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Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*

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The prevailing view of American tort history regards nineteenth-century tort doctrine as deliberately structured to accommodate the economic interests of emerging industry.¹ According to this view, the courts jettisoned a potent pre-nineteenth-century rule of strict liability in favor of a lax negligence standard, leniently applied that standard to enterprise defendants, administered a severe defense of contributory negligence, and placed strong controls on negligence law under the name of "duty." In one scholar's appraisal, "the thrust of the rules, taken as a whole, approached the position that corporate enterprise would be flatly immune

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1. Chief contributors to this overall view include L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 409-27 (1973); M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 67-108 (1977); Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951); Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946); Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 LA. L. REV. 1 (1970). See generally L. GREEN, *TRAFFIC VICTIMS* 31 (1958); 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* 1197-99 (1956); B. SCHWARTZ, *THE LAW IN AMERICA* 55-59 (1974); S. SPEISER, *LAWSUIT* 120, 122, 124-26 (1980); Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 515-17 (1961); Peck, *Negligence and Liability Without Fault in Tort Law*, 46 WASH. L. REV. 225, 225-33 (1972); Ursin, *Judicial Creativity in Tort Law*, 49 GEO. WASH. L. REV. 229, 259-63 (1981); Gordon, *Book Review*, 94 HARV. L. REV. 903, 907 n.17 (1981). Of course, not all of these contributors would fully concur in all of the text's statements describing the prevailing view, which is a composite.

For judicial acceptance of the historians' view, see *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 587-88, 578 P.2d 899, 904-05, 146 Cal. Rptr. 182, 187-88 (1978) (discussing contributory negligence); *Dillon v. Legg*, 68 Cal. 2d 728, 734-35, 441 P.2d 912, 916-17, 69 Cal. Rptr. 72, 76-77 (1968) (discussing strict liability and duty).

from actions sounding in tort.”²

Frequently, nineteenth-century tort law is described as providing a “subsidy” to economic enterprise.³ A liability rule presumably amounts to a subsidy if it entails a departure from an otherwise appropriate liability standard designed to relieve a class of injurers from the expense of liability. Of course, in the nineteenth century, innovative industry may have been perceived as providing social benefits that could have justified a subsidy. Recognizing this possibility, scholars like Professors Gregory and Horwitz tend to narrow their arguments. Gregory concludes that by the twentieth century, American industry had simply outgrown whatever subsidy needs it possessed at an earlier date.⁴ For his part, Horwitz considers the subsidy that could have been afforded by the direct expenditure of tax revenues and disapproves of the negligence rule only because it disguised the existence of the subsidy and negatively affected the distribution of American wealth.⁵

But this possibility of regressivity⁶ is only one aspect of a more general moral problem. Even if a subsidy of enterprise makes economic sense, it seems simply unconscionable to exact that subsidy from the individual victims of serious accidents by depriving them of their right to compensation from the enterprises responsible for their injuries.⁷ Professor Gregory surely appreciates this in referring to the “ruthless” quality of the nineteenth-century negligence rule,⁸ while Professor Friedman, in characterizing nineteenth-century tort law as having “spared [capital] for its necessary work,” tends to regard that law as an “engine of oppression.”⁹ Evaluation of the negligence rule as a subsidy thus gives rise to a powerful moral objection.

How accurate, then, is the subsidy interpretation? This article tests that interpretation by scrutinizing nineteenth-century tort law as it developed

2. L. FRIEDMAN, *supra* note 1, at 417. For a similar evaluation, see M. HORWITZ, *supra* note 1, at 99-101 (nineteenth-century tort law created “immunities from legal liability” and thereby enabled American economic enterprise “to challenge and eventually overwhelm the weak and relatively powerless segments of the American economy”).

3. See, e.g., M. HORWITZ, *supra* note 1, at 63-108; Gregory, *supra* note 1, at 368.

4. Gregory, *supra* note 1, at 368, 396.

5. M. HORWITZ, *supra* note 1, at 99-101.

6. Horwitz’ lack of empirical proof is discussed in McClain, *Legal Change and Class Interests: A Review Essay on Morton Horwitz’ The Transformation of American Law*, 68 CALIF. L. REV. 382, 394-95 (1980).

7. This sense of unconscionability would not be appropriate, however, if the original compensation “right” had itself been exclusively derived from economic or utilitarian premises, without any regard to considerations of fairness.

8. See Gregory, *supra* note 1, at 368.

9. L. FRIEDMAN, *supra* note 1, at 410, 417. Friedman indicates that countervailing tendencies like judicial “heart” and the emerging political “voice” of labor prevented this “engine” from becoming “perfect.” *Id.* at 417. His treatment of doctrinal compromises appears in *id.* at 417-27. See Tushnet, *Perspectives on the Development of American Law: A Critical Review of Friedman’s “A History of American Law,”* 1977 WIS. L. REV. 81, 89-90.

in two quite different American jurisdictions—California in the new West and New Hampshire in the old Northeast.¹⁰ I chose California because it is my state, because it has long been an important state politically and economically, and because its judiciary has been so influential in the elucidation of tort doctrine in the twentieth century.¹¹ I selected New Hampshire because it was one of the original thirteen states, because its textile mills placed it in the forefront of nineteenth-century industrialization, and because subsidy scholars have not given the state any extended consideration.¹²

My methodology was straightforward: I read every tort case¹³ I could find in the nineteenth-century New Hampshire and California Reports,¹⁴ which collect the opinions of those states' Supreme Courts.¹⁵ Also, in order

10. In recent years, American social history has been enriched by close studies of individual communities. *E.g.*, S. THERNSTROM, *POVERTY AND PROGRESS: SOCIAL MOBILITY IN A NINETEENTH CENTURY CITY* (1964). These studies gain the advantage of depth while running some risk of narrowness. *See id.* at 6.

11. Most subsidy scholarship has focused unduly on a few states, particularly Massachusetts, New York, and Pennsylvania. *See* Scheiber, *Regulation, Property Rights, and Definition of "The Market": Law and the American Economy*, 41 J. ECON. HIST. 103, 107-08 (1981). Horwitz, for example, neglects western jurisdictions. *See* Presser, *Book Review*, 52 N.Y.U. L. REV. 700, 721-22 (1977).

12. I advance no claims about the general representativeness of my two jurisdictions. California is in many ways atypical, *see* C. MCWILLIAMS, *CALIFORNIA: THE GREAT EXCEPTION* (1976), and New Hampshire is known for a certain Yankee stubbornness. Moreover, New Hampshire's late nineteenth-century Chief Justice, Charles Doe, may well have been idiosyncratic by contemporary judicial standards. G. WHITE, *THE AMERICAN JUDICIAL TRADITION* 126 (1976).

Even so, however, the law of nineteenth-century New Hampshire remains quite appropriate for study. First of all, Doe was not appointed to the Court until 1859 (serving, then, for 35 years). *See* J. REID, *CHIEF JUSTICE: THE JUDICIAL WORLD OF CHARLES DOE* 77-78, 201-06, 432-33 (1967). Moreover, Doe's opinion in *Brown v. Collins*, 53 N.H. 442 (1873), is commonly regarded as the most important expression and defense of the nineteenth-century negligence standard. *See* L. FRIEDMAN, *supra* note 1, at 426; J. REID, *supra*, at 134-39; G. WHITE, *TORT LAW IN AMERICA* 16-17 (1980) [hereinafter cited as G. WHITE—*TORT LAW*]. The Doe Court's conception of the nineteenth-century negligence system thus seems highly relevant. And since *Brown* and *Buch v. Amory Mfg. Co.*, 69 N.H. 257, 44 A. 809 (1897)—the two nineteenth-century New Hampshire tort opinions that remain read today—tend to be known for their anti-liability tenor, it seemed likely that New Hampshire would prove hospitable to the subsidy thesis.

13. As defined here, "tort" includes most cases dealing with physical harm to body or property, and most cases whose judicial opinions espouse what is now recognized as basic tort doctrine. Cases of defamation, malicious prosecution, and nuisance, especially nuisance involving continuing interference rather than traumatic injury, have been excluded. For the most part, cases dealing with riparian law have also been excluded. *See pp.* 1737-39 *infra*.

14. There were about 430 cases in California and about 340 in New Hampshire.

15. During the nineteenth century, the New Hampshire and California Supreme Courts were the only appellate courts in their respective states. For details on the California Court, *see* Kagan, Cartwright, Friedman, & Wheeler, *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961, 974-75 (1978). For an account of political complications affecting the New Hampshire Court in the 1870s, *see* J. REID, *supra* note 12, at 201-06.

An approach that concentrates on appellate opinions has obvious limitations. I encourage others to study what evidence there may be on nineteenth-century accidents, claims, and trials. Professor Tony Freyer is presently engaged in promising research of railroad company records. For my limited study of jury trial data in California, *see p.* 1764 *infra*. In New Hampshire, the relation between trial law and appellate law was quite close: Supreme Court justices also heard cases at the trial level, and would refer difficult legal issues to the full Court. *See* J. REID, *supra* note 12, at 79.

to evaluate the claim that nineteenth-century courts subverted a broad prior rule of strict liability,¹⁶ I have reviewed the literature on pre-1800 tort history. Part I of the article analyzes that literature and traces the processes by which the negligence standard received recognition in nineteenth-century New Hampshire and California. It finds the claim of strict liability subversion largely unwarranted. Part II of the article depicts the nineteenth-century negligence system in operation. It describes nineteenth-century American economic developments, specifies the particular injury problems those developments engendered in New Hampshire and California, and identifies the tort solutions that those states' Courts devised. Part III comments more generally on the major doctrines contained in the case law of the two jurisdictions. The resulting general assessments¹⁷ are that the nineteenth-century negligence system was applied with impressive sternness to major industries and that tort law exhibited a keen concern for victim welfare.¹⁸ Two major exceptions to these generalizations—employers' liability, and governmental liability in California—are then identified and discussed.

Inasmuch as my basic assessments challenge the subsidy thesis, I should comment here on two other recent studies that likewise seem wary of that thesis. The major objective of Professor White's book is to show how tort rules grow out of the larger intellectual culture.¹⁹ He accordingly finds

16. This is Horwitz' argument, but not Friedman's. Horwitz believes that tort law was solidly in place by 1800. See pp. 1727-30 *infra*. Friedman, by contrast, thinks that tort law did not exist in any meaningful sense until midway through the nineteenth century. L. FRIEDMAN, *supra* note 1, at 261-62, 409-10. It was at this time, he suggests, that the modern negligence rule was put into effect. "Absolute liability was rejected; more accurately, it was never considered." *Id.* at 410. For my own findings on the "timing" of tort law in New Hampshire, see 1730-31 *infra*.

17. For a somewhat different interpretation of the California evidence, published after I had completed most of my own California research, see Bakken, *The Development of the Law of Tort in Frontier California, 1850-1890*, 1978 S. CAL. Q. 405. See Schwartz, A Review of Bakken (memorandum, available on request from the author and on file with *Yale Law Journal*).

18. In recent years, certain scholars, adopting either an ethical or an economic perspective, have argued for the superiority of strict liability. See G. CALABRESI, *THE COSTS OF ACCIDENTS* (1970); Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972). If strict liability is objectively the "right" rule, then a court's reliance on any less exacting rule could be deductively regarded as a kind of subsidy. Note, however, that the superiority of strict liability has by no means been clearly established. The two ethicists, Epstein and Fletcher, disagree with each other in significant respects. Professor Posner would strongly object to Calabresi's economic condemnation of a negligence system. See pp. 1721-22 *infra*. And both Posner and Calabresi would challenge Epstein's and Fletcher's refusal to take economic considerations into account. Though both the Friedman and Horwitz texts seem suffused with the sense that strict liability is basically proper, documentation for this is woefully lacking.

It seems clear that an historically oriented article is no place to confront tort law's ultimate issues. The article that actually proves or disproves the correctness of strict liability will deserve high praise for that proof alone, and for its impact on contemporary theory and doctrine; its relevance for historical analysis would seem secondary and incidental. In any event, in this monograph I emphasize the extensiveness of nineteenth-century negligence liability without fully evaluating an even more extensive strict liability alternative. To this extent the monograph is concededly incomplete. I expect to offer reflections on the recent strict liability debate in a forthcoming *Georgia Law Review* symposium.

19. G. WHITE—TORT LAW, *supra* note 12, at xi-xvi.

Horwitz' economic reasoning inadequate as a form of historical explanation.²⁰ Nevertheless, he accepts much of Horwitz' actual narrative of early nineteenth-century tort doctrine.²¹ In addition, White makes strong assertions about the actual restrictiveness of late nineteenth-century tort liability rules,²² and imputes to nineteenth-century tort intellectuals the firm motive of placing tight "limits" on the scope of defendant liability.²³ It thus appears that White and those espousing the subsidy thesis occupy substantial common ground. Indeed, he has suggested that he regards that thesis as itself proper, even though "incomplete."²⁴

Professor Posner's article rejects the subsidy claim and propounds the alternative view that nineteenth-century tort law was overwhelmingly concerned with achieving the goal of economic efficiency.²⁵ While the Posner study is in many ways admirable,²⁶ his particular economic ideology so dominates his historical exposition as to render that exposition unsatisfactory for those not already sharing his ideology.²⁷ For the agnostic reader, Posner's efficiency thesis seems to smother, rather than illuminate, his historical evidence.²⁸ My own research may support the limited conclusion that many nineteenth-century tort rules are consistent with an economic analysis. That consistency occurs, however, at a rudimentary level that reveals rather little about actual common-law objectives.²⁹ Moreover, my study leaves me unable to agree that modern economic reasoning pro-

20. *Id.* at 3, 4.

21. *Id.* at 15-16, 249-50. See also *id.* at 61 (negligence displaces strict liability).

22. *Id.* at 61-62.

23. *Id.* at 38 (imposing limits on tort liability was a "fundamental component of the late nineteenth-century scientists' theory of torts"). White does not clearly explain why tort intellectuals wished to restrict liability. See *id.* at 50, 231.

24. White, *The Impact of Legal Science on Tort Law, 1880-1910*, 78 COLUM. L. REV. 213, 213 n.4 (1978).

25. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972). Posner here employs the efficiency concept in a rather narrow sense. See note 30 *supra*.

26. Posner's methodology was to read all reported appellate opinions rendered in all American jurisdictions during the first quarter of the years 1875, 1885, 1895, and 1905. *Id.* at 34. This methodology complements my own interestingly; each is in its own way intensive.

27. Almost every ruling that Posner chooses to report he is able to provide with an economic explanation. He offers no information about nineteenth-century tort cases that is in any way independent of his own explaining; he does not even furnish any case citations, or any actual excerpts from opinions. His reader thus faces a "take it or leave it" option.

28. It is therefore not surprising that historians like Friedman and Horwitz (and the scholars reviewing their works) have simply ignored Posner's account of the nineteenth century. White, for example, treats Posner primarily as a contemporary normative theorist rather than as a serious nineteenth-century historian. G. WHITE—TORT LAW, *supra* note 12, at 219-21.

29. Thus judges, in assessing whether conduct was negligent, often revealed an interest in considering the advantages of that conduct and also its risky disadvantages. But that interest, standing alone, is as consistent with an ethical as with an economic interpretation of the negligence principle. See Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 699-703 (1978).

I should add that I do not find implausible the moderate idea that the common law has been somewhat concerned with the human-welfare aspects of the efficiency goal. See Schwartz, *Economics, Wealth Distribution and Justice*, 1979 WIS. L. REV. 799, 799-801 (1979).

vides a categorical explanation for nineteenth-century tort doctrine generally.³⁰ Parts II and III draw attention to New Hampshire and California rulings that do not seem amenable to economic justification and that thereby impugn the efficiency theory of law, at least in the strong form in which the theory is typically asserted.³¹

I. Development of the Negligence Rule

A common version of the subsidy thesis insists that tort law, until recast by nineteenth-century judges, was largely dominated by strict liability. The meager quality of the English and American evidence counsels caution in making any dramatic assertions about pre-nineteenth-century tort doctrine. It does appear, however, that the nineteenth-century American negligence rule developed in a basically evolutionary way and against the backdrop of English tort notions that encouraged such an evolution more than they inhibited it.

A. England

Research into pre-1800 English tort doctrine is fraught with hazards. One can look at judges' remarks ventured in the course of what amounted to oral argument. But as has been observed, "[t]o ransack the Year Books for large statements of doctrine made in irrelevant circumstances by judges barely conscious of their significance is neither a pleasing nor a profitable task."³² One can also study the pleadings and trial verdicts available in the mostly unpublished plea rolls and rely on them in attempting to infer the pertinent liability standards. But the process of drawing "believable inferences" from raw documents of this sort is frequently "perilous."³³ And

30. Posner himself has subsequently backed away from his 1972 conclusions. He now suggests that the nineteenth-century negligence rule, at least as applied in many railroad cases, may have involved a "subsidy" after all, though one that was economically justified by the external benefits that the railroads bestowed on neighboring real property. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 182-83 (2d ed. 1977). This suggestion stems in part from his new recognition that from a narrow efficiency perspective, negligence-versus-strict liability can be viewed as an open question. *Id.* at 137-42, 441-43.

31. See the delightfully audacious maxim ventured in Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757, 764 (1975) ("[T]he logic of the law is really economics.")

32. C. FIFOOT, *HISTORY AND SOURCES OF THE COMMON LAW* 189 (1949). The number of discussible judicial declarations turns out to be surprisingly small; and for purposes of contemporary analysis, the range of accident situations they profess to cover is far from adequate. Thus there were no judicial statements dealing in terms with the plaintiff's contributory negligence until *Butterfield v. Forrester*, 11 East 60, 103 Eng. Rep. 926 (1809). The wrongful death problem was not authoritatively addressed until *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (Nisi Prius 1808). See Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043, 1043, 1056-58 (1965).

33. See Arnold, *Accident, Mistake, and the Rules of Liability in the Fourteenth-Century Law of Torts*, 128 U. PA. L. REV. 361, 368, 374 (1979). Despite its methodological difficulties, this genre of research has been pursued very profitably in recent years, by Arnold and most notably by Milsom. See S. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* (2d ed. 1981).

whether one turns to the Year Books or the plea rolls, questions of substantive law frequently are obscured or confounded by the demands of the English writ system.³⁴

Despite these inadequacies of evidence,³⁵ many scholars have confidently found huge portions of strict liability in traditional English law. Professor Gregory finds strict liability inherent in the English writ of trespass.³⁶ But this alignment of English trespass with strict liability is misleading. As developed in the late twelfth century, the early writ of trespass—far from entailing strict liability—seems to have been primarily addressed to intentional harm-causing conduct,³⁷ conduct that would now be identified as basically criminal.³⁸ To be sure, by a process we now may be barely able to reconstruct,³⁹ trespass began to extend to conduct that involved “*vi et armis*” (the trespass formula) only in the loose sense of harm that was forcibly, even if accidentally, inflicted.⁴⁰ The propriety of this extension was confirmed, and the standard of liability in trespass explicitly—though ambiguously—discussed, in *Weaver v. Ward*,⁴¹ a 1616 case concerning the accidental discharge of firearms. Although *Weaver* did suggest that the trespass-plaintiff’s proof of immediately caused harm established a *prima facie* case, it also indicated that the defendant could refute liability by showing that what happened had been an “inevitable accident”—that the defendant had been “utterly without fault” or had “committed no negligence.” While these various formulations clearly rule out the idea of unqualified strict liability, their precise meaning is far from clear.⁴²

34. See O. HOLMES, *THE COMMON LAW* 63-64 (M. Howe ed. 1963).

35. Even if medieval law *had* been subject to a significant strict liability rule, that rule would require interpretation. Perhaps medieval thinking imputed a motive (whether conscious or unconscious) to every action in a way that just about eliminated the concept of unintended harm. See A. EHRENZWEIG, *PSYCHOANALYTIC JURISPRUDENCE* 244 (1971). Perhaps in a simple medieval world, almost every serious injury was the result of intentional or at least negligent conduct. See J. FLEMING, *AN INTRODUCTION TO THE LAW OF TORTS* 3 (3d ed. 1967); S. MILSOM, *supra* note 33, at 297.

36. See Gregory, *supra* note 1, at 361-62. A semantic point: “strict liability” was not a phrase that courts employed during the periods under review. On those occasions when strict liability was considered, the idea was conveyed in a variety of indirect ways.

37. See S. MILSOM, *supra* note 33, at 290, 297 (discussing “malicious injury”); see also T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 456 (5th ed. 1956); Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, *supra* note 1, at 11-12.

38. See T. PLUCKNETT, *supra* note 37, at 465. Was it the purpose of the trespass writ, then, to give the crime victim a civil remedy? See S. MILSOM, *supra* note 33, at 285-88, 295 n.3, & ch. 14; Arnold, *supra* note 33, at 370-71.

39. Compare T. PLUCKNETT, *supra* note 37, at 465-66 with Arnold, *supra* note 33, at 370-74.

40. See C. FIFOOT, *supra* note 32, at 56. But see note 55 *infra*.

41. Hobart 134, 80 Eng. Rep. 284 (1616). The often cited Case of the Thorns, Y.B. Mich. 6 Edw. 4, f. 7, pl. 18 (1466), primarily dealt with a weak claim of privilege against an intentional tort. (All of the English cases cited in this part are reproduced in C. FIFOOT, *supra* note 32.)

42. For a later case suggesting a narrow meaning, see *Dickenson v. Watson*, Jones, T. 205, 84 Eng. Rep. 1281 (K.B. 1682); but for a case rejecting liability on grounds that the defendant had “done his best endeavor,” see *Mitten v. Faudrye*, Popham 161, 79 Eng. Rep. 1259 (K.B. 1626).

The question of the liability standard in trespass was further complicated by what was then routine trespass procedure. A trespass writ generally took the form of a "stark uninformative declaration."⁴³ In answering the writ the defendant could offer a "blank plea of Not Guilty,"⁴⁴ and then present to the jury whatever extenuating evidence he thought relevant. The standard of liability in trespass thus was left to the effective discretion of the individual jury,⁴⁵ and we simply lack information as to how juries exercised this discretion;⁴⁶ jury verdicts of guilty and not guilty remain largely "inscrutable."⁴⁷

Professor Malone emphasizes the strict liability he finds in the English fire cases.⁴⁸ Though the judicial statements in question⁴⁹ contain certain strict liability phrases, they also avail themselves of the language of negligence. Whether these negligence references were mere rhetorical flourishes or were instead intended to posit an actual liability standard is a question that has provoked disagreement.⁵⁰ No one contends, however, that a strict liability rule applied to fires that were accidentally set. Rather, the rule is said to have covered deliberately started fires that accidentally spread to a neighbor's property.⁵¹ Even these fires were subject to strict liability only to the extent that they remained "within the control" of the defendant.⁵² And since, for example, an unexpectedly strong wind tended to negate control,⁵³ the control requirement can easily be regarded

Related to the "inevitable accident" defense was the idea that trespass would not lie if the object immediately causing the injury—a ship or a horse, for example—had escaped the defendant's control. See Prichard, *Trespass, Case and the Rule in Williams v. Holland*, 1964 CAMBRIDGE L.J. 234, 241-42. For an indication of the way in which a control requirement qualifies any supposed rule of strict liability, see pp. 1724-25 *infra*. In addition, recently uncovered evidence suggests that a trespass action was vulnerable to a complete defense of contributory negligence as early as the fourteenth century. See Arnold, *supra* note 33, at 362-64.

43. See M. PRICHARD, *SCOTT V. SHEPHERD (1773) AND THE EMERGENCE OF THE TORT OF NEGLIGENCE* 14 (1976).

44. *Id.*

45. See S. MILSOM, *supra* note 33, at 295-300.

46. *Id.* at 296-99.

47. M. PRICHARD, *supra* note 43, at 14. For one recent guess that juries applied strict liability, see Arnold, *supra* note 33, at 377-78 n.79. Professor Arnold agrees, however, that his guess is based on evidence that is both derivative and "meager." *Id.* For an intermediate position, see S. MILSOM, *supra* note 33, at 299-300.

48. See Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, *supra* note 1, at 14-15. Malone stresses the importance of the fire problem in medieval England. *Id.* at 25.

