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**“A Fundamental Error in the Law of Torts:  
The Restriction of Strict Liability to Uncommon Activities”**

**by**

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**Note: It is expected that you will have reviewed the speaker’s paper before the seminar.**

**A Fundamental Error in the Law of Torts:  
The Restriction of Strict Liability to Uncommon Activities**

Steven Shavell\*

*Courts generally insist that two criteria be met before imposing strict liability. The first—that the injurer’s activity must be dangerous—is sensible because strict liability possesses general advantages in controlling risk. But the second—that the activity must be uncommon—is ill-advised because it exempts all common activities from strict liability no matter how dangerous they are. Thus, the harm generated by the large swath of common dangerous activities—from hunting, to construction, to the operation of railroads—tends to be socially excessive. After developing this theme, the Article addresses the question of how the uncommon activity requirement could have arisen and finds that its legal pedigree is problematic. The conclusion is that the uncommon activity requirement for the imposition of strict liability should be eliminated.*

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## INTRODUCTION

The choice that our legal system makes between the major forms of liability in tort—strict liability and the negligence rule—is a basic one. In practice, it is made through the application of two criteria. In order to impose strict liability, a court must find that (1) the injurer’s activity generates a highly significant danger, even when undertaken with reasonable care; and (2) the injurer’s activity is uncommon.<sup>1</sup> The contention of this Article is that the latter uncommon activity requirement<sup>2</sup> for the use of strict liability<sup>3</sup> constitutes a serious mistake of policy because it places all common dangerous activities outside the ambit of strict liability. Were these dangerous activities also subject to strict liability, the toll of harm from accidents could be favorably lessened. Therefore, an improvement over present doctrine would rely on the dangerousness requirement<sup>4</sup> alone.

Part I of the Article describes the use of the uncommon activity requirement under the law. The main point demonstrated there is that the interpretation of a common activity is expansive, such that very few activities would clearly be considered uncommon. Consequently, the set of common activities that are shielded from strict liability regardless of the danger they pose is large. Part I also canvasses tort law in other countries and finds that the United States stands alone in employing the uncommon activity requirement to limit the area of strict liability.

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<sup>1</sup>RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 20 (2010) (hereafter RESTATEMENT (THIRD)). That these criteria are in fact important in judicial decision making is discussed and to an extent documented *id.* at Reporters’ Note, cmts. e, g, h, j, and k.

<sup>2</sup> This restriction will sometimes be referred to as the uncommon *usage* requirement.

<sup>3</sup> This term will be employed as a shorthand for strict liability with a defense of contributory or comparative negligence—in other words, it will be assumed that in a strict liability regime injurers would not be liable if victims were negligent.

<sup>4</sup> This term will refer to the first requirement with the understanding that it connotes danger given the exercise of reasonable care.

Part II reviews the main functional advantage that strict liability holds over the negligence rule: strict liability tends to result in a more desirable reduction in accident risks.<sup>5</sup> This advantage derives from two factors. First, strict liability should encourage potential injurers to exercise all possible types of care so as to appropriately reduce risks, not just the subset of precautions that courts can effectively police under the negligence rule. For example, under strict liability, individuals might generally refrain from texting when driving because they would know that they must pay for harms that they cause. In contrast, under the negligence rule, they might often engage in texting because they would believe that proof that they were texting, and thus of their liability, could well be difficult. Second, strict liability should lead potential injurers to properly moderate their levels of participation in dangerous activities, again because under this form of liability injurers must pay for the harms that they cause.<sup>6</sup>

The risk-reducing virtues of strict liability furnish a justification for the dangerousness requirement that courts apply in determining whether to impose strict liability. As is emphasized, it is when an activity presents a significant danger that strict liability has the potential to meaningfully lower risk. If an activity is not dangerous when conducted with due care, there is little scope for strict liability to yield such a benefit.

Part III explains why it is socially undesirable for the law to demand that an activity be uncommon in order for it to be subject to strict liability. The essence of the argument is what was

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<sup>5</sup> I focus on this functional issue rather than on other functional issues (notably, the achievement of compensatory objectives and the limitation of litigation costs) or on moral concerns for reasons given at the beginning of Part II *infra*.

<sup>6</sup> Notwithstanding the advantage of strict liability in controlling risk-creating actions of potential injurers, the negligence rule possesses a parallel advantage in controlling risk-reducing actions of potential victims. Part IIB discusses why this advantage of the negligence rule would tend to be less significant than that of strict liability.

indicated above, that society relinquishes valuable opportunities to reduce accident risks when it excludes common dangerous activities from the realm of strict liability.<sup>7</sup>

Indeed, the mistake of insulating common dangerous activities from strict liability is rendered especially serious precisely *because* these exempted activities are common: for the common nature of the activities means that society's failure to reduce the accident risks that they engender is suffered frequently rather than unusually. Consider driving accidents in which pedestrians or bicyclists are victims, one of the illustrations that is discussed (two others concern hunting and railroad operations). Because driving is a common activity, drivers are not subject to strict liability for accidents that harm pedestrians or bicyclists despite the substantial dangers that motor vehicles pose to them; and because so many individuals engage in driving so often, the number of driving accidents that harm pedestrians or bicyclists is great. This state of affairs suggests that our country forgoes important opportunities to lower driving-related accident risks to pedestrians and bicyclists on account of its legal doctrine.

Part IV critically assesses arguments that have been advanced in favor of the uncommon activity requirement for the imposition of strict liability. Among the views appraised is the widespread notion that the reach of strict liability must be contained because that form of liability may exert an undesirable chilling effect on socially useful activities; the possibility that when activities are common, they will not actually be dangerous because potential victims will likely be on guard against them; the opinion of Judge Richard Posner and others that imposing

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<sup>7</sup> One way to express this argument is as follows. Suppose that it would be socially desirable to impose strict liability on the *sole* person in a community who engages in a dangerous activity because doing so would significantly reduce accident risks. This activity would be uncommon since only one person engages in it; hence under the law, strict liability could be imposed. Now suppose instead that the *very same activity*—and thus *identically dangerous*—is common since many people in the community engage in it. The argument of social policy that applied to the sole person who engaged in the dangerous activity should apply to *each* of the many individuals engaging in the activity because it is assumed to be the identical activity. Yet the uncommon activity requirement of the law would protect from strict liability all of the many individuals engaging in the dangerous activity. See *infra* Part IIIA.

strict liability on common activities would have little effect on accident risks; and the belief of Professor George Fletcher that strict liability is appropriate only for risks that are one-sided rather than reciprocal. None of the ideas reviewed ostensibly supporting the uncommon activity requirement seem persuasive and some are illogical.

Part V asks about the origin of the requirement of uncommon usage. If it constitutes a mistake, as is claimed, how did it come to be adopted? The uncommon activity requirement was introduced into our legal system in black letter form in the *Restatement (First) of Torts* in 1938.<sup>8</sup> At that time, considerations of accident prevention were essentially overlooked by courts and commentators on tort law, so that it is not entirely surprising that the mistake which the requirement is claimed to represent could have been made. In any event, it is demonstrated that the requirement did not in fact constitute a restatement of relevant law or writing but rather was devised by the Advisers to the *Restatement*. A conjecture is that the Advisers found the requirement attractive because it furnished a convenient means of achieving a felt goal of cabining the domain of strict liability.

The Conclusion recommends that the uncommon activity requirement be eliminated because it conflicts with the objective of reducing accident risks. The Conclusion also reminds the skeptical reader who views the requirement as part of the natural legal order that the requirement is not a prerequisite for strict liability in any country apart from the United States and that it was an invention of the authors of the *Restatement* rather than a crystallization of the law.

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<sup>8</sup> RESTATEMENT (FIRST) OF TORTS §§ 519-520 (1938) (hereafter RESTATEMENT (FIRST) or RESTATEMENT).

Before proceeding, let me note that there is no article of which I am aware devoted to the uncommon activity requirement. The main contribution of my effort thus lies in its focus upon this constraint on the application of strict liability.<sup>9</sup>

## I. THE RESTRICTION OF STRICT LIABILITY TO UNCOMMON ACTIVITIES UNDER THE LAW

### A. *United States*

As stated above, the primary necessary conditions for imposition of strict liability under the *Restatement (Third)* are that “(1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and that (2) the activity is not one of common usage.”<sup>10</sup> Blasting is the quintessential example offered by the *Restatement (Third)* of an activity meeting both of these requirements and for which strict liability is generally imposed—because blasting is deemed dangerous even when conducted with appropriate care and because it is viewed as uncommon.<sup>11</sup>

To understand how the second requirement restricts strict liability, we have to determine when an activity would be seen as common. The *Restatement (Third)* tell us that an activity is common, and thus is insulated from strict liability, if it is undertaken “by a large fraction of the people in the community.”<sup>12</sup> Driving is mentioned as an example,<sup>13</sup> and similarly, such

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<sup>9</sup> However, several authors who, like me, view tort law mainly from a functional perspective, discuss the uncommon activity requirement in the course of undertaking more general considerations of the doctrines bearing on the use of strict liability: see KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 199–201 (4<sup>th</sup> ed. 2012); Mark Geistfeld, *Should Enterprise Liability Replace the Rule of Strict Liability for Abnormally Dangerous Activities?* 45 *UCLA L. REV.* 611, 653 (1998); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 112 (1987). In contrast to me, these writers all find the uncommon activity requirement rational; see *infra* Part IV.

<sup>10</sup> *RESTATEMENT (THIRD)*, *supra* note 1. Strict liability for product-related harms or for those due to professional malpractice are not considered herein because the uncommon activity requirement does not apply to them.

<sup>11</sup> *Id.* cmt. e and Reporters’ Note, cmt. e.

<sup>12</sup> *Id.* cmt. j.

widespread activities as hunting, boating, and the use of off-road vehicles would presumably be viewed as common;<sup>14</sup> further, as is consistent with their being treated as common, these activities are ordinarily governed by the negligence rule.<sup>15</sup>

Even if an activity is undertaken by only a few parties, including just one, the *Restatement (Third)* observes that it may still be considered common if it is “pervasive within the community.”<sup>16</sup> Accordingly, the activity of a single company engaged in the transmission of electricity or natural gas in a community could be deemed common since the company’s electric wires or its gas pipelines would be omnipresent there.<sup>17</sup> Likewise the operations of water utility companies and of airlines could be considered common; and these activities tend to be governed by the negligence rule.<sup>18</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> Millions of Americans engage in each of these activities. The number of individuals who hunted with firearms was 17.5 million in 2014; see FIREARMS-RELATED INJURY STATISTICS, 2015 Edition, at 5, [http://www.nssf.org/PDF/research/IIR\\_InjuryStatistics2015.pdf](http://www.nssf.org/PDF/research/IIR_InjuryStatistics2015.pdf). The number of individuals who participated in recreational boating was 74.5 million in 2012; see NATIONAL RECREATIONAL BOATING SURVEY, 2012, at 38, <https://www.uscgboating.org/library/recreational-boating-survey/2012survey%20report.pdf>. The number of individuals who used motorized off-road vehicles was on average 40 million over the period 1999–2007; see OFF-HIGHWAY VEHICLE RECREATION IN THE UNITED STATES AND ITS REGIONS AND STATES: A NATIONAL REPORT FROM THE NATIONAL SURVEY ON RECREATION AND THE ENVIRONMENT (NSRE), 2008, at 10, [http://archive.sharetrails.org/uploads/EconomicStudies/National%20Survey%20on%20Rec%20&%20Env\\_NSRE\\_OHV\\_FINAL\\_FEBRUARY\\_2008.pdf](http://archive.sharetrails.org/uploads/EconomicStudies/National%20Survey%20on%20Rec%20&%20Env_NSRE_OHV_FINAL_FEBRUARY_2008.pdf).

<sup>15</sup> On hunting, see, e.g., Ray Taylor, *Hunting Accident Litigation*, 27 AM. JUR. TRIALS 261, § 2 (Originally published in 1980); and STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS 2A § 9.81 (2009). On boating, see, e.g., H.C. Lind, *Liability of owner or operator of motorboat for injury or damage*, 63 A.L.R.2d 343, §§ 2–3[a] (Originally published in 1959). On off-road vehicles, see, e.g., Jay M. Zitter, *Liability for injury or death resulting from use or operation of snowmobile*, 98 A.L.R.6th 231, §§ 2–5 (Originally published in 2014) and Boyd J. Peterson, *Liability for injury incurred in operation of power golf cart*, 66 A.L.R.4th 622, § 2 (Originally published in 1988).

<sup>16</sup> RESTATEMENT (THIRD), *supra* note 1, cmt. j.

<sup>17</sup> *Id.*

<sup>18</sup> On water utilities, see, e.g., C. T. Drechsler, *Water distributor’s liability for injury due to condition of service lines, meters, and the like, which serve individual consumer*, 20 A.L.R.3d 1363 (Originally published in 1968). On airlines, see, e.g., William K. Jones, *Strict Liability for Hazardous Enterprise*, 92 COLUM. L. REV. 1705, 1747–1748 (1992) (showing that “[n]egligence is the norm in suits seeking redress for ground damage inflicted by aircraft”).

The willingness of courts to grant protection from strict liability through the flexible use of the concept of a common activity is also illustrated by the various nature of activities that have been deemed common by courts. For example, the *Restatement (Third)* mentions the following activities among many others as having been found common: operation of a dam; use of a back-hoe mounted pavement breaker; irrigation of crops; transportation of hazardous substances; storage of petroleum products; spraying of pesticides; spreading HIV through sexual contact; display of fireworks.<sup>19</sup>

Additional support for the view that courts are willing to characterize a wide array of activities as common is inferential. Notably, many types of accident are generally governed by the negligence rule even though they result from activities that appear to be comparable in danger to that associated with the standard area of strict liability of blasting. Consider, for instance, operating cranes (that can collapse or drop heavy objects) and managing petroleum products (that can cause fires and explosions).<sup>20</sup> Because these activities seem to involve risks similar to those from blasting, a natural surmise is that the reason that they are insulated from strict liability is that courts would consider them to be common.

In all, then, it appears that the uncommon activity requirement functions to protect a wide range of dangerous activities from strict liability because they are common.

