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RETHINKING COMPARATIVE LAW: VARIETY AND UNIFORMITY IN ANCIENT AND MODERN TORT LAW

SAUL LEVMORE*

Ancient codes and customary laws have a great deal of subject matter in common with one another and with contemporary legal systems. It could hardly be otherwise. Any system of rules that seeks to regulate behavior or resolve disputes in a community that is too large to rely solely on informal sanctions, but that is large enough for its rules to have been recorded in a way that allowed survival to the present day, must deal with murder, theft, accident prevention, insolvent debtors, and other circumstances in which, for various reasons, purely private agreements and enforcement mechanisms are likely to be inferior to more formal rules and arrangements. Indeed, nearly every legal system of which we are aware, from ancient Babylon to our own, not only contains rules about murder and theft but also deals with inheritance, marital obligations, and those mundane matters that are the stuff of private law.

Traditional comparativists, be they lawyers or philologists, explain uniformity among legal systems as a product of direct

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* Professor of Law, University of Virginia, Visiting Professor, Yale Law School. Tom Bergin, David Eisenberg, Richard Posner, Roberta Romano, Robert Scott, Paul Stephan, and participants in a Legal Theory Workshop at Columbia Law School made this project especially enjoyable.

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borrowing, imposition, or common inheritance.¹ Most anthropologists seem more flexible and sophisticated in their willingness to explore parallel evolution, comparable cultural adaptation, and even similarities in social problems and institutional functions across different societies.² But it is rare even for anthropologists to compare systems that are geographically remote,³ and it is unusual for lawyers and philologists, at least, to compare systems that did not overlap in time and that are unlikely to have shared a common influence. Although most comparativists seem to shy away from functional or behavioral explanations of legal and other institutions, they would probably explain variety among the rules of different legal systems as the product of randomness, or as reflecting distinct cultural features or ancestry.⁴ Similarly, they would typically describe uniformity among the legal rules of different societies as revealing common roots or as accidental, especially when the uniformity does not seem "unusual."⁵ Thus, if a thief must pay double damages in systems A and B, but nine times the value of the object stolen in system C, there is probably nothing remarkable at issue.⁶ We would expect


4. See R. David & J. Brierley, supra note 1; M. Gluckman, supra note 2. But see W. Goldschmidt, supra note 2.

5. For an interesting example and general discussion, see A. Watson, Legal Transplants 82-87 (1974) (discounting the role of pure chance in legal development but noting example of variety with no general historical explanation).

every society to regard some things as personal or private property, so that the concept—as opposed to the specifics—of theft might be borrowed from a neighboring or conquering civilization but might just as well be developed in isolation. There is nothing so remarkable about multiple damages as to indicate borrowing between A and B. Similarly, C's rule may reflect a different degree of concern about the same problem that confronted A and B; it would be interesting to know, for example, whether the terrain or tribal structure of C was such that thieves were relatively difficult to catch so that greater penalties were necessary \textit{ex ante} to deter thieves. Only if two rules are both unusual and identical, either in their form or substance, is there reason to search hard for a common ancestor or common cultural feature. There are, however, few such rules, and I am aware of no extraordinary examples of such "unusual uniformity" among systems that are geographically or chronologically far apart.

In this Essay, I introduce an alternative or supplementary explanation of variety and uniformity in legal systems. I begin with a belief or conjecture that many legal rules serve to channel behavior and I argue that we should find more uniformity across legal systems when theory tells us that a rule matters. For example, since it is easy to predict the deterioration of the social and economic fabric of any society if there are no deterrents to theft, we should expect to find thieves liable at least for what they have taken, and probably more. For many of the same reasons, we should expect negligent behavior to be discouraged as well. To be sure, modern constructs such as workers' compensation systems and the New Zealand Accident Compensation Act decline to rely on the tort system to deter negligent behavior. But these developments are accompanied by regulatory and other rules that serve to penalize and deter negligent acts. In fact, although it is easy to quibble over the definition of uniformity among penalties, I know of not a single legal system that fails to discourage theft and the negligent infliction of harm.

7. "Unusual" is obviously a subjective adjective; I would search hard if two legal systems required a thief to pay seven and one-half times the value of the object stolen, or if both treated the theft of certain personal property more severely than the theft of other such property.

On the other hand, there are other legal rules that are not compelled by behavioral effects and realities. Many procedural rules fall into this category; it is unlikely, for example, that a society would undergo great change simply by altering its rules governing the admissibility of certain kinds of evidence or the number of persons contained on its juries. It is therefore easy to predict that such rules will not be uniform in different societies because such uniformity would be the product of happenstance (or detailed imitation). More interestingly, some fundamental substantive rules fall into the category of uncompelled rules. In this Article, I discuss one of the most familiar of these rules, the choice between strict liability and negligence in tort law.

Substantial literature exists on the difference, if any, between liability standards. For example, if $T$ saves his $500 boat from certain destruction by taking a fifty percent chance with $V$'s $400 dock—and actually destroys the dock—then, under a negligence rule, $T$ will presumably not be liable. If the situation should repeat itself, $T$ will have no reason to do anything differently; he will again attach his boat to $V$'s fragile dock. And even if a rule of strict liability prevails and $T$ must pay $V$ $400 because he has "caused" $V$ damage, $T$ will still dock because an expected loss of $200 (fifty percent of $400) is more attractive than the certain loss of a $500 boat. The difference between the two rules is one of relative wealth between $T$ and $V$ and, perhaps, of their respective "activity-level effects"; a strict liability rule will probably lead to more dock-building in the long run. The important point is that, as far as immediate behavioral ef-

9. Even the rule controlling the payment of legal fees may illustrate this variety. As is well known, the British system requires the loser to bear court costs. Under the American system, each side bears its own legal costs. See Shavell, Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs, 11 J. LEGAL STUD. 55 (1982) (arguing that it is far from certain which system is likely to achieve the socially desirable level of litigation). For some discussion of the effect of different jury sizes, see Kaye, And Then There Were Twelve: Statistical Reasoning, the Supreme Court, and the Size of the Jury, 68 CALIF. L. REV. 1004 (1980).

fcts are concerned, both negligence and strict liability rules discourage the sacrifice of, say, a $3,000 dock to save a $500 boat, but do not discourage the sacrifice of a $400 dock for this same purpose.

In studying different legal systems, we might therefore expect to see the adoption of a negligence rule in some systems, the use of a strict liability rule in others, and even the adoption of something in between in some systems, for a nonnegligent $T$ would still continue to dock in an efficient way even if he had to pay some portion of $V$'s damage. In short, we can look for uniformity when the rules matter in a direct behavioral way, and variety among rules when they do not matter. To be sure, the details of this variety may be a product of cultural influences, attitudes towards wealth distribution, or even intentional attempts to affect activity levels, like dock-building. For the most part, however, I shy away from explaining these details and seek instead both to demonstrate the extent of this variety and to argue that the location of this variety is no accident.

In order to demonstrate the remarkable degree of variety in the tort area and the uniform deterrence of negligent acts, I have focused on material that has survived from ancient legal systems. Although ancient legal systems obviously could have influenced one another, it is more useful to compare old codes far enough apart to suggest independent origins than to compare modern legal systems that almost necessarily share influences.

11. I would expect variety not only when rules matter but also when reasonable people might disagree about the effects of rules and, therefore, the identity of the best rule. This branch of the uniformity-variety idea is developed in Levmore, supra note 6.


On the other hand, it is quite clear that modern legal systems have directly influenced one another. See, e.g., E. Ludwig, NAPOLeON 171, 286, 371 (1926) (conquests of Napoleon I spread the use of the French Civil Code to many countries in the early nineteenth century and influenced development of law in allied and even distant countries); David, On the Concept of "Western" Law, 52 U. Cin. L. Rev. 126 (1983); Vazquez, supra
My use of these materials necessitates a warning that I must issue at the outset to those unfamiliar with the literature of comparative law, philology, or anthropology: it is impossible to be confident or complete in our theories about the meanings and reasons behind primitive laws. Some rules did not survive. It is hard to know whether those that survive represent codifications of customary practices or reflect a conqueror’s innovations. Most importantly, without firsthand experience or extensive contemporary reports, it is difficult to know whether rules are fact-specific or illustrative. A code which calls for $A$ to reimburse $B$ for negligently allowing $B$’s fields to be trampled by animals may or may not mean that $A$ is also liable if $B$’s house is damaged as a result of $A$’s negligence. Given that virtually all that survives from early legal systems is in the form of vignettes, or descriptions of specific circumstances (such as trampled fields) accompanied by rulings, this is a serious ambiguity. Only a very modern lawmaker would announce that “a negligent actor must pay.” As will become clear, my own view—influenced by some faith in human resourcefulness—is to expect rules to be illustrative. But some commentators simply do not believe that early lawmakers were capable of analogizing or generalizing. If so, some part of the analysis in this essay is a dubious exercise.

Nevertheless, I think that the material that follows will display the remarkable ingenuity reflected in these early traditions. I hope to demonstrate that even if some of the rules found in primitive legal systems were intended to be fact-specific rather than illustrative, a behavioral approach to these rules greatly enriches our understanding of their content and of the uniformity and variety among them.

I. Theoretical Comments and the Common Law

The literature on this subject is so important and extensive that little further rehearsal is necessary. If $A$ negligently, but not maliciously, injures $B$, then $A$ must be made to pay $B$’s damages if the community or legal system wishes to discourage $A$ from

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note 1; Watson, supra note 1.

13. See, e.g., B. Jackson, Reflections on Biblical Criminal Law, in Essays in Jewish and Comparative Legal History 32 (1975) (asserting that verses in Exodus cannot be said to impose negligence or strict liability rules because such rules are abstract legal concepts of a later date).
such activity in the future.\textsuperscript{14} If A's boat is worth $199 and the expected damage to B's dock is $200, A must be made to pay at least $200 or he will dock his boat. A rule that requires A to pay B more than B's damages raises familiar problems of moral hazard,\textsuperscript{15} overdeterrence,\textsuperscript{16} and magnification of fact-finding errors.\textsuperscript{17} On the other hand, if A destroys B's property in a non-

\textsuperscript{14} The discussion in the text assumes away a small or extremely tight society in which moral suasion and neighborly sanctions completely replace such laws. I know of no community with more than a few hundred members that relies solely on such interpersonal incentives.

\textsuperscript{15} If B can recover more than his actual damages from A, B will have little incentive to prevent or reduce the effects of A's negligence. For example, if A has negligently left a pit uncovered, B may decide to graze his herd nearer to the pit than due care requires in the hope of recovering double damages if his cattle are injured. Theoretically, a flawless factfinder would then find B also negligent, and B would either recover nothing or have his recoverable damages reduced. However, it is very likely that A will not be able to prove B's negligence. This moral hazard is probably much more significant when the damage is to B's property, rather than to his person.

\textsuperscript{16} See R. Posner, supra note 10, at 143 (explaining that if A must pay more than B's damages, A will have an incentive to behave inefficiently and to take precautions that exceed the cost of B's damages).

\textsuperscript{17} Imagine that a negligence rule is in effect and that T engages in an activity that yields 70 in benefits per day—taking all benefits, alternatives, and costs into account other than those caused by fires. Imagine further that T's activity causes fires which, on average, cost 50 in damage per day. T's activity does not appear to be negligent, and a perfect factfinder would always find T nonnegligent (for 70 exceeds 50) and, therefore, would not hold T liable. Thus, T would continue his activity.

If the factfinder errs in an unbiased way, then T's activity will not normally be immediately suppressed. Imagine, for example, that the factfinder always assesses the benefits correctly but one-half the time assesses the damage from T's fires at 80 and one-half the time at 20. Viewed \textit{ex ante}, the activity is no longer worth 70 a day to T but, instead, is now worth 30, for every other day, on average, T will have to pay 80. The factfinder will, after all, declare that T was negligent when the factfinder assesses damages of 80. In this example, T will continue his activity, but since it is now less profitable to do so—much as it would be under a strict liability rule—over the long run the activity might be contracted.

If, on the other hand, the rule in place provides that negligent actors must pay treble damages, then factfinding errors will have a much greater effect. If the factfinder does not err, then when T's fire costs 50, T will be found nonnegligent and there will be no liability. If T really causes a fire of magnitude 90, then T will be forced to pay 270; but even a single damage rule would shut T down, for 90 exceeds 70. But if T's fire is really of size 50 and the factfinder constantly errs in an unbiased way (sometimes assessing damages at 80 and other times at 20), T will be deterred strongly from his negligent activity. When 20 is the assessment, T will be found nonnegligent and will pay zero; but when 80 is the assessment, T will appear negligent (for 80 exceeds 70) and damages will be trebled to 240. T will, on average, face liability of 120 and will not undertake an activity worth 70 to him. A multiple-damage rule thus exacerbates the effects of factfinding errors. Note that a multiple-damage rule in the context of strict liability is even worse in the sense that it deters more nonnegligent actors; yet this deterrence exists whether or not there is error by the factfinder. Finally, note that a nontrivial biased error
negligent fashion, as when the boat he docks is worth $201, then whether we make A pay nothing (a negligence rule) or all of B's damage (a strict liability rule), A may just as well continue his activity. The rule thus does not matter in an immediate behavioral sense, even if A and B are unable to bargain, for the $201 boat, but not the $199 boat, will continue to be docked regardless of the rule.

What if B is also at fault? This is hardly the place to analyze the behavioral effects of all possible rules, but some introduction to the regulation of the behavior of multiple parties is useful. The problem is best viewed as one of limiting strategic behavior. Imagine that B will suffer a $100 property loss unless A takes a precaution that costs A $30, or B expends $30, or both A and B take smaller steps at a cost of $3 and $20 respectively. If our factfinding processes are flawless, we will be able to use legal rules to achieve the efficient, or most desirable, outcome. We can simply order A and B, ex ante, to take the smaller steps, or find A entirely liable if B takes the smaller ($20) precaution and A takes no precaution, and B liable if he takes no precaution while A takes the ($3) step required of him.

However, if the parties know much more about the precautions and injuries than the factfinder, every rule is problematic. If, for instance, B is unable to collect when contributorily negligent, and if B fears that an isolated $20 precaution will not prevent a factfinder from concluding that B's failure to take the $30 precaution caused his loss, then B may simply expend $30. If A fears he will be found negligent when an accident occurs unless he takes the clear route to safety with an expenditure of $30, then he too may spend (and waste) $30. On the other hand, B may guess that A will play it safe, and A that B will do so—so

will destroy the efficiency of any system. It is difficult to offset such bias for it is hard to measure and predict.

18. A will continue his activity under a negligence rule because he saves $201 by docking his boat. A will also continue under a rule of strict liability because docking will still save him money, even though it is only the difference between $201 and $200. Other less cost-benefit oriented definitions of negligence are possible, but I think that these, too, will affect behavior much like a strict liability rule.

