defendant had committed a battery. It focused on the act-type—a kick. There was no dispute that the defendant performed the kick intentionally, which is all that was needed for the defendant to be subject to liability for battery.<sup>17</sup> Absent

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14. 50 N.W. 403 (Wisc. 1891).

15. *Id.* at 404.

16. *Id.* at 403–04.

17. *Id.*

The jury having found that the defendant, in touching the plaintiff with his foot, did not intend to do him any harm, counsel for defendant maintain that the plaintiff has no cause of action, and that defendant's motion for judgment on the special verdict should have been granted. In support of this proposition counsel quote . . . the rule that "the intention to do harm is of the essence of an assault." Such is the rule, no doubt, in actions or prosecutions for mere assaults. But this is an action to recover damages for an alleged assault and battery. In such case the rule is correctly stated, in many of the authorities cited by counsel, that *plaintiff must show either that the intention was unlawful, or that the defendant is in fault. If the intended act is unlawful, the intention to commit it must necessarily be*



special circumstances, an intentional tap on the shoulder is not a battery because there is nothing inappropriate or unacceptable about that way of touching another. By contrast, there is something wrong about kicking another, even gently. Parents teach their children not to kick others—that it is wrong. Teachers tell their students that kicking is not allowed and that it will lead to discipline. In short, a kick is a form of touching that, in most settings, is not to be done.

It might be tempting to suppose that the Wisconsin court was prepared to find “fault” with Putney in his flouting of school rules. Yet, the court nowhere suggested that Putney’s *disposition* toward the rule against kicking in the classroom was relevant to liability. In this respect, *Vosburg* is consistent with decisions holding that battery liability can attach without conscious rule breaking. Indeed, it is a familiar bit of black letter law that a tort defendant cannot defeat a battery allegation, as a criminal defendant might defeat a prosecution, by establishing that he was incapable of appreciating the wrongfulness of his actions because of a mental illness.<sup>18</sup> If the defendant is capable of forming an intention to perform the relevant act-type—so long as he actually meant to hit, kick, grope, spit on, or otherwise touch another person in a manner regarded as improper—he is subject to liability.<sup>19</sup> Likewise, liability can even attach if the defendant reasonably but mistakenly believed that he was touching the plaintiff in an acceptable manner.<sup>20</sup> Neither conscious awareness of rule breaking nor unreasonable conduct is necessary for battery.

Certain defenses to battery are arguably also defined in a way that renders liability for this tort strict. For example, according to the Second Restatement of Torts, a defendant may face battery liability even if she had good reason to believe that the plaintiff consented to being touched in what would otherwise be an inappropriate manner.<sup>21</sup> For a defendant to benefit from the doctrine of apparent consent, her mistake as to consent must not only be reasonable, but must also have been generated by something that the plaintiff said or did (or failed to say or do in a situation in which there is an expectation that something would have been said or done). An actor

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*unlawful. Hence, as applied to this case, if the kicking of the plaintiff by the defendant was an unlawful act, the intention of defendant to kick him was also unlawful.*

*Id.* (emphasis added).

18. See *Wagner v. State*, 122 P.3d 599, 609–10 (Utah 2005) (“[A]s long as a person, mentally handicapped or not, intended to touch the person of another, and the touch was a harmful or offensive one at law, he has committed a battery, . . . it is not an element of [battery] that the actor appreciate that the contact is unwanted.”).

19. Thus, no battery liability should attach if a delusional defendant attacks another person in the genuine belief that he is attacking a plant.

20. See *White v. Univ. of Idaho*, 797 P.2d 108 (Idaho 1990). Defendant, a longtime acquaintance of plaintiff with whom he shared an interest in piano, was a social guest in plaintiff’s home. While plaintiff was seated, defendant approached her from behind and touched her back with his fingers, mimicking the motions of a pianist touching a keyboard, thereby unexpectedly causing her physical harm. The court concluded that this touching constituted a battery, endorsing a lower court’s assertion that “the intent required for the commission of a battery is simply the intent to cause an unpermitted contact.” *Id.* at 109.

21. RESTATEMENT (SECOND) OF TORTS §§ 50, 892(2) (AM. LAW INST. 1977).

who, based on the mistaken representation of a third-party, had every reason to suppose that the plaintiff consented to being touched, is subject to liability for battery.

The defamation torts—or at least central instances of libel and slander—have the same structure as battery and trespass. The right in defamation is the right to one’s good name. The corresponding wrong involves intentionally publishing the kind of statement or depiction that will tend to injure a person’s reputation and thereby causes such an injury. In other words, the act-type is that of communicating something of a defamatory nature about another. As a matter of common law,<sup>22</sup> so long as one intentionally makes such a statement, and reputational harm follows, there can be liability. The gist of the wrong has nothing to do with fault in the sense of a lack of diligence or prudence.

Indeed, under common law, so long as the defendant intentionally uttered a statement that reasonably could be understood to refer to the plaintiff, and that reasonably could be construed as defamatory of her, the defendant was subject to liability. This was the upshot of Justice Holmes’s opinion for the U.S. Supreme Court in *Peck v. Tribune Co.*<sup>23</sup> There, the defendant ran an advertisement in its newspaper. The advertisement included a picture of the plaintiff, wrongly identified as “Mrs. A. Schuman,” and falsely describing her as one of Chicago’s “most capable and experienced nurses.”<sup>24</sup> It further included a statement from “Mrs. Schuman” extolling the health benefits of defendant’s whisky.<sup>25</sup>

Plaintiff alleged that she was libeled by the advertisement because it identified her as a nurse who regularly consumed whisky. The Court permitted the claim to go to the jury. First, it reasoned that even if the picture of the plaintiff had been inserted into the advertisement by mistake, the picture together with the text of the advertisement constituted a statement “of and concerning” the plaintiff.<sup>26</sup> The fact that the defendant did not intend to make a statement about the plaintiff was irrelevant—it was enough that the statement reasonably could be interpreted to be a statement about her.<sup>27</sup> Second, the Court held that a jury could deem it defamatory to say of someone that she is a nurse who partakes of whisky, even if the statement was not intended to be defamatory by the defendant and even if, for many viewers of the advertisement, the statement would not change their opinion of the plaintiff.<sup>28</sup>

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22. Of course, since *New York Times v. Sullivan*, 376 U.S. 254 (1964), the common law of defamation has been subjected to various constitutional limitations.

23. 214 U.S. 185 (1909).

24. *Id.* at 188.

25. *Id.*

26. *Id.* at 189.

27. Said Holmes for the Court: “If the publication was libellous the defendant took the risk.” *Id.* In other words, a person who publishes a statement that, by its content, carries the potential to defame someone takes the risk that the statement will reasonably be construed as referring to, and defamatory of, a particular person.

28. *Id.* at 190.

As described in *Peck*, the tort of libel subjects to liability a person who intentionally publishes a statement that can plausibly be understood by a respectable portion of the community as defamatory of the plaintiff.<sup>29</sup> Diligence on the part of the publisher—for example, taking steps to avoid saying something about the plaintiff or to avoid saying something defamatory about her—does not defeat liability. That common law defamation could amount to a strict liability wrong would eventually prove to be of great concern to Holmes’s successors on the Court. Indeed, it was in part this aspect of defamation law that fueled the Court’s recognition of fault as a constitutional requirement in *Gertz v. Robert Welch, Inc.*<sup>30</sup> And yet, even before *Gertz*, in their stricter incarnations, libel and slander were understood to be wrongs.

### 3. Nuisance: Out-of-Place Uses

It is no accident that Morton Horwitz placed nuisance law at the center of his effort to establish that pre-nineteenth-century tort law was dominated by a rule of strict liability.<sup>31</sup> Likewise, it is no accident that Ronald Coase relied on nuisance cases in articulating his efficiency-driven approach to the analysis of tort liability.<sup>32</sup> Each rightly perceived that nuisance liability is in some sense strict. Yet both were mistaken in supposing that nuisance liability is strict in the sense of not requiring wrongdoing. The familiar English case of *Sturges v. Bridgman*<sup>33</sup> can help capture the breadth and distinctiveness of the wrong of nuisance.<sup>34</sup>

Plaintiff, a doctor, owned a residence that shared a wall with a building occupied by the defendant confectioner. A conflict arose when the doctor converted what had been a garden in the rear of his residence into a consulting room. The new west wall of the consulting room was built against the rear wall of the defendant’s kitchen. Into that rear wall the defendant had set two mortars (stone bowls). Employees placed foodstuffs in the mortars, then pounded them with large wooden pestles housed within brackets that were also attached to the wall. Although the use of the mortars had not previously disturbed users of the garden, *Sturges* offered evidence that the pounding and scraping noises seriously interfered with his use of his consulting room and would similarly interfere with standard residential uses of the room.<sup>35</sup>

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29. *Id.* at 189.

30. 418 U.S. 323 (1974); *see id.* at 347 (“We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher . . . of a defamatory falsehood injurious to a private individual.”).

31. HORWITZ, *supra* note 1, at 70, 74–75.

32. A.W. Brian Simpson, *Coase v. Pigou Reexamined*, 25 J. LEGAL STUD. 53, 54 (1996) (emphasizing Coase’s use of nuisance cases); Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 966 (2004) (same).

33. (1879) 11 Ch D 852 (Eng.).

34. For background, see A.W. Brian Simpson, *The Story of Sturges v. Bridgman: The Resolution of Land Use Disputes Between Neighbors*, in PROPERTY STORIES 11 (Gerald Korngold & Andrew P. Morriss eds., 2d ed. 2009).

35. *See id.* at 16–17.

The opinion of the Court of Appeals in *Sturges* is primarily concerned with the question of whether the plaintiff and prior possessors of the residence had acquiesced to the defendant's use of the mortars. Implicit in the framing of this question is the conclusion, apparently uncontested, that the confectioner's use of the mortars otherwise would constitute an actionable nuisance—an unreasonable interference with the plaintiff's use and enjoyment of his property.<sup>36</sup>

It is difficult to see in what sense the defendant in *Sturges* acted unreasonably: the defendant's business was appropriate to the neighborhood, the use of noisy equipment in such a business was apparently commonplace, there is no suggestion that the defendant set up or used his equipment in a dangerous manner, the defendant even appears to have made reasonable efforts to accommodate his neighbor.<sup>37</sup> In short, there is no fault in *Sturges*, if by fault one means a failure to take reasonable care to avoid interfering with the interests of the plaintiff.<sup>38</sup> Yet liability attached and the defendant was enjoined from operating the mortars along the establishment's rear wall.<sup>39</sup>

As with trespass to land, nuisance starts with the idea of the possessor's right or entitlement to exclude.<sup>40</sup> In trespass, the entitlement is to exclude persons and objects from entering. In nuisance, the entitlement is primarily to exclude odors, noises, and vibrations.<sup>41</sup> In this respect, a nuisance, like a trespass, is ordinarily an invasion of one's property by another.<sup>42</sup> However, there are key differences between the two wrongs. For liability, trespass simultaneously requires more by way of intent and less by way of injury. These two differences are related. A trespass is a deliberate occupation of land. If there is no intent to occupy a particular space, there is no

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36. Simpson, *supra* note 34, at 37 (noting that there was no dispute of the evidence of the interference, and no serious dispute that, absent a finding of acquiescence by the plaintiff, defendant's use of the mortars constituted a nuisance); Smith, *supra* note 32, at 1001 (noting that there was little if any dispute as to whether the defendant's use of the mortars constituted a nuisance).

37. Simpson, *supra* note 34, at 32 (reporting that, in response to *Sturges*'s complaints, Bridgman limited the use of the mortars to certain times of day).

38. Smith, *supra* note 32, at 967–68 (noting and criticizing the tendency of certain economically oriented scholars to reduce nuisance to negligence).

39. Simpson, *supra* note 34, at 38, 41 (observing that the court did not enjoin the operation of the confectionery, but instead required the defendant to rearrange its equipment to lessen its impact on the plaintiff, and that the business continued to operate for several years after the litigation).

40. Smith, *supra* note 32, at 1002 (asserting that nuisance law operates from a baseline that grants property possessors a “strong default package of rights” to be free from invasions emanating from outside their properties).

41. *Id.* at 999–1000 (noting courts' tendency to require invasions (or imminent invasions) as a prerequisite to nuisance liability).

42. Nuisance liability can sometimes attach to noninvasive activities. For example, some courts have held that the operation of a funeral home in a residential neighborhood is a nuisance. Professor Smith suggests that these are marginal cases. *Id.*

trespass.<sup>43</sup> But any intentional occupation will suffice for trespass; even if it does not result in physical harm to the property.