### *B. The Rest of the World*

No country apart from ours appears to restrict strict liability through the uncommon

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<sup>19</sup> RESTATEMENT (THIRD), *supra* note 1, Reporters' Note, cmt. j. As is also reported *id.*, some of these activities (for instance, spraying of pesticides) have been found uncommon as well. But the point being advanced concerns the potential for courts to find activities common.

<sup>20</sup> These activities are generally subject to the negligence rule. On cranes, *see, e.g.*, J. H. Cooper, *Liability for injury or damage caused by negligent operation of crane, derrick, or the like*, 81 A.L.R.2d 473 (Originally published in 1962). On petroleum products, *see, e.g.*, Barron C. Ricketts, *Liability in connection with fire or explosion incident to bulk storage, transportation, delivery, loading, or unloading of petroleum products*, 32 A.L.R.3d 1169 (Originally published in 1970).

activity requirement. Consider first England.<sup>21</sup> The use of strict liability there grows out of the famous case of *Rylands v. Fletcher*<sup>22</sup> and requires that a party brought a thing onto his land that would pose a danger if it escaped and that its use was non-natural.<sup>23</sup> The interpretation of non-natural, though not unambiguous, centers on the creation of an unusually high risk.<sup>24</sup> Significantly, neither of two leading strict liability cases suggest that an activity resulting in an unusually large risk would be protected from strict liability if it were common,<sup>25</sup> and

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<sup>21</sup> What is to be stated about England largely pertains to Canada as well. *See, e.g.*, ALLEN M. LINDEN & BRUCE FELDTHUSEN, *CANADIAN TORT LAW* (10<sup>th</sup> ed. 2015), at ch. 14. In Australia, the role of strict liability is essentially non-existent; *see, e.g.*, MARTIN DAVIES & IAN MALKIN, *TORTS* (7<sup>th</sup> ed. 2015) at 3–4, 719–720. In New Zealand, the issue of strict liability is moot as to personal injury because that country abrogated the right to sue for such harm in 1974, when it established a general no-fault accident compensation scheme; *see, e.g.*, STEVEN TODD, URSULA CHEER, CYNTHIA HAWES & BILL ATKIN, *THE LAW OF TORTS IN NEW ZEALAND* (7<sup>th</sup> ed. 2016) at ch. 2. For property damage, however, New Zealand follows England; *id.* at 591–592.

<sup>22</sup> *See* 3 L.R.-E. & I. App. 330 (H.L. 1868). This decision of the House of Lords upheld that made on appeal in the case of *Fletcher v. Rylands*, 159 Eng. Rep. 737 (Ex. 1865), concerning John Rylands, an entrepreneur who created a reservoir on his property, and Thomas Fletcher, the owner of nearby coal mines. It happened that Rylands’ reservoir burst through an abandoned mine shaft, invaded Fletcher’s mines, and left them unusable. The House of Lords found Rylands responsible for the harm suffered by Fletcher even though Rylands was not at fault.

<sup>23</sup> There are other requirements as well (such as foreseeability of harm). On the requirements for strict liability associated with *Rylands v. Fletcher*, *see, e.g.*, SIMON DEAKIN, ANGUS JOHNSTON & BASIL MARKESINIS, *MARKESINIS AND DEAKIN’S TORT LAW* (7<sup>th</sup> ed. 2013), at 506–513; and EDWIN PEEL & JAMES GOUDKAMP, *WINFIELD & JOLOWICZ ON TORT* (19<sup>th</sup> ed. 2014), at 500, 504–506.

<sup>24</sup> DEAKIN, et. al., *supra* note 23, at 509–512; and PEEL & GOUDKAMP, *supra* note 23, at 504–506.

<sup>25</sup> In one of these cases, *Rickards v. Lothian*, (1913) 16 C.L.R., a water overflow from a fourth floor bathroom in a commercial building damaged books in a dealer’s storeroom two floors below. The defendant manager of the building was not found negligent (the bathroom was well-maintained; a malicious interloper had caused the overflow) and strict liability was not imposed because the risk generated by the normal operation of a bathroom is not high. There is no suggestion in the opinion that if the use or storage of water in the bathroom had been unusually dangerous for some reason, the defendant would not have been held strictly liable. The other case, *Cambridge Water Company v. Eastern Counties Leather PLC* (1994) 2 AC 264, concerned the pollution of water in the city of Cambridge caused by a chemical used in a tanning process by Eastern Counties Leather (E.C.L.), which was located in the small industrial village of Sawston a few miles away. The main finding in the case was that E.C.L. would not be held strictly liable because it could not have reasonably have foreseen that its chemical would cause pollution harm. However, the court noted, *id.* at 270, that the operation of tanneries in Sawston was a common activity, where tanneries had been present for over 350 years. Further, the court stated at 309, that if E.C.L. had foreseen the risk it created, then it would have been held strictly liable: “I cannot think that it would be right . . . to exempt E.C.L. from liability under the rule in *Rylands v. Fletcher* on the ground that the use was natural or ordinary. The mere fact that the use is common in the tanning industry cannot . . . be enough to bring the use within the exception. . . . Indeed, I feel bound to say that the storage of substantial quantities of chemicals on industrial premises should be regarded as an almost classic case of non-natural use. . . .” In other words, the court stated that the common nature of the activity carried out by a tannery in Sawston would not insulate the tannery from strict liability due to the danger it

authoritative treatises on English tort law make no mention of an analogue to the uncommon activity restriction.<sup>26</sup>

In the codes of civil law countries, there does not seem to exist any principle corresponding to our uncommon activity requirement for the imposition of strict liability. The most influential codes are those of Germany and France. Under the German civil code, tort liability is based essentially on fault—the code contains no broad provisions imposing strict liability and includes only one, minor, strict liability provision governing harms done by non-domestic animals.<sup>27</sup> Hence, for all intents and purposes, strict liability in Germany is the province of the legislature,<sup>28</sup> mooted the issue of the principles under which strict liability is imposed by courts.

In France, the civil code has been interpreted in a striking manner, such that strict liability has become more important than the negligence rule. This result has come about because strict liability tends to apply when harms are caused by things under one's control, where the view of "things" is broad.<sup>29</sup> There is certainly no restriction of strict liability to uncommon activities—

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created (if it had foreseen the danger). This view of the court seems in direct contradiction to the uncommon activity requirement in the United States.

<sup>26</sup> See DEAKIN, et. al., *supra* note 23, at ch. 16; and PEEL & GOUDKAMP, *supra* note 23, at ch. 16. To be clear, these two treatises do discuss in various ways the point that common activities are normally not very dangerous and that, when so, under English law these common activities are generally not subject to strict liability. This obviously does not imply that *if* a common activity is conducted in circumstances under which it is known to be very dangerous that it would escape the imposition of strict liability.

<sup>27</sup> See, e.g., CHRISTIAN VON BAR, NON-CONTRACTUAL LIABILITY ARISING OUT OF DAMAGE CAUSED TO ANOTHER (2009), at 561 ("German law does not recognize a general rule of strict liability for things or for people; nor does it contain a general provision on strict liability for dangerous things or activities. The Civil Code does, however, envisage strict liability for certain animals (CC § 833 first sentence).") These are so-called luxury animals as opposed to domestic animals; for details, *see id.* at 679–680. See also KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW (3<sup>rd</sup> ed. 1998), at 653.

<sup>28</sup> VON BAR, *supra* note 27, at 561; ZWEIGERT AND KÖTZ, *supra* note 27, at 653.

<sup>29</sup> See, for example, ZWEIGERT AND KÖTZ, *supra* note 27, at 659–666. Strict liability grew out of a series of decisions of the French Supreme Court, under which it has become "virtually unnecessary . . . to have special statutes to introduce strict liability for defined types of accident. . . . 'Thing' . . . includes every corporeal object. The

indeed, the most influential decision resolving the principles under which strict liability would be imposed concerned a very common activity, driving a delivery truck.<sup>30</sup>

I have considered the civil codes or sources on them of a wide array of civil law countries in addition to those already mentioned—Brazil, China, Egypt, Japan, Mexico, the Netherlands, the Nordic countries, Russia, Spain, and others. In none does one find a doctrine similar to our uncommon activity requirement exempting common activities from strict liability.<sup>31</sup>

## II. THE SOCIALLY DESIRABLE IMPOSITION OF STRICT LIABILITY

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composite form of the object is immaterial: fluids and gases are included, as are radioactive materials and energized wires. . . . Motor cars, trains, ships, and elevators are ‘things’. . . just as much as a board with a protruding nail. . . or a trapdoor in a dark stairway.” *id.* at 661.

<sup>30</sup> The case at issue, *Jand’heur v. Les galleries belfortaises*, Cass. ch. réun. 13 Feb. 1930, DP. 1930 I.57, concerned an accident in which a delivery truck driven by an employee of a department store struck a young girl. Negligence on the part of the employee driver could not be shown, but liability was imposed. *See, e.g.*, Edward A. Tomlinson, *Tort Liability in France for the Act of Things: A Study of Judicial Lawmaking*, 48 LOUISIANA L. REV. 1299, 1338–1341 (1988).

<sup>31</sup> On strict liability in European civil law countries, including Austria, Belgium, Bulgaria, France, Germany, Greece, Hungary, Italy, Luxembourg, the Netherlands, the Nordic countries, Portugal, Slovenia, and Spain, see the detailed treatment in VON BAR, *supra* note 27, at ch. 3, section 2: Accountability without intention or negligence, at 632–746. This source discusses areas in which strict liability would often be imposed on common activities (such as on owners of buildings and other man-made structures that collapse or from which parts fall, at 656–672; on keepers of animals, at 673–686; and on firms for damage caused by dangerous substances or emissions, at 718–735); it makes no mention of any code provisions or judicial practices that would protect dangerous activities from strict liability specifically because they are common. I now cite the codes and key strict liability provisions, if they exist, in a number of other civil law countries, in none of which do I find provisions limiting strict liability to uncommon activities per se. On Brazil, *see* Civil Code of Brazil, 2014 Edition; enacted Jan. 10, 2002; English translation by Julio Romanach, Jr.; the primary provisions addressing strict liability include article 927, addressing in part intrinsically risky activities, article 936, concerning harm done by animals, and article 938, regarding objects falling from buildings and the collapse of buildings. On China, *see* Tort Law of the People’s Republic of China, Decree of the President of the People’s Republic of China, No. 21, which came into force July 1, 2010; English translation at <http://blog.tianya.cn/post-3180104-26513698-1.shtml>; the main provisions imposing strict liability include ch. IX, on ultra hazardous activities, and ch. X, on harms done by domestic animals. On Egypt, *see* Civil Law, Law No. 131 of 1948, English translation in Nicola H. Karam, *Business Laws of Egypt*, v. 3 (7<sup>th</sup> ed. 1991); the major provisions imposing strict liability include article 176, for harms done by animals, and article 178, regarding especially risky things. On Japan, *see* Minpo [Civil Code], Law No. 89 of 1896, as amended, Sec. 709, Ministry of Justice translation, at <http://www.moj.go.jp/content/000056024.pdf>; ch. 5, addressing torts, is essentially based on fault, mooted the issue of the imposition of strict liability. On Mexico, *see* Federal Civil Code, modified in 2010, at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=199821](http://www.wipo.int/wipolex/en/text.jsp?file_id=199821) [html version allows English translation]; article 1913 imposes strict liability for especially dangerous activities. On Russia, *see* Civil Code of the Russian Federation, modified in 2011, at <http://www.russian-civil-code.com>; the main provision imposing strict liability is article 1079, concerning for extra hazardous activities.

In order to evaluate the desirability of the uncommon activity requirement for the use of strict liability, we must of course refer to an underlying social objective, for only then can we clearly identify the socially desirable imposition of forms of liability and discern whether the requirement promotes or stands in its way. It will generally be presumed here that the social goal is broadly utilitarian in nature, involving as a positive element the benefits parties obtain from their activities and as negative elements the costs of care<sup>32</sup> that parties exercise to lower risks and the harms that eventuate despite the taking of care.<sup>33</sup> Focusing on this stylized measure of social welfare is sensible because its determinants are of obvious relevance to social well-being and because it permits us to achieve a measure of analytical clarity.<sup>34</sup>

We will now review reasons why strict liability would be expected to be superior to the negligence rule as a means of inducing potential injurers<sup>35</sup> to beneficially reduce accident risks,<sup>36</sup> qualifications to this argument concerning the behavior of potential victims, and then why the dangerousness test for imposing strict liability serves to promote the lowering of accident risks.

#### *A. The Risk-reduction Advantage of Strict Liability*

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<sup>32</sup> The terms “care” and “precautions” will be used synonymously.

<sup>33</sup> That is, the goal is taken to be the total benefits parties derive from their activities minus the costs of precautions and the harms (or more exactly, the expected harms—see *infra* note 36) that are generated.

<sup>34</sup> Among the factors that are not incorporated in the foregoing social goal is litigation costs. Consideration of these costs would not, however, systematically disfavor either strict liability or the negligence rule, as is explained in Part IV *infra*. The social goal that is employ here abstracts as well from the compensatory objectives of tort law (which tend to favor strict liability) and from the positive moralistic weight that some might attach to the use of the negligence rule per se.

<sup>35</sup> These parties will often be referred to simply as injurers.

<sup>36</sup> By “accident risks” or “risks” I refer to both the probability of an accident and to the magnitude of the harm that would occur if an accident eventuated. In particular, I will usually mean by accident risks “expected harm,” which is defined as the probability of harm multiplied by its magnitude (assuming for simplicity that if an accident occurs, the magnitude of harm would have just one value). Thus, if the probability of an accident is 3% and the harm that would result in an accident is \$100,000, the expected harm would be 3% x \$100,000 or \$3,000. This expected harm figure can be interpreted as the average harm that would be sustained were the activity involving the 3% risk of a \$100,000 harm undertaken repeatedly.

As noted in the introduction, strict liability should lead to better risk reduction by injurers than the negligence rule for two reasons, one relating to levels of care and the other to their levels of activity. These reasons are now taken up in turn.<sup>37</sup>

Levels of care. The argument that is advanced here is that under strict liability, injurers will tend to be motivated to choose all types of care appropriately, whereas under the negligence rule, injurers will be encouraged to choose only some types of care properly—only those types of care that are well incorporated into the negligence determination, not the types of care that are poorly governed by the courts or are left unexamined by them.<sup>38</sup>

By care, I mean risk-lowering actions that promote safety when a party is engaged in a potentially harmful activity. In general, parties can exercise in a multiplicity of ways. Drivers can not only control their speed, they can also monitor their side and rear-view mirrors, scan ahead for danger, and select safe routes. Firms conducting blasting operations can not only construct safety barriers, they can also better select and train their employees and improve warnings to potential victims.

