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For A Bramwell Revival

by RICHARD A. EPSTEIN*

I. One of a Great Breed

All too often the nineteenth century is a victim of oversimplification if not mischaracterization at the hands of its twentieth century critics. Starting with the realist movement, there has been a pervasive belief that prior to our own times judges were naive about their social roles and about the necessity of appealing to broad first principles to decide concrete cases, whether they wished to or not. Instead, these judges were either transfixed by some naive Blackstonian belief that law was “found” but not “made” or relied on some “mechanical” rule to decide cases that cried out for some more rigorous defense as a matter of policy.1

In my view, this caricature of the nineteenth century rings false to anyone who has spent time reading the original opinions of the great justices, both English and American, who graced the common law. While it is certainly open to the modern critics of nineteenth century to disagree with the results reached by earlier judges, and the reasons that they gave for them, it is, I think, a serious misreading of history to assume that these judges were unable to formulate the substantive grounds for their decisions in clear and powerful language. Often, these judges were motivated by philosophies that are out of fashion today, and, broadly speaking, they observed strict limits on the judicial function that might seem a bit too fastidious in our more freewheeling times.2 It is all too often a pity that nineteenth century thinkers are seen chiefly through the eyes of the twentieth century detractors, on and off the bench. But there is much to learn from the greatest judges of the nineteenth century—Parke, Bowen, Blackburn, Jessel, and Herschell in England; Kent, Shaw, Holmes (of Massachusetts), Cooley, and Mitchell in the United States—just by reading them.

In this lofty company, one judge who stands out today is Baron George Bramwell, the outlines of whose career I have summarized in my

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1. For statements of this sort, see Roscoe Pound, Mechanical Jurisprudence, 8 COLUM. L. REV. 605 (1908); JEROME FRANK, LAW AND THE MODERN MIND (1930).

2. For one of countless examples of the conflict, see e.g., MacDonald v. General Hospital, 120 Mass. 432 (1876) with the President and Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942) where the former defends and the latter attacks the charitable immunity of hospitals in the provision of care. The later opinion is certainly more ingenious and thorough than the former, but it is hardly correct for that reason.
brief introduction to this symposium. Bramwell is unusual even for the laissez faire judges of his own time because of his coherent and unstinting devotion to a set of broad political principles that animated his day-to-day legal work. While some of his contemporaries, like Blackburn, may have had a broader historical sweep of subject matter, and others like Bowen, a keener sense of the wise aphorism, few, if any, had Bramwell’s strong sense of the theoretical foundation of legal rules, or his ability to make a forthright statement of his position as an integral part of his judicial work. The very clarity and power of his sometimes incautious expression made him the most convenient judicial foil of reformers and critics of a latter age.

As was the case with Thomas Hobbes, one could disagree with Bramwell, but one could never doubt where he stood. In their disagreement, the critics were often dismissive of Bramwell, or at least of the philosophical foundations of his world view. Sir William Holdsworth wrote of him that “He never realized that the simple application of the laissez faire principle gave no solution to the social and economic problems of the new industrial age.” But why? Writing a half a century later, Patrick Atiyah was quite eager to condemn Bramwell as “something of a fanatic” for his devotion to the principle of freedom of contract, while taking evident pleasure in attacking Bramwell for his naiveté about the major social and political questions of our time. For a long time, these slights were gratuitous. The many years between Bramwell’s death and Margaret Thatcher’s rise to power did nothing to reverse what Bramwell regarded as a dangerous slide toward collectivism. It was easy for the leading academic lawyers of subsequent generations to establish a new mainstream that left Bramwell’s thought stranded high and dry. There was little reason to attack Bramwell, because there was no one who really cared to come to his defense. It was quite enough to point out the sins of his thought to knowing nods of approval from bench and bar alike.

To be sure, Bramwell’s intellectual position was far from invulnerable and, at times and in certain ways, his defense of laissez faire was too extreme. Later, I shall argue that his major weakness stemmed from his failure to systematically incorporate into his world view a response to problems of collective action and public goods—for indeed, the correct response to these issues is not easily meshed with thoroughgoing laissez

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5. “[T]he state of a man’s mind is as much a fact as the state of his digest. It is true that it is very difficult to prove what the state of a man’s mind at a particular time is, but if it can be ascertained it is as much a fact as anything else.” 29 Ch. 459 (1885)
7. PATRICK ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 377 (hereafter cited as “ATIYAH, RISE AND FALL”)
faire principles of private property and free contract. But, Bramwell's shortcomings pale into insignificance relative to those of his critics, who remain blissfully unaware of the weaknesses in their own rival conceptions of a sound legal order. On balance, he should be remembered for his distinctive strengths and not berated for his failings. He deserves his place with the greatest English judges of his own time, which is to say with the greatest common law judges of all time.

Can anything be done to revive the reputation of one of the giants of the bench? I hope that it can. Accordingly, my purpose in this article is to offer some modest defense of Bramwell's substantive legal positions on many issues, and then expose what I take to be the theoretical weakness of his position which, in part, accounts for some of the unsatisfactory portions of his work. I propose to achieve this goal by looking at his judicial output, and to some extent, his nonjudicial writings, by field of inquiry. Bramwell was on the bench for over 35 years and left his mark on most important areas of law. Rather than follow his work chronologically, it is instructive to look at it thematically.

The first section examines Bramwell's view on the freedom of contract, and defends him against the charge that he was an uncritical devotee of the principle and blind to its limitations. As part of that defense, I shall also respond to the common charge of his critics that he ignored the fundamental background social inequalities that in their view decisively undermine the moral authority and economic use of contractual freedom. In doing so, I shall examine Bramwell's interesting views of the relationship between contract and textual interpretation. Finally, I shall cast a few stones at his critics, and indicate why their views of contract law turn out to be far less sophisticated than his.

The second section deals with Bramwell's treatment of the law of quasi contract, especially as it relates to principles of fraud and mistake and to the law of contract generally. Once again, I examine both his judicial opinions and his nonjudicial writings, and defend him against the charge this his devotion to freedom of contract blinded him to the important role that quasi-contract played in the overall scheme of the law.

The third section switches focus to tort. The examination of tort begins with a defense of Bramwell's view of strict liability in tort. It then continues with a discussion of his views on assumption of risk, which link up closely with his views on contract and legislation generally. Whatever the weaknesses in the details of Bramwell's exposition, he understood the main point so often forgotten today: that contract should trump tort, not the other way around.

The fourth section of the project concerns Bramwell's response to collective action, coordination, and public goods problems. It is here that his performance is most uneven. At one level, his theoretical grasp of the issue, as revealed in his remarkable decision in Bamford v. Turnley,8 was

unrivaled for his time, not only for lawyers but economists as well. Yet, at one level, he unnecessarily limited his analysis to the law of nuisance, and he did not see the broad range of issues to which it could be usefully applied.

The fifth section compares Bramwell’s view with the responsible modern critique of laissez faire, which seeks to meld a use of market institutions with responsible forms of government redistribution of income or wealth, and argues that Bramwell’s pessimism on this question has been born out by the failure of modern reforms. The Liberty and Property Defence League may not have had all the answers to its critics, but much of its program rests on a core of good sense that we would well be advised to follow today.

II. Contracts

A. The Sanctity of Contract in a World of Background Inequalities.

The bedrock assumption in Bramwell’s world view was that voluntary arrangements between individuals should be enforced by the law without regard to the substantive terms of the agreement. Individuals, Bramwell never tired of saying, knew their own interests better than anyone else and could be counted on to protect those interests far better than any self-anointed or publicly-appointed guardian. The office of the state was to protect the spheres of individual liberty and thereafter to leave people alone to do what they choose with what they own. When ordinary commercial engagements turn out poorly, the parties must live with whatever terms they set for themselves. The systematic gains from a regime of strong contracts should not be undermined by judicial sympathy for a loser in his time of need.

The sanctity of the bargain was thus the pole star in Bramwell’s judicial heavens. He rigorously applied this principle to all persons without regard to fear or favor. In the early stages of his career, the insistence that all persons were alike before the law was seen as a progressive element. Prior political theory had implied that legal advantage might rightly be given to persons who were favored with fortune and power. After all, one of the most divisive issues of nineteenth century English politics was the reform acts, which by degrees slowly took England to a position of universal suffrage by the end of World War I. That outcome would have been quite unthinkable when Queen Victoria ascended the throne some years before. But Bramwell had no truck with any notions of that sort. For him, all contracts were alike and of equal dignity: if a rich person made an improvident bargain, he was not disposed to twist the law to let him out of it. The position of blind and equal justice was for him an evident antidote to privilege and power. But as the nineteenth century drew to a close, the dominant view was that the law had to take into account differences in background conditions and social class in dealing with the ravages of
urbanization and industrialization. Now that claims of established privilege had been rooted out, in part by people like Bramwell himself, the newer agenda wanted to provide small merchants and individual workers some offsetting legal advantages against the newly emergent industrial behemoths.

Bramwell’s commitment to this neutral view of contract law has earned him almost universal academic condemnation. Professor Ramasastry quotes the historian Daniel Duman, whose critique of Bramwell assumes familiar lines: “For Bosanquet and Bramwell, as much as for Blackstone, the ideal was equal justice for all. They failed to realize, though not out of malice, that inherent social inequality largely nullified the concept of equality before the law.”9 Abraham pursues exactly the same line, for he thinks that ignoring the disparate background social positions of the contracting parties generates an empty and formal body of contract law.

This Whig conception of liberty as a function of property and expressed in contract was both formal and negative... Although the point cannot be argued here, it is safe to say that any contract-based conception of liberty must remain formal. Ignoring background inequalities among the contracting parties is to ignore what probably animates them and, in regard to the public sphere, constitutes a regression from the Jeffersonian position.10

Later on, he accuses Bramwell of an implicit class by bias for his (that is Bramwell’s) refusal to recognize the limitations on contractual neutrality. “Now, it is characteristic of ruling classes that they identify their own interests as the general interest and the interest of other classes as narrow self-interest.”11

Professor Abraham (whose views on this point are not shared by Professor Ramasastry) thus treats the sins of Bramwell’s formalism as more or less beyond argument, which is a pity because they make Bramwell suffer from a bum rap. His insistence on formal conceptions of contractual justice was no covert effort to give the edge to his own side. In fact, he had no side and he had no friends, save his own principles—which could gore any ox, even his own. Nor did Bramwell’s principles call for “formalism” for its own sake, independent of the overall good

9. DANIEL DUMAN, THE JUDICIAL BENCH IN ENGLAND 1727-1875, 104 (1982). Ramasastry endorses that position. “As Duman points out, if one looks at freedom of contract in light of the inherent social disparities that existed, then the whole notion of legal equality rings hollow.” RAMASASTRY at 330. Yet her agreement on this point should not be taken as an excessively critical view of Bramwell, for she also notes that “freedom of contract may have been constraining with regard to the substantive outcomes of his cases while simultaneously serving overall as a progressive and liberating force in the reform of the common law as a process.” RAMASASTRY at 330. She thus parts company with the usual monolithic condemnation of his work. “Bramwell’s life and career take on a complexity that is noticeably absent from the conventional static and unified account of his work.” RAMASASTRY at 329 I agree with her estimation that as to the long term benefits of freedom of contract as an instrument of social reform, but do not think that there is some implicit price that has to be paid in the treatment of individual cases.

10. ABRAHAM at 315-318.

11. Id. at 39.
they produced for society at large. Bramwell’s view was that social advancement did not come from large scale political movements that sought to alter the terms of trade or to redistribute the spoils of the productive labor. Rather, progress came from hard work and patient advancement, where contract was the major instrument which allowed all persons to pursue their own lives in harmony with the plans of other individuals.

So understood, Bramwell’s position easily weathers the criticisms brought to bear against it. Begin with the first charge against his formal system: bargains between unequals must always work to the disadvantage of the weaker, such that legal intervention is required to redress the resulting inequality. To place this charge in perspective, it is critical to note that Bramwell, like all good libertarians, accepts defenses to contractual enforcement that are based on duress, which covers both the threat or use of force and the refusal to honor prior contractual obligations. He also protects infants and insane persons against the ostensible contracts that they sign. So, it is not his position that all contracts have to be enforced, and the ones that he filters out of the system are those that no one should wish to enforce—namely agreements from which one side wins and the other side loses. Yet here too, all is without fear or favor: the rich can be victims of duress as well as its practitioners. No a priori conclusions are allowed to determine who has the whip hand in any transaction.