Nuisance lacks a comparable intent requirement and, in that sense, potentially reaches more conduct than trespass. Even if a defendant does not intend for noise or odors emanating from his property to reach property owned by the plaintiff, if they actually reach the plaintiff's property, they can provide the basis for a nuisance action. However, *de minimis* invasions will not count as nuisances; rather, the interference must be unreasonable in the sense that it must substantially interfere with the plaintiff's use and enjoyment. The wrong of nuisance is objectively defined in that it turns on socially determined entitlements or baselines. A possessor of property is expected to endure only so much by way of interference. To say the same thing: "Whether a use [of land] is reasonable or not depends on whether it interferes with the plaintiff's use and enjoyment of his land to an extent beyond what any neighbor ought to bear."<sup>44</sup>

Importantly, the fact of significant interference is not enough. The activity or condition generating the interference must also be out of place or inappropriate. A homeowner with a fondness for hosting large dinner parties does nothing "wrong" by holding them. Nonetheless, to avoid nuisance liability, he may have to observe certain restrictions on his activities, including taking steps to ensure that his guests' comings and goings do not unduly disturb his neighbors. To commit a nuisance is to act wrongfully by interfering seriously with another's use of his property through a failure to tailor one's activities on one's own property in a manner appropriate to the use and location of the properties, the character of the neighborhood, and so forth.<sup>45</sup>

### *B. The Wrongfulness of Tort Law's Strict Liability Wrongs*

Our brief review of the parameters of liability for negligence, trespass, battery, defamation, and nuisance has aimed to establish that tort liability often is imposed with substantial indifference to the ease or difficulty a defendant may have in complying with applicable standards. Our point is partly Holmes's: that even earnest souls who make every effort to do the right thing can face liability.<sup>46</sup> But it is also a broader and perhaps more troubling point: the tendency among courts to understand and define tortious wrongdoing objectively often results in the imposition of liability even when the defendant has done all that he reasonably should have done

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43. For example, a driver who loses control of his car and slides off a public road, crashing into the plaintiff's fence, has not trespassed because the driver never intended to be there.

44. J.E. Penner, *Nuisance and the Character of the Neighbourhood*, 5 J. ENVTL. L. 1, 5 (1993).

45. Smith, *supra* note 32, at 1003 (asserting that the threshold for substantial or unreasonable interference is sensitive to the character of the neighborhood in which the plaintiff's property is located).

46. *See supra* notes 6–7 and accompanying text.

to avoid injuring the plaintiff. We refer to this phenomenon as tort law's recognition of "strict liability wrongs."<sup>47</sup>

Our use of this phrase is meant to be provocative. Among the questions we expect it to provoke is the following: Is there really a meaningful notion of "wrong" and "wrongdoing," or are we just playing word games? We have already begun to answer this question in the preceding discussions of particular torts, but it will be worthwhile to take a moment to address it more directly.

It is cogent to speak of "strict liability wrongs" because, even when liability for negligence, trespass, battery, libel, or nuisance is strict, it is still predicated on the defendant's having violated a standard of conduct. For example, negligence is defined as the injuring of another through conduct that is careless as to that other.<sup>48</sup> Liability for negligence does not attach unless the defendant failed to meet the standard of care. As we have seen, there will be occasions on which a given defendant will have little ability to meet this standard. But this does not mean that there is no standard, nor that the conduct somehow satisfies that standard. To use a variant on Jules Coleman's helpful phraseology, there is a wrong in the doing, even if not a wrong in the doer.<sup>49</sup>

What is true for negligence is true for tort law's other strict liability wrongs. A constituent of the basis for liability is some defect in the defendant's action beyond the mere fact of having caused injury. In trespass, there must be an intentional occupation of physical space possessed by another. In battery, there must be an intentional touching of an inappropriate sort. In nuisance, there must be a use of land that is out of place, and so forth. As we will see below, each of these instances stands in contrast to the idea of strict liability without wrongdoing.<sup>50</sup>

In sum, each wrongs-based tort contains a rule that sets a standard of conduct by identifying a way of acting upon another that one is enjoined from doing. One is not to defame another, one is not to batter another, one is not to inflict a physical injury upon another through carelessness, and so

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47. Cf. Gregory C. Keating, *Strict Liability Wrongs*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS* 292 (John Oberdiek ed., 2014). Our usage of the phrase "strict liability wrongs" diverges in important respects from Professor Keating's.

48. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *HORNBOOK ON TORTS* § 9.5 (2d ed. 2016) (listing the elements of negligence).

49. JULES L. COLEMAN, *RISKS AND WRONGS* 333 (1992). Coleman refers to "fault" rather than "wrong." We use "wrong" because our core claim is that tort law recognizes faultless wrongs.

50. Vicarious liability in tort only magnifies the requirement of a wrongdoing for tort liability. For example, respondeat superior operates to hold employers strictly accountable for certain wrongs committed by their employees. One could imagine a non-wrongs-based licensing scheme under which employers would be permitted to operate their businesses only on the condition that they make good the losses caused by their operations. But, of course this is not how respondeat superior works. It instead presupposes the commission by an employee of an employment-related wrong and then expands the set of actors who can be held accountable for that wrong. Broad domains of vicarious liability, *see, e.g.*, *Taber v. Maine*, 67 F.3d 1029 (2d Cir. 1995), do not relax the requirement of wrongdoing; they relax principles of agency or attribution. Tort law's vicarious liability doctrines are but another respect in which tort is strict in its imposition of liability for wrongs.

on. For each of the wrongs of tort law, we might imagine the defendant asking the plaintiff: “I grant that my actions caused you harm, but what did I do wrong?” And for each we can imagine an answer from the plaintiff of the following form: “You built on my land,” “you called me a thief,” “you caressed me without permission,” “you glanced away from the road and drove right into me.” These are all responses that identify an act that one can understand as having contravened a norm of conduct. The issue of whether the act in question contravened a legal norm of conduct is distinct from the issue of whether the actor is culpable for having performed it. In each case, there is an act that the defendant might not have done and might have successfully avoided by complying with a relevant norm of conduct supplied by tort law.

It is sometimes said that torts such as negligence, battery, trespass, defamation, and nuisance contain “pockets” of strict liability.<sup>51</sup> Insofar as this usage suggests that each of these torts has a wrongs-based core surrounded by a penumbra of non-wrongs-based liability rules, it is mistaken. Take battery, for example. It is not as if certain batteries are wrongs, whereas others are not. A battery, so far as tort law is concerned, is always a wrong. It is always a violation of the directive to refrain from intentionally performing act-types that involve the inappropriate touching of another.

As we have noted elsewhere, the directives of tort law impose a special kind of duty—namely, a duty not to injure others, as opposed to a duty to refrain from acting in a manner that carries with it the potentiality of injuring others.<sup>52</sup> In other words, tort duties are defined such that they cannot be violated until there has been an injury. Yet, at the same time, tort law also requires that the injury must have been brought about by action of a particular kind. It does not require that we avoid injuring others, full stop. It requires us to avoid injuring others through the violation of certain norms of conduct. For example, even though the tort of negligence, taken as a whole, establishes a duty of *noninjury* that, by definition, can only be breached when an injury occurs, that duty incorporates a subduty of *noninjuriousness* that guides conduct—i.e., the subduty of taking due care to another. To say that this subduty is a duty of noninjuriousness is in part to say that, unlike the overall duty recognized by negligence law, it *can* be breached even before an injury occurs. Other torts similarly are defined in terms of duties of noninjury that incorporate and are qualified by subduties of noninjuriousness.

One might imagine a body of injury law that contains no subduties of noninjuriousness and hence no conduct-guiding directives. Such a legal system would deem a person liable for causing injury to another irrespective of whether the person’s conduct was in any sense deficient or defective. Relative to this imagined body of law, tort law’s rules are *less*

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51. Abraham, *supra* note 10, at 272 & n.6 (citing scholars who refer to “pockets” of strict liability in negligence).

52. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 941–45 (2010).

*strict*. They hinge liability not merely on injury, but on injury that is the realization of misconduct. As we have discussed, it is a mistake to suppose that tort law's guidance rules are defined in such a way that they can always be satisfied by conduct that is diligent, reasonable, or done in good faith. Still, it is important to avoid overreacting to this mistake by reverting to the view that the qualifiers built into tort law's duties of noninjury are empty. The norms of tort law simultaneously serve as bases for determining whether a plaintiff's rights have been violated and as standards of conduct.

## II. THE FAULT IN STRICT LIABILITY

Particular torts are defined in a sharp-edged manner—a quality that is sometimes expressed by reference to the “objectivity” of the standards of conduct that they set. The objective dimension of familiar torts often has been understood to indicate an embrace of liability beyond wrongdoing. But this understanding is mistaken. Overwhelmingly, tort liability is simultaneously wrongs based *and* strict.

Still, there is arguably a small corner of tort law that recognizes a form of strict liability that does not require wrongdoing in any sense. In this section, we identify this form of strict liability, explain its normative structure, and contrast it with wrongs-based strict liability.

### A. *Rylands v. Fletcher* and *Abnormally Dangerous Activities*

Each of the three Restatements of tort law has recognized a special domain of strict liability under the labels “ultrahazardous” or “abnormally dangerous” activities.<sup>53</sup> This domain is quite narrow, applying only to injuries caused by blasting, escaped wild animals, bursting reservoirs, and a few other activities. Plaintiffs' lawyers, courts, and commentators have at times suggested that the particular form of liability that attaches to abnormally dangerous activities should occupy more of the torts landscape. But no such expansion has occurred. Indeed, the provisions of the Third Torts Restatement pertaining to physical harm cover much the same terrain as those of their predecessor Restatements.<sup>54</sup> This form of strict liability is reserved only for the exceptional case of injuries caused to bystanders (and their property) by a short list of activities.

Lord Cairns's opinion in *Rylands v. Fletcher*<sup>55</sup>—the famous case of the bursting reservoir—is understandably regarded as a canonical articulation of the rationales of strict liability for abnormally dangerous activities:

[T]he principles on which this case must be determined appear to me to be extremely simple. The Defendants, treating them as the owners or

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53. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM §§ 20–23 (AM. LAW INST. 2010); RESTATEMENT (SECOND) OF TORTS §§ 519–520 (AM. LAW INST. 1977); RESTATEMENT (FIRST) OF TORTS § 520 (AM. LAW INST. 1938).

54. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM §§ 20–23.

55. (1868) 3 LRE & I App. 330 (HL).



occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural use[] of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the Plaintiff, the Plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving, or by interposing, some barrier between his close and the close of the Defendants in order to have prevented that operation of the laws of nature.

....  
On the other hand if the Defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land,—and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the Plaintiff, then it appears to me that that which the Defendants were doing they were doing at their own peril; and, if in the course of their doing it, the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the Plaintiff and injuring the Plaintiff, then for the consequence of that, in my opinion, the Defendants would be liable.<sup>56</sup>

Lord Cairns added that he “entirely concur[red]” with the opinion of Justice Blackburn, issued in the lower appellate court that had heard the case.<sup>57</sup> Blackburn’s opinion reasoned that a person who, for his own purposes, stores a thing on his land that is well known for its propensity to escape and cause harm to his neighbors does so at his peril.<sup>58</sup> Such a person, he concluded, is required to “make good the damage which ensues if he does not succeed in confining [the thing] to his own property.”<sup>59</sup>

In his *Rylands* opinion, Lord Cairns did not so much argue for the liability of the defendant but rather classified the fact pattern as belonging to a type that obviously entails liability. In particular, (1) he emphasized that there are certain “non-natural” uses of property that involve the bringing onto land of the kind of thing that is known to be prone to escape and invade neighboring property, even when care is taken to prevent escape; (2) he declared that a person who brings such a thing onto his land is answerable to one who suffers damage when the risk of escape and invasion is realized; and (3) he referred to the invasion itself as an “evil,” without any suggestion that the decision to bring the invading thing onto the land was itself wrongful or impermissible.<sup>60</sup>

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56. *Id.* at 338–39.

57. *Id.* at 340.

58. *Id.* at 339.

59. *Id.* at 339–40 (quoting Justice Blackburn’s lower court opinion).

60. *See id.*

*Rylands* was preceded in England by two different kinds of authority—one judicial and one legislative. First, Lord Cairns accepted Justice Blackburn's reliance on prior decisions that, for example, had imposed liability for escaping cattle that had eaten a neighbor's crops, and for the failure of a privy that had resulted in filth invading a neighbor's cellar.