Under the assumed social objective, it would be best for a party to adopt an element of care when its cost is less than the reduction in expected harm that the precaution would bring

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<sup>37</sup> For ease of exposition, I do not consider the role of victims in accidents in Part IIA (I do so in Part IIB *infra*), but, as was noted earlier, the reader should interpret the term strict liability as strict liability with a defense of contributory or comparative negligence. The arguments that are made here and in Part IIB will for the most part be well-known to readers familiar with economically-oriented analysis of tort law, to which reference will be made.

<sup>38</sup> This general point about the inadequacy of the negligence rule as a means of controlling care in its many dimensions, in contrast to the ability of strict liability to induce proper care in all its dimensions, is made in STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 9 (1987), and STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF ACCIDENT LAW* 181–182 (2004). It is explained here in amplified form. In any event, the point is a generalization of the often-made observation that evidentiary problems in applying the negligence rule are not problems for use of the strict liability rule. A perspicacious example of this observation is found in OLIVER WENDELL HOLMES, *THE COMMON LAW* 117 (1881), where, in discussing *Rylands v. Fletcher*, Holmes states that “as there is a limit to the nicety of inquiry which is possible in a trial, it may be considered that the safest way to secure care is to throw the risk upon the person who decides what precautions shall be taken.”

about.<sup>39</sup> Thus, if the cost in effort to a driver of frequently checking his or her mirrors is modest and would significantly reduce accident risks, this precaution would be socially desirable; or if the cost to a firm of a safety barrier is less than the savings in expected harm that it would generate, the barrier would be socially desirable. More generally, the best level of care (how frequently a driver should monitor the mirrors, how many safety barriers should be constructed) is determined similarly.<sup>40</sup> That is to say, the conception of socially desirable care that I am discussing is the familiar one that courts customarily employ, of balancing the burden of the exercise of care against its benefits in terms of risk–reduction.<sup>41</sup>

What decisions about care will in principle be made under liability rules? *Under strict liability injurers will naturally be led to choose all dimensions of care in a socially correct manner (whether to take care, at what level).* The logic is simply that, for any type of care, injurers will be motivated to compare its cost to the reduction in expected harm that the precaution would generate—for injurers will bear any harm that they cause on account of their liability for it. If a strictly liable blasting firm contemplates spending \$1,000 on a safety barrier

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<sup>39</sup> As was stated, the social objective is the benefits individuals obtain from their activities less the sum of the costs of care and of expected harm. The question at issue now concerns whether a party should take care, not whether the party should engage in his or her activity (in other words, the benefit that the party obtains from the activity is taken as fixed). Hence, the party should take a precaution if and only if that would lower the sum of the costs of care and expected harm, which is to say, if and only if the costs of care would lower expected harm by more than those costs.

<sup>40</sup> To determine the optimal level of care, one considers the question whether it is desirable to increase the level of care. For instance, if a blasting company already has installed one safety barrier, then constructing a second barrier would be socially desirable if its cost is less than the expected reduction in harm that it would generate *given* that the first barrier is already in place.

<sup>41</sup> This is the balancing that is done according to the Hand Formula, indicating that care ought to be taken if its burden  $B$  is less than the expected harm that care eliminates, namely,  $PL$ , where  $P$  is the reduction in the probability of suffering a loss  $L$ . See Judge Learned Hand's opinion in *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947) and RESTATEMENT (THIRD), *supra* note 1, § 3 cmt. e, stating that the determination of negligence “can also be called a “cost-benefit test,” where “‘cost’ signifies the cost of precautions and the ‘benefit’ is the reduction in risk those precautions would achieve” and where “the phrase ‘magnitude of the risk’ includes both the foreseeable likelihood of harm and the foreseeable severity of harm that might ensue.”

and this would lead to a \$5,000 savings in expected harm, the firm would be induced to construct the barrier, as is socially desirable.<sup>42</sup>

It should be emphasized that this logic explaining why injurers will generally tend to exercise correct care does not depend on the court's having this or that knowledge about care—about its cost or effectiveness in reducing risk, about the level of care actually taken, or about types of care that can be taken. The only knowledge that courts must have to apply strict liability is the magnitude of the harm that came about.<sup>43</sup>

The conclusion is quite different when the other principle of liability governs. *Under the negligence rule, the exercise of care will often be improper—inadequate or excessive, depending on circumstances.* The general reason is that in considering care, courts will frequently encounter informational difficulties in applying the negligence rule.<sup>44</sup> One possibility is that judicial knowledge about the costs or the benefits of care will be imperfect. This could lead a court to set a due care standard that is lax (suppose the costs of employee safety training are judged to be higher than they truly are or the benefits lower) or to set an excessive standard (suppose the opposite). Accordingly, parties might be led to take either inadequate or unnecessarily high care depending on the character of the court's imperfect information.

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<sup>42</sup> Note too that if constructing a second barrier also would cost \$1,000 but would only reduce the expected harm by \$500 given the presence of the first barrier, then the second barrier would not be installed (the firm would rather bear \$500 more in expected liability payments than to spend another \$1,000 on a barrier). Thus the level of care taken by the firm would be one barrier, which would be the socially optimal level.

<sup>43</sup> I abstract from issues of causation in this Part.

<sup>44</sup> In the absence of such difficulties, the negligence rule will result in proper care being taken, presuming that the level of due care is set by the courts at the optimal level. Consider the following example. A blasting firm can construct a safety barrier that would cost \$1,000. If it does not do so, expected harm will be \$20,000, and if it does so, expected harm will fall to \$15,000, by \$5,000. Hence, it is socially desirable for the barrier to be constructed. If constructing the barrier is deemed due care, then the firm will be induced to provide the barrier: if it does not it would be negligent, so that its expected liability would be \$20,000; whereas if it erects the barrier, its expenses will be only \$1,000 as it will be free of liability. The important point just illustrated, that if due care is chosen optimally, rational actors will be induced to take due care, was first clearly stated and demonstrated in John Prather Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323, 340–342 (1973).

Another possibility is that courts may incorrectly assess the level of care actually taken, such as a driver's speed. The prospect of such errors in measuring the level of care that was taken can also result in the exercise of incorrect levels of care.<sup>45</sup>

An additional possibility is that courts may have insufficient information even to consider a dimension of care. Notably, a court might be unable to observe a level of care (how frequently a driver checks the mirrors), might be unaware of the existence of a type of care (a new test that a firm engaged in blasting could have employed to predict dangers), or might have such poor information about the costs and benefits of a dimension of care (what route a driver should have taken to lower accident risks) that determination of due care as to it would be considered too conjectural to undertake. The negligence rule will have no effect on the exercise of such unpoliced dimensions of care.<sup>46</sup>

Levels of activity. The point explained in this section is that under strict liability injurers will be led to moderate participation in their activities in a way that appropriately reflects the dangers that the activities create. But under the negligence rule, that will not be true—injurers will fail to curb their levels of activity consistently with the dangers that they generate, and their levels of activity will thus tend to be socially excessive.<sup>47</sup>

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<sup>45</sup> In particular, under plausible conditions such errors can induce parties to take excessive care to guard against the possibility of being found mistakenly negligent. See originally, John Calfee and Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. LAW REV. 965 (1984); see also SHAVELL (1987), *supra* note 38, at 79–81 and 93–96.

<sup>46</sup> To be clear, this statement is correct if injurers know in advance that a dimension of care will be unpoliced. If injurers instead believe only that there is a probability that a dimension of care will be unpoliced, injurers will often have an inadequate liability-related incentive to take care rather than no such incentive.

<sup>47</sup> The general points made here about the contrast between strict liability and negligence in governing parties' levels of activity (both of injurers and of victims) are first developed in Steven Shavell, *Strict Liability versus Negligence*, 1, 9 J. LEGAL STUD. 1 (1980). See also discussions of these points in LANDES & POSNER (1987), *supra* note 9, at 54–77, 107–122; SHAVELL (1987), *supra* note 38, at 5–51, 64–66; and SHAVELL (2004), *supra* note 38, at 177–212; and see Jones, *supra* note 18, at 1715–1751 (emphasizing the advantages of strict liability in controlling injurer behavior in different areas of accident).

To elaborate, by a party's level of activity, I mean, for example, the number of miles an individual drives or the number of times that a firm makes use of blasting to excavate construction sites. The level of activity is distinct from the level of care that a party exercises when engaged in an activity. Obviously, both aspects of behavior influence risk: the more care that is taken each time a party engages in an activity, the less the risk in that instance; and the greater the number of times the party engages in the activity, the higher will be the accumulated risk.

The socially desirable level of activity reflects, on one hand, the benefits that a party obtains from his or her activity and, on the other, the costs of care taken in the activity and the expected harm that it generates. The sum of the costs of care and the expected harm will be referred to as the social costs of an activity. It is socially best for an activity to be carried out as long as increasing its level generates greater benefits than the incremental social costs.<sup>48</sup> But once the point is reached at which the added benefits would begin to exceed the extra social costs, there should be no further increase in the level of activity.

It is apparent that *under strict liability, an injurer will choose the socially desirable level of activity*. The reason is that, in deciding whether to increase his or her level of activity, a strictly liable party will make the socially desirable comparison between the benefits obtained and the social costs, including the harm done to others, for the party will bear the harm under strict liability. If a driver contemplates making a trip to the grocery store on a rainy night when visibility is poor, the driver will weigh the benefits from shopping in that instance against the costs of the trip, taking into account the expected harm to others on such a night because the

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<sup>48</sup> For example, suppose the cost to a driver of taking optimal care on a trip is \$50 and the expected harm generated by the trip is \$70. Then the total social costs generated by the trip would be \$120, so that it would be optimal for the driver to make trips as long as the benefit to the driver exceeded \$120.

driver will be liable for it. Accordingly, the driver will in principle make a socially desirable decision whether to make the trip to the grocery store. Likewise, if a construction firm considers whether to blast to excavate a site, it will weigh the benefits from so doing against the costs, including the expected harm from blasting as it will be liable for such harm. Hence, the firm should be led to make the socially desirable decision whether to blast.

In contrast, *under the negligence rule, the level of activity will tend to be socially excessive—because parties who are not negligent do not pay for harms that their activities nevertheless cause.* This basic disadvantage of the negligence rule is essentially a corollary of what was just explained about strict liability. Under strict liability, parties to choose the right level of activity because they bear the harm that their activity generate. But by definition of the negligence rule, parties do *not* bear the harm that their activity causes—for as long as they act with due care when engaging in an activity, they will not be held liable for harm that occurs. The driver contemplating a trip to the grocery store on a rainy night will not take into account the harm that might result, knowing that if he or she drives with appropriate care, there would be no liability for harm. Hence, the driver might decide to make the trip when that would not be socially desirable.<sup>49</sup> Similarly, the construction firm might decide to blast when that would not be socially desirable if it were subject only to the negligence rule.

The importance of the excessive activity level problem under the negligence rule will be greater the larger is the risk of harm, for the source of the problem is that the actor does not take into account the harm that occurs despite the exercise of due care. In many contexts, there will be

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<sup>49</sup> In the example of the previous note, the driver would be induced to take due care on any trip and thus would bear \$50 in costs. But being non-negligent, the driver would not bear any of the expected harm of \$70 caused by each trip. Hence, the driver would regard the cost of a trip as only \$50 instead of its total social cost of \$120. If the driver's benefit from the trip exceeded \$50 and was less than \$120, the driver would elect to make the trip even though that choice would be socially undesirable.

an appreciable risk of harm even though due care is taken (especially because the use of the negligence rule will not adequately control all dimensions of care, as discussed in the previous section). Where, however, the exercise of due care would eliminate the chance of most harm, the problem of excessive activity levels under the negligence rule would not be of significance.<sup>50</sup>

*B. The Risk-reduction Advantage of the Negligence Rule*

Having discussed why strict liability should be superior to the negligence rule as a means of inducing injurers to exercise precautions and to temper their levels of participation in dangerous activities, let me now explain why the negligence rule is in principle superior to strict liability as a means of inducing *victims* to exercise precautions and to curb their levels of participation in activities that expose them to risks. These incentive merits of the negligence rule will sometimes be called *mirror-image* advantages because they are in a sense dual to the advantages of strict liability regarding the behavior of injurers.

In what follows, it will be supposed that the defense of contributory negligence (or of comparative negligence) accompanies strict liability and the negligence rule. This assumption was suppressed in the discussion in Part IIA above, as was noted, but here, since the focus is on the behavior of victims, we will be explicit about it.

Consider first *care levels of victims*, and for concreteness, imagine the victims to be pedestrians who might be injured by cars. Under the negligence rule, victims will in theory be led to take appropriate care in all dimensions of care that they can exercise. The logic is that

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<sup>50</sup> A final observation should be made about the problem that the negligence rule fails to appropriately control the injurer's level of activity. Namely, this problem can be viewed as deriving from the fact that, according to its conventional definition, negligence is failure to take adequate *care* when engaging in an activity—but negligence is not inappropriately *engaging in an activity*. See RESTATEMENT (THIRD), *supra* note 1, cmt. j, stating that “claims of negligence that focus on the actor’s entire activity are uncommon.” The reason for this in turn may plausibly be ascribed to the problem that courts lack the information needed to determine socially desirable levels of activity, as suggested in Shavell, *supra* note 47, at 22–23, and SHAVELL (1987), *supra* note 38, at 25–26, 50–51.

since drivers will be induced to take due care,<sup>51</sup> they will not be liable for accidents that still occur. Pedestrians will realize that this is so and therefore will bear their own losses. For that reason, pedestrians will be motivated to exercise care optimally in every regard. Thus, for instance, a pedestrian might wear reflective clothing when on a walk at night or would take special precautions crossing a street where the pedestrian happens to know that oncoming vehicles do not have a good view of the crossing point.<sup>52</sup>

In contrast, under strict liability with a defense of contributory negligence, victims would be properly motivated to take only those types of care that would be well incorporated into the contributory negligence determination. Thus, although pedestrians would refrain from clearly contributorily negligent behavior, say darting out onto a road with substantial traffic, they might not be induced to take precautions that plausibly would not be examined in a contributory negligence determination, like wearing reflective clothing at night or taking special care at a crossing point where driver visibility is poor.