The question, however, is whether the win/lose outcomes avoided by the conventional contract defenses are plausible renditions of the world whenever the only objection to a contractual union is the difference in wealth or social position of the two parties to the contract. To restate Bramwell’s position in somewhat more modern terms, the difference in wealth or social position of the two parties to the contract do not prevent agreements between the parties from being win/win arrangements, judged, of course, at the time of contract formation, not at the time of disagreement. Let us suppose that A has wealth equal to 1 and B has wealth equal to 1000. B now proposes a contract to A in a setting in which force, deception, and incompetence are not in evidence. Is there any reason why A should accept that agreement if his wealth is reduced below 1? Any reason to believe that he would? A has the capacity to just say no, and will do that out of his own self-interest no matter whether B has wealth equal to 1 or 1,000. So long as A cannot be forced by B to any position below his prior state of affairs, where is the “exploitation” of social position that calls forth confident condemnation of this voluntary transaction? Never lose sight of the main point: unless people believed that there were mutual gains from ordinary contracts, why would they make them, and why would the law choose to enforce their promises? One could try to appeal to some moral theory of promising, but that theory would ring hollow in a world where no one could see the point of the practice. Ordinary morality sets its stamp of approval on promising—and, for that matter, chooses to condemn the enforcement of promises that are obtained by fraud and

12. As it does in Patrick Atiyah’s little volume on contact theory, see infra at note 23.
duress or from incompetents and the like—because it perceives the gains from trade that typically emerge from voluntary agreements. Simply showing a disparity in wealth does nothing to negate the expectation of joint improvement from exchange. If joint gain is what drives the social acceptance of contract among equals, then why not among those who are not equals? Contract is thus the road to advancement for the poor, a source of upward mobility. It is pointless and mischievous to close it down out of a misguided sympathy for their position. If only the advocates of the minimum wage understood the damage that they wreak today on the very persons they wish to help!

A more sophisticated version of this argument could stress a second point, one not usually raised by Bramwell’s critics, but which deserves some brief comment nonetheless. Here, the argument is that while both sides share in the gain from contract (thereby conceding that the strong charge of exploitation is false), nonetheless the division of the gains is unfair in that the rich person will get the lion’s share of the benefit. Once again, the criticism fails. To begin with, the charge is really quite benign if the rich person puts ten times as much into the deal as the poor person, for then an equal rate of return on investment can be obtained only if he retains a larger percentage of the surplus, and if the bargain so provides, who is in a position to object? But there is nothing which says that B will do better on the division of surplus than A: the reverse could easily be true. All too often, it is easy to misperceive who has the “power” in negotiations. If B has more wealth and more at stake, then he has more to lose. A may lose a day’s wages in the field, but B could see his entire crop rot for want of a timely harvest. Who has the leverage here? Hard to say without a detailed knowledge of the contractual strategies and business alternatives open to each: but that is just the point, for no facile condemnation of contracts on this ground works either. The great advantage of a regime of contract is that we are more likely to see the crops harvested than rot. Bramwell’s instinct is sound when he writes, as Abraham quotes: be more concerned with producing “the largest pile,” and not with its distribution.\(^{13}\) To many this sounds harsh, but it is not. The pile is not just given, but has to be made. You cannot redistribute what you did not produce.

**B. Contract and Regulation.**

Bramwell’s general views on the question of contract were well in accord with the dominant political sentiments of his times. The difficulties that both he and his colleagues on the bench faced had to do with the interaction between contract and regulation, and with the clash between a principle in which he devoutly believed and a set of statutory rules to which he took the strongest possible exception. On questions like this, a

\(^{13}\) Abraham at 62. For further discussion see infra at 300, quoting Bramwell, as attributed to him by Fairfield, in his biography of Bramwell completed shortly after Bramwell’s death. CHARLES FAIRFIELD, SOME ACCOUNT OF GEORGE WILLIAM WILSHERE BARON BRAMWELL OF HEVER AND HIS OPINIONS 252 (1898).
charge of fanaticism, such as the lodged against Bramwell, surely has room to operate. It is always tempting to ignore the statute and to enforce the contract, as if Parliament never had the last say on anything.

Yet oddly enough, it is on the question of the interaction between contracts and regulation that one often saw Bramwell at his best, even in those cases where he held that the contractual provision survived the superimposed scheme of statutory regulation. Two cases, decided about a quarter a century apart, show something of his reasoning.

In Archer v. James,14 the plaintiff was an artisan who constructed heels for 7d (pence) per dozen. As part of his contract, the defendant supplied the plaintiff with certain equipment—a frame, machine, stands, windings, and the like—at a figure of 3s 9d per week (or 45 pence), which were deducted from the money that was otherwise payable to the plaintiff. The question was whether this contractual arrangement was in violation of the so-called Truck Acts—with “truck” as in “barter or otherwise exchange”—which required the employer to pay the worker “lawful money for all their lawful wages,” under a sanction of treble damages for that portion of the wages that were not so paid. The original statute identified the abuse associated with payment in kind as one that “in the occupations of clothmaking, the labourers thereof have been driven to take great part of their wages in pins, girdles, and other unprofitable wares, under such price that it did not extend to the extent of their lawful wages.” The obvious abuse against which this statute could be addressed is a case where the employer originally promises wages in cash and then substitutes as payment the very produce of the labor, produce which to the laborer has a value equal to only a fraction of the cash forgone. The question here was whether the prohibition of the statute extended to the set up charges.

In the Exchequer the case divided two to two, with Pollock, C.B., joining Bramwell in favor of upholding the contract and Keating, J., and Byles, J., taking the opposite position. The issue here is technical and close: it could surely be argued with Keating and Byles that any benefit to the laborer was a substitute for cash and therefore was a payment in wages. In effect, the employer promised to pay 7d per dozen pins and then reduced these wages by offering the equipment for 3s 9d, as the statute prohibited.

Bramwell took a very different view of the case, and one that merits, at the very least, close attention for it shows a certain level of statutory inventiveness that is not normally associated with conservative judges. But it is hardly the work of any fanatic. He starts with the observation that

[If the words were plain, it would be irrelevant to inquire as to the object or policy of the Legislature—our duty would be simply to declare what we found enacted. But there is a doubt as to the meaning of the language, in order to solve which it is proper to inquire into the probable object and policy of the statute.15]

Hardly a silly position. Bramwell next asked the purposes for which

the Truck Act might have been enacted and notes that, for example, “an employer of labour may engage a man to work for him, with a promise of apparently fair wages, part or all in goods, and then cheat him by giving him inferior goods overcharged.” Alternatively, he may use the system to get the worker into debt in order to exert control over him. But Bramwell sees no nefarious purpose in the current scheme. The laborer is not required to accept inferior goods at an inflated valuation; nor is there any effort to force indebtedness as the laborer is able to work more than the number of hours needed to pay off the total amount of the fixed indebtedness. So, in Bramwell’s view, the wages are not equal to a sum obtained by multiplying the 7d by the hours worked. Wages are that sum less the fixed amount of money paid for the equipment necessary to perform the labor. He then notes that the question of construction of wages is close, but that the Truck Act “ought not to be interpreted loosely, more especially as it makes an infringement of its provisions a crime.”

The economics of the situation certainly entered into Bramwell’s calculations and in a productive way. One way to avoid the Truck Act was to furnish the equipment for free and then to pay a lesser sum—5d was the number put in argument—for each dozen heels made. A quick calculation should make it evident that if the laborer made 22 1/2 dozen, then the net amount received for the work would be the same as 4 1/2d. But, the question is not to find a single output at which the employer and the laborer are indifferent as to the form of payment. It is to identify the best set of incentives that can be used to the advantage of both sides. Here, it is clear that the actual method adopted in the trade is preferable to the alternative method—unquestionably legal—that has been proposed. The key point is that the marginal value of each dozen pins is 7d, not 5d, and only the chosen price schedule, complete with set off, reflects those differences. Thus, the uniform 5d figure leaves the employer at risk that the laborer will slack off and produce a small output and still make a profit, even though he has consumed resources—the set up—that he has not fully paid for. Surely a situation in which he makes one dozen heels and receives a net pay of 5d when the social value of his product (allowing for set up costs) is negative 3s, 2d, is not desirable. (It is not negative 3s, 4d, because of the margin the value of the first dozen equals 7d.)

The distortions in the system are not confined to cases where the laborer works too little; they also apply where the laborer works too much. To be sure, once 22 1/2 dozen heels have been made, the net payments are the same under the two systems, but the marginal incentives are not: the laborer has an incentive to produce more heels at 7d per dozen then he does at 5d per dozen, which is what the chosen compensation formula allows, and for the benefit of both sides. Once the incentives are understood, the choice is clear: a literal reading of the statute creates an odd set of incentives, and counteracts no known abuse. A more expansive reading of the term ‘wages’ avoids the substantive difficulties, but at some

16. Id. at 1006.
cost to strict canons of statutory construction. It is hard to fault Bramwell for choosing that second alternative, especially in a criminal case.

A similar problem about the interaction of statute and contract arises in a case of which both Abraham17 and Ramasastry18 make much: *Manchester, Sheffield & Lincolnshire Railway Company v. H.W. Brown.*19 There, a fishmonger had entered into a contract with the railroad to ship his fish for a one-fifth reduction in price if he waived liability "for any loss or delay in transit or from whatever other cause arising." When the fish were spoiled in transit, he sued for their destruction just as if he had paid the higher price for the coverage. The case would have been easy for all the members of the House of Lords if the only question was whether the fishmonger was bound by his contract at common law. But, the Railway and Canal Traffic Act of 1854 provided that any exemption from liability for loss or damage to goods attributable to "the Neglect or Default" of the company was void unless the provision "shall be adjudged by the Court or Judge before whom any Question relating thereto shall be tried to be just and reasonable. . . ."20 The question was whether this particular waiver satisfied this condition, and a unanimous court held that it had.

What is striking about Bramwell's opinion is his effort to envision a set of circumstances in which the waiver in question might be regarded as unreasonable, and he hits a neat example when he writes:

[1]If, for instance, where a company were entitled to charge £100 for the carriage of a thing they took off 5s. upon the footing of their being exempted from all responsibility, that peradventure a man who had entered into that contract with them might say, 'No, I have discovered that 5s. which you have let me off is not an equivalent, nor anything like an equivalent for the loss which I sustain by your getting rid of your responsibility.'"21

Here, Bramwell foreshadows the modern point that railroads might seek to avoid regulatory price ceilings by giving insufficient reductions for waivers of liability—agreements that shippers will still enter into because they are willing in general to pay more than the established tariff for the shipment.

Baron Bramwell's opinion is, however, not usually remembered for this passage, but more for his stern injunction that the fishmonger had to live by his waiver. But once again, his argument is completely sound. Bramwell's point is that there is no risk of exploitation as in the above example because the railroad offered both modes of shipment, with and without liability. The power to avoid exploitation lay in the acceptance of the general terms. It was only after laying this groundwork that Bramwell

17. ABRAHAM, mss. at 311.
18. RAMASASTRY, mss. at 336-340.
19. 8 A.C. 703 (H.L.E. 1883).
21. *Manchester, Sheffield & Lincolnshire Railway Co. v. Brown*, 8 A.C. at 717, duly quoted by Ramasastry, who, characteristically, does not so much defend his decision, as insist that it be put in the larger perspective of his overall work.
unleashes a characteristic attack on the temerity of the fishmonger.

The argument comes to this: the allowance is so just and reasonable to all fish dealers that it is unjust and unreasonable to each of them. Well, one has heard a great many discussions about free will, but I protest that this is a novelty—I never heard anything like it before—it is the most extraordinary proposition that I ever heard in my life. The assumption that he is obliged to do it because he cannot otherwise compete with his fellow-fishmongers is the most gratuitous one that was ever invented in this world.22

Perhaps we should fault Bramwell for his hyperbole, for certainly worse legal arguments have been made. However, his overall conclusion is undoubtedly correct, even with the statutory requirement of just and reasonable contacts. Suppose that the Railway had removed the waiver option, and told the fishmonger to ship for the full price with the full liability or not at all. Then, howls of protest would erupt if that contract were accepted, and the goods safely delivered. A huffy fishmonger would demand a refund of some portion of the price because he really preferred to take the risk at the lower price, naturally enough, to effectively compete. The blunt truth is that this fishmonger faced the same schedules and the same tariffs as his rivals, and if he cannot compete, it is because his other costs exceed those of this rivals. Why then should he be the darling of the law, relative to others who have managed their affairs better? Allowing recovery here is a straight and undeserved subsidy of free insurance.

