

FROM STRICT LIABILITY TO WORKERS'  
COMPENSATION: THE PRUSSIAN RAILROAD LAW,  
THE GERMAN LIABILITY ACT, AND THE  
INTRODUCTION OF BISMARCK'S ACCIDENT  
INSURANCE IN GERMANY, 1838-1884

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I. INTRODUCTION: LEARNING ABOUT TORT REFORM FROM  
THE GERMAN MODEL

Policymakers in the United States today perceive tort litigation as a serious drain on the economy.<sup>1</sup> This debate over tort reform is framed exclusively in terms of domestic experience. Studying the experiences of other countries, however, is essential to raise the level of this debate. When we examine accident rates in Europe, we find that fatal accidents in the United States occur at a rate forty percent higher than they do in Europe.<sup>2</sup> Crude tort reform, in other words, would treat a symptom rather than an underlying cause. One explanation of the higher United States accident rate may be different regimes for compensating accidents and sickness. European countries generally have universal health insurance,<sup>3</sup> so illness is treated as illness. In the United States, people who are not covered by health insurance redefine their illnesses as the re-

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1. See, e.g., George W. Bush, State of the Union Address (Jan. 29, 2003), in *State of the Union: President's State of the Union Message to Congress and the Nation*, N.Y. TIMES, Jan. 29, 2003, at A12 ("Because of excessive litigation, everybody pays more for health care and many parts of America are losing fine doctors.").

2. See *infra* table accompanying note 360.

3. See Bruce C. Vladeck, *A Classic Clash of Political Values*, N.Y. TIMES, Feb. 4, 1992, at A21.

sult of an accident, and then try their luck in the tort litigation lottery.<sup>4</sup>

Modern state insurance compensation schemes began with Bismarck's introduction of social insurance in Germany in the 1880s.<sup>5</sup> An examination of the German strict liability regimes that paved the way for workers' compensation, however, is necessary to understand the adoption of social insurance. It is often remarked that strict liability makes potential defendants universal insurers for injuries<sup>6</sup>—and in Germany the early adoption of a strict liability regime compelled an early adoption of social insurance. Much in this little-known German background prefigures the modern debate over tort reform. A better acquaintance with this background will allow modern policymakers to choose with more sophistication among the many reform options.

This Note will examine how Germany dealt with the new accidents engendered by the Industrial Revolution, and the highly dangerous industries of railroads and coalmines in particular. The Note will begin by discussing the first modern strict liability act: the 1838 Prussian Railroad Law.<sup>7</sup> Originally

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4. Cf. John Fabian Witt, *Towards a New History of American Accident Law: Classical Tort Law and the Cooperative First-Party Insurance Movement*, 114 HARV. L. REV. 690, 697, 839 (2001) (arguing that the refusal of the United States to develop further social insurance in the early twentieth century is the reason the United States has such massive tort litigation at the end of the century). Because only those injured in an accident can claim compensation, whereas those who are merely sick cannot, sick people have an incentive to construe their illnesses as results of accidents, no matter how minor. See, e.g., *Vosberg v. Putney*, 47 N.W. 99, 99 (Wis. 1890) (plaintiff's diseased leg, which was actually caused by a self-inflicted injury, reconstrued as the result of a kick by the defendant). Thus the lack of universal health insurance in the United States feeds the increase in tort litigation.

It is true that *accident* insurance (as distinguished from health insurance) causes a slight upward blip in accidents after it is introduced. See *infra* text accompanying note 309. Once it becomes certain that the costs of accidents will be imposed on business, however—whether through strict liability or properly adjusted state insurance premiums—accidents resume their downward trend. See *infra* text Part XI.E.

5. See generally GREG EGHIGIAN, *MAKING SECURITY SOCIAL: DISABILITY, INSURANCE, AND THE BIRTH OF THE SOCIAL ENTITLEMENT STATE IN GERMANY* 25-31 (2000) (outlining the standard accounts about the introduction of Bismarck's social insurance program).