Now consider *levels of activity of victims*. Under the negligence rule, victims will be led to engage in activities that expose them to risk only to the socially appropriate extent. The logic is again that victims like pedestrians will bear their own losses because injurers like drivers will be led to act non-negligently. And because pedestrians will bear their losses, they will engage in their activities, such as crossing streets or walking along the road, only to the extent that the benefits to them outweigh the expected losses that they would suffer.<sup>53</sup>

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<sup>51</sup> This statement presumes that there is no uncertainty surrounding the negligence determination in regard to dimensions of care that courts consider.

<sup>52</sup> The incentives of pedestrians to which I refer in this and the next several paragraphs are only the financial incentives related to the choice of liability rules. Other incentives, notably, the desire not to be injured, are of clear importance to pedestrian behavior, and I will shortly comment on them.

<sup>53</sup> To amplify, it is socially desirable for a pedestrian to walk along a road if the benefit from so doing, say, \$50, outweighs the cost of exercising appropriate care, say \$10, plus the expected harm. Thus, if the expected harm were

Under strict liability, however, pedestrians will engage excessively in their activities. For as long as pedestrians exercise due care in order to avoid findings of contributory negligence, they will be compensated for their losses by drivers. Hence, pedestrians will walk too many miles, exposing themselves to socially excessive risk.<sup>54</sup>

The foregoing mirror image risk-reducing advantages of the negligence rule with respect to victim behavior could in principle be more important than the advantages of strict liability with regard to injurer behavior.<sup>55</sup> Thus, on purely a priori grounds, one cannot say that strict liability is superior to the negligence rule in encouraging socially desirable risk-reduction. The choice between the rules can be regarded as a contest between the advantage of better control of injurer behavior under strict liability and the advantage of better control of victim behavior under the negligence rule.<sup>56</sup>

However, empirical intuitions suggest that strict liability is usually superior to the negligence rule as an instrument for the control of risk. To think otherwise is, crudely, to adopt the view that it is generally more important to control risk-reduction by potential victims of harm than by potential injurers. That view is facially unappealing, and on reflection, several

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\$70, the walk would not be socially desirable. Further, since the pedestrian bears losses suffered under the negligence rule, the pedestrian would not go on the walk, since his or her benefit of \$50 would be exceeded by the \$80 total expected expenses. But if the expected harm from the walk were only \$20, then the walk would be socially desirable, and the pedestrian would go on it, as his or her expected expenses would be only \$30.

<sup>54</sup> In the example from the previous note, the pedestrian would go for a walk in the first case where the expected harm from the walk is \$70 and the walk is socially undesirable; for the pedestrian's only cost would be the cost of care of \$10, which is less than the \$50 benefit from the walk.

<sup>55</sup> For example, suppose that there are no advantages of strict liability in controlling injurer behavior. This would be true, for instance, if there were just one dimension of injurer care that was perfectly addressed by the negligence rule; and if taking the socially desirable level of this care eliminated the possibility of accidents. Then the issue of an excessive injurer activity level would be moot. Accordingly, a mirror image advantage of the negligence rule with regard to victim behavior could make that rule superior.

<sup>56</sup> This issue is analyzed in Shavell, *supra* note 47, at 17–22, and SHAVELL (1987), *supra* note 38, at 26–32.

specific reasons can be offered for why the risk–reduction advantages of strict liability in governing injurer behavior exceed those of the negligence rule in regulating victim behavior.<sup>57</sup>

The first concerns the dimensions of care that are poorly policed or left unpoliced by courts. In most accident situations it seems that injurer dimensions of care are greater in number and complexity, and thus more difficult for courts to consider, than victim dimensions of care. This implies that strict liability will be more valuable to employ in order to better control injurer care than the negligence rule will be valuable in order to better control victim care. For example, in blasting, a firm’s dimensions of care will include the selection and training of employees, analysis of the rock that needs to be broken up, the type and quantity of explosive that is to be employed, the location of explosive charges, and the nature of the warnings given to potential victims. But for the potential victims, the dimensions of care would typically be fewer in number, principally only avoiding proximity to the blasting site or taking precautions to protect property damage. These types of care for victims can probably be reasonably well considered in a contributory or comparative negligence determination, meaning that the use of strict liability will not much compromise victim care. But strict liability will often be needed to control some of the dimensions of the blasting firm’s care given their number and character. In most accident settings that I have contemplated, similar observations to those just made about blasting are relevant, supporting the view that strict liability is more important to utilize so as to control inadequately policed elements of the care of injurers than negligence is to employ to control inadequately policed elements of the care of victims.

An additional argument supports the view that the use of the negligence rule is not much needed to stimulate care by victims. Namely, the risk that victims face often often includes

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<sup>57</sup> These are also illustrated by my consideration in Part IIIC *infra* of accident settings concerning driving, hunting, and rail transport of hazardous materials.

serious physical injury, including death. This type of danger suggests that victims may have a reason to exercise care that would dominate in importance liability-related financial considerations.<sup>58</sup> Hence, the effect of liability rules on victim care may well be of second-order importance, implying that the advantages of strict liability in controlling injurer care should be of focal interest to us. Nevertheless, if the risk of harm to victims is purely to their property, the point under discussion would not be relevant; my surmise, though, is that accident contexts in which the risk of physical injury to victims are important, and to that extent the argument I have sketched in this paragraph is applicable.

The argument of the preceding paragraph also suggests that victims' choice of activity levels will not be much affected by the choice of liability rules. That is, if risk includes serious physical injury, victims will wish to moderate their exposure to risk by reducing their activity levels largely independently of liability-related financial considerations. Hence, the advantage of strict liability in moderating injurers' activity levels should guide our thinking about activity levels, unless the risk of harm to victims is primarily to their property.

Whether or not it is correct that strict liability tends to be superior to the negligence rule for the reasons discussed in this and Part IIA, society can of course choose which rule to employ based on the character of cases. There is no need for us to choose strict liability over the negligence rule or the reverse in extremely broad categories of case; the courts can decide between the rules on the basis of observable characteristics of cases.

### *C. The Virtue of the Dangerousness Test for the Imposition of Strict Liability*

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<sup>58</sup> Financial compensation often does not make a victim nearly whole if he or she has suffered serious physical injury and presumably could not make up for death. Let the utility of a potential victim be  $u(y)$  in the absence of an accident and  $u(y) - d$  if an accident occurs, where  $y$  is wealth and  $d$  is the disutility of the injury. Suppose that  $u(y)$  is bounded from above by some  $u^*$ . Such a bound must exist under the standard assumptions of expected utility theory—see KENNETH J. ARROW, *ESSAYS IN THE THEORY OF RISK-BEARING* (1971) at 63–65. Then if  $d > u^*$ , there is no amount of compensation that would make the victim whole after an injury.

As the reader knows from Part IA, the first requirement for the use of strict liability is that the dangerousness test be satisfied, that an activity generates substantial risks even when conducted in a non-negligent manner.<sup>59</sup> It is observed here that this test helps to single out activities for which the risk-reduction advantage of strict liability over the negligence rule could be large and thus provides a way of distinguishing activities for which imposing strict liability could add meaningfully to social welfare.

When an activity passes the dangerousness test, the implication is that there is a potential for substantial risk-reduction to occur if strict liability is employed rather than the negligence rule. The large risk that exists under the negligence rule signals the possibility that the risk could be measurably reduced under strict liability through the two channels that were discussed in Part IIA: by injurers' taking greater levels of types of care that are inadequately policed under the negligence rule, and by injurers' reducing their levels of engagement in the harmful activity. If there are many accidents in which cars injure bicyclists under the negligence rule, use of strict liability could significantly lessen these risks by inducing drivers to take greater notice of bicyclists and to drive fewer miles on roads where bicyclists are present. Of course, the possibility of such risk reduction through application of strict liability does not guarantee that it will come about; thus satisfaction of the dangerousness test furnishes only an approximate prediction of the substantiality of risk reduction benefits that would follow from use of strict liability.

When an activity does not satisfy the dangerousness test, there will not be much potential for further risk-reduction to occur if strict liability is employed—simply because of the

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<sup>59</sup> What I mean by a “non-negligent manner” is a manner that courts would usually find non-negligent in fact. Notably, I do not refer to how safe an activity would be if parties took *all* the precautions that would be required in the ideal (that is, if an omniscient court policed every conceivable precaution). It is the risk that accompanies an activity when conducted non-negligently as courts *practically determine negligence* that bears on the argument I am about to make concerning the potential for strict liability to improve safety.

mathematical fact there will be little room for an already low risk to be decreased. If the activity of walking causes essentially no harm to others when undertaken with reasonable attentiveness, how much more could that limited harm fall if strict liability were employed rather than the negligence rule?

Because the dangerousness test indicates when there is a potential for significant risk reduction, use of the test to impose strict liability makes rough functional sense. In particular, if we presume, as I do in this Article, that society wishes to employ the negligence rule as the default form of liability for some reason, then it would be rational for society to deviate from that rule and to employ strict liability if the probable social benefits from enhanced risk reduction meet a hurdle represented by the dangerousness test.

### **III. THE RESTRICTION OF STRICT LIABILITY TO UNCOMMON ACTIVITIES IS SOCIALLY UNDESIRABLE**

#### *A. The Logical Error in the Uncommon Activity Requirement*

Let it be assumed here that, for the reasons just discussed, the dangerousness test serves to identify accident contexts in which the imposition of strict liability rather than the negligence rule would be socially beneficial because of superior reduction of accident risks. Under that hypothesis, the use of the uncommon activity restriction on the imposition of strict liability will be shown to be socially undesirable.

To demonstrate this conclusion, consider an actor involved in an activity that is very dangerous under the negligence rule despite the exercise of due care. Hence, according to the hypothesis, the risk generated by the actor would be socially desirably lowered if strict liability were imposed on the actor. The reasoning that led to this conclusion was, by its nature, concerned with the influence of strict liability on the behavior of the *particular actor* in

question—the reasoning was patently unrelated to the absence or to the presence of *other actors* who might be engaged in the same activity.

For instance, a firm involved in blasting might not furnish proper safety instruction to its employees under the negligence rule because of problems courts would face in observing the level of safety training, but the firm would do so under strict liability whenever the costs of instruction are less than the resulting savings in payments for expected harm. Manifestly, the possible presence of *other* firms engaged in blasting has no bearing on the comparison that the firm in question makes of its training costs to its savings in payments for expected harm; the firm in question will provide training under strict liability if *its* costs are less than *its* savings in payments whether there are no other firms that blast, a few such firms, or so many that their blasting activity would be considered common.

Accordingly, it must be that the socially salutary effect of strict liability that we are presuming exists for the actor in question who meets the dangerousness test holds whether or not the actor's activity is common. In other words, the uncommon activity restriction on the imposition of strict liability is socially undesirable; the restriction can cause society to forfeit social gains from risk reduction for no relevant reason.

It should be noted that the foregoing argument against the uncommon activity restriction is, on reflection, quite general; it is not contingent upon my having viewed reduction of risk as the social advantage of strict liability. Under *any* conception of social welfare for which the answer to the question, “Is it desirable to impose strict liability on an actor?” depends only on *that* actor's behavior and only on those individuals who might suffer harm from that actor, we would arrive at the conclusion that the uncommon activity restriction would be socially undesirable. For then the social desirability of imposition of strict liability on an actor cannot be

influenced by the presence of other actors who are engaged in the same activity as the actor under consideration.<sup>60</sup>

*B. The Perverse Consequences of the Uncommon Activity Requirement*

The mistaken view that common dangerous activities should be exempted from strict liability is peculiarly consequential because it means that society sacrifices its ability to beneficially reduce accident risks many times over. As was observed in the introduction, since common activities are by definition activities that are undertaken often (or that are pervasive within a community), the effect of the uncommon activity requirement is to make society suffer from heightened accident risks frequently. This point will be illustrated shortly in Part IIIC in the discussion of examples of common dangerous activities.

A corollary of the preceding criticism is the observation that if the uncommon activity requirement were reversed—if the requirement for imposition of strict liability was that an activity must be common and thus that strict liability could not be imposed on uncommon activities—society would be better off. For then strict liability would be employed where it would often make a difference to risk rather than where it would seldom make a difference. Suppose, for example, that the uncommon activity of owning poisonous snakes as pets is just as dangerous to a snake owner's neighbors as is the common activity of driving cars is to bicyclists. Then society would be better off if our tort doctrine exempted the few owners of poisonous

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<sup>60</sup> To clarify this more general argument, suppose that there are a number of actors engaged in the same activity; call the actors  $A_1, A_2, \dots, A_n$ ; and suppose that each actor  $A_i$  exposes a different group  $G_i$  of individuals to possible harm. Assume that social welfare is the sum of the welfares  $W_i$  enjoyed by each actor  $A_i$  and its potential victims  $G_i$ ; that is, social welfare is  $W_1 + W_2 + \dots + W_n$ , where  $W_i$  is some function  $F_i(A_i, G_i, r_i)$  with  $r_i$  denoting the legal rule (strict liability or negligence) applying to actor  $A_i$ . Then it is clear that if strict liability results in higher welfare than the negligence rule for any actor  $A_i$  and its group of potential victims  $G_i$ , social welfare will be maximized if strict liability is imposed on that actor  $A_i$  *regardless* of how many other actors  $A_j$  there are and regardless of whatever is the better form of liability  $r_j$  for them. Also, the welfare-related function  $F_i$  need not depend on incentives to take care and the number of accidents; it could for instance depend on views about appropriate compensation for loss, on litigation costs, or on conceptions of fairness; the only requirement made about  $F_i$  is that it depends solely on the actor  $A_i$  who might cause harm, the population  $G_i$  of potential victims of the harm that actor might generate, and the legal rule  $r_i$ —in other words, not on the  $A_j, G_j,$  and  $r_j$  for  $j \neq i$ .

snakes from strict liability than society is under our actual tort doctrine that instead exempts the multitude of drivers from strict liability for causing injury to bicyclists. (But, of course, society would be even better off if our tort doctrine exempted neither the owners of poisonous snakes nor the drivers from strict liability.)