Second, as Brian Simpson famously demonstrated, there was a significant political and legislative backdrop to *Rylands*.<sup>61</sup> Mid-nineteenth-century England had seen at least two dam failures that resulted in hundreds of deaths and the destruction of entire villages. The first of these, the Holmfirth disaster, occurred in 1852.<sup>62</sup> The second—the failure of the Dale Dyke Embankment—occurred in 1864 during the pendency of the *Rylands* litigation.<sup>63</sup>

In response to the earlier Holmfirth disaster, indemnity provisions known as “Holmfirth clauses” sometimes appeared in private bills authorizing particular dam-building projects.<sup>64</sup> Such a clause was in fact contained in the 1853 bill that authorized the construction of the Dale Dyke Embankment.<sup>65</sup> Thus the waterworks company that built that embankment was, under the terms of its authorizing statute, strictly liable for damages resulting from the catastrophic 1864 failure. Following that second dam failure, Parliament considered general legislation that would have required companies that built dams for public reservoirs to be prepared to compensate victims for harm caused by dam failures, but that legislation stalled in committee.<sup>66</sup>

The use of indemnity provisions in private bills authorizing dam constructions probably influenced the result in *Rylands*. Justice Blackburn was clearly aware of them, having invited plaintiff's counsel to address them in the course of oral argument.<sup>67</sup> Moreover, Simpson's research tells us that in 1864, Lord Cairns was retained by property owners who suffered losses in the Dale Dyke disaster, and he advised them that the Holmfirth clause in the 1853 authorizing bill entitled them to recover without proof of fault.<sup>68</sup>

To be sure, neither Blackburn's nor Cairns's opinions overtly mention dam failures or indemnity clauses. And Simpson is at his most speculative in suggesting that the two judges treated *Rylands* not so much as an occasion for the application of law to the dispute before them as an

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61. See generally A.W. Brian Simpson, *Legal Liability for Bursting Reservoirs: The Historical Context of Rylands v. Fletcher*, 13 J. LEGAL STUD. 209 (1984).

62. *Id.* at 219.

63. *Id.* at 225.

64. *Id.* at 231–32.

65. *Id.* at 231.

66. *Id.* at 228–30.

67. *Id.* at 249.

68. *Id.* at 232. Simpson also notes that lawyers representing *Rylands* and *Fletcher* in the appellate courts had previously appeared before a commission that Parliament had created to assess and allocate damages in connection with the Dale Dyke disaster. The lawyers had argued over the question of whether the Holmfirth clause in the authorizing legislation for the Dale Dyke Embankment covered liability for pure economic loss, as opposed to personal injury and property damage. See *id.* at 234–37, 244.

opportunity to legislate from the bench to fill the gap left by Parliament's failure to enact a generally applicable indemnification requirement for dam builders.<sup>69</sup> Still, the notoriety of the dam failures surely enhanced the judges' sense of the *obviousness* of the risks associated with storing large volumes of water. More importantly, it seems plausible to suppose that Blackburn and Cairns saw a basic continuity between the precedents they cited and the emergence of Holmfirth clauses. Relying on prior judicial decisions and then-recent legislative practice, they seem to have reasoned that a valuable activity—the storage of mass quantities of water in man-made reservoirs—that carries with it an entirely familiar and serious risk of a harmful invasion of neighboring properties was appropriately subject to liability irrespective of fault.<sup>70</sup>

As Jed Shugerman has shown, *Rylands* overcame an initially chilly reception in American courts partly because of our own experience with catastrophic dam failures, including the dam failure that resulted in the disastrous Johnston Flood of 1889.<sup>71</sup> Fifty years later, the First Restatement of Torts generalized out of *Rylands* the idea of strict liability for injuries caused by “ultrahazardous activities,” a category that, in substance, has been with us ever since.<sup>72</sup> Interestingly, *Rylands* has probably had greater impact in the United States than in England, which has not recognized an equivalent to the category of abnormally dangerous activities. Indeed, in 2003 the House of Lords declared that *Rylands* had merely applied nuisance law.<sup>73</sup>

As noted, the Second Restatement replaced the term “ultrahazardous” with the phrase “abnormally dangerous” but otherwise followed its predecessor in defining the category by reference to factors found in *Rylands* itself. Specifically, section 520 lists six factors to be considered in determining whether an activity is “abnormally dangerous”:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be

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69. Simpson maintains that Blackburn (and by implication Cairns) decided *Rylands* with an eye firmly on the policy question of what liability courts ought to impose for future catastrophic dam failures absent a legislatively created indemnity provision. He seems to treat their invocation of precedents as mere window dressing for a judgment favoring the imposition of strict liability purely on policy grounds. *Id.* at 250–52.

70. *Id.* at 251 (“The legislation [requiring indemnity in the Dale Dyke disaster], though relating only to a particular Waterworks Company, may well have been viewed by the judges who favored Fletcher’s claim as expressing a general legislative policy.”).

71. Jed Handelsman Shugerman, *The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of Fletcher v. Rylands in the Gilded Age*, 110 *YALE L.J.* 333, 358–72 (2000). Shugerman further has argued that courts staffed with elected judges, and especially elected judges with longer terms, were particularly inclined to embrace *Rylands*. Jed Handelsman Shugerman, *The Twist of Long Terms: Judicial Elections, Role Fidelity, and American Tort Law*, 98 *GEO. L.J.* 1349, 1367–78 (2010).

72. RESTATEMENT (FIRST) OF TORTS §§ 519–520 (AM. LAW INST. 1938) (recognizing strict liability for harms caused by the realization of risks that render an activity ultrahazardous, and defining “ultrahazardous” by reference to factors including those identified by *Rylands v. Fletcher* as grounds for imposing strict liability).

73. *See Transco plc v. Stockport Metro. Borough Council* [2003] UKHL 61, [2004] 2 AC 1.

great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes.<sup>74</sup>

According to the Third Restatement's more pithy formulation, an activity is abnormally dangerous if "(1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and (2) the activity is not one of common usage."<sup>75</sup> Today, the most common activity to trigger *Rylands*-style strict liability is likely the use of explosives.<sup>76</sup> This is no surprise. Though by no means wrongful per se, blasting is a "non-natural" activity that poses an obvious and serious danger to neighbors that, at least historically, has not been entirely manageable through the use of care. The activity itself is not wrongful, but the harms it brings about are nonetheless an evil.

### B. Strict Liability Without Wrongdoing

At least in some applications, liability for abnormally dangerous activities is distinctive because its imposition does not turn on a determination that the defendant committed a legal wrong. Of course, one could say that the bringing about of physical injury or property damage is *itself* a wrong—after all, without an injury there would not be any liability. *Rylands*, however, is not such a decision, nor are such decisions typically found in tort law. For torts ranging from defamation to trespass, the plaintiff's being injured by what the defendant did is a part of the wrong but not the wrong in and of itself. As we noted above, the various torts recognize a duty of noninjury that is qualified by a subduty of noninjuriousness. The subduty identifies prohibited ways of behaving that are agent accessible, not simply consequences that are not to be brought about. Causing physical harm without carelessness is not the wrong of negligence any more than causing harmful contact without the requisite intent is the wrong of battery.

In *Rylands*, it is probably significant that the House of Lords was not criticizing the Defendant for having created a reservoir. Similarly, the Second and Third Restatements' use of the phrase "abnormally dangerous" is not meant to connote disapproval. The characterization of the risk level as unusually high, while relevant to liability, is not intended to suggest these activities are forbidden or ill advised. On the contrary, building reservoirs and using explosives for demolition have generally been understood to be permissible and indeed valuable activities.

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74. RESTATEMENT (SECOND) OF TORTS § 520 (AM. LAW INST. 1977).

75. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 20 (AM. LAW INST. 2010).

76. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 443 (2d ed. 2011) ("Strict liability seems most readily imposed when physical harm results from the defendant's use or storage of dynamite or other materials intended to cause explosions." (footnotes omitted)).

Fletcher's claim against Rylands had much in common with a nuisance action. The plaintiff was claiming that the defendant interfered with his enjoyment of his real property, without alleging an intentional boundary crossing by the defendant. Moreover, the interference asserted stemmed from an activity the defendant undertook on his own property, and the defendant was not being accused of behaving in a culpable manner.

There is nonetheless arguably a crucial difference between *Rylands* liability and nuisance liability. The court in *Rylands* seems never to have suggested that the defendant was doing something he was not supposed to be doing. There was nothing about the creation of the reservoir that was itself invasive, and there is no indication from the Law Lords that the defendant was required to stop carrying on his activity in the manner in which he had been carrying it out. Nuisance, as we have seen, turns on the idea of a context-inappropriate use of one's property. In *Sturges*, for example, the court concluded that the confectioner's use of loud, vibrating equipment attached to a wall shared with his neighbor was impermissible.<sup>77</sup> That use of the equipment was a *misuse* of the confectioner's property, i.e., a use that exceeded the relatively broad reign given to property owners to do what they wish on their properties.<sup>78</sup> The claim of a plaintiff suing on an abnormally dangerous activity theory is not predicated on the violation of a right to be free of injury flowing from a certain kind of conduct by the defendant. It is the damage done, not the property-right invasion, that grounds the claim.

### C. Conditional Permissibility and Licensing

In so far as *Rylands* and its progeny impose liability without anything that would qualify as wrongdoing, they create an interpretive problem for anyone who claims, as we have claimed, that torts are wrongs. A tenet of our "civil recourse" theory is that, through tort law, the state affords to a plaintiff a right of action against a defendant only because the defendant has wronged the plaintiff. A right of action is a power to exact a remedy from a defendant as redress for having been wronged. Without a wrong, there is no entitlement to a right of action. Strict liability for injuries inflicted by abnormally dangerous activities—if it really is not wrongs-based liability—breaks the civil recourse mold.

Still, the most important issue is not one of theoretical defensiveness or conceit, but one of simple explanation. Why does the common law permit plaintiffs to recover from defendants in such cases if the defendant has not committed a legal wrong against the plaintiff? Our answer, like that of

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77. *Sturges v. Bridgman*, (1879) 11 Ch D 852 (Eng.).

78. One can imagine a building inspector saying to the confectioner, "You are perfectly at liberty to run this business in this location, and to use mortars in doing so. However, it would be wrong to place your mortars along that particular wall: there's too much potential for disruptive noise and vibration." Of course the mere placement of the mortars along the wall, without actual interference, would not amount to the tort of nuisance. Our point is that the placement of the mortars in that location provides the kernel of misuse, or inappropriate use, that is arguably missing from a case like *Rylands*.

Professors Robert Keeton,<sup>79</sup> George Fletcher,<sup>80</sup> and Gregory Keating,<sup>81</sup> looks to an idea of fair distribution rather than wrongfulness. Defendants who engage in certain activities unilaterally impose well-known, well-defined, and substantial risks upon others in a course of conduct that (typically) is consciously undertaken for their own benefit. If such a knowing imposition of risk upon others is permitted—if it is not enjoined or prohibited—those engaged in the risk imposition must stand ready to compensate those injured by it. The permissibility of this kind of extraordinary risk imposition is conditioned on the readiness of the risk imposer to take responsibility for the injuries that flow from it, irrespective of the presence or absence of wrongdoing.

Anglo-American law provides several different ways of rendering an activity conditionally permissible in this manner. Licensing, taxing, and regulatory approval are three of the most familiar.<sup>82</sup> Simpson's narrative of the Parliamentary response to dam failures provides a nice, real-world illustration. The private bills containing Holmfirth clauses quite explicitly conditioned permission to build reservoir dams on the engineering company's agreement to pay for any losses caused by dam failure.<sup>83</sup>

As Simpson suggested, *Rylands* can be understood as a common law parallel, applicable to private reservoir builders, to the legislative licensing regime for public reservoir builders.<sup>84</sup> The regime of strict liability applicable to builders does not judge the conduct of building a reservoir as wrongful or impermissible. Rather, it insists that the builder stand ready to pay for the injuries that flow from it. The same is probably true of many instances of liability for abnormally dangerous activity: it is permissible to engage in the activity, but one must stand ready to pay for the injuries that it causes.<sup>85</sup>

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79. Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959).

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

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

82. Simpson, *supra* note 61, at 231–32.

83. *Id.*

84. For a modern decision emphasizing the parallels between licensing schemes and liability for abnormally dangerous activities, see *Klein v. Pyrodyne Corp.*, 810 P.2d 917, 922–23 (Wash.) (en banc), *amended by* 817 P.2d 1359 (Wash. 1991) (relying both on the abnormally dangerous activities doctrine and a state statutory insurance mandate to hold a public fireworks operator strictly liable for injuries to patrons injured during a fireworks display).