6. See, e.g., FRANK J. VANDALL, *STRICT LIABILITY* 22-25 (1989).

7. See *infra* Part IV.

intended to protect landowners and passengers, the law was reinterpreted by the courts so that its chief thrust was to protect workers.<sup>8</sup> This Note will emphasize the remarkable legal innovation of the Prussian courts as a crucial development that made railroads the insurers of their workers (through strict liability) and paved the way for workers' compensation. At the end of the 1860s, a series of terrible accidents in coalmines and on railroads impelled the Reichstag to pass the German Liability Act of 1871, which imposed strict liability on railroads throughout Germany.<sup>9</sup> Other industrialists, however, found themselves facing an avalanche of litigation about work-related accidents. The steel industry advocated stricter forms of liability, because that increased the market for their products, which increased safety. A steel industrialist, Louis Baare, proposed workers' compensation as a solution to the litigation crisis, and this became the basis for Bismarck's social insurance scheme.<sup>10</sup> This Note will argue that workers' compensation must be understood as a demand of the German steel industry that served its own particular interests. Social insurance did not arise from the moral benevolence of Otto von Bismarck, but from the crude horse-trading known to us from public choice theory.<sup>11</sup> Louis Baare's proposal of state social insurance as a solution to a litigation crisis resonates with us today, as we seek solutions to the crisis of asbestos litigation.<sup>12</sup>

The Note will also compare briefly the parallel developments in Britain and the United States.<sup>13</sup> The adoption of workers' compensation in those countries followed a similar pattern. A series of terrible railroad accidents awoke the public conscience, leading the legislatures to pass the Employers' Liability Acts. The Employers' Liability Acts fostered litigation,

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8. See *infra* Parts IV.B and V.

9. See *infra* Part VII.

10. See *infra* Part IX.C.

11. Public choice theory refers to the application of economic theory to political decision making, thereby replacing the "benevolent despot" model of government with one of a self-interested wealth-maximizer. See Geoffrey Brennan & James Buchanan, *Predictive Power and the Choice Among Regimes*, 93 *ECON. J.* 89, 89 (1983).

12. See RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION COSTS AND COMPENSATION: AN INTERIM REPORT 1 (2002), available at <http://www.rand.org/publications/DB/DB397/DB397.pdf> (noting that "[a]sbestos litigation is the longest running mass tort in U.S. history").

13. See *infra* Part XII.

which dissatisfied employers and employees alike. Workers' compensation in its turn replaced the Employers' Liability Acts. This Note will argue that the higher liability imposed on railroads in Britain and the United States performed a similar function to that in Germany—it served as the lead end of the wedge that created an opening for workers' compensation.<sup>14</sup>

A final Part of the Note will contrast the accident rates in Germany and the United States.<sup>15</sup> The United States' record is shockingly bad. In the United States, the ease with which tortfeasors could shift the liability to the injured meant they built infrastructure cheaply and dangerously. In Germany, the early imposition of strict liability forced dangerous industries—like railroads and coalmines—to prevent accidents from occurring in the first place.<sup>16</sup> These choices of the late nineteenth and early twentieth centuries remain with us today. Our dangerous infrastructure—largely an inheritance from that time—inflicts on us an accident rate that is nearly twice that of European countries.<sup>17</sup>

Study of this German experience allows us to isolate the solutions that true tort reformers should propose: the reconstruction of a dangerous infrastructure and the expansion of social insurance beyond workers' compensation to health insurance.

The story of the adoption of strict liability and workers' compensation in Germany abounds with paradoxical characters. The classic villains of German history—Junkers, steel industrialists, reactionary politicians, cartels<sup>18</sup>—appear as frequently as they do in Georg Grosz paintings, yet each makes a positive contribution, albeit for selfish motives. The heroes at the center of the drama, however, are the nameless Prussian and German judges who reinterpreted the Prussian 1838 Railroad Law to protect the working classes.

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14. *See id.*

15. *See infra* Part XI.E.

16. *See id.*

17. *See infra* table accompanying note 360.

18. For a classic description of these villains, see HANS-ULRICH WEHLER, *DAS DEUTSCHE KAISERREICH 1871-1918* [THE GERMAN EMPIRE 1871-1918], at 46-47, 51, 53-55, 62-69 (Joachim Leuschner ed., 7th ed. 1994).

## II. STRICT LIABILITY, NEGLIGENCE, AND INSURANCE: CHOOSING HOW TO PAY FOR ACCIDENTS IN ANGLO- AMERICAN AND GERMAN LAW

The story begins with the problem of mass accidents, a phenomenon of the Industrial Revolution, and the alternative compensation schemes developed in Anglo-American law: strict liability and negligence. Germany developed a third alternative: government social insurance. The puzzle is why government social insurance emerged in Germany first. The answer is because Prussia, the largest German state, was the first to enact a statute applying strict liability to railroads.