The choice of either negligence or strict liability may affect A's activity in the long run. A is less likely to expand his boating activities (because it would increase his docking needs) under a rule of strict liability.

that neither takes a precautionary step. Similarly, one may take a $30 or $20 step and the other a safer $30 step to avoid liability. In sum, the poorer the factfinder's information, the more likely it is that there will be either overcare or undercare. Note, finally, that a comparative negligence rule hardly solves the problem. If, for example, the property at risk is worth only $25, then $B$ may sensibly take no precaution at all unless he is sure that, even if $A$ takes no precaution, he will be found to be more than eighty percent at fault—although $A$'s failure to take a mere $3 precaution may certainly seem more reprehensible than $B$'s inaction.\footnote{See C. Goetz, Cases and Materials on Law and Economics 306-09 (1984) (comparative negligence calculation can consider either the parties' relative shortfalls in inputs of care or impact of care shortfalls).}

In such a setting, with shared negligence among multiple causal agents, it is not so much that rules do not matter as that their behavioral effects are so uncertain (especially with imperfect information) that reasonable people may easily disagree about their relative superiority. Comparative negligence may be superior to some alternatives, but it may well be inferior to some of the other rules. If $C$ is injured because $A$ failed to spend $35 and then $B$ later failed to spend $50 to avoid the accident that $A$ might have already prevented, a system might hold $B$ liable because he had the last clear chance to save the day, or $A$ liable because in the long run he is the least cost avoider (one hardly wants to encourage $A$ to rely on $B$'s heroics), or both liable in the hope that one will take a precaution rather than try to out-guess the other. Again, the various rules probably lead to very different results, but it is far from clear which is best.

The implications of these theoretical sketches of basic tort law rules for understanding variety and uniformity are straightforward. Just as it is almost unimaginable that a society could be successfully organized without some sanction to discourage theft, so too it is unlikely that it could prosper without discouraging negligent behavior. Whether it does this with a strict liability rule or a negligence rule, it almost surely requires some rule to prevent the inefficient exploitation of neighbors' resources. In fact, I have been unable to find even a single example of a system of laws in which negligent actors regularly avoid liability.\footnote{See supra text accompanying note 8. There is, of course, some room for disa-
signed to actors who are nonnegligent or only possibly negligent, but clearly negligent tortfeasors are either singled out for liability or held liable along with other causal agents. Either way, there is uniform imposition of liability for (and hence discouragement of) negligent acts.

It is more difficult to theorize about uniformity regarding the magnitude of this liability for negligently imposed injury. Considerations of moral hazard and factfinding error often argue against multiple damages.\(^2\) Since these considerations are unlikely to disappear in other societies, we might expect a uniform rule of single damages for negligent tortfeasors. On the other hand, we might expect damages to be multiplied when there is little fear of factfinding error and there is reason to think that many negligent injuries are difficult to trace or otherwise part of an underenforcement problem. As far as deterrence is concerned, the prospect of paying treble damages one-third of the time is obviously equal to paying full, single damages each time. Such underenforcement might be the case for different wrongs in different societies or might simply be a general problem to a different degree in different societies. It is, in short, easy to predict that negligent tortfeasors will be liable for damages in all societies but less easy to predict that this uniformity will extend to the remedy of single damages.

Although the arguments in this Essay revolve around this idea of uniformity, I do not mean to suggest that it is an exact, objective concept. Speed limits are, for example, different in various contemporary societies (in a way that may or may not reflect different cost-benefit calculations), so that while I would argue that some types of driving are uniformly deterred, there is hardly uniformity of opinion or treatment regarding every set of circumstances. The uniformity that I will contrast with variety is, thus, subjective and yet this contrast will (I hope) be an impression that most readers share. Legal systems may employ different definitions of free speech and property, for example, and yet it is meaningful to speak of the uniform suppression of expression and deterrence of theft. When there is disagreement at the fringes, there is often agreement (or at least overlap) over

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\(^2\) See supra notes 15 & 17.
the essentials. Consideration of just such essentials suggests that negligent behavior is uniformly deterred.

The variety of rules governing nonnegligent injurers is so striking in primitive legal systems that only a few words of introduction are necessary. In our own common-law system, we find, as might be expected, oscillation between a negligence and strict liability rule. Although some observers favor a nearly universal strict liability rule,\(^23\) it is fair to describe current tort law as built on a negligence foundation with exceptional cells of strict liability. Generally speaking, these cells are easily explained as solutions to specific problems in the application of a negligence rule. It is, for example, not at all surprising that in our own system the doctrine of res ipsa loquitur and other presumptions practically turn negligence into strict liability for certain encounters, such as those between passers-by and falling objects.\(^24\) If, under a negligence rule, plaintiff-pedestrians would win ninety-nine percent of all litigated cases, then society is probably better off letting such plaintiffs win automatically, avoiding the burden of the negligence suits. The cost of getting one percent of all such cases wrong, including losses from the underdeterrence of the few wild pedestrians who actually cause accidents, is very likely far outweighed by the savings in litigation costs. This rule can be refined, as it is in our own system, to allow a defendant to show that his case is abnormal (that is, that he was not negligent).\(^25\)

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\(^{23}\) See Epstein, A Theory of Strict Liability, 2 J. LEG. STUD. 151, 157 (1973) (concluding that "both economic and moral views of negligence provide unsatisfactory bases for the law of tort") (emphasis in original).

Even if a legal system chooses negligence as the primary standard for its tort rules, it is likely (if not necessary as a behavioral matter) that strict liability will be chosen for intentional, or measured, nonnegligent inflictions of losses. Whether this is described as a matter of defendant's "motive" or as a matter of undoing private, unilateral attempts at wealth distribution, the point remains that negligence is often the typical rule and that strict liability cases can often be described as limited to specific cells as described in the text. See generally Ames, How Far an Act May be a Tort Because of the Wrongful Motive of the Actor, 18 HARV. L. REV. 411 (1905).


\(^{25}\) See Ryder v. Kinsey, 62 Minn. 85, 64 N.W. 94 (1895) (defendant able to rebut presumption of negligence and show that collapse of a building was due to a latent defect
Somewhat similarly, blasters are said to be governed by a rule of strict liability. This cell of strict liability is quite explicable. For a negligence rule to succeed (in deterring antisocial activity), the potential negligent actor must expect to be detected and forced to pay at least those damages his actions generate. But an explosion will often destroy all the evidence that a victim could use to prove negligence. This must have been especially true before the development of modern arson squads and forensic techniques, when the blasting rule was developed. If plaintiffs are often unable to prove negligence when their damages were in fact negligently caused, then a negligence rule will not succeed in deterring antisocial behavior (unless damages are multiplied). Fortunately, since strict liability and negligence are almost equivalent in their effect upon behavior, the law is able to employ the strict liability rule where the negligence rule would fail. That the early common law also imposed strict liability for a spreading fire, which also destroys the evidence of its origin, reinforces this explanation. The blasting rule (and other cells of strict liability) is further explained by noting that alternative blasting techniques, safety steps, and the like are sufficiently technical, time-specific, and obscure that potential victims are much less able to bargain for alternatives with the blaster than is the blaster able to initiate bargaining with them to protect valuable objects or take other precautionary steps. Again, the rule is quite sensible in allowing the blaster to convince a perceptive court that plaintiff might better have avoided (or bargained to avoid) the injury in question. Thus, in one

and not his own negligence).


27. W. PROSSER & W. KEETON, supra note 26, at 543. The English courts continued to hold defendants strictly liable for fires which began during an abnormally dangerous activity. See id.; see also Mansel v. Webb, 88 L.J.K.B. 323 (1918); Tuberville v. Stampe, Eng. Rep. 1072 (1909); Beaulieu v. Fingham, Y. B. 2 Hen. 4, 18, pl. 61 (1401). The early English law of strict liability was altered by statutes in the eighteenth century after which defendants were no longer liable for damage caused by accidental fires. See W. PROSSER & W. KEETON, supra note 26, at 543.

On this side of the Atlantic, courts have based liability for damage caused by fire on negligence. B. W. KING, INC. v. TOWN OF W. NEW YORK, 49 N.J. 318, 230 A.2d 133 (1967); O'Day v. Shoublin, 104 Ohio St. 519, 136 N.E. 289 (1922). Strict liability for some types of fires has been imposed by statute. W. PROSSER & W. KEETON, supra note 26, at 544.
splendid case, a blaster was not held liable for losses suffered by a mink rancher whose mink killed their offspring when frightened by defendant's blasting. The decision speaks in terms of intervening causes, but it is fair to argue that most blasters are unaware of the unusual proclivities of mink and that the best route to the socially desirable result is for mink ranchers who are aware of nearby blasting to separate mother mink from their kittens.

There are, of course, other such cells of (and exceptional subcells to) strict liability, but the argument can proceed without a comprehensive survey. The point is simply that just as in our own system we find some oscillation between strict liability and negligence, so too we ought to expect such variety in other systems. We ought to expect uniformity with respect to things like theft and negligent blasting or firesetting. We might even expect uniformity regarding nonnegligent blasting or firesetting if many societies face the problem of evidence destruction. In contrast, there is no social need for, and therefore no reason to expect, uniform liability or freedom from liability for most non-negligent behavior; as illustrated earlier, such behavior will normally continue whether or not some liability is imposed. The rule does not matter (or does not matter much) so that whether it is the product of assimilation, randomness, cultural influences, or conquest, it will not lead to unsettling behavioral consequences. Somewhat similarly, since it is not clear which rule best encourages socially desirable behavior when numerous misbehaving parties are concerned, there is no reason to expect uniformity among legal systems in this context. Just as the variety of rules across jurisdictions in our own legal system can be said to reflect the fact that we are unsure whether contributory negligence, comparative negligence, or any single modification of these rules dominates or is dominated by the other possible rules, so too the lack of uniformity that we will see presently among primitive legal systems dealing with multiple tortfeasors or contributorily negligent victims may reflect the fact that no rule emerged as clearly inferior or superior.

29. See supra note 18 and accompanying text.
30. As implied earlier, most of the discussion in this Article explores the link between the idea of a tort rule that does not matter and variety among legal systems rather than the link between variety and the questionable superiority of a given rule. The latter
It is possible, of course, that although the choice between no liability (a negligence rule) and liability (a strict liability rule) for nonnegligent acts is not affected by behavioral implications, at least in the short run, all legal systems would choose the same rule. Thus, as a theoretical matter, uniformity does not reflect utilitarian necessity nearly as much as variety reflects the lack of such necessity or the presence of conflicting goals. In the end, the argument in this Essay must, like all arguments, appeal to an intuitive sense of how the world works. I will not argue for any specific view of the development and evolution of legal rules. The discussion that follows, however, most readily supports a position that combines an emphasis on law as "a device shaped by the members of society in response to internal conditions in the search for ways and means to translate their basic social postulates into action" with a view that changes (of these postulates) are stimulated when a culture's rules are not consonant with its survival.

II. Primitive Laws

A. The Laws of Eshnunna

It is fascinating to compare three major sources of ancient law in the Near East. In likely chronological order, these include the Laws of Eshnunna, the Code of Hammurabi, and the rules...
found in Exodus. A good place to begin is at sections 5 and 53 of the Laws of Eshnunna:

Section 5
If a boatman was negligent and caused the boat to sink—as much as he caused to sink, he shall pay in full.

Section 53
If an ox gored an ox and caused (it) to die, both ox owners shall divide the price of the live ox and the carcass of the dead ox.

Section 5 is almost surely the oldest of all negligence rules; assuming that it was meant to serve some precedential or illustrative function, it announces or codifies precisely the sort of rule I would expect a legal system to contain. What about a nonnegligent boatman whose vessel accidentally sinks? It will be recalled that variety rather than uniformity might be expected in just such circumstances. Our own legal system would probably not hold such a boatman liable, but others might adopt a strict liability rule. Either way, the rule does not seem to matter much. Section 53 may, however, give a clue about Eshnunna's treatment of nonnegligent injuries. It calls for a division of damages—call it a “splitting” rule—when A’s ox gores B’s ox. Although the Laws of Eshnunna do not explicitly deal with the case of a “regoring ox” that gores another animal, where the owner knows or should know that his is a vicious animal, it is quite clear that section 53’s splitting rule concerns nonnegligent behavior. Not only is there no indication that A did anything

34. A fourth legal system, that of the Hittites, is taken up infra at note 108.
35. All translations of the laws of Eshnunna in this Article are taken from R. Yaron, supra note 12. All translations that appear in this Article are reproduced exactly as they appear in the cited works. Question marks are generally used by translators (and reproduced here) to signify some uncertainty about the translation.
36. Yaron is not alone in translating the Akkadian word in section 5 as “negligent.” R. Yaron, supra note 12, at 23. The phrase is translated “if the sailor has been careless” in 4 The Assyrian Dictionary 48 (A. Oppenhiem ed. 1958). Akkadisches Handwörterbuch 191 (1965) also imputes negligence or carelessness. Words such as “negligent” or “careless” are very important for the argument in this Article, and it would be nice to have more information about the use of the original in its day.
37. R. Yaron, supra note 12, at 23 (footnote added).
38. Id. at 49.
39. It is useful to note that most observers sensibly regard codes as rarely announcing a new set of laws, but rather most often as compiling prevailing customs and practices. See, e.g., 1 G. Driver & J. Miles supra note 12, at 46; A. Schreiber, supra note 12, at 24.
wrong (unlike the boatman in section 5) but also the sections that follow demand very substantial payments from the warned but careless owner of a vicious dog, a crumbling wall, or a regoring ox that causes the death of a human being; indeed, the sections, construed together, imply that no payment is required for a first-time gorer injuring a human.\(^4\) A fair implication is that section 53's splitting rule deals with a nonnegligent owner.

One could hardly ask for a better example of harmless variety among legal systems. Just as negligence and strict liability rules both discourage inefficient behavior, like sacrificing a $3,000 dock to save a $500 boat, and do not entirely discourage efficient injurious behavior, like sacrificing a $400 dock to save the $500 boat, so too a split-when-not-negligent rule discourages inefficient but not efficient behavior. The boatman who sacrifices a $400 dock will pay $0, $400, or $200 depending on which rule is in effect.\(^4\) But, irrespective of which rule governs, he will choose rationally and efficiently to save his $500 boat. The boat-

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40. See R. Yaron, supra note 12, at 49 (emphasis in original):
Section 56/57
If a dog (was) vicious and the ward (authorities) have had (it) made known to its owner, but he did not guard his dog and it bit a man and caused (him) to die—the owner of the dog shall weigh out \(\frac{2}{3}\) a mina silver.
Section 58
If a wall was threatening to fall and the ward (authorities) have had (it) made known to the owner of the wall, but he did not strengthen his wall and the wall collapsed and caused a son of a man to die—(it is a case concerning) life: decree of the king.
Section 54/55
If an ox (was) a gorer and the ward (authorities) have made (it) known to its owner, but he did not guard his ox and it gored a man and caused (him) to die—the owner of the ox shall weigh out \(\frac{1}{6}\) a mina silver.