C. Turning on Bramwell’s Critics

I shall not go through any of Bramwell’s other contract opinions at this moment and will happily concede that they may be wrong on point of detail. But before leaving the question of contract, it is worth at least a few words to comment on the substantive approach of his critics. It is not enough just to dispose of freedom of contract. Something has to be offered up in its place, and the question is what. Patrick Atiyah, for his part, comes up with the novel suggestion that it would be wise to back off the rule that allows legal enforcement of fully executory contracts.23 After all, the modern theories of detrimental reliance allow the enforcement of promises when consideration and mutuality are lacking, so why not make reliance the linchpin of the law?24 He also notes that cases of moral obligation call for the enforcement of a promise when the plaintiff has provided some service to the defendant for which the plaintiff thereafter agrees to pay.25

Now, I have no desire to dispute these expansions of contractual liability to cover a few marginal cases in which consideration is lacking. But it is just perverse to insist that some form of reliance or return benefit

22. Id. at 719-720.
should be necessary to enforce bargains if the parties prefer executory enforcement. To be sure, there are lots of contract settings in which the parties understand that one side is allowed to "cancel" before the other has begun work. For example, it is all right to cancel a plane reservation, or a doctor's appointment, 24 hours in advance. However, Bramwell would have never made the mistake of confusing a sensible default rule with an inflexible legal command. In some financial markets, the ability to make binding forward contracts is critical to the long term success of the markets. If no one wants, nor needs, some mythical element of "reliance" to make markets in these instruments, why insist otherwise? Atiyah for one never offers any satisfactory explanation of why his poor commercial instincts should receive so exalted a status. And it is not possible to provide one for him.

But it may be said, why worry about these nice points of commercial law: the real concern with background social inequities does not point to future markets. Instead, it points to minimum wage and maximum hour legislation, to protective legislation that exempts trade unions from the ordinary rules of contract and tort, to rent control on residential real estate, to price controls more generally and to fair trade in the international arena. Here is not the place to examine any of these social initiatives in detail, but can anyone think that the bureaucratic tangles, the endless delays, the pompous posturing, the political favoritism, and the stifling of competition that results from this regime does better than Bramwell's traditional injunction that allows people to enter into the bargains they choose amongst the many alternatives available to them? Judged against the shambles of these failed programs, Bramwell is indeed an intellectual giant.

III. Quasi-contract

Further evidence of the ostensible fanaticism of Baron Bramwell derives from his hostility to the law of quasi-contract, most notably in connection with the consumption of goods that are received by mistake. He is chastised for his stubbornness on this point by Professor Ramasastry, who writes that, in Boulton v. Jones26 "Bramwell was willing to ignore completely the potential inequity involved in one party receiving a windfall at the expense of the seller due to the lack of any formal agreement."27

Once again, the charges against Bramwell are false, both insofar as they describe Bramwell's position, and insofar as they imply that he was the odd man out on questions of quasi-contractual liability. As to the first point, the facts of Boulton v. Jones show not the dangers but the strength of Bramwell's position. The case arose when the plaintiff sold and delivered goods to the defendant under circumstances that failed to give notice that he had taken the assignment of the business from one Brocklehurst,

27. RAMASASTRY, mss. at 335.
his former employer, against whom the defendant had a setoff from a prior transaction. The defendant took and used those goods but refused to pay for them, noting that his setoff was useless against the plaintiff, and (it seems fair to add) against Brocklehurst himself, who had gone out of business. A unanimous court (Pollock C.B., Martin, B., Channell, B., and Bramwell, B.) all held that the plaintiff’s action for the price failed because the plaintiff concealed his true identity from the defendant. 28 Bramwell gave, as an illustration of his reasons, the general, and undoubted, proposition that a contract for the performance of personal services is not delegable to a third party. In this case, the prejudice from the delegation arose because of the loss of the setoff, which Bramwell duly noted, along with the arguable fraud on the plaintiff’s part. So stated, the case does not involve delivery of the goods “in error,” but something more insidious. By no stretch of the imagination, does it represent a case where the defendant is acting in some irrational or vengeful way.

Nor did Boulton receive a bad reception elsewhere. Thus, in Boston Ice. Co. v. Potter, 29 the plaintiff delivered ice to the defendant without disclosing his true identity. It seemed as though the plaintiff had once had a contract with the defendant, which had been terminated because of the defendant’s dissatisfaction. The defendant entered into a second contract with another supplier, the Citizens Ice Company, which was then acquired by the plaintiff who did not give defendant notice of the change in ownership. The ice delivered was of good quality, and the priced demanded was only the market price. The case was, if anything, stronger for the plaintiff than Boulton v. Jones, but the court nonetheless disallowed the action, noting, without apparent concern the following general proposition: “A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent.” 30 It promptly invoked by the same illustration of the delegation of the duty to paint a portrait that Bramwell had used some 20 years before. Boulton v. Jones was cited in the case, and the plaintiff sought to distinguish that decision as being more favorable to the defendant because of the existence of the setoff on which Bramwell had placed some reliance. But, the Court quite sensibly brushed the point aside, saying that while the existence of the setoff made Boulton easy for the plaintiff, the broader right rested on the undoubted power of all persons to chose their trading partners. Keener on Quasi Contracts 31 and Cheshire & Fifoot on


29. 123 Mass. 28 (1877).

30. Id. at 30.

31. WILLIAM KEENER, 2 A SELECTION OF CASES ON THE LAW OF QUASI-CONTRACTS 268-71 (1889).
Contracts32 reveal no dissatisfaction with the decision.

The redoubtable Atiyah joins the fray with a harsh criticism, treating Boulton v. Jones as a bad decision that reflects Bramwell’s unfortunate views expressed in the First Report of the Mercantile Law Commission.

He [Bramwell] also disliked the whole law of quasi-contract, for he could not understand how a man could be forced to pay for a benefit which he had received but which he had not agreed to pay for. While many people would accept the justice of this as a general rule, Bramwell carried it so far that it is difficult to see any room at all for quasi-contractual liabilities in his philosophy.

I ask, why should a man who buys goods pay for them? Either he has undertaken to do so, or he has not. If he has, make him liable to the extent of his undertaking; to his last shilling and acres if he has pledged them. But if he has not, if he has not undertaken at all, or if he has limited liability, I do not only see no reason why he should be called on to do that which he has not engaged to do, but I think it a positive dishonesty to attempt to make him.33

Atiyah then notes that Bramwell gave expression to these views in Boulton v. Jones, which he nowhere analyzes.

Atiyah is just plain wrong. Initially, it is important to recall an important distinction between the two senses of quasi-contract or restitution. In one set of cases, restitution deals with the provisions to make payment for goods consumed by mistake when there is no trace of contract, and by implication no effort of one person to “thrust” himself upon another. The joint mistake of the two parties is a reason for affording some remedy, be it return of the goods or payment of their market value in the event of consumption. But Bramwell’s hostility does not extend to that case, for as he says at the outset, his inquiry asks “why should a man who buys goods pay for them?” It is impossible to infer from this that he opposed quasi-contract in the classical cases of innocent mistake, which are just not in issue here. We now are in the land of explicit agreement, and once again Atiyah misstates Bramwell’s position. Here, we do not simply have cases where there is “a benefit for which he [the defendant] has not agreed to pay for,” which suggests that the matter was not addressed. Rather, Bramwell’s position is that where remedy is specific it controls the scope of liability. In his picturesque language, he notes that the proposition applies where personal credit is extended (“to his last shilling”) where he has pledged real property (“and acres if he has pledged them,”) and neatly reversing field, that he should be protected from suit (“if he has limited his liability,”) a point of obvious concern to Bramwell given his long-standing interest in company law.

Does this view make Bramwell an extremist? Well let me join his

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32. CHESHIRE & FITFOOT, supra note at 207 & 452.

33. See ATIYAH, RISE AND FALL at 376, quoting H.C. Parliamentary Papers, xxvii 445, 471.

crowd, for I too believe that contract language dominates any abstract theory of restitution that we as judges and law professors can invent. But, it is a mistake to think that the law of restitution should be imported into the law of contract because of some divine symmetry. Rather, there are cases in which the return of the goods is appropriate because it has been specified by the parties, or because of the difficulty of making calculations about expectation damages when these might otherwise be prudent. But, there is no simple way to import the conceptions of restitution into contract, and Bramwell’s views on this subject, which are typical of those of nineteenth century authors, have been ably defended in a recent article by Professor Andrew Kull, a leading restitution scholar of our own times. Against this background, it is hard to give much weight to the criticisms of Bramwell’s position.

IV. Tort

Bramwell’s tough sense of principle is also evident from his decisions in the law of tort. The basic issues in tort can conveniently be divided into two groups. The first of these addresses what must be shown about the defendant’s conduct in order to create a prima facie case of liability; the second, what must be shown of plaintiff’s conduct to eliminate that liability in whole, or, after the advent of comparative negligence, in part. Bramwell addressed both these issues at various stages in his career and it is useful to turn to them here.

A. The Prima Facie Case

Professor Abraham takes Bramwell to task for his very poor opinion in Blyth v. Birmingham Water Works, on which I shall comment in a moment. But I think that he misreads Bramwell when he treats him as the devotee of a negligence system, which on many issues he was not. The key decisions here are two: his famous opinion in Rylands v. Fletcher where he opts for a strict liability standard for anyone who “pours or sends” his own water into the mines or lands of another, and most notably, his strong opinion in Powell v. Fall where he disagrees sharply with the received wisdom of Vaughan v. Taff Vale Ry. Co. and Hammersmith R. Co. v. Brand. Vaughan and Hammersmith both took

34. See e.g., CHARLES FRIED, CONTRACT AS PROMISE: A CONTRACTUAL OBLIGATION 25-27 (1981).
38. 5 Q.B. 597 (1880).
40. L.R. 4 H. L. 171 (1869).
the position that any railroad that operated in compliance with statutory standards should be relieved of liability for any harm that it caused strangers. In doctrinal terms, the position was that compliance with statutory standards should be regarded as conclusive evidence of due care, which is all that a defendant needs to show in order to escape liability in a negligence based system.

Bramwell had no patience for this soothing reasoning. His ability to take on the railroads for the benefit of whomever they injured shows once again that he showed no fear or favor to the rich and powerful whom he treated no better or worse than the poor and downtrodden. What is more, he adopted a position that is clearly right as a matter of theory. Theoretically, if legislation and adjudication are sound, there is no allocative difference between a negligence and a strict liability standard. But Bramwell was one who realized that things were never perfect. He put the argument as follows:

The Locomotive Acts are relied upon as affording a defence, but instead of helping the defendant they shew not only that an action would have been maintainable at common law, but also that the right to sue for an injury is carefully preserved. It is just and reasonable that if a person uses a dangerous machine, he should pay for the damage which it occasions; if the reward which he gains for the use of the machine will not pay for the damage, it is mischievous to the public and ought to be suppressed, for the loss ought not to be borne by the community or the injured person. If the use of the machine is profitable, the owner ought to pay compensation for the damage.

Clearly a strong thread links the Bramwell of Powell v. Fall to the Bramwell of Manchester, Sheffield & Lincolnshire Railway Company v. H. W. Brown. In both cases, Bramwell senses that the social question is one that asks where that loss should be imposed and why. It is easy for railroads to trumpet the general benefits that they provide, and thus divert attention from the question of whether the increase in benefits justifies the parallel increase in cost. But why trust these pious declarations? The best test if functional: forces the defendant to pay in order to continue. If it cannot pay the damages, then there is good evidence to believe that its pious protestations are wrong. If it can, then there is good proof that its declarations are right. Of course, even damage awards may be insufficient if railroads cause irreparable harm to life and property in the ordinary course of their operations, which is why some statutory commands are appropriate for their operation. But, it hardly follows that because this horrible risk exists, and these important precautions are taken, that damages should not be awarded in cases where the precautions themselves fall short. Statutory compliance, therefore, is a necessary but insufficient condition for sound operation in this stranger setting. Once it is recognized that the clever railroad may well have induced the legislature to adopt precautions that are less than optimal, then the case for strict liability

43. Powell v. Fall, 5 Q.B. at 600-01.
becomes still stronger. It forms a judicial barrier against the manipulation of the legislature, one that lasts until the legislature—in Bramwell’s case, Parliament—gives unmistakable evidence of its own intention. Where is the weakness in this position?