49. *Turberville v. Stampe*, 1 Ld. Raym. 264, 91 Eng. Rep. 1072 (1697); *Beaulieu v. Finglam*, Y.B. 2 Hen. 4, f. 18, pl. 6 (1401). Note that these two cases, though now read in conjunction, were separated by almost three centuries.

50. Compare C. FIFOOT, *supra* note 32, at 155-56 (negligence references taken seriously) with Ogus, *Vagaries in Liability for the Escape of Fire*, 1969 CAMBRIDGE L.J. 104, 105 (negligence references regarded as pro forma).

51. See Arnold, *supra* note 33, at 361-62; Ogus, *supra* note 50, at 105.

52. See Ogus, *supra* note 50, at 105 ("ignis suus").

53. See the language in *Turberville*, discussed in Ogus, *supra* note 50, at 107.

as a correlate or proxy for fault.⁵⁴

The fire cases were pleaded in trespass on the case. As a general matter, the case variation on the trespass writ provided a remedy for English victims who could not make any plausible claim of forcible injury.⁵⁵ In the absence of such a claim, however, the case plaintiff needed to explain in his writ why the imposition of liability was appropriate in his situation. Since it appears that a number of situations were found sufficient in this respect, case possessed from the start a catch-all or "miscellaneous"⁵⁶ quality that makes it difficult to generalize about its standard of liability. Traditionally, however, case has been affiliated with negligence,⁵⁷ and overall this affiliation seems fair.⁵⁸ The earliest instances of case involved suits against professionals like blacksmiths, physicians, and veterinarians who were held liable for negligence in their undertakings.⁵⁹ In the fifteenth and sixteenth centuries, a limited number of claims were litigated in case between parties not in any preexisting contractual relation; for these claims, a liability standard approaching negligence was applied.⁶⁰ By the late seventeenth century, collision suits began to come before the courts—collisions of vessels at sea, of horse-drawn carriages on highways, and of carriages with pedestrians. Since these collisions involved forceful contacts, they raised a clear trespass possibility. Yet, for several possible reasons,⁶¹ these suits were frequently pleaded in case, with liability depending on proof of the defendant's negligence.⁶² Even when the facts of a particular collision led to its being presented in trespass, it appears that

54. Modern tort law recognizes that the defendant's "control" of the harm-causing instrumentality points in the direction of *res ipsa loquitur*. The early English fire cases are sensibly interpreted in a *res ipsa* way in Williams, Book Review, 25 U.C.L.A. L. REV. 1187, 1193 (1978).

For discussion of a series of changes in English law initiated by a badly worded 1707 statute (6 Anne, c. 31, § 6), see Ogus, *supra* note 50, at 107-21.

55. Professor Milsom has shown that even prior to the development of case, victims of indirect harm were occasionally allowed to proceed in trespass by relying on fictitious or ritualistic allegations. But he does not seem to argue that this fictionalization ever became routine. See S. MILSOM, *supra* note 33, at 290-91. "Just how widespread the use of dishonest writs . . . had been before 1367 we shall probably never know." M. PRICHARD, *supra* note 33, at 8.

56. See S. MILSOM, *supra* note 33, at 301; T. PLUCKNETT, *supra* note 37, at 469.

57. See Gregory, *supra* note 1, at 363-65.

58. See S. MILSOM, *supra* note 33, at 394.

59. See C. FIFOOT, *supra* note 32, at 66-92 (discussing early examples of case). These suits involved parties in a pre-existing economic relation. Note, in this regard, that even the medieval law of contract tended to resist strict liability. See McGovern, *Enforcement of Informal Contracts in the Later Middle Ages*, 59 CALIF. L. REV. 1145, 1161-67 (1971). "Apparently the notion of responsibility without fault on the basis of a contractual undertaking was generally foreign to medieval ways of thought. . . ." *Id.* at 1165.

60. See J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 343 (1979).

61. One reason was loss of control. See note 42 *supra*. Another reason was vicarious liability. See p. 1726 *infra*.

62. See M. PRICHARD, *supra* note 43, at 16-20 (discussing the landmark status of the negligence reasoning in *Mitchil v. Alestree*, 1 Vent. 295, 2 Lev. 172, 3 Keb. 650 (1676)); see generally C. FIFOOT, *supra* note 32, at 164-65.

negligence was recognized as the liability pivot.⁶³ Of course, collisions of one sort or another—often involving railroads—came to typify tort litigation in the nineteenth century.

One early fire opinion, in vacillating between strict liability and negligence, indicates that an employer could be held strictly liable for the within-the-employment negligence of his employee in allowing a fire to spread.⁶⁴ In general, any claim of vicarious liability relegated a plaintiff to case,⁶⁵ and as late as 1685 the law was willing—the fire cases apart—to hold employers liable only for torts they had actually commanded.⁶⁶ In its sixteenth-century form, moreover, the command rule evidently required the employer to have “commanded the very act in which the wrong consisted (unless the command had been to do a thing in itself unlawful).”⁶⁷ Gradually, however, in eighteenth-century England the modern notion developed that the employer could be held liable for any of his employee’s scope-of-employment torts,⁶⁸ but in personal injury cases this notion seems to have been associated with the assumption of some negligent conduct on the employee’s part.⁶⁹

Therefore, whatever the strict liability possibilities that may have harbored in the writ of trespass, these possibilities evidently were connected to or at least contained by a narrow rule of employer vicarious liability,⁷⁰ a rule that, as it eventually expanded, acquired a noticeable negligence orientation. Negligence, moreover, was all along the accepted standard of liability in the malpractice and the collision cases. Indeed, if one searches traditional English tort law for clear instances of strict liability, one winds up mainly with the animal cases. Even these cases reveal an uncertain prior history. Cattle owners originally were held liable for those cattle trespasses that their owners deliberately incited;⁷¹ and the early suits over animals attacking humans may well have involved plain negligence on the part of the animals’ custodians.⁷² To be sure, over time each of these

63. See J. BAKER, *supra* note 60, at 343; S. MILSOM, *supra* note 33, at 395.

64. See *Beaulieu v. Finglam*, Y.B. 2 Hen. 4, f. 18, pl. 6 (1401).

65. See M. PRICHARD, *supra* note 43, at 18.

66. See T. PLUCKNETT, *supra* note 37, at 472-75.

67. See Wigmore, *Responsibility for Tortious Acts: Its History-II*, 7 HARV. L. REV. 383, 392 (1894).

68. The account afforded here is in opposition to the common assumption that the scope-of-employment test is of “ancient” origin. See L. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 166-67 (1957).

69. See C. FIFOOT, *supra* note 32, at 185-86; Wigmore, *supra* note 67, at 394-402.

70. The narrowness of this rule embarrasses the claim that traditional English law, had it only been carried forward, would have served as a powerful liability source in the nineteenth-century industrial setting. It is unclear, however, how the “particular command” rule would have worked as applied to railroad companies running trains on their tracks.

71. See S. MILSOM, *supra* note 33, at 291.

72. See Arnold, *supra* note 33, at 366-67.

Nineteenth-Century Tort Law

animal doctrines inclined in the direction of strict liability.⁷³ But the explanations for these evolutions remain very much in doubt;⁷⁴ and in any event the modest animal rules posed no particular threat to nineteenth-century industrialization.

To sum up, then, the strict liability strands in traditional English law seem ambivalent and confused; the negligence strands, both more distinct and more capable of extended application. Since, however, it is nineteenth-century American law that we ultimately seek to understand, it makes sense to inquire about pre-nineteenth-century doctrine in this country.

B. *United States*

Subsidy scholars prior to Professor Horwitz (including, for example, Professor Gregory)⁷⁵ tended to assume that early American doctrine had simply followed English models. Not accepting this assumption, Horwitz chooses to undertake a substantial American law investigation.⁷⁶ On the American side as well, however, the historian suffers from a paucity of evidence;⁷⁷ judicial opinions do not become readily available until after the ratification of the Constitution.⁷⁸ Nonetheless, Horwitz professes to demonstrate that turn-of-the-century American law was comprehensively committed to strict liability.

Horwitz' most inclusive argument is that in 1800 both trespass and case were governed by a firm rule of strict liability, a rule that American courts later overthrew in favor of a negligence standard.⁷⁹ To document

73. In the dangerous animal cases, strict liability was qualified by a requirement of *scienter*, which introduces the element of deliberate risktaking.

74. For a range of opinions on the trespassing cattle cases, see A. HARARI, *THE PLACE OF NEGLIGENCE IN THE LAW OF TORTS* 135-36 (1962); S. MILSOM, *supra* note 33, at 291; M. PRICHARD, *supra* note 43, at 9; Schwartz, *Foreword: Understanding Products Liability*, 67 CALIF L. REV. 435, 459 n.159 (1979).

75. See Gregory, *supra* note 1, at 364-65.

76. The assumption does seem plausible, however, given many American judges' perception of the general continuity of Anglo-American common law, a perception fortified by American reception statutes. An American inquiry should therefore be careful to identify and explain any substantial differences between England's common law and the common law in this country. I do not find that Horwitz exhibits this care. See notes 79, 95, 96, 98 *infra*.

77. The only general study of American colonial law is R. MORRIS, *STUDIES IN THE HISTORY OF AMERICAN LAW* (2d ed. 1959). But Morris begs the question by assuming that American law accurately followed English precedents. Moreover, since the basic Morris text is now over 50 years old, its understanding of English law is no longer reliable. For whatever it is worth, Morris' basic conclusion is that the general colonial rule (subject to exceptions) was "no liability without fault." *Id.* at 201-58.

78. "[I]t is pointless to speak of an 'American law' before the 1800's." G. GILMORE, *THE AGES OF AMERICAN LAW* 8 (1977). At the least, the meagerness of the pre-1800 American judicial record makes it harder for the reader to believe that turn-of-the-century American law sharply deviated from English norms.

79. M. HORWITZ, *supra* note 1, at 90-91, n.146. Horwitz thus implies that American case in 1800 bore remarkably little resemblance to its English namesake—given the latter's traditional negligence affiliations. See pp. 1725-26 *supra*. Yet one 1826 New Hampshire opinion not only equates

this sequence, he cites three opinions⁸⁰ in New York, Massachusetts, and Pennsylvania, all rendered between 1817 and 1833, and identifies them as "turning point[s]" in the law.⁸¹ The three opinions plainly do espouse a negligence point of view. In none of them, however, is there any indication of a prior general rule of strict liability that the courts thought they were abrogating. Far from "boldly announcing . . . for the first time" a negligence liability standard,⁸² the courts conceived of themselves as applying a negligence rule that to whatever relevant extent was already in the law. The opinions of the Massachusetts and Pennsylvania courts have been skillfully parsed to this effect by Professor Williams.⁸³ Horwitz imputes to the plaintiff in the New York case, *Foot v. Wiswall*,⁸⁴ the claim that the defendant "acted at his peril."⁸⁵ In fact, the plaintiff agreed that "negligence" was the key to the case,⁸⁶ and explicitly alleged that the defendant was at "fault" for navigating "in a night so dark that vessels could not be distinguished."⁸⁷ Only in the context of this basic element of original fault did the plaintiff refer to the defendant as "afterwards" having "acted at his peril."⁸⁸

Horwitz elaborates on his general position on trespass and case by referring to various specific lines of authority.⁸⁹ He claims that in 1800 "vir-

case with negligence, but indicates that this equation was "well settled" in the common law. See *Dalton v. Favour*, 3 N.H. 465, 466 (1826), discussed at p. 1731 *infra*.

At one point Horwitz refers to nineteenth-century American decisions as undermining "the basic presumption of compensation for injury that had been erected over several centuries of the common law." M. HORWITZ, *supra* note 1, at 89. Given the "several centuries" allusion, the common law in question obviously is that of England. Since the "presumption of compensation" assessment is inapt for case, it must be English trespass that Horwitz has in mind. But the explanation above of the complexities of trespass suggests that the Horwitz characterization is facile. See, for example, the recognition of a *Weaver v. Ward* defense of "inevitable accident" in *Harvey v. Dunlop*, Hill & Den. 193 (N.Y. 1843) (Lalor Supp. 1857). Horwitz tries to treat *Harvey* as an "after-the-transformation" case. M. HORWITZ, *supra* note 1, at 91. But this tactic fails, because the *Harvey* opinion is written in quite traditional terms, relying on *Weaver* even to the point of placing on the defendant the burden of proof, and because Horwitz fails to cite "before" cases, in New York or elsewhere, that reject the *Weaver* defense in the trespass context.

80. The cases are *Sproul v. Hemmingway*, 31 Mass. 1 (14 Pick. 1833); *Foot v. Wiswall*, 14 Johns. 304 (N.Y. 1817); *Lehigh Bridge v. Lehigh Coal & Navig. Co.*, 4 Rawle 8 (Pa. 1833).

81. M. HORWITZ, *supra* note 1, at 90-91, 96-97, 298.

82. *Id.* at 90, 97.

83. Williams, *supra* note 54, at 1191-93. I would supplement Williams only by referring to the *Lehigh* Court's expansive definition of the circumstances that would tend to show negligence. 4 Rawle 8, 25 (Pa. 1833).

84. 14 Johns. 304 (N.Y. 1817).

85. M. HORWITZ, *supra* note 1, at 90 n.146.

86. 14 Johns. 304, 305-06 (N.Y. 1817).

87. *Id.* at 306.

88. *Id.* *Foot*, like *Sproul*, was a collision case; and traditional English law dealt with collision claims in negligence terms. See pp. 1725-26 *supra*. Horwitz, while finding that collision litigation in eighteenth-century America was surprisingly rare, adverts to one 1770 Massachusetts case that indeed applied a negligence standard. See M. HORWITZ, *supra* note 1, at 88 n.141.

89. One of Horwitz' arguments is that strict liability in tort was "just another application" of the general rule of just compensation for the taking of property. M. HORWITZ, *supra* note 1, at 97. What makes this claim so curious is Horwitz' own showing that the just compensation requirement was

tually all injuries were still conceived of as nuisances,” and that nuisance was then a strict liability tort.⁹⁰ But if by “injury” Horwitz means “personal injury,” he cites no cases to prove his point; all of his nuisance references involve situations in which the defendant’s land activity harmed or interfered with the plaintiff’s land. Moreover, that nuisance law in 1800 actually was governed by a comprehensive strict liability rule is far less clear than he suggests.⁹¹

Horwitz also claims that American officials and professionals were held liable for neglect of duty and that “neglect” was a strict liability concept.⁹² He does uncover two cases placing strict liability on sheriffs for the escape of debtors.⁹³ But the other cases he cites clearly rely on the idea of actual fault. His early medical case held a doctor liable for performing surgery in a “most unskilled, ignorant, and cruel manner,”⁹⁴ while his legal malpractice case explicitly concerned the “improper management”⁹⁵ of civil litigation.

Horwitz further argues that turn-of-the-century American law held employers liable for all harms caused by their employees’ acts, without regard to whether these acts were at all negligent.⁹⁶ But the two ship collision opinions he brings forward fail to bear him out.⁹⁷ In *Bussy v. Donaldson*,⁹⁸ for example, the Court strongly suggested that there would be no

surprisingly absent from American law at the turn of the century; moreover, as the requirement itself developed in the nineteenth century, courts subjected it to important limitations. *See id.* at 66 (noting “a clear trend” in the law and “an equally clear countertrend”).

90. *Id.* at 85; *see id.* at 90 (nuisance “dominated tort actions for injuries”).

91. *See Williams, supra* note 54, at 1193-97. For example, *Hay v. Cohoes Co.*, 2 N.Y. 159 (1849), *relied on* in M. HORWITZ, *supra* note 1, at 70 n.47, was a blasting case and as such is subject to a special liability rule. *See Spano v. Perini Corp.*, 25 N.Y.2d 11, 15-16, 250 N.E.2d 31, 33-34, 302 N.Y.S.2d 527, 530-31 (1969) (discussing *Hay*).

92. M. HORWITZ, *supra* note 1, at 85-87.

93. *Patten v. Halsted*, 1 N.J.L. 277 (Coxe 1795); *Johnson v. Macon*, 1 Va. 4 (1 Wash. 1790).

94. *Cross v. Guthery*, 2 Root 90, 91 (Conn. 1794). Horwitz also cites *Coker v. Wickes* (R.I. 1742), *reported in* Chafce, *Reports Records of the Rhode Island Court of Equity, 1741-1743*, 35 PUBLICATIONS OF THE COLONIAL SOCIETY OF MASSACHUSETTS 91, 105-07 (1944). *Coker* concerned a patient’s family that refused to pay the doctor’s bill on grounds that the doctor’s “performance” had been “altogether bad.” *Id.* at 105. The court, finding the doctor’s performance adequate, ordered payment.

95. *Stephens v. White*, 2 Va. 203, 211-12 (2 Wash. 1796). Since the English decisions also explained professionals’ liability in negligence terms, *see p. 1725 supra*, these American opinions are hardly surprising.

96. M. HORWITZ, *supra* note 1, at 91-92. As English law plainly did not subject employers to any liability this extreme, *see p. 1726 supra*, Horwitz here implicitly assumes a strong divergence between the American and the English positions.

97. One is *Snell v. Rich*, 1 Johns. 305 (N.Y. 1806). The *Snell* court nonsuited a plaintiff on grounds that the person responsible for the collision was not the defendant’s employee. The plaintiff had specifically alleged that the vessel had been “carelessly navigated and managed.” The court’s opinion is ambiguous as to whether the plaintiff’s evidence verified this allegation. *Id.* at 305.

Horwitz also cites, but then derides as anomaly, an early South Carolina opinion denying an employer’s liability because of the lack of negligence in his employee’s conduct. *Snee v. Trice*, 3 S.C.L. 178 (1 Brev. 1802), *discussed in* M. HORWITZ, *supra* note 1, at 92-93.

98. 4 Dall. 206 (Pa. 1800). The *Bussy* plaintiff had alleged the pilot’s “negligence, and improvi-

liability for collisions resulting from "mere accident."⁹⁹ Horwitz quotes only from a separate opinion by Justice Smith. Smith agreed with the Court on the issue of the defendant's "responsibility" but disagreed with respect to the "assessment of damages," suggesting that while full compensation is mandatory when an injury is caused by the defendant's "gross negligence," if the injury is "merely fortuitous and accidental" the measurement of damages should be left to the "discretion" of the jury.¹⁰⁰ Whatever the meaning of this confused passage, it was written as a dissenting view.¹⁰¹

In short, Horwitz' assuredly interesting assortment of evidence seriously fails to uphold his various strict liability positions.¹⁰² But one scholar's failure of proof, while in this case suggesting the considerable pertinence of the negligence idea from an early date, still may leave us unenlightened about the actual state of the law. At this point, I can describe in detail the nineteenth-century experience in New Hampshire and California.

The New Hampshire record makes clear that tort case law remained quite spare during the first half of the nineteenth century. Indeed, the Supreme Court, obviously not then conceiving of tort as a discrete field of law, was inclined to deal with injury problems on a rather individualized basis. The only tort-like cases in the first two volumes of the state's Reports, which covered the period up to 1820,¹⁰³ concerned the liability of sheriffs. In those cases, the Court originally supported strict liability, though by the 1820s it was applying a negligence standard.¹⁰⁴ Two spreading fire opinions in 1823 were written in negligence terms, with negligence rather plainly carrying the meaning of a lack of care or skill.¹⁰⁵ In one of these cases, the Court revealed an unwillingness to accept the general scope-of-employment rule, and therefore withheld liability.¹⁰⁶ *Dal-*

dent and unskillful management." *Id.* at 206. *Bussy and Snell v. Rich*, 1 Johns. 305 (N.Y. 1806), are both collision cases; on the tradition of the negligence standard for collisions, see pp. 1725-26 *supra*.

99. 4 Dall. at 207. Ruling that the ship's pilot was guilty of gross negligence and that the pilot was a legal agent of the ship's owner, the *Bussy* court found the defendant liable. The court then held that full compensation is the general test for damages whenever there is liability.

100. *Id.* at 208.

101. Moreover, Smith was merely stating his own thoughts as to the proper legal rule. See *id.* He made no claim that his own views were sanctioned by history, or that there were recognized precedents that the majority was impugning.

102. For criticism of the scholarship in Horwitz' contracts chapter, see Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533 (1979).

103. Unfortunately, there is only one volume of opinions for the initial period of 1803-1815. The preface to that volume suggests the possible existence of additional unpublished opinions. N.H. (Smith) at v. But if they did exist, they are no longer available. See Letter to the author from Frank C. Mevers, New Hampshire State Archivist (June 20, 1980)(on file with *Yale Law Journal*).

104. See pp. 1735-36 *infra* (discussion of early New Hampshire case law).

105. See *Chesley v. Thompson*, 3 N.H. 9 (1823); *Wilson v. Peverly*, 2 N.H. 548 (1823).

106. See *Wilson v. Peverly*, 2 N.H. 548, 549-50 (1823) (distinguishing between manual laborers and general agents).

ton v. Favour,¹⁰⁷ in 1826, granted a negligence recovery in case to the victim of a firearms accident. Since the entire trespass-case distinction was largely ignored in other New Hampshire opinions,¹⁰⁸ *Dalton's* ambivalent discussion of the requisites for trespass¹⁰⁹ turned out to be without consequence.¹¹⁰ In 1827, in the first of many trespassing cattle cases, the Court announced rules so complex as to resist classification along the negligence-strict liability axis.¹¹¹ In 1843, the Court in its first carriage collision case applied a negligence standard and inferred actionable negligence from a statutory violation.¹¹² The next year, in a single dog-bite case, the Court accepted *scienter*-based strict liability.¹¹³

In all, there is nothing in the New Hampshire record during this half-century that confirms Horwitz' view that American judges consciously intervened to overthrow a solid, general rule of strict liability.¹¹⁴ Nor is there a single New Hampshire tort opinion that bears the stamp of the dynamic, utilitarian reasoning that Horwitz believes was characteristic of that period's judiciary.¹¹⁵ The record instead supports a Friedman-like appraisal¹¹⁶ that tort law did not begin to gain any momentum or achieve any density until mid-century. In 1849, the Court for the first time endorsed the scope-of-employment rule, and applied, indeed extended, that

107. 3 N.H. 465 (1826).

108. There is loose language in one opinion somewhat suggesting strict liability in trespass. See *Sinclair v. Tarbox*, 2 N.H. 135, 136 (1819). But for one holding, in a narrow context, that even a direct injurer is not a trespasser unless he is genuinely a "wrong doer," see *Cory v. Little*, 6 N.H. 213, 214 (1833).

109. In one paragraph the Court suggests that directness is the test of trespass, but a later paragraph focuses on willfulness. See 3 N.H. at 466.

110. *Dalton's* more general holding is that the victim of a directly caused injury is not required to plead in trespass, but can proceed in case so long as he alleges the negligence of the defendant; as noted, see note 79 *supra*, the Court regarded the identification of case and negligence as "well settled" by the common law. Horwitz' effort to treat *Dalton* as a "transformation" case, see M. HORWITZ, *supra* note 1, at 94, seems frustrated by the Court's opinion, which primarily relies on prior authority. And that reliance was by no means disingenuous. For example, the New York opinion in *Blin v. Cambell*, 14 Johns. 432 (N.Y. 1817), seems exactly in point, even to the extent of involving guns. For one effort to explain the evolution of English law, see Prichard, *supra* note 42.

111. *Avery v. Maxwell*, 4 N.H. 36 (1827). A New Hampshire statute contributed to the complications.

112. *Brooks v. Hart*, 14 N.H. 307 (1843). The Court, while suggesting a result of no liability in the case of "mere . . . misfortune," found it difficult to understand how a carriage-driver could violate the state's stay-to-the-right statute without being guilty of negligence of some sort. See *id.* at 311-12.

A 1786 statute imposed liability on towns for highway accidents caused by highway defects. Finding itself largely bound by the "plain letter" of this statute, the Court in an early opinion held that a town's liability did not depend on its knowledge of the defect. *Morrill v. Town of Deering*, 3 N.H. 53, 54 (1824).

113. *Kittredge v. Elliott*, 16 N.H. 77 (1844).