85. Some conduct fitting the definition of an abnormally dangerous activity will also fit the definition of wrongs-based torts, such as negligence or nuisance. For example, suppose the inclusion of injuries caused by wild animals in the abnormally dangerous activity category extends to a case in which a pet tiger escapes from his owner's suburban home and mauls a neighbor, despite the owner having taken care to prevent the escape. The victim's claim that liability should attach on an abnormally dangerous activity theory would no doubt succeed, but the victim might also have a meritorious negligence claim because a reasonable jury might well conclude the mere keeping of a tiger for one's private amusement in a residential setting is careless. There is no reason to suppose, however, that all conduct that gives rise to liability under the doctrine of abnormally dangerous activities would also give

As indicated above, licensing-based strict liability in the common law involves a small set of activities deemed abnormally dangerous. In Part III, we examine some of the reasons for its restricted scope of application, but one especially important reason deserves attention here. The activities that generate strict liability in common law are not only abnormally dangerous, they are *conspicuously* so. Licensing schemes normally emerge *ex ante* from legislatures, regulators, or the market, not *ex post* through judicial rulings. This is understandable: *ex ante* licensing regimes help ensure solvency and give fair notice. Those undertaking the licensed activity are aware of their potential liability. They generate a risk of injury and encounter the risk of liability with their eyes wide open.

Common law licensing-based strict liability lacks these formal *ex ante* features, at least where the courts have not yet spoken authoritatively or where doctrine is ambiguous in application. Some activities are, however, *ultrahazardous* or *abnormally dangerous*. The risk of personal injury or property damage that these activities pose to others is virtually self-evident. Rylands's building of his reservoir is a good example of such an activity. Defendants in these cases perforce recognize that they are, for their own benefit, engaging in a particular, well-defined activity that poses hard-to-consistently-control risks upon others. Although it is perhaps question begging to say that such defendants assume the risk of liability, it is not question begging to say that the conspicuousness and magnitude of the risk they are taking with respect to others render it fair to require such defendants to bear the costs of the injuries they bring about.

Licensing-based strict liability is in a deep sense both *regulatory* and *rights based*. It is regulatory insofar as government officials are exercising their prerogative to condition certain activities on the actor's liability for harms generated by the activity. Underlying the power to so condition activities is the power to protect the security of those who are endangered. Correlative to the conditioned liberty to act is the right of those who suffer harm to hold such risk creators financially accountable for the harm that flows from the activities. As Keating (like Fletcher before him) has argued, there are reciprocity and fairness arguments underlying this scheme of conditioned liberty.<sup>86</sup> However, the scheme is not built around a primary right against mistreatment by others. Rather, it permits the enforcement of a right to recover damages that is predicated on a fair scheme of risk allocation. In this sense, too, the normative structure of licensing-based strict liability is distinct from the normative structure of wrongs-based strict liability. Although each can be understood as rights based in some sense, the latter predicates liability on the defendant's having wronged the plaintiff, whereas the former does not.

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rise to a separate wrongs-based claim. To the contrary, the category clearly extends to scenarios that would not give rise to a claim of trespass, nuisance, or negligence.

86. Keating, *supra* note 81.

*D. Is Licensing-Based Strict Liability Really Wrongs Based?*

In recent work, Gregory Keating and John Gardner have raised important challenges to claims, such as ours, that tort law houses two distinct notions of strict liability. Although on very different grounds from one another, each suggests that what we have called “licensing-based” strict liability is best understood as a form of wrongs-based liability. Here, we review and respond to their arguments.

1. Keating on Conditional Wrongs

Keating’s view is in one way quite straightforward. He believes a significant domain of strict liability (including that which stems from abnormally dangerous activities) involves a special kind of wrong—a “conditional wrong”—that must be distinguished from a “conduct-based wrong.”<sup>87</sup>

Conduct-based wrongs express what I shall call *primary* criticism of conduct. The law lodges its criticism against the infliction of harm in the first instance on the ground that the conduct responsible for the harm was wrong. The harm, therefore, should never have occurred. Strict liability, by contrast, predicates responsibility on the judgment that the conduct at issue was justified (or reasonable) *in inflicting injury*, but *unjustified (or unreasonable) in failing to repair the injury done*. This is *secondary* criticism of conduct. The law lodges its criticism against harming-justifiably-without-repairing. This kind of strict liability identifies a *conditional wrong*.<sup>88</sup>

Like us, Keating is quite happy to accept that, in abnormally dangerous activities cases, the *conduct* of the defendant that brings about harm to the plaintiff need not be in any sense wrongful. Nonetheless, contrary to our account, he insists that liability in these cases is predicated on a wrong by the defendant. The wrong, as he describes it, is causing harm and then failing to make a compensatory payment to the victim.

For Keating, then, the “wrong” in *Rylands* lay not in the defendant’s doing damage to the plaintiff’s mine, but in the defendant’s unreasonable failure to step forward in the aftermath to pay for the damage done.<sup>89</sup> For torts such as negligence, the wrong is completed at the moment of injury. In *Rylands*, by contrast, at the moment at which Fletcher’s mines were

87. See Keating, *supra* note 47, at 301.

88. *Id.*

89. Keating holds out as exemplar of conditional wrongdoing not *Rylands*, but *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910). See Keating, *supra* note 47, at 302 (“The wrong in *Vincent* lay not in the defendant’s doing damage to the dock, but in the defendant’s wrongful (or unreasonable) failure to step forward and volunteer in the aftermath of the storm to make good the damage done the dock.”). By contrast, we regard *Vincent* as illustrating the demanding or “strict” nature of the wrong of trespass to land. In short, *Vincent* holds that an actor who, for good reason, intentionally avails himself of another person’s real property without permission commits a trespass. See *Vincent*, 124 N.W. at 222. That the actor acted for a good reason does nothing to defeat the owner’s claim to have suffered a wrongful invasion of his property rights. See JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS* 151 (2010).



flooded no wrong had yet occurred. In a sense, the duty whose breach constitutes a wrong only exists once the harm has occurred. That is why it is a conditional duty and the wrong is a conditional wrong.<sup>90</sup>

We accept Keating's view that there is a domain of what are traditionally called "tort" cases in which courts impose liability on defendants for bringing about harm absent the violation of a norm of conduct. The category of abnormally dangerous activities, we agree, is a category in which there is tort liability without what Keating calls a "conduct-based wrong." And needless to say, once a final judgment against the defendant has been issued in such a case, the defendant has, in at least one important sense, a legal obligation to pay compensation to the plaintiff. Our task is thus to evaluate Keating's theoretical move of describing these scenarios as involving a form of "conditional wrong." Is this description sound? We think not.

The easiest way to see the untenability of Keating's account is to imagine that Rylands was particularly keen to fulfill his legal duties. Thus, suppose that, as soon as he learned that Fletcher's mines had been flooded with water from his reservoir, Rylands stepped forward and offered to pay for the damage. Rylands's offer would in no way undermine Fletcher's right to sue for damages. More specifically, to win his case, Fletcher was not required to prove that Rylands failed to offer to pay or that Rylands failed to set aside enough funds to cover the cost of damage that might be caused by his reservoir failing. The predicate of liability is the doing of the harm, *not* the doing of the harm *plus* the failure to step forward to offer to pay.

There are areas of the law in which the occurrence of harm does trigger a duty to offer to pay, or to pay, and in these contexts the failure to comply with the duty generates liability. Insurance law and certain kinds of leases provide examples. Insurers can face liability for failing to pay out once they have been made aware that certain harms to an insured have occurred. Lessees of land or vehicles commonly have duties of repair for certain damage that occurs during the course of their lease. In these cases, the defendant may well have done nothing wrong, but once the harm or need for funds arises, a duty can be triggered, without litigation, to pay or offer to pay. A failure to comply with that sort of duty is a certain kind of legal wrong, and the relevant beneficiary may thereby have a legal claim against the nonpaying party for the failure to step forward and pay. Failure to pay for costs that one should pay for can indeed be the source of liability in the law, but that is not what occurs in abnormally dangerous activity cases.

It is true that a blaster (or flooder) who not only offers to pay, but also actually does pay, will typically not face tort liability. But it is important to be clear about why this would be the case. A conscientious Rylands who stepped forward and paid Fletcher would avoid tort liability principally for one reason: any real-world Rylands behaving this way would require a written settlement agreement that included a waiver by Fletcher of his tort

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90. As Keating makes clear, the language of conditionality stems from Robert Keeton's classic article. See Keeton, *supra* note 79, at 418–21.

claims. And it is the waiver, not the payment per se, that would eradicate those claims. If for some reason there were no effective waiver, and if litigation ensued, a court probably would offset Rylands's prior payment against any damages awarded. But this hardly demonstrates Keating's point—it actually shows the opposite. Any setoff of this sort would be a matter of restitution or the law of damages and would presuppose that a tort had been committed.

In short, the problem with Keating's proposal is not that it is simply playing with words to call the nonpayment of compensation a legal *wrong*, for it is actually possible to give meaning to this theoretical assertion. The problem is that when we do actually flesh out the content of what it means to call the nonpayment of compensation a legal "wrong" in such cases, we see that abnormally dangerous activity liability does not involve "conditional wrongs" in Keating's sense.<sup>91</sup>

## 2. Gardner on Duties to Succeed

John Gardner has provided an account of strict liability as pervasively duty based.<sup>92</sup> One might think this account provides a strategy for including *Rylands* (which Gardner treats as duty based) as a wrongs-based tort case. Moreover, Gardner's account seems to provide a strategy for accommodating all of abnormally dangerous activity liability within the domain of liability based on breach of duty. His account thus seems to salvage those parts of tort law we have claimed do not fall within even broad notions of wrongs-based liability.

A great deal of tort law, in Gardner's view, involves what he calls *duties to succeed* rather than *duties to try*. The duty not to trespass on another's land, for example, is not a duty to *try* to avoid interfering with another person's right to the exclusive possession of their real property; it is a duty to *succeed* in not interfering with the plaintiff's property right. While negligence law, in his view, actually involves a duty to *try* not to injure others by taking care not to do so, not all torts involving physical harm are like this. *Rylands* is an example of a case in which liability is predicated on the breach of a duty to succeed in not damaging another's land.

The key to Gardner's account lies in his conceptual and moral argument against certain criticisms of strict liability. Surveying a range of putatively Kantian-based views of tort law, Gardner takes on two interrelated claims. The first is the claim that the moral principle of "ought implies can"

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91. A similar line of argument undercuts an interesting variant on the idea of conditional wrongs suggested to us in conversation by Jed Shugerman: namely, that a defendant who engages in abnormally dangerous activity without being adequately insured (or self-insured) has committed a wrong. The flaws in this variant are that (1) our legal system knows how to create duties of adequate insurance and how to impose liability for failure to comply with such duties, and that is not what is occurring when there is an imposition of liability for injuries caused by an abnormally dangerous activity, and (2) nothing in the plaintiff's case hinges on establishing insolvency or lack of insurance.

92. John Gardner, *Obligations and Outcomes in the Law of Torts*, in RELATING TO RESPONSIBILITY 111 (Peter Cane & John Gardner eds., 2001).

rules out duties to succeed that exceed the range of duties to try.<sup>93</sup> The second claim is that, as an interpretive matter, a norm demanding that one not bring about certain harms must be understood to have content that implicitly incorporates a duty to try.<sup>94</sup> We shall put Gardner's treatment critique of the first claim largely to one side, noting simply that he (like thinkers from Kant to Holmes to Stephen Perry) takes the view that a person's having a general capacity to comply with a norm is sufficient to satisfy the "can" for any plausible version of "ought implies can."

On the second claim, Gardner's view seems to be that, once we get beyond the mistake of thinking that the "ought implies can" principle renders duties to succeed morally problematic, the opponent of such duties is simply blinking reality in denying that they are found in tort doctrine. Like it or not, our legal system enjoins people from doing certain things or bringing about certain harms or interferences, and it holds people accountable when they do cause such harms or interferences. There is nothing odd about a normative system—be it law or less institutionalized norms of conduct—recognizing rights not to be harmed and imposing duties not to harm others.

Readers should see that, in most respects, we and Gardner are on the same page with respect to strict liability. Like Gardner, we think that tort law contains a great deal of objectivity-based strict liability. Like Gardner, we reject the claim that tort law consistently allows good faith or reasonable efforts on the part of an actor to defeat liability. Where Gardner asserts that duties in tort law are duties to succeed in not harming others or interfering with others, we assert that torts are defined so that persons sometimes commit legal wrongs against others notwithstanding reasonable efforts to avoid doing so. If Gardner were to add to his view that a breach of a legal duty to succeed (in the torts where there is such a duty) is a wrong, then, at least for a broad swath of cases, his view and ours would coincide.