Bramwell’s opinion in *Rylands v. Fletcher* is much to the same effect. On his view of the facts, the defendant poured and sent its water into the plaintiff’s mine, and that was the end of the case. In his view, it hardly mattered whether the action was done with ignorance or with knowledge of the dangerous consequences: “As a rule the knowledge or ignorance of the damage done is immaterial.” In my view, Bramwell’s pronouncement was correct on the facts of this case because *Rylands* itself did not reveal any contributory negligence or other misconduct by the plaintiff that might make an allegation of intention (for which knowledge would be powerful evidence) relevant by way of reply. The odd point seems to be that Baron Martin’s insistence on a negligence rule came less from his disagreement about the proper rule for water “cast upon the plaintiff’s land.” Rather, here Martin preferred to stress that the reservoir was half full as well as half empty. He thus redescribed events: “What they [the defendants] did was this, they dug a reservoir in their own land and put water in it, which, by underground openings of which they were ignorant, escaped into the plaintiff’s land. I think this is a very different thing from a direct casting of water upon the land,” for which a different legal rule—negligence—held.

The irony here is that Martin treats the suit as one for indirect harm and hence applies the negligence rule. Judge Blackburn’s genius was to accept Martin’s description of the facts, and to flip the law to the “true rule”

that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff’s default; or perhaps that the escape was the consequence of vis major, or the act of God; but as nothing of this sort exits here, it is unnecessary to inquire what excuse would be sufficient.

In essence, Blackburn applies a strict liability rule to what would in the earlier days of special pleading be an action on the case, normally governed by negligence rules. The ultimate irony is that since some water was at rest before the bottom of the reservoir burst and some was not, two forces were involved, so that trespass and case are each appropriate but only for half the water. The case thus straddles the categories.

A unified strict liability theory for direct and indirect harms is, on balance, preferable, but neither Bramwell nor Blackburn quite addressed this possibility because neither was attentive to the difference in physical properties between solids and liquids. It would have behooved *all* the

45. *Id.* at 744.
judges to recognize that fluids could confound the once regnant categories of trespass and case as no hypothetical case about log in the road could possibly do. The right response therefore was for some court to say it does not matter whether the water was poured into the mine or merely brought and collected there: either way, the defendant is responsible if it enters the plaintiff's mine unless it can be showed that a third party poured it there, a point on which I will focus in a moment. Bramwell thus missed (as did Blackburn, J.) the opportunity to create a uniform body of tort law for harm caused to strangers in which both sides of the directness/indirectness line would be governed by the strict liability principle that Bramwell so elegantly defended 15 years later in *Powell v. Fall*. But here, his sin is only that of omission. It hardly points to any deficiency is his world view on strict liability in tort, for indeed such deficiencies are hard to find.

Professor Ramasastry does not take Bramwell to task for his opinion in *Rylands* itself, but she does think that two of his later decisions retreat from it. *Carstairs v. Taylor* refused to apply the strict liability principle of *Rylands* to the defendant-landlord for harm caused when a rat gnawed through a gutter that he had installed in a warehouse that he shared with the plaintiff—tenant who occupied the lower floor. However, the two reasons Bramwell gave for the distinction are no mere contrivance, but consistent with his basic view. First, the landlord and tenant were in privity with each other and the gutter was constructed for their mutual benefit. It was thus wholly unlike the reservoir in *Rylands*, which was for the benefit of the defendant alone. Bramwell said as much.

In *Rylands v. Fletcher* the defendant, for his own purposes, conducted the water to the place from which it got into the plaintiff's premises. Here the conducting of the water was no more for the benefit of the defendant than of the plaintiff. If they had been adjacent owners, it would have been for the benefit of the adjacent owner that the water from his roof was collected, and the case would have been within the decision in *Rylands v. Fletcher*; but here the roof was the common protection of both, and the collection of the water running from it was also for their joint benefit.

As in so many other contexts, the usual rule when one party undertakes an action for the benefit of both, is to insist on a standard of ordinary care. Bramwell would have honored any lease provision drafted to deal with this contingency whether it called for strict liability or full exoneration. But his reading of the default provision is consistent with his earlier views, not a deviation from them.

His second explanation touches on the act of God exception men-

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48. 6 L.R. 217 (Ex. 1871), criticized in Ramasastry at mss. 66-67, TAN 207-12.

49. *Id.* at 221-222.

50. It is possible to argue this case the other way on the strength of the Nitroglycerine Case, 82 U.S. (15 Wall.) 524 (1872). That case involved an unmarked package containing Nitroglycerine that exploded when opened. Actions for wrongful death were denied for want of proof of negligence, but an action for damage premises were allowed on the theory that the covenants under the lease were strict.
tioned but not explored by Blackburn. It may seem odd to find that the gnawing of rats counts, for its seems more like the act of a stranger. But in principle there is no reason why it should not. The only question to be asked is whether the landlord owed some special duty to the tenant in virtue of the lease to prevent the damage or to repair the gutter before the flooding took place? On these matters the lease itself was silent, so that the question again reduces to a search for negligence by lessor, of which there was none. The materials used were standard in the trade, and he conducted an inspection of the drains some four days before the rats gnawed into them. The landlord’s position is *Carstairs* is solid.

Nor did Bramwell deviate from his general strict liability position in *Nichols v. Marsland*, which involved waters stored in a complicated set of weirs and ornamental pools. A storm of great force arose and wrested the waters out of their embankments, and the question was whether the act of God defense, which was adumbrated by Judge Blackburn in *Fletcher v. Rylands*, was applicable in this case. Bramwell held that it was, given the severity of the storm. His language does give clear hints of negligence:

In this case I understand the jury to have found that all reasonable care had been taken by the defendant, that the banks were fit for all events to be anticipated, and the weirs broad enough; that the storm was of such violence as to be properly called the act of God, or vis major. No doubt, as was said by Mr. McIntyre, a shower is the act of God as much as a storm; so is an earthquake in this country; yet every one understands that a storm, supernatural in one sense, may properly, like an earthquake in this country, be called the act of God, or vis major. No doubt not the act of God or a vis major in the sense that it was physically impossible to resist it, but in the sense that it was practically impossible to do so. Had the banks been twice as strong, or if that would not do, ten times, and ten times as high, and the weir ten times as wide, the mischief might not have happened. But those are not practical conditions, they are such that to enforce them would prevent the reasonable use of property in the way most beneficial to the community.

Bramwell thus far appears to make the idea of an act of God strictly correlative with the notion of negligence. Set the standard of care as you will, and the act of God occurs when natural forces exceed it. And since set them he must, Bramwell will choose a level that is capable of practical compliance. Yet, in the next paragraph, he veers, imperceptibly, back towards strict liability. He reverts to his own characterization and observes that the defendant had done nothing wrong.

It is not the defendant who let loose the water and sent it to destroy the bridges. She did indeed store it, and store it in such quantities that, if it was let loose, it would do, as it did, mischief. But suppose a stranger let it loose, would the defendant be liable? If so, then if a mischievous boy bored a hole in a cistern in any London house, and the water did mischief to a neighbour, the occupier of the house would be liable. That cannot be.

The clear implication is that he treats the storm like the act of a stranger, or the gnawing of the rats, and thus within the act of God excep-

51. 10 L.R. 255 (Ex. 1875).
52. *Id.* at 258-59.
53. *Id.* at 259.
tion that Blackburn introduced but did not flesh out in *Rylands*.

Bramwell might have added a joint causation argument as well, for if the water that did the damage was both that which was stored, and that which came down the watercourse from the storm itself, there are two causes for the injury, such that the water not so stored was solely responsible. Note that two different sources of water were also at play in *Rylands*, but with this critical difference: the defendant was responsible both for the water at rest in the reservoir, and the water that was being poured into it. Here, this defendant is not responsible for the water from the storm. I prefer this mode of thinking to the one which Bramwell adopted, for its does avoid his arguments about letting harm go uncompensated from reasonable uses beneficial to the community, and thus avoids the implicit clash with Bramwell’s later emphatic sentiments in *Powell v. Fall*, a case that has no act of God overtones. But the price to be paid here is that it requires one to separate the water into two components, as is done in other cases where huge floods overcome dams and levies. The case is on any account a close one, and Bramwell’s mistakes, if they are mistakes, are those which he shares with others.

Although its immediate circumstances are quite different, a similar analysis applies to Bramwell’s important decision in *Holmes v. Mather*,

54 decided the same term as *Nichols*.55 That opinion is typically quoted for its discussion of the relationship between trespass and case, an opinion which shows a decided bias against the strict liability regime that Bramwell championed both in *Fletcher v. Rylands* and *Powell v. Fall*. Thus Bramwell wrote:

As to the cases cited, most of them are really decisions on the form of action, whether case or trespass. The result of them is this, and it is intelligible enough: if the act that does an injury is an act of direct force vi et armis, trespass is the proper remedy (if there is any remedy) where the act is wrongful, either as being wilful or as being the result of negligence. Where the act is not wrongful for either of these reasons, no action is maintainable, though trespass would be the proper form of action if it were wrongful.

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In effect, Bramwell has said that trespass only lies where the immediate act that caused the action was done negligently or wilfully, the antithesis of his general strict liability position. What is odd is that on this point, for which the case is most often cited, Bramwell made no argument and he ignored the English precedents that seem to cut in the opposite direction.

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But his historical points are far less interesting than his substantive discussion, which reveals a rather more nuanced understanding of the situation. The basic facts of the case were that the defendant wished to try out a new team of horses on a public way, and sat beside the groom as the

54. 10 Ex. 261 (1875).
55. Trinity Term, 38 Victoria.
56. 10 Ex. 261 at 268-69.
groom guided the horses on the road. A dog suddenly came from the side of the road, barked loudly, and panicked the horses so that they bolted. The groom told the owner to sit tight and did all that he could to bring the horses under control. As the out-of-control carriage rounded the corner to the right, the groom saw the plaintiff standing there and sought to lead the horses away from her, but they kept on in the original direction, running her down, and causing serious injury.

I believe that Holmes is a textbook case in which the standard principles of strict liability ought to apply given that the control of the wagon was fully within the defendant's hands, from the initial decision to try a new dual harness to the last moments before the crash. Better that the loss should be located on the defendant than the plaintiff should have to decide which, if any, of these actions undertaken by the defendant and his groom were negligent. The case law, however, went quite the other way, for Blackburn's opinion in Fletcher v. Rylands explicitly ruled out the possibility of strict liability actions for persons standing on or near the highway, in a passage that was quoted to the bench by defendant's counsel.58

On this point at least the precedent was reasonably clear in demanding a negligence standard.

Yet with all this said, Bramwell is ambivalent about the negligence/strict liability debate and misses his own live and let live point that he raised some years before in Bamford v. Turnley.59 Thus, he writes, if the plaintiff can recover for the injury occasioned by the dog bark, then "I really cannot see why she could not bring an action because a splash of mud, in the ordinary course of driving, was thrown upon her dress or got into her eye and so injured it . . . For the convenience of mankind in carrying on the affairs of life, people as they go along the roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid."60 Yet the illustration given, of the splash of mud,61 is an illustration of the form of low-level interaction for which Bramwell's own

58. Id. at 263, quoting Fletcher v. Rylands, 1 Ex. 265, 286 (1866).
59. See the discussion infra at mss 42-44.
60. 10 Ex. 261 at 267.
61. The language returns again in the American context, where it is also used to support the case of negligence see Osborne v. Montgomery, 234 N.W. 372, 276 (Wis. 1931), per Rosenberry, J.

The fundamental idea of liability for wrongful acts is that upon a balancing of the social interests involved in each case, the law determines that under the circumstances of a particular case an actor should or should not become liable for the natural consequences of his conduct. One driving a car in a thickly populated district, on a rainy day, slowly and in the most careful manner, may do injury to the person of another by throwing muddy or infected water upon that person. Society does not hold the actor responsible because the benefit of allowing people to travel under such circumstances so far outweighs the probable injury to bystanders that such conduct is not disapproved. Circumstances may require the driver of a firetruck to take his truck through a thickly populated district at a high rate of speed, but if he exercises that degree of care which such drivers ordinarily exercise under the same or similar circumstances, society, weighing the benefits against the probabilities of damage, in spite of the fact that as a reasonably prudent and intelligent man he should foresee that harm may result, justifies the risk and holds him not liable.
‘live-and-let-live rule’ is appropriate. But, we should be far more reluctant to find implicit in-kind compensation in this case, where the magnitude of the injury is great and its frequency so low. The live-and-let-live rule that works well for repeated low level interactions (where frequency is high and severity low) should not be carried over to these once-in-a-lifetime situations.