114. The only particular strict liability rule that the Court knowingly rejected was the one pertaining to sheriffs. The sheriff cases possess a special economic logic that complicates Horwitz' larger argument. See pp. 1735-36 *infra*.

115. See M. HORWITZ, *supra* note 1, at 1-4.

116. Friedman's views are described in note 16 *supra*.

rule in a case involving negligence in railroad construction.¹¹⁷ In subsequent New Hampshire opinions in the 1850s and 1860s, "tort" gradually emerged as a coherent body of law, with negligence its guiding liability principle.¹¹⁸ This process was later ratified by Chief Justice Doe's opinion in *Brown v. Collins*.¹¹⁹ *Brown's* holding, in denying liability, was actually quite narrow.¹²⁰ But the Doe opinion, revealing what Professor White refers to as the new interest in "conceptualization,"¹²¹ contained a critique of certain strict liability ideas, including those discernible in the array of English opinions in *Rylands v. Fletcher*.¹²²

In California, the case law did not begin, of course, until the opening of the state court system in 1850. What is impressive is how frequent tort suits were from the outset and how immediately negligence emerged as the almost unquestioned liability standard.¹²³ Both before and after *Rylands*, the California Supreme Court decided escaping water cases on a negligence basis,¹²⁴ never even considering any *Rylands* argument. The Court found that early state statutes superseded the English rule of strict liability for trespassing cattle,¹²⁵ and deemed negligence to be an ample basis for liability in two blasting cases.¹²⁶ Only with respect to the custody

117. See *Stone v. Cheshire R.R.*, 19 N.H. 427, 435 (1849), discussed at p. 1742 *infra*.

118. The Court read negligence into the highway defect statute, see note 112 *supra*, in *Hubbard v. City of Concord*, 35 N.H. 52, 68-69 (1857), and in *Johnson v. Town of Haverhill*, 35 N.H. 74, 80 (1857).

119. 53 N.H. 442 (1873).

120. In *Brown*, the defendant's horse, frightened by railroad noise, bolted out of the defendant's control and damaged a post on the plaintiff's property.

[W]hatever may be the full legal definitions of necessity, inevitable danger, and unavoidable accident, the occurrence complained of in this case was one for which the defendant is not liable, unless every one is liable for all damage done by superior force overpowering him, and using him or his property as an instrument of violence.

Id. at 451. For the possible liability of the railroad as the originating cause in such cases, see note 212 *infra*.

121. See G. WHITE—TORT LAW, *supra* note 12, at 4-8.

122. L.R. 1 Ex. 265, L.R. 3 H.L. 330 (1868).

123. See, e.g., *Halloway v. Henley*, 6 Cal. 209 (1856) (employer liable for negligence); *Innis v. Steamboat Senator*, 4 Cal. 5 (1852) (applying fault rules to ship collision). Of the early negligence opinions, the only one that actually reflected on the negligence standard was *Hoffman v. Tuolumne County Water Co.*, 10 Cal. 413 (1858), a breaking dam case in which the strict liability alternative came to the Court's attention by way of certain property law maxims. California never adopted the writ system and thus succeeded in avoiding the trespass-case confusion. See *Fraser v. Sears Union Water Co.*, 12 Cal. 555, 557 (1859) (trespass-case distinction "nice, and now obsolete"). The scope-of-the-employment rule of vicarious liability was accepted by the California Court without serious discussion. See *Thorne v. California Stage Co.*, 6 Cal. 232, 233 (1856).

124. See, e.g., *Campbell v. Bear River & Auburn Water & Mining Co.*, 35 Cal. 679 (1868); *Hoffman v. Tuolumne County Water Co.*, 10 Cal. 413 (1858).

125. *Waters v. Moss*, 12 Cal. 535, 539 (1859). Compare *Hahn v. Garratt*, 69 Cal. 146, 10 P. 329 (1886) (common law rule in effect in one county) with *Merritt v. Hill*, 104 Cal. 184, 37 P. 893 (1894) (common law rule rejected state-wide). See note 128 *infra*.

126. See *Buchel v. Gray Bros.*, 115 Cal. 421, 47 P. 112 (1896); *Mariani v. Dougherty*, 46 Cal. 27 (1873). For two other blasting opinions that perhaps intermediate between negligence and strict liability, see *Munro v. Pacific Coast Dredging & Reclamation Co.*, 84 Cal. 515, 24 P. 303 (1890), and *Colton v. Onderdonk*, 69 Cal. 155, 10 P. 395 (1886), discussed in note 301 *infra*.

of animals known to be dangerous did the Court accept strict liability,¹²⁷ and even here one judge dissented, finding insufficient reason to depart from the negligence standard.

The California common-law opinions during this half-century altogether avoided anything resembling a general discussion of industrial or economic policy.¹²⁸ This is true of the 1850-1900 New Hampshire opinions as well, with the interesting exception of *Brown v. Collins*, which frequently alludes to "progress and improvement" as providing support for its negligence views.¹²⁹ What I understand Doe to be saying is not that enterprise should be relieved of liability as such, but rather that, in light of the nineteenth-century's hardly deniable public interest in economic development, liability should not be imposed when there is no proper "legal principle" or "legal reason" for doing so.¹³⁰ As a study of the possible "legal principles" for strict liability, Doe's opinion surely ranks as an impressive document,¹³¹ especially when measured against the then-existing literature. The conclusion he reached was that a rule of strict liability did not seem justified.¹³²

This conclusion, it should be noted, was one that was shared by all the leading legal intellectuals of Doe's generation.¹³³ In *The Common Law*, published eight years after *Brown*, Holmes declared that strict liability "offend[ed] the sense of justice."¹³⁴ Wigmore, writing in 1894, praised

127. *Laverone v. Mangianti*, 41 Cal. 138 (1871).

128. Two California opinions, concerned with the trespassing cattle problem, did discuss the relative importance to the state of ranching and farming. See *Hahn v. Garrett*, 69 Cal. 146, 147, 10 P. 329 (1886); *Waters v. Moss*, 12 Cal. 535, 538 (1859). The Court's purpose, however, was merely to provide the background for particular state statutes whose implications dictated the Court's holdings. See *Merritt v. Hall*, 104 Cal. 184, 37 P. 893 (1894) (explaining prior cases).

129. 53 N.H. 442, 448 (1873).

130. 53 N.H. 442, 447-448 (1873).

131. Doe's critique of the *Rylands* opinions is plainly formidable. In considering the occasional trespass locution that the law looks only to the hardship of the victim, Doe suggested that "by transferring the hardship from one party to another, nothing more will be done than substitute one suffering party for another." *Id.* at 445. Identical analysis appears in an often cited passage in R. KEETON & J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM* 242 (1965).

132. Anyone who is inclined to pigeonhole Doe as a "conservative" must reckon with his many liberal judicial innovations, including the recognition of a generous criminal insanity defense, the abolition of the writ system, the reform of the rule against perpetuities, and the admission of women to the New Hampshire bar. See J. REID, *supra* note 12, at 56, 116, 121, 128-30, 267.

133. It would be interesting to know how this consensus among legal intellectuals related to the more general themes of moral philosophy in the late nineteenth century. In this respect, Professor White's book, G. WHITE—*TORT LAW*, *supra* note 12, is less helpful than one might have hoped.

134. O. HOLMES, *supra* note 34, at 77-78. Holmes' famous historical appraisal was that the common law had never accepted strict liability "unless in that period of dry precedent . . . between a creative epoch and a period of solvent philosophical reaction." *Id.* at 72.

Professor Reid places Doe and Holmes in stark opposition, mainly because of their differing views on the role of the jury. See J. REID, *supra* note 12, at 140-47. But on the question of the "rightness" of the general rule of negligence liability, Doe and Holmes were in basic accord. (It is true that Holmes, unlike Doe, was sympathetic to a limited rule of strict liability for *Rylands*-like "extrahazardous" activities. O. HOLMES, *supra* note 34, at 119, 122-25.)

Doe's *Brown* opinion as "masterly."¹³⁵ Ames expressed the view that strict liability asserts an "unmoral standard,"¹³⁶ and Thayer recorded his agreement with the "fundamental proposition of the common law which links liability to fault."¹³⁷ Thayer's view rested in good part on his assessment of "[h]ow powerful a weapon the modern law of negligence places in the hands of the injured person. . . ."¹³⁸ This assessment is at least roughly congruent with my own observations on the nineteenth-century negligence system, which are set forth in the following sections.

II. Economic Developments and Tort Responses

A high degree of abstraction afflicts the legal historians' typical references to nineteenth-century "entrepreneurs" and "infant industries."¹³⁹ Except for the railroads,¹⁴⁰ the enterprises in question are rarely identified, and the entire nineteenth century is generally treated as a single, undifferentiated economic episode. Yet any effort to ascertain how nineteenth-century tort law related to the American economy should refer to the specific economic developments occurring during that century. What follows is a summary of those developments and an amplification of tort law's response to the injury claims they engendered.

A. Traditional Economic Enterprise

In 1790, shortly after the ratification of the Constitution, the vast majority of Americans lived and worked on family farms.¹⁴¹ In the urban towns, simple products were fabricated by artisans, working either alone or with apprentices; general merchants engaged in the process of buying and selling a wide range of products, although with an increasing interest in specialization.¹⁴² But even in such a pre-industrial economy, lending

135. Wigmore, *Responsibility for Tortious Acts: Its History—III*, 7 HARV. L. REV. 441, 455 n.3 (1894).

136. Ames, *Law and Morals*, 22 HARV. L. REV. 97, 99 (1908).

137. Thayer, *Liability Without Fault*, 29 HARV. L. REV. 801, 815 (1916). For an expression of alarm about workers' compensation as incompatible with the general negligence rule, see Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 235, 344, 368 (1913).

138. Thayer, *supra* note 137, at 805. For Doe's own understanding of the ambitiousness of negligence liability, see p. 1744-45 & notes 293, 356 *infra*.

139. See McClain, *supra* note 6, at 395; Foner, Book Review, NEW YORK REVIEW OF BOOKS, April 14, 1977, at 37, 38.

For occasional specifics in Horwitz' account, see M. HORWITZ, *supra* note 1, at 100, 292 n.49.

140. Friedman's tort law discussion emphasizes the railroads, but at the expense of largely ignoring other nineteenth-century businesses. See L. FRIEDMAN, *supra* note 1, at 409-427.

141. Only 5% of the population resided in urban areas while almost 90% of the work force was engaged in agricultural pursuits. A. CHANDLER, *THE VISIBLE HAND* 51 (1977); Lampand, *The Evolving System of Cities in the United States: Urbanization and Economic Development*, in ISSUES IN URBAN ECONOMICS 81, 108 (H. Perloff & L. Wingo eds. 1968).

142. A. CHANDLER, *supra* note 141, at 14-19, 51-52.

transactions had become common; and one line of early nineteenth-century New Hampshire cases dealt with a tort-like dimension of the law of creditors' rights. A debtor who failed to pay could be imprisoned at his creditor's behest; if the debtor escaped, the creditor could sue the sheriff in charge. Horwitz cites New Jersey and Virginia cases in the 1790s in which sheriffs were held strictly liable for their "neglect of duty" to ensure the debtor's confinement.¹⁴³ An 1809 New Hampshire Supreme Court opinion contains dictum to the same effect.¹⁴⁴ But in later cases in which sheriffs were actual defendants, the New Hampshire Court proved remarkably hostile to strict liability. An 1819 decision reasoned that should a prisoner escape even though a sheriff had made "all honest attempts to discharge [his] duties," the jury should be permitted "to relieve the sheriff from any but nominal damages."¹⁴⁵ If enforcing the letter of the statute would have imposed on the sheriff a harsh liability for a debtor's escape, the Court concluded that the statute should be interpreted imaginatively to prevent this from happening.¹⁴⁶ In general, while a sheriff could be held liable for his "neglect of duty," the "duty" in question was merely to make "all reasonable effort."¹⁴⁷

In New Hampshire, then, "sheriff" law abandoned an early strict liability suggestion in favor of what amounted to a negligence liability rule.¹⁴⁸ This New Hampshire development is perhaps in line with the doctrinal story that Horwitz tells. Yet, if anything, the rearrangement of values that this development entailed disputes the story's supposed moral. According to Horwitz, turn-of-the-century strict liability achieved a "fair result between private litigants,"¹⁴⁹ while the later nineteenth-century negligence rule flaunted a pro-development bias. Yet in the sheriff cases, the commercial interests were on the *plaintiff's* side of the lawsuit. The Court's 1809 opinion explicitly justified sheriff strict liability on the grounds that without it, "[c]reditors would have miserable security for

143. *Patten v. Halsted*, 1 N.J.L. 277 (Coxe 1795); *Johnson v. Macon*, 1 Va. 4 (1 Wash. 1790), both discussed in M. HORWITZ, *supra* note 1, at 86-87, 296 nn.132 & 133. Sheriff cases date back to medieval England; Milsom regards them as an offshoot of the law of bailment. S. MILSOM, *supra* note 33, at 268.

144. *Steele v. Warner*, N.H. (Smith) 263, 265 (1809).

145. *Gordon v. Edson*, 2 N.H. 152, 154 (1819) (dictum). To be sure, even the award of nominal damages presupposed strict liability of a sort. But nominal damages are the functional equivalent of no liability at all, and no liability was the result that the *Gordon* Court clearly sought to achieve. The Court believed that it was proposing a reform of the law: that prior to its opinion the law had required the sheriff to pay the full amount of the debt. *Id.* at 153.

146. See *Gordon v. Edson*, 2 N.H. 152, 154-56 (1819); *Tappan v. Bellows*, 1 N.H. 100, 109-10 (1817).

147. See *Ferrin v. Symonds*, 11 N.H. 363, 366 (1840).

148. For a similar trend in sheriff attachment-of-property cases, compare *Porter v. Tarlton*, N.H. (Smith) 372 (1814) (strict liability) with *Runlett v. Bell*, 5 N.H. 433 (1831) (negligence).

149. See M. HORWITZ, *supra* note 1, at 1.

their debts.”¹⁵⁰ In contrast, the Court’s later negligence opinions found the imposition of stricter obligations on sheriffs to be unfairly harsh. This particular shift from strict liability to negligence, far from disparaging fairness for the sake of commercial advantage, evidently subordinated commercial interests in order to achieve what the Court perceived to be a just result.¹⁵¹

B. *The Textile Mills*

In late eighteenth-century England, the new textile mills, with their spinning “mule” and power loom technology, initiated the Industrial Revolution.¹⁵² Eventually, the secrets of their technology were transported across the Atlantic,¹⁵³ and in the early nineteenth century, textile mills began appearing in New England, where local workers already possessed a comparatively high level of technical and mechanical skills.¹⁵⁴ These textile mills constituted the first significant stage of American industrialization.¹⁵⁵ Economists like W.W. Rostow, who identified railroad building in the 1840s as the “takeoff point” for the modern American economy,¹⁵⁶ erred in overlooking the “remarkable explosion of industrial activity” prior to 1840, an explosion “dominated in every sense” by the textile mills.¹⁵⁷ In 1840, the vast majority of all “factories” in the United States were textile mills;¹⁵⁸ as late as 1860, textiles remained the country’s largest manufacturing industry.¹⁵⁹

From the start, these mills found a particular haven in New Hampshire, whose streams and rivers provided an ample source of power.¹⁶⁰

150. *Steele v. Warner*, N.H. (Smith) 263, 265 (1809).

151. In relaxing the liability pressure on jailers, the Court was possibly expressing its humane opposition to imprisonment for debt. See W. NELSON, *AMERICANIZATION OF THE COMMON LAW* 149-50 (1975) (discussing Massachusetts law).

152. See D. LANDES, *THE UNBOUND PROMETHEUS* 41-42, 80-88 (1969).

153. English law attempted to prohibit the export of textile machinery and even to prevent the emigration of mechanics who had experience with textile technology. See G. GUNDERSON, *A NEW ECONOMIC HISTORY OF AMERICA* 159 (1976).

154. See Hekman, *The Product Cycle and New England Textiles*, 94 Q. J. ECON. 697 (1980). For an explanation of why New England’s work force was unusually skillful, see *id.* at 700-01.

155. See A. CHANDLER, *supra* note 141, at 67-72; S. RATNER, J. SOLTOW, & R. SYLLA, *THE EVOLUTION OF THE AMERICAN ECONOMY 185-90* (1979).

156. See W. ROSTOW, *THE STAGES OF ECONOMIC GROWTH* 38, 55-56, 61 (2d ed. 1971); pp. 1740-41 *infra*. For Rostow’s response to his critics, see W. ROSTOW, *supra*, at 223-41.

157. See Zevin, *The Growth of Cotton Textile Production After 1815*, in *THE REINTERPRETATION OF AMERICAN ECONOMIC HISTORY* 122, 122-23 (R. Fogel & S. Engerman eds. 1971). Zevin suggests that the new technology, which affected the economics of supply, explains slightly less than half of the phenomenal growth in textile sales. The rest resulted from the economics of demand, including a growing population with preferences for cotton products. *Id.* at 125-37.

158. See A. CHANDLER, *supra* note 141, at 60.

159. For value added data, see S. RATNER, J. SOLTOW, & R. SYLLA, *supra* note 155, at 190. In 1860, the average cotton textile manufacturer employed 143 persons; no other class of manufacturers employed, on average, more than 33. *Id.*

160. In 1850 the three leading cotton textile production states were Massachusetts, New Hamp-

Nineteenth-Century Tort Law

During the 1820s, cotton textile factory building expanded rapidly. A number of mills clustered along the Merrimack River to form the new town of Manchester: industrialization thus fostered urbanization. The largest of these mills was owned by the Amoskeag Manufacturing Company, whose operations by 1835 covered 700 acres.

Through 1840, then, textile production was the infant industry that was foremost in America. Yet the textile mills were almost wholly absent from tort law decisions in New Hampshire during the first half of the nineteenth century. Indeed, the tort problems that the New Hampshire Supreme Court addressed simply had nothing to do with modern economic activity; most of the case law looked backward to a more traditional and largely rural society.¹⁶¹ There were no suits brought by any injured employees against their employers, and no tort claims of any sort brought against the textile factories. "Industrial" as these factories may have been, the products they fashioned plainly had little accident-causing potential; and historians' comments indicate that working conditions within the textile factories were generally safe.¹⁶²

With respect to the textile industry, therefore, the tort law subsidy thesis is not so much false as irrelevant.¹⁶³ But if we temporarily allow our definition of "tort" to expand somewhat, one significant line of cases can be identified. Textile companies, relying on water for power, were famous for building dams.¹⁶⁴ In early nineteenth-century New Hampshire, many riparian-law civil actions involved dams that caused harm to adjacent property by the backup or overflow of river water.¹⁶⁵ The New Hamp-

shire, and Connecticut. See J. DU BOW, *STATISTICAL VIEW OF THE UNITED STATES* 180 (1854). The remainder of this paragraph is based on E. MORISON & E. MORISON, *NEW HAMPSHIRE* 128-34 (1976).

161. The Court's tort cases concerned roaming livestock, spreading fires, carriage accidents, a firearm accident, and a dog-bite. See pp. 1730-31 *supra*.

162. See E. MORISON & E. MORISON, *supra* note 160, at 154. According to a recent study of a large textile company in nineteenth-century Massachusetts, the "basic machine-tending jobs" usually reserved for women employees were almost free of accident risks; there was some exposure to risk in the semi-skilled "carding" and "picking" jobs monopolized by men. T. DUBLIN, *WOMEN AT WORK* 65 (1979).

163. Tort suits against the textile mills remained rare during the 1850-1900 period. A few claims were finally brought by injured employees. See, e.g., *Parent v. Nashua Mfg. Co.*, 70 N.H. 199, 47 A. 261 (1899); *Jacques v. Great Falls Mfg. Co.*, 66 N.H. 482, 22 A. 552 (1891). And *Buch v. Amory Mfg. Co.*, 69 N.H. 257, 44 A. 809 (1897), often cited today for its good samaritan dictum, happened to involve a cotton mill defendant.

164. See Hekman, *supra* note 154, at 702-03.

165. Riparian rules are a part of property law rather than tort law; they are thus treated by Horwitz mainly in his property chapter rather than in his tort chapter. I have accepted a relaxation of a proper tort definition only in order to bring into my study a significant number of private law rulings that were concerned with the textile mills in the early decades of their operations. Except for the case law pertaining to the 1868 Mill Act, I have used 1862 as the cutoff date for reading riparian opinions in New Hampshire, and I have made no effort to study water law rulings in California. On the latter, see the complex discussion in McCurdy, *Stephen J. Field and Public Land Law Development in California, 1850-1866: A Case Study of Judicial Resource Allocation in Nineteenth-Century*

shire Supreme Court decided these cases in accordance with its sense of the "rights" and "wrongs" of riparian law. The Court's basic rule—apparently drawn from tradition—was that a dam owner is almost automatically liable for the harms that dambuilding causes.¹⁶⁶ Although the textile mills were only occasionally involved in these appeals as immediate parties, the Court's rule must have been burdensome to the textile industry. In 1862, the Amoskeag was finally brought into Court as a water case defendant.¹⁶⁷ The Company's stone dam along the Merrimack had thrown back water, damaging the plaintiff's bridge. The Company argued that its operations necessitated such a dam and that its charter from the New Hampshire legislature immunized it from liability for such necessary acts.¹⁶⁸ The Supreme Court, while suggesting that the charter's implications might rule out a criminal indictment, specifically concluded that the charter gave the Company "no right to throw back the water upon the lands of others to their injury; and for such flowage the defendants are liable, notwithstanding their charter."¹⁶⁹ Thus, when cases in-

America, 10 LAW & SOC. REV. 235, 253-63 (1975).

In his property chapter, Horwitz stresses the extent to which the textile mills benefited from the mill acts of the early nineteenth century. M. HORWITZ, *supra* note 1, at 47-53. New Hampshire's first mill act was enacted, however, in the pre-industrial days of 1718, see *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 20 (1885), and was therefore obviously written with simple grist mills rather than modern textile mills in mind. Moreover, the 1718 Act was repealed in 1792, and no new act of general application was passed until 1868. *Id.* There thus was no general act in effect in New Hampshire during the epoch in which the great textile mills were built. Moreover, the two or three special mill acts that were enacted in the course of that epoch were evidently without practical consequence for private property rights. See *Ash v. Cummings*, 50 N.H. 591, 595 (1872) (statement of counsel).

The 1868 Act was itself notably generous inasmuch as it required the mill owner to pay the neighboring landowner a sum equal to 150% of his losses. *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 10 n.* (1885). The Act thus augmented the landowner's common-law damage remedy in a major way.

166. See, e.g., *Cowles v. Kidder*, 24 N.H. 364 (1852); *Woodman v. Tufts*, 9 N.H. 88 (1837); *Gilman v. Tilton*, 5 N.H. 231 (1830).

"Reasonable use" was occasionally mentioned by the Court in its dam opinions, but the phrase seems to have meant little more than the absence of actual injury. See *Eastman v. Amoskeag Mfg. Co.*, 44 N.H. 143, 159 (1862); *Gerrish v. New Market Mfg. Co.*, 30 N.H. 478, 483 (1854). In the 1860s reasonable use did become quite significant in riparian actions relating to drainage and discharge. *Hayes v. Walden*, 44 N.H. 580 (1863); *Bassett v. Salisbury Mfg. Co.*, 43 N.H. 569 (1862). The *Bassett* Court, however, appreciated that reasonable use was apparently no part of the law in the overflowing dam cases. *Id.* at 578.

An 1844 opinion dealt with the limited right of the flooded landowner to exercise self-help in abating the nuisance created by a mill. *Great Falls Co. v. Worster*, 15 N.H. 412, 438-39 (1844). In no nineteenth-century New Hampshire case did a landowner seek injunctive relief against the operation of a dam. Whatever abatement and injunctive opportunities the landowner possessed were superseded by the generous monetary remedies in the 1868 Act. See note 165 *supra*.

167. *Hookset v. Amoskeag Mfg. Co.*, 44 N.H. 105 (1862). This is the first New Hampshire Supreme Court case of any sort in which the Amoskeag is a captioned party.

168. *Id.* at 107. In a related case, *Eastman v. Amoskeag Mfg. Co.*, 44 N.H. 143 (1862), Amoskeag relied on a New Hampshire statute that specifically authorized the Company's erection of a particular dam.