It is interesting to note that the Laws of Eshnunna do not specifically address the case in which \(A\) simply kills \(B\). Presumably the penalty was well-known or the matter was left in the hands of the family of the deceased. Other legal systems do, however, often state the penalty for such a case. But when a vignette reports, for example, that when \(A\) kills \(B\), \(A\) must die, is intentional, negligent, or even accidental behavior contemplated? It is possible that strict liability is the rule for such torts—perhaps because proof of \(A\)'s intent or negligence is particularly difficult to ascertain. See Posner, A Theory of Primitive Society, with Special Reference to Law, 23 J. LAW & ECON. 1 (1980). As will become evident, my approach in this Article focuses on specific rules and vignettes found in ancient documents and seeks to understand when negligence and strict liability rules were chosen. Inasmuch as it is often difficult to know whether the provisions in ancient codes that deal with "\(A\) kills \(B\)" contemplate intentional, negligent, or even nonnegligent wrongdoing, such torts play only minor roles in the argument that develops.

41. The boatman will pay $0 under a negligence rule, $400 under a strict liability regime, and $200 under a splitting rule.
man who is negligent will, of course, pay full damages, for splitting is available only for nonnegligent behavior. The rule in section 53 can thus be seen as a compromise in terms of its effects on the parties' wealth, but as roughly equivalent to negligence and strict liability in terms of its behavioral effects and efficiency-promoting characteristics.

Even if section 53 were intended to be more fact-specific than illustrative so that the splitting rule would have been limited to animals or even to oxen alone, the uniformity-variety argument retains its vitality. An advantage of a negligence rule is that the legal system need not deal with valuation problems after every injury. In many cases the defendant will be found nonnegligent and the matter will be closed. Strict liability and the section 53 rule do require valuation; anything that is gained from these rules, such as incentives to continue a given activity, may be more than offset by the burden of many more valuation tasks. It is possible, however, that the market price of oxen was easily ascertainable. If so, a liability rule, full or partial, for the nonnegligent destruction of an ox would have generated only small administrative and transaction costs. On the other hand, a liability rule that required, say, full or partial payment for the nonnegligent injuring of a person by a domesticated dog would have generated substantial administrative costs. While the marketplace may be a convenient place to value live and dead oxen, it is less useful in valuing human life or disabilities.

Valuation problems can, of course, be avoided, without absolving injurers of liability, by simply legislating some monetary damages. Just as the Laws of Eshnunna mandated payment of two-thirds of a mina of silver by the negligent owner of a regoring ox or vicious dog that killed a person, they might have decreed a penalty of some smaller fraction of a mina for the owner of a first-time gorer or biter that injured or killed a person. And some lesser penalty might have worked just as well as the section 53 scheme. That the legal system of Eshnunna did not follow this route may indicate that the real point of section 53 is not a compromise between negligence and strict liability, but rather a response to uncertainty. B's ox may have been the vicious one and it may have incited A's ox so that lawmakers with

42. See supra note 18; Shavell, supra note 10.
43. See supra note 40.
full information might have required payment from the owner of the dead ox for any damage suffered by the victor. Uncertain causality may thus be behind section 53’s splitting rule. And if A’s ox really was a vicious instigator, A would still have been encouraged to guard it carefully because if his ox gored a person the law would have extracted payment from him.44

44. R. YARON, supra note 12, at 49, § 54/55. The Laws of Eshnunna also address the question of a bailee’s liability when property placed in his care has been stolen. Id. at 40, § 36/37. Indeed, the central question in the bailment law of many legal systems is that of strict liability versus negligence. I think it unwise, however, to look to the bailment rules of a legal system for clues about its treatment of nonnegligent losses in general. The bailor and bailee are normally in a close contractual relationship so that their ability to contract out of the society’s “off-the-rack” bailment rules is relatively great. Moreover, these bailment relationships are often long term or recurring ones so that the rules may somehow be sensitive to the strategies that are a part of (or a danger of) such relationships.

In terms of the uniformity-variety thesis, I am not terribly concerned with whether the bailment rule tracks the tort rule (strict liability or negligence) of a given legal system. When they differ, it is arguable that variety is reflected just where predicted, but also arguable that variety within a legal system is somewhat puzzling, for one would expect “consistency” if only for the sake of convenience. In this Article, I report in the notes the resolution of the strict liability versus negligence question in bailment law for each system. Inasmuch as the rules do not always match their counterparts in tort law so that variety is found within systems, I suggest either that there is little reason to expect this kind of consistency within a legal system or that bailment law is just different; the contractual setting may raise precaution and risk allocation problems that require an analysis that is very different from that appropriate to tort law. With these introductory comments in place, it is easy to describe the bailment rules of Eshnunna as negligence-based. Sections 36/37 provides that:

If a man gave his goods . . . [for] . . . deposit, and—the house not having been broken into, the threshold not having been scraped off, the window not having been torn out—he caused the goods of the deposit, which he had given to him, to be lost, he shall replace his goods.

If the house of the man was plundered, (and) with the goods of the deposit (or?), which he had given to him, loss of the owner of the house was incurred—the owner of the house shall in the house of Tispak swear to him by god: “Together with thy goods my goods were . . . lost, I have not done evil and/ or fraud.” He shall swear to him, and he shall have nothing upon him.

Id. at 39.

Inasmuch as there is no mention of compensation (in the original agreement), it is unclear whether or not these actions cover both gratuitous and nongratiitous bailees. But, apart from this minor ambiguity, the rules are obviously motivated by evidentiary concerns. The bailee is responsible unless there is clear evidence of theft. And even if there is clear evidence, the bailee is still liable unless his own goods are also missing—in which case he must still swear his innocence. In a small community, it is surely difficult to hide one’s own possessions and still enjoy them, so that the requirement that the bailee’s own goods also be missing is probably a means of separating fraudulent from honest bailees, for a thief is unlikely to take bailed goods and leave all else. The rule is thus one of negligence, but unlike more familiar negligence rules, it is one which places the burden of proof on the defendant. One suspects that in Eshnunna the bailee would
Admiralty law contains a similar response to uncertain causality in the mechanics of the rule of general average contribution. If, to lighten a ship during a storm, its master jettisons some cargo, then all owners of property at risk—including the owner of the ship itself—are treated as a community and each shares in the loss in proportion to the value of the goods he had at stake in this community. This is obviously a (somewhat more modern) kind of splitting rule, for the ship captain's behavior during a storm is hardly negligent, and yet the shipowner, like everyone else, shares in the loss. This general average rule is probably more than just an example of variety between negligence and strict liability when behavioral consequences do not dictate a rule. A rule of no liability (negligence) might be exploited by corrupt behavior; shippers could pay the captain to toss someone else's goods overboard. General average may thus be a way to ensure fair treatment among shippers and to save them the cost of seamy negotiations. A rule of strict liability—with its costs presumably passed on to the shippers in the form of higher freight rates—would not have been a bad alternative but, arguably, shippers (at least at some points in history) prefer the choice between partial coverage (general average) and "homemade" strict liability through the purchase of what would be, in effect, insurance coverage.

In any event, an important detail of general average is that, in computing each shipper's proportion of the enterprise, money and valuables carried by passengers are excluded from general

also not have been liable for losses resulting from nonnegligent fires.


46. If the captain is negligent, then at least theoretically he is, not surprisingly, liable for all losses. This liability is rarely beneficial to shippers or other victims because, although the shipowner can be held liable if, for instance, the vessel is not seaworthy, the shipowner is not held vicariously liable for the captain's or crew's negligence. See G. Gilmore & C. Black, supra note 45, at 151-55. As a result, shippers cannot look beyond the captain for most negligently inflicted losses and, therefore, are often left facing a judgment-proof defendant. The general average process does not exclude a negligent party; victims must bring a separate action against the negligent captain, for example, for any reimbursement of that which they had to pay out in a general average calculation. There appear to be very few cases in which a captain is held liable—perhaps because potential plaintiffs do not waste their time and resources going after a judgment-proof party. But see Gray v. Johansson, 287 F.2d 852 (5th Cir. 1961). This is no less the case for a negligence claim brought to recover that which a shipper had to pay in a general average calculation.

47. G. Gilmore & C. Black, supra note 45, at 247.
average calculations.\(^4\) Although it is possible that this exclusion reflects the realities of factfinding, for one would hardly want to search all survivors after a storm, it is also possible that the rule reflects the fact that the value of money and other possessions, such as gems, will rarely correlate with their role in causing the disaster. It is plausible that the original rulemaker (or parties to a private general average agreement) would have preferred a rule that made parties contribute to a loss according to the proportional weight of their cargo; after all, the point of jettison is generally to lighten the ship. But a rule based on weight, with some mixing in of the value of the ship or of an arbitrary percentage of cargo losses to be paid by the shipowner in order for it to make sense, would have been slightly less workable.\(^4\)

In short, it is possible that section 53 of the laws of Eshnunna and the general average contribution rule in admiralty law display rational responses to the problem of nonnegligent loss. The rules resemble one another but are quite different from those found in other systems. Alternatively, the splitting rules these two legal systems contain can be understood, at least in part, as influenced by the causal uncertainties in the circumstances they address. These rules may be more accurately described as subtle examples of comparative negligence than as

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\(^4\) Personal possessions have not always been excluded from general average calculations. In Roman law, the rule was that only items to be consumed during the voyage were excluded from the general average calculation. See K. Selmer, *The Survival of General Average* 45 (1968). Later rules required passengers to contribute only a fraction of the value of their possessions to the calculation. Interestingly enough, the passenger could opt out of the system and avoid any obligation to contribute by carrying his own valuables and declaring in advance that he would bear the entire risk of losing his own goods if these goods were lost. *Id.* In 1890, the York-Antwerp Rules were amended to exclude passengers’ luggage and personal effects, not shipped under a bill of lading, from general average calculations. This amendment was a response to a judicial decision in the United States which had included luggage in general average. The delegates to the Conference in 1890 felt that continuing to demand general average contributions from passengers would create ill will and inconvenience. R. Lowndes & G. Rudolf, *The Law of General Average and The York-Antwerp Rules* § 804 (1975).

\(^4\) Note that shippers can easily declare the value of their goods (and may have already done so for insurance purposes) but do not always need to know the weight of these goods. Moreover, a ship’s difficulties are as likely to come from the way weight distributes itself on the ship as from the absolute amount of weight on board. The tendency of cargo to move about is, of course, still more difficult to measure. The ship must be made part of the story because it may sometimes be efficient to sacrifice a part of the ship itself in order to save cargo, and it is almost always sensible for the ship’s captain, in tossing cargo overboard, to consider that he will be answerable to his employer who, in turn, will bear a hefty share of all losses.
compromises between strict liability and negligence. Either way, they suggest that variety among legal systems will be more pronounced when the choice of rule will not much affect the incentive system necessary for a complex society to flourish. Just as negligence, split, and strict liability are all likely to generate similar, acceptable behavior, so too no one rule clearly dominates in the regulation of multiple negligent parties. We find variety where no one of these rules in particular is necessary for social and economic organization.

B. The Code of Hammurabi

The tort rules found in the Code of Hammurabi are most easily described by reference to our own. Although the common-law tort system that we know (modified by occasional legislative decisions) is negligence-based, there are areas that are carved out for the application of a strict liability rule. As noted earlier, strict liability is often employed when negligent behavior is either hard to discern and prove, or so likely, that the litigation costs associated with a negligence rule are best avoided.

The Code of Hammurabi describes a variety of situations in which an intentional wrongdoer, such as one who strikes another in a dispute, must pay a penalty. Wrongful or negligent behav-

50. Hammurabi was the sixth and most influential king of a dynasty which ruled Babylon for nearly three hundred years. J. Driver & J. Miles, supra note 12, at 3. It is not clear when, between the eighteenth and the twenty-second centuries B.C., he ruled. Under Hammurabi's rule all of Babylon was united. Each city in Babylon subscribed to a different deity. The king, although not himself divine, was regarded as receiving his power from heaven. The power of the king was limited by a popular assembly and by the laws, which the king as well as his subjects had to obey. A. Schreiber, supra note 12, at 19, 20, 58 (1979). The Code of Hammurabi is thought to have been promulgated toward the end of Hammurabi's forty-three year reign. J. Driver & J. Miles, supra note 12, at 34. Hammurabi's Code was found inscribed on an eight-foot high monument during excavations in Susa, the ancient city of the Persian kings, which took place in the winter of 1901-1902. Several of the columns on the monument had been erased, leaving the Code incomplete. S. Cook, supra note 12, at 6; Meek, supra note 33.

51. See supra text accompanying notes 23-27.

52. Strict liability is also the rule for damage caused by dangerous animals (such as tigers) when they have been in the control of an owner and for nonnatural uses of land (such as the storage of explosives, flammable liquids, or large quantities of water in cells, hydraulic power mains, or other storage facilities). W. Prosser & W. Keston, supra note 26, at §41-42, 549-50. For a discussion of the liability rule in these cells, see S. Levmore, The Tort System (undated manuscript on file at University of Virginia Law Library).

53. All translations of the Code of Hammurabi are from C. Edwards, The Hammurabi Code (1904) [hereinafter cited as THE HAMMURABI CODE]. Sections 195-205 describe
ior consistently calls for single damages or another penalty suitable in the circumstances. Thus, a careless boatman must replace the boat and cargo that he loses. A boat builder must repair a boat that becomes disabled within one year of his building it. Presumably, boats required substantial maintenance so that the warranty period lasted but one year. By way of contrast, a house builder's liability toward injured persons and property (and the reconstruction of the house itself) if his building collapses is not limited in time. It becomes clear from the constant emphasis on the poor work done by the builder that the Code assumes he has been negligent. The owner of a regoring ox who has not blunted its horns or otherwise taken precautions must also pay when damage is done. And, unlike the Laws of Eshnunna, this Code requires no payment for an unpredictable goring. The

both retributive and monetary penalties for striking another. Thus, if a man "strike the body" of another he was required by § 204 to pay 10 shekels of silver, whereas § 206 provides: "If a man has struck another man in a dispute and wounded him, that man shall swear, 'I did not strike him knowingly'; and he shall pay for the doctor." Id. at 62. It is quite clear that in this section the striker is asked to swear that he did not intend to do serious harm. See G. Driver & J. Miles, supra note 12, at 412-13.

54. "236. If a man has given his boat on hire to a boatman, and the boatman is careless, and the boat is sunk and lost; then the boatman shall replace the boat to the boat-owner." The Hammurabi Code, supra note 53, at 66.

55. 235. If a boat-builder has built a boat for a man and his work is not firm, and in that same year that boat is disabled in use; then the boat-builder shall overhaul that boat, and strengthen it with his own material, and he shall return the strengthened boat to the boat-owner. Id.