However, we part ways with Gardner over *Rylands* and abnormally dangerous activity cases. He treats them as involving breaches of duties to succeed and hence places them in the same basket as wrongs such as trespass, whereas we maintain that the form of strict liability at work in these cases is (at least sometimes) licensing based rather than wrongs based. Put differently, his version of (what we call) objectivity-based strict liability expands to include liability for abnormally dangerous activities, but our version does not. Why not? Have we made a mistake by becoming too restrictive at this juncture? Are these not just simply areas of *very demanding* liability, in the objectivity-based sense? Is *Rylands* not simply an example of liability for breach of the duty to succeed in not harming one's neighbor's land? And if so, isn't harming one's neighbor's land a legal wrong?

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93. *Id.* at 118–19 (arguing that the ought-implies-can principle applies equally to duties to try and duties to succeed and thus is not a distinct ground for rejecting duties to succeed).

94. *Id.* at 118.

Our answer has two interrelated parts: one relating to a possible gap between the concept of a legal duty and the concept of a legal wrong and one relating to a cluster of ideas that courts express when they invoke the category of strict liability for abnormally dangerous activities. First, as to duties, the concept of a legal duty famously gets content at two different ends. From a Hartian perspective, legal duties exist where there are (valid) legal rules that impose them. Such rules are, by their nature, directive or injunctive. The duties in tort law, as Gardner and we understand them, always correlate to rights in plaintiffs. The basic picture is this: there is a rule enjoining mistreatment and a corresponding right not to be so mistreated. Tort law is set up so that the breach of the primary duty and right generates a (secondary) right to recover damages or some other remedy.

If this is all one pours into the concept of a duty, then Gardner is perhaps correct that there is conceptual room to say that abnormally dangerous activity liability involves genuine duties to not cause harm to others. However, the above account is both suspect and vague. We need to ask what it means for a rule to exist that is directive or injunctive. From a Calabresian view, it may be sufficient that the rules are understood to be connected to plaintiff-empowering rules that generate liability when the putative duty is breached. Our point in calling torts “wrongs,” however, is to suggest that tort law contains norms of conduct designating some acts as “wrongs,” and those norms have a kind of directive force that is not reducible to their connection to liability rules. It is of course open to us to stipulate that we do not count rules as duty-imposing rules unless they have this extra directive force. Or we could concede that such rules are duty imposing but assert that the breaches of such duties do not count as wrongs. In prior work we have overwhelmingly allowed duties and wrongs to travel hand-in-hand, and we shall do so here, therefore taking the former route of saying that Gardner’s account is too reductive if it supposes that legal duties possess injunctive force merely by virtue of being connected to liability.

We agree with Gardner that some duties in law and morality are duties to succeed and that actors are often unable to secure compliance with such duties by reasonable efforts. However, we think that the norms that impose such duties are injunctive in a sense that goes beyond the fact that noncompliance can generate liability. Consider again the standard case of trespass to land. The norm that one is not to interfere with another’s exclusive possession designates such interferences as “not to be done” and communicates that such interferences are wrongful acts toward others. The law’s systemic empowerment of individuals to redress such interferences is predicated on those interferences being wrongs in this sense. The fact that care does not necessarily secure compliance does not undercut the classification of the interference as “not to be done” or wrongful. This is the core of our point about the existence of strict liability wrongs.

In contrast to the law of trespass, there is a feature of abnormally dangerous activity liability (say, blasting) that stands in the way of applying the model just articulated. Liability of this sort goes beyond liability for

injuries brought about by a failure to use reasonable care. Indeed, these are, by definition, activities with the intrinsic capacity to bring about harm so long as they are conducted at all, no matter what precautions are taken. And yet it is also built into the idea of such activities that courts are openly treating those activities as “to be done” or permissible, rather than “not to be done” or impermissible. When they impose liability for harms caused by *careful* blasting, courts are therefore not designating “injuring by engaging in the activity” as “not to be done” in any sense not reducible to liability rules (there is nothing else it could mean). Of course, they do designate “injuring by engaging in *careless* blasting” as something that is not to be done. But in the cases with which we are concerned, the whole point is that a plaintiff may recover without proving that the defendant injured her by failing to use sufficient care. The upshot is that when our legal system imposes liability in an abnormally dangerous activity case, it is not predicating liability on the defendant’s having committed a legal wrong.

Gardner offers what appears to be an appealing account of abnormally dangerous activity law, but its appeal involves collapsing two very different ideas under the duty-to-succeed umbrella. Tort law does impose on blasters a duty to succeed in not injuring others, and the duty is in some ways quite strict. The law of negligence, after all, instructs that it is impermissible to injure another through careless blasting, where carelessness is measured on an objective standard that is largely insensitive to any difficulties a particular actor might face in meeting it. Apart from the law of negligence, there is also—thanks to the doctrine of abnormally dangerous activities—liability for blasting even where legally mandated care is taken. In this sense, tort law recognizes both a qualified duty not to injure through a failure to take precautions while blasting (negligence), as well as an unqualified duty not to cause injury by blasting (abnormally dangerous activity liability). It is tempting to run these two distinct grounds of liability together by saying, simply, that tort law for blasting involves strict liability, where strict liability means liability for breach of a demanding duty to succeed. If one then adds to this thought the idea that the breach of the duty to succeed is a legal wrong because it results in liability, one might seem to have refuted the argument that abnormally dangerous activity law involves tort liability without wrongs.

As we have argued above, the problem with this line of analysis is that it conflates two different senses of “duty”—one that depends on the existence of norms designating certain acts as not to be done and one that counts as duty imposing solely by virtue of linking conduct of a certain description to liability. Where the liability system for blasting depends on the existence of duty in only the second sense, as we have argued that it does when the plaintiff relies on the abnormally dangerous activity doctrine, the law is not in fact predicating liability on breaches of a norm designating certain acts as wrongs. Because negligence-based liability in such areas designates objectively careless injuring through blasting as wrongs, it is tenable to say that the law recognizes a duty to succeed in a more robust sense of duty. However, the acts of defendants that generate liability under the rule for

abnormally dangerous activities are not breaches of that duty, but of the other, thinner kind of duty. Even if they do generate liability, those acts are not wrongs.

### III. OBJECTIONS AND REPLIES

Here we identify and rebut four objections to our analysis: (1) that we have mischaracterized tort doctrine in asserting that licensing-based strict liability is anomalous, (2) that tort law's identification of strict liability wrongs renders tort law morally indefensible, (3) that there is no basis for placing licensing-based liability for abnormally dangerous activities within the domain of tort law, and (4) that an instrumentally rational tort law would include wide swaths of licensing-based strict liability rather than a tiny sliver.

#### A. *The Doctrinal Objection: Is Products Liability Wrongs-Based or Licensing-Based?*

Those who take the view that tort law recognizes broad swaths of licensing-based strict liability will by now be impatient with us. For we have yet to consider the part of tort law they might well regard as the most obvious and important exemplar of such liability—namely, strict products liability. We have postponed consideration of that doctrine until now so that we could sharpen the distinction between strict liability wrongs and licensing-based strict liability.

In the mid-1960s the California Supreme Court<sup>95</sup> and the Second Torts Restatement<sup>96</sup> adopted the doctrine of strict products liability to supplant negligence and warranty as the grounds of liability for product-related injuries. Per Justice Roger Traynor's opinion for the California court in *Greenman v. Yuba Power Products, Inc.*,<sup>97</sup> a plaintiff would henceforth stand to recover by proving that "he was injured while using the [manufacturer's product] in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the [product] unsafe for its intended use."<sup>98</sup> In the Second Restatement, William Prosser emphasized that this form of liability "applies although . . . the seller has exercised *all possible care* in the preparation and sale of his product."<sup>99</sup>

Among the grounds proponents cited in favor of adopting strict products liability was that it would allow tort law to function as a kind of insurance mechanism, whereby the losses suffered by victims of product-related injuries could be spread among all consumers of the product, or perhaps among an even broader pool through a seller's liability insurer. For

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95. *See Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963).

96. RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1977).

97. 377 P.2d 897 (Cal. 1963).

98. *Id.* at 901.

99. RESTATEMENT (SECOND) OF TORTS § 402A(2)(a) (emphasis added).

example, in his earlier *Escola v. Coca Cola Bottling Co.*<sup>100</sup> concurrence, which helped pave the way for the eventual adoption of strict products liability, Traynor reasoned as follows:

Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.<sup>101</sup>

Given that products liability doctrine is prepared to hold commercial sellers of products liable for injuries even when they exercise “all possible care,” that it was implemented in part out of a desire to create a loss-spreading mechanism, and that it is a centerpiece of modern tort law, it is understandable that many regard it as “Exhibit A” in favor of a view of tort as a law of liability, not wrongs. And yet this would be a mistake.

Consider a defendant held liable to a plaintiff on a products liability theory. The plaintiff will have to prove that the defendant sold a product in a dangerously defective condition and that she was injured by the realization of that danger. The defendant who sells a defective product that injures a consumer violates a standard of conduct. And the standard is not simply “do not injure a consumer.” The standard is “do not injure a consumer by sending into commerce a dangerously defective product.” From *Escola* forward, defect has always been essential to liability.<sup>102</sup> A seller faces no liability when its *sound* product causes an injury to a consumer; there is no wrong in selling a sound product even if it injures someone. Sellers instead are charged with a duty to protect consumers against dangers associated with defective products, and their failure to do so renders their conduct wrongful.

Of course, what makes products liability *strict* is that a plaintiff can prevail without proof of seller carelessness. Indeed, a plaintiff can prevail even if there is affirmative evidence that the seller took “all possible care” to prevent a defective product from entering commerce. As we saw in the discussion of battery, trespass, defamation, and nuisance, the mere fact that liability is imposed on diligent actors hardly warrants the conclusion that such liability is not wrongs based.<sup>103</sup> Faultless (“strict”) wrongs are commonplace in tort. A rule of liability for injuries caused by a seller’s defective product is just another example of a rule that defines wrongdoing on demanding or unforgiving terms.

Products liability law today distinguishes three types of defects: manufacturing defects, design defects, and failure to warn. The latter two are—and perhaps always have been—quite plainly wrongs based. Indeed,

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100. 150 P.2d 436 (Cal. 1944).

101. *Id.* at 441 (Traynor, J., concurring).

102. *Id.* at 440 (“[I]t should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a *defect* that causes injury to human beings.” (emphasis added)).

103. *See supra* Part I.

since the mid-1980s, for better or worse, courts and commentators have increasingly insisted that, for these kinds of defects, the law of products liability sets a standard of conduct with fault-like features. Indeed, the products liability provisions of the Third Torts Restatement, published in 1998, insist that these forms of liability turn on proof that the plaintiff's injury was a foreseeable result of a negligence-like failure by the seller to adopt an available, well-defined alternative design or warning.<sup>104</sup> One may question whether, as an interpretive matter, the Third Restatement too readily assimilates liability for design defect and failure to warn with liability for negligence. Indeed, we are inclined to conclude that it does.<sup>105</sup> The point remains that it is a wrong—even if not exactly the wrong of causing injury through carelessness—to injure another through the sale of a product that has an unsafe design or inadequate warnings. Injurious conduct of this sort was cogently conceived of as wrong even prior to the renewed emphasis on fault that has come with the modern tort reform movement.

Liability for manufacturing defects—for example, a glass bottle that is weaker than it should be according to its own design standards, a food item with a foreign object in it, or a car that comes off the assembly line missing a component necessary for its brakes to function properly—is perhaps the best candidate for a licensing-based form of strict liability.<sup>106</sup> Indeed, it might seem that this branch of products liability law operates on the same basis as liability for abnormally dangerous activities. It is not wrong to engage in the mass production of consumer products. And it may be inevitable that mass production will allow some products to leave the seller's custody in a defective condition, even if the seller takes care. Accordingly, when it comes to liability for manufacturing defects, liability seems to be licensing based rather than wrongs based. In effect, the law seems to say to product sellers: “You are free to engage in the mass production and sale of consumer products on the condition that you stand ready to pay for any injuries caused by a product containing a manufacturing defect.”

While certain judges and scholars have taken this view of manufacturing defect liability, it is far from clear that the licensing-based model best fits this category. As noted above, one could say of a competent surgeon or driver that, sooner or later, each is bound to engage in careless surgery or driving. This observation might diminish the blame that attaches if and when such carelessness occurs, but it need not, and typically does not, undercut the treatment of the careless conduct as a violation of a norm—

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104. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b)–(c) (AM. LAW INST. 1998).