169. 44 N.H. at 110. The holding in *Eastman* was similar. "[A]n act authorizing one to build a dam . . . merely protects him from an indictment for a nuisance in obstructing the river; but if in doing this he overflows his neighbor's land, he is liable to an action therefor." *Id.* at 160.

volving the overflow from dams began to subject textile manufacturers to common-law review, the New Hampshire Court insisted on applying a traditional liability rule, despite its obviously antidevelopmental tendencies; and it emphatically refused to give the textile mills any special liability rule privileges.¹⁷⁰

C. *The Transportation Revolution And The Railroads*

The first half of the nineteenth century witnessed important advances in transportation. A number of improved toll roads or "turnpikes" were built, often by private enterprise, at various locations on the East Coast and in the Midwest;¹⁷¹ these turnpikes provided an important stimulus for various forms of economic activity. In *Randall v. Proprietors of the Cheshire Turnpike*, a turnpike company employee, although willing to accept the plaintiff's toll, warned the plaintiff that a bridge along the turnpike was in a dangerous state of disrepair and advised him to go another way.¹⁷² When the plaintiff attempted to cross anyway, his wagon fell through the bridge. In the plaintiff's suit, turnpike officials, emphasizing the warning given, argued the defense of assumption of risk. Finding that defense ineffective, the New Hampshire Court held that the turnpike company, to avoid liability, must not only explicitly disclaim liability, but must also commercially dissociate itself from the traveller's undertaking by refusing to accept his toll.¹⁷³ Especially when *Randall* is contrasted with an earlier Court opinion largely adopting the assumption of risk defense in a case involving a defect in an ordinary public highway,¹⁷⁴ *Randall* easily can be read as suggesting a judicial concern for turnpike safety when it is jeopardized by the commercial practices of a corporate defendant.¹⁷⁵

The wave of turnpike building was followed by one of canal building.

170. The Court also intervened to prevent enterprise from taking advantage of ordinary citizens. In *Carleton v. Redington*, 21 N.H. 291 (1850), the owner of a scythe factory was sued by a farmer who alleged that the height of the factory dam violated restrictions in the deed by which the farmer had earlier conveyed the property in question to the factory owner. The defendant sought to identify a contemporary oral agreement that professedly relaxed those restrictions. The Supreme Court found this parol evidence inadmissible, stating that otherwise persons "skilled in the science of hydraulics" might improve their economic position at the expense of persons of more ordinary knowledge, which would result in "wrong and injustice" insofar as the law would be failing to "guard persons . . . against the injurious consequences of their own follies or weaknesses." *Id.* at 303-04.

171. A good account of the turnpikes is Stover, *Canals and Turnpikes: America's Early-Nineteenth-Century Transportation Network*, in *AN EMERGING INDEPENDENT AMERICAN ECONOMY 1815-1875*, at 60-79 (J. Frese & J. Judd eds. 1980). On New Hampshire's turnpikes, see 1 E. KIRKLAND, *MEN CITIES AND TRANSPORTATION* 38-39 (1948); Stover, *supra*, at 69.

172. 6 N.H. 147, 148 (1833).

173. *Id.* at 150.

174. *Farnum v. Town of Concord*, 2 N.H. 392 (1821).

175. *Randall* is the first true (that is, non-riparian-law) tort action in New Hampshire brought against a private corporation.

Canals in America were both few in number and primitive in character until 1817, when the New York Legislature voted to build the Erie Canal.¹⁷⁶ But New York's action set off a building boom that resulted, by 1840, in a large network of canals within the Northeast and Midwest.¹⁷⁷ These canals, by tying in to New England's natural waterways, enabled textile products to reach a larger market,¹⁷⁸ thereby contributing to the textile mills' economic success. Since there were no canals in New Hampshire, that state's judicial records provide no information on the relationship between the canals and tort law. It is notable, however, that the "Canals" chapter in Shearman & Redfield's 1869 treatise on negligence consists only of five short pages, reporting rulings that hardly reveal any clear pro-canal bias.¹⁷⁹ Once again, the tort subsidy thesis suffers from the embarrassment of irrelevance.

In time, the canals were challenged, and all but overwhelmed, by the railroads.¹⁸⁰ In the late 1840s and 1850s, the first of several major railroad-building booms occurred. The opening of the railroads resulted in new or improved transportation services for persons and freight and spurred growth in industries that provided the railroads with necessary supplies like machinery and rails. A recognition of these various benefits contributed to the traditional understanding—which Friedman evidently shares—that the railroads were indispensable to nineteenth-century economic growth.¹⁸¹ This "axiom of indispensability" was dramatically disputed, however, by Robert Fogel in 1964,¹⁸² who estimated that even as late as 1900, railroads were responsible for less than five percent of the country's gross national product.¹⁸³ Estimates can be kept as low as this partly because of the willingness of historians like Fogel to "counterfactually" hypothesize—as an alternative to the railroads—an ambitious system of canals serving the Midwest and the Great Plains.¹⁸⁴ Yet whatever the possibilities of canal building may have been, the truth remains that "from the standpoint of historical fact, it was the railroad that actually

176. See G. GUNDERSON, *supra* note 153, at 146.

177. On the American canals generally, see *id.* at 143-47; Stover, *supra* note 171, at 79-94.

178. See Zevin, *supra* note 157, at 132-33.

179. T. SHEARMAN & A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE 286-90 (1869). The only shorter chapter is "Clerks and Other Recording Officers." *Id.* at 328-31. The highway obstruction chapter runs 90 pages. *Id.* at 391-480.

180. There were no railroads operating in America until 1830. G. TAYLOR, THE TRANSPORTATION REVOLUTION 1815-60 at 76-77 (1951). Ten years later, railroad systems remained in a preliminary state. See W. BROWNLEE, DYNAMICS OF ASCENT 194 (2d ed. 1979).

181. See L. FRIEDMAN, *supra* note 1, at 262, 410.

182. R. FOGEL, RAILROADS AND AMERICAN ECONOMIC GROWTH 1-9 (1964).

183. See *id.* at 223. Given what is now seen as Fogel's undue neglect of passenger (as compared to freight) benefits, his estimate can easily be raised to slightly more than seven percent. See Boyd & Walton, *The Social Savings from Nineteenth Century Rail Passenger Services*, 9 EXPLORATIONS IN ECON. HIST. 233, 251 (1972).

184. See R. FOGEL, *supra* note 182, at 92-93.

brought the lower transport costs. . . ."¹⁸⁵ If the railroads are hence able to take credit for these cost savings, their contribution to the late nineteenth-century national product is genuinely impressive.¹⁸⁶

The railroads first entered New Hampshire in the late 1840s. By 1874 "nearly every hamlet" had been provided with service.¹⁸⁷ In the West, ever since California was admitted as a state in 1849, its residents were almost unanimous in their belief that a transcontinental railroad was "the key" to the state's future economic development¹⁸⁸ and to the state's status as a complete member of the federal Union.¹⁸⁹ In 1860, the Central Pacific launched a joint venture with the Union Pacific to build the first of the transcontinentals. The construction on this railroad, then regarded as the "great work of the age,"¹⁹⁰ was completed with golden spikes in May 1869. By 1910 there were four transcontinental routes terminating in California, including the Southern Pacific and the Santa Fe, and a system of feeder railroads running through the state.¹⁹¹ Competition among the transcontinentals led to astonishing reductions in cross-country freight charges, and in passenger fares as well.¹⁹² The result of low-cost railroad service was "a flow of migration, . . . an avalanche rushing madly to Southern California."¹⁹³ In addition, the inexpensive farm-to-market

185. A. FISHLOW, *AMERICAN RAILROADS AND THE TRANSFORMATION OF THE ANTE-BELLUM ECONOMY* 306 (1965).

186. In addition, as Fogel concedes, whatever the effect of the railroads on the growth rate as such, the railroads undeniably "determined . . . which of many possible growth paths would be followed." R. FOGEL, *supra* note 182, at 237. In this respect they were assuredly of great importance. Finally, the railroads transformed the structure of business organization in America. Insofar as they recruited capital from investors throughout the nation, created an administrative hierarchy assigning specific tasks to salaried managers, and developed sophisticated informational procedures for purposes of internal evaluation, the railroads constituted the first modern economic enterprise. See A. CHANDLER, *supra* note 141, at 1-6, 81-121.

187. E. MORISON & E. MORISON, *supra* note 160, at 144 (quoting contemporary source). Railroad building was preceded, however, by a considerable public debate within the state. *Id.* at 134-38. During the "railroad war" of 1840-1844, railroads were temporarily denied access to the eminent domain power. See E. KIRKLAND, *supra* note 171, at 275. This "war" was finally won, however, by the railroads and their supporters. *Id.*

Given the adequacy of the existing system of water distribution, it may be that the New England textile mills did not greatly benefit from the new railroads. See W. BROWNLEE, *supra* note 180, at 202. Over time, the railroads lured farmers away from New Hampshire into the more fertile farmlands of the Midwest. See E. MORISON & E. MORISON, *supra* note 160, at 147.

188. M. BLACKFORD, *THE POLITICS OF BUSINESS IN CALIFORNIA, 1890-1922*, at 3 (1977); see G. NASH, *STATE GOVERNMENT AND ECONOMIC DEVELOPMENT* 44, 55 (1964).

189. C. MCWILLIAMS, *supra* note 12, at 60-61. In 1867, Henry George referred to "the railroad that we have looked for, hoped for, prayed for so long." George, *What the Railroads Will Bring Us*, 1 *OVERLAND MONTHLY* 297, 298 (1868).

190. See C. DEGLER, *THE AGE OF THE ECONOMIC REVOLUTION, 1876-1900*, at 23 (2d ed. 1977).

191. See M. BLACKFORD, *supra* note 188, at 3-4.

192. In 1886 the Southern Pacific's passenger fare from the Midwest to Southern California had stabilized at approximately \$125. But the Santa Fe then began a fare-cutting war. "On March 6, 1887, the Southern Pacific met the Santa Fe rate of \$12. In a matter of hours, the rate dropped to \$8, then to \$6, then to \$4. By noon on March 6, the Santa Fe was advertising a rate of \$1 per passenger." C. MCWILLIAMS, *SOUTHERN CALIFORNIA: AN ISLAND ON THE LAND* 118 (1973).

193. *Id.* (quoting a local historian).

freight service that the railroads provided allowed California, by 1900, to acquire the economic position of "the nation's fruit bowl."¹⁹⁴ Thus, regardless of the extent to which the railroads created or merely allocated economic growth,¹⁹⁵ California was clearly one of their major beneficiaries.

The railroads, unlike the textile factories, were highly conducive to accidents and injuries;¹⁹⁶ the case law in New Hampshire from the late 1840s and in California from the mid-1860s is replete with opinions on railroad liability. An early opinion from each state helps reveal the judicial mood. When railroad building began in New Hampshire, the railroads employed contractors to perform the construction work. The question quickly surfaced whether these railroads were vicariously liable when the negligence of their contractors resulted in injury. In *Stone v. Cheshire Railroad*, the New Hampshire Supreme Court perceived that the question "is an important one in itself, and increases in importance as railroads of this description increase throughout the country."¹⁹⁷ The Court then effectively held that railroad building was a nondelegable duty and that the railroad was therefore subject to vicarious liability.¹⁹⁸

In California, the first personal injury action against a major railroad was *Kline v. Central Pacific Railroad*, decided in April 1869.¹⁹⁹ Kline, a teenager, illegally boarded a train. After the railroad conductor employed sharp language and put a hand on his shoulder in ordering him off the train, he jumped from a moving car and suffered injury. Although the California Court agreed that the plaintiff was a "wrongdoer," it granted him a recovery, finding that his wrongdoing was "remote" and that the railroad was legally required, having discovered his presence, to use reasonable care in removing him from the railroad car. The Court thus commemorated the imminent completion of the Central Pacific's transcontinental by requiring that railroad to compensate a mere trespasser.

In New Hampshire and California, later railroad cases fell into recurring categories. Railroads were most likely to cause injuries to passengers, to persons riding in carriages at railroad intersections, to livestock wan-

194. M. BLACKFORD, *supra* note 188, at 5.

195. For an indication of the benefits received by farming states and by states on the major East-West routes, see A. FISHLOW, *supra* note 185, at 297-303.

196. For a factually rich discussion of nineteenth-century railroad safety problems, see 2 E. KIRKLAND, *MEN CITIES AND TRANSPORTATION* 351-97 (1948). Kirkland places "blame" for nineteenth-century railroad injuries on railroad managers, railroad employees, and the public alike. See *id.* at 355-89.

197. 19 N.H. 427, 439 (1849).

198. *Id.* Twenty-seven years later, when railroad building was basically completed, the Court cut back sharply on the *Stone* vicarious liability rule. See *Carter v. Berlin Mills Co.*, 58 N.H. 52, 58 (1876).

199. 37 Cal. 400 (1869).

dering on railroad tracks, and to farmers whose crops were set on fire by sparks.²⁰⁰ Two basic tort issues persist throughout the Courts' opinions: the negligence or wrongdoing of the railroad,²⁰¹ and the contributory negligence of the plaintiff-victim. In the passenger cases, only rarely did the railroads escape liability on the grounds that they were not negligent.²⁰² Because the high speeds of the new railroads created "hazards to life and limb," and because the railroads were "entrusted [with] the lives and safety" of their passengers, the New Hampshire Supreme Court held railroads liable to passengers for "even the smallest neglect."²⁰³ If a railroad car derailed, the California Supreme Court declared a presumption of negligence on the railroad's part;²⁰⁴ if a car experienced a sudden jerk, both the California and New Hampshire Courts agreed that this event was *prima facie* evidence of negligence.²⁰⁵ Obviously, the reasoning in these cases consisted of an unlatinized, common sense version of the doctrine now called *res ipsa loquitur*.

Railroad passengers were only rarely denied a recovery on account of contributory negligence. If a passenger was injured while boarding or disembarking a moving railroad car, the California Court, while hardly regarding such conduct as intelligent, nonetheless ruled that it was not nec-

200. Of course, there were also many suits against railroads by their own employees. There is little in the appellate opinions in these suits, however, that seems peculiar to railroads. They are therefore subsumed under the doctrinal category of employee-versus-employer, dealt with at pp. 1768-71 *infra*. Railroads were also frequent defendants in the nineteenth-century "trespasser" cases, which are discussed at p. 1767 *infra*.

201. Aggravated forms of wrongdoing raised distinct issues of punitive damages and vicarious liability. The Court in *Hopkins v. Atlantic & St. L. R.R.*, 36 N.H. 2 (1857), held a railroad liable for punitive damages when the "gross negligence" of its employee resulted in a passenger injury. Can punitive damages be awarded against a corporation under mere vicarious liability? "[W]hatever may have been the ancient rule . . . money corporations, corporations which, like these defendants, are established and conducted in whole or in part for the pecuniary benefit of the members, are liable in actions for torts, in the same way . . . [as] natural persons." *Id.* at 17. Is mere gross negligence an adequate predicate for punitive damages? Given the railroads' "practical monopoly for transporting passengers" and "the disasters which have happened in that mode of travelling," "gross carelessness in the management of railroad trains ought not to be encouraged by any lax administration of the law . . . ." *Id.* at 18-19. For later developments in punitive damage law in New Hampshire, see the double jeopardy holding in *Fay v. Parker*, 53 N.H. 342 (1872).

In *Turner v. North Beach & Mission R.R.*, 34 Cal. 594 (1868), a black woman passenger was excluded from a railroad car by its conductor, possibly because of her color. The Court ruled that if the employee-conductor was acting maliciously and contrary to instructions, the passenger's punitive damage remedy would run against the conductor and not against the railroad. But the Court also held that, despite the conductor's defiance of the railroad's orders, the railroad could be held liable to the passenger for the passenger's actual damages.

202. These rare cases all concerned location for disembarking. See *Benson v. Central Pac. R.R.*, 98 Cal. 45, 32 P. 809 (1893).

203. *Taylor v. Grand Trunk Ry.*, 48 N.H. 304, 313-14 (1869). If "negligence" is itself given a rigorous economic definition, then "slight negligence" seems either economically meaningless or economically wrong.

204. See *Mitchell v. Southern Pac. R.R.*, 87 Cal. 62, 64, 72, 25 Pac. 245, 245 (1890) (negligence presumed from derailment and from unusual speed of railroad prior to derailment).

205. See *McCurrie v. Southern Pac. Co.*, 122 Cal. 558, 561, 55 P. 324, 325 (1898); *Emery v. Boston & Me. R.R.*, 67 N.H. 434, 36 A. 367 (1893).

essarily negligent and hence affirmed jury verdicts against the railroad.²⁰⁶ As for the passenger who failed to look ahead while debarking, the New Hampshire Court specified that if she was in a "flustered state of . . . mind" because the railroad had overshot its station, a jury finding of no contributory negligence was appropriate.²⁰⁷

In every railroad intersection case, the plaintiff was able to present enough evidence on the initial issue of the railroad's negligence to take the case to the jury.²⁰⁸ Frequently, the plaintiff in a crossing case established negligence by showing that the railroad had failed to comply with a state statute or local ordinance applicable to railroad operations;²⁰⁹ by inferring negligence from a legislative violation, the Courts were effectively developing the doctrine of negligence per se. Of the pure common-law rulings, the most interesting was *Huntress v. Boston & Maine Railroad*,²¹⁰ in which the New Hampshire Supreme Court conceded that neither the railroad's engineer nor its fireman was negligent as the train approached the crossing. The Court then observed, however, that "railway managers may be presumed to have special knowledge of the dangers of their business, and to be aware of the constant peril arising at level crossings . . ."²¹¹ Relying on this observation, the Court concluded that the jury could properly find the railroad negligent for not having "guard[ed] against accidents by stationing flagmen [at the crossing] or slackening the speed of the trains."²¹²

The remaining issue in the crossing cases concerned the victim's almost self-evident contributory negligence in attempting to cross the tracks with-

206. *Finkeldey v. Omnibus Cable Co.*, 114 Cal. 28, 45 P. 996 (1896) (streetcar case); *Carr v. Eel River & E. R.R.*, 98 Cal. 366, 371-73, 33 P. 213, 214-15 (1893). When an occasional jury was willing to find the plaintiff contributorily negligent for jumping from a moving train, the Court allowed the jury's defense verdict to stand. See *Cravan v. Central Pac. R.R.*, 72 Cal. 345, 346-47, 13 P. 878, 878-79 (1887).

207. *Foss v. Boston & Me. R.R.*, 66 N.H. 256, 259-60, 21 A. 222, 224 (1890). Perhaps the Court's "flustered" evaluation was affected by the Court's awareness of the plaintiff's gender. Cf. *Bass v. Concord St. Ry.*, 70 N.H. 170, 173, 46 A. 1056, 1058 (1899) (describing a debarking woman passenger as being "preoccupied" by her "wraps and bundles" and hence not contributorily negligent). Note, however, *Tucker v. Henniker*, 41 N.H. 317, 321-22 (1860), in which the Court firmly held that the "man" in "reasonable man" refers to "mankind," that American women are quite adept at managing horses and carriages, and that a "reasonable woman" instruction is therefore clearly inappropriate.

208. In a railroad intersection case, the California Supreme Court noted that "[w]henver an enterprise . . . necessarily involves serious risk to life or limb, a due regard to the rights and safety of others requires that great care shall be taken to prevent accidents . . ." *Robinson v. Western Pac. R.R.*, 48 Cal. 409, 421 (1874).

209. See *Clark v. Boston & M.R.R.*, 64 N.H. 323, 10 A. 676 (1887).

210. 66 N.H. 185, 34 A. 154 (1890).

211. *Id.* at 191, 34 A. at 156-57.

212. *Id.* In *Presby v. Grand Trunk Ry.*, 66 N.H. 615, 22 A. 554 (1891), steam from an approaching train frightened the plaintiff's horse in a way that led the horse to bolt and throw the plaintiff, who then sued the railroad. The Court upheld the jury's finding that the railroad had been negligent in its choice of the automatic valve that released the steam. So long as the evidence showed "that valves of a higher pressure are sometimes used," the jury could determine whether the defendant's own valve was "suitable." *Id.* at 618, 22 A. at 554.

out taking account of the danger of the approaching train. On this issue the California Court, while sometimes concluding that the victim was negligent per se,²¹³ was still willing to look at each case on its facts, emphasizing that the carriage driver was not required to exercise “the utmost coolness and discretion,”²¹⁴ and was “authorized to assume” that the train would not approach the crossing negligently.²¹⁵ The New Hampshire Court appraised crossing collisions in a way that almost gave the victim a presumptive excuse. In *Huntress* itself, the plaintiff’s decedent failed to see the approaching train, even though a warning bell was ringing and there was a long and unobstructed view. In affirming the plaintiff’s verdict, Doe first postulated that

[w]hen there is no evidence of insanity, intoxication, or suicidal purpose, and no evidence on the question of his care, except the instinct provided for the preservation of animal life, it may be inferred from this circumstantial proof that, for some reason consistent with ordinary care and freedom from fault on his part, his attempt to cross was due to his inadequate understanding of the risk.²¹⁶

Doe then concluded that since “high rates of speed create a degree of danger that is not generally realized by those who have no special means of information on the subject,” the failure to appreciate the risk is not in itself contributory negligence.²¹⁷ Of the fourteen intersection cases in New Hampshire during the nineteenth century, plaintiffs emerged victorious in every one.

In suits against railroads for the destruction of livestock wandering on railroad tracks, the California Supreme Court gave effect to a legislative enactment requiring railroads to fence off their tracks to keep livestock away;²¹⁸ this statute explicitly called for liability if a fence was lacking. While New Hampshire also had a statute on fencing, it merely provided that if a railroad failed to build a proper fence, the landowner could build one himself and secure double reimbursement for his costs from the railroad. In *Dean v. Sullivan Railroad*, the New Hampshire Supreme Court, recognizing that the issue was one of “great importance” for railroads and landowners,²¹⁹ interpreted the statute as implicitly imposing on railroads a

213. See, e.g., *Pepper v. Southern Pac. Co.*, 105 Cal. 389, 38 P. 974 (1895); *Glascok v. Central Pac. R.R.*, 73 Cal. 137, 14 P.2d 518 (1887).

214. *Nehrbas v. Central Pac. R.R.*, 62 Cal. 320, 335 (1882).

215. *Strong v. Sacramento & Placerville R.R.*, 61 Cal. 326, 328 (1882). This “authorization” evidently rendered irrelevant the foreseeability of railroad negligence.

216. *Huntress v. Boston & Me. R.R.*, 66 N.H. 185, 190; 34 A. 154, 156 (1890).

217. *Id.*

218. See *Fontaine v. Southern Pac. R.R.*, 54 Cal. 645 (1880).

219. 22 N.H. 316, 318 (1851).

positive obligation to erect such fences, an obligation that warranted civil liability in the event of railroad noncompliance.²²⁰

In assessing the contributory negligence defense, both the New Hampshire and the California Courts were modest in the demands they placed on the livestock owner. The New Hampshire farmer was not found contributorily negligent if he failed to employ an attendant to prevent his livestock from wandering onto the railroad tracks that traversed his property; the "expense" of hiring such an attendant was simply too great.²²¹ In *McCoy v. California Pacific Railroad*,²²² a farmer, though knowing of the defect in the railroad's fence, took no steps at all to prevent his cattle from straying onto the track. The California Court ruled that the farmer's conduct was free of contributory negligence in large part because "he probably knew that so long as the defendant chose to continue running its cars upon this open track, it undertook at its peril that no harm should come to the stock for the want of a proper fence."²²³ Logically, this reasoning begs the question; substantively, it reveals the Court's clear assumption that the farmer's lack of care should not frustrate the desired result of railroad liability.

In suits by farmers against railroads for fire damage to property, the California and New Hampshire Courts ruled in favor of the farmer on almost every major issue. An 1840 New Hampshire statute rendered railroads legally liable for fires attributable to railroad locomotives. The New Hampshire Court gave the statute a broad interpretation, ruling, for example, that even interstate railroads were subject to its application.²²⁴ California lacked such a statute, but the California Supreme Court, finding that a "perfect" railroad engine would not produce fire-causing sparks, concluded that emission of such sparks afforded "prima facie proof" of negligence on the railroad's part.²²⁵ This, of course, is *res ipsa* reasoning, but with a hint, in a later opinion, of strict liability.