*C. Examples of Common Dangerous Activities for which Strict Liability Would Be Desirable*

We now briefly examine three examples of dangerous activities that cannot be subject to the negligence rule because they are common. For each, reasons are offered to believe that risks would be beneficially reduced were strict liability employed, illustrating the main point of this Article.

*Driving.* Consider driving accidents involving pedestrians or bicyclists as victims.<sup>61</sup> Such accidents are due to obvious and substantial dangers generated by driving: motor vehicles are heavy and large machines that move at significant speed, whereas pedestrians and bicyclists are essentially unprotected from harm if a vehicle strikes them. These factors are reflected in injury and fatality data.<sup>62</sup> Driving is also a common activity. Hence, drivers who injure pedestrians or bicyclists are subject to liability only under the negligence rule.<sup>63</sup>

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<sup>61</sup> Driving accidents involving two motor vehicles are not considered because the notion of strict liability is problematic in that context, especially since both vehicles often sustain harm. This basic observation is presumably why no legal system of which I am aware attempts to define strict liability for two-vehicle accidents.

<sup>62</sup> During 2015 vehicle accidents in the country led to approximately 70,000 pedestrian injuries and 5,376 pedestrian deaths, and to about 45,000 bicyclist injuries and 818 bicyclist deaths. See TRAFFIC SAFETY FACTS, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, August 2016, at 4.

<sup>63</sup> See *supra* note 13 and, e.g., George Blum, 21 A.L.R. 5<sup>th</sup> (originally published 1994) *Instructions on “unavoidable accident,” “mere accident,” or the like in motor vehicle cases—modern cases*, at C. *Accidents Involving Pedestrians and Cyclists*, showing that where driver negligence is not at issue, drivers are not liable. In the civil law world, however, drivers are usually strictly liable for accidents in which pedestrians or bicyclists are harmed (assuming that these victims are free of fault); see, e.g., ZWEIGERT & KÖTZ, *supra* note 27, at 661, 665 on France and *id.* at 654–655 on Germany.

Why is it plausible that the risks drivers impose on pedestrians and bicyclists would be lower if driver liability were strict? It has been explained generally in Part IIA, with some reference to driving, that strictly liable actors would be motivated to increase dimensions of care that are inadequately policed by courts under the negligence rule. In particular, strictly liable drivers might refrain more frequently from using cellphones and from texting when on the road; they might be expected to pay greater attention to pedestrians who are particularly at risk and to such bicyclists; they might slow down more in parking lots, or when visibility is poor or the roads are slippery; for these aspects of care would often not be taken into proper account in a negligence determination.<sup>64</sup> Likewise, strictly liable commercial entities might devote more effort to screening their drivers' traffic records, skill levels, and character and might make greater investments in safety equipment (larger mirrors, higher quality rear view cameras, vehicles with sliding doors) than they would under the negligence rule.

Additionally, strictly liable drivers might reduce their levels of activity due to the risks that they create. In principle, drivers should reduce their miles driven because driving would be more expensive per mile.<sup>65</sup> More specifically, drivers might travel less along routes where or when they are especially likely to encounter pedestrian traffic or bicyclists. Other, more subtle effects, could also be predicted, such as consolidation of truck deliveries of goods,<sup>66</sup> delay of the

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<sup>64</sup> For example, a court might well not know whether a driver had been distracted by a cellphone conversation, causing the driver to swerve slightly to the right and hit a bicyclist riding alongside (there might be no one who witnessed either the cellphone use within the vehicle or that it swerved to the right).

<sup>65</sup> Liability insurance premiums generally reflect miles driven, and the premium rate per mile driven would rise under strict liability. Additionally, liability insurance coverage can be incomplete and insurers can refuse to continue to offer coverage after successful claims are brought—giving drivers further reasons to reduce miles driven under a strict liability regime.

<sup>66</sup> If trucks more frequently combine their loads, miles driven will fall, which will result in greater liability-related savings in a strict liability regime. Companies such as Amazon, Federal Express, and UPS could well be imagined to factor such considerations into their delivery practices.

age at which parents agree to give their children driving privileges,<sup>67</sup> and the like. The accretion of these effects would also be expected to reduce accident risks.

With regard to the behavior of pedestrians and bicyclists, strict liability would be accompanied by a defense of contributory or comparative negligence. Hence, in a strict liability regime, pedestrians and bicyclists would have a liability–related reason to exercise care where it can be well policed by courts. These individuals, though, would in theory have subpar liability-associated reasons to take types of care that courts could not adequately govern and would also engage in walking and bicycling activities to an excessive extent. A plausible intuition, however, is that such effects would be of minor importance, especially because of a qualifying factor that was noted in Part IIB—the risk of physical injury to potential victims. This risk seems so pronounced for pedestrians and for bicyclists that it should render marginal the influence of a change from the negligence rule to strict liability.

*Hunting.* The activity of hunting is self–evidently dangerous, both to hunters themselves and to other individuals who might be within their striking distance. Statistics on hunting–related injuries and fatalities bear out its risks.<sup>68</sup> Hunting is also an activity in which millions of Americans engage.<sup>69</sup> Because of its common nature, liability for hunting–related accidents is generally governed by the negligence rule.<sup>70</sup>

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<sup>67</sup> Liability and collision insurance premiums rise when minor children are added as drivers. In a strict liability regime, the increase in premiums would be greater than under the negligence rule.

<sup>68</sup> In 2013 (the latest year for which statistics were reported in the cited source), unintentional firearms fatalities in the United States were estimated to number 530 and injuries to have been 5,696; *see* FIREARMS–RELATED INJURY STATISTICS, 2015 EDITION, NATIONAL SHOOTING SPORTS FOUNDATION, at 2, 5. Available at [http://www.nssf.org/PDF/research/IIR\\_InjuryStatistics2015.pdf](http://www.nssf.org/PDF/research/IIR_InjuryStatistics2015.pdf).

<sup>69</sup> *Id.* at 5, observing that 17.5 million individuals hunted with firearms in 2014.

<sup>70</sup> *See, e.g.,* B. Fineberg, *Hunter’s civil liability for unintentionally shooting another person*, 26 A.L.R.3d 561 (Originally published 1969) §2[a]. But hunting accidents are often subject to strict liability in the civil law world; this is so, for example, in France—*see supra* notes 29 and 31 and accompanying text—and Spain—*see* Hunt Act, Ley 1/1970, de 4 de abril, de caza (Law 1, April 4, 1970), art. 33, ¶5.

The use of strict liability would be predicted to lower hunting accident risks by inducing hunters to take types of precautions that are not regulated or are only poorly policed by the negligence rule. For example, a hunter might have a suspicion that hikers are in the area but might nevertheless shoot at a deer in the distance and instead hit a hiker. Taking the shot could well have been inappropriate given the hunter's probabilistic beliefs about the presence of hikers, but a court might not know about these beliefs (how would a court know that the hunter happened to have seen hikers in the area earlier in the day?). Or, a hunter might have had a few beers, which could have led to his forgetting to engage the safety on his weapon and to an injury to a fellow hunter from an accidental discharge; or the hunter could have failed to properly supervise a child or another hunter with little experience handling weapons, again resulting in injury. Such actions of hunters that could be negligent in truth might escape the scrutiny of the courts in a negligence determination, leading to inadequate incentives of hunters to take proper care along important dimensions. In a strict liability regime, however, the motivation of hunters to take appropriate precautions in all respects will in principle be correct, and in practice superior to those under the negligence rule, because the knowledge of the court about what actions hunters actually took and should have taken will be irrelevant to findings of liability.

Likewise, the imposition of strict liability would be expected to reduce accident risks by lowering the level of hunting activity. As a general matter, hunters would engage in hunting less often because they would realize that, each time they hunted, they would be bearing the risk of doing harm for which they would be strictly liable, rather than typically not bearing risk under the negligence rule, presuming that they would be acting with what the courts would be likely to consider reasonable care. Additionally, hunters might take fewer shots when hunting, avoid going hunting in relatively crowded hunting areas, and decide against taking along children for

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whose actions they could be held responsible. Through these avenues, the amount of hunting would decrease, and with it the number of hunting accidents.

Finally, one would not expect the behavior of potential victims in a strict liability regime to add to risks in a real way for the same reason that applied to pedestrians and bicyclists. Namely, individuals who are exposed to the risk of injury from hunters will be primarily concerned about their health and safety; thus, the degree to which the rule of liability will affect their risk-reducing actions will be minimal.

*Rail transport of dangerous materials.* All manner of materials that pose significant risks are moved by rail: crude oil can spill from tank cars and cause fires and pollution; liquefied chlorine can escape from pressurized tank cars and form into lethal clouds of chlorine gas; and heavy objects and substances can cause harm in derailments.<sup>71</sup> But because such rail traffic is voluminous,<sup>72</sup> the uncommon activity requirement implies that liability for harms arising from the shipping of dangerous materials on railroads tends to be governed by the negligence rule.<sup>73</sup>

Were strict liability instead generally applied in accidents involving this type of rail transport, the exercise of many dimensions of care that might be inadequately policed under the

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<sup>71</sup> Recent Rail Accidents, U.S. Department of Transportation, available at <http://dot111.info/category/recent-derailments/> maintains and updates a record rail accidents. These include accidents involving crude oil—*see, e.g.*, an event at Aliceville, Alabama, in 2013, <http://dot111.info/category/disasters/aliceville-al/>; accidents in which chlorine gas was released—*see, e.g.*, an occurrence in Graniteville, South Carolina, in 2005, <https://www.nts.gov/investigations/AccidentReports/Pages/RAR0504.aspx>; and derailments involving rail cars carrying automobiles—*see, e.g.*, <http://jalopnik.com/train-derailment-near-bmw-plant-trashes-120-ultimate-dr-1789700038>.

<sup>72</sup> For example, in 2012, 27.6% of all hazardous materials shipments (measured in ton miles) in the United States moved by rail, and about two thirds of these shipments were of flammable liquids, especially gasoline; *see* Freight Facts and Figures 2015, U.S. Department of Transportation at 10, 1; available at [https://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/FFF\\_complete.pdf](https://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/FFF_complete.pdf). Also, over 20 million tons of motor vehicles and parts were transported annually by rail over the period 2006–2015; *see* Annual U.S. Class 1 Rail Tons, Motor vehicles & parts, American Association of Railroads; available at <https://www.aar.org/Pages/Freight-Rail-Traffic-Data.aspx>.

<sup>73</sup> *See supra* note 19 and accompanying text.

negligence rule would be improved. These types of care include the screening and training of employees; their assignment to tasks; the attention paid by locomotive engineers to speed, warning signals, and track conditions; the securing of couplings between rail cars; the sealing of tank cars; the location of holding yards; route choice; and the degree of investment in a modernized, safe fleet of tank cars and of other types of specialty rail cars. Courts cannot practically control well this multitude of precautions that contribute to risk reduction for the various reasons regarding lack of information that have been discussed. But under strict liability, railroads would tend to select all precautions in a socially desirable manner because they would be paying for the accidents that occur, and the lack of knowledge of courts about these matters would be immaterial.

With regard to levels of activity, the major way that ton–miles of rail shipping of dangerous materials would decline under strict liability is through increases in shipping prices that would accompany a change from the negligence rule. Shipping prices would rise, of course, because they would impound the higher liability expenses associated with the transportation of dangerous materials under strict liability. These higher prices could lead to a reduction in shipping by rail in a number of ways. Purchasers of rail shipping services might switch to alternative methods of transport (such as by sea–going vessel, barge, or pipeline); purchasers might contract with nearer suppliers; and purchasers might find alternative, less dangerous materials that suit their purposes. These channels of influence aside, an increase in shipping prices would raise the price of final goods (such as the price of gasoline at the pump), which would tend to reduce sales and thus ton–miles of shipping.

Last, one would not expect the behavior of potential victims of accidents involving rail transport of dangerous materials to be much affected by imposition of strict liability. There is

little that individuals can usually do to reduce the risks from railroad accidents that they face, and the likelihood that any particular party would be injured in such an accident is likely to be so low as to make most precautions that could help uneconomic.

#### **IV. MISTAKEN JUSTIFICATIONS FOR THE RESTRICTION OF STRICT LIABILITY TO UNCOMMON ACTIVITIES**

Having explained why limiting the use of strict liability to uncommon dangerous activities is socially undesirable, I review and assess here reasons that have been adduced to justify the uncommon activity restriction.

*Socially desirable activities—and notably many common activities— would be unduly discouraged by the imposition of strict liability.* A frequently encountered view about strict liability is that its use can exert a detrimental chilling effect on socially beneficial activities of individuals and firms and thus should be only cautiously imposed.<sup>74</sup> In particular, as will be discussed in Part V, under this belief, the uncommon activity requirement would be attractive, for excluding common activities from strict liability would protect a very extensive and valuable class of our activities from being unjustifiably stanching.

Yet as was emphasized in Part IIA, the notion that strict liability improperly reduces the level of socially beneficial activities is at its core incorrect. The well-known line of reasoning that was presented there is that because strictly liable parties pay for the harm they cause, they will be induced in choosing their levels of activity to take into account not only the benefits they obtain but also the harms they generate. It follows that, although the imposition of strict liability will lead parties to reduce their levels of activity, and possibly to end some activities, these will be virtues of strict liability, not demerits—for reductions in levels of activity due to strict liability are evidence that the activities were not socially worthwhile to conduct at prior levels.

*Socially desirable activities that provide external benefits would be discouraged by strict liability.* The foregoing argument that strict liability does not undesirably curb participation in our generally useful activities did not reflect the possibility that some activities generate not only

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<sup>74</sup> See *infra* notes 110–113 and accompanying text on expressions of this view.

harm but also benefits for third parties. For example, if a firm engaged in blasting increases its level of activity, it may need to hire more employees and that could have salutary effects in the community;<sup>75</sup> or if a railroad expands its operations to service a town, the well-being of the town's citizens might rise by more than the profits of the railroad.<sup>76</sup> Does consideration of such positive external benefits—of so-called positive externalities—alter the conclusion favoring the use of strict liability? The answer is no.