56. 229. If a builder has built a house for a man, and his work is not strong, and if the house he has built falls in and kills the householder, that builder shall be slain.

... 232. If goods have been destroyed, he shall replace all that has been destroyed; and because the house that he built was not made strong, and it has fallen in, he shall restore the fallen house out of his own personal property. Id. at 65-66.

57. Section 229 imposes liability if a builder's work is "not strong." Section 233 similarly imposes liability if a wall shifts and the builder's work "is not done properly." Id.

58. 251. If a man's ox is known to be addicted to goring, and he has not blunted his horns, nor fastened up his ox; then if his ox has gored a free man and killed him, he shall give half a mina of silver.

252. If it be a man's slave, he shall give a third of a mina of silver. Id. at 68.

59. "250. If a mad bull has rushed upon a man, and gored him, and killed him; that case has no remedy." Id.
wetnurse who suckles a second child without informing its parents that a prior child died in her service is severely punished. Finally, the landowner who has been too lazy to strengthen the bank of an irrigation canal must pay for the flood damage that occurs.

There are, however, a few cells of strict liability in the Code of Hammurabi. A shepherd is strictly liable for cattle that become diseased while in his care. This treatment is probably akin to res ipsa loquitur, the lawmaker assuming that disease only strikes a herd in the charge of a negligent herdsman. A second rule that has at least a flavor of strict liability concerns the bursting of irrigation canals. In Babylon, irrigation would have been necessary during the summer, and there is substantial evidence that in Hammurabi’s time there were extensive canal systems and land reclamation projects. Indeed, the potential gains from such public works may have been the force behind Hammurabi’s success in uniting the region. The Code is especially attuned to the problems of flooding on land controlled by

194. If a man has given his child to a nurse, and the child dies in the hand of the nurse, and the nurse without the knowledge of his father and his mother suckles another child; she shall be prosecuted, and because she has suckled another child without the knowledge of his father and his mother, her breasts shall be cut off.

This section has been understood to be an appropriate talionic—that is, retributive—penalty because the defendant can no longer work as a wetnurse. See G. Driver & J. Miles, supra note 12, at 406 n.12. But retribution would seem to call for the killing of the wetnurse’s own child. Moreover, the actual language of the original text is singular, not “breasts” but “breast.” I wonder if it is possible that the nurse is being branded (but not put out of work) so that future clients will know to question her reliability.

Although the section speaks of fault, it is apparently a presumption more than a precondition of liability. The best translators point out that the “loss in the fold” is more accurately translated as loss through a certain common infectious disease, or perhaps as lameness, and that the lawmaker regards this problem as occurring only with a lazy or incompetent shepherd. In order to recover from the herdsman, the owner must simply show that his cattle or sheep are infected. Compare G. Driver & J. Miles, supra note 12, at 47 with Meek, supra note 33, at 177.
tenants.  

53. If a man has been too lazy to strengthen his dyke, and has not strengthened the dyke, and a breach has opened in the dyke, and the ground has been flooded with water; the man in whose dyke the breach has opened shall reimburse the corn he has destroyed.

54. If he has not corn to reimburse, he and his goods shall be sold for silver, and it shall be divided among those whose corn has been destroyed.

55. If a man has opened his irrigation ditch, and, through negligence, his neighbour's field is flooded with water, he shall measure back corn according to the yield of the district.

56. If a man has opened the waters, and the plants of the field of his neighbor the waters have carried away, he shall pay ten gur of corn per gan.

Section 56 presents an interpretative, or hermeneutical problem. It is quite clear that sections 53 through 55—while establishing in passing a pro-rata distribution rule in bankruptcy—codify the rule that a negligent party must pay (single) full damages. It is difficult to know whether there is an underenforcement problem in this setting. It is possible that neighbors always knew the state of one another's canal banks so that when flooding occurred evidence quickly developed regarding negligent behavior. Alternatively, it may be a res ipsa situation; breaches of the sort mentioned in section 53 may rarely occur unless there has been negligent behavior. In section 55, the

64. Two sections deal with the contractual arrangements, as opposed to the loss allocation, between tenant and landlord in the event of flooding:

45. If a man has let his field to a cultivator for a rental, and has received the rental; and if afterwards the god Adad [i.e., a thunderstorm] has flooded the field and destroyed the harvest, the loss is to the cultivator.

46. If he has not received the rental of his field, or has let it for one-half or one-third of the crop; then the cultivator and the lord of the field shall take their proportions of the corn that is left in the field.

THE HAMMURABI CODE, supra note 53, at 35-36.

65. Id. at 37. Gur and gan are ancient units of measure. Estimates of the modern-day equivalent of one gur range from 3.25 to 8 bushels. One gan is thought to be between 15 and 20 acres. G. Driver & J. Miles, supra note 12, at 134. The translation of this last section is drawn from C. Johns, THE OLDEST CODE OF LAWS IN THE WORLD 14 (1903). Section 56 is certainly translated incorrectly in THE HAMMURABI CODE, supra note 53, at 37.

66. So long as the farmer can sell his own goods and buy grain in the open market, § 54 is easily understood as providing the familiar bankruptcy rule.
bank has not crumbled but the tenant seems to have mismanaged the floodgate. The section specifies damages either because the victim's land has so eroded that planting will be impossible (although one would think that liability should then be for lost net profit and not for gross yield) or because the flooding has destroyed evidence of what was lost and corroborating evidence is difficult to obtain. The question, then, is whether section 56 provides a negligence rule, a strict liability rule, or a splitting rule. The compensation it calls for is equal to one year's rent, or one-third of the typical crop yield. It is thus possible that section 56 is different from section 55 in that section 55 specifies negligent behavior, leaving us to conclude that section 56 provides for one-third damages when flooding is caused by nonnegligent behavior. This would be a clear splitting rule, although not down the middle.

Alternatively, it is possible that the precondition of negligence found in section 55 is meant to carry over to section 56, and that section 56 envisages the possibility that the injured party will be able to replant his field or use the payment to rent another field. It is also possible that section 55 refers to an intentional act, but inasmuch as the damages are light and, as we have seen, the Code elsewhere extracts more serious penalties from intentional wrongdoers, this interpretation seems improbable. Finally, it is possible that both interpretations are to be combined: section 56 is concerned with nonnegligent behavior and with a field that can be replanted. Under this last interpretation, section 56 announces a strict liability rule. This interpretation is not unreasonable in light of the explicit reference to negligence in section 55. Such a reference implies that flooding can occur both through the negligent and the nonnegligent opening of a floodgate. Section 55 provides the result for the first case and section 56 for the second one.

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67. 1 G. Driver & J. Miles, supra note 12, at 154.
68. See supra note 53.
69. This interpretation of §§ 55-56 is reinforced by later sections dealing with a builder's liability:

[Sections 230-231 provide penalties in the event a child or slave is killed.]

229. If a builder has built a house for a man, and his work is not strong, and if the house he has built falls in and kills the householder, that builder shall be slain.
It is easy to see why strict liability might be chosen for the management of floodgates. When there is negligence, there will sometimes be witnesses and sometimes confessions, but often it will be hard for victims to prove that a floodgate was mismanaged. Farming in that part of the world is to this day a lonely business, and it is easy to imagine that the owner of a flooded field would not know whether to blame his neighbor or simply to bemoan his bad luck. Just as the common law generally holds a blaster strictly liable—perhaps because it is difficult for victims to develop proof of wrongdoing on his part—so, too, the Code of Hammurabi may have chosen in section 56 to legislate some disincentive for those who, but for a strict liability rule, might open floodgates knowing that a negligence-based rule may result in no liability because their action would be difficult for others to discern and prove.\textsuperscript{70}

\begin{itemize}
\item \textsuperscript{70} fallen in, he shall restore the fallen house out of his own personal property.
\item 233. If a builder has built a house for a man, and his work is not done properly, and a wall shifts; then that builder shall make that wall good with his own silver.
\end{itemize}

\textit{The Hammurabi Code, supra} note 53, at 65-66. The builder's negligence is thus mentioned in each section which imposes liability. In contrast, § 56 does not mention negligence, but does impose liability.

70. The Code also uses strict liability as an occasional tool in its treatment of bailments. Its rules provide:

\begin{itemize}
\item 242. If a man hires for a year, the fee for a draught ox is four \textit{gur} of corn.
\item 243. The fee for a milch-cow is three \textit{gur} of corn given to the owner.
\item 244. If a man has hired an ox or an ass, and a lion has killed it in the open country, then it is to the owner.
\item 245. If a man has hired an ox, and by neglect or by blows has caused its death, he shall replace ox by ox to the owner of the ox.
\item 246. If a man has hired an ox and broken its foot or cut the nape of its neck, he shall replace ox by ox to the owner of the ox.
\item 247. If a man has hired an ox, and has knocked out its eye, he shall give silver to the owner of the ox for half its value.
\item 248. If a man has hired an ox, and has broken off its horn, or cut off its tail, or damaged its muzzle, he shall give silver for a quarter of its value.
\item 249. If a man has hired an ox, and God has struck it, and it has died; then the man who hired the ox shall swear by the name of God, and shall be guiltless.
\item \textsuperscript{...}
\item 263. If he [the herdsman] has lost ox or sheep that has been entrusted to him, he shall replace ox by ox, sheep by sheep, to the owner.
\item \textsuperscript{...}
\item 266. If a stroke of God has occurred in a fold, or a lion has slain, then the herdsman shall clear himself before God, and the owner of the fold shall meet the disaster to the fold.
\item 267. If the herdsman is in fault, and has been the occasion of the loss in the fold; then the herdsman shall restore the cattle and sheep which he has
Finally, the Code imposes penalties, or liability, on unsuccessful surgeons.

causd to be lost in the fold, and shall give them back to the owner.  
Id. at 67-70. The hirer is thus excused from liability only when the animal has been killed in the open country by a lion. He is liable when he is at fault under § 245, and when “God has struck it” he is conditionally excused; § 249 requires him to swear as to his innocence. And a shepherd is apparently responsible when the animal is in his charge—and not in his employer’s pen, or fold. Under § 266, he must swear an oath that he was not at fault and, thus, not liable under § 267. The treatment of the hirer is easiest to understand. A verifiable destruction, truly beyond his control, excuses him; presumably, the appearance of the carcass will prove that a wild animal was indeed the cause of the loss in the hirer’s hands. See 1 G. Driver and J. Miles, supra note 12, at 438-39. If the animal died from a sudden illness or as a result of consuming poisoned water or some other act of God, the Code lets losses lie where they fell—on the owner. But because there is some possibility that the hirer overworked the animal or otherwise caused its death (he has no incentive to poison it but he may have been careless in choosing a water hole), § 249 chooses a result in between liability and no liability; the oath will deter some misbehavior by hirers.

This rule of § 249 is best seen from the point of view of all owners, or lessors. If the law held the hirer liable, or essentially adopted a strict liability rule, then hirers would pay slightly less to rent animals because they would bear the risk of animal mortality. Neither a hirer nor an owner is likely to be in a better position, or indeed in any position at all, to prevent such fatalities. The rule of liability for acts of God simply does not matter. Still, all parties may like a clear rule so that rental rates can reflect the risks. In this context, the Code can be viewed as choosing a negligence rule, but then going one step better by having the hirer swear that he was not at fault. Thus, while the burden of proof is on the plaintiff, or owner, occasionally the mystique of an oath will elicit a confession from a faulty hirer. The system chooses negligence (much as it does for other accidents) although it could just as well have chosen some other rule.

The only ambiguity in the treatment of the hirer appears in §§ 244 and 269. The latter addresses the case of a lion’s killing the hired animal in the owner’s fold or pen, while the former deals with an “open country” attack on an animal in the hirer’s control. Neither addresses the case in which a lion strikes in the hirer’s fold (if he has one). See 1 G. Driver & J. Miles, supra note 12, at 438. It would seem that it can hardly be contended that the owner should absorb the loss in such a case, for if that is the intention, § 244 is quite unnecessary as it addresses the much easier case in which the loss was out in the open country. The Code must therefore intend for the hirer to have some responsibility to scare off lions; if the animal is in the hirer’s own fold, he is surely responsible to investigate noises and to ward off animals.

The Code’s treatment of the nongratuitous bailee or herdsman is a bit more difficult. Here again we would expect the parties to allocate responsibility to the one best able to avoid unnecessary losses when the identity of such an actor is clear, but otherwise to provide a set of certain rules that may or may not be different from those found in other legal systems. The drafter of §§ 263-267 must have contemplated two types of losses: one set occurs in the pasture and the other set involves losses in the fold. The most straightforward interpretation of this portion of the Code might focus on this distinction. Section 267 legislates a negligence rule for losses that occur back home in the pen, but § 265 adopts a strict liability or res ipsa rule for all losses that occur out in the field. Finally, § 266 repeats the theme found in § 249: Although the herdsman is not responsible for nonnegligent losses that occur in the owner’s fold or pen, he may as well swear as to his blamelessness for it is possible that such an oath will cause him to confess the fact that he left a gate unlatched, ignored some noises, or was otherwise negligent in a way that is later difficult for his employer to prove. The nongratuitous bailee, unlike the hirer,
218. If a doctor has treated a man with a metal knife for a severe wound, and has caused the man to die, or has opened a man's tumour with a metal knife, and destroyed the man's eye; his hands shall be cut off.

219. If a doctor has treated the slave of a plebeian with a metal knife for a severe wound, and caused him to die; he shall render slave for slave.71

Although I do think that the Code creates a cell of strict liability in the operating room, two contextual comments need to be made. First, there is reason to accept the view of some commentators that in this and in other ancient societies talionic or retaliative penalties, such as that calling for amputation of the surgeon's hands, were generally commutable at the parties' option into monetary compensation.72 This is especially easy to accept in the standard tort (as opposed to the more public criminal) case, for if A strikes out B's eye, B will generally prefer compensation to A's joining him in misery. That we have so many records of the period, and especially of Hammurabi's Babylon, and yet no evidence that citizens walked around without hands and eyes, reinforces this view of talionic or in-kind justice as a metaphor or, at most, as a powerful spur to negotiations.73

Moreover, given the septic conditions of surgical practices before the modern era, amputation would have often meant death, and there is little reason to suppose that ancient laws were intended to produce the unnecessary deaths of tortfeasors and careless contractors. Indeed, there is every reason to think

71. The Hammurabi Code, supra note 53, at 64.

72. The point is often made by commentators on Jewish law who seem a bit uncomfortable with explicit retribution. See 1 B. Cohen, Jewish and Roman Law 18 (1966). For the same notion in Roman law, see A. Schreiber, supra note 12, at 46; J. Thomas, Textbook of Roman Law 350-51 (1976); The Pentateuch, supra note 12, at 405.