105. If so, it is perhaps in part because the Restatement Reporters, like so many other mainstream torts scholars, falsely equated wrongs-based liability with fault-based liability.

106. The Third Restatement states that manufacturing defect liability is strict rather than fault based, though the Reporters suppose that this branch of products liability law will often function in a manner akin to the doctrine of *res ipsa loquitur*, allowing plaintiffs to hold liable manufacturers who were in fact careless without offering proof of that carelessness. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. a.



i.e., as the wrong of negligence. Nor do we ordinarily suppose that, simply by virtue of isolated careless action (even careless action that causes injury), the surgeon should no longer be permitted to engage in surgery or the driver should be required to cease driving. Both remain permitted to engage in these activities notwithstanding that, in the course of pursuing them, they might commit wrongs. Similarly, the law of large numbers may tell us that a mass manufacturing process, even when implemented with rigorous safety protocols, will inevitably lead to the sale of products that contain manufacturing defects. Recognition of this inevitability is perfectly compatible with treating the sale of a defective product that causes injury as a wrong.<sup>107</sup>

Strict products liability was advocated and adopted on several mutually supporting grounds. As noted above, an insurance rationale was among these.<sup>108</sup> According to that rationale, strict liability is warranted for product-related injuries because manufacturers tend to be better situated than injury victims to absorb and spread the costs of their injuries.<sup>109</sup> The presence of this rationale might seem to suggest that at least some courts that adopted strict products liability did so on the specific understanding that products liability, or at least manufacturing defect liability, would not be wrongs based, but instead policy driven and licensing based.

Even granting that courts adopted, or today maintain, parts of strict products liability on an insurance rationale, the argument from rationale to characterization is unsound. The same reasoning could readily support the adoption of a wrongs-based notion of strict products liability. When judges contemplate rendering certain torts strict (in the sense of more demanding or less forgiving), they need not, and typically do not, ignore relevant practical considerations. Quite the opposite, they will usually look for practical reasons (along with precedential and other reasons) that support the imposition of strict liability. If the adoption of a scheme of defect-based products liability promises improved loss spreading, then improved loss spreading is a reason for the courts to recognize a new wrong—the wrong of injuring another through the sale of a dangerously defective product.

We can make a slightly more qualified version of this last point. Below, we note that a somewhat paradoxical advantage of demarcating the fault line between licensing-based and objectivity-based strict liability is that it allows certain difficult judgments to be finessed.<sup>110</sup> Strict products liability—particularly liability for manufacturing defects, but also liability for design and warning defects under certain conceptions of

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107. In addition, the idea that the sale of some defectively manufactured products is an inevitable by-product of mass manufacturing does not mean that dangerously defective products are inevitable. For example, defective plastic bottles do not carry the same risks as defective glass bottles.

108. See *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963); *supra* notes 91–98 and accompanying text.

109. *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944). (Traynor, J., concurring).

110. See *infra* Part III.B.

defectiveness<sup>111</sup>—come close to the line, precisely because the standard in such cases is so unforgiving. Often there will be nothing a seller can do to avoid committing this particular wrong. It would not be surprising to find that the judges who crafted and implemented this very demanding standard of conduct took some comfort in the law's recognition of licensing-based liability for abnormally dangerous activities. They may have reasoned, even if we are pushing wrongs-based liability to the limits, it can alternatively be justified as licensing-based strict liability.<sup>112</sup>

*B. The Normative Objection:  
The Strict Liability in Fault Is Indefensible*

Tort law, we claim, is filled with strict liability wrongs. This observation naturally invites questions as to why tort law's standards are so demanding and whether they should be. The answers to these questions, though not identical, are related. Obviously judges long ago concluded, and continue to maintain, that it is appropriate to treat batteries, trespasses, libels, nuisances, and careless injurings that involve no fault on the part of the defendant as actionable civil wrongs. Since the 1960s, courts have said the same about injuries caused by the commercial sale of defective products. Why?

It is natural for judges, or at least modern judges, to consider the pragmatic or instrumental value of different tort rules for achieving social ends. Indeed, we noted above that some proponents of strict products liability explicitly invoked justifications such as the deterrence of undesirable conduct and the compensation of injury victims.

But a concern for goals of these sorts cannot fully explain the law's list of torts or why they are defined in sharp-edged ways. Battery, trespass, defamation, nuisance, and negligence are the names of torts because, first and foremost, each tracks (and helps reinforce) familiar social norms about how each of us is obligated to interact with others. These norms are not some arbitrary collection but are connected to other norms and values that

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111. For example, some courts have applied a hindsight-based version of the risk-utility test, according to which design defect or failure to warn liability can attach for product-related injuries even if the risks that render the product defective could have been discovered only after the time of manufacture and sale. A famous, if isolated, example of the use of such a test in the New Jersey courts is *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539, 546–47 (N.J. 1982), where the court rejected the defendant's efforts to invoke a "state of the art" defense to plaintiffs' failure to warn claims. A jurisdiction with courts that are genuinely committed to the use of this sort of test is one whose products liability law is (at least in some applications) dancing on, or even crossing over, the line between objectivity-based and licensing-based strict liability.

112. Our core claim in this section is interpretive. It maintains that, for the most part, the states' adoption of the doctrine of strict products liability has involved the adoption of wrongs-based rather than licensing-based strict liability for product-related injuries. In making this expressly qualified claim, we are also recognizing that some jurisdictions for some categories of products liability cases are probably best interpreted as having adopted licensing-based strict liability or having finessed the issue as described above. Nothing we have said is meant to imply that states lack the authority to adopt licensing-based strict liability schemes for product-related injuries.

have long been central to notions of a law-governed, liberal society. While there are some exotic entries, the basic list of torts is hardly a source of surprise. Law students are not shocked to learn that the law treats a punch in the nose, an unwanted caress, a physical invasion of property, an act of malpractice, or the circulation of false statements about a person that are likely to cause harm to her social standing as actionable wrongs. Throughout their lives they have been told that these ways of interacting with others are wrongful. Even somewhat more esoteric torts, including products liability, tend to resonate with familiar notions of responsibility and wrongdoing. The idea that a company that injures consumers through the sale of a dangerously defective product has failed to meet a basic and important responsibility is hardly counterintuitive to nonlawyers.

What we have said to this point helps to explain why we have the torts that we have. Remaining to be explained, however, is why these wrongs are defined so as to set demanding standards of conduct. In fact, there are several reasons to conclude that judges have been on solid ground in so defining them.<sup>113</sup>

First, tort law's use of broad notions of wrongdoing satisfies certain desiderata associated with the effort to set standards of conduct through law, particularly standards incorporated in duties of noninjury. Take negligence, for example. There are benefits to having the standard of care articulated as a standard that requires *the actual exercise of reasonable care on a given occasion*, as opposed to best efforts to exercise such care, or a record of having exercised such care. Judges and juries can more easily administer it. It communicates the law's expectations for conduct in a relatively clear manner—we are told, simply, to be careful rather than to make best efforts to be careful. It sets an aspirational standard that encourages care and discourages excuses. “A system of norms that uses success verbs to define required conduct and failure verbs to define impermissible conduct sends a stronger message about how society expects its members to behave.”<sup>114</sup>

More fundamentally, when standards of conduct are being set within a body of law that is first and foremost concerned with enjoining forms of *mistreatment* and empowering victims of such mistreatment to *respond* to those who have mistreated them, there is reason to set them in a manner that is appropriately attentive to the interests of potential victims. A patient who is injured by a surgeon's careless error is justified in considering herself to have been wronged by the surgeon. In other contexts, the fact that the surgeon is generally very reliable, and that the surgeon was doing her best, might well counsel against a finding of wrongdoing. For example, it is highly unlikely that a surgeon who was careless in this way would face criminal sanctions. This is in part because, as “public” rather than “private” wrongs, crimes are generally defined to require greater culpability than

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113. John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123 (2007).

114. *Id.* at 1158.

torts. Yet facts pertaining to the surgeon's character and disposition, even if sufficient to fend off a criminal prosecution, do not suffice to undermine the patient's claim of mistreatment and the patient's entitlement to a response from the surgeon, whether in the form of an apology or compensation. Of the surgeon, she may justly complain: "Your failure to perform with the required competence, resulting in harm to me, was a wrongful injuring of me. For that, I am entitled to demand something of you."

One might plausibly suppose that strict liability wrongs provide a clear instance in which law departs from morality.<sup>115</sup> Indeed, today it is common to suppose that legal norms have an artificial aspect associated with their positivity or "enactedness"—this is in part how they are distinguished from moral norms. Yet it is not clear that the strictness of legal norms is traceable to their status as enacted law. For it may be that moral norms are best understood in terms of a deinstitutionalization and deobjectification of norms of conduct that are, in the first instance, entrenched, institutionalized, and objectified much in the manner of the norms of tort law. In other words, it may be that, in morality no less than in tort law, there are duties of noninjury that give rise to strict liability wrongs. If so, then the strictness of the legal wrongs of tort law would not mark the sort of anomalous phenomenon that requires an elaborate explanation and defense.

A related worry is that tort law, understood as a law of wrongs, is destined to be narrow, static, reductionist, and overly moralistic. But this concern is fueled by (and indeed part and parcel of) the failure to grasp what it means for tort law to recognize strict liability wrongs. As shown by liability for innocent trespasses, excused negligence, reasonable nuisances, and carefully-manufactured-but-nonetheless-defective products, the concept of tortious wrongdoing is capacious and varied, not cramped or reductionist. Torts constitute a "gallery of wrongs."<sup>116</sup> They are united in requiring injury resulting from a failure to meet a standard of conduct, while allowing for considerable variety both with respect to what can count as an injury and what sort of standard one is expected to meet.

For much the same reasons, it would be false to assert that a view of torts as wrongs is inherently moralistic in a pejorative sense. To isolate the presence of strict liability wrongs in tort law is to demonstrate that the commission of a tort often will not warrant strong forms of condemnation or blame. Each tort involves a failure to live up to a standard of conduct, but many such failures are understandable and forgivable to a substantial degree. While tort law allows special remedies for victims of aggravated wrongs (most notably, punitive damages), it is primarily concerned with *accountability* for wrongdoing. Torts frequently are a matter of "not delivering" or "falling down on the job," rather than acting maliciously or

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115. See, e.g., Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459–60 (1897) (emphasizing the importance of distinguishing law from morality in understanding the common law).

116. GOLDBERG & ZIPURSKY, *supra* note 89, at 27–43.

flouting the rules. One can thus embrace the idea that torts are wrongs without adopting a finger-wagging disposition, much less a punitive one.

Finally, there is nothing in the foregoing analysis to suggest that, as conditions change, legislatures or courts are precluded from recognizing new wrongs or from defining them broadly. This much is obvious from the emergence in the twentieth century of new common law torts such as invasion of privacy, intentional and negligent infliction of emotional distress, and strict products liability, as well as new statutory torts such as securities fraud and workplace discrimination. In each instance, new wrongs were recognized out of concern that extant law was failing to address certain forms of injurious misconduct and the undesirable consequences they generated.

*C. The Taxonomic Objection:  
Why Treat Rylands as a Tort Case?*

In our view, it is in some sense a mistake for legal academics and courts to treat *Rylands* (understood as having adopted a licensing-based conception of strict liability) and liability for abnormally dangerous activities as a part of tort law. After all, torts are wrongs, and these instances of liability are not predicated on wrongdoing. Yet courts do treat *Rylands* and its progeny as tort cases. In this section, we aim to explain the senses in which *Rylands* both does and does not belong in the category of tort and to do so in a manner that is genuinely synthetic rather than a bit of doublespeak.

Tort law is, in almost all of its applications, a law of wrongs. A tort plaintiff's right to recover is contingent on her proof that the defendant (or its agent) committed a legal wrong upon her. Yet the recognition of strict liability for abnormally dangerous activities demonstrates that, at least in the United States, there are tort claims not predicated on wrongdoing. Even granting that this exception is intelligible—that there is something distinctive about injuries caused by such activities that warrant the imposition of liability without wrongdoing—a taxonomic question remains: why has liability for these activities been treated as *tort* liability?