Observe first that the presence of positive externalities implies that to induce parties to choose socially desirable levels of activity, they should have to pay an amount equal to the harm minus the external benefits. If a firm providing blasting services causes harm of \$5,000 and generates external benefits of \$1,000 per excavation task, it should have to pay \$4,000 per task, for then the price it charges will reflect the net social harm associated with blasting services.

It follows that neither strict liability nor the negligence rule will result in ideal levels of activity. If the blasting firm is strictly liable, it will raise its price by \$5,000 rather than by only \$4,000 per task, and its too-high price will lead to a reduction in the level of blasting relative to the ideal. If, though, the firm is subject to the negligence rule, it will not raise its price at all rather than by \$4,000 per task, and its too-low price will generate a socially excessive level of

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<sup>75</sup> The employees might, for instance, be less likely to cause family problems or to commit crimes than if they were unemployed.

<sup>76</sup> The railroad would be unable to capture the full benefits of travel that citizens and local businesses would enjoy, for the railroad in general would not know the magnitude of these benefits and would be limited in its ability to price discriminate. Hence, the increase in the town's overall welfare would outweigh, perhaps significantly, the railroad's own financial incentive to provide service.

blasting. Which rule is better will depend on the magnitudes of the external harms and benefits, among other factors.<sup>77</sup>

Nevertheless, it is apparent that strict liability will necessarily lead to ideal levels of participation in activities if it is combined with a subsidy equal to the external benefits of activities; for then parties engaged in potentially harmful activities will pay an amount equal to the harms they cause minus the external benefits. If the blasting firm is strictly liable and thus bears \$5,000 in additional expenses per task, but it also receives a subsidy of \$1,000, the firm will raise its price by \$4,000, the socially correct amount.

In contrast, use of the negligence rule will generally lead to the wrong result. Under the negligence rule, as I mentioned, the blasting firm will not raise its price to reflect the expected harm due to its activity, whereas it should raise its price by \$4,000 to appropriately lower the level of blasting activity. The only circumstance in which the negligence rule would lead to the socially correct price for blasting is that in which the external benefit by chance equals the \$5,000 harm (and in that case the outcome would be the same as under strict liability with a subsidy of \$5,000).

Hence, the possibility that activities generate positive externalities does not alter the superiority of strict liability over the negligence rule as a means of controlling the level of activities. The combined use of strict liability and subsidies, not the negligence rule, is the right response in principle to the presence of positive external benefits.

*Strict liability would result in a socially excessive level of litigation costs.* A further argument that appears to contribute to a broad desire to limit strict liability, and thus to the appeal of the uncommon activity requirement as a means to that end, is that strict liability would

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<sup>77</sup> Notably, the larger the external harm, the greater will be the attractiveness of strict liability, and the higher the external benefits, the more important will be the appeal of the negligence rule. Also of relevance will be the number of buyers of blasting services who would be affected by a change in the price at various levels.

lead to a greater volume of cases than the negligence rule because proof of fault would not be at issue. Therefore, according to the argument, litigation costs under strict liability should be higher than under the negligence rule.

However, strict liability could also lead to a lower volume of cases because, as was argued in Part IIA, there will tend to be fewer accidents under that rule. Moreover, settlement is more likely under strict liability than under the negligence rule and the cost of trial would often be lower on account of defendant fault not being at issue. These factors could lead litigation costs to be lower under strict liability.

Therefore, the hypothesis that strict liability would usually result in greater litigation costs is questionable; it might or might not depending on the particulars. Moreover, we have the example of France, where strict liability is the dominant form of tort liability<sup>78</sup> and where I am not aware of a special concern over the level of litigation or litigation costs. My conclusion is thus that the fear of an unduly high level of litigation costs does not constitute a defensible general rationale for limiting the scope of strict liability.

*Imposition of strict liability on common activities might be pointless—since individuals would sometimes find themselves paying damages and other times collecting damages. A view that might be thought to support the restriction of strict liability to uncommon activities is that the use of strict liability for common activities accomplishes little—it moves funds back and forth between parties but does not much alter their financial positions over time.<sup>79</sup> For example, suppose farmers in an agricultural community will have a regular need to burn their fields in order to clear underbrush and that these fires will occasionally spread to a neighbor's property*

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<sup>78</sup> See *supra* notes 29 and 30 and accompanying text.

<sup>79</sup> See *infra* note 114 and accompanying text on a closely-related view.

and do harm. Thus, farmers will sometimes find that they have caused harm on account of their fires and other times that they have suffered harm from the fires of others. Accordingly, the use of strict liability for the fires might not change the typical farmer's wealth on average; the damage payments that a farmer would receive when the farmer is a victim of a fire could be roughly balanced by the damage payments the farmer must make when he or she is the cause of fire-related harm to others. Hence, it might be asked, why harness the legal system and incur the expenses and effort associated with litigation if that does not ultimately result in a change in the wealth positions of farmers?

The defect in this view is that it makes no reference to the point that imposition of strict liability would be expected to reduce fire risks. In a strict liability world, aspects of care that would not be well-controlled by the negligence rule would be improved and the number of fires that farmers would set to clear underbrush would fall.<sup>80</sup> The entire farming community might thus benefit from fewer fires spreading due to the imposition of strict liability.

*Imposition of strict liability on common activities would have little effect on participation in those activities and hence on risk—since common activities tend to be of high value; whereas the opposite is true of uncommon activities.* A line of reasoning in support of the uncommon activity restriction that has been expressed by well-known economically-oriented commentators, including Judge Richard Posner, flows from their belief that common activities tend to be of relatively high value. Given this belief, the commentators suggest that imposing strict liability on parties engaged in common activities will have little effect on participation in them—because the

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<sup>80</sup> Suppose that a farmer might be able to cheaply enlist others to accompany him during a burn so that they could help to douse a fire that seemed like it might spread. If evidence of this opportunity would not be available to courts, the farmer would not be found negligent for failure to have arranged such assistance. Hence, under the negligence rule, the farmer would might well not take this risk-reducing precaution. Under strict liability, however, the farmer would be more likely to take the precaution because he would have to pay for harm if his fire spread.

parties will be reluctant to curb their engagement in activities that are valuable to them.

Accordingly, the commentators find that there is no reason to adopt strict liability for common activities. In contrast, the commentators assume that uncommon activities tend to be of low value to those who engage in them. Consequently, the commentators maintain that imposing strict liability on uncommon activities will lead to their significant curtailment, a desirable outcome if the activities are dangerous.<sup>81</sup>

Let me note initially how different the view held by these economically-oriented commentators is from the usual view that I discussed at the outset of this Part—that imposition of strict liability can lead to socially undesirable *suppression* of valuable common activities. The view of the commentators now under discussion is in a sense the opposite, that imposition of strict liability on valuable common activities would not lead to their suppression, so there is no call for strict liability.

The view under consideration is unpersuasive for several reasons. First, it is unclear what the basis is for the empirical judgment that an uncommon activity is likely to be less valuable to the party undertaking it than a common activity would be to the party engaging in it. Why would we think that blasting to accomplish excavation of a construction site, an uncommon activity, would be less valuable to a person who decides to pay for blasting than using earth-moving equipment for the task, a common activity, would be for the person who decides on this usually slower method? Why would we think that owning a poisonous snake as a pet, an unusual

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<sup>81</sup> See LANDES & POSNER, *supra* note 9, at 112, stating that the uncommon usage requirement makes sense because, among other things, it points to the “feasibility of reducing accidents by curtailing . . . the activity”; and the reason that the curtailing would come about for uncommon activities is that they are “presumptively not highly valued.” Likewise, see *Indiana Harbor Belt Railroad Company v. American Cyanamid* 916 F.2d 1174 (7<sup>th</sup> Cir. 1990), where Judge Richard Posner states at 1177 that “the activity was not a matter of common usage, so there was no presumption that it was a highly valuable activity[,]” meaning that imposing strict liability on the activity could well lead to its curtailment. See also Geistfeld, *supra* note 9, at 653, suggesting the same; RESTATEMENT (THIRD), *supra* note 1, Reporters’ Note, cmt. j also notes this view.

activity, would provide less utility to a person who chooses to do so than would owning a poodle, a common activity, provide happiness to the person who elects to have this kind of pet?<sup>82</sup> There is no obvious justification for such an opinion.<sup>83</sup>

Second, consider an activity (whether common or uncommon) that carries a high value per participant. And suppose, as is often true, that a party does not make an either-or decision whether to engage in the activity but rather chooses the level at which to participate in it—how many miles to drive, how often to walk a dog, how much output to produce. Then the fact that the party engaged in the activity derives substantial value from the full extent of his or her participation in it hardly means that the party will not reduce the degree of that participation if subjected to strict liability (and hardly means that, after reducing the degree of participation, the remaining value will not be high). As has been emphasized throughout, parties will lower their levels of activity when the imposition of strict liability forces them to bear the expected harm, and this effect can easily be significant when the expected harm is high, regardless of the total utility derived from the activity. The notion that when the total value of an activity is high, there will often be no effect on participation in it from imposition of strict liability applies only in the fairly limited circumstance in which an activity is binary in character—a person either engages in it once or not at all.

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<sup>82</sup> In considering these examples, the reader should bear in mind that those who engage in an activity are a self-selected group, composed of those who find the activity relatively valuable—that is, after all, why they choose to engage in it. Thus, even though most people presumably would not wish to own a snake as a pet, there is a subset of individuals who are fascinated by snakes and would derive substantial pleasure from having one. It is these individuals whose utility we have to judge when we evaluate the utility from owning pet snakes versus the utility of those individuals who choose to own pet poodles.

<sup>83</sup> Note that the view under consideration refers to the value *per person* of an activity, not the summed value over all persons (which would be higher for common activities). What is relevant for purposes of predicting whether strict liability will affect the behavior of a person is, of course, the situation of that person. It is when the value for a typical individual of an activity is high that imposing strict liability would not deter the activity—that is, or should be, the claim of the commentators under consideration—and my point is simply that I see no reason to believe that those who engage in an uncommon activity derive systematically less utility from it per person than those who engage in a common activity.

Third, the power of strict liability to reduce risk by increasing precautions that are not well-policed by the negligence rule<sup>84</sup> constitutes an often-strong affirmative reason for imposing strict liability that is largely independent of the value of the activities to participants. In other words, even if parties did not much alter their decisions to engage in an activity, they could still be led to take greater care due to the imposition of strict liability.

In sum, both the hypothesis that an uncommon activity is likely to be less valuable to a party than a common activity and the suggested implications of that view appear to lack foundation.

*Common activities might not be dangerous because victims will be alert to their presence.* An observation that is occasionally made in support of the uncommon activity requirement concerns the behavior of potential victims.<sup>85</sup> Namely, when an activity is common, victims will be aware of the danger and take precautions against it—perhaps rendering it not very dangerous<sup>86</sup>—whereas if an activity is uncommon, victims will be unaware of it or, because of its improbability, not take precautions against it—perhaps rendering it quite dangerous.<sup>87</sup>

Although this observation is sensible, it does not support the uncommon activity requirement and it is a fallacy to think otherwise. The import of that requirement is that a common activity that is *presumed to be dangerous* despite the exercise of appropriate care is

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<sup>84</sup> See *supra* Part IIA.

<sup>85</sup> See Kenneth S. Abraham, *Rylands v. Fletcher: Tort Law's Conscience* in ROBERT L. RABIN & STEPHEN SUGARMAN (eds.), *TORT STORIES* 207, 222 (2003); and ABRAHAM, *supra* note 9, at 200; RESTATEMENT (THIRD), *supra* note 1, Reporters' Note, cmt. j.

<sup>86</sup> If a homeowner uses a powered clipper to trim the hedges at the front of his or her house, passersby would be likely to keep a safe distance from the homeowner because they will be familiar with this common garden implement. As a result, the activity of trimming hedges with a device that could be dangerous to a passerby who came too close will turn out not to present much risk.

<sup>87</sup> If a tenant in an apartment building keeps a poisonous snake as a pet, other tenants might not know about it, and even if they did have this knowledge, they might think it very unlikely that the snake would escape and thus take few precautions against it, raising the danger that the snake presents to them.

exempted from strict liability. Thus, the requirement would insulate from strict liability an activity like driving on scenic roads that are used by many bicyclists where it has been shown that, regardless of the exercise of due care by both drivers and bicyclists, the dangers to bicyclists remain high. The observation under discussion simply does not bear on the desirability of imposing strict liability in such a context where a common activity is dangerous. Rather, the observation constitutes a reason for thinking that common activities *might not be dangerous*, but that has no relevance to the question whether strict liability should be imposed when common activities *are dangerous*.

*Fletcher's theory: uncommon dangerous activities should be subject to strict liability because such liability is morally entailed for the imposition of nonreciprocal risks—and activities that generate only reciprocal risks should be exempt from strict liability.* In an often-cited article, Professor George Fletcher advanced a non-consequentialist, moral principle requiring that where injurers impose substantial nonreciprocal risks on victims, such as companies engaged in blasting would impose on passersby, then the injurers should generally be held strictly liable for injuries caused.<sup>88</sup> However, where injurers impose risks on victims that are similar to the risks that victims also impose on injurers—situations where risks are reciprocal,

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<sup>88</sup> George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972). The article is cited in the RESTATEMENT (THIRD), *supra* note 1, Reporters' Note, cmt. j and references to it are frequently made by commentators; *see, e.g.*, ABRAHAM, *supra* note 9 at 196–197; Jones, *supra* note 47, at 1774 n. 352; and Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266, 1270 (1997). The principle Fletcher puts forward he labels the “paradigm of reciprocity” and he assumes at 540–541 that its effects on “socially desirable forms of behavior” are “irrelevant”—thus it is an avowedly non-consequentialist principle. Fletcher states at 542 that under the principle, a “victim has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant—in short, for injuries resulting from nonreciprocal risks” (italics added). For the most part, Fletcher presumes that this right to recover for the imposition of nonreciprocal risks should be enjoyed under the rubric of strict liability rather than the negligence rule (which he criticizes as antithetical to his principle in Sections III and IV). He stipulates at 551–556 that the right of recovery under strict liability is, however, limited by certain excuses and justifications.

exemplified by the risks of collisions that drivers impose on one another—the principle holds that injurers should not face liability unless they are negligent.<sup>89</sup>

It is true, as Fletcher emphasizes, that his principle is consistent with the imposition of strict liability on uncommon dangerous activities, for being uncommon, these activities generate nonreciprocal risks.<sup>90</sup>

But it is also the case that Fletcher’s principle conflicts in a significant way with the uncommon activity requirement. The reason is that many activities that are considered common under the law, and thus that are governed by the negligence rule, involve the imposition of substantial *nonreciprocal* risks.<sup>91</sup> Therefore, these activities should instead be governed by strict liability according to Fletcher’s theory. In particular, as was observed in Part IA, common activities under the law often concern firms that are engaged in dangerous enterprises—like the operation of railroads, the transmission of electricity, gas, or water, the use of pesticides, the transport of dangerous materials<sup>92</sup>—imposing significant risks on individuals in the general population. The typical individual in the population can hardly be said to be imposing comparable risks on the employees or the property of the firms under consideration. Hence, Fletcher’s theory calls for the imposition of strict liability on these firms even though they are

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<sup>89</sup> Fletcher states that “cases of nonliability are those of reciprocal risks, namely those in which the victim and the defendant subject each other to roughly the same degree of risk.” *Id.* at 542. But he goes on to qualify this view at 548. He observes there that when injurers act negligently in a context that is normally one of reciprocal risks, injurers convert the context into one of nonreciprocal risks (for a negligent actor imposes a nonreciprocal risk on the great majority of others who are non-negligent). Therefore, he recommends that the negligence rule should apply to a situation of initially reciprocal risks: “[P]rinciples of negligence liability apply in the context of activities, like motoring and sporting ventures, in which the participants all normally create and expose themselves to the same order of risk.”