73. See 1 G. Driver & J. Miles, supra note 12, at 408.
that these ancient lawmakers sought to decrease the amount of violent retribution in their societies. Traditions of blood revenge and of long-standing and spiraling vengeance among clans were almost surely a major concern of the talionic decrees in the Code of Hammurabi and other ancient systems. It is thus plausible (even in the face of evidence that in our own time some societies impose talionic penalties) that interpretations of the Code’s provisions should assume less violent rather than more violent alternatives. That “an eye for an eye” really means that the tortfeasor had better reach a settlement with the unfortunate victim or his family, is, therefore, a superior interpretation. Of course, the potential of such settlements will serve as a fair deterrent to antisocial activity.

The second contextual comment about the Code’s treatment of unsuccessful surgeons concerns its balancing of rewards and liabilities. Logic does not necessarily demand any such balance, but the Code of Hammurabi is hardly alone among legal systems in raising the penalty for failure precisely in those circumstances in which it is generous with rewards for success. For example, the surgeon who operates on a severe wound receives ten shekels of silver—a sum equal to the damages called for when a man strikes a woman and causes her to miscarry and five times the price set for the construction of a typical boat or the employment of a builder for seventy-two days. Whether or not these

74. The Pentateuch, supra note 12, at 405.
75. The expression comes from Exodus 21:24, but is also found in less pithy fashion in § 196 of Hammurabi’s Code: “If a man has destroyed the eye of a free man, his own eye shall be destroyed.” The Hammurabi Code, supra note 53, at 61.
76. There would certainly be nothing illogical in imposing penalties for failure and in leaving parties to bargain about compensation for success. Nevertheless, as the text goes on to show, the Code and other legal systems often balance penalties and rewards.
78. “215. If a doctor has treated a man with a metal knife for a severe wound, and has cured the man, or has opened a man’s tumour with a metal knife, and cured a man’s eye; then he shall receive ten shekels of silver.” The Hammurabi Code, supra note 53, at 63.
79. “209. If a man strike the daughter of a free man, and causes her foetus to fall; he shall pay ten shekels of silver for her foetus.” Id.
80. “234. If a boat-builder has built a sixty-ton boat for a man, he shall give him two shekels of silver for his pay.” Id. at 66. “228. If a builder has built a house for a man, and completed it, he shall give him for his pay two shekels of silver for each sar [of surface] of the house.” Id. at 65. See 1 G. Driver & J. Miles, supra note 12, at 425
fixed fees could be bargained down, it is clear that in return for the risk of liability the surgeon was to be paid handsomely for success. At a minimum, it appears that he earned a one hundred percent premium in return for the risk of liability. In an important way the Code thus describes the inevitable companion to strict liability—higher prices, or forced insurance. The surgeon's liability for failure and, if the earlier discussion is correct, the compensation of injured patients are financed by the patients who are treated.

The system described above is usefully compared with our modern-day use of negligence in the medical context. Superficially, negligence seems ill-suited to the task of deterring sloppy medical practices. Proof problems abound because the patient finds it extremely difficult to reconstruct the steps taken by his doctor. As such, it is tempting to suggest that negligent behavior will go undetected and undeterred and, therefore, that strict liability would be a more appropriate standard for judging medical services. On the other hand, as every thoughtful modern tort student knows, strict liability in this area is especially unworkable because patients go to doctors when things are already wrong and no fact-finding system could hope to hold doctors strictly liable for their contribution to the harm while separating out preexisting conditions. The same probably can not be said for the surgeons of ancient Babylon. While their negligence was probably very hard to distinguish ex post, it is not difficult to imagine that the drafter of this Code section comprehended that the liability his rules imposed would follow a patient's death during or, at most, soon after surgery. Separating out preexisting conditions in this inexact way is obviously relatively easy because the patient either survives surgery or does not. In support of this view, it should be noted that the Code provides a reward,

(argining that this is equivalent to the wage of a builder for 72 days).

It may be that these sections only set minimum, maximum, or even off-the-rack prices and that different bargained-for prices were permissible. Regardless, the discussion in the text relies only on the relative magnitude of these prices.

81. "221. If a doctor has healed a man's broken bone or has restored diseased flesh, the patient shall give the doctor five shekels of silver." The Hammurabi Code, supra note 63, at 64. Inasmuch as there is no liability for failure to cure, and the possibility of death from treatment or the medical problem itself is sufficiently removed to go unmentioned, it is arguable that the 100% increase in fees in § 215 as compared to § 221 is better traced to the risk of liability than to the extra work required for a severe wound.
or fee, for the surgeon who heals a broken bone but does not provide for liability when a bone is improperly set.\textsuperscript{82} In this setting, the precondition is not easily separated from that which a surgeon causes.

Unfortunately, it is impossible to be absolutely certain that strict liability actually did govern the unsuccessful surgeons of Hammurabi's day. The verbs that link the surgeon's actions with the patient's misfortune may or may not have a connotation of negligence.\textsuperscript{83} Nor, as we have seen,\textsuperscript{84} is it absolutely clear that strict liability appears elsewhere in the Code. Translators seem to agree, however, that in dealing with builders, tenant-farmers, and boatmen the Code is relatively explicit about the presence or assumption of negligence or carelessness.\textsuperscript{85} It is arguable, therefore, that when silent the Code means to address nonnegligently caused injuries.

In sum, it is at least plausible that there are as many as three strict liability cells in the Code (excluding the treatment of bailees) and that these cells can be explained in much the same way as more modern uses of strict liability in the common law can be explained. Hammurabi's law and our own are thus similar, or at least analogous, in their treatment of tortfeasors. One might expect such similarity given the behavioral consequences of negligence and strict liability rules. Indeed, it is possible that the choice of negligence rather than strict liability as the basic rule in Hammurabi's day reflected (as it may in our own system) the practical problems of valuation in a complex society.\textsuperscript{86} Moreover, even the exceptions to the general (uniform negligence) rule in the Code of Hammurabi appear on close inspection to be more similar to, than different from, our own exceptions to the negligence rule.

\textsuperscript{82} The Code provides for liability only where the doctor has treated a man with a metal knife. See supra note 81 and text accompanying note 71.

\textsuperscript{83} The sections which impose liability upon the doctor all speak of him as having "caused" the patient to die. See, e.g., text accompanying note 72. It is possible that the drafter contemplated that this causality only be found when the doctor has been negligent.

\textsuperscript{84} See supra text accompanying notes 62-70.

\textsuperscript{85} See supra notes 55, 64 & 69.

\textsuperscript{86} A strict liability rule generates many more valuation cases for the legal system because damages must be assessed whenever a defendant is found to have caused an injury whether or not the defendant's behavior is deemed negligent.
C. Exodus

Of the many ways of understanding the rules set out in the Book of Exodus, two are particularly well suited for the comparative purposes of this Article. One calls for an examination of the text itself; we are assisted in this, as we were in the case of the Code of Hammurabi, by some information about the era and the people who might have first lived by the laws as codified in Exodus.87 The second method looks not only at the text but also at interpretations of it that were written more than one thousand years ago.88 These interpretations were made mostly by Jewish commentators who sought to live by the word of the ancient document. These commentators flourished more than one thousand years89 after earlier generations might have first lived according to the rules set out in Exodus. An obvious advantage of this second method is that it includes more information about the operation of a given set of tort rules; a disadvantage is that the information is most likely about a society that had by then interacted with other civilizations.

This section looks mostly to the unembellished text; when later commentary is used, it is specifically so noted. Although my focus on the text is largely motivated by the fact that comparison with other ancient codes seems best if all are unadorned or all adorned by oral traditions and later developments, it is really impossible to isolate the rules that were developed in any one time period in a civilization. To some extent every code records prevailing or developing practices.90 A single lawmaker can innovate a bit, but can hardly legislate an entirely new social

87. Traditional Jews regard the Bible as of divine origin and as having been received by Moses about the year 1350 B.C. Secular scholars regard the Old Testament as consisting of a number of distinct strands composed by different authors at different times. For these scholars the rules set out in Exodus, or the Book of the Covenant (the segment which contains the rules discussed in this section), date between 1200-400 B.C. Any debate about the origin of these rules is beside the point of this Essay; the rules discussed in the text are clearly ancient and almost surely later than Hammurabi's Code. Moreover, it is almost surely the case that belief in the Bible's divine origin does not preclude acceptance of the notion that its rules often codified or repeated practices that were already in effect among the people who first looked to the Book for their law.

88. The Talmud contains, among other materials, extensive commentaries on Biblical passages. Talmudic law was an oral tradition, but was eventually codified in A.D. 500 J. Hertz, The Babylonian Talmud XXII (L. Epstein ed. 1935) [hereinafter cited as Babylonian Talmud].

89. Id.

90. The Pentateuch, supra note 12, at 406.
order. The dating of ancient written codes will ordinarily not tell
us when the practices they codified first developed.

Disclaimers aside, it is useful to reproduce segments of the
text for, as will become clear, the uniformity and variety that
one finds are most remarkable. The section of Exodus dealing
with torts begins with cases of one person injuring another. Ta-
lionic rules are set out, although here it is even clearer that
apart from homicide the law describes a system of monetary
compensation, rather than strictly in-kind retribution.\(^9\) The
text\(^{92}\) then contains the following verses from chapter 21:

33. And if a man shall open a pit, or if a man shall dig a pit
and not cover it, and an ox or an ass fall therein,

34. the owner of the pit shall make it good; he shall give
money unto the owner of them, and the dead beast shall be his.

35. And if one man's ox hurt another's, so that it dieth; then
they shall sell the live ox, and divide the price of it; and the
dead also they shall divide.

36. Or if it be known that the ox was wont to gore in time
past, and its owner hath not kept it in; he shall surely pay ox
for ox, and the dead beast shall be his own.\(^{93}\)

Chapter 22 begins with the rules providing for multiple restitu-
tion by thieves and then returns to tort law:

4. If a man cause a field or vineyard to be eaten, and shall let
his beast loose, and it feed in another man's field; of the best of
his own field, and of the best of his own vineyard, shall he
make restitution.

5. If fire break out, and catch in thorns, so that the shocks of
corn, or the standing corn, or the field are consumed; he that
kindled the fire shall surely make restitution.\(^{94}\)

Verses 33, 34, and 36 of chapter 21 appear to announce a
negligence rule. They focus on two clear examples of negligent
behavior and then carefully provide for simple restitution or sin-

\(^9\) B. JACKSON, supra note 12, at 82; THE PENTATEUCH, supra note 12, at 405.
\(^{92}\) All translations of Exodus are from THE PENTATEUCH, supra note 12. There are,
of course, many translations of the Bible and strong feelings are held as to the relative
merits and distortions of each. I think it is fair to say that the tort and theft rules repro-
duced and discussed in this Article are translated by Hertz (and virtually all other trans-
lators) in an uncontroversial way.

\(^{93}\) THE PENTATEUCH, supra note 12, Exodus 21:33-36.

\(^{94}\) Id. Exodus 22:4-5.
gle damages.\textsuperscript{95} Verses 33 and 34 do not suggest a strict liability rule for all pit diggers, because it is quite clear that if the digger covered the pit and then, say, a storm or passer-by uncovered it, the digger would not be liable.\textsuperscript{96} It is possible that even commentators who view these ancient rules as fact-specific rather than illustrative would agree that these two verses contain a generally applicable negligence rule. A commonly used hermeneutic method suggests that when a text lists more than one example of something, it implies the inclusion of unmentioned items with similar characteristics.\textsuperscript{97} Although it is not surprising to find a negligence rule in such an ancient system, note that a strict liability rule also would not be surprising. Both rules deter negligent behavior by forcing the negligent party to feel, or internalize, the hurt he causes his victim. It would be astonishing to find a negligent party paying less than single damages. But it is clear that at least in the Laws of Eshnunna, the Code of Hammurabi, and the Book of Exodus we find uniformity on this matter: negligent actors pay.

As mentioned earlier,\textsuperscript{98} there is some reason to expect variety in the treatment of nonnegligent actors who cause injuries. There is the possibility of no liability (a negligence rule), full liability (a strict liability rule), or one-half liability (an even "splitting" rule). Indeed, any sort of split liability is possible: a one-third splitting rule was discussed in the context of Hammurabi's Code\textsuperscript{99} and a variable splitting rule is found in general average contribution in admiralty law.\textsuperscript{100} In verse 35 of Exodus, we find the very same splitting rule that is found in section 53 of the Laws of Eshnunna. In fact, these two provisions offer the closest parallel between Biblical law and another ancient Near

\textsuperscript{95} The tortfeasor is permitted to keep the carcass in verse 34. He is thus required to pay exactly what the victimized owner lost.

\textsuperscript{96} The pit was probably created for the storage of water. It is tempting to think of it as an animal trap, in which case verse 33 surely contains a strict liability rule. But if Exodus 21:33 refers to a trap, then it would hardly absolve the owner who covered it, unless covering refers to something much more than camouflage. Moreover, the people who lived by the rules found in Exodus (whether in ancient or later times) almost surely abided by the many rules found elsewhere in the Bible concerning impure, and thus inedible, animals. Trapping would not have been a terribly profitable enterprise under these rules in a desert where the market for fur coats was surely limited.

\textsuperscript{97} See A. Schreiber, supra note 12, at 204-09.

\textsuperscript{98} See supra text accompanying note 11.

\textsuperscript{99} See supra text accompanying note 67.

\textsuperscript{100} See supra text accompanying notes 45-48.
For the purposes of this Essay, it is not important to determine whether the parallel came about by borrowing for it would be noteworthy that the splitting rule was adopted while other rules were not imitated. The important point is that the two systems of social organization were apparently able to function with a splitting rule for nonnegligent behavior. That this splitting was apparently still the "custom of the desert" as recently as one hundred years ago only adds to this point.

Exodus also contains rules, reproduced above, that may form cells of strict liability. The grazing in verse 4 is, however, probably not a good illustration of such a strict liability rule. First, it is not clear whether grazing on another's land might have reflected negligent herding rather than intentional wrongdoing. We need more information than what is available on the herding and fencing practices of the people first governed by these rules in order to determine whether or not verse 4 does more than describe an intentional tort. It would not be illogical or purely repetitive for verse 4 to address intentional trespass, for the lawmaker may wish to make clear that some intentional torts are to be treated like negligence, as in verse 36, rather than like crimes, which may trigger liability for multiple damages.

On the other hand, verse 4 may concern accidental grazing, in which case it either announces a valuation procedure or possibly a subtle splitting rule if trespassing grazers are only occasionally detected. Full liability that must be paid only occasionally is, after all, equivalent to a splitting rule.