Holmes v. Mather is also tricky because it is not really a case about negligence as such. Viewed closely, it fits into the same pattern found in Nichols—the case preceding Holmes in the reports, no less—for at bottom it is really a case of inevitable accident.62 Thus, the nicest point in the opinion comes as Bramwell chases after Herschell, Q.C., with his usual relentless energy:

Here, he [Herschell] says, if the driver had done nothing, there is no reason to suppose this mischief would have happened to the woman; but he did give the horses a pull, or inclination, in the direction of the plaintiff—he drove them there. It is true that he endeavored to drive them further away from the place by getting them to turn to the right, but he did not succeed in going that. . . .

What I take to be the case is this: he did not guide the horses upon the plaintiff; he guided them away from her, in another direction; but they ran away with him, upon her, in spite of his effort to take them away from where she was. It is not the case where a person has to make a choice of two evils, and singles the plaintiff out, and drives to the spot where she is standing. . . . I think that the observation made by my Brother Pollock during the argument is irresistible, that if Mr. Herschell’s contention is right, it would come to this: if I am being run away with, and I sit quiet and let the horses run whether they think fit, clearly I am not liable, because it is they, and not I, who guide them; but if I unfortunately do my best to avoid injury to myself and other persons, then it may be said that this is my act of guiding them that brings them to the place where the accident happens. Surely this is impossible.63

What is at stake here is a neat incentive argument. If the baseline condition is that the owner is not liable for the runaway horses, then Bramwell’s conclusion quickly follows. We do not want (as is so often done today with vaccines that relieve illness) to impose liability on persons who improve situations from what they would have otherwise been. Thus, if Holmes had involved the case of a third person who sought to control the raging team, imposing liability on him would be perverse because of the tax it imposes on actions to rescue and assist another. If society (including all potential victims) are better off with the rescue being attempted, then it is foolhardy to discourage the rescue by holding the rescuer liable for the harms that do remain without giving him credit for the harms that are averted. There is an implicit divergence between the social benefits of the act and the private costs to the actor, a divergence that the legal system should seek to avoid. Even if there is no compensation awarded for heroic acts that avoid injury, the implicit offset should be that the injurer is not


63. Id. at 267–68. There is no reference to Baron Pollock raising this point in oral argument in the reports, though Bramwell hinted at it. Id. at 265.
held liable for actions that ex ante reduce the costs of harm.64

But here, the defendant is not an interloper but the owner of the animals. The weakness in Bramwell’s argument rests in his assumption that there ought to be no liability for the runaway animals in the first place. Yet in my view, a rule of vicarious liability that treats owners as responsible for the wrongful acts of their animals should be applied, with an action over against the owner of the dog, if he could be found, for inducing the horses to bolt. The third party causation does not excuse the defendant but gives an action over, at least under this thoroughgoing version of strict liability.65 Now with this baseline, the Bramwell argument collapses. There are no longer any perverse incentives from holding the owner liable to the plaintiff, for the defendant is fully compensated for his efforts (or those of his servant) by the reduction in the likelihood of injury in the first place. As that is so, it no longer pays the defendant to remain idle if some injury reduction steps are available. He should take the precautions to reduce the losses to his own pockets. The individual incentives are once again in perfect alignment with the social ones if the inevitable accident defense is rejected and if the defendant is held liable for the harm caused by the bolting horses regardless of the source of their fright.

Once the case is seen in this light, therefore, it is not just a case of plain old ordinary accident, but a far narrower category of inevitable accident, involving harms that could not be avoided by any practicable steps.66 In addition, the closer look at both Nichols and Holmes reveals the implicit pattern in Bramwell’s argument that links up strict liability and casual intervention into one not quite tidy bundle. In those cases where the harm is one that the defendant causes without intervention or assistance from some other act, Bramwell is prepared to impose strict liability: that is surely his view in both Fletcher v. Rylands and Powell v. Fall. But where there are genuine acts of intervention—the storm in Nichols and the runaway horses in Holmes—Bramwell will offer excuses that sound in negligence but in practice read much more narrowly. And


The pre-nineteenth century test for determining whether an accident was inevitable was typically described in terms such as “utterly without his fault,” “did all that was in his power,” “unavoidable necessity,” and the like. To escape liability, defendants who had prima facie caused harm had to establish that they should not be viewed as responsible for the accident because some other cause had made it impossible, as a practical matter, to avoid injuring the plaintiff. Under this approach, the question was not whether the actor had behaved unreasonably—whether they should have avoided the accident—but whether they could have avoided it by greater practical care.
this inevitable accident conception is a deviation from the most rigorous form of strict liability, but surely one that is eminently defensible in theory, and accepted in practice.

B. Plaintiff's Conduct

Contributory negligence. The flip side of tort laws deals with the issue of plaintiff's conduct, where the classical division is that between contributory negligence and assumption of risk. The first of these defenses refers to cases where the plaintiff's conduct was a joint cause of his own injury. On that issue, Bramwell made relatively little distinctive contribution, but he was insistent that plaintiffs were as much responsible for the consequences of their own actions as defendants. It is therefore worth commenting briefly on a couple of his cases, which give some clue as to the tenor of his mind.

Mangan v. Atterton\(^67\) is a brief case which contains some of Bramwell's harshest rhetoric. The defendant whitesmith left exposed on a public street (as he customarily did) "a machine for crushing oil-cake, unfenced and without superintendence." The machine was operated by a handle on one side and had exposed crushing rollers on the other side. The handle could have been, but was not secured by wires. The plaintiff was a four-year old boy, who came along the street under the care of his seven-year old brother and in the company of friends. The boy stuck his hand in the cogs at his brother's direction while his brother turned the wheel, crushing the plaintiff's hand. The trial judge directed the jury to find that if it thought that "the machine was dangerous, and one that should not have been left unguarded in the way of ignorant people, and especially children, without, at all events, the handle being removed or fastened up and the cogs thrown out of gear,"\(^68\) then they could award damages to the plaintiff.

On appeal, the 10 pound verdict for the plaintiff was reversed. Martin, B., held that the defendant's act was not the proximate cause of the harm "because the accident was directly caused by the act of the boy himself." Bramwell, B., concurred, not only for that reason but for another starker one as well.

The defendant is no more liable than he had exposed goods coloured with poisonous paint, and the child had sucked them. It may seem a harsh way of putting it, but suppose this machine had been of a very delicate construction, and had been injured by the child's fingers, would not the child, in spite of his tender years, have been liable to an action as a tortfeasor? That shews that it is impossible to hold the defendant liable.\(^68A\)

To this outburst, Brian Simpson responded with evident exasperation—"Sir George Bramwell was plainly not a plaintiff's man,"\(^69\) so

\(^{67}\) L.R. 1 Ex. 239, 240 (1866).

\(^{68}\) Id. at 239.

\(^{68A}\) Id. at 240.

much so that Simpson questioned whether Bramwell’s dissent in *Fletcher v. Rylands* (decided just the year before) might itself be taken as the “perhaps surprising,” given that the incautious mining of the plaintiff could be regarded as the cause of his own harm. But, Simpson’s view ignores the strong proprietary elements in Bramwell’s thinking. In *Fletcher v. Rylands*, the defendant was in Bramwell’s view a trespasser for having poured and set the water into the plaintiff’s land, while the plaintiff was under not duty to take any steps to protect that land from being flooded by the foreign water of another (so long as he was prepared to take the risk that natural flooding would destroy his own mines). *Mangan* involved a machine that was let to stand on public property, where the defendant had as much right to be as the plaintiff. The force that impelled the damage was, moreover, no action of the defendant but that of the plaintiff’s own brother who, if anyone, was the trespasser in this unfortunate situation, even if he had intended no harm to his little brother. The causation element is one step removed. The only way to salvage this case for the plaintiff is to appeal to some doctrine of attractive nuisance, given the hidden danger lurking in the machine. There is much American authority for invoking a doctrine of that sort (most notably with railway turntables, but under circumstances that seem somewhat less favorable to the plaintiff, given that this crushing device was one that children did not habitually play with.) Yet even here, Bramwell may not have been swayed even if there had been habitual use because of his categorical reluctance to impose affirmative duties to protect strangers, even children, from their own mischief. But is he that wrong? The question still remains, if the parents entrust the care of a four-year old to a seven-year old, why should a struggling whitesmith be subject to liability for that decision. Even today, many attractive nuisance cases do not make it to the jury, and the regnant Restatement provision carefully circumizes this head of liability.

The ostensible harshness in the decision does not, I suspect, derive from the result in a case that would (I think) be left to a jury today, but in Bramwell’s choice of language. For him, liability was always a two-way street. That conduct which was sufficient to create in a party as defendant was sufficient (in a world where contributory negligence was a complete defense) to block recovery for a plaintiff. The rival vision of a two-tier system of negligence, in which the level of care expected of plaintiff is lower than that expected by defendant, was not part of Bramwell’s world view. And why should a wrongdoer be able to profit from his own wrong? So, the best way Bramwell could make his point is to show that


72. See *RESTATEMENT (SECOND) OF TORTS*, §339.

73. For evidence that such a standard did have support, though in contexts removed from *Mangan*, see Gary Schwartz, *Tort Law and the Economy in Nineteenth Century America: A Reinterpretation*, 90 YALE 1717 (1981); for the explicit defense of the two-tier system, see Fleming James, *The Qualities of the Reasonable Man in Negligence Case*, 16 MO. L. REV. 1 (1951).
the plaintiff as trespasser would have to be responsible for any damage that he caused the machine by his meddling. The irony is that Bramwell does have a strong point, for a single unified standard surely is easier to administer than a dual standard that insists on some difference in the levels of care but is never quite able to instruct a jury exactly what they are. My own instincts are that Bramwell (and Martin) were probably wrong here, and that the modest relaxation from this principle is the case of infant trespassers proves more stable in practice than it does attractive in theory. I think that the case is far closer than many others suspect and that the success of the relaxation in liability stems not from the distance that the law has moved, but from the closeness that modern doctrines retain to the uncompromising Bramwell position.

The second of the Bramwell contributory negligence opinions finds him on far stronger ground. *Stubley v. The London & North Western Railway Co.*,74 involved a wrongful death action for damages for a woman killed when she ventured on a train track at a crossing guarded by gates and marked by caution boards. She had made the common mistake of seeing one train go by, only to assume that both tracks were clear. A man from the other side of the track had called out to her, but she was somewhat deaf, and did not hear his last second warnings, and she never looked up to see the onrushing train. The charge in the case was that the railroad did not take sufficient precaution to keep ordinary people off the track or to warn them of oncoming trains. Bramwell did not deny that this was a negligence case—a conclusion that does not lead him into inconsistency with his subsequent decision in *Powell v. Fall*, for here the decedent was not a bystander off the road, but a trespasser on the line. But his individualism then came through. No guard could keep her from crossing the track if she so chose, and none should be required to warn her of what was evident to the senses. So Bramwell, with his usual energy dismissed the suggestion that a warning be given by casting the blame on the decedent:

Warn them of what? That when a carriage on your own side of the road is passed, you will often find on the other side of the road a carriage which has not passed. A policeman then is to be placed there to tell them, not what they do not know, but what from carelessness or heedlessness they forget at a moment when it ought to be remembered. If such a precaution is necessary here, it must also be used elsewhere: and the argument would shew that on every road, every canal, every railway in the kingdom, means must be taken to warn people against the consequences of their own folly.

Once again the language is blunt, but here it seems fully appropriate: the cost of precautions is surely cheaper with the plaintiff, and, if hard of hearing, all the more reason she should keep a ready lookout. Bramwell was right to assume that the rest of the world could not alter its established patterns of business to protect her from her own neglect. So the case is not really one of contributory negligence, rather it is one of alternative negligence: the plaintiff seeks to recover when she has been heedless and the railroad has taken all appropriate precautions. Unless plain-

74. L.R. 1 Ex. 13 (1865).
tiffs are always to win as a matter of course, decisions like *Stubley* have to come out as they do. Today, we could use a bit more of a philosophy that holds all individuals, be they plaintiffs or defendants, responsible for the consequences of their actions.