<sup>90</sup> *Id.* at 547.

<sup>91</sup> In other words, what I am asserting is that not only uncommon activities generate nonreciprocal risks, common activities sometimes do as well.

<sup>92</sup> See *supra* notes 16-20 and accompanying text.

shielded from such liability by the uncommon activity requirement. In this sense, then, Fletcher's theory is consistent with my conclusion (but not with my reasoning) that the uncommon activity requirement is unwise.<sup>93</sup>

Yet Fletcher's theory also supports the uncommon activity requirement in contexts in which common activities involve reciprocal risks. Moreover his theory supports the requirement in circumstances in which *all* individuals would be better off if the requirement did not apply and strict liability were imposed. This implication should be taken as problematic for both Fletcher's theory and the uncommon activity requirement, presuming that one values the well-being of individuals. To amplify, consider the example mentioned above concerning a community of farmers who burn their fields to clear underbrush but in so doing impose fire risks on one another.<sup>94</sup> In that example, the activity of burning fields is common, so that strict liability is barred under the uncommon activity requirement; and the risks can be taken to be reciprocal (farmer A imposes risk on his neighbor farmer B when A burns, and B imposes risk on A when B burns), so that strict liability would also be barred under Fletcher's theory. But all members of the community might be made better off if strict liability were imposed on them. That could be so if all farmers have the opportunity to take inexpensive precautions to reduce the risk of spreading fires, but the farmers would not be induced to take these precautions under the negligence rule for evidentiary reasons.<sup>95</sup> Because the farmers would be led to take the inexpensive precautions

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<sup>93</sup> Still, the observation of this paragraph that Fletcher's theory is inconsistent with our law, because it fails to impose strict liability where substantial non-reciprocal risks are imposed, weakens Fletcher's claims for his theory because these claims are closely related to its explanatory power. In that regard, it is a difficulty for Fletcher that he did not pay attention to the law in civil law countries. France is a significant counterexample to his theory because the use of strict liability there is dominant; see *supra* notes 29–30 and accompanying text.

<sup>94</sup> See *supra* notes 79-80 and accompanying text.

<sup>95</sup> See *supra* note 80 for an example.

under strict liability, however, the incidence of harm from spreading fires would fall and could raise the well-being of all.<sup>96</sup>

## V. THE RESOLUTION OF A PUZZLE: IF THE UNCOMMON ACTIVITY REQUIREMENT IS MISTAKEN, HOW DID IT ARISE?

It has been argued in this Article that the uncommon activity requirement is a mistake of policy because it interferes with the proper reduction of accident risks. This raises the question of the origin the requirement—why were the points made here in criticism of the requirement not appreciated by those who authored it? As was noted in the Introduction, these were the individuals who produced the *Restatement of Torts* in 1938. But they did so in the context of decades of writing on tort law and decisions that had paid little attention to the issue of the influence of tort liability on accident risks.<sup>97</sup> This fact helps to explain why the possible dulling of liability-related incentives to reduce accident risks played no cautionary role of which I am aware in the adoption of the uncommon activity requirement.

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<sup>96</sup> To illustrate, suppose that all farmers are identical, that each can take a precaution that would cost \$100 per year, and that the precaution would reduce losses from fires from \$500 per farmer per year to zero. Then if the precaution would not be taken under the negligence rule, each farmer would bear losses of \$500 a year. If the precaution would be taken under strict liability, each farmer would incur costs of \$100 each year but experience no losses. Thus, each farmer would be better off by \$400 per year under strict liability in this reciprocal-risk example.

<sup>97</sup> Neglect of accident reduction as a goal of tort law characterizes all of the major American treatises on tort law published prior to 1938 that I examined: MELVILLE MADISON BIGELOW, *THE LAW OF TORTS* (8<sup>th</sup> ed., 1907); CHARLES K. BURDICK, *THE LAW OF TORTS* (4<sup>th</sup> ed., 1926); THOMAS M. COOLEY, *A TREATISE ON THE LAW OF TORTS* (3<sup>rd</sup> ed., John Lewis, 1906); FOWLER VINCENT HARPER, *A TREATISE ON THE LAW OF TORTS* (1933); and THOMAS ATKINS STREET, *THE FOUNDATIONS OF LEGAL LIABILITY* (1906). Indeed, although the first chapter of HARPER, the most modern of those treatises, is entitled “Social Policy of Tort Law,” it did not discuss the control of accident risks as a function of tort law (it is primarily devoted to the enumeration of the categories of interests that tort law protects). The same essential disregard of accident prevention is evidenced in articles on tort law, such as those that I cite in note 120 *infra* and in judicial decisions, including 163 cases that I examined bearing on strict liability as described in note 118 *infra*. Modern commentators also express a similar view about the orientation of the legal community in the past; *see, e.g.*, Robert Rabin, *The Ideology of Enterprise Liability*, 55 MD. L. REV. 1190, 1195 (1996). The foregoing is not to deny that occasional reference is made to the notion that an object of tort law is to prevent harm. For example Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40 (1915) mentions at 53 that “The possessor of a dangerous thing must use due care to prevent it from doing harm” in an article that is concerned with describing the determination of due care. Such observations as his are unhelpful, though, because of their obvious and superficial character. Only exceptionally does one encounter the statement or development of a specific argument relating to tort liability and accident prevention; *see, e.g.*, HOLMES, *supra* note 38, at 116–117 (on why strict liability may best prevent accidents); and William Schofield, *Davies v. Mann: The Theory of Contributory Negligence*, 3 HARV. L. REV. 263, 269–270 (1889) (on why the doctrine of last clear chance may promote deterrence of accidents).

An apposite starting point for consideration of the use of strict liability as formulated in the *Restatement* is 1868, when the celebrated English case of *Rylands v. Fletcher* that was mentioned earlier was decided.<sup>98</sup> Shortly after the *Rylands* decision, Massachusetts imposed strict liability on similar grounds and Minnesota did the same a few years later.<sup>99</sup> However, New York, New Jersey, New Hampshire, and Pennsylvania explicitly rejected *Rylands* in the 1870s and 1880s. Yet by the early 1900s, a majority of states had endorsed some version of strict liability linked to *Rylands*.<sup>100</sup> Thus, *Rylands*-influenced strict liability gained a foothold in this country in the years following the well-known English result.

The types of cases in which strict liability was applied in the period after *Rylands* included ones where blasting brought about injury,<sup>101</sup> where stored nitroglycerine exploded and caused windows to shatter,<sup>102</sup> where a farmer's cesspool fouled a neighbor's well,<sup>103</sup> where a

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<sup>98</sup> *Supra* note 22 (hereafter *Rylands*). It is useful to reproduce part of the opinion of Justice Blackburn in the case that *Rylands* affirmed, *Fletcher v. Rylands*, *supra* note 22, at 279–280: “We think the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prim[a] facie answerable for all the damage which is the natural consequence of its escape. . . . The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable . . . that the neighbour . . . make good the damage . . . .”

<sup>99</sup> On the adoption of *Rylands*-based strict liability as described in this paragraph, *see* Note, 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, 338–346 (2000) (emphasizing that the reception of strict liability after *Rylands* was not as restricted as many scholars have suggested because they inappropriately focused on early judicial hostility to the rule); and *see* also WILLIAM LLOYD PROSSER, *The Principle of Rylands v. Fletcher*, in *SELECTED TOPICS ON THE LAW OF TORTS* 135, 148–154 (1954). Moreover, as is well appreciated, strict liability had been employed in this country prior to *Rylands*, notably, for harms due to trespassing cattle (unless modified by statute)—*see, e.g.*, HARPER, *supra* note 97, at § 166—for harms due to wild animals and to domestic animals known to be dangerous, *id.* at § 171; for harms due to various types of nuisance, *id.* at §§ 179, 181, 183; and for harms due to blasting, *id.* at § 202.

<sup>100</sup> Texas was an important exception; *see* *Turner v. Big Lake Oil Co.*, 96 S.W. 221 (Tex. 1936).

<sup>101</sup> *Colton v. Onderdonk*, 69 Cal. 155, 10 Pac. 395, 58 Am. Rep. 556 (1886).

<sup>102</sup> *Bradford Glycerine Co. v. St. Marys Woolen Mfg.*, 54 N.E. 528 (Ohio 1899).

train derailed and harmed a home and its occupant,<sup>104</sup> where ice fell from the observation tower of a hotel and damaged the roof of a building below,<sup>105</sup> where a brick wall collapsed and struck an abutting structure,<sup>106</sup> where a ditch dug to alleviate a drainage issue led to erosion problems preventing ready access to buildings nearby,<sup>107</sup> and where a copper smelting operation generated pollution harms for individuals living in the area.<sup>108</sup>

Although courts were thus finding parties strictly liable in a variety of situations, the importance of *Rylands*–associated liability was limited because this liability was not ordinarily applied, or did not have effect, unless negligence was not established and unless the risk due to the injuring party’s activity was pronounced.<sup>109</sup>

A significant basis in public policy for restriction of the scope of strict liability<sup>110</sup> was said to be that liability without fault could undesirably discourage participation in socially

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<sup>103</sup> Ball v. Nye, 99 Mass. 582 (1868).

<sup>104</sup> Chicago & N.W. Ry. Co. v. Hunerberg, 16 Ill. App. 387 (1885).

<sup>105</sup> Davis v. Niagara Falls Tower Co., 64 N.E. 4,5 (N.Y. 1902).

<sup>106</sup> Ainsworth v. Lakin, 62 N.E. 746 (Mass. 1902).

<sup>107</sup> Reinhart v. Sutton, 51 P. 221, 222 (Kan. 1897).

<sup>108</sup> Ducktown Sulphur, Copper & Iron Co. v. Barnes, 60 S.W. 593 (Tenn. 1900).

<sup>109</sup> In some cases, strict liability was imposed when negligence or nuisance could also have been shown; when so, *Rylands*–based strict liability only nominally made a difference to the imposition of liability—liability would probably have been imposed in any event. For discussion of cases in which strict liability was imposed after *Rylands* and before publication of the RESTATEMENT, *supra* note 8, *see, e.g.*, Francis H. Bohlen, *The Rule in Rylands v. Fletcher. III.*, 59 U. PA. L. REV. 423, 433–441 (1911); HARPER, *supra* note 97, at §§ 156–164; and PROSSER, *supra* note 99, at 149–164 (in which most of the cases cited were decided before 1938).

<sup>110</sup> Not only considerations of policy favored restriction of strict liability. Because the negligence rule was felt to have a strong moral warrant (to act negligently is to do wrong), many thought that it would have been upsetting to the ethically appropriate assignment of liability to permit a significant expansion of strict liability. *See, e.g.*, James Bar Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908) and HARPER, *supra* note 97, at § 155 (referring to the notion that legal liability should generally be premised on fault because “ordinarily it is grossly unjust to require a person who innocently or accidentally causes harm to pay for it.”).

beneficial activities, especially those of business.<sup>111</sup> A typical judicial expression of that view is stated in *Losee v. Buchanan*, where the court observed, in justifying its decision against holding a company strictly liable for an explosion of its steam boiler, that “We must have factories, machinery, dams, canals and railroads.”<sup>112</sup> Commentators on tort law, including Oliver Wendell Holmes and Francis H. Bohlen, who became the Reporter for the *Restatement*, advanced similar concerns.<sup>113</sup>

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<sup>111</sup> The assessments of modern commentators on the importance of this consideration to the development of tort law, especially in the nineteenth century, vary; *see, e.g.*, on one hand, LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 350–366 (3<sup>rd</sup> ed. 2001) and MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860*, 63–108 (1977) (each emphasizing the view that the development of the negligence rule was explained in substantial part as a means of subsidizing business in the emerging industrial age); and, on the other hand, Robert L. Rabin, *The Historical Development of the Fault Principle*, 15 *GA. L. REV.* 925 (1981) and Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 *YALE L.J.* 1717 (1981) (each taking issue with the thesis of writers like Friedman and Horwitz).

<sup>112</sup> 51 N.Y. 476 (1873) at 484. Likewise, *see, e.g.*, *Quinn v. Crimmings*, 171 Mass. 255 50 N.E. 624, 68 Am. St. Rep. 420, 42 L.R.A.101 (1898) at 258, where the court stated, in explaining why it would not hold a party strictly liable when his fence fell and caused harm through no fault of his own, that because “it is desirable that buildings and fences be put up, the law . . . does not . . . make every owner of a structure insure all that may happen”; *Brown v. Collins*, 53 N.H. 442 (1873) at 448, where the court stated that it would not hold a farmer strictly liable when his horses, which were pulling a cart loaded with grain to a grist mill, were frightened by an approaching train, bolted, and knocked over a lamp post, because to do so “would impose a penalty on [the farmer’s] efforts, made in a reasonable . . . manner . . . . It is impossible that legal principle can throw so serious an obstacle in the way of progress and improvement”; and *Turner v. Big Lake Oil Co.*, 96 S.W. 221 (Tex. 1936) at 165–166, where the court held that strict liability should not be imposed for harm due to pollution from salt water ponds, in part because “Texas has many great oil fields, tens of thousands of wells in almost every part of the state. . . . One of the by-products of oil production is salt water, which must be disposed of without injury to property or the pollution of streams. The construction of basins or ponds to hold this salt water is a necessary part of the oil business.”