Here we must refine our metaphor of the fault line within strict liability. We have relied on that metaphor to suggest that the difference between wrongs-based and non-wrongs-based strict liability is sharp and of great significance.<sup>117</sup> And so it is. To cross the fault line is to alter fundamentally the basis for a defendant's liability. Yet there are also respects in which the line is quite subtle. Indeed, it is one that courts and commentators have frequently ignored or glossed over. *Rylands* itself is a testament to the fact that certain forms of licensing-based liability are

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117. See *supra* Part III.B.

simultaneously discontinuous and continuous with wrongs-based liability.<sup>118</sup>

It is significant that *Rylands* itself was pleaded and argued as a case of wrongs-based liability.<sup>119</sup> It is equally significant that the judges who favored liability in that case declined to distinguish sharply between the case before them and precedents involving liability for negligence, trespass, and nuisance.<sup>120</sup> The plaintiff in *Rylands* came very close to establishing the commission of a traditional tort—some would say that he succeeded. The builder Rylands hired to construct the reservoir may well have been careless, for example. However, any such carelessness could not be imputed to Rylands because the builder was hired as an independent contractor.<sup>121</sup> The defendant's flooding of the plaintiff's mine also had some of the qualities of a trespass (the physical invasion) and a nuisance (the interference with the plaintiff's use).<sup>122</sup> In his *Rylands* opinion, Justice Blackburn suggested that a decision to hold the defendant liable was consistent with a general principle of justice that he took to be implicit in prior decisions imposing liability for trespass and nuisance.

Many subsequent courts and commentators have suggested that, at least in hindsight, *Rylands* ought to be understood as imposing wrongs-based liability—that it is best reconstructed as an application of the nondelegable duty doctrine (under which the independent contractor's fault could be charged to the defendant) or as an application of nuisance law.<sup>123</sup> But there is another way to interpret the “near miss” aspect of the case. Assuming that the plaintiff could not quite make out a claim for a wrongs-based tort instead helps to explain why the House of Lords in that case was entitled, and other courts in comparable cases are entitled, to include their imposition of licensing-based liability for injuries caused by abnormally dangerous activities under the umbrella of tort. Claims for injuries caused by abnormally dangerous activities, like claims grounded in negligence or nuisance, assert that the plaintiff has a right to compensatory damages from

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118. Holmes long ago asserted that the escaping cattle cases on which *Rylands* relied lay “on the boundary line” between liability irrespective of fault (even in the legal sense of fault) and liability based on a failure to exercise prudence. HOLMES, *supra* note 7, at 117.

119. Simpson, *supra* note 61, at 212.

120. Ken Oliphant, *Rylands v Fletcher and the Emergence of Enterprise Liability in the Common Law*, in EUROPEAN TORT LAW 2004, at 81, 88–92 (Helmut Koziol & Barbara C. Steininger eds., 2005) (arguing that Baron Bramwell (in the Exchequer Court), Justice Blackburn (in the Exchequer Chamber), and Lord Cairns (in the House of Lords) all treated *Rylands* as rooted in, yet extending beyond, recognized instances of liability for negligence, trespass, and nuisance).

121. Prosser suggested that *Rylands* would have come out differently under English law if it had been decided a few years later, by which time, he claimed, the English courts had adopted a form of nondelegable duty analysis for negligence caused by contractors who engaged in “inherently dangerous” activities. William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 401 & n.7 (1942).

122. Prosser argued that a claim of trespass would have failed for lack of “directness,” and that the English courts at the time defined nuisance so as to require a continuous rather than one-off interference with the plaintiff's use and enjoyment of her property. *Id.* at 401–02.

123. See *supra* notes 73, 121.

the defendant because the defendant undertook an activity that caused injury to the plaintiff. It is barely a stretch, if it is a stretch at all, to describe the plaintiff in *Rylands* as bringing a “personal injury claim” for compensatory damages. The basis of this form of liability is not a wrongfully inflicted injury but rather the realization of a risk of injury associated with a permitted, nonwrongful activity. But in other respects the claim resembles a personal injury claim predicated on a wrong. It is thus unsurprising that it should have been placed within the rubric of liability for wrongs.

A critic could attempt to turn the foregoing observations against us. Insofar as courts treat claims for damages based on abnormally dangerous activities as tort claims notwithstanding the absence of wrongdoing, doesn't this cut against our claim that torts are wrongs? Wouldn't it be more accurate to say that the category of torts extends to acts, wrongful or not, that cause loss and hence give rise to claims for compensation? Wouldn't this recasting of tort solve the taxonomic problem posed by *Rylands* and its progeny in a simpler, more elegant fashion?

Unfortunately, an effort to describe the subject matter of tort as acts causing compensable losses would create more taxonomic problems than it would solve. Although all torts involve an injuring, the tort concept of an injury is much broader than the concept of a loss. There are many torts without losses, including, for example, harmless trespasses. Likewise, tort claims often give rise to forms of relief that do not involve compensating losses, including nominal damages, punitive damages, and injunctive relief. For these reasons, one cannot solve the puzzle of the place of *Rylands* within tort law by redefining tort to be the law of (noncontractual) compensable losses.

Just as the close resemblance of licensing-based liability for abnormally dangerous activities to wrongs-based liability helps to explain why courts and commentators might have been led to misconceive of the former as wrongs based, it also allows courts to claim a particular institutional competence to handle them under the heading of tort. Assessing a claim for compensation for injuries caused by abnormally dangerous activities requires the receipt of evidence and the application of legal rules to a sequence of issues. These include whether the activity is abnormally dangerous, whether a dangerous aspect of the activity proximately caused the plaintiff's injury, and whether the plaintiff was comparatively at fault. Such questions are appropriately dealt with through the usual litigation process and by courts employing standard tort procedures.

To be sure, liability for losses caused by abnormally dangerous activities might be imposed through different institutions and in many ways. Workers' compensation schemes, which also implement a licensing-based form of liability, obviously rely more heavily on administrative proceedings. So too does New Zealand's accident compensation system<sup>124</sup>

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124. See generally Stephen Todd, *Forty Years of Accident Compensation in New Zealand*, 28 T.M. COOLEY L. REV. 189 (2011).

and, in our legal system, the program established by the National Childhood Vaccine Injury Act.<sup>125</sup> Indeed, as we have noted, *Rylands* itself was preceded by, and arguably influenced by, private acts of Parliament that conditioned permissions to build dams on the builder or operator of the dam standing ready to compensate persons injured by a dam failure.<sup>126</sup> And yet there is enough in common between wrongs-based and licensing-based claims to compensation to render reliance on litigation and adjudication a viable institutional choice.

More affirmatively, there may be good practical reasons for our legal system to continue to include, under the same umbrella, a special case of licensing-based liability alongside genuine wrongs-based liabilities. In particular, it is not always easy to say when an injury has been caused by wrongful or nonwrongful activity. As to some highly risky activities, plaintiffs assert that the risk level of the activity renders it unreasonably dangerous or negligent, or they assert that the defendant's manner of conducting the activity was negligent. Some juries and judges might be inclined to agree with such assertions, others may not, and others might remain undecided. This is frequently true of entrepreneurial enterprises like those in *Rylands*, for example. Strict liability for abnormally dangerous activities allows for the imposition of liability without a unified decision as to whether certain conduct falls below the line of reasonable prudence. In this way, licensing-based strict liability gives courts some leeway to impose liability without making a decision as to whether the conduct was wrongful or nonwrongful. One might argue that the opinions of Blackburn and Cairns in *Rylands* equivocated in just this way.<sup>127</sup> Given that there is sometimes uncertainty as to the wrongfulness of a defendant's conduct, it is perfectly sensible to include licensing-based liability within a body of law overwhelmingly concerned with liability for wrongs. When courts invoke licensing-based strict liability in cases of uncertainty, they are, in effect, using licensing-based liability to paper over the fault line in strict liability.

*D. The Instrumental Objection: Licensing-Based Strict Liability  
Should Be the Rule, Not the Anomaly*

For tort theorists such as ourselves, there is an initial feeling of relief attached to the conclusion that there is enough of a resemblance between genuine torts (which are wrongs based) and non-wrongs-based strict liability for abnormally dangerous activities to explain how they came to be lumped together under the heading of tort law and, indeed, to explain why there are certain advantages that come from coupling the one form of liability to the other. Similarly, it initially seems reassuring to discover

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125. 42 U.S.C. § 300aa-22(b)(1).

126. See *supra* Part II.A.

127. Cf. HOLMES, *supra* note 7, at 117 (suggesting that *Rylands*'s holding reflected the courts' recognition that there are "limit[s] to the nicety of inquiry which is possible in a trial," and their judgment that the safer course was "to throw the risk upon the person who decides what precautions shall be taken").



reasons for allowing certain causes of action for damages to proceed even in the absence of a wrong by the defendant.

However, the sense of relief quickly evaporates when we realize that the analysis of the preceding section generates a new puzzle. If it is *sometimes* justifiable to use tort law's mechanisms to impose liability on defendants for injuries they have caused nonwrongfully, why does tort law have so little licensing-based liability? Why this much, but no more? If there are considerations of fairness that justify licensing-based liability for a small slice of the harms that risk creators cause to innocent victims, why are those considerations insufficient to justify tort liability for all of the injuries that risk creators cause to innocent people? Perhaps it is true that licensing-based strict liability currently attaches to only an isolated set of activities. But is this aspect of tort doctrine really justifiable?

It is worth briefly reviewing and rejecting three familiar efforts to answer these questions. The first and most obvious is suggested by the First Restatement's phrase "ultrahazardous activities."<sup>128</sup> One could argue that certain activities, such as blasting with dynamite, are simply "off the charts" in their riskiness, and therefore persons and entities should not be allowed to take such risks unless they stand ready to compensate the victims for their injuries.

This answer is unilluminating for numerous reasons. First and foremost, it is far from obvious that the risks presented by what the law has deemed abnormally dangerous activities actually fall into that category. Second, even if they did, it is unclear why an extraordinary risk would generate such liability but a large risk should not. Third, there are some rather extraordinary risks that do not generate such liability.

A second unsatisfactory answer (famously advocated by George Fletcher) is that many activity-related risks that otherwise should be governed by licensing-based strict liability fall out of that category because victims have assumed them, at least insofar as they are generated by these activities even after the exercise of due care.<sup>129</sup> Driving automobiles is risky, just as blasting is, but almost all of us use the roadways, while few of us engage in blasting. In a world of mutual or reciprocal risk causing, we all assume the risk associated with nonnegligent driving. It is the asymmetrical quality of blasting or keeping a reservoir that prevents the mutual assumption of risk model from ratcheting the liability standard up to negligence.<sup>130</sup> The idea that licensing-based strict liability derives from nonreciprocal risk imposition seems to garner support from the Second Restatement's use of the phrase "*abnormally* dangerous activities," and from its emphasis on the lack of "common usage" as critical to determining whether strict liability will apply.<sup>131</sup>

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128. RESTATEMENT (FIRST) OF TORTS §§ 519–520 (AM. LAW INST. 1938).

129. See Fletcher, *supra* note 80, at 548.

130. *Id.* at 546.

131. RESTATEMENT (SECOND) OF TORTS § 520 (AM. LAW INST. 1977) (emphasis added).

Alas, the reciprocity model has justly been subjected to withering criticism. Its central problem is that one cannot make the model work without expanding the reach of the idea of assumed risks in ways that are untenable or ultimately self-defeating. To take the automotive example, the world is full of pedestrians, cyclists, and nondrivers who do not impose reciprocal risks on car drivers, yet cannot avail themselves of strict liability.<sup>132</sup> If one tries to fend off this counterexample by arguing that such persons benefit more broadly from the operation of cars, one confronts a parallel argument about reservoirs and blasting being beneficial to the public in general.

Lord Cairns's reference to "non-natural activities" in his *Rylands* opinion provides a third apparent ground for delimiting the reach of licensing-based strict liability, one which shares the emphasis on nonreciprocity without relying on the idea of assumed risks.<sup>133</sup> Normal activities trigger liability only when done wrongfully because our system treats individuals as entitled to engage in those activities so long as they are careful about the risks posed to others. Imposing liability for injuries caused, but not through wrongs, would burden these activities, and yet actors have done nothing to warrant that burden.<sup>134</sup> By contrast, there are certain activities that generate risks beyond those characteristic of everyday life and generate substantial risks to others even when done carefully. As to these, we are ambivalent about whether such risky enterprises should be permitted, and we are not taken by the idea that they must be permitted as a matter of course. Thus, we accommodate both our desire to permit these activities and our misgivings about their risks by requiring those engaging in such activities to stand ready to pay for the losses they cause. On this view, the principal reason for not broadening the class of activities subject to licensing-based strict liability is that doing so fails to recognize a clean entitlement to engage in activities about which we are not ambivalent (so as long as one undertakes them with reasonable care).