**Assumption of risk.** For our purposes, however, the critical issue in Bramwell's judicial philosophy concerns the scope and authority of the defense of assumption of risk. While it is sometimes easy to forget the point, the question of employer's liability, as it was then known, was as important to the general politics of the nineteenth century as, say, the scope and application of the civil rights law are today. In both cases, the disputed claim is whether individual parties can set the terms of their relationships by contract, or whether they are bound to all the states who determine with whom they should deal and on what terms. For the nineteenth century jurist, an antidiscrimination statute runs into the teeth of the dictum in *Boston Ice Co. v. Potter*, concerning the right of a party "to select and determine" whom he will contract with, which was treated as a self-evident truth. But the principle of liberty of contract did receive a powerful challenge in industrial accident cases, where the employer's position was that any assumption of risk by the individual worker should bar the cause of action—at least if the contract so required it.

The attack on the principle of assumption of risk was therefore not some detail on joint causation, as was the case with contributory negligence, but on the vexed boundary between tort and contract over which ceaseless battles were, and are, raised. The early decisions on the fellow servant or common employment rule made it appear as though the worker had, at least as against the employer, assumed the risk of injury from a coworker. That theory was one of the issues at stake in the passage of the Employer's Liability Act of 1880, which repealed the common employment defense, but which nonetheless left some scope for the assumption of risk defense. First, there was the question of whether the parties could contract out of the employer's liability, which was allowed in *Griffiths v. Earl of Dudley* on conventional freedom of contract grounds. The second form of the defense did not depend on an express agreement but on consent implied from the circumstances, which occupied the English Court of Appeals throughout the 1880s. The question constantly was put in the form of the relationship between knowledge of the risk, which did not provide a defense to liability, and assumption of

75. 123 Mass. 28, 30 (1877).
77. 43 & 44 Vict. c. 42 (1880).
78. Q.B.E. 357 (1882).
risk, which did. The decisions left the question in some degree of doubt until the matter reached the House of Lords in *Smith v. Baker*, 80 a decision that saw Bramwell in lone dissent from his compatriots.

The case involved a worker who was injured when a stone that was being slung over him fell from its sling and hit the plaintiff’s head. The plaintiff admitted that he had received a general warning from his supervisor to be aware of stones that were being slung but said that he had received no warning about the particular stone that had hit him, even though other workers (who also thought the practice dangerous) got out of the way. It was uncertain based upon the facts whether the dropping of the stone was negligent, but the case went off on the issue of whether the risk was assumed on these facts for an injury that might have been negligently caused. The majority of the House of Lords held that he “did not consent at all. His attention was fixed upon a drill, and while, therefore, he was unable to take precautions himself, a stone was negligently slung over his head without due precautions against it being permitted to fall.” 81 Hence full liability.

Bramwell may have voted alone in the House of Lords, but he did agree with the three Lord Justices of the Court of Appeal (Coleridge, Lindsey, and Lopes, all strong judges) who thought that the assumption of risk defense held even if the negligence allegations could have been made out. 82 In any event, the substantive dispute between Bramwell and his colleagues was at one level very small, for Bramwell was (rightly in my view) prepared to infer from the conversation between the ganger and the workmen that they had the sole responsibility to take care of themselves, and that the supervisor would not be in a position to give them any individualized warning. To Bramwell, it did not matter that the worker did not have specific knowledge of this particular threat. It was enough that the worker had complete knowledge of the practice and of the danger that it posed. It was a case in which consent was inferred conclusively from continuation of the work with knowledge of the risk, the sort of decision that resulted in an assumption of risk defense in this country in some jurisdictions at that time. 83

Bramwell did not get into hot water because of the facts of the case or his disputed view of them. Rather, he has been frequently criticized for using the language of the bargain to explain why the plaintiff should be denied recovery.

It is a rule of good sense that if a man voluntarily undertakes a risk for a reward which is adequate to induce him, he shall not, if he suffers from the risk, have a compensation for which he did not stipulate. He can, if he chooses, say “I will undertake the risk for so much, and if hurt, you must give me so much more or,

81. Id. at 336, per Lord Halsbury, L.C.
82. Id. at 329.
an equivalent for the hurt." But drop the maxim. Treat it as a question of bargain. The plaintiff here thought the pay worth the risk, and did not bargain for a compensation if hurt: in effect he undertook the work, with its risks, for his wages and no more. He says so. Suppose he had said, "If I am to run this risk, you must give me 6s. a day and not 5s.," and the master agreed, would he in reason have a claim if he got hurt? Clearly not. What difference is there if the master says, "No; I would only give the 5s."? None. I am ashamed to argue it.84

Atiyah, for one, pounces on the passage for the sin of circularity: "What Bramwell failed to perceive here as in numerous other instances, was that he was always assuming what he set out to prove"85 — namely that the workman had assumed the risk. But it was, in Atiyah’s view, equally consistent with the facts that for the wage stated, the worker had bargained for the right to compensation in the event of injury. Yet, here again, Atiyah misses several points. First, no one in the House of Lords argued that the terms of the bargain went in the opposite direction; instead they insisted on a knowledge of the specificity of the risk as a precondition for the assumption of risk defense, without ever saying why it was relevant. Neither did they, nor Atiyah, give any affirmative reasons as to why or how Atiyah’s rendition of the bargain might have comported with the facts of the case. Yet oddly enough, Bramwell did undertake that task even before the quoted passage, stressing the importance of the foreman’s earlier warning that no specific warning would be given. Moreover, the “He says so,” in the quoted passage is a way of saying that the risk was express. In addition, if one were to take the more theoretical tack of asking who is the cheaper cost avoider, it could well be the employee, given the warnings that he received but did not act on. So, Bramwell is surely on respectable ground that the bargain was just as he said it was.

Atiyah, however, does not give up the hunt but goes on to say that Bramwell did not realize that the question of circularity plagues any effort to explain the common sense conclusion that passengers of the railroad did not assume the risk of employee negligence in any suit against the employer, while the fellow servant did.86 It may well be that Bramwell did not provide the argument, but it should not be supposed that none could be provided to fill the gap. The simple explanation relates to the relative capacity for avoidance. Workers are chosen for their skills and their diligence, and the expectation is that they will take steps for their own safety, just as they take steps for the safety of their passengers. But passengers come in all ages, sizes, and capacities, and it is clear that their only duty is to follow the instructions that they receive, namely, to stay out of the way. For them, specific acts of negligence have to be proved. The difference in outcome rests on the difference in capacity for loss.

84. [1891] A.C. at 344.
85. See ATIYAH, RISE AND FALL at 377. Professor Ramasastry makes a similar point not only with respect to his decision in Smith v. Baker, but also with his more general opposition to the Employer’s Liability Act of 1880, where he stood largely alone in Parliament. GALLEYS AT 46-47.
86. ATIYAH, RISE AND FALL at 378, criticizing Bramwell’s testimony to a House of Commons Select Committee on Employers’ Liability in 1876.
avoidance, which is captured in a rough and ready way by the manner in which passengers and employees are selected. Whatever the shifts in rules on employees, the default rules on passengers of common carriers have remained largely unchanged as we move from railroads to jet planes.

These debates between Bramwell and his critics are so energetic because of the underlying realization that all players are involved in a bigger game. Let this or that default question be decided one way, and in a world of free contract the terms could be made explicit in the other if people find them inefficient or unwise. Yet, it was not the choice of default rules, but the more basic principle of freedom of contract that was under attack in England in the 1890s. Freedom of contract managed, barely, to survive the Employer’s Liability Act of 1880,87 but it most certainly did not survive the Workmen’s Compensation Act of 1897,88 which, as Dicey noted, did away with any freedom of contract defense unless the private agreement “secures to the workmen benefits at least as great as those which they would derive from the Compensation Acts; and this arrangement must be sanctioned by a State official.”89 Dicey was quick to understand the implications, which he stated in the next sentence. “This legislation bears all the marked characteristics of collectivism.”90 And the real battle was whether this approach was a good thing.

Bramwell of course railed against such legislative interventions with all the power that he could summon, and for good reason. The state should let the parties contract as they will. Bramwell’s only mistake was to fail to see the descriptive point that there is no necessary connection between any contracts that the parties might choose to make and the common law rules of negligence and assumption of risk that he defended in Smith v. Baker. In fact, it was common in England at his time to adopt a voluntary arrangement that foreshadowed the coverage rules of the workmen’s compensation acts. Here is not the place to explain why the compensation arrangement is likely to be mutually beneficial in the dangerous employments (such as mines and railroads) in which it was adopted.91

V. Collective Action Problems

The common law rules of contract, restitution, and tort do not directly respond to the collective action problems that prove so intractable to the law. To set the stage for this discussion, it should be sufficient to say that the prisoner’s dilemma game is so well known today that it hardly

87. 43 & 44 Vict. c. 42 (1880).
88. 60 & 61 Vict. c. 37 (1897).
89. A.V. LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY (1st ed. 1905) (hereinafter cited as “DICEY, LAW AND OPINIONS”). The Section of the Act is §3. This need for state approval made it more difficult to reach private agreements.
90. See DICEY, LAW AND OPINION 282.
91. For my effort, Epstein, Historical Origins, supra note at 76.
needs repetition. Each of two actors would be better off to cooperate with
the other. Nonetheless, the temptation for private gain leads both to defect
from the cooperative solution, such that each is left worse off than before.
Indeed one justification for governmental compulsion is to prevent that
defection, even where the individual actors do not use force or fraud to
seek to take advantage of the incompetence of the other. The justification
for government coercion is that it benefits both sides to the transaction in
circumstances in which consent is not available to organize their activities.
The basic thrust of social contract theory (where social contracts are
not ordinary contracts) rests on just this insight. All persons are better off
with the mutual renunciation of the use of force, which they are powerless
to bring about by any series of bilateral contracts, however skillfully con-
structed.

It is not, however, only in a state of nature that coordination prob-
lems arise. They also arise in civil society. Nuisance law, which polices
the boundaries between landowners, often has to respond to just these
coordination problems, and in a routine case of this sort, Bramwell, in
what may have been his finest moment, stated clearly the proposition that
anticipates the next century’s welfare economics. Thus, he writes in
Bamford v. Turnley.92

The instances put during the argument, of burning weeds, emptying cess-pools,
making noises during repairs, and other instances which would be nuisances if
done wantonly or maliciously, nevertheless may be lawfully done. It cannot be
said that such acts are not nuisances, because, by the hypothesis, they are; and it
cannot be doubted that, if a person maliciously and without cause made close to a
dwelling-house the same offensive smells as may be made in emptying a
cesspool, an action would lie. Nor can these cases be got rid of as extreme cases,
because such cases properly test a principle. Nor can it be said that the jury settle
such questions by finding there is no nuisance, though there is. . . . There must be,
then, some principle on which such cases must be excepted. It seems to me that
that principle may be deduced from the character of these cases, and is this, viz.,
that those acts necessary for the common and ordinary use and occupation of land
and houses may be done, if conveniently done, without submitting those who do
them to an action. . . . There is an obvious necessity for such a principle as I have
mentioned. It is as much for the advantage of one owner as of another; for the
very nuisance the one complains of, as the result of the ordinary use of his neigh-
bour’s land, he himself will create in the ordinary use of his own, and the recipro-
cal nuisances are of a comparatively trifling character. The convenience of such a
rule may be indicated by calling it a rule of give and take, live and let live. . . .

But it is said that, temporary or permanent, it is lawful because it is for the
public benefit. Now, in the first place, that law to my mind is a bad one which,
for the public benefit, inflicts loss on an individual without compensation. But

92. 122 Eng. Rep. 27, 32-33 (Ex. 1862): Even Patrick Atiyah quotes this passage at
length and accords it faint praise: “On this point Bramwell’s economics seems to have been
somewhat sounder, and indeed, not unsophisticated, for he was taking into account externali-
ties. It is difficult to understand why he never saw the need to do this when discussing free-
don of contract.” See ATIYAH at 380. But as should be evident from the text, Bramwell’s
economics is light-years ahead of Atiyah’s. As to the last point, if there were reciprocal
gains from nonenforcement of contracts, then the result should apply, as indeed it does, see
infra at 279-281.
further, with great respect, I think this consideration is misapplied in this and in many other cases. The public consists of all the individuals of it, and a thing is only for the public benefit when it is productive of good to those individuals on the balance of loss and gain to all. So that if all the loss and all the gain were borne and received by one individual, he on the whole would be the gainer. But whenever this is the case,—whenever a thing is for the public benefit, properly understood,—the loss to the individuals of the public who lose will bear compensation out of the gains of those who gain. It is for the public benefit there should be railways, but it would not be unless the gain of having the railway was sufficient to compensate the loss occasioned by the use of the land required for its site; and accordingly no one thinks it would be right to take an individual’s land without compensation to make a railway.