220. *Id.* at 319.

221. *White v. Concord R.R.*, 30 N.H. 188, 205 (1855). On whether the common law, without statutory supplementation, obliged railroads to provide protections of this sort, compare *Dean v. Sullivan*, 22 N.H. 316, 321 (1851) (raising possibility of common law obligation) with *Woolson v. Northern R.R.*, 19 N.H. 267, 269-70 (1848) (denying common law obligation). The New Hampshire Court did rule, however, that the state fence statute was not meant to protect farmers' livestock while "trespassing" on the adjacent property owner's land or while straying along a public highway. See *id.* at 270 (specifically declining to attach importance to the unusual risks of railroading). Suits by the owners of "trespassing" cattle proved common. See, e.g., *Giles v. Boston & Me. R.R.*, 55 N.H. 552 (1875); *Mayberry v. Concord R.R.*, 47 N.H. 391 (1867). A later statute, 1850 N.H. LAWS ch. 953, § 5, required railroads to erect "cattle guards" at railroad-highway intersections to protect cattle properly on highways.

222. 40 Cal. 532 (1871).

223. *Id.* at 535.

224. *Smith v. Boston & Me. R.R.*, 63 N.H. 25, 25, 28 (1884).

225. *Butcher v. Vaca Valley & C.L.R.R.*, 67 Cal. 518, 524, 8 P. 174, 178 (1885).

[L]et us assume that defendant's engine was a perfect engine, properly equipped and properly run, and that, notwithstanding such conditions, it would ordinarily, when in use, throw out sparks of fire, leaving in its wake, as it passed through the country, property destroyed and possibly lives lost. Certainly this could hardly be tolerated in law.²²⁶

In addition, both the California and New Hampshire Courts refused to hold that a landowner was contributorily negligent if he stored his crops too close to the railroad tracks; the landowner's rights as landowner simply prevailed over the kind of reasonableness balancing basic to a contributory negligence analysis. As one New Hampshire judge, speaking for a full Court, put it, "I do not see what restriction the court can place upon the use one may make of his own, inside the maxim *sic utere*, &c., without a sheer invasion of his right of property."²²⁷ Professor Horwitz,²²⁸ like Professor Posner,²²⁹ finds that utilitarian-minded courts insisted on treating real property merely as a productive asset rather than as an estate with intrinsic value. This treatment is deplored by Horwitz as antihumanist, though applauded by Posner as central to a proper economic inquiry. Yet the holdings in these railroad-farmer tort disputes²³⁰ suggest that the New Hampshire and California Courts, whether wisely or otherwise, refused to conceive of land ownership as nothing more than an economic enterprise.

Sometimes a railroad-caused fire spread from one farmland to another. In *Ryan v. New York Central Railroad*, a famous 1866 case, the New York Court of Appeals ruled that a tort doctrine of proximate cause prevented a negligence suit against a railroad by anyone other than the owner of the first property damaged; only this property's burning was deemed an immediate rather than a remote consequence of the railroad's negligence.²³¹ Given both the holding and some pro-commerce language in the *Ryan* opinion, Professor Friedman relies on *Ryan* as providing the most

226. *Judson v. Giant Powder Co.*, 107 Cal. 549, 560-61, 40 P. 1020, 1023 (1895).

227. *Rowell v. Railroad*, 57 N.H. 132, 137 (1876). The California Supreme Court reached a similar conclusion. See *Steele v. Pacific Coast Ry.*, 74 Cal. 323, 329-30, 15 P. 851, 854 (1887); *Flynn v. San Francisco & S.J. R.R.*, 40 Cal. 14, 19 (1870). The United States Supreme Court was later to agree with the *Flynn* and *Rowell* holdings. See *LeRoy Fibre Co. v. Chicago, M. & St. P. Ry.*, 232 U.S. 340, 350 (1914).

228. M. HORWITZ, *supra* note 1, at 31, 33.

229. See Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205, 206-07 (1973); see Posner, *supra* note 25, at 60.

230. In California, the landowner's exemption from contributory negligence claims was found relevant in at least one case involving a defendant other than a railroad. "[T]he right of a man to make free use of his property is not to be curtailed by the fear that his neighbor will make a negligent use of his." *Yik Hon v. Spring Valley Water Works*, 65 Cal. 619, 620, 4 P. 665, 666 (1884) (quoting S. THOMPSON, *THE LAW OF NEGLIGENCE* 168 (1880)).

231. 35 N.Y. 210 (1866).

conspicuous proof of the pro-enterprise preference of tort law in the nineteenth century.²³² But if the *Ryan* issue is taken as the touchstone of a jurisdiction's tort law values, the fact is that the *Ryan* rule was rejected in both California and New Hampshire.²³³ As the California Court determined:

We are . . . confident, considering the long dry season of California and the prevalence of certain winds in our valleys, that it may be left to a jury to determine whether the spreading of a fire from one field to another is not the natural, direct or proximate consequence of the original firing.²³⁴

D. *The Late Nineteenth-Century Transformation*

The textile factories introduced industrialization into the United States in the early nineteenth century, while the railroads were a primary force after mid-century. It is the period between 1870 and 1910, however, that is generally credited as completing the transformation of the American economy and as accomplishing a transformation of American society as well.²³⁵ By 1900, the United States had emerged as the world's premier economic power. During this period the annual growth rate in the country's per capita gross product was almost double the growth rate of preceding decades. Manufacturing output leaped from \$860 million in 1859 to \$6.26 billion in 1899; per capita annual income rose from \$225 in 1870 to \$600 in 1910.²³⁶ Increases in the production of steel and the use of coal greatly strengthened the national economy. The telegraph was invented in the 1840s, and by the 1870s extensive systems of telegraph communication were in operation. The inventions of the telephone in 1875 and the phonograph in 1879 further advanced the revolution in communications. Edison's invention of the electric light in 1879 initiated a revolution in illumination and power sources; an entire industry of electric power sup-

232. L. FRIEDMAN, *supra* note 1, at 410-11.

233. The New Hampshire rejection of the *Ryan* principle came in *Hooksett v. Concord R.R.*, 38 N.H. 242 (1859) (interpreting state statute).

234. *Henry v. Southern Pac. R.R.*, 50 Cal. 176, 183 (1875) (affirming jury verdict for the plaintiff).

In a somewhat belated footnote, Friedman mentions the "erosion" of the *Ryan* rule. See L. FRIEDMAN, *supra* note 1, at 419 n.25. But erosion is not the same as outright rejection. For an indication that almost all jurisdictions refused to apply the *Ryan* rule, see W. PROSSER, J. WADE & V. SCHWARTZ, *CASES AND MATERIALS ON TORTS* 299 nn.4-5 (6th ed. 1976). Within New York itself, post-*Ryan* decisions make it appropriate to speak of erosion. *Id.* at n.5.

235. This paragraph draws on C. DEGLER, *supra* note 190; R. HIGGS, *THE TRANSFORMATION OF THE AMERICAN ECONOMY, 1865-1914* (1977); and E. KIRKLAND, *INDUSTRY COMES OF AGE* (1961).

236. See G. GUNDERSON, *supra* note 153, at 305. A strong supply of capital joined with new technology in spurring these gains. *Id.* at 306-07.

ply rapidly developed. Beginning in the 1890s, American cities began to assume their present form; in particular, the use of structural steel girdings and the development of electric elevators made possible the erection of high-rise office buildings in downtown areas. Intraurban transit systems, which previously consisted of horse-drawn vehicles, were converted to electricity. In Los Angeles during the mid-1880s, a number of entrepreneurs began to build transit lines; by the early twentieth century, Los Angeles developed the most extensive rail transit system in the country.²³⁷

The enterprises that contributed to this late nineteenth-century transformation produced many tort issues, some of them novel. In *Gregg v. Page Belting Co.*, the New Hampshire Court approved the right of the passenger-victim of an elevator fall to sue, under a negligence theory, both the owner of the building containing the elevator and the manufacturer and repairer of the elevator itself, the absence of privity notwithstanding.²³⁸ In *Treadwell v. Whittier*, the California Supreme Court affirmed the jury's verdict on behalf of the plaintiff injured when the elevator in the defendant's store inexplicably fell.²³⁹ The Court ruled that mere proof of the elevator fall established a presumption of negligence compelling a plaintiff's verdict unless adequately rebutted.²⁴⁰ Also, by imaginatively classifying elevator operators as "common carriers,"²⁴¹ the Court required them to conduct inspections according to "the best known tests reasonably practicable."²⁴² That classification the Court explained as follows:

When persons are injured by the giving way of the machinery the hurt is always serious, frequently fatal . . . . The aged, the helpless, and the infirm are daily using these elevators. The owners make profit by these elevators, or use them for the profit they bring to them. The cruelty from a careless use of such contrivances is likely to fall on the weakest of the community. All, including the strongest, are without the means of self-protection upon the breaking down of the machinery. The law, therefore, throws around such persons its protection, by requiring the highest care and diligence.²⁴³

237. See R. BANHAN, LOS ANGELES 277-84 (1971); R. FOGELSON, THE FRAGMENTED METROPOLIS 85-93 (1967).

238. 69 N.H. 247, 251-52, 46 A. 26, 28 (1897) (dictum). The Court treated the rights of the bystander as an open question. *Id.* at 252, 46 A. at 28.

239. 80 Cal. 574, 22 P. 258 (1889). See also *Smith v. Whittier*, 95 Cal. 279, 30 P. 529 (1892) (case arising from same incident).

240. 80 Cal. 574, 582-83, 22 P. 258, 268-69 (1889).

241. *Id.* at 595, 22 P. at 272.

242. *Id.* at 585, 22 P. at 269.

243. *Id.* at 592, 22 P. at 271. In dictum, the *Treadwell* Court suggested that the victim, lacking privity, could not sue the elevator operator directly. But the Court's purpose in mentioning this dictum was to buttress its provocative conclusion that the owner of the building, as the purchaser and user of the product, was vicariously liable for any negligence on the manufacturer's part. *Id.* at 595-96, 22 P. at 272-73.

The new supply of electric power came to the attention of the California Court in *Giraudi v. Electric Improvement Co.*²⁴⁴ A restaurant dishwasher went onto his employer's roof in order to secure a restaurant sign during a heavy rainstorm. On the roof, he came into contact with a dangling electric power line, the location of which he apparently once knew but had forgotten. The Court affirmed the jury's finding that there had been no contributory negligence on the victim's part. "To forget is not negligence, unless it shows the want of ordinary care, and it is a question for the jury . . . . 'The ignorant and the unwary are entitled to the protection of the law as well as the wise and educated.'"²⁴⁵ The Court also endorsed the jury's finding of the power company's negligence.

Defendant was using a dangerous force, and one not generally understood. It was required to use very great care to prevent injury to person or property. It would have been comparatively inexpensive to raise the wire so high above the roof that those having occasion to go there would not come in contact with them.²⁴⁶

The defendant further argued that since "the public . . . receive[s] the benefits of convenience and comfort from the supply of [electricity],"²⁴⁷ the electric company should not be liable to a member of the public when the latter's conduct leading up to his accident was in any way imperfect. The Court responded thus:

[T]he public—aside from the consumers using . . . [a dangerous] commodity—owe no duty to those introducing it; but, on the other hand, it is the duty of those making a profit from the use of so dangerous an element as electricity to use the utmost care to prevent injury to any class of people composing the public which exists in any considerable numbers.²⁴⁸

In short, the power company's request for a liability rule subsidy was disdainfully rejected.

Of the enterprises characteristic of the late nineteenth century, the urban electric railroad systems generated the largest number of tort claims. Such systems were common in California cities by the mid-1880s and began to appear in New Hampshire near the end of the century. In almost four dozen suits brought by passenger and pedestrian victims—suits rais-

244. 107 Cal. 120, 40 P. 108 (1895).

245. *Id.* at 126, 129, 40 P. at 110-111, (quoting in part from *Mackay v. New York Cent. R.R.*, 35 N.Y. 75, 80 (1866)).

246. 107 Cal. at 124, 40 P. at 109.

247. *Id.* at 128, 40 P. at 110.

248. *Id.* at 128, 40 P. at 111.

ing a myriad of issues—the plaintiffs prevailed in a strong majority. The evidence at trial was almost always sufficient to support a finding of some negligence on the railroad's part.²⁴⁹ By and large, the Courts' opinions remained faithful to the idea set forth by the California Court in an early 1850s case involving a primitive street railroad:

Where the streets of a city, forming, as usual, thronged thoroughfares, are diverted from their ordinary and legitimate uses, by special license, to a private person, for his own benefit, and for the pursuit of a business which involves constant risk and danger, no other rule is consistent with the safety and protection of the community, than that which demands extraordinary care.²⁵⁰

In *Redfield v. Oakland Consolidated Street Railway*,²⁵¹ a streetcar rolled downhill, injuring a passenger, in part because the car was operated by only one employee. The railroad sought to show that one-employee operation was customary within the industry. Historians advise that nineteenth-century tort law frequently regarded a defendant's compliance with industry custom as fatal to any claim of negligence; only with Judge Hand's famous opinion in *The T.J. Hooper*,²⁵² they suggest, did the modern view solidify that compliance with custom is merely evidence of non-negligence.²⁵³ Yet in *Redfield* itself, the Court ruled not only that compliance with industry custom did not require a verdict for the defense, but also that it was not even admissible as evidence on the question of negligence. "[C]ustom may originate in motives of economy, or the stress of pecuniary affairs, or in recklessness, and not from considerations based upon the proper discharge of their duty toward others using their cars."²⁵⁴ The Court added that even if the challenged practice had not resulted in any previous accidents, "that circumstance is only a matter of wonderment, and is an instance of how good luck will sometimes protect carelessness for long periods."²⁵⁵

249. One exception is *Perry v. Malarin*, 107 Cal. 363, 40 P. 489 (1895), in which the derailment of a horse-drawn streetcar resulted in the plaintiff's injury. While acknowledging that this derailment warranted a presumption of negligence, the Court found the presumption completely overcome by defendant's evidence that his horses had become unmanageable only because a third party had suddenly and unforeseeably jumped right in front of them. *Id.* at 366-67, 40 P. at 489-90.

250. *Wilson v. Cunningham*, 3 Cal. 241, 243 (1853).

251. 112 Cal. 220, 43 P. 1117 (1896).

252. 60 F.2d 737 (2d Cir. 1932).

253. See the materials, including an excerpt from a Horwitz essay, in C. GREGORY, H. KALVEN & R. EPSTEIN, *CASES AND MATERIALS ON TORTS* 153-56 (3d ed. 1977).

254. 112 Cal. at 224-25, 43 P. at 1118 (1896). A conventional economic analysis would find *Redfield* unacceptable insofar as the Court was so willing to assume a serious conflict between the railroad's interest in profits and the passenger's interest in safety, despite the contract between the two of them. See Posner, *supra* note 25, at 37-38, 39, 74-75.

255. 112 Cal. at 226, 43 P. at 1119 (quoting *Monaghan v. Pacific Rolling Mill Co.*, 81 Cal. 190,

Only rarely did the defense of contributory negligence bar a street railway victim from recovery.²⁵⁶ While the California Court appreciated that pedestrian accidents could be almost entirely avoided if pedestrians exercised "the greatest care and caution,"²⁵⁷ it nevertheless held that the law required no more than the ordinary care of "people in general."²⁵⁸ In addition, the California Court denied that parents were contributorily negligent as a matter of law if they allowed their children to play unattended on the street where they might be injured by a negligently driven street-car. To find parents at fault in such a case, stated the Court, "would be harsh and unreasonable, especially to the poor, in every town and city."²⁵⁹

A post-accident liability release signed by a street-railway accident victim came to the Court's attention in *Crowley v. City Railroad*.²⁶⁰ Accepting the jury's finding that the plaintiff was inebriated at the time he signed his release, the Court ruled that inebriation should be regarded as a form of incompetency and that incompetency is a sufficient reason for voiding the release. *Crowley* led to two later cases in which the California Court considered—and invalidated—tort liability releases secured by business defendants. The Court intervened to protect one victim who was apparently disoriented by pain and suffering,²⁶¹ and another who could read no English;²⁶² moreover, the Court was quite willing to accuse a business enterprise of deceptive practices.²⁶³ The rulings in these release cases well exemplify the solicitude for the victims of industry that so many of the

193, 22 P. 590, 591 (1889)). For an early opinion disparaging custom, see *Kelly v. Cunningham*, 1 Cal. 365, 367 (1851). For the later view that evidence of compliance with custom, though hardly conclusive, is at least relevant to the negligence issue, see *Hennessey v. Bingham*, 125 Cal. 627, 633, 58 P. 200, 202 (1899).

256. One of these rare cases is *Bailey v. Market St. Cable Ry.*, 110 Cal. 320, 42 P. 914 (1895).

257. See *Driscoll v. Market St. Cable Ry.*, 97 Cal. 553, 567, 32 P. 592 (1893).

258. *Id.* at 567, 32 P. at 592.

259. *Karr v. Parks*, 40 Cal. 188, 193 (1870). In *Fox v. Oakland Consol. St. Ry.*, 118 Cal. 55, 50 P. 25 (1897), the Court denied that the parents' lack of wealth—insofar as it prevented them from hiring an attendant for their child—should be taken into account in considering their supervisory negligence. But the Court by no means indicated that the lack of such an attendant constituted contributory negligence. To the contrary, the Court found that a verdict for the plaintiff was well within the jury's discretion.

260. 60 Cal. 628 (1882).

261. *Smith v. Occidental & Oriental S.S. Co.*, 99 Cal. 462, 34 P. 84 (1893).

262. *Meyer v. Haas*, 126 Cal. 560, 58 P. 1042 (1899).

263. *Id.* at 564, 58 P. at 1043. Two cases involving nineteenth-century telegraph companies raised another problem concerning the relation of contract and tort: the validity of pre-mishap liability disclaimers. In *Hart v. Western Union Tel. Co.*, 66 Cal. 579, 6 P. 637 (1885), a divided Court held that a disclaimer of negligence liability was valid, so long as the company, for a reasonable additional charge, offered its customers a guarantee of transmission accuracy. (This charge would cover the cost of "telegraphing back" the message to the sending office in a way that would detect any errors.) *Hart* also held, however, that disclaimers are without effect in the event of "gross negligence" on the part of the telegraph company. Ten years later, the Court reaffirmed this gross negligence holding and approved a particular jury's gross negligence finding, even though the Court all but conceded that the evidence supporting this finding was meager. *Redington v. Pacific Postal Tel. Cable Co.*, 107 Cal. 317, 325-26, 40 P. 432, 435 (1895).

nineteenth-century opinions display, a solicitude hardly compatible with the subsidy thesis.

E. *Legislative Assistance for Nineteenth-Century Enterprise*

In arguing that the legal system chose to subsidize nineteenth-century economic enterprise by way of lenient liability rules, Professor Horwitz makes explicit a claim that seems implicit in much of the subsidy writing: that government chose not to intervene on behalf of enterprise through more ordinary legislative channels.²⁶⁴ Such a characterization of governmental activity—conforming to what was once the common view²⁶⁵—has been challenged by many contemporary historians, including, as it happens, Friedman.²⁶⁶ The available evidence indeed suggests that nineteenth-century American legislatures not only demonstrated a considerable willingness to assist emerging industries, but also displayed considerable ingenuity in determining the various forms that assistance would take.

For example, the early textile factories, while privately financed,²⁶⁷ were supported by a tariff against English textiles enacted by Congress in 1816—the first American tariff openly serving protective purposes.²⁶⁸ The early turnpike companies received special corporate charters from various states.²⁶⁹ In New Hampshire in the 1840s and California in the 1850s and 1860s, railroad building was preceded by amendments to the states' corporation laws that strengthened the principle of limited liability and relaxed requirements that investors be local residents.²⁷⁰ State governments were willing to purchase turnpike company stock;²⁷¹ the federal government purchased canal company stock;²⁷² and in California, local governments acting under the Local Aid Law of 1859 invested in railroad company stock, thereby giving railroad construction "a decided impetus" as "[l]ocalities vied with one another to attract the carriers."²⁷³

Breaking sharply with frugal traditions, state governments went deeply

264. See M. HORWITZ, *supra* note 1, at xv, 100-101.

265. See Scheiber, *Federalism and the American Economic Order 1789-1910*, 10 LAW & SOC. REV. 57, 59 (1975).

266. See L. FRIEDMAN, *supra* note 1, at 157-58. The literature is well summarized in Scheiber's consistently interesting essay. See Scheiber, *supra* note 265.

267. Textile mills were risky ventures; a chief reason they were located in New England was the presence in that region of merchant-entrepreneurs willing to invest in them. See Hekman, *supra* note 154, at 705-07.

268. See S. LEE & P. PASSELL, *A NEW ECONOMIC VIEW OF AMERICAN HISTORY* 209 (1979).

269. See G. TAYLOR, *supra* note 180, at 24-25. A few turnpikes were directly state owned. *Id.* at 25-26.

270. See E. MORRISON & E. MORISON, *supra* note 160, at 137; G. NASH, *supra* note 189, at 49-50. For a general discussion of incorporation law reform in the nineteenth century, see L. FRIEDMAN, *supra* note 1, at 166-78.

271. See G. TAYLOR, *supra* note 180, at 25.

272. See *id.* at 49.

273. See G. NASH, *supra* note 188, at 51.

into debt in order to finance the construction of the great canals.²⁷⁴ In New Hampshire in the 1860s and 1870s, a number of local governments "bonded themselves heavily in order to secure railroad connections."²⁷⁵ While government borrowed for industry's sake, it also loaned its own funds to industry at low interest rates. Congress, pursuant to 1862 and 1864 legislation, extended more than \$60 million in federal loans to the Union and Central Pacific at an interest rate of six percent, well below the twenty-one percent rate a skeptical capital market otherwise demanded.²⁷⁶ In addition, California's Legislature directly financed the Central Pacific's borrowing by agreeing in the State Subsidy Act of 1863 to pay outright \$1.5 million in interest on bonds that the railroad planned to issue.²⁷⁷

Public land disposal policies also were deployed on behalf of economic interests. Early in the century the federal government donated millions of acres of public domain land to midwestern canal projects.²⁷⁸ "[B]etween 1850 and 1872, the federal government together with nine states gave some 70 railroads about 183 million acres of land, roughly the area of the United Kingdom, Belgium, and Spain combined";²⁷⁹ in particular, the great transcontinental was a major land grant beneficiary.²⁸⁰

274. See G. TAYLOR, *supra* note 180, at 33, 49. Scheiber refers to many of the canals as "public enterprises." See Scheiber, *supra* note 265, at 90.

275. See C. GOODRICH, GOVERNMENT PROMOTION OF AMERICAN CANALS AND RAILROADS 1800-1890, at 248 (1960). The state government declined to offer public aid, however. See *id.* at 132.

276. See R. FOGEL, THE UNION PACIFIC RAILROAD: A CASE OF PREMATURE INVESTMENT 18, 46, 81-82 (1960), reprinted in 78 JOHNS HOPKINS U. HIST. STUD. (1960). These loans covered about half the cost of the transcontinental railroad's construction. *Id.* at 46. The private-side financing of the Union Pacific involved the utilization of the famous Credit Mobilier. See C. GOODRICH, *supra* note 275, at 187-89.

277. See G. NASH, *supra* note 188, at 58-59. As a state legislative committee declared, "it is for the best interests of the state to render such assistance as it can afford to the Central Pacific Railroad Company." *Id.* at 59.

For a discussion of state and local aid in other jurisdictions, see E. KIRKLAND, *supra* note 235, at 63-68 (post-1860); G. TAYLOR, *supra* note 180, at 92-94 (pre-1860). A few states actually undertook to build and run their own railroads. *Id.* at 90-92.

278. *Id.* *supra* note 180, at 49.

279. C. DEGLER, *supra* note 190, at 22. These data may well mislead, since without railroad building much of this land would have been of trivial value. Insofar as the railroads increased land values, allowing the companies to profit from land appreciation possessed the efficiency virtue of internalizing benefits. See note 30 *supra*.