<sup>113</sup> In HOLMES, *supra* note 38, Holmes states at 94 that “a general principle of our law is that loss from accident must lie where it falls” when there is no negligence, and for the law to do otherwise—to impose strict liability broadly—would be unsound because, he says at 95, “the public generally profits by individual activity. As action cannot be avoided, and tends to the public good, there is obviously no policy in throwing the hazard of what is at once desirable . . . upon the actor.” He adds at 96 that the “cumbrous and expensive machinery [of the state] ought not be set in motion unless some clear benefit is to be derived from disturbing the *status quo*.” At the same time, Holmes emphasizes that the law imposes strict liability for certain hazardous activities and offered justifications for such; *id.* at 116–117 (referring to strict liability for trespasses of cattle and to Rylands–related strict liability, and stating that “as there is a limit to the nicety of inquiry which is possible in a trial, it may be considered that the safest way to secure care is to throw the risk upon the person who decides what precautions shall be taken”); and *see generally*, DAVID ROSENBERG, *THE HIDDEN HOLMES* 125–126, 133–145 (1995). Francis Bohlen’s conclusions about strict liability were also two–sided. In Bohlen, *supra* note 109, at 432–433, 446–447, he states that the law desirably permits activities to be free from strict liability if they are sufficiently important to the public interest or to the general prosperity. Yet he observes that where activities would impose disproportionate harms on others, imposition of strict liability could be appropriate; *id.* at 444.

Another frequently-made argument against strict liability was that individuals can be understood to have made a social contract to accept many risks of harm. In particular, individuals would wish to have made such a contract because they benefit from the activities that are fostered if freed from the burden of strict liability, and individuals also benefit because they themselves would otherwise have to pay damages when they cause injury to others.<sup>114</sup>

Against this background the *Restatement* was drafted and published in final form in 1938. It stated in Section 520 that strict liability for harm could be imposed on an activity only if the activity (1) “involves a risk of serious harm . . . which cannot be eliminated by the exercise of the utmost care,” and (2) “is not a matter of common usage.” The *Restatement* makes clear that the second requirement is an *independent* bar to strict liability: even if an activity satisfies the dangerousness requirement, strict liability cannot be imposed if the activity is common.<sup>115</sup>

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<sup>114</sup> Bohlen, *supra* note 109, at 443–444, writes “[I]t is a benefit to all the neighbors that land may be . . . utilized without fear of legal liability. In a city practically every one maintains on his property ordinary walls and fences, in every house there are water pipes; the very plaintiff whose house is flooded by the escape of water from the bursting pipes on his neighbor’s premises himself is using similar pipes to supply his own house with water. In a word, such things as buildings, walls, and fences, and the laying down of water pipes for domestic uses, are inseparable incidents to the residential use of all such property. The value of every city lot is enhanced by the right to so use it without liability so long as care is exercised. There is not, therefore, merely the benefit to the public generally in permitting the utmost freedom in such uses, it is a distinct advantage to the very neighbors who themselves run the risk incident to the exercise of the defendant’s similar right.” And in Francis H. Bohlen, *The Rule in Rylands v. Fletcher. II.*, 59 U. PA. L. REV. 373 (1911), Bohlen observes at 374 that “Without dams no mills could be erected, without mills to saw the abundant timber into lumber, only the most primitive buildings could be put up, without grist mills, let the settler grow what grain he pleased, it could only be prepared for use as food by the most primitive methods. The law, in its effort to protect [by means of strict liability] a right incident to the riparian proprietor’s domestic and farming use of his land, would have put almost insuperable obstacles in the way of his building either houses or barns and would have practically destroyed the value of his principal crop.” In *Losee v. Buchanan*, 51 N.Y. 476 (1873), the court states at 484 “By becoming a member of civilized society, I am compelled to give up many of my natural rights, but I receive more than a compensation from the surrender by every other man of the same rights . . .” and at 485 “I hold my property subject to the risk that it may be unavoidably or accidentally injured by those who live near me; and as I move about upon the public highways and in all places where other persons may lawfully be, I take the risk of being accidentally injured in my person by them without fault on their part. . . .”

<sup>115</sup> RESTATEMENT, *supra* note 8, cmt. g states that “even those activities or instrumentalities which cannot be made safe by the utmost precaution and care may be carried on or used without incurring absolute liability if the activity or instrumentality is one which is commonly carried on or used.”

Was the *Restatement's* uncommon usage requirement an accurate representation of the law? The answer is no—because there certainly had been findings of strict liability for common activities before the *Restatement* was promulgated. A number of examples were mentioned above (for maintaining a cesspool, operating a railroad or a hotel, digging a ditch) and others are not difficult to adduce.<sup>116</sup> Also of importance is that strict liability had traditionally been imposed for major categories of nuisance as well as for damage done by straying livestock and for injuries caused by dogs and other domestic animals known to be dangerous.<sup>117</sup> These long-standing uses of strict liability are inconsistent with the uncommon activity requirement, for nuisances often arise from mundane activities and owning livestock and dogs are prototypically common activities.

Moreover, I can find no reference to the notion of an uncommon activity requirement in any case,<sup>118</sup> treatise on torts,<sup>119</sup> or written work on strict liability that I have investigated that was

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<sup>116</sup> Many of the cases resulting in strict liability cited by PROSSER, *supra* note 99, at 149–164 involve common activities. For instance, *Baltimore Breweries' Co. v. Ranstead*, L.R.A. 294 (1894) concerned the actions of a brewery (which discharged waste water onto a city street); *Brennan Construction Co. v. Cumberland*, 29 App. D.C. 554 (1907) addressed the operations of an asphalt paving enterprise (which allowed petroleum products to escape from its holding tanks); and *Susquehanna Fertilizer Co. v. Malone*, 9 L.R.A. 737 (1890) related to the activities of a fertilizer company (which generated noxious odors).

<sup>117</sup> HARPER, *supra* note 97, at §§ 166, 181, 183; and the cited language of Justice Blackburn in *Fletcher v. Rylands*, *supra* note 98. It is true that nuisance and harm done by animals are not addressed in § 520 of the RESTATEMENT, *supra* note 8—so that the uncommon activity requirement of that section does not conflict in a formal way with the imposition of strict liability for many nuisances and animals. But my point is that there is a conflict in substance between the uncommon activity requirement and the imposition of strict liability for certain nuisances and animals. (For example, if a basis for restricting strict liability in § 520 is that such liability could chill participation in socially desirable activities, why would not that be a concern as well for the socially desirable activity of raising livestock?) Essentially this tension was also noted by Francis H. Bohlen, *The Rule in Rylands v. Fletcher. Part I*, 59 U. PA. L. REV. 298, 311–313 (1911), and by PROSSER, *supra* note 99, at 169–170.

<sup>118</sup> I have examined all of the 163 American cases decided through 1938 bearing on strict liability that were collected in PROSSER, *supra* note 99, in his section at 149–164 entitled “The American Cases.” None of the opinions in these cases states the principle that common activities should be exempted from strict liability regardless of their danger. To be sure, some of the opinions mention the threat that strict liability might pose for common valuable activities—*see, e.g.*, note 112 *supra* and accompanying text, in cases involving the use of steam boilers, the maintenance of buildings, the transport of goods on horse-drawn carts, and oil production. But these opinions do not state that the common activities in question would be insulated from strict liability regardless of the risks they generate.

published before the *Restatement*.<sup>120</sup> I have also searched the available minutes of meetings of the Advisers to the *Restatement* and have found no discussion of the requirement.<sup>121</sup>

In any event, the uncommon activity requirement constituted an elegant way to contain strict liability so as to serve the presumed purpose of avoiding the suppression of socially desirable activities: by definition, the requirement insulated a large domain of activities from strict liability; further, these activities, being common, were valuable to society and thus were perceived as important not to hinder. Additionally, the requirement was apparently readily administrable by courts—courts did not have to undertake a possibly difficult balancing test to determine whether strict liability was inappropriate<sup>122</sup>—they needed only to assess whether an activity was common in order to exclude it from strict liability. The requirement also sat comfortably with the social contractarian argument that I mentioned above.<sup>123</sup> Altogether, then,

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<sup>119</sup> None of the major American treatises on torts that I investigated that were published between the Rylands decision and 1938 mentions a principle equivalent to the uncommon activity requirement: see BIGELOW, *supra* note 97, at 461-468; BURDICK, *supra* note 97; COOLEY, *supra* note 97; HARPER, *supra* note 97, at §§ 156-164; and STREET, *supra* note 97, at 49-70.

<sup>120</sup> None of the articles that I read dealing with strict liability and negligence that were published during the approximate time period in question refers to the notion of an uncommon activity requirement: see, e.g., Bohlen, *supra* note 109; Francis H. Bohlen, *Aviation under the Common Law*, 48 HARV. L. REV. 216 (1934); Fowler V. Harper, *Liability without Fault and Proximate Cause*, 30 MICH. L. REV. 1001 (1932); Rufus C. Harris, *Liability Without Fault*, 6 TUL. L. REV. 337, 352-361 (1932); Nathan Isaacs, *Fault and Liability*, 31 HARV. L. REV. 954, 974-979 (1918); Roscoe Pound, *The Economic Interpretation and the Law of Torts*, 53 HARV. L. REV. 365 (1940); Jeremiah Smith, *Tort and Absolute Liability I-III*, 30 HARV. L. REV. 241 (1917); Jeremiah Smith, *Liability for Substantial Physical Damage to Land by Blasting: The Rule of the Future I-II*, 33 HARV. L. REV. 542, 667 (1920); Ezra Ripley Thayer, *Liability Without Fault*, 29 HARV. L. REV. 801 (1916).

<sup>121</sup> See the records of the meetings of the Advisers between September, 1925, and December, 1933, in volumes 1 and 2 of AMERICAN LAW INSTITUTE. RESTATEMENT OF TORTS: MINUTES OF CONFERENCES, 1925-1938, on file at the Harvard Law School Library (HLS MS 1475) in six volumes; however, volumes three through six, covering 1934-1938, are missing (and I am unaware of other libraries that possess the material in these volumes). A version of the uncommon activity requirement appears as early as 1934; see Preliminary Draft No. 69 [of the RESTATEMENT], August, 1934, available from HeinOnline (<http://heinonline.org>) at 78, stating that an ultra hazardous activity (the category of activity that can be subject to strict liability) must be “carried on or created for a purpose personal to the actor and not for a purpose common to the mass of mankind.” It is, of course, possible, that the Advisers discussed the uncommon activity requirement in meetings in the period 1934-1938 for which records are not available.

<sup>122</sup> One might have thought a balancing test was necessary. For example, Bohlen himself earlier articulated the choice between strict liability and fault as involving a balancing test; see *supra* Bohlen, note 109, at 432-433.

one can see reasons why the uncommon usage requirement might have held appeal for the authors of the *Restatement* even though it has been argued that its fidelity to the law was questionable (and even though it is has been argued to be inadvisable on the ground that it undermines proper accident prevention).

Having explained what I believe is the origin of the uncommon activity requirement, let me complete my account of its history by turning to the two subsequent versions of the *Restatement*. In the *Restatement (Second)*, for which William L. Prosser was the Reporter, two major changes were made in Section 520: both the dangerousness and uncommon usage requirements were demoted to “factors . . . to be considered” for imposing strict liability; and the location of an activity and its value to the community were introduced as additional factors to be taken into judicial account.<sup>124</sup>

In the *Restatement (Third)*, however, we saw in Part IA a return to the initial *Restatement* in that the dangerousness and the uncommon activity factors were reinstated as the two primary requirements for imposition of strict liability; the extra factors advanced by Prosser in the *Restatement (Second)* were relegated to commentary.

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<sup>123</sup> When an activity is common, it is appealing to say that individuals can be viewed as having made a contract to accept it; for then they are likely to benefit from engaging in the activity without being burdened by strict liability, and this benefit might be thought to offset the harm that they would sustain as victims of the activity.

<sup>124</sup> RESTATEMENT (SECOND) OF TORTS (1977) (hereafter RESTATEMENT (SECOND)) at § 520 states that “In determining whether an activity is abnormally dangerous, the following factors are to be considered: (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 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.” Note that factors (a)–(c) are an amplified version of the dangerousness requirement of the RESTATEMENT (FIRST), *supra* note 8: “(a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care . . . .” Factors (e) and (f) of the RESTATEMENT (SECOND) § 520 were new.

## CONCLUSION

I have recommended in this Article that, because of the arguments supporting the view that strict liability is generally superior to the negligence rule in reducing accident risks, the application of strict liability should be expanded to cover common as well as uncommon dangerous activities.

The reader who is given pause by such a significant proposal for change in our law of torts should bear in mind the discussion of Part IV criticizing substantive arguments for restricting the use of strict liability (especially that concerning its asserted chilling effect on desirable activities); the review in Part IB of the use of strict liability world-wide, revealing that no other country employs the uncommon activity requirement, and noting that in France, a major civil law country, strict liability has been the dominant form of liability in tort since about 1930, without apparent untoward consequences; and the account of Part V, arguing that the uncommon activity requirement was devised by the Advisers to the *Restatement* even though it did not accurately reflect the law, and possibly held appeal because it represented a ready way to constrain the application of strict liability at a time when control of accident risks was paid little attention.

Finally, let me observe that if my recommendation is followed, the use of strict liability will be determined by the dangerousness test alone. While that test possesses attractiveness as a means of sorting activities for which strict liability would accomplish the most good in reducing accident risks, as discussed in Part IIC, it presupposes that the negligence rule is the default form of liability. But why should that be so? Since virtually all our activities present some accident risks that may not be well-controlled by the negligence rule, why would it not be desirable for society ordinarily to seek to lower these risks through the use of strict liability?