This line of thinking is of course highly schematic, both because it does not specify the activities in which we have an unburdened entitlement to engage, why we are so entitled, or what sort of extra liability provisions will actually constitute an undue burden on them. That it is schematic is a shortcoming insofar as it provides less illumination, but a strength insofar as it permits the answers to the latter questions to be fleshed out in different ways. Is it critical that individuals be regarded as enjoying an unburdened right to drive an automobile, so long as they drive carefully? Why? Is it because of the importance of freedom of movement, because of a right to work, because a legislature has said so, or simply because of the realities of

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132. Jules L. Coleman, *Justice and Reciprocity in Tort Theory*, 14 W. ONT. L. REV. 105, 112 (1975).

133. See Stephen R. Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, in PHILOSOPHY AND THE LAW OF TORTS 72, 114–15 (Gerald J. Postema ed., 2001) (suggesting that abnormally dangerous activity liability is generated by risks that arise from outside of "accepted patterns of interaction").

134. *Id.*

modern life? Is the right to be free of the burden that strict liability would carry contingent on how great a burden it will impose? Is it contingent on whether liability insurance is available, and at what cost?

However one might flesh out the answers to these questions, the answer will not go far enough to satisfy a critic of our account. The problem is that there are many activities that go beyond what anyone would regard as “natural use” and go beyond what would seem to be a good case for a “clean entitlement” to engage in the activity. Operating a cement factory, transporting chemicals, and manufacturing airplanes are all such activities, and yet we do not have licensing-based strict liability for them.

It is important to recognize at this juncture a distinction between domains in which licensing-based liability should be regarded as an option for our legal system and domains in which it is not only an option but also an actuality. Like Judge Richard Posner, we have no trouble accepting that licensing-based liability for the transportation of certain dangerous chemicals is in principle a possibility.<sup>135</sup> It is not a natural use; it is not something for which there is a “clean” entitlement; it may not be feasible to remove all possibility of harm by careful performance; it is highly risky; it is something that, at least in principle, could be insured. The choice of whether to select such a form of liability when available invites attention to a flood of other considerations: the extra costs that such activities will generate, the ability to pass along such costs, the possible reduction in activity level, the possible simplification of litigation, the added availability of compensation for those injured, the cost of alternative means of making available such compensation, and so on. Common law courts have come out in different places for different candidates for licensing liability, and so have legislatures. Like Jules Coleman<sup>136</sup> and John Gardner,<sup>137</sup> and unlike Ernest Weinrib,<sup>138</sup> we see no reason to think that courts should categorically exclude such instrumentalist considerations in determining whether to deviate from the wrongs-based mold where licensing-based liability is available as a matter of principle.

Notwithstanding this recognition of the relevance of instrumental considerations to the decision about whether to adopt a licensing-based strict liability rule for injuries caused by certain activities, or perhaps because of it, we regard ourselves as having an explanatory debt, at least to the following extent. Our “civil recourse” theory puts wrongs-based tort liability front and center, and seems only to concede as an afterthought that there might be some room for non-wrongs-based liability within the common law of torts. But we then seem to add that it is only because of a *mélange* of instrumentalist considerations that non-wrongs-based liability does not extend even further, and we back away from refining that *mélange*. Our openness to non-wrongs-based liability from a normative point of view seems anomalous alongside our overall commitment to the essential place

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135. *Ind. Harbor Belt R.R. v. Am. Cyanamid Co.*, 916 F.2d 1174 (7th Cir. 1990).

136. *See* COLEMAN, *supra* note 49.

137. *See* Gardner, *supra* note 92.

138. *See* WEINRIB, *supra* note 4.

of wrongs within the law of torts. Surely there must be reasons that lead us to think not just that wrongs-based liability is the paradigm of tort law but that it should remain so.

And, indeed, there are. Tort law includes, but does not center upon, liability for accidents one has caused through highly risky activity. Tort law overwhelmingly consists of norms of conduct that, when breached, empower victims to recover from the breaching party—the wrongdoer. It turns out that some litigation today stems from accidents that were not brought about by legal wrongs yet still find a place within our liability system. A seemingly progressive inclination has motivated such developments, for licensing-based liability compensates victims who might otherwise have had no means or limited means of self-repair.

The retreat from wrongs carries its own perils, however. Tort law plays an important role in our legal system beyond determining who shall be held accountable to whom when cases are litigated. Tort law's primary rules of conduct, prohibiting people from wronging one another, constitute an important repository of norms of conduct. They are not pure liability rules; they go hand in hand with an assessment of conduct as violative of a standard of conduct that is well accepted and conventional. Such norms are at least designated as standards of conduct by official sources and applied as such by fact-finders in trials, by lawyers guiding their clients, and by legal actors striving to comply with the law. They are not pure abstractions, mere ideals of how one is expected to treat others. They are enforceable, for they by and large determine when legal actors are vulnerable to demands for damages from putative victims, what sorts of structures one's lawyers and insurers will be requiring one to abide by, and so on.

Licensing-based liability and wrongs-based liability can function reasonably well side by side, we believe, when wrongs-based liability is the lead actor and licensing-based liability plays a minor supporting role. This is especially so when licensing-based liability is identified and conceptualized in terms of outliers—when it is treated like certain versions of promissory estoppel, *quantum meruit*, or unconscionability within contract law. No doubt there are parts of our system that do not quite fit a model we wish to have for a variety of systemic reasons—a model that hangs together in a relatively stable manner but cannot itself accommodate all the disputes we would wish to accommodate in a manner that sits well with our overall set of values and goals. There is no strong a priori reason to rule out the possibility of a subsidiary domain of rules and principles, one that operates on a different but not wholly unrelated set of rationales. Licensing-based strict liability for abnormally dangerous activities is just such a subsidiary domain.

If licensing-based liability should grow too much in size or in prominence relative to wrongs-based liability, it may be that the role of tort law in our society will change. Two kinds of change have been hailed as positive: the increase in compensation to those who are in need, and the increase in deterrence of risk generators. However, there is a downside as well, and we do not mean here the cost increases that are alleged by

contemporary tort reformers to accompany the expansion of tort liability. To the extent that tort law is experienced and understood to be disconnected from standards of conduct, its capacity to guide conduct and its place as a repository of norms may be greatly diminished. In short, if lawyers as litigators, in a spirit of enhancing compensation, treat tort law as generally having nothing to do with wrongs, only with compensation, we must reconcile this with the reality that we will lose credibility when, as counseling lawyers, we advise that the rules of tort law are not mere liability rules, but are standards of conduct. To the extent that licensing-based liability is merely a sidekick, we do not imperil our own standing to speak of tort law as a law of wrongs, but if the roles are switched, that standing is lost.

The same considerations that cause us concern over the prospect of seriously weakened notions of wrongdoing and accountability also point toward practical considerations that ought to bear on and guide efforts at tort reform (assuming they are to be undertaken). Precisely because tort law is a law of wrongs, and not a law of liability rules, legislation that cuts back on tort law threatens to undermine notions of responsibility for wrongdoing. Other things being equal—for example, absent evidence that the tort law in question is subject to widespread misapplication or abuse—tort reform should be done narrowly. If there is reason to think tort law is interfering with certain medical practices, such as OB/GYN, the reform should target its application to those practices, not malpractice law generally. Moreover, if tort law is to be displaced from a domain of activity, as negligence law was by the adoption of workers' compensation, there is reason to favor replacement schemes that carry with them at least a reflection of tort-like notions of wrongdoing and responsibility. Workers' compensation liability is not tort liability; it is not wrongs based. Nonetheless, it, unlike a more general first party insurance scheme, operates on terms that retain the notion that employers bear a particular responsibility for the safety of their employees.

#### CONCLUSION

One is entitled to ask what is at stake in gaining a proper handle on the place of strict liability in tort. In fact, the stakes are potentially significant. We conclude by focusing on four domains of potential impact.

First is the domain of torts scholarship and teaching. As we noted at the outset, torts professors have, for more than a century now, largely organized their understanding of the subject around the distinction between strict and fault-based liability. Yet because they have been prone to mischaracterize the distinction, they have been prone to pose misleading questions for themselves and their students. For example, if one recognizes what we have called "the strict liability in fault," then the much debated historical question of whether liability under the old trespass writs was strict or fault-based seems poorly framed. In all probability, liability under the writs, like liability today, was fault-based *and* strict. Then, as now, one could be held liable for a blameless bit of negligence, an innocent trespass, a nuisance

without fault, and a conversion committed under duress. It was only in the mid-nineteenth century that the English courts, through *Rylands*, arguably recognized a conditional, non-wrongs-based form of strict liability. Such liability remains exceptional to this day.

Second is the domain of judicial decision making. More specifically, there is the question of judicial authority to reform tort doctrine. The failure to appreciate what we have dubbed “the fault within strict liability” permits scholars substantially to overstate the degree to which tort law already recognizes liability without wrongdoing and, in turn, the leeway judges enjoy to recognize new variants of licensing-based strict liability (as opposed to objectivity-based forms of strict liability). Indeed, it is sometimes argued that, given the objectivity of negligence law’s ordinary prudence standard, the longstanding recognition of vicarious liability, and the adoption of strict products liability, the courts have already broadly endorsed liability without wrongdoing.<sup>139</sup> It would seem to follow that judges would simply be doing what they have always done if they were to decide to implement additional licensing-based strict liability in the name of objectives such as deterrence and compensation.

In fact, as we have demonstrated, there is little precedent for judicial recognition of licensing-based forms of strict liability. *Rylands* and its progeny are really the only example, and *Rylands*—as we have explained—sits right on the fault line between objectivity-based and licensing-based strict liability. One can hardly infer from this very special, borderline case that judges have historically wielded, and therefore are entitled to wield, broad authority to implement licensing-based strict liability. It is far more plausible to assert that they enjoy such authority at the margin—an authority they have arguably exercised in the case of strict liability for manufacturing defects.

Third is the domain of legislation. When it comes to tort reform, legislatures have substantially greater room to maneuver than courts. Thus, it is in principle open to them to substantially displace current tort regimes of wrongs-based liability with forms of licensing-based strict liability, whether in the name of economic equality, efficiency, or justice. Should they?

Without purporting to be able to offer a definitive answer to this complex question, we would suggest that our analysis sheds needed light. For example, legislators must appreciate the type of choice they would be facing: what it is that they are reforming, and hence what it is they would be gaining and losing by engaging in reform. It may be that, on balance, there are reasons to move to licensing-based schemes, at least with respect to certain activities that produce injuries on a recurring basis. But this should not obscure the fact that certain tradeoffs will have to be made. Any gain in efficiency or justice would come at the cost of diminishing the

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139. On the supposition that legislation can inform the direction of the common law, some would add to these the legislative adoption of strict liability within workers’ compensation schemes.

extent to which the law establishes norms of interpersonal conduct and enables persons to hold others accountable for violations of those norms. A world with fewer wrongs-based torts is a world that is less about the duties that we owe one another, and less about the rights we enjoy against each other, and more about the aggregate distribution of costs and benefits.

Finally, there is the domain of political and legal culture. For several decades now, those on the progressive side of debates about law have tended to be those who are suspicious of law that focuses on wrongs and responsibilities. To assign liability exclusively on the basis of wrongdoing, the thinking goes, is to precommit to a liability regime that is far too narrow to bring about systemic goods such as deterrence and compensation. Likewise, to emphasize responsibility is to arm potential defendants with too many grounds for avoiding liability, either by establishing their lack of fault, by blaming victims, or some combination of the two. We will do better, on this view, to resolve the problems associated with injuries and losses as problems of distributive justice or aggregate welfare.

We believe that there is something to be said for these instincts. Yet we also believe that they easily are overstated. Tort law's standards of conduct, as we have explained, are often quite demanding of defendants and protective of victims. Law that holds persons and firms strictly to their interpersonal obligations makes for a good deal of responsibility and liability, including forms of responsibility of which progressives tend to approve. This, we believe, is the main lesson of the rise of strict products liability. It is a body of law that holds commercial sellers accountable to product users for their wrongs, yet does so on the basis of a strict and therefore expansive notion of what counts as a wrong. While it may be true that even expansive regimes of wrongs-based tort liability will be narrower in scope than licensing-based liability, it hardly follows that tort is properly described as imposing liability on narrow or unduly moralistic terms.

Moreover, in an era in which prospects for progressive legislation are dim and in which progressives can sometimes fairly be criticized for being inattentive to notions of individual responsibility, it is hardly obvious that the right way for progressives to proceed is by advocating for the displacement of tort law by schemes of compensation or deterrence. By holding persons and firms to demanding norms of conduct, tort law arguably strikes a more politically viable and sensible balance.