Verse 5 of Chapter 22 contains the clearest example of strict liability in ancient laws. By describing the fire as kindled and then as catching in thorns, the drafter contrasts verse 5 with verse 4 in which a beast was let loose and another's field or vineyard caused to be eaten. I think it not unlikely that this contrast was meant to distinguish accidental from negligently caused losses. The fire may have spread accidentally while no attempt was made to constrain the movement of the beast. The verses which precede and follow verse 5 make it clear that this strict liability rule is fact-specific and not illustrative, for the nonnegli-

101. B. Jackson, supra note 12, at 130.
102. Id. at 137.
103. Exodus 22:3 provides that a thief must pay at least double for stolen property found in his possession. The Pentateuch, supra note 12, Exodus 21:3.
gent actor generally incurs no more than split liability. Nor is this variety particularly unexpected. Fires, like explosions, must often consume evidence that would show negligence in starting or tending a fire. As between a negligence rule, with underdetection of negligent behavior, and a strict liability rule, the latter may be preferable. This may be so even though a strict liability rule generates numerous valuation proceedings. Early English law also had a strict liability rule for firestarters. Whether the demise of this rule is correctly traced to the desire of lawmakers to discourage urban density, to encourage precautionary behavior by every property owner, or to encourage participation in volunteer firefighting units, it is clear that more than one negligence-based legal system has been influenced by arguments in favor of strict liability for firestarters.

104. Exodus 21:28 provides that a first-time goring ox which kills a human shall be put to death even though there is no tort liability on its owner. This is a clear indication that at least in this setting a nonnegligent actor is not liable; at most one might insist that since the owner forfeits his ox there is very slight liability. The rule of verse 28 may be limited to personal injury—as opposed to the splitting rule in verse 35 where personal property is concerned—perhaps because human life is too difficult to value (and therefore difficult to divide). On the other hand, verse 35 may contemplate some uncertainty as to which animal began the fatal battle. Finally, verse 28 may contemplate some fault on the part of the human who may have taunted the ox or otherwise not taken reasonable precautions. In any event, there is no indication that a nonnegligent owner of an animal would pay fully for any damage.

105. See supra note 27.

106. It is arguable that in a world full of self-confident optimists who expect the other fellow to start fires, a strict liability rule leads to more crowding than is socially optimal. Put simply, since such a tort rule provides free "insurance" against spreading fires, potential homeowners may not care about the fire-related disadvantage of constructing a home close to existing structures. The argument is more fully explored in S. Levmore, supra note 52.

107. The demise of the strict liability rule shadows, in time, the creation of volunteer firefighting units. It is thus plausible that the tort rule was meant to encourage self-confident homeowners to join such organizations or at least to work hard in emergencies. See id.

108. Royal decrees of the Hittite Kingdom, which survive from a time between 1925 and 1600 B.C., also provide clues about the use of negligence and strict liability in an ancient Near Eastern legal system. See J. Garstang, The Hittite Empire 3 (1829); O. Gurney, The Hittites 24 (1954); Hittite Laws, supra note 12. Translations in this note are taken from the last-cited work. The relevant sections are as follows:

§98 If a free man sets a house on fire, he shall re-build the house. And for everything that perishes in the house, whether man, cattle or sheep, he shall certainly compensate.

§ 99 If a slave sets a house on fire, his master shall compensate for him, and they shall cut off the slave's nose and his ears and they shall return him to his master. But if he does not compensate, he shall surrender the slave.

§ 100 If anyone sets a barn(?) on fire, he shall feed the [ox]en and shall
In short, a literal reading of Exodus yields powerful evi-

bring (straw) until summer; everything that is in the barn(?) he shall return. If there was no straw in it, he shall only (re)build the barn(?).

§ 105 If anyone sets standing corn on fire and . . . and (the fire) spreads to an [orchard, if vines, apple trees, [pomegranate trees or pear trees are burnt, for one tree he shall give six shekels of silver and he shall replant them, and his estate shall be liable. But if it is a slave, he shall give three shekels of silver.

§ 106 If anyone lights fire in his field and allows it to spread into crops and sets the (other) field on fire, he who set (the field) on fire shall take the burnt field and shall give a good field to the owner of the field; he shall till(?) it.

Id. at 30-33 (footnotes omitted).

Section 98 is most likely concerned with negligent rather than intentional firestarting because an intentional firestarter would almost surely have been punished with something more severe than the simple restitution rule set forth in this section. Inten-
tional wrongdoers elsewhere in the Hittite laws are punished with severe monetary dam-
ages. For example, § 59 requires one who steals a ram to give fifteen sheep. It is barely
possible, however, that §§ 98-100 deal with negligent or intentional firestarting on the victim's premises while §§ 105-106 deal with the more difficult question of a fire that was started (unintentionally, one presumes) on the firestarter's own property but then spreads. Either way, it is quite clear that the payment required in § 105 for each tree that is destroyed amounts to full liability—or more. In § 101 the law requires someone who steals a tree to pay the same amount. And both provisions reduce the liability to three shekels if the firestarter or thief is a slave.

Two questions thus present themselves. First, why is there less liability if the wrong-
doer is a slave? And, second, what sort of liability is comprehended in § 106? The first
question is difficult to tackle without more knowledge of the institutional context. It is
probable that many slaves were temporarily indentured servants and had their own property so that the penalty was to be paid by them and not, by virtue of vicarious liability, by their masters. The Hittite laws certainly seem to contemplate that a slave would have his own funds from which to make the required payment. Such indentured servants are dealt with in great detail in Biblical law and early Jewish law, so that their existence in the Hittite civilization should not be unexpected. See THE PRINCIPLES OF JEWISH LAW 231-33 (M. Elon ed. 1975). If this is so, then the reduction in liability is surely part of an elegant deterrence scheme (rather than a compensation system) in which fines are graduated, much like in a progressive income tax system, according to the economic impact they will make on potential tortfeasors. On the other hand, if the laws intend that the master is to pay the fines resulting from his slaves' acts, then the purposes of the rule may be to impose shared responsibility; the Hittite legal system may hold masters less than fully liable in order to enlist other citizens, or potential victims, to monitor the behavior of slaves. Note that § 9 provides explicitly for such vicarious liability, but it is unclear whether it is illustrative of a more general liability of masters for their slaves' acts, or fact-specific.

Section 106 may well lend support to the argument concerning variety among legal rules. The argument runs as follows: Sections 98 and 100 provide as clearly as possible for full liability for the negligent firestarter. Again, it is conceivable that these sections (unlike §§ 105 and 106 which may deal with a fire first set on one's own property) are concerned with intentional firestarting. For several reasons, I will assume for the remain-
der of the discussion that §§ 98 and 100 unambiguously provide for single damages in the event of negligent firestarting. First, there is little reason to think that arson is sug-
gested; second, it is quite likely that the draftsman or reporter deals with intentional
torts earlier in the Code, negligence in §§ 98 and 100 (and possibly with comparative negligence in § 99), and the causality problems of a spreading fire in §§ 105-106.

Section 105 then deals either with a spreading fire of negligent origin or with liability for a nonnegligently set fire. Either way, § 106 seems at first to be but a minor variation of § 105. It appears to provide for single damages because the firestarter must provide a substitute tilled field and in return take the burnt field, much as the owner of a regoring ox in Exodus took the carcass. See supra text accompanying note 93. Viewed in this manner, §§ 105 and 106 provide either for strict liability in the case of fire—an exception or cell that is by now familiar and quite defensible—or for a rule about spreading fires that was like that of the early common law. See supra notes 104-07 and accompanying text.

The overlap of §§ 105 and 106 that is implied by this interpretation is not troubling. The Hittite Laws often give two vignettes before moving on to another issue; in fact, it is possible that the draftsman intended for rules to be understood as illustrative rather than specific only when two examples were given. Thus, §§ 98 and 100 and §§ 105 and 106 may set out general rules, while § 99 may indicate that a slave is not to be mutilated for any wrong other than firestarting.

There is, however, one unexplained element of § 106. The field is already full of crops as is clear from the description of the damage caused by fire, and yet, while the firestarter must till a good field, there is no indication that he must compensate the victim for the lost crops unless "good" means that the field is planted. It is therefore possible that a better interpretation of these sections is that § 105 deals with the spreading of a negligently set fire—perhaps "standing corn" is understood to be valuable and flammable so that any fire set nearby is automatically regarded as negligent. Section 106 may then, finally, refer to a nonnegligently set fire. Here the firestarter pays part of the damage done but need not replace crops that were destroyed. In sum, § 106 may repeat a strict liability rule or it may contain a liability rule for negligently set fires that spread—and by implication provide that there is no liability for nonnegligently set fires. Conversely, it may contain a splitting rule if the nonnegligent firestarter is excused from paying for crops that are destroyed. Again, the variety and ambiguity occur when the rule does not matter (or where the best rule is uncertain). When the rule does matter, as in § 98, we find striking uniformity among these four ancient legal systems of the Near East.

Interestingly enough, the resolution of the strict liability versus negligence question may not be the same in the bailment law of the Hittites as in their tort law. The relevant sections provide:

§ 70 If anyone steals an ox or a horse or a mule or an ass, and its owner finds it and receives it as it was, in addition he shall give double, and his estate shall be liable.

§ 71 If anyone finds an ox or a horse or a mule, he shall bring it to the royal gate. But if he finds it in the country, it shall be brought before the elders and he may continue to harness it. But if its owner finds it and receives it as it was, he shall not hold him as a thief. If he does not bring it before the elders, he is a thief.

§ 72 If an ox dies in the field of another, the owner of the field shall give two oxen and his estate shall be liable.

§ 75 If anyone harnesses an ox, a horse, a mule (or) an ass and it dies or a wolf devours it or it vanishes, he shall give it as it was. But if he declares "It died through an act of God," he shall take an oath.

§ 76 If anyone borrows an ox, a horse, a mule (or) an ass and it dies with him on the spot, he shall bring it and shall give (the price of) its hire.
bines the splitting notion of the Laws of Eshnunna with a strict liability cell not unlike those found elsewhere. There is uniformity when behavioral consequences require it, and a fair amount of variety otherwise.\textsuperscript{109}


Unfortunately, the surrounding sections in the Hittite laws concern less fatal injuries and offer little help in interpreting these five sections. Section 72 has been interpreted as presuming negligence on the part of the hirer—in which case it is an interesting example of double recovery for behavior that is merely negligent. See \textit{id.} at 169; \textit{supra} text accompanying notes 21-22. I regard this reading as fairly plausible. Section 75 calls for single damages in the case of destruction by a wild animal or loss by straying; if the animal dies naturally, § 75 calls only for an oath as to innocence. The question, therefore, is what sorts of death are contemplated in the first part of § 75 (single damages) as opposed to § 73 (double damages). The former may refer to death from moderate overworking or from goring by another (but not wild) animal, in which case § 72 could only refer to death by negligence. The system may opt for double damages because it is confident that there is no moral hazard and that negligent and nonnegligent behavior in this setting can be accurately separated.

Alternatively, § 75 may contemplate negligence; it is easy to suggest that a hirer should also guard against wolves and “vanishing” animals. But then to what does § 72 refer? It may concern a lost animal that materializes in someone’s field. If so, § 71 announces the general rule of finders, and § 72 then protects against the nonreporting finder who, suddenly in fear of detection, kills the animal he has illicitly used and claims to have suddenly discovered. Under this reading, he is a thief and treated just the way § 70 treats more conventional thieves. This reading is also quite plausible, so that Hittite law may be said to hold the hirer responsible for negligence (with some res ipsa loquitur categories) or triply responsible (that is, a carcass plus two live oxen under § 72) for negligence and singly responsible for certain other losses (such as those to wild animals). Neither view is terribly at odds with the uniformity-variety thesis developed in this Article. The second may seem a bit smoother, but it somewhat contradicts the usual treatment of negligence found in the Hittite laws as displayed in § 98, reproduced above, and in other provisions as well, and, thus, emphasizes my discomfort with the thesis within one legal system. Variety and uniformity \textit{within} a legal system is a difficult comparative law question that is, as far as I know, not explored by comparativists but must now be put aside for another day.

109. Variety is also found in the bailment laws of Exodus, chapter 22, which provide:

6. If a man deliver unto his neighbour money or stuff to keep, and it be stolen out of the man's house; if the thief be found he shall pay double.

7. If the thief be not found, then the master of the house shall come near unto God, to see whether he have not put his hand unto his neighbour's goods.

8. For every matter of trespass, whether it be for ox, for ass, for sheep, for raiment, or for any manner of lost thing, whereof one saith: "This is it," the cause of both parties shall come before God; he whom God shall condemn shall pay double unto his neighbour.

9. If a man deliver unto his neighbor an ass, or an ox, or a sheep, or any beast, to keep, and it die, or be hurt, or driven away, no man seeing it;

10. the oath of the Lord shall be between them both, to see whether he have not put his hand unto his neighbour's goods; and the owner thereof shall accept it, and he shall not make restitution.
Later legal materials, grounded in the ancient Biblical text, contain much material that can be compared and recharacterized as uniform or various in ways that support the major argument of this article. Two examples from Jewish law are closely

11. But if it be stolen from him, he shall make restitution unto the owner thereof.
12. If it be torn in pieces, let him bring it for witness; he shall not make good that which was torn.
13. And if a man aught of his neighbor; and it be hurt, or die, the owner thereof not being with it, he shall surely make restitution.
14. If the owner thereof be with it, he shall not make it good; if it be a hireling he loseth his hire.

The Pentateuch, supra note 12, Exodus 22:6-14. The text almost certainly contemplates at least three different types of bailees. Verses 6-8 almost surely deal with a gratuitous bailee while verses 9-12 deal with a nongratiutous bailee. The former is only liable when at fault; in the case of theft he merely swears his innocence and is then not liable. Note that in all these systems, oaths are employed when they are harmless. See infra note 127 and accompanying text.

The nongratutitous bailee, on the other hand, is liable for theft even though he is not liable for destruction by a wild animal or for the natural death of his charge. He must, however, swear to his innocence regarding the latter and provide evidence of the former. In short, the risk of theft, but not the risk of other nonnegligent losses, is borne by the nongratutitous bailee. One might argue either that this is an example of variety precisely across the range in which the rule does not matter or that the relational contract of bailment might on further inspection prove to work better with these rules in place. It is barely possible that verses 6-12 do not differentiate between gratuitous and nongratuitous bailees but rather that there is one set of rules for money and goods and another set of rules for animals. Under this view, the reference in verse 8 to animals might anticipate the use of the oath not for theft but for natural losses as in verse 10. But this argument is both forced and unnecessary; the first reading is more natural and either reading supports the thesis or the argument that variety within the system must be a product of a problem peculiar to the bailment contract.