280. For the details of the arrangement, see E. KIRKLAND, *supra* note 235, at 58.

Agriculture was an important economic activity in the nineteenth century—an activity that was traditional in an obvious sense, though innovative in its utilization of new technology. Throughout the century, the federal government encouraged the rapid agricultural development of the American frontier by actively selling its western farmlands for prices often well below market levels; indeed, homestead legislation in 1862 and 1864 allowed squatters to acquire certain federal properties at no cost. See W. BROWNLEE, *supra* note 180, at 178-80. The infrastructure of an agricultural economy was further nurtured by the federal sponsorship of agricultural colleges through the Morrill Acts, and in California by research undertaken at the University of California's new Berkeley campus. See *id.* at 341; G. NASH, *supra* note 188, at 104-05.

Agricultural production increased greatly in the last half of the nineteenth century. But farm prices fell, at least in nominal dollars (the entire economy was then deflating). Whether the average farming

Virtually all of these strategies for intervention secured important benefits for enterprise.²⁸¹ Most of them surely complied with a proper economic definition of subsidy,²⁸² though there can be difficult questions of perception and calculation.²⁸³ It is hardly clear there was anything unsatisfactory in the distribution of burdens that they imposed.²⁸⁴ And these interventions were quite overt; in their time, many were indeed quite controversial. Thus they were largely free of both the regressivity and the disguised quality that Horwitz finds offensive in the supposed tort law subsidy.

The record further shows that on those occasions when the legislatures in New Hampshire and California did advert to the tort-like harms and injuries that enterprise characteristically caused, they chose to expand liability burdens rather than to contract them. The New Hampshire Legislature enacted a statute rendering railroad companies civilly responsible for railroad-caused fires,²⁸⁵ while the California Legislature required railroads to fence off their tracks and to pay for any livestock destroyed for

household became richer or poorer is a much debated question. See S. LEE & P. PASSELL, *supra* note 268, at 293-97 (discussing studies). It is clear, however, that in the late 1890s agriculture entered a period of great prosperity, culminating in the golden "parity" era of 1910-1913. See W. BROWNEE, *supra* note 180, at 343-44.

281. Government sources were responsible for one-third of all turnpike capital, three-quarters of canal capital, and one-quarter of all railroad capital (even prior to 1860). See W. BROWNEE, *supra* note 180, at 196, 201-02; Stover, *supra* note 171, at 71.

282. It is difficult to think about the liberalization of incorporation laws in subsidy terms. Whether government subscription to enterprise stock counts as a subsidy depends on the expected rate of return. A few of the canals — most notably the Erie — were so successful as to easily permit the repayment of the state government loans. Even for these canals, however, the *ex ante* risks of economic failure were so substantial as to make it impossible to solicit investments—at least in the vast sums required—from private credit markets. See W. BROWNEE, *supra* note 180, at 202; G. TAYLOR, *supra* note 180, at 48-49; Rubin, *An Innovating Public Improvement: The Erie Canal*, in CANALS AND AMERICAN ECONOMIC DEVELOPMENT 15, 16 (C. Goodrich ed. 1961); Stover, *supra* note 171, at 85. The state's shouldering of these risks surely ranks as a subsidy. Most of the canals were balance sheet failures; if the public investments in them were justifiable—even *ex ante*—it was at least partly because of their expected contribution to the state's economic growth. See the rich discussion in Rubin, *An Imitative Public Improvement: The Pennsylvania Mainline*, in CANALS AND AMERICAN ECONOMIC DEVELOPMENT 67, 107-14 (C. Goodrich ed. 1961).

283. Whether the various subsidies were economically warranted can likewise raise vexing questions. The human capital that the early textile factories nurtured permits the argument that the federal tariff was efficient for its first 25 years, but not thereafter. See David, *Learning By Doing and Tariff Protection: A Reconsideration of the Case of the Ante-bellum United States Cotton Textile Industry*, 30 J. ECON. HIST. 521 (1970). While many of the subsidized railroads turned out to yield high rates of return, prior to construction profitability was sufficiently uncertain as to necessitate a subsidy if railroad building, with its attendant social benefits, was to proceed. Still, the actual subsidies provided may have been excessive or non-optimally structured. See S. LEE & P. PASSELL, *supra* note 268, at 312-19.

284. Intervention sometimes took the form of direct expenditure of public funds. See p. 1754 *supra*. Since the federal government in the nineteenth century levied only a few trivial excise taxes, it seems pointless to attempt to compare the distribution of burdens that could have been effected by a federal tax-supported subsidy with the distribution that was in fact effected by federal tariffs, federal public lands policy, and federal low-interest loans.

285. See p. 1746 *supra*.

want of a proper fence.²⁸⁶ Another California statute subjected railroads to liability for railroad crossing accidents occasioned by the railroad's failure to ring a proper bell.²⁸⁷ The first wrongful death statute enacted by the New Hampshire Legislature in 1850 was made applicable to railroads alone.²⁸⁸

In sum, legislative bodies, even while providing various forms of economic assistance to nineteenth-century industries, took action to protect citizen safety²⁸⁹ and to augment the compensation rights of industry victims.²⁹⁰ The California and New Hampshire Legislatures thus were successful in separating the question of an enterprise's general need for economic support²⁹¹ from the question of the scope of its liability in tort for the injuries that it occasioned.²⁹²

III. Nineteenth-Century Tort Doctrine

The previous part has questioned the subsidy thesis by considering the nineteenth-century cases on an industry-by-industry basis. This part, cutting across industry boundaries and looking at all the case law, reviews nineteenth-century tort doctrine in a somewhat more general way.

286. See p. 1745 *supra*. It seems reasonable to assume that farmers were well represented in the New Hampshire and California Legislatures. For a report, however, of the railroad's success in purchasing influence within the New Hampshire Legislature, see E. MORISON & E. MORISON, *supra* note 160, at 173.

287. CAL. CIV. CODE § 486 (Deering 1895); see *Orcutt v. Pacific Coast Ry.*, 85 Cal. 291, 24 P. 661 (1890) (applying statute in tort suit).

288. 1850 N.H. Laws, c. 953, § 7. Noting that trains are "driven at rates of speed known to no other mode of traveling" and hence are "attended with risks peculiar to themselves," the New Hampshire Court found this statute constitutional. *Boston, C. & M. R.R. v. State*, 32 N.H. 215, 226 (1855).

In cases not covered by the statute, however, the New Hampshire Court applied the common-law rule that there is no recovery for wrongful death. See *Wyatt v. Williams*, 43 N.H. 102 (1862). For a recognition by the California Court of this common-law rule, see *Kramer v. San Francisco Mkt. St. R.R.*, 25 Cal. 434, 435-36 (1864). This rule, by denying liability whenever death is the result of the risk and by eliminating the prospect of liability insofar as death is part of the risk, deals a nearly fatal blow to the efficiency or "regulatory" theory of the nineteenth-century common law of torts. The New Hampshire Court also ruled that a negligence action does not survive the death of the tort-feasor, since a tort is a "personal" wrong. *Vittum v. Gilman*, 48 N.H. 416 (1869).

289. It is quite possible, of course, that the states' legislatures should have been more aggressive in regulating industry for the sake of safety. See E. KIRKLAND, *supra* note 196, at 360-61.

290. I found no statutes in either New Hampshire or California that were designed to relieve defendants of any tort liability that the common law would otherwise have imposed. For discussion of the New Hampshire Mill Act, see note 165 *supra*.

291. One review of the recent literature finds disagreement as to whether governments intervened in order to promote public "commonwealth goals" or merely to advance "private entrepreneurial interests." Scheiber, *supra* note 265, at 59.

292. For the view that tort law is capable of raising questions of fairness having nothing to do with "distribution of wealth" in the economist's sense, see Schwartz, *Economics, Wealth Distribution, and Justice*, 1979 WIS. L. REV. 799.

Nineteenth-Century Tort Law

A. Negligence

Nineteenth-century tort law in New Hampshire and California emphasized negligence as the standard of liability. The negligence principle proceeded to demonstrate its vitality. It could be ambitious in its detection of activities that harbor appreciable risks.²⁹³ The more substantial the New Hampshire and California Courts perceived the risks in the defendant's activity to be, the higher the level of care that they required the defendant to exercise.²⁹⁴ Insisting on more "care" when an activity entails greater risks is, of course, in line with the twentieth-century understanding of the negligence rule; the cases thus suggest that the nineteenth-century rule already possessed a distinctly modern character.

The factor of private profit was seen as a reason for being skeptical, rather than appreciative, of the propriety of risky activity engaged in by enterprise.²⁹⁵ In general, the New Hampshire and California Courts were reluctant to find that economic factors justified a defendant's risktaking. Neither Court even once held that mere monetary costs rendered non-negligent a defendant's failure to adopt a particular safety precaution.²⁹⁶ The California Court seemed quite unimpressed with defendants' claims that their conduct complied with industry customs.²⁹⁷ On one occasion, the New Hampshire Court proved openly hostile to a claim of justification couched in enterprise terms. In *Sewall's Falls Bridge v. Fiske & Norcross*,²⁹⁸ the plaintiff's bridge had been damaged by the accumulation of logs that the defendants had floated down the river. The Court ruled irrelevant and hence inadmissible the defendants' evidence that "a large amount of timber at the head waters of the Merrimack . . . cannot be taken to market, without costing more than its value in market, in any other mode than that which they practiced."²⁹⁹ According to the Court,

293. This was perhaps most strikingly revealed in a quite deliberate New Hampshire dictum. In discussing a saloonkeeper who had illegally and hence "negligently" sold liquor to rowdy and inebriated customers, Chief Justice Doe suggested that there was no obvious reason why the saloonkeeper "should not . . . [himself] be liable for damage done by men whom he has drawn together in the same place, and aided in making irrational, uncontrollable, and dangerous . . ." *Underhill v. City of Manchester*, 45 N.H. 214, 218 (1864).

294. As the California Court said of a rancher who drove cattle through city streets, when "the lives and limbs of human beings are placed in peril," tort law insists on "the utmost care and diligence." *Ficken v. Jones*, 28 Cal. 618, 626 (1865); see the railroad, elevator, and electric power cases discussed at pp. 1743-44, 1749-51 & note 208 *supra*; see generally *Glueck v. Scheld*, 125 Cal. 288, 57 P. 1003 (1899) (handling guns); *Knott v. McGilvray*, 124 Cal. 128, 56 P. 789 (1899) (leaving tools hanging over thoroughfare).

295. See pp. 1749-51 & note 201 *supra*.

296. When the Courts were able to identify a clearly effective safety precaution, they generally found negligence in the failure to adopt it. See, e.g., *Gerke v. California Steam Navigation Co.*, 9 Cal. 251 (1858); *Presby v. Grand Truck Ry.*, 66 N.H. 615, 22 A. 554 (1891).

297. See p. 1751 *supra*.

298. 23 N.H. 171 (1851).

299. *Id.* at 178.

"the prospective extent of [the defendants'] interests and the contemplated magnitude of their operations, could not give them any special privilege to manage their business in a careless and negligent manner. . . ." ³⁰⁰

The New Hampshire and California Courts elaborated on the negligence standard³⁰¹ so as to facilitate the plaintiff's ability to prove his case. Both Courts were eager to find negligence when the defendant violated a statute or ordinance designed to promote safety.³⁰² As the California Court explained, if an ordinance seeks to prevent placing "in jeopardy the lives of men, women, and children," that ordinance's safety purpose should be futhered by holding the defendant to a "strict legal accountability" when his violation of the ordinance causes private injury.³⁰³ The California Court, while rarely using the exact phrase "*res ipsa loquitur*," still applied the *res ipsa* notion to a range of business-caused injuries;³⁰⁴ indeed, *res ipsa* logic had taken hold in California in 1859,³⁰⁵ four years prior to

300. *Id.* at 179. The Court concluded that the jury should make up its mind about negligence by studying the defendant's actual conduct rather than by pondering the "forests at the source of the Merrimack." *Id.*

In a later riparian-law discharge case, the Court seemed far more receptive to claims of commercial objectives. See *Hayes v. Waldon*, 44 N.H. 580 (1863), discussed in note 166 *supra*. The difference between the *Sewall's Falls* and the *Hayes* opinions may reflect the Court's perception of the differences between tort law and riparian law.

301. A California opinion that is somewhat similar to *Sewall's Falls* is *Munro v. Pacific Coast Dredging & Reclamation Co.*, 84 Cal. 515, 24 P. 303 (1890), involving a person killed by the defendant's blasting. Though conceding that the blasting had been skillfully carried out, the Court found that the explosion itself constituted a "careless and negligent" act. *Id.* at 518, 519, 527, 24 P. at 304, 306. In reaching this conclusion, the Court noted that the blasting created a known risk of death; it emphasized that the act was undertaken in a densely settled neighborhood; and it simply indicated no interest in whatever commercial purposes the defendant may have been furthering by way of its blasting.

The interpretations of the negligence standard in *Sewall's Falls* and *Munro* obviously narrow the differences between negligence and strict liability. A similar ambiguity appears in *Colton v. Onderdonk*, 69 Cal. 155, 10 P. 395 (1886). Here an urban landowner, using gunpowder to excavate his property, harmed a neighbor's property. Though agreeing that the blasting had been carefully performed, the Court held the defendant liable, describing his blasting as "an unreasonable, unusual, and unnatural use of his own property. . . ." *Id.* at 158-159, 10 P. at 397. It is uncertain whether this is the language of negligence or of *Rylands* strict liability.

302. See, e.g., *Barton v. McDonald*, 81 Cal. 265, 22 P. 855 (1889) (city ordinance prohibiting private creation of holes in sidewalk); *Higgins v. Deeney*, 78 Cal. 578, 21 P. 428 (1889) (city ordinance on horse-and-wagon speed).

303. *Seimers v. Eisen*, 54 Cal. 418, 420 (1880) (applying ordinance requiring fastening of horses left on public street).

If it is true that the legislatures incline toward inefficient results, see R. POSNER, *supra* note 30, at 404-07, then the *Seimers* rule of negligence per se—which extends the effects of legislation in a way that displaces ordinary common-law judgments—seems correspondingly inefficient. Posner comes close to conceding this. See Posner, *supra* note 25, at 39.

304. See, e.g., *Chico Bridge Co. v. Sacramento Transp. Co.*, 123 Cal. 178, 55 P. 780 (1898) (defendant's barge collides with plaintiff's bridge); *Judson v. Giant Powder Co.*, 107 Cal. 549, 40 P. 1020 (1895) (nitroglycerin factory explodes); *Dixon v. Pluns*, 98 Cal. 384, 33 P. 268 (1893) (tool falls on sidewalk from scaffolding). The New Hampshire Court, though hesitant about the *res ipsa* approach, see *Paine v. Grand Trunk Ry.*, 58 N.H. 611 (1879), nonetheless accepted it on occasion. See *Garland v. Towne*, 55 N.H. 55 (1874) (ice falling from defendant's roof).

305. *Fairchild v. California Stage Co.*, 13 Cal. 599 (1859).

Byrne v. Boadle, the English case that is usually credited with having originated the *res ipsa* idea.³⁰⁶ In addition, the California and New Hampshire Courts assigned to the lay jury primary responsibility for both ascertaining the facts of the defendant's conduct and evaluating the negligence significance of those facts.³⁰⁷

All of these factors converged to produce a nineteenth-century negligence standard with a highly expansive quality, as the case results indicate. A tort rule that denies liability in the absence of negligence is most open to controversy when the defendant has engaged in risky (but somehow non-negligent) conduct that has brought about the plaintiff's injury without the concurrence of any negligent (or clearly risk-producing) conduct on the part of any third party or of the victim himself.³⁰⁸ Among all of the nineteenth-century cases that met these conditions, there were only a very small number in which the Courts reached the stark conclusion that the defendant's conduct was free of negligence and hence immune from liability.³⁰⁹

B. Contributory Negligence

Professor Friedman describes the tort defense of contributory negligence as a "cunning trap" set by courts for nineteenth-century accident victims;³¹⁰ Professor Malone argues that nineteenth-century courts frequently were aggressive in withdrawing the contributory negligence issue from the jury in order carefully to monitor industry liability.³¹¹ These assessments are contradicted, however, by the nineteenth-century experience in New Hampshire and California.

306. 2 H & C 722 (Exch. 1863).

307. See, e.g., *McDermott v. San Francisco & N. Pa. R.R.*, 68 Cal. 33, 8 P. 519 (1885). On the implications of the jury's large role, see pp. 1763-65 *infra*.

308. In cases that can be so described, the power lying in the simple idea that "the defendant caused the plaintiff's injury" escapes the complications introduced by any possibility that "a third party caused the plaintiff's injury" or that "the plaintiff caused his own injury." The strict liability issue is thus undisturbed by the possibility of defenses such as contributory negligence, assumption of risk, and intervening cause.

309. These rare cases include: *Baddeley v. Shea*, 114 Cal. 1, 45 P. 990 (1896) (homeowner not negligent in failing to discover rotten board hidden in his porch); *Steen v. Williamson*, 92 Cal. 65, 28 P. 53 (1891) (jury finds dropping of pipe on plaintiff's foot inevitable accident); *Garnier v. Porter*, 90 Cal. 105, 27 P. 55 (1891) (fire non-negligently spreads); *Lyons v. Child*, 61 N.H. 72 (1881) (no negligence in nighttime collision of two carriages).

310. L. FRIEDMAN, *supra* note 1, at 411-12. According to Professor Levy, nineteenth-century plaintiffs making "a misstep, however slight, from the ideal standard of conduct," were routinely and unfairly denied recoveries. L. LEVY, *supra* note 68, at 319. For acceptance of the doctrine of "slight" contributory negligence, see W. PROSSER, *LAW OF TORTS* 421 (4th ed. 1971).

311. Malone, *The Formative Era of Contributory Negligence*, *supra* note 1, at 151, 152, 182.

Professors Levy and Ursin—supposedly writing about California law specifically—claim that "the nineteenth-century [contributory negligence] doctrine could fairly have been called the rule of railroad and industrial immunity." Levy & Ursin, *Tort Law in California: At the Crossroads*, 67 CALIF. L. REV. 497, 509 (1979).

Each state's Supreme Court from an early date accepted the traditional rule of contributory negligence as a complete defense.³¹² Both Courts were openly ambivalent about the rule, however. The New Hampshire Court, though conceding that the rule was "well settled" in the common law, expressed "doubts . . . as to the justice of the rule."³¹³ The California Court revealed its own doubts by way of a hypothetical: "We apprehend, if a man carelessly fires a gun into the street, that it would scarcely be admissible for him, when sued for the injury done another by it, to say that, by reasonable care, the other might have got out of the way."³¹⁴ Affirming the defense in an 1869 opinion, the Court supported it with a very limited rationale. "The law does not justify or excuse the negligence of a defendant. . . . He is both legally and morally to blame"; he is relieved of liability only because, given "the nature of the case, [the law] is unable to ascertain what share of the damages is due to his negligence."³¹⁵ This modest explanation provided solid support, in the short run, for the California Court's development of the doctrine of last clear chance. According to the Court, when the plaintiff's contributory negligence was no more than a "remote" cause of his injury, a complete assignment of that injury to its "proximate" cause seemed right.³¹⁶ In the long run, when the Court finally decided that it was feasible to apportion damages, the nineteenth-century explanation of the traditional rule could be relied on to help justify a new rule of comparative negligence.³¹⁷

Last clear chance was only one of a number of ways in which the nineteenth-century California and New Hampshire Courts intervened—in a plainly modern fashion—to ameliorate the impact of the contributory negligence rule. In California, the Court held that contributory negligence was no defense against a claim of willful and wanton misconduct.³¹⁸ In suits against negligent third parties, the New Hampshire Court refused to "impute" the negligence of a vehicle driver to the passenger-plaintiff³¹⁹ or

312. See, e.g., *Kelly v. Cunningham*, 1 Cal. 365 (1851); *Farnum v. Town of Concord*, 2 N.H. 392 (1821).

313. *Murch v. Concord Ry.*, 29 N.H. 9, 43 (1854).

314. *Fraser v. Sears Union Water Co.*, 12 Cal. 556, 559 (1859).

315. *Needham v. San Francisco & S.J. R.R.* 37 Cal. 409, 419 (1869).

316. See *id.* at 419-22. For New Hampshire's adoption of what amounted to the last clear chance rule, see the extensive causal reasoning in *Littleton v. Richardson*, 34 N.H. 179 (1856). Note that the rule was expressed in terms of proximate causation; the actual phrase "last clear chance" did not enter the law until a later date. See G. WHITE—TORT LAW, *supra* note 12, at 45-50. Currently, proximate cause is regarded as a doctrine that places significant limits on the liability of tort defendants. In the nineteenth century, however, it was very rare for defendants to escape liability for proximate cause reasons. Its most important nineteenth-century application was in the last clear chance cases—and here the proximate cause idea worked to plaintiffs' advantage.

317. See *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 821 n.17, 532 P.2d 1226, 1238 n.17, 119 Cal. Rptr. 858, 870 n.17 (1975).

318. *Esrey v. Southern Pac. Co.*, 103 Cal. 541, 37 P. 500 (1894).

319. *Noyes v. Boscawen*, 64 N.H. 361, 10 A. 690 (1887).

to impute a parent's supervisory negligence to an injured child.³²⁰ The California Court placed the contributory-negligence burden of proof on the defendant, and regarded a technical misassignment of the burden of proof as reversible error, even when the defendant was the Central Pacific.³²¹ When an intoxicated plaintiff fell into a hole in a public sidewalk that a defendant had negligently left uncovered, the California Court virtually read the contributory negligence issue out of the case: "A drunken man is as much entitled to a safe street, as a sober one, and much more in need of it."³²² When allocating decisionmaking between judge and jury, the New Hampshire Court specified that the contributory negligence issue could be taken away from the jury only in "extraordinary" circumstances;³²³ the California Court frequently used language almost as strong.³²⁴

In administering tort appeals, the two states' Courts developed a variety of maxim-like ideas emphasizing the lenient and forgiving quality of the contributory negligence standard. Thus, a plaintiff was not required to exercise "great care"³²⁵ or to behave in a "very timid or cautious" way;³²⁶ contributory negligence was not proven by an "indiscretion"³²⁷ or a mere "error of judgment,"³²⁸ let alone by a "misjudgment" in retrospect.³²⁹ If the plaintiff was "startled and alarmed," that was taken into account in evaluating the reasonableness of his conduct.³³⁰ Momentary distraction is a "most common occurrence" on city streets and "falls far short" of contributory negligence.³³¹ If the plaintiff forgot what he knew about the particular danger, the Court could say that "people are liable to lapses of memory."³³² Attenuating maxims like these were almost totally lacking in the

320. *Bisaillon v. Blood*, 64 N.H. 565, 15 A. 147 (1888). California law was theoretically willing to impute parental negligence, but in no case did the parent's alleged negligence ultimately bar the child-victim's claim. For the nearest instance, compare *Meeks v. Southern Pac. R.R.*, 52 Cal. 602 (1878) (parents found negligent per se) with *Meeks v. Southern Pac. R.R.*, 56 Cal. 513 (1880) (on retrial parents found not negligent; also railroad had last clear chance).

321. *McQuilken v. Central Pac. R.R.*, 50 Cal. 7 (1875). In New Hampshire, the burden of proof rested on the plaintiff—but the Court made clear that this was a mere formality. See *Hutchins v. Macomber*, 68 N.H. 473, 474, 44 A. 602, 602 (1896).

322. *Robinson v. Pioche, Bayerque & Co.*, 5 Cal. 461, 462 (1855).

323. *Palmer v. City of Portsmouth*, 43 N.H. 265, 267 (1861).

324. *Schierhold v. North Beach & M. R.R.*, 40 Cal. 447, 453-54 (1871) (evidence of misconduct must be "clear and irresistible").

325. *Dufour v. Central Pac. R.R.*, 67 Cal. 319, 322, 7 P. 769, 771 (1885).

326. *Strong v. Sacramento & P. R.R.*, 61 Cal. 326, 328 (1882).