Every syllable of this opinion occupies just the right place. Bramwell understands the basic prohibition against invasion of the property of others—the very proposition that he was to defend just two years later in Rylands. Bramwell thus avoids the Coasean trap of being unable to assign causation in individual cases, for he admits the existence of a nuisance in the case.93 Yet, by the same token, he understands why it makes no sense to provide any legal remedy in those cases of “live and let live” where small violations of right could work to the long term disadvantage of all parties, in circumstances where it is too costly for them to escape from their initial dilemmas by contact. So, he relaxes the basic rule of liability, not by pretending that there was no physical invasion, but by showing that the relaxation works for the mutual benefit of both sides. Note that this principle does not allow the violation of individual rights for the public at large; rather, it calls for the infringement of everyone’s rights for the benefit of everyone, given the reciprocal nature of the benefits so conferred.

To make good this insight, Bramwell then weaves together two fundamental principles of welfare economics. First, he cuts through the usual cant about the public interest and notes that it is not separate from the welfare of all its citizens—including those who are subject to onerous regulations. “The public consists of all the individuals of it” as succinct and accurate statement of the principle of methodological individualism, as it has come to be called, as one could hope to see. There is no longer any mythical or abstract public that benefits when individuals and firms sacrifice their entitlements to onerous regulations. There are only some who benefit and some who lose. How then do we decide whether to go forward? Again Bramwell does not miss a beat: “a thing is only for the public benefit when it is productive of good to those individuals on the balance of loss and gain to all. So that if all the loss and all the gain were borne and received by one individual, he on the whole would be the gainer.” So, here is the standard test of economic efficiency accurately stated and fairly applied a half century before it made its way into standard economic theory. This is not the unthinking voice of laissez faire, but a careful analyst who has hit upon a rule for ranking alternative social states.

So how does one use this insight? Again, Bramwell sees the connection between the ordinary tort law and the general theory of just compen-

sation before those comparisons were fully understood in this country. “But whenever this is the case,—whenever a thing is for the public benefit, properly understood,—the loss to the individuals of the public who lose will bear compensation out of the gains of those who gain.” The parallel to his vision in Powell v. Fall is complete, and how much better the social order would be if the legislation evaluated under our own takings clause were forced to conform with Bramwell’s dictates. No longer is it enough to justify regulation solely by saying it serves the public interest, when such may not be the case. Better it is that when property rights are taken (even the right to exclude the fumes of others) compensation be supplied, be it in cash or kind. I must say that over the years this passage has had an enormous influence on my own thinking, for it makes clear the linkage between the private tort law and the constitutional principles of property, public use, and just compensation. No one could charge Bramwell with an unthinking devotion to the principles of laissez faire, for he, better than anyone else, has explained why and how the just compensation principle becomes part of a legal system that can no longer make do exclusively with the principles of private property and freedom of contract. The new element of forced exchanges, of takings with just compensation, has to be injected into the overall system.

It is here, however, that one can quarrel with some of the other Bramwell opinions that give both Abraham and Ramasastry some pause. The opinions which draw the greatest criticisms are those which contain the potential for applying Bramwell’s more general theorem of costs and benefits developed in Bamford v. Turnley. It is worthwhile to mention just a few of them here.

One of his earliest tort decisions, Blyth v. Birmingham Water Works Co.95 is best known, not for Bramwell’s contribution, but for the canonical definition of negligence offered by Baron Alderson. “Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.”96

That sentiment seems harmless enough in its generality, but it does contain an implication that would set off warning bells in someone with Bramwell’s strong libertarian bent. It equates commission with omission and thus tends to undo the distinction between misfeasance and nonfeasance that animates so much of the common law. In the context Alderson uttered it, the point made good sense. The defendant was no ordinary individual, but a waterworks company whose charter imposed on it a wide range of affirmative obligations. It is one of the oddities of the case that

96. Id. at 1049.
both Alderson and Bramwell sought to measure the defendant’s duty by
the type of system that was first installed, thereby ignoring the caking of
ice on the hydrant which made it evident to all that something was amiss
during that severe winter. Here, it is not hard to conclude that the defen-
dant’s duty covered the maintenance of the system and that in turn
required inspections and repairs as necessary. Defendant in fact made
those repairs after the accident in question.

Bramwell, of course, would be very uneasy about these duties, and
in his concurring opinion took the position that the “defendants were not
bound to keep the plugs clear. It appears to me that the plaintiff was under
quite as much obligation to remove the ice and snow which had accumu-
lated, as the defendants.” That statement would be true if there were an
act of God on neutral turf that either could prevent and neither had
caused. But here, I have no doubt that the legal position for waterworks
was no different than that which applied in Chicago this past winter when
the pipes leading to the Epstein household froze (twice, thank you). We
were forbidden by the City to touch the system ourselves, for fear that it
would be impossible to trace any damage that we might cause to the op-
eration as a whole by any misguided repairs. The City insisted on the exclu-
sive right to deal with the system, and our only obligation was to notify
the City of a break in order to get them to schedule the repairs. Dealing
with public utilities makes the misfeasance/nonfeasance calculus irrele-
vant, and Bramwell should be faulted for not seeing the implications of
his own later formulation in Bamford v. Turnley. The coordination prob-
lem between various individuals who might (but need not) be injured by
the possible leakage from the plug is overcome by having the affirmative
duty placed on the Water Works, which is quite happy to assume it in any
event as part of its ordinary business. Alderson was therefore right in this
text to be indifferent to the omission/commission distinction, but both
men would have done a far better job generally if they had geared their
decision to the distinct, institutional status of the Water Works.

Bramwell did somewhat better, but far from perfectly, on the collect-
ive action problem in Atkinson v. Denby\(^{97}\) where the plaintiff, who owed
the defendant some £319, had paid defendant £50, and issued a promisso-
ry note for another £108 in order to get the defendant to sign a composi-
tion agreement which said that each creditor agreed to release the plain-
tiff-debtor from his obligations for 5s. on the pound, or for 25 percent of
liability. The question was whether the plaintiff could sue the defendant
for the recovery of the £50 so paid, and by implication not pay the
remaining £108 on the debt. Bramwell sided with two of his colleagues to
hold that the £50 paid was recoverable. Professor Ramasastry rightly
points to some isolated language of Bramwell’s opinion to show that he
had some concern with the dangers of overreaching in a contractual set-
ting—which could be taken to show that he really did worry about

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exploitation and unfairness in contract it. But a closer look at the opinion shows that Bramwell suffered from no such weakness of temperament or intellect. Thus, the full sentence reads: "Here, though in one sense the payment was voluntary and the agreement illegal, it was a payment under coercion, and the parties were not in pari delicto because there was an oppressor and an oppressed." The concern with oppressor and oppressed was solely within the context of the law of illegal contracts, which is why the reference was to plaintiff not being in pari delicto with the defendant. It was said to furnish a reason why the money should be recovered after it had been paid off.

To understand the full case, it is important to remember—as Bramwell noted, but Baron Pollock—stressed that the transaction in question was to be condemned largely as a fraud on the other creditors. These creditors had settled for 25 percent of their debts while the defendant, who had entered into a binding agreement with them, sought to get 50 percent of his debt paid outside the settlement, 25 percent under the settlement, and to conceal the full arrangement from his contracting partners. In this set of circumstances, it is difficult to see who is oppressing whom: after all, the defendant agreed to release one-quarter of his claim, and there is no question that if the composition had just been between these two parties, without the master agreement between the debtor and all his creditors, Bramwell and his colleagues would have happily enforced it as a routine compromise of a claim. It is therefore the collective action aspects of the situation that render this preference, as we should not call it, so suspect. But here, the creditors were onto the risk and so covenanted among themselves to accept 5s. on the pound. The real victims therefore are neither the plaintiff nor the defendant: they are the other creditors who have lost assets that were concealed from them.

Ideally, neither the plaintiff nor the defendant should keep the money that was concealed from view. It would be nice to pay it over to the creditors generally, but they did not sue here. Perhaps it was understood that once the plaintiff gained the return of the money, it would be turned over to these somewhat astonished creditors, but that point is not made fully clear in the opinion. The closest we get is Pollock's observation, which speaks to the evil of the concealment, without quite giving the creditors' the loot: "It is a gross fraud on the other creditors, and if we were to hold that the money could not be recovered back, the consequence would be that creditors would refuse to enter into arrangements, each sus-

98. She writes;

The language and nature of his early opinion seem to be a vast departure from the traditional portrayal of Bramwell as a judge who refuses to interfere with the terms of private agreements. I have not been able to locate a specific reason for his judgment, but it appears quite anomalous with regard to its language and acknowledgment of the "oppressor" and "the oppressed."

RAMASASTRY, at 334.

PECTING that the other was endeavoring to obtain an unfair advantage." 100 But, he does not quite say that the other creditors should get the money as assets concealed from them fraudulently in negotiation. The question of oppression was bound up with the third party fraud, on which Pollock spoke more extensively than Bramwell. Yet no matter how one reads it, Atkinson affords no reason to think that Bramwell had retreated from his steadfast views that in ordinary commercial arrangements the terms of a contract should be enforced as written.

The final opinion in which Bramwell discussed, albeit it only obliquely, collective action problems is Ibottson v. Peat, 101 a case of which Abraham is sharply critical. 102 The discussion of water rights in that case is cryptic and highly individualistic. Bramwell notes, quite simply, that the case of Chasemore v. Richards, 103 shows that "if a man has the misfortune to lose his spring by his neighbour's digging a well, he must dig his own well deeper." 104 The decision reflects the view that the only wrong that one owner of property can commit against another is a physical invasion of the premises. This position is surely incomplete in the sense that digging the well by one person has powerful external consequences on the welfare of another, so that the fair question to ask of Bramwell, and of the House of Lords, is why that set of consequences should be ignored. The quotation thus raises the question of whether the spatial conception of ownership should dominate over some conception that recognizes correlative duties as between neighbors.

In fairness to Bramwell, he was only restating a proposition of the House of Lords, and did not mount any systematic defense of it. But, it is useful to note how the question arose. Ibottson was a variation of Keeble v. Hickeringill, 105 and addressed the question whether a defendant, after the plaintiff had lured his game away by placing corn on his own land, was entitled to create a loud nuisance that caused damage to plaintiff's own animals. It was held that it was not. The plaintiff's action was itself no trespass and the wildlife on plaintiff's land was lawfully there, and was not owned by the defendant. The defendant for his part claimed that he had invested great sums of money in cultivating the game that the plaintiff had tempted away. It was in fact a case of conversion of labor without there being a taking of property owned by the plaintiff, which is why no action for trespass or conversion would lie. For Bramwell, the connection between Ibottson and Chasmore was that the noninvasive conduct of the

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100. Id. at 786.
102. ABRAHAM, at 291.
104. 159 Eng. Rep. at 687. He thus repeats the query he had made during argument: "In Chasemore v. Richards, the plaintiff was possessed of an underground spring which supplied his well, and the defendant, by digging a well on his land, dried up the plaintiff's spring; but the only remedy the plaintiff had was to dig his well deeper." Id. at 686.
plaintiff was not a wrong and therefore did not justify the invasive conduct (the loud nuisance) done to prevent the plaintiff from keeping the game. A neat connection indeed. Yet even here Bramwell saw that the defendant was not without sympathy but noted the ambiguity in the situation. "In my opinion that is a bad plea. There is nothing in point of law to prevent the plaintiff from doing that which the plea alleges that he has done. I say 'in point of law' because it cannot be contended for a moment that an action would lie against the plaintiff. As to the propriety of such conduct between gentlemen and neighbors I say nothing."