Verses 13 and 14 in this chapter of Exodus deal with the case of the gratuitous borrower. The text calls for liability even when the animal dies of natural causes and therefore surely imposes liability for theft and for negligence. However, the law excuses the borrower of the animal if its owner was “with it.” The text seems to pronounce a strict liability rule, yet it also implies that if the owner consented to the bailment—that is, was with it at the time the bailment was created—there is no liability except for negligence and theft. See Babylonian Talmud, Baba Mezi’a 95b; The Principles of Jewish Law, supra note 108, at 257. The law may thus provide an incentive for C to borrow an animal directly from its owner, A, rather than from B, who has borrowed or hired A’s animal. Such an incentive might serve to clarify contractual terms, because C and A will speak to one another, and to avoid complex multiparty litigation if something goes wrong. If so, there is variety where the rule does not matter in an immediate behavioral way. Alternatively, the liability rule is a res ipsa loquitur or burden-shifting rule. When the owner is present, there is no reason for such a rule because the owner can see for himself that there is no negligence in the treatment of his property. Finally, verse 14 also refers to the nongratutitous hirer. Whether it intends for this bailee to be treated like the borrower or like the nongratutitous herdsman is not important; in either case, the uniformity-variety thesis is quite robust, even though the task of explaining variety within one system may remain uncompleted.
related to the material already discussed and give the flavor of the tradition from which they are drawn. The first example deals only with the interpretation of the splitting rule in verse 35 of chapter 21. Commentators have noted that the rule works well enough when the two animals are of roughly equal value (when alive) but that it is not at all clear how the split operates when disparate values are involved. For instance, if an ox worth twenty shekels gores an ox originally worth sixty shekels but now worth only two shekels as a carcass, a literal application of the splitting rule would provide that each receives eleven shekels after the sale-and-split. This results in one party losing forty-nine shekels and the other nine shekels. Alternatively, splitting may require equal division of losses, in which case the owner of the gored ox receives half the carcass and twenty-nine shekels. Finally, an equal division of losses interpretation might be accompanied by an element of limited liability so that the owner of the gorer must never pay more than the value of the remaining live ox.

Postbiblical Jewish law, about midway in time between the codification found in Exodus and our own time, apparently chose the last of these alternatives, limiting liability to the full value of the surviving ox. This variation is especially interesting because Roman law, which provided for strict liability as long as the gored ox was not the instigator, contained the analogous concept of “noxal surrender.” Under this rule, the owner of the ox (or, in other cases, the slave) causing the harm, surrendered it to the owner of the dead ox. Once again, I do not argue that any one of these many rules is superior or inferior to the others but rather that these rules all deal with virtually identical situations and prescribe different results precisely across the range in which any given set of legal rules leads to acceptable or even identical consequences.

110. B. Jackson, supra note 12, at 134.
111. Id. The percentage of recovery will also be unequal if the gorer is more valuable than his victim. If the victim is worth 20 shekels alive and 2 shekels dead, then the loss, allowing for division of the carcass, is 19 shekels. If the gorer is worth 30 shekels, the owner of the victim will recover 15 shekels when the goring ox is sold. The owner of the victim will recover over 75% of his loss, while the owner of the gorer will recover just over 50% of his loss.
113. See J. Thomas, supra note 72, at 382-83.
A second postbiblical development concerns comparative negligence, or the appropriate rule for multiple careless agents. It was noted earlier\(^\text{114}\) that the problem of the goring ox may be one of comparative negligence, for the real issue may be that when neither animal has a goring history we have no idea which ox attacked the other or whether the survivor presents a future danger. To the extent that this view is better than one that regards these rules as suggesting different treatments of nonnegligent actors, the uniformity-variety thesis is simply refocused. The variety in the treatment of gorers thus supports the theoretical point of view that the rule of law may matter, but that no single treatment of multiple causal agents dominates. There is, unfortunately, no more explicit discussion in any of these ancient codes of multiple causal agents, or even of cases in which A uses B's property to harm C.

Postbiblical Jewish law, however, contains a fair amount of discussion about the possible extension of Exodus 22:4,\(^\text{115}\) to cases in which A's negligence has allowed B's animals to graze over C's fields. Imagine, for example, a fencebreaker, A, who rides along, knocks down a fence post, and then does not pause to repair the damage. The case is obviously not explicitly addressed by the Biblical verse. A rather famous Talmudic passage announced that A was not liable for damages—but was liable by the "laws of heaven."\(^\text{116}\) At first glance, the mortal rule seems excessively concerned with direct, physical causation as there is a parallel or derivative rule which provides that bandits who leave a shed door open are not liable for ensuing damages caused by animals unless they actually removed the animals and actively pushed them to disaster.\(^\text{117}\) But a survey of related postbiblical law exposes important clues that lead us in the direction of comparative negligence.

First, later law apparently did hold a fencebreaker liable for damage done by escaped animals.\(^\text{118}\) And it has been suggested\(^\text{119}\) that such liability did not extend to the more common case of bandits allowing animals to escape because, in the case of ban-

\(^{114}\) See supra text accompanying note 44.
\(^{115}\) See supra text accompanying note 94.
\(^{116}\) BABYLONIAN TALMUD, supra note 88, Baba Kamma 55b.
\(^{117}\) See B. JACKSON, supra note 12, at 251.
\(^{118}\) Id. at 259.
\(^{119}\) Id. at 252 n.6.
dits, the owner might have heard noise and come out to secure his animals. The idea behind this distinction is apparently that bandits approach the owner’s home while vandals or other fencebreakers usually operate far afield. Only in the former case is the owner even remotely at fault. Second, medieval commentators tried to explain away the absence of (mortal) liability by suggesting that the fence that enclosed the animals must have already been in bad repair so that the owner was somewhat at fault for its disrepair. It is thus plausible that extensions of Exodus 22:4 were somehow blocked by a concern that liability was not entirely fair or constructive if other actors might have taken some mitigating steps, or that more extensive liability would remove incentives for other actors to help minimize accidental losses.

Finally, the Talmudic passages that discuss fencebreaking also discuss other actions that are punishable by the judgment of heaven, but not of mortals. And at least four of these actions present questions that might be characterized as concerning comparative wrongdoing. For example, someone who hires (two) false witnesses to benefit not himself but another party (monetarily) is said to be liable by the laws of heaven. Clearly, there are at least four wrongdoers in this setting: the hirer, the two witnesses, and the beneficiary. Their liability to the wronged party is, to say the least, a complicated least-cost-avoider problem. It is arguable that in the treatment of multiple causal agents—where theory suggests that no one rule is clearly superior—Jewish law opted for a rule of no liability. On the contrary, our own system, for example, has experimented with no liability, partial or shared liability, and full liability. Variety is thus found where no one rule is compelled, or even suggested, by

120. Id. at 252-53.
121. Babylonian Talmud, supra note 88, Baba Kamma, 55b-56a.
122. Id.
123. See Butterfield v. Forrester, 103 Eng. Rep. 926 (1809) (plaintiff who travelled at negligent speed unable to collect from defendant who negligently blocked road).
124. See Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) (plaintiff who negligently stopped on a busy highway allowed partial recovery from defendant who was driving too fast).
125. See Davies v. Mann, 10 M. & W. 546 (Ex. 1842) (plaintiff allowed complete recovery for his fatally wounded donkey from defendant who was travelling at excessive speed even though plaintiff had wrongfully allowed his donkey to graze on a public road).
an analysis of the behavioral consequences.

For purposes of comparative law, the most interesting aspect of postbiblical Jewish law's treatment of multiple causal agents is the reference to the judgment or laws of heaven. Many legal systems occasionally employ oaths or references to supernatural penalties along with civil or criminal liability. Oath-taking also plays an important role in the treatment of bailees in Exodus as it does elsewhere in Biblical law. \(^{126}\) I would extend the uniformity-variety argument to the use of the supernatural. It would be quite surprising to find a legal system that permitted a defendant to exonerate himself with a sacred oath after numerous witnesses testified to his thievery. Nor is there likely to have been a society that condemned convicted thieves or murderers only to the laws of heaven. There may be some counterexamples, yet it is difficult to imagine many societies so secure as to tempt exploitative nonbelievers to take advantage of their fellow citizens. It is not difficult to imagine a society exonerating an accused defendant when, for example, only hearsay evidence is available; the law may then state that such a defendant is left to the laws of heaven or must take an oath (or else be punished). The threat of divine punishment may not alone ensure acceptable social behavior. But when immediate, harsh punishments are considered inappropriate, little is lost by threatening potential wrongdoers who are believers, with such punishments. Although this is hardly the place to defend an argument about the use of the supernatural in numerous societies and eras, I do mean to suggest that its use conforms to the uniformity-variety thesis. \(^{127}\) We should expect to see such tools used when more

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126. See supra note 109.

127. Roughly speaking, societies have looked to oaths, ordeals, and witchcraft precisely when more "scientific" (i.e., reproducible) means and "better" methods are unavailable. Supernatural adjudication has thus been popular in weighing the evidence against adulterers, witches, breachers of religious law, and in other cases in which the aura of enforcement was probably more important than the sifting out of antisocial actors. It would, for instance, be very unlikely to find a legal system that allowed an oathtaker to go free when three witnesses identified him as a violent perpetrator. This topic is far beyond the intended boundaries of this Article. It should be pointed out, however, that the uniformity-variety thesis is hardly contradicted by the fact that all legal systems of which I am aware rely on "real" evidence when any is available and turn to oaths and supernatural evidence only when no other evidence is available. See generally H. SILVING, The Oath, in ESSAYS ON CRIMINAL PROCEDURE 1 (1964); THE PRINCIPLES OF JEWISH LAW, supra note 108, at 616-17 (oath admitted only where no sufficient evidence is available). For a discussion of oaths in the ancient Near East that supports the
earthly penalties are inappropriate or even counterproductive and when the absence of any penalty is undesirable.

The use of the supernatural may be especially ingenious in the context of multiple causal agents. Imagine that either A or B, an animal owner and a fencebreaker, could prevent harm to C and that there is only a trivial amount of duplicative waste if both A and B take very inexpensive precautions to prevent the harm. A splitting rule (rough comparative negligence) may fail if, for example, A's precaution costs exceed one-half of C’s damages or if A guesses that B will take precautions while B guesses that A will do so. Holding both A and B liable will not guarantee success because, again, each may guess that the other will act; moreover, the prospect of double recovery may have hazardous effects on C’s behavior. A rule that picks A (or B) as the better accident avoider and holds only him liable for any damages suffered by C is also flawed. If B (or A) turns out to be the better avoider and the parties cannot easily bargain with one another, then all hope of optimal deterrence is lost.

But what if A knows he will be held liable and B knows he will be handled according to the laws of heaven? When B is a believer, the rule is quite elegant. A and B are deterred (in different ways) while C is not overcompensated. Of course, A may do nothing, hoping that B will take precautions. But the chances are that A will be a bit fearful that he will be paired with a nonbeliever—rare as such persons might be in a given society. While B will likely expect that A, who faces full earthly liability, will take precautions, supernatural penalties are placed on B if he fails to take precautions whether or not C is injured.128

128. The system suggested thus mixes “upfront” and “outcome” approaches. Our tort system is normally outcome-oriented in that wrongdoers (like B) may have to pay all of the damages a victim suffers. Sometimes there is no damage and, therefore, no liability; but sometimes damages are great and the tortfeasor pays enormous sums. On average a potential tortfeasor is faced with the average damage he will impose and is led to compare this cost with the benefit to him of the activity that he wishes to undertake. An upfront system is more immediately probabilistic but no different in spirit. A negligent actor (or even a nonnegligent one in an upfront strict liability system) can be made to pay the expected value of the harm he imposes whether or not actual damages are greater or less than this upfront determination. Over the course of many events, the two
This expedition into a tiny corner of postbiblical Jewish law demonstrates, I think, that the uniformity-variety theme is richer when one explores the evolution and traditions of the system as opposed to its earlier texts. Nevertheless, because we have little material on the evolution of most primitive legal systems, the discussion in this Article returns to a comparison of early codifications of different legal systems.

D. Mongolian Customary Law

The earliest Mongolian codes contain many rules regarding class distinctions, taxes, and family law, and few concerning torts and contracts. Later material and traditions collected by conquerors and scholars do, however, contain many tort, contract, and property rules. In many cases, the rules vary little approaches yield equal payments. Indeed, payments under an upfront approach could be put in a fund and used to pay real victims. The point in the text is, thus, that the mystical liability placed on $B$ is upfront in design so that even if $B$ guesses that $A$ will take precautions, some deterrence remains.

129. Mongolian tribes were nomadic cattle breeders and occasional farmers. The high point of Mongolian military and political power came in the thirteenth century under the leadership of Chingiz Khan and his descendants. V. Riasanovsky, Customary Law of the Mongol Tribes 5-17 (1929). China ruled much of Mongolia from 1758 until 1911. Inner Mongolia is still a part of China. In 1924, Outer Mongolia proclaimed a People's Republic. Id. at 17. The extent to which tribal customs concerning tort, contract, and property law issues, as opposed to traditional crimes, have been suppressed under Soviet control is not clear. See Feldbrugge, Criminal Law and Traditional Society: The Role of Soviet Law in the Integration of Non-Slavic Peoples, 3 Rev. of Socialist Law 3 (1977).

There are four major sources of primitive, or prerevolutionary, Mongolian law. The first written code was the Yasa, adopted by Chingiz Khan in 1229. It has, unfortunately, not survived and is known only by descriptions from ancient historians and explorers. See V. Riasanovsky, supra, at 20-21. A second source of law is the Mongol-Oirat Regulations of 1640. These regulated all of what is now Outer Mongolia during the seventeenth century. Id. at 30. The third source is the Khalkha-Djirom, a code of customary law from Northern Mongolia. The central portion of the Code was adopted in 1709. Id. at 39-40. This Code was not available to foreign scholars until 1914 when Russian explorers made a copy of it. The final source of law consists of the regulations of the Chinese Board of Foreign Affairs. These regulations, codified in 1789, were based primarily on the customary laws of the Mongolian tribes. Id. at 52.

130. The Code of the Yuan Dynasty of 1320, for example, contains sections dealing with the ranks of ministers, finances, war, and marriage, but not with torts or contracts. V. Riasanovsky, supra note 129, at 24.

131. Id. at 34, 101. The Mongol-Oirat Regulations of 1640 and the Regulations of the Chinese Board of Foreign Affairs (1789) both contain many rules relating to private law. Many customary practices were codified by the Chinese Board of Foreign Affairs in 1789. The codification was based primarily on prevailing Mongolian customary law which was, of course, of much older origin. Id. at 101, 109.
among the various tribes. And inasmuch as virtually all the peoples in the part of the world we now call Siberia and Mongolia have been herdsmen and hunters, rather than farmers and manufacturers, it is not surprising that the various tribal customs deal repeatedly with similar questions. A great deal of these customary laws deal with criminal, family, and immigration law matters. Although it is arguable that many of these provisions resemble our own when social organization so requires and vary otherwise, I continue to focus the discussion on materials concerning strict liability and negligence.

With few exceptions, Mongolian tribal laws do not let losses lie where they fall. Minors up to the age of eight are free of responsibility in at least one tribe, and a fenceowner is not liable if someone happens to injure himself against the fence. There are other such examples but by and large, as we will see presently, splitting rules prevail, and clearly negligent acts are treated almost as harshly as crimes. Examples of uniformity and variety are thus especially interesting in Mongolian law because splitting—which was a curiosity in other legal systems—dominates the legal terrain of Mongolian law.