The traditional account of the Industrial Revolution holds that it increased the overall accident rate.<sup>19</sup> Whether this was based in reality, or more due to perception,<sup>20</sup> contemporaries did perceive the rise in accidents as a crisis.<sup>21</sup> The accident victims were often left destitute.<sup>22</sup> The Industrial Revolution increased mass accidents—such as railroad crashes,<sup>23</sup>

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19. Cf. P.W.J. BARTRIP & S.B. BURMAN, *THE WOUNDED SOLDIERS OF INDUSTRY: INDUSTRIAL COMPENSATION POLICY 1833-1897*, at 8 (1983) (noting the assumption that the industrial revolution caused an increase in industrial accidents but discussing the defects of that statistical analysis, and concluding that, although the absolute number of accidents certainly rose, it is unclear whether the rate did as well).

20. Agriculture has always been one of the most accident-prone industries. See, e.g., 1 STENOGRAPHISCHE BERICHTE DES REICHSTAGES [STENOGRAPHIC REPORTS OF THE REICHSTAG] 464 (Apr. 29, 1871) [hereinafter SBRT] (statements of Mitglied des Reichstages [Member of the Reichstag, MdR] and National Liberal leader Eduard Lasker) (observing that agriculture causes many accidents, especially from horseback riding). The new industries actually may have been safer than the old agricultural economy. There has not yet been a statistical study to see if this is true, however. Cf. BARTRIP & BURMAN, *supra* note 19, at 8 (noting that available data does not imply that industrial production was more dangerous than agricultural work). What was new, however, was the mass accident and the publicity it engendered. See *infra* text accompanying notes 23-27.

21. See BARTRIP & BURMAN, *supra* note 19, at 14.

22. See Witt, *supra* note 4, at 727, 731.

23. There is an ample literature on railroad accidents. See generally, e.g., L.T.C. ROLT, *RED FOR DANGER: A HISTORY OF RAILWAY ACCIDENTS AND RAILWAY SAFETY* (3d ed., David & Charles 1976) (1955) (studying railroad accidents in the United Kingdom); 1 HANS JOACHIM RITZAU, *VON SIEGELSDORF NACH AITRANG: DIE EISENBAHNKATASTROPHE ALS SYMPTOM* [FROM SIEGELSDORF TO AITRANG: THE RAILROAD ACCIDENT AS A SYMPTOM] (1972) (studying twentieth century German railroad accidents); O.S. NOCK, *HISTORICAL RAILWAY DISASTERS* (2d ed. 1969) (studying railroad accidents in the United King-

coalmine explosions,<sup>24</sup> and steamboat fires.<sup>25</sup> The newspapers were filled with reports of the mass accidents,<sup>26</sup> and opponents of capitalism cited them to attack industrial development.<sup>27</sup>

Given this perception of a crisis, the courts of England and the United States grappled with alternative methods of assigning liability for accidents: strict liability and negligence. The dominant scheme became negligence. A third alternative, insurance, was discussed, but was not adopted until 1897 in England and after 1910 in the United States.

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dom); ROBERT B. SHAW, *DOWN BRAKES: A HISTORY OF RAILROAD ACCIDENTS, SAFETY PRECAUTIONS AND OPERATING PRACTICES IN THE UNITED STATES OF AMERICA* (1961) (providing an excellent history of railroad accidents in the U.S., but exhibiting a pro-railroad bias in its analysis); 1-2 LUDWIG RITTER VON STOCKERT, *EISENBahnUNFÄLLE: EIN BEITRAG ZUR EISENBahnBETRIEB-SLEHRE* [RAILROAD ACCIDENTS: A CONTRIBUTION TO THE STUDY OF RAILROAD OPERATION] (1913) (discussing mostly German and Austrian accidents of the early twentieth century in the first volume, reprinting photographs of railroad accidents in the second volume).

24. There are numerous studies of individual coalmine accidents, but the only country for which there is a comprehensive history is Great Britain. See HELEN DUCKHAM & BARON DUCKHAM, *GREAT PIT DISASTERS: GREAT BRITAIN 1700 TO THE PRESENT DAY* (1973).