But both Chasmore and Ibottson are cases in which the live-and-let-live logic of Bamford v. Turnley should at least have led him to question the rigid nature of the outcome. Starting with Ibottson, the appeal to neighborhood—which has been the linchpin of more modern analysis of nuisance law—could have led to the idea that both sides would have been left better off if each could invest labor in improving his fields without having to fear that others would entice away their animals. The situation would thus be the converse of Bamford in the sense that it would render certain noninvasive forms of conduct actionable, just as Bamford rendered certain forms of invasion nonactionable. But the principle is the same in both cases: the deviation from strict autonomy rights improves the situation of both parties, so that if one man owned both plots of land he would think himself the gainer. This movement from invasive to noninvasive nuisances was in fact taken with respect to the rules of lateral support, and Bramwell might have come out the other way if he had taken this possibility into account, although the case is in truth a very close one indeed on the merits.

The possible case of judicial modification is somewhat stronger in the water cases, of which Chasmore is only one. To make matters simple, assume first that the underground spring was only under the land of these two landowners. A rule that allows one party to take what he will and which forces the other to dig deeper could well leave both parties worse off in response. Each digs in retaliation for the other so in the end both have spent more to get, arguably, a smaller amount of water than each would have had if the wells had been kept at a more restrained depth. The difficulty here is another instance of the familiar prisoner’s dilemma game, in which each has the incentive to defect from the common solution by digging deeper no matter whether the other owner decides to dig a deep or a shallow well. In a two party situation, this poor outcome may well be overcome by a contract whereby each side agrees to limit its output. Reaching that agreement in this context could well be tricky, however, for it is difficult perhaps to define the ideal amounts of water that each could take out, or to police the solution that is reached.

The situation becomes still more tricky when more than two owners tap into a common stream, for now the possibility of agreement is complicated by strategic behavior. Modern studies suggest that once the number of bargainers exceed five, the entire situation tends to unravel, and that some state intervention, be it by common law rule or by regulation, may be necessary to stop the mutual destruction.\textsuperscript{108} Bramwell’s individualism, however, tended to blind him to these collective action problems. Yet, even here we have to be cautious, for it is not clear that the simple existence of a collective action problem necessarily calls for a collective solution. General rules and institutions have to be articulated with reference to general conditions, not just particular disputes. Underground water in England is common, and most cases of unimpeded digging do not have the untoward results that they did in \textit{Chasemore v. Richards}. So, it may well not be worth the costs of putting a property system in place that requires more complex administrative enforcement. Here is not the place to resolve that question, for the outcome is not what matters. The key shortfall is that Bramwell did not see that his just compensation formula of \textit{Bamford} in principle had to be applied to this case before the analysis was complete. If all owners are left better off after the administrative costs are absorbed, then there is just compensation for the restrictions that makes the several owners operate like a single owner who becomes a net gainer. Bramwell had the tools to reach the correct outcome, but in his brief exposition, he did not show an awareness of the universal power of his general theory of nuisance law, or the extent to which they require a principled modification of the some portions of \textit{laissez faire}.

\textbf{VI. Redistribution}

The last issue on which Bramwell’s \textit{laissez faire} policy has been subject to criticism is the issue of redistribution. In dealing with this question, it is absolutely critical to note that committing one’s self to state solutions to collective action problems does not commit one to redistribution in any way, shape, or form. Quite the opposite. The whole purpose of the just compensation solutions to collective action problems is to leave everyone better off than before and to encourage positive sum outcomes that private bargaining cannot achieve. But the case for redistribution is different, for here we must be willing to tolerate zero or even negative sum games so long as the increased utility to the poor is believed to offset the reduction in social wealth needed to secure the redistribution. The question is whether redistribution should be adopted as a matter of state policy once the collective action problem is solved. Sitting as a judge within the English system, Bramwell would ordinarily have little opportunity to comment on a question of that magnitude, but as a pamphleteer, he was certainly in a position to let his views be know. And, in Economics v.

Socialism,\textsuperscript{109} delivered before his Liberty and Property Defence League, he was not shy about attacking the redistribution through state coercion. However, he does so in a way that raises all the right questions on redistribution, and in an incredibly short compass.

Here is a running commentary on the high points of his speech. He begins with the laissez faire credo — "Leave everyone to seek his own happiness in his own way, provided he does not injure others. Govern as little as possible. Meddle not, interfere not, any more than you can help. Trust to each man knowing his own interest better, and pursuing it more earnestly than the law can do it for him."\textsuperscript{110} Here, he has summarized the basic tenets of the position: given self-knowledge, rely on self-interest subject to a side constraint about injury. Yet, this position still leaves him uneasy, as well it should. "It is impossible not to have a doubt or misgiving, whether it is right that one man should have in an hour as many pounds sterling as another has in a year; whether one man should suffer the extreme of misery and privation, and another have every, not only necessity, but superfluity. It is a truth hard to believe; but I am satisfied that it is a truth."\textsuperscript{111} Points go to Bramwell for his candor. He does not hide behind the learned economic proposition that denies the possibility of any interpersonal comparisons of utility. He admits that they were possible, and wishes that income could be more evenly distributed.

Bramwell then shies away from that comfortable conclusion. And he has his reasons. "The great object of a society in this matter should be to make what the Americans call the largest pile—the greatest quantity that exists is not desirable, but I say that in the attempt to bring it about by law the pile will be reduced."\textsuperscript{112} No hedging here, for he anticipates the entire modern generation of rent seeking arguments. "If you gave an equal share to each, do you suppose—can anyone suppose—that each would work as hard as he does now."\textsuperscript{113} He understands incentives as well. "Poverty and misery shock us, but they are inevitable. They could be prevented if you could prevent weakness, and sickness, and laziness, and stupidity, and improvidence—not otherwise. To tell the weak, the lazy, and the improvident that they should not suffer for their faults and infirmities would but encourage them to indulge in those faults and infirmities."\textsuperscript{114} Bramwell will not play the role of economist as false optimist. He does not think that allowing private forces to operate in markets will yield the best results in the best of all possible worlds. He takes a rather more pessimistic view of the potential of (some) people, but thinks that a system of unqualified support would increase the very characteristics that no one wants to see replicated. Many people today try to deny that the point is

\textsuperscript{109} Economics v. Socialism: An Address to the British Association (1888).
\textsuperscript{110} Id. at 10.
\textsuperscript{111} Id. at 11.
\textsuperscript{112} Id. at 11-12.
\textsuperscript{113} Id. at 12.
\textsuperscript{114} Id. at 13.
true, or even to pretend that the effects are likely to be small, notwithstanding that in our own time we have seen an enormous expansion of social support services go hand in hand with a decline in legitimate births and educational achievement. One does not have to be Charles Murray to recognize that Bramwell’s fears have been confirmed by our own bold welfare experiment.

Yet, the incentive argument is not universal. “If it is said that poverty and misery may exist without fault in the sufferer, it is true. But it is but rarely that they do, and the law cannot discriminate such cases.”115 So once again, Bramwell does not make his case easier than it should be. He concedes that there are cases of bad luck but insists that these cannot be separated from others by the law, and who can gainsay him after years of eligibility requirements that never quite seem to work to control swollen welfare rolls. “To attempt to remedy the disparity of conditions would make the well-off poor, the poor not well off. Socialism is not good for man till man himself is better.”116 He instinctively strips away the utopian sentimentality about efforts at equalization of incomes. It will level downward not upward—again correct in my view. And finally: “Private charity may be useful, not in indiscriminate gifts and doles—soup kitchens, coals, flannel, and clothes given to all who apply—but in careful relief, given in no case that is not investigated and seen to be deserving of help.”117 Again, the strong sense that charity is not an unalloyed good, but should be reserved for the deserving poor. His clear implication is to do nothing to help the others, although it seems equally clear that he would not prohibit others from extending charity that he himself regards as foolish. He would just argue against it.

So what is wrong with this position? We could criticize Bramwell for his bluntness, but not for his lack of clarity. We can say that it is not fashionable to speak of individuals in less than glowing terms. After all, the modern Republican spirit is one that talks about full citizen participation in life, and conjures of images of people that are far removed from the loutish description that Bramwell gives of some of his fellow citizens. But for all that is he wrong, or just tactless?

One way to answer this last question is to look at the refutations of laissez faire, written by those who understand what it means. My favorite candidate for this high office is Jacob Viner, whose intellectual history of laissez faire, written toward the end of his distinguished career, takes issues with the laissez faire conception that Bramwell defended.118 It would be ideal if Viner had responded to Bramwell, but his targets were political theorists of greater note: Adam Smith, Herbert Spencer and Friedrich Hayek, all of whom were in the Bramwell’s intellectual tradi-

115. Id.
116. Id.
117. Id. at 14.
tion. Viner is careful not to defeat a caricature of the argument.

I will carefully avoid using the term laissez faire to mean what only unscrupulous or ignorant opponents of it and never its exponents make it mean, namely, philosophical anarchism, or opposition to any governmental power or activity whatsoever. I will in general use the term to mean what the pioneer systematic exponents of it, the Physiocrats and Adam Smith, argue for, namely, the limitation of government activity to the enforcement of peace and of "justice" in the restricted sense of "commutative justice," to defense against foreign enemies, and to public works regarded as essential and as impossible or highly improbable of establishment by private enterprise or, for special reasons, unsuitable to be left to private operation.119

Armed with this definition, Viner speaks both of the prevention of the use of force, the enforcement of promises, and with just a little tugging and hauling, the provision of public goods. It is a good working definition of the basic principles, one that leaves it to lawyers to work out the details of consideration and contributory negligence. So, what are his objections? One is that it might not allow for the prevention of monopoly, with its negative implications for resource allocation. Fine. We can add that to the list, so long as we are aware that there are many slips between the identification of a problem and its proper containment. It is not as though the history of antitrust enforcement never took a wrong turn.

Yet, Viner's bottom line objection goes to the question of income redistribution, on which Bramwell held such negative views.

When economists discuss the workings of a free competitive market, they agree that the existing pattern of distribution of wealth, of income, and of individual knowledge, capacities, and skills, affects the price-structure. They presumably agree also that the price-structure of today affects the income-structure of tomorrow. It is not appropriate, therefore, in a final appraisal from either an ethical or an economic-efficiency point of view of the mode of operation of an economic system, to consider the operations of the market on the assumption that the existing pattern of income distribution is the consequence of a dispensation of Providence. It is not reasonable to treat an existing income distribution, for the purpose of analyzing the market, as if it just "happened," as if it were as independent of influence by the market and as incapable of influence on the market, through the effect of aggregate human exercises of will and economic power, as the Rocky Mountains or storms and earthquakes are free from human control. . . . [T]he decline of laissez faire in England, and the growth there of systematic state-interference not only with the economy as a whole, but with the free market, came largely as the result of dissatisfaction with the prevailing distribution-of-income pattern.120

From this Viner's reform follows:

But a laissez faire program which confined its efforts to preserving or restoring a free market, even a competitive market, while remaining silent on or opposing any proposals for adopting new or retaining old measures in the area of distributive justice, would seem to me glaringly unrealistic with respect to its chances of political success, and highly questionable also with respect to more exalted criteria of merit.121

So there you have it. Viner then proposes that academics and
bureaucrats seek to mesh the operation of the free market with the forms of income redistribution and offers reasons of both prudence and fairness to achieve that end. Accordingly, he speaks of his "Utopia" as the end to which modern thinkers should strive.122 Without question, he (among others), has set the agenda for responsible reform in the past 30 years, and the time has come to recognize that we cannot square the circle by reconciling freedom of contract with income redistribution, and for just the reason that Bramwell said we cannot. Viner's proposal says nothing of private charity, but his redistributivist policies will help kill it off as government assumes more and more of the functions of support than used to be done by private persons. Yet, the state cannot, as Bramwell said, distinguish nicely among the various claims of support. Viner's proposal does not take into account the difficulties of misbehavior by the poor, or, for that matter the rich, nor does it speak of how politics can convert noble ideas into flawed programs. Nor does Viner point out a single form of intervention, apart from those designed to secure public goods in nonre-distributive fashion, that has actually achieved his goals. Even targets on income equality are as elusive today as ever before. Yet with all this insistence on higher ends, the minimal functions for which we should depend on the state are not so easily satisfied. One day's look at the morning paper reveals an ever increasing concern with crime, and a grim realization that we are less able to fight infectious disease today than in years past. The optimism of Viner and other responsible and compassionate critics of laissez faire should give way to a more realistic sense of what governments can and ought to do. The experiences of 100 years show that Bramwell was right on the large questions of political philosophy and economic outline even if he may have been wrong on small points of detail. A Bramwell revival is long overdue indeed—and not just in the common law courts.

122. Id. at 68-69.