These splitting rules impose liability on many nonnegligent and even, perhaps, on some negligent causal agents. The general average contribution rule of admiralty law is perhaps the construct most similar to these splitting rules. At the other end of the tort spectrum, an intentional wrongdoer, such as one

132. The rule comes from the Buriats, a large Mongol tribe living in Eastern Siberia. Id. at 187. The Chinese Board of Foreign Affairs Regulations held similarly that a child under ten who commits a theft is not responsible. Id. at 118.

The sources of Buriat law differ from those of the laws of the Mongolian tribes living in Inner or Outer Mongolia because the Buriats have been in Siberia since the time of Chingiz Khan. C. Bawden, THE MODERN HISTORY OF MONGOLIA 1 (1988). Old Russian law is thought to have had a minor but significant influence on Buriat law, but it played no part in the development of the law in Inner or Outer Mongolia. V. Riasanovsky, supra note 129 at 59-60.

133. V. Riasanovsky, supra note 129, at 187.

134. For example, the Buriats divide the burden of losses when damage is "unintentional." Id. at 187. This rule may split damages for negligent behavior since unintentional damage may sometimes be negligent. Although such a rule may under-deter negligent acts, it is possible that this sort of rule greatly diminishes litigation costs, for negligence may be more difficult to establish than intention. Moreover, the potential for partial liability may alone be a significant and sufficient deterrent if precautionary steps are relatively inexpensive.

135. See supra notes 45-48 and accompanying text.
who insults, spits, throws mud, robs, or misappropriates, is punished rather severely. Finally, simple acts of negligence incur single-damage liability much as one would expect. It is difficult, however, to generalize about the treatment of the accidental killing or maiming of another person. There is little, if any, of the talionic spirit in these laws. But is it multiple, full, or partial liability when an owner of cattle must pay "nine animals and a valuable thing" when his cattle kill a nobleman? The question defies any answer and mocks our own infatuation with determining the value of lost life and pain and suffering. It is, I suppose, possible that an informed answer to this question would undercut the uniformity-variety thesis. But there is, for instance, no reason to think that intentional wrongdoers are regarded as less liable or blameworthy than unintentional but negligent tortfeasors. The vignettes and rules concerning personal injury are probably best excluded from an investigation of the strict liability versus negligence issue in these tribal laws. While these rules regarding personal injury do display a preference for clear rules that require little litigation, they neither support nor contradict the thesis that splitting, or sharing, is the hallmark of these legal systems.

Perhaps the clearest example of the requirement in Mongolian tribal law that negligent actors pay and nonnegligent split, as in Exodus 21:33 and 21:35, is found in the customary laws of the Buriats, an eastern Mongolian tribe. If disease spreads from A's cattle to B's, A pays half the damages. But if A has not previously reported the outbreak of contagious disease in his herd to the authorities, then A is fully liable to B. This rule, that antisocial, negligent actors pay and nonnegligent ones split, is, however, neither neat nor uniform in Mongolian tribal law. Here, the variety, or inconsistency, is found at times within

136. For the treatment of such tortfeasors among the Kalmucks, a Mongol tribe that originated in Western Mongolia and migrated first to Tibet and then to the steppes of the Lower Volga, see V. Riasanovsky, supra note 129, at 244-45; see also id. at 281-83 (outlining various whippings and multiple payments).
137. Thus, among the Buriats, one who "in joking frightens a nervous man" is liable for single damages. Id. at 187. For a possible exception, see supra note 134.
138. See V. Riasanovsky, supra note 129, at 89.
139. See supra notes 92-102 and accompanying text.
140. V. Riasanovsky, supra note 129, at 177.
141. Id. at 158, 177.
the system itself, but still within the very range in which variety will not be harmful.

Some tribes are more insistent on splitting than others, but all split in some situations. Thus, if A’s cattle stray into B’s land which is properly fenced, A must pay B’s damages. Yet if the fence is substandard, one tribe, the Horins, held the owner of the cattle not responsible, while another, the Selenguis, held him liable for one-half the damages.142 If, on the other hand, a sharp piece of B’s fence injured A’s cattle, the Horins held B liable for half of A’s damages. The Horins’ system seems more intent on redistribution away from substandard fenceowners than on splitting, because when cattle enter a badly fenced cornfield and died from overeating, the Selenguis provide for a split rule in both directions, while the Horins hold the fenceowner liable for all damages.143

Still different splitting rules govern other nonnegligent situations. If C hires D to sharpen a knife and D cuts himself, C pays two-thirds of the damages.144 If E asks F for a ride on his horse or in his cart and F injures himself during the journey, E pays two-thirds.145 If E is injured, F pays nothing.146 An accidental firestarter is liable for a spreading fire, yet a hunter who accidentally shoots another hunter must pay only half of the damages.147 There are many more such inconsistent examples in these laws, but more often than not a very negligent or intentionally harmful actor pays multiple damages, a negligent actor, such as one who fails to close a gate,148 pays single damages, and a nonnegligent causal agent pays one-third, one-half, two-thirds, or all of the damages a victim suffers.149

142. Id. at 183.
143. Id.
144. V. RIASANOVSKY, CUSTOMARY LAWS OF THE NOMADIC TRIBES OF SIBERIA 70 (1965).
145. Id. at 75.
146. The idea behind this may be that any recovery by E would, in the future, deter F from offering E a ride.
147. V. RIASANOVSKY, supra note 129, at 186.
148. Id. at 188.
149. One who digs a pit to catch a fox must pay for all the damages suffered when another person’s animal falls in the pit. Id. at 187-88.

As the reader might have guessed, Mongolian tribal law occasionally opts for splits but is otherwise much like other legal systems in its treatment of bailments. The gratuitous bailee either pays all or one-half of any losses but does not pay for losses of bailed cattle. V. RIASANOVSKY, supra note 129, at 192. The notion may be that one does not lose
At least one tribe takes the uniformity of variety, as it were, so far as to combine noxal surrender\textsuperscript{150} with splitting: Among the silver or like items (even to a thief) except with a bit of carelessness, whereas cattle are more difficult to smother with attention. The Southern Buriats specify that this bailee who has lost cattle entrusted to him must help search for the lost animals. \textit{Id}. In this customary law, borrowers pay for lost items, and pay fivefold if the goods are lost or stolen when he has taken them on a journey. \textit{Id}. Finally, among the Kirghiz, "[i]f two or three men, pooling their capital, send anyone to trade in another place and thieves take his merchandise away from him and he takes an oath on it, then he is not responsible." V. Riasanovsky, \textit{supra} note 144, at 14. If it were not "in another place" the law would almost surely expect some evidence or identification of thieves.

Before concluding this discussion of bailment law, it is useful to note that we have seen some bailment rules (like those in Mongolian law) that are much like the tort rules of the same legal system and some that are quite different, thus reflecting variety within a system. There is, of course, fair variety among the bailment rules of different systems. This variety extends to American law which uses a number of confusing standards against which to measure the behavior and liability of bailees. With these standards, the law hovers about a negligence rule although there is one cell of strict liability for some misdeliveries. \textit{See} R. Brown, \textit{The Law of Personal Property} 525-69 (W. Raushenbush ed. 1975).

In the bailment law of ancient India, a depositary, or gratuitous bailee in the jargon of the common law, was required to exercise "diligentia"; if not, he was liable for ensuing damage or loss. 1 L. Sternbach, \textit{Juridical Studies in Ancient Indian Laws} 525-44 (1964). And in the event of damage or theft, there was a presumption that diligentia had not been exercised. There were, however, two exceptions to this presumption. First, the bailee was not liable for losses caused by acts of God or princes. Losses from fire, flood, or foreign invaders thus fell on the bailor. Such losses, of course, would have been just as likely to occur in the bailor's possession as in the bailee's, so the rule essentially provides that the bailment does not include an insurance policy. Second, if goods belonging to the depositary were stolen along with the bailed property, then the bailee was not liable because, as in the previous case, diligentia would be assumed. \textit{Id}. at 54-56. It will be recalled that this was precisely the evidentiary rule found in the Laws of Eshnunna. Interestingly enough, ancient Indian law, much like American law, distinguishes among ordinary negligence, gross negligence, and fraud. Fraud in this setting means obvious selfishness, as when the depositary cares well for his own goods but treats the deposited goods negligently. In this case, when there is a loss the bailee must pay the value of the lost object plus interest.

Finally, Oliver Wendell Holmes reported that early English and German law held bailees strictly liable, except perhaps for losses through acts of God or public enemies. O.W. Holmes, \textit{The Common Law} 175 (1881). The variety of bailment rules may thus be complete in the sense that it stretches from bare negligence to strict liability. That Holmes was able to advance the argument that early substantive law was guided by procedural rules under which only bailees could sue third parties such as thieves does not contradict the uniformity-variety thesis. These procedural and substantive rules might have differed where the law mattered little; all systems collected from negligent bailees.

On the other hand, as emphasized in note 108 \textit{supra}, more work needs to be done to explain the variety within some systems (such as the bailment rules in American law), for it is arguable that consistency (as found in Mongolian tribal law) should prevail unless there is a reason for variety. I suspect that some other insights are needed in order to better understand the concerns and contracts of bailors and bailees.

150. The expression refers to the Roman law rule (\textit{see supra} text accompanying note 113) whereby the owner of an animal must either make compensation for the dam-
Kirghiz of Siberia, if A's dog has not yet attacked a person three times and it bites someone or tears his clothing, then A can limit his liability by giving up his dog.\textsuperscript{151} It is clear, then, that while negligent actors must pay, nonnegligent actors must normally pay or split in a variety of ways, depending on the circumstances. The details of these tribal systems are thus very different from our own and from other "primitive" legal systems. But at a different level of understanding, the systems are remarkably uniform; the details vary only within the predictable ranges.\textsuperscript{152}

**Conclusion**

The uniformity-variety thesis is not limited to the question of tort liability and it is surely not limited to primitive law. The discussion in this Article has primarily focused on primitive legal systems because in these settings there is less need to debate
the relevance of borrowing among systems, and because the behavioral importance of legal rules is sometimes clearer when far removed from our own culture. Moreover, it is remarkable, I think, to learn that many of the problems we wrestle with in the law today were considered with subtlety and imagination equal to our own thousands of years ago and in civilizations thought to be quite primitive.

The primitive legal systems that I have studied contain other material of comparative and behavioral interest that I have not studied with care. It is unfortunate that much of this material concerns topics that are not found in more than one or two of these older systems. Even so, the laws and practices recorded in this material can be usefully compared to modern legal rules. Thus, Mongolian law provides for quantum meruit for workmen who do not abandon a project "arbitrarily," while Hittite law calls for no recovery, or even a penalty, for the partial completion of a craftsman's contract. Hittite law also calls for a filing system for real property and for some lost objects. Mongolian law provides for a central recording system for credit transactions and for the forfeiture of interest by a creditor who fails to "file," while the Code of Hammurabi appears to build on the idea that a security interest is a hostage to ensure contractual performance. The Code of Hammurabi also provides for expectancy damages when a contract is breached and for

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153. My study of the conflict involving the innocent possession of stolen property, Levmore, supra note 7, also supports the uniformity-variety thesis but considers it in a different context, where the rule does matter but where reasonable people could disagree as to the identity of the best rule. I have also done a comparative study of rules governing rescue. See Levmore, supra note 80.

154. V. Riasanovsky, supra note 129, at 193.

155. Section 145 reads: "If anyone builds a cattle stable, he shall give six shekels of silver. [If] he stops [to build(?)], he shall forfeit his payment." Hittite Laws, supra note 12, at 40. If "he shall give" refers to the client of the builder, then the rule simply fixes the price of a cattle stable (at least in the absence of an explicit agreement to the contrary) and indicates that noncompletion leads to nonpayment. On the other hand, "he" may refer to the builder, in which case the rule requires the craftsman to post a bond that he must forfeit if he fails to complete the project. We are not told whether the builder will be paid for materials.

156. Id. at 162-63.

157. V. Riasanovsky, supra note 129, at 76.

158. See 1 G. Driver & J. Miles, supra note 12, at 216.

159. 237. If a man has hired boatman and boat, and laden her with corn, wool, oil, dates, or any other kind of freight, and if that boatman is careless and
monitoring-sensitive penalties in agency relationships. Hittite, Jewish, Roman, and Mongolian law each provides for a different degree of vicarious liability. With respect to every one of these topics, our own legal system provides comparable but different rules. Moreover, a behavioral analysis of the roles played by these rules would show, I think, that variety is found where it is to be expected. Comparative studies, among both primitive and modern legal systems, may in this way be a most profitable route to understanding the significance of our own laws.

sinks the boat, and her cargo is lost; then the boatman shall replace the boat he has sunk and all her cargo that he has lost.

*The Hammurabi Code, supra* note 53, at 66.

160. If a retailer has received silver from a trader, and disputes with the trader; then the trader shall call the retailer before God and the elders, regarding the silver received; and the retailer shall restore three-fold the silver he has received.

106. If a trader has wronged a retailer, and the retailer has repaid to the trader all that the trader gave him, and the trader contests what has been given to him; then that retailer shall call the trader before God and the elders; and because the trader has contested with his retailer, he shall pay to the retailer six-fold of all that he has received.

*Id.* at 41-42.

Driver and Miles interpret the trader-retailer relationship as that of a merchant and his agent. They consider it difficult to understand why fraud on the part of a merchant is punished by a fine twice that of the fine for fraud by his agent. They suggest that perhaps the lawmaker regarded the bringing of a false claim twice as reprehensible as denying a just claim. 1 G. Driver & J. Miles, *supra* note 12, at 197.

Perhaps the different penalties can also be explained as an attempt to encourage the merchant to choose trustworthy agents. The merchant is given more incentive to choose honest agents if he can only receive three-fold, rather than six-fold, damages. When the merchant is more careful in choosing his agents, buyers may also be protected. This incentive to screen agents is very similar to that created by the American rules concerning entrustment. *See Levmore, supra* note 6.

161. *Compare Hittite Laws, supra* note 12, § 99 (liability on owner for slave’s negligence but can give up slave instead of paying full damages) with 2 B. Cohen, *supra* note 72, at 599 (Jewish law generally does not hold principal responsible for agent’s crimes while Roman law allowed suits against one who, with lawful power of command, ordered an agent to do a wrong) and V. Riasanovsky, *supra* note 129, at 189 (“For any loss incurred by a man sent on an errand to a distant place the one who sent him is responsible.”).

162. In the case of vicarious liability, for example, there are behavioral arguments for and against an expansive liability rule. The more a principal is held liable, the more monitoring or other safety precautions may take place. But, on the other hand, increased liability on the principal involves a subtle move toward strict liability, and the cost of such a move may be precisely what motivated the society’s adoption of a general negligence rule in the first place. In short, reasonable people can disagree over the best “level” of vicarious liability and, in fact, we find variety in the levels of such liability in different legal systems.