327. *Lawrence v. Green*, 70 Cal. 417, 421, 11 P. 750, 752 (1886).

328. *Folsom v. Concord & M. R.R.*, 68 N.H. 454, 460, 38 A. 209, 210 (1896).

329. *Davis v. Concord & M. R.R.*, 68 N.H. 247, 250, 44 A. 388, 390 (1894).

330. *Robinson v. Western Pac. R.R.*, 48 Cal. 409, 421 (1874).

331. *Barry v. Terkildsen*, 72 Cal. 254, 256, 13 P. 657, 658 (1887).

332. See *Davis v. Pacific Power Co.*, 107 Cal. 563, 576, 40 P. 950, 953 (1895). For similar reasoning, see *Van Praag v. Gale*, 107 Cal. 438, 40 P. 555 (1895). But see *Davis v. California St. Cable R.R.*, 105 Cal. 131, 38 P. 647 (1894).

In an early wrongful death case, the California Court held that a lack of contributory negligence

Courts' opinions dealing with the possible negligence of tort defendants, who were frequently held to a standard of the "utmost care." Whatever, then, the symmetry in form of the doctrines of negligence and contributory negligence, they were administered under an emphatic, if implicit, double standard.³³³

Moreover, the judicial rhetoric is confirmed by the pattern of judicial results. In New Hampshire, those results were rather dramatic. In nineteenth-century cases involving personal injury,³³⁴ not one victim was denied recovery for the sole reason of a finding of contributory negligence as a matter of law,³³⁵ and only two victims were denied recoveries for the sole reason of a contributory negligence finding by the jury.³³⁶ In over thirty personal injury cases, the Court affirmed jury verdicts rejecting the defendants' contributory negligence claims;³³⁷ in five other personal injury cases, the Court set aside as erroneous either directed verdicts or jury verdicts favoring defendants on contributory negligence grounds.³³⁸

In almost ninety cases, the California Court either approved the jury's finding of no contributory negligence or ruled that the contributory negligence issue was properly for the jury, and hence that directing a verdict was in error.³³⁹ In sixteen cases, the jury evidently found the plaintiff guilty of contributory negligence; eight of these verdicts the Court set

could be inferred from mere evidence as to "the character and habits and the natural instinct of self preservation" of the victim. *Gay v. Winter*, 34 Cal. 153, 164 (1867).

333. That is, when the conduct of the defendant and the plaintiff combined to expose the plaintiff to a major risk, the Courts subjected the defendant to a stern negligence obligation even while defining the plaintiff's contributory negligence obligation in a mild and permissive way. Consider, for example, the New Hampshire rulings in *Huntress*, pp. 1744-45 *supra*, and the California rulings in *Giraudi*, p. 1750 *supra*.

A conventional economic analysis of the contributory negligence problem, see R. POSNER, *supra* note 30, at 123-24, would find this double standard plainly out of order. For an evaluation of these conventions, see Schwartz, *supra* note 29.

334. When the plaintiff's complaint related to mere damage to property, the New Hampshire Court seemed more willing to find that the negligence or other wrongdoing of the plaintiff or his employee served as a bar to liability. See, e.g., *Page v. Hodge*, 63 N.H. 610, 4 A. 805 (1885); *Underhill v. City of Manchester*, 45 N.H. 214 (1864).

335. In four employee cases and one railroad passenger case, contributory negligence loomed as an alternative reason for the Court's denial of recovery. See, e.g., *Young v. Boston & Me. R.R.*, 69 N.H. 356, 41 A. 268 (1898) (recovery denied because of absence of employer negligence, assumption of risk, and contributory negligence).

336. *Eaton v. Boston & Me. R.R.*, 67 N.H. 422, 40 A. 112 (1893) (passenger deboarding train); *Brember v. Jones*, 67 N.H. 374, 30 A. 411 (1892) (two-carriage highway accident). For defense verdicts in passenger cases that seemingly combined factual findings of no negligence by defendants and contributory negligence by plaintiffs, see *Douyette v. Nashua St. Ry.*, 69 N.H. 625, 44 A. 104 (1899); *Murch v. Concord Ry.*, 29 N.H. 9 (1854) (court sitting as jury).

337. See, e.g., *Boothby v. Grand Trunk Ry.*, 66 N.H. 342, 34 A. 157 (1890); *Clark v. Barrington*, 41 N.H. 44 (1860).

338. See, e.g., *Whitcher v. Boston & Me. R.R.*, 70 N.H. 242, 46 A. 740 (1899); *Tyler v. Concord & M. R.R.*, 68 N.H. 331, 44 A. 524 (1895).

339. See, e.g., *McKune v. Santa Clara Valley Mill & Lumber Co.*, 110 Cal. 480, 42 P. 980 (1895); *Gay v. Winter*, 34 Cal. 153 (1867).

aside, typically because of some error in the judge's instructions.³⁴⁰ In twenty-three cases, the Court held the plaintiff contributorily negligent as a matter of law; in a large number of these, the Court emphasized that the plaintiff's conduct was not merely negligent, but was negligent "in the highest degree,"³⁴¹ was marked by "gross negligence"³⁴² or "recklessness,"³⁴³ or was virtually "willful."³⁴⁴

C. *The Jury*

The New Hampshire and California Courts recognized the primary jurisdiction of the jury over questions of negligence and contributory negligence. The jury's authority over the level of damages was even more complete. To be sure, new trials were sometimes ordered on grounds that the judge had improperly instructed the jury as to the legal measure of damages;³⁴⁵ and when the victim's injury was mainly emotional or economic in nature, the California Court occasionally rejected a jury verdict as excessive.³⁴⁶ When the plaintiff suffered a clearly serious physical injury, however, the Courts repeatedly and consistently refused to overturn the jury's assessment of damages as excessive.³⁴⁷ Instead, the Courts, emphasizing the absence of "precise rules" in the calculation of damages and recognizing "the good sense and unbiassed judgment of the jury,"³⁴⁸ allowed jury verdicts to stand, even when the jury's award was larger than the Courts felt appropriate.³⁴⁹

340. Compare *Fernandes v. Sacramento City Ry.*, 52 Cal. 45 (1877) (defense verdict set aside: contributory negligence instructions withdrew too much from jury) with *Maumus v. Champion*, 40 Cal. 121 (1870) (defense verdict affirmed: record supported contributory negligence finding.)

341. *Everett v. Los Angeles Consol. Elec. Ry.*, 115 Cal. 105, 122, 43 P. 207, 208 (1896).

342. See, e.g., *Flemming v. Western Pac. R.R.*, 49 Cal. 253, 257 (1874).

343. See, e.g., *Hager v. Southern Pac. Co.*, 98 Cal. 309, 310, 33 P. 119, 119 (1893).

344. *Bailey v. Market St. Cable Ry.*, 110 Cal. 320, 329, 42 P. 914, 917 (1895).

In almost all of the 23 cases, the Court's conclusion that reasonable minds could not differ in assessing the plaintiff's conduct as unreasonable appears to be plainly correct.

345. See, e.g., *Fox v. Oakland Consol. St. Ry.*, 118 Cal. 55, 50 P. 25 (1897); *Tarbell v. Central Pac. R.R.*, 34 Cal. 616 (1868).

346. See *McCarty v. Fremont*, 23 Cal. 196 (1863).

347. The California Court did authorize the practice of trial judge remittitur. *Gregg v. San Francisco & N. Pac. R.R.*, 59 Cal. 312 (1881). In one case, the Court endorsed a new trial for the plaintiff because of the inadequacy of the jury's damage award. *Mariani v. Dougherty*, 46 Cal. 27 (1873).

348. *Aldrich v. Palmer*, 24 Cal. 513, 516 (1864).

349. See *Howland v. Oakland Consol. St. Ry.*, 110 Cal. 513, 522, 42 P. 983, 985 (1895).

This article will make no attempt to exposit in detail the damage rules developed by nineteenth-century cases, though damage issues loomed large in many tort appeals. It suffices to say here that nineteenth-century courts went a long way towards developing what we now recognize as the body of modern damage law. Thus it was held that a plaintiff could recover for all predicted future losses, *Hopkins v. Atlantic & St. L. R.R.*, 36 N.H. 9 (1857), and for mental anguish as well as physical suffering, see, e.g., *Sloane v. Southern Cal. Ry.*, 111 Cal. 668, 683 44 P. 320, 323-24 (1896) (nervous shock compensable, even when suffered by person with pre-existing emotional vulnerability); *Fairchild v. California Stage Co.*, 13 Cal. 599, 601 (1859). The collateral source rule was recognized in *Seavey v. Dennett*, 69 N.H. 479, 45 A. 247 (1898). The "pecuniary loss" recoverable under the California wrongful death statute was held to exclude grief, but to include loss of society. See *Munro*

Given the prerogatives that these states recognized in the jury, how the jury exercised its powers is of keen concern. In the California appellate opinions, one can detect two hundred forty-eight jury verdicts for plaintiffs, only twenty-six for defendants.³⁵⁰ In suits against railroads, the breakdown in verdicts is one hundred eleven to twelve. In New Hampshire cases after 1850, there were one hundred forty-seven jury verdicts for plaintiffs, but only twenty-two for defendants.³⁵¹ During the entire nineteenth century, in suits against towns for highway accidents, the jury verdict ratio was forty-one to nine; in all tort suits against railroads, it was seventy-one to four.

Because plaintiffs and defendants may have faced unequal incentives to appeal,³⁵² the pattern of jury verdicts reviewed on appeal may not accurately represent the original ratio of jury verdicts at trial. To evaluate this possibility, I studied all jury verdicts in tort cases filed in Los Angeles County against railroad company defendants between 1889 and 1895.³⁵³ These records show twenty-six verdicts for plaintiffs and only thirteen for defendants.³⁵⁴ While this two-to-one ratio is much less than the ratios reflected in the appellate reports, it still amply suggests that trial juries indulged a considerable preference for injured plaintiffs.³⁵⁵ This suggestion receives support, moreover, from a number of judicial comments. In 1893, the California Court worried about the tendency of juries to catch at a mere "pretense of evidence for the purpose of somewhat equalizing financial conditions by taking money from one party and giving it to the other."³⁵⁶ Another California opinion described the jury as having been

v. Pacific Coast Dredging & Reclamation Co., 84 Cal. 515, 525-26, 24 P. 303, 305-06 (1890); Beeson v. Green Mountain Gold Mining Co., 57 Cal. 20, 38-39 (1880). And the California Court rejected a proposal that it place a ceiling on wrongful death recoveries. Redfield v. Oakland Consol. St. Ry., 110 Cal. 277, 285-86, 42 P. 822, 823-24 (1895).

350. Professor Posner's review of late nineteenth-century appellate opinions across the nation also yielded about a ten-to-one ratio of jury verdicts favoring the plaintiff. Posner, *supra* note 25, at 51.

351. Many New Hampshire claims, especially those relating to highway defects, were submitted to "referees," whose roles and powers are not made clear.

352. Railroad defendants, for example, were subject to repeated tort claims in a way that gave them long-run interests in the results of particular cases.

353. These trial documents are available in the Los Angeles County Archives Office.

354. Professor Posner, sampling trial verdicts in two Illinois counties, found 19 verdicts for plaintiffs and 13 for defendants. Posner, *supra* note 25, at 92.

355. This is especially true in light of the apparent power of George Priest's 50% Theorem. Priest, *Selective Characteristics of Litigation*, 9 J. LEGAL STUD. 399 (1980). As Priest argues, even if a jury harbors a certain preference with respect to outcomes, rational and knowledgeable lawyers will settle cases in such a way that the cases actually litigated will tend to cluster around the borderline of the jury's preference. See *id.* at 421; Klein & Priest, *A Theory of Litigation: Selection and Resolution* (unpublished manuscript on file with *Yale Law Journal*). Accordingly, any clear deviation from a 50-50 pattern of jury verdicts is *prima facie* unexpected and hence provocative.

356. Driscoll v. Market St. Cable Ry., 97 Cal. 553, 563, 32 P. 591, 591 (1893).

In New Hampshire, Chief Justice Doe, conceding the possibility that the jury might commit a "wrong" in the evaluation of facts, insisted that "wrongs" of this sort cannot "be legally prevented or rectified by a judicial alteration of the law." *Huntress v. Boston & Me. R.R.*, 66 N.H. 185, 192, 34

“carried away by sympathy for the plaintiff, which is quite natural.”³⁵⁷ The subsidy thesis assumes a tort system under the tight control of a judiciary hostile to liability; this assumption is contradicted by the breadth of the decisionmaking powers that judges vested in juries combined with the evident direction of the juries’ case-deciding sympathies.³⁵⁸

D. Duty

In discussing nineteenth-century tort law, legal historians like Horwitz indicate that until 1800, tort problems did not commonly arise between persons who were mere “strangers” to each other prior to an accident. Nineteenth-century judges supposedly experienced great difficulty in recognizing any general duty between strangers in an increasingly populous world, and therefore cast that duty in the attenuated language of negligence.³⁵⁹ This presentation of the duty issue, however, is poorly supported by what we know about English tort history.³⁶⁰ In any event, the general duty issue played almost no encumbering role in nineteenth-century tort law in New Hampshire and California. From the beginning, each state’s Court, in cases involving accidents between strangers, routinely granted recoveries on a showing of negligence, without the slightest concern for

A. 154, 157 (1890). Doe’s biographer interprets that statement as an acknowledgment and an acceptance of the prospect that jurors “might hold railroads and other corporate defendants liable for every act.” J. REID, *supra* note 12, at 110.

357. *Perry v. Malarin*, 107 Cal. 363, 368, 40 P. 489, 490 (1895). Arguments by counsel also indicate the nature of jury attitudes. The defendant in *Wilson v. Southern Pac. R.R.*, 62 Cal. 164, 169 (1882), formally complained that juries harbor “prejudices” against railroads. In *Bellegarde v. San Francisco Bridge Co.*, 90 Cal. 179, 181, 27 P. 20, 20 (1891), the defendant pleaded that it not be “handed over to the tender mercies of another anti-corporation jury.”

358. Any lack of objectivity on the part of the jury also impairs the efficiency or regulatory theory of tort law.

In cases in which a chief issue at trial was the alleged contributory negligence of the plaintiff, jury verdicts for the plaintiff are consistent with the possibility that the jury covertly applied a rule of comparative negligence, accepting a defendant’s factual claim, but modifying its legal impact. See *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 811, 532 P.2d 1226, 1231, 119 Cal. Rptr. 858, 863 (1975) (describing practice). The plaintiff’s victory, therefore, may have been less complete than a plaintiff verdict might make it appear. Yet if it is true that the judiciary tolerated jury nullification of an official common law rule that was adverse to plaintiffs, this practice seems at war with the subsidy thesis and the efficiency thesis as well.

359. See, e.g., M. HORWITZ, *supra* note 1, at 88, 89, 92; G. WHITE—TORT LAW, *supra* note 12, at 16-19, 40-41. See *id.* at 50 (negligence a “severely limited” liability standard developed by courts for “general duty” cases).

360. The “professional undertaking” instances of trespass on the case did involve parties who stood in some pre-accident legal or economic relationship. But such a relationship was quite lacking in other instances of case. This is especially true of the highway suits—suits in which, the plain stranger status of the litigants notwithstanding, the duty issue was never even mentioned. See M. PRICHARD, *supra* note 43, at 33. And surely under the trespass writ a prior relationship had never been seen as any sort of prerequisite. Strangers were on both sides of the lawsuits in such trespass classics as *Weaver v. Ward*, Hobart 134, 80 Eng. Rep. 284 (K.B. 1616), and *Scott v. Shepherd*, 2 Black, W. 892, 96 Eng. Rep. 525 (1773). The very stereotype of trespass involved one stranger attacking another. See S. MILSOM, *supra* note 33, at 290, 297. For an interesting discussion of the emergence of the “duty” issue in English law, see M. PRICHARD, *supra* note 43, at 30-33.

any problem of duty.³⁶¹ When the duty issue was alluded to, it was disposed of in almost summary terms. In one case, the California Court agreed that "negligence, to be actionable, must rest on a breach of an obligation or duty imposed on the party complained of"; but the Court then specified that "the obligation or duty is devolved by law on all men to use their unimpeached legal rights so as not to injure others."³⁶²

A very different version of nineteenth-century duty law has been offered recently by the California Supreme Court.³⁶³ This version stipulates that until 1800, tort law had no duty concept; then, in the 1800s, courts invented "duty" as a way of carefully controlling the scope of negligence liability. This version is also unsupported by the evidence. Except in the trespasser cases noted below, nineteenth-century law in New Hampshire and California was remarkably free of the special no-duty and immunity rules that later cluttered and complicated those states' laws. In the nineteenth century, neither state's law suggested, for example, that charities were immune from claims brought by patients; that vehicle drivers were immune vis-a-vis their social guests; or that family members were immune from suits by other family members.³⁶⁴ And the only suit against a product seller for an injury caused by a product defect led to a victory for the non-privacy product victim.³⁶⁵

To be sure, there were trespasser cases that gave the Courts difficulty

361. See, e.g., *Gerke v. California Steam Navig. Co.*, 9 Cal. 251 (1858); *Robinson v. Pioche, Bayerque & Co.*, 5 Cal. 460 (1855); *Wilson v. Cunningham*, 3 Cal. 241 (1853); *Brooks v. Hart*, 14 N.H. 307 (1843); *Dalton v. Favour*, 3 N.H. 465 (1826).

Two professional malpractice cases raised issues of "privity," if not "duty." In *Edwards v. Lamb*, 69 N.H. 599, 45 A. 480 (1899), a doctor, in treating his patient, negligently infected the patient's wife, who was assisting in the treatment. The New Hampshire Supreme Court granted a recovery. The California Court, however, denied liability in *Buckley v. Gray*, 110 Cal. 339, 42 P. 900 (1895), where a lawyer's negligence in drafting his client's will prevented the plaintiff from receiving an inheritance. When the California Court eventually ruled in favor of a disappointed legatee, it did so primarily on a contract theory of intended beneficiary. *Lucas v. Hamm*, 56 Cal. 2d 583, 590-91, 364 P.2d 685, 688-89, 15 Cal. Rptr. 821, 824-25 (1961).

In *Hagerty v. Powers*, 66 Cal. 368, 369, 5 P.2d 622, 622 (1885), the Court denied the liability of a father who merely had "negligently suffered" his son to possess a pistol. Within tort law even today, the problem of "affirmative duties" remains distinct.

362. *Chidester v. Consol. Ditch Co.*, 59 Cal. 197, 202 (1881). Another opinion affirmed the existence of a general duty of ordinary care that "all persons owed to each other under like circumstances of meeting by chance." *Franklin v. Southern Cal. Motor Rd. Co.*, 85 Cal. 63, 70, 24 P. 723, 725 (1890). In light of this general duty, the fact that the defendant repairmen were negligent while they were performing contractual obligations they owed to a property owner was deemed no reason to deny a recovery to a third party directly injured by that negligence; according to the Court, "defendants were bound so to exercise their rights so as not to interfere with the rights of others." *Donnelly v. Hufschmidt*, 79 Cal. 74, 75, 21 P. 546, 546 (1889).

363. See *Dillon v. Legg*, 68 Cal. 2d 728, 734-35, 441 P.2d 912, 916-17, 69 Cal. Rptr. 72, 76-77 (1968).

364. It is not the case that the Courts were actually imposing liability in those situations; there simply were no suits.

365. *Lewis v. Terry*, 111 Cal. 39, 43 P. 398 (1896) (tenant recovers against retailer who had willfully misrepresented safety of folding bed to buyer-landlord). For diverse dicta on manufacturers' liability, see p. 1749 & note 243 *supra*.

— and understandably so. If a landowner failed to incur expenses solely geared to provide protection for trespassers, it might not be clear at what point the landowner's omission could properly be regarded as unreasonable³⁶⁶ —the negligence issue here blending into the issue of affirmative duty.³⁶⁷ Similarly, the wrongdoing of the person inattentively walking on a railroad track as a train approached was an indissoluble mix of trespassing and contributory negligence.³⁶⁸ Trespasser problems were thus closely related to the Courts' more general interests in negligence and contributory negligence.³⁶⁹ The California Court's concern for how costly it would be for a landowner to assure safety³⁷⁰ testifies to the nineteenth-century affiliation between trespassing and the negligence doctrine, while the New Hampshire Court's distinction between "active" and "passive" dangers indicates the impact of the affirmative duty problem.³⁷¹ As for the nineteenth-century linkage between trespassing and contributory negligence, it is revealed both by the California Court's special protection of the child trespasser³⁷² and by each Court's recognition of the rights of the "discovered" trespasser.³⁷³

E. Curtailments of Negligence Liability

On balance, then, the trespasser cases afford no more than a limited

366. In almost all of the nineteenth-century trespasser cases, to have protected the trespasser would have imposed a significant added burden on the landowner. On the possible relevance of "added burden" even under a late twentieth-century negligence scheme, see *Rowland v. Christian*, 69 Cal. 2d 108, 118, 443 P.2d 561, 567-68, 70 Cal. Rptr. 97, 103-04 (1968).

367. The Courts seemed troubled by the difficult question of the extent to which a mere trespasser can rely on the fact of property ownership as the predicate for imposing on the landowner a range of affirmative obligations to render his property safe. For an opinion analogizing a landowner's failure to incur an added burden for the sake of trespassers to the more general problem of good samaritan obligations, see *Buch v. Amory Mfg. Co.*, 69 N.H. 257, 260, 44 A. 809, 810 (1897).

368. See *George v. Los Angeles Ry.*, 126 Cal. 357, 58 P. 819 (1899); *Tennenbrock v. South Pac. Coast R.R.*, 59 Cal. 269 (1881).

On nineteenth-century public attitudes towards the railroad trespasser, see E. KIRKLAND, *supra* note 196, at 395-96.

369. One opinion indicates that the negligence and contributory negligence issues effectively exhaust the trespasser problem. See *Felch v. Concord R.R.*, 66 N.H. 318, 29 A. 557 (1890).

370. See *Peters v. Bowman*, 115 Cal. 345, 47 P. 113 (1896).

371. In *Mitchell v. Boston & Me. R.R.*, 68 N.H. 96, 118, 34 A. 674, 677 (1894), the New Hampshire Court classified the running of a railroad as an "active intervention" warranting liability in the event of negligence. A railroad could hence be liable if it failed to make reasonable efforts to detect a trespasser on its tracks at locations where trespassing was foreseeable. See *Felch v. Concord R.R.*, 66 N.H. 318, 29 A. 557 (1890).

372. Compare *Barrett v. Southern Pac. Co.*, 91 Cal. 296, 27 P. 666 (1891) (accepting attractive nuisance doctrine) with *Clark v. Manchester*, 62 N.H. 577 (1883) (rejecting doctrine).

373. *Tennenbrock v. South Pac. C. R.R.*, 59 Cal. 269, 271-72 (1881) (dictum); *Frost v. Eastman R.R.*, 64 N.H. 220, 222, 9 A. 790, 791 (1886) (dictum). Once a defendant has "discovered" a trespasser, the defendant is in a last clear chance situation. See p. 1760 *supra*. For the idea that a landowner can be liable for negligence subsequent to the time when he merely "should have known" of the trespasser's presence, see *Leavitt v. Mudge Shoe Co.*, 69 N.H. 597, 598, 45 A. 558, 558 (1899) (dictum).

caveat on the tendency towards victim protectiveness that the two states' tort law generally exhibited. In California, however, tort law did recognize one *de jure* immunity:³⁷⁴ an immunity enjoyed by the government itself.³⁷⁵ The immunity rule precluded recovery against local governments for the negligent failure to keep streets and bridges in proper repair,³⁷⁶ for malpractice in and by a public hospital,³⁷⁷ and for other positive acts by public employees that directly resulted in injury.³⁷⁸ Even after the Legislature declared that "[t]he county is responsible for providing and keeping passable and in good repair bridges and all public highways," the Supreme Court was unwilling to rule that statutory "responsibility" included civil liability.³⁷⁹ On one occasion, when a San Quentin prison guard lost his arm through the negligence of his superior officer, the legislature passed a special act appropriating \$10,000 to compensate him for his injury; the Court actually ruled the statute unconstitutional as an illicit gift of public funds.³⁸⁰

Employers in California and New Hampshire certainly did not enjoy any general immunity from tort liability. In nineteenth-century California, the employee prevailed in thirty-seven Supreme Court opinions, the employer in forty-three; in the New Hampshire Supreme Court, there were eleven victories for employees, twenty-three for employers.³⁸¹ But

374. There was also a *de facto* immunity accorded California landlords, who were defendants in eight tort actions brought by injured tenants. Although the tenants presented a range of substantial arguments, in seven of these cases the California Supreme Court ruled against liability. *See, e.g.,* *Townsend v. Briggs*, 99 Cal. 481, 34 P. 116 (1893); *Sieber v. Blanc*, 76 Cal. 173, 18 P. 260 (1888). Viewed individually, none of these seven opinions appears overwhelmingly wrong; taken in the aggregate, however, they reveal a conspicuous judicial opposition to landlord liability. On New Hampshire law, compare *Scott v. Simmons*, 54 N.H. 426 (1874) (landlord liable for negligent construction and for failure to repair known hazards) with *Towne v. Thompson*, 68 N.H. 317, 44 A. 492 (1895) (*Scott* seemingly overruled).

375. The New Hampshire experience in this regard was rather different. The New Hampshire Court interpreted the common law as including a government immunity doctrine. *Edgerly v. Concord*, 62 N.H. 8 (1882). But the Court also held that the immunity did not apply when the public agency was engaged in a proprietary function. *Rhobidas v. Concord*, 70 N.H. 90, 47 A. 82 (1899). Moreover, an early New Hampshire statute rendered towns civilly liable for injuries caused by dangerous obstructions on town highways. *See* notes 112 & 118 *supra*. And suits by highway travellers against towns for highway-obstruction accidents constituted, at least at the appellate level, the largest single category of tort claims. What impresses in New Hampshire, therefore, is the extent of the government's liability in tort. Note, however, the Court's conversion from strict liability to negligence in interpreting the highway statute. *See* notes 112 & 118 *supra*.

376. *Huffman v. San Joaquin County*, 21 Cal. 426 (1863).

377. *Sherbourne v. Yuba County*, 21 Cal. 113 (1862).

378. *Howard v. City of San Francisco*, 51 Cal. 52 (1875).

379. *Barnett v. County of Contra Costa*, 67 Cal. 77, 78, 7 P. 177, 177 (1885).

380. *Bourn v. Hart*, 93 Cal. 321, 322, 28 P. 951, 952 (1892). For a narrow interpretation of an end-of-the-century statute that seemingly contained a general waiver of the state's tort immunity, *see* *Denning v. California*, 123 Cal. 316, 323-24, 55 P. 1000, 1002 (1899) (immunity remains for torts committed in course of "governmental function").

381. Five cases in California and two in New Hampshire yielded opinions containing significant holdings favoring each side.

Employee suits were the largest single category of tort claims in California; in New Hampshire,

both the number and the percentage of defense rulings do suggest the serious tort law obstacles that an injured worker faced, especially the well-known trinity of employer defenses: contributory negligence, assumption of risk, and the fellow-servant rule.³⁸² Actually, the defense of contributory negligence, standing on its own, was not a major factor; in only one case in either state was it the single reason for denying the employee's recovery.³⁸³ On the remaining issues there was an interesting divergence between California and New Hampshire. In California, workers' claims were usually disallowed because of the fellow-servant rule.³⁸⁴ In New Hampshire, employee claims were most commonly rejected because of assumption of risk.³⁸⁵

Professor Posner's recent account of nineteenth-century tort law attempts to explain both the employment-tied assumption of risk defense³⁸⁶ and the fellow-servant rule.³⁸⁷ Assumption of risk allegedly enabled an employee to capitalize on his preference for risk; the fellow-servant rule supposedly combined with the employer's liability for retaining incompetent servants to give imperiled employees an efficient incentive to inform supervisors of their colleagues' careless habits.³⁸⁸ In the employment setting, the assumption of risk rationale rests on two premises: that the worker has available to him employment alternatives that are essentially identical to his existing job, except for the absence of both that job's safety hazard and the resulting wage differential; and that the worker will incur no significant costs in opting for one of those alternatives. The nature of employment experience contradicts both of these premises. The typical job consists of a package of attributes that readily distinguishes it from other jobs,³⁸⁹ and the search for a new job can often be a difficult, if not painful, endeavor.³⁹⁰ Moreover, in New Hampshire the risk the employee was held

they ranked second, behind highway obstruction suits.

382. In addition, in employee cases tort law's basic negligence standard was sometimes given an unusually timid definition. See *Sappenfield v. Main St. & A.P. R.R.*, 91 Cal. 48, 27 P. 590 (1891).

383. See *Kenna v. Central Pac. R.R.*, 101 Cal. 26, 35 P. 332 (1894).

384. See *Trewatha v. Buchanan Gold Mining & Milling Co.*, 96 Cal. 494, 28 P. 571 (1892) (even if employer has provided defective equipment, negligence of fellow servant precludes liability).

385. See *Leazotte v. Boston & Me. R.R.*, 70 N.H. 5, 6, 45 A. 1084, 1085 (1899) (assumption of risk defense applied despite strong showing of employer negligence). Indeed, by the end of the century, employees' appeals were frequently dismissed in boilerplate, one-sentence assumption of risk per curiams. See, e.g., *Evans v. Meredith Shook & Lumber Co.*, 69 N.H. 664, 38 A. 1099 (1896).

386. For a discussion of New Hampshire's limited and ambivalent use of assumption of risk outside of the employment context, see p. 1739 *supra*. Apart from employment cases, the nineteenth-century California Court never resorted to this defense. See *Judson v. Giant Powder Co.*, 107 Cal. 549, 554, 40 P. 1020, 1020 (1895) (rejecting "doctrine of fatalism").

387. See Posner, *supra* note 25, at 44-46, 67-70.

388. See *id.* at 44, 45.

389. See A. REES, *THE ECONOMICS OF WORK AND PAY* 97 (1973); cf. T. HAREVEN & R. LANGENBACH, *AMOSKEAG* 12, 21 (1978) ("family spirit" made working at Amoskeag Company a special experience). But cf. *id.* at 47 (ease of finding non-Amoskeag employment).

390. See A. REES, *supra* note 389, at 96.

to assume was not a general hazard of the employment,³⁹¹ but rather a specific risk, caused by the employer's negligence, that the employee became aware of only after working on his job for some period of time.³⁹² In learning any particular job, an employee invests his own resources in that job, an investment that would be costly to abort if he should quit that job in favor of other employment. As for the fellow-servant rule, in its California version the Posner apology does not suffice. For one thing, the rule was frequently applied when the "fellow servant" in question was not a person whose work habits the injured employee had any real opportunity to observe³⁹³ and when that "servant" was a foreman or supervisor, whom the individual employee would surely be hard pressed to challenge.³⁹⁴ Also, while the California Court acknowledged in form the employer's liability for the negligent appointment or retention of incompetent servants, in the realities of litigation the Court proved hostile to this liability theory in a way that seemingly rendered it a dead letter.³⁹⁵

Overall, my study of nineteenth-century tort law indicates that the negligence system was a surprisingly abundant source of liability. The government cases obviously establish an exception to this generalization because of the outright immunity they flaunted. The employment law is also exceptional, given the number and proportion of the claims it denied, the uniqueness and perhaps wrongness³⁹⁶ of the reasons relied on in those

391. These are the hazards that have led to economists' findings of wage differentials. The most interesting study is Thaler & Rosen, *The Value of Saving a Life: Evidence From the Labor Market*, in *HOUSEHOLD PRODUCTION AND CONSUMPTION* 265-98 (N. Terleckyj ed. 1975).

392. *E.g.*, *Leazotte v. Boston & Me. R.R.*, 70 N.H. 5, 45 A. 1084 (1899); *Nouise v. Theobald*, 68 N.H. 564, 41 A. 182 (1896). The California Court explicitly held that the defense can be applied even if the risk did not exist in the workplace at the time the plaintiff began his employment. *Snowden v. Idaho Quartz Mining Co.*, 55 Cal. 443 (1880).

393. *See, e.g.*, *Callan v. Bull*, 113 Cal. 593, 45 P. 1017 (1896); *Livingston v. Kodiak Packing Co.*, 103 Cal. 258, 37 P. 149 (1894); *Fagundes v. Central Pac. R.R.*, 79 Cal. 97, 21 P. 437 (1889).

394. *See, e.g.*, *Stevens v. San Francisco & N. Pac. R.R.*, 100 Cal. 554, 35 P. 165 (1893) (employee possessing management authority to discharge other employees still a "fellow servant"); *McLean v. Blue Point Gravel Mining Co.*, 51 Cal. 255, 253 (1876) (fellow-servant rule ignores employees' differing "grades of employment").

395. In a dozen cases injured employees alleged such employer negligence; in each case, the Supreme Court, frequently overturning jury verdicts, found the plaintiff's evidence inadequate. *See, e.g.*, *Gier v. Los Angeles Consol. Elec. Ry.*, 108 Cal. 129, 41 P. 22 (1895); *Cosgrove v. Pitman*, 103 Cal. 268, 37 P. 232 (1894); *Holland v. Southern Pac. Co.*, 100 Cal. 240, 34 P. 666 (1893). The New Hampshire Court was similarly unresponsive. *See Nash v. Nashua Iron & Steel Co.*, 62 N.H. 406 (1882).

396. In the employment cases, assumption of risk seems simply wrong; the fellow-servant rule is better characterized as troubling. One cannot make up his mind about the rule unless one has a firm grasp on the principles underlying vicarious liability in the first place. One need not agree that vicarious liability is something of an aberration within the law, *see Pound, The Economic Interpretation and the Law of Torts*, 53 HARV. L. REV. 365, 375-76 (1940), in order to realize that it is a late-blooming doctrine, *see pp. 1726, 1730 supra*, whose purposes we do not yet fully understand. When an outsider to an employer's enterprise is injured by the negligence of an employee who has been deputized by the employer to exercise the latter's authority in his dealings with the outside world, there is a strong intuition that the employer should be held responsible. But that intuition is largely absent when the negligence of an ordinary employee simply injures a person standing near him in the

denials, and the resulting complexities and obvious costliness of litigation. How should we think about these classes of cases? It is said that historians can be divided into "lumpers and splitters."³⁹⁷ Lumpers want "to put all the past into boxes. . . . [They] do not like accidents; they would prefer to have them vanish." Splitters, by contrast, like "to point out divergences, to perceive differences. . . . They do not mind untidiness and accident in the past; they rather like them."³⁹⁸ I am both enough of a "lumper" to want to emphasize the general tendency towards victim protectiveness in nineteenth-century tort law and enough of a "splitter" to secure satisfaction from identifying employment and government-related injuries as important limitations on this tendency.

To explain the exceptional status of workers' cases, I can do little more than refer to uncertain hypotheses.³⁹⁹ Nevertheless, by identifying these cases as an exception to the pattern, I am able to comment on one question that has deeply interested other legal analysts: Why, in the early twentieth century, were the employment cases, and those cases alone, removed from the tort system?⁴⁰⁰ The historical record suggests that one of this question's answers is interestingly straightforward. Because tort law as applied to workers' injuries was peculiarly ungenerous, unsatisfying, and administratively costly, it proved vulnerable to challenge and to eventual displacement.⁴⁰¹

employer's workplace. See T. WEIR, *A CASEBOOK ON TORT* 191-92 (2d ed. 1970). Within tort law, the fellow-servant issue—unique as it is to the problem of workers' injuries—may elude a satisfying solution.

397. J. HEXTER, *ON HISTORIANS* 241-42 (1979).

398. *Id.* at 241-43. Professor Horwitz is, of course, a lumper; Professor Friedman is a lumper who hedges his bets with a bit of splitting. See note 9 *supra*. As a historian, Professor Posner is a lumper as well.

Hexter's vocabulary may be unfortunately value-laden; it denigrates lumping. Without some lumping, however, few historians would be able to propound new theses. With his own preference for splitting, Hexter may be best at critiquing the theses that others have labored to advance. See Skinner, Book Review, *NEW YORK REVIEW OF BOOKS*, January 24, 1980, at 39-41.

399. Possibly, upper-class judges felt no sympathy for injured blue-collar workers. But if attitudes toward workers are important, one can hardly overlook the native-immigrant conflicts in New England and the anti-Chinese hysteria in California. On the former, see T. DUBLIN, *supra* note 162, at 145-64. On the latter, see A. SAXTON, *THE INDISPENSABLE ENEMY* (1971).

Professor Tushnet's explanation is that judges chose to conceptualize workers' injury cases within a "contract framework." Tushnet, *supra* note 9, at 90. I do not find this very helpful. The problem was not contract reasoning as such, but contract reasoning that was deficient and hostile. In the passenger cases, the Courts adopted a partial contract approach that served to enhance rather than to detract from the railroads' overall liability burdens. See p. 1743 *supra*.

400. See, e.g., Friedman & Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967); Henderson, *Should Workmen's Compensation Be Extended to Non-occupational Injuries?* 48 TEX. L. REV. 117, 125-26 (1969); Rabin, *Some Thoughts on Tort Law from a Sociopolitical Perspective*, 1969 WIS. L. REV. 51, 64-65, 69-70; Smith, *Sequel to Workmen's Compensation Acts* (pt. 2), 27 HARV. L. REV. 344, 368 (1914).

401. New Hampshire moved directly from the common law to workers' compensation in 1911. See I J. BOYD, *COMPENSATION FOR INJURIES TO WORKMEN* 6-7, 12, 735-36 (1913). California's 1911 enactment of workers' compensation, *id.* at 11, 649-700, was preceded by a 1907 "employer's liability" statute that trimmed, but retained, the fellow-servant rule and the assumption of risk defense.

As for the government cases, one should begin by acknowledging that any number of ideas and instincts may be disturbed by the prospect of substantial governmental liability in tort. Unfortunately, the California Court's opinions are quite superficial in a way that frustrates any effort to ascertain what the Court, in espousing immunity, was seeking to prove. Nevertheless, one can still assess what the Court's espousal tends to disprove. It impugns the subsidy thesis, since a judiciary motivated by a strong preference for private enterprise would hardly see fit to confer a unique and categorical immunity upon public enterprise.⁴⁰² The rule also seems at odds with any microeconomic explanation of nineteenth-century tort law, inasmuch as a general rule of government immunity in tort is seriously inefficient.⁴⁰³

Conclusion

The subsidy thesis can be conjoined to various assumptions about the judicial process. Professor Gregory believes that the furnishing of a negligence-law subsidy entailed a policy choice rendered by the judiciary on the basis of its own perceptions of the nineteenth-century public interest.⁴⁰⁴ Both Horwitz and Friedman, however, reject this understanding of the judicial process. According to Horwitz, during the nineteenth century America's judicial law increasingly became "simply reflective of the existing organization of economic and political power."⁴⁰⁵ Friedman's presentation is more vivid still: "The legal system does the bidding of those whose hands are on the controls. The laws . . . reflect the goals and poli-

1907 Cal. Stats. ch. 97, § 1. In the early 1900s, the legislatures in a number of states evidently abrogated the fellow-servant rule altogether. See J. BOYD, *supra*, at 8. If I am right in regarding the fellow-servant issue as genuinely vexing, see note 396 *supra*, then the abrogation of the rule would not produce clearly satisfying results and hence would not lead to a stable situation. In any event, once a legislature does intervene in the common law by passing a significant statute, it establishes "jurisdiction" over a particular problem in a way that is likely to lead to further legislative action.

402. Note the awkwardness of Friedman's attempt to explain in terms of his industrial subsidy thesis the rule of charitable immunity that he takes to be characteristic of nineteenth-century law. L. FRIEDMAN, *supra* note 1, at 416.

403. Employing economic reasoning, Professor Spitzer concludes that governmental immunity in tort is never justified. Note, *An Economic Analysis of Sovereign Immunity in Tort*, 50 S. CAL. L. REV. 515 (1977). Since the only factual example his Note considers is a farmland fire caused by the operation of a government-owned railroad, see *id.* at 516, an activity that seems plainly "proprietary" and not "discretionary," this conclusion seems unjustified, or at least premature. But Spitzer's analysis soundly supports the point that a universal rule of governmental immunity is without economic merit.

404. See Gregory, *supra* note 1, at 368; cf. J. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956) (discussion of "the release of energy" in nineteenth-century American law).

405. M. HORWITZ, *supra* note 1, at 253. In other passages, Horwitz ventures alternative views of the judicial process. At times he refers, somewhat like Gregory, to judges who perceived themselves as formulating "legal doctrine with the self-conscious goal of bringing about social change." *Id.* at 30. Elsewhere he speaks of an "alliance" forged between judges and nineteenth-century entrepreneurs. *Id.* at 253. He also alludes to "antebellum statesmen" who evidently possessed effective control over both the judicial and the legislative branches. *Id.* at 100-01.

cies of those who call the tune."⁴⁰⁶

The economic determinism in these and similar statements has led distinguished critics to assess Horwitz as a "neo-Marxist"⁴⁰⁷ and Friedman as an adherent of a "vulgar Marxism."⁴⁰⁸ Any number of fundamental Marxist concepts are absent from their thought, however;⁴⁰⁹ and I prefer to regard them as "populists." That label captures their somewhat conspiratorial views of history;⁴¹⁰ it emphasizes the indigenously American character of their reasoning; it underlines their commendably democratic concern for the plight of the common man;⁴¹¹ and it accords with their own emphasis on the nineteenth century, as well as with Friedman's concern for that century's railroads.

Among the perils of populism, however, is a tendency towards oversimplification. It is true that during the nineteenth century the negligence standard acquired a new prominence and publicity; but to conclude, as subsidy writers suggest, that the emphasis on negligence entailed the dramatic or deliberate overthrow of an ambitious prior rule of strict liability requires a reading of the historical record that is unsubtle at best and inaccurate at worst.

In general, the New Hampshire and California case law resists the claim that the nineteenth-century negligence system can properly be characterized or disparaged as an industrial subsidy. The Courts expanded on the negligence standard in ways that rendered it ambitious and demanding, narrowing the gap between negligence and strict liability. Far from erecting a duty prerequisite to every tort claim, the Courts easily recognized that everyone owes a duty to everyone else to abstain from negligent conduct. The Courts applied the defense of contributory negligence sparingly and sympathetically, and developed a variety of extenuating maxims that virtually excluded from the law the concept of "slight" contributory

406. L. FRIEDMAN, *supra* note 1, at 14.

407. Dworkin, *Seven Critics*, 11 GA. L. REV. 1201, 1210 (1979); Reid, Book Review, 55 TEX. L. REV. 1307, 1317 (1977).

408. Tushnet, *supra*, note 9, at 85. Tushnet also describes Friedman as a pluralist in an odd pluralist society in which the corporate interests almost always win. *Id.*

409. Neither's analysis incorporates, for example, the labor theory of value, the intermediate role of the bourgeoisie, or the revolution-producing dialectic.

410. Horwitz' conspiracy theories even apply to styles of judicial opinion-writing. He claims that until midway through the nineteenth century, American judicial opinions possessed a dynamic and instrumental quality, but that they then shifted to a highly static and formalistic style. Horwitz specifies that this shift occurred because American judges were collusively seeking both to lock in the pro-industry common law rules that judges had earlier fashioned, and to conceal those rules' inherently political character. See M. HORWITZ, *supra* note 1, at 253-56.

There is possible tension between the positions taken by Horwitz and by White. The late nineteenth century, which for Horwitz is a period of dry formalism, is for White the epoch of creative conceptualizing. See G. WHITE—TORT LAW, *supra* note 12, at 4-8. For the period prior to 1860, my own reading of judicial opinions calls into question Horwitz' assertions about judicial instrumentalism. See p. 1733 *supra*.

411. See generally L. GOODWYN, *THE POPULIST MOVEMENT* (1978).

negligence.

The record in New Hampshire and California reveals no tendency on the part of the judiciary to shelter emerging industries from what would otherwise be their liability in tort. If anything, novel forms of risktaking generated by the profit motive were viewed with enhanced, rather than reduced, suspicion. To this extent, the Courts, far from being vulnerable to a populist critique, were themselves operating on the basis of populist impulses. Turnpikes and especially textile mills played an important role in the early nineteenth-century New Hampshire economy; yet that state's Court subjected turnpike companies and textile factories to emphatic liabilities. The railroads loomed large during the last half of the century; yet in the New Hampshire and California Courts railroad companies suffered defeat on the vast majority of contested issues. Electric power supply and new elevator systems typified the late nineteenth-century's economic and societal transformation. Yet in opinions animated by a concern for safety, the California Court spurned a power company's implicit request for a liability rule subsidy and held elevator operations to an exacting liability standard.

The larger lessons of my research project are several. One is that the basic assertions included in the subsidy thesis are either false or misleading.⁴¹² Indeed, the reinterpretation supported by most of the two-state evidence is that the Courts, in implementing the negligence system, were solicitous of victim welfare and generally bold in the liability burdens they were willing to impose on corporate defendants. If my conclusions are revisionist, they are also somewhat conservative.⁴¹³ They suggest that the overall performance of tort law in the two states studied need not be disowned as offensive or discreditable; in truth, they indicate that there is a surprising degree of continuity between nineteenth-century tort law and the law we now recognize in the late twentieth century.⁴¹⁴ The subsidy thesis is conducive to the view that judicial decisionmaking is under the direct control of elites wielding effective economic power. Insofar as the evidence fails to support that thesis, the reader can reject the claim of

412. Since I do not know to what extent New Hampshire and California are representative, see note 12, my most modest claim is that the thesis is misleading insofar as it professes to have comprehensive, nationwide application. One lesson is that there is a need to select other states and to subject their tort law to review. For a similar call for localized private law studies, see Scheiber, *supra* note 11, at 108. These reviews will need to be thorough, however; I have become skeptical of the value of displaying individual holdings or excerpts from isolated opinions.

413. The article declines, however, to embrace the common-law efficiency thesis, which itself has a strongly conservative base. Many of the modern "neo-conservative" writings on public policy impress me as grouchy in tone and partisan in argument.

414. In recent American history scholarship, the theme of continuity has tended to be tied, unnecessarily, I think, to the theme of consensus. For an overview that is less unsympathetic than its title suggests, see Higham, *The Cult of "American Consensus": Homogenizing Our History*, in 1 *THE CRAFT OF AMERICAN HISTORY* 193 (A. Eisenstadt ed. 1966).

Nineteenth-Century Tort Law

economic determinism and continue to adhere to whatever his beliefs might be as to the integrity or distinctiveness⁴¹⁵ of the common law process.

The theory that nineteenth-century tort law was designed to benefit private economic interests can be clearly distinguished from the theory that tort law was singlemindedly geared to achieve the goal of economic efficiency.⁴¹⁶ My study, by uncovering many important tort rulings that seem poorly suited for an efficiency explanation,⁴¹⁷ disputes this efficiency theory, at least in the ambitious form that has recently received so much attention. It is evident that the two states' common law maintained a range of interests in a way that frustrates the economists' reductionist efforts. In particular, the special rules that the common law developed for workers' injuries withstand the attempts at economic justification. Those rules also fail to conform, however, to the strong tendency towards victim protectiveness that nineteenth-century tort law typically exhibited. In New Hampshire and California, the law's treatment of workers' injuries was singularly complex, ungenerous, and troubling. Recognition of this—while it requires an important qualification of the proposed reinterpretation—also makes it easier to understand why the choice was made in the early twentieth century to withdraw workers' injuries from the overall tort system.

415. I refer to these attributes rather than to "autonomy." In today's world, it is doubtful that any well-educated lawyer can seriously believe that the common law is "autonomous" as either a mode of discourse or a mode of governance. For another perspective on the autonomy issue, see Tushnet, *supra* note 9.

416. That both can be described as "economic" understandings of the common law is nicely ironic. Compare Pound, *supra* note 396, at 365 with Posner, *supra* note 31, at 757.

417. See pp. 1739, 1743, 1747, 1751, 1756-58, 1762, 1765, 1768-70, 1772 & notes 203, 254, 288, 296, 298-300, 303, 333, 358, 403.

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