25. Steamboat fires were the most destructive of all mass accidents but are also the least studied. For a study of one steamboat fire, the *Sultana*, which killed over 1700 people and is the worst maritime disaster in United States history, see GENE ERIC SALECKER, *DISASTER ON THE MISSISSIPPI: THE SULTANA EXPLOSION, APRIL 27, 1865*, at xi (1996).

26. See COLLEEN A. DUNLAVY, *POLITICS AND INDUSTRIALIZATION: EARLY RAILROADS IN THE UNITED STATES AND PRUSSIA 180* (1994) ("We can hardly look into an exchange paper, of late, without meeting an account of some dreadful accident on railroads.") (quoting *AMERICAN RAILROAD JOURNAL*, Feb. 15, 1851); BARRY SUPPLE, *THE ROYAL EXCHANGE ASSURANCE: A HISTORY OF BRITISH INSURANCE 1729-1970*, at 226 (1970) (noting that railroad accidents were of "almost daily occurrence") (quoting *TIMES* (London), 1849). *But cf.* 1 SBRT, *supra* note 20, at 210 (Apr. 13, 1871) (statements of MdR Becker) (declaring that railroads stop newspapers' publishing too many accounts of railroad accidents by threatening to pull their advertising); REGINA OGOREK, *UNTERSUCHUNGEN ZUR ENTWICKLUNG DER GEFÄHRDUNGSHAFTUNG IM 19. JAHRHUNDERT* [STUDIES OF THE DEVELOPMENT OF STRICT LIABILITY IN THE NINETEENTH CENTURY] 105 n.28 (1975) (same).

27. See Friedrich Engels, *Die Lage der Arbeitenden Klasse in England* [*The Condition of the Working Class in England*], in 2 KARL MARX & FRIEDRICH ENGELS: *WERKE* [WORKS] 463-64 (photo. reprint 1990) (1957) (observing that "the coalmine is the scene of a mass of the most horrible accidents, and these in particular should be accounted for by the selfishness of the bourgeoisie").

American legal thought rejected the idea of insurance. Oliver Wendell Holmes, Jr., writing in 1881, observed: "The state might conceivably make itself a mutual insurance company against accidents," but "[s]tate interference is an evil, where it cannot be shown to be a good. Universal insurance, if desired, can be better and more cheaply accomplished by private enterprise."<sup>28</sup>

It was not until Britain adopted the Workmen's Compensation Act in 1897<sup>29</sup> that state insurance began to make its way into the Anglo-American world.<sup>30</sup> This was copied in New York state in 1910.<sup>31</sup> A form of insurance related to workers' compensation, disability insurance, was adopted on the federal level in 1935 when the Social Security Act was passed as part of the New Deal legislation.<sup>32</sup>

In the mid-nineteenth century, Anglo-American courts adopted the principle that liability could be found only if the defendant was negligent—if she had not taken due care. Under the negligence system, the plaintiff bore the cost of unavoidable accidents; under a strict liability system, the defendant bore this cost.<sup>33</sup> The defendants were often railroads and other new industries, and the plaintiffs were often the employees of those railroads. Professors Charles Gregory,<sup>34</sup> Morton

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28. O.W. HOLMES, *THE COMMON LAW* 96 (Boston, Little, Brown 1881). Similarly, members of the American cooperative insurance movement argued in 1891 that "governmental insurance, whether voluntary or compulsory, can never be made a success even under monarchical forms of government." See Witt, *supra* note 4, at 811 (quoting *Paternalism*, FRATERNAL MONITOR, Feb. 1, 1891, at 12).

29. 60 & 61 Vict., c. 37 (Eng.).

30. See Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775, 797 (1982) [hereinafter Epstein, *Historical Origins*].

31. See PRICE V. FISHBACK & SHAWN EVERETT KANTOR, *A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION* 102 (2000).

32. See Old Age, Survivors, and Disability Insurance Benefits (Social Security Act), ch. 531, 49 Stat. 620 (1935) (current version at 42 U.S.C. §§ 401-33 (2000)). See also ARTHUR M. SCHLESINGER, *THE COMING OF THE NEW DEAL* 297-315 (1959) (discussing the 1935 passage of the Social Security Act).

33. See Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 365-70 (1951) (discussing American courts' development of the negligence concept in the nineteenth century).

34. See *id.* at 368, 382.

Horwitz,<sup>35</sup> and Lawrence Friedman<sup>36</sup> contended<sup>35</sup> that the negligence system was a state-sponsored subsidy to the new industries. The ruling classes preferred not to court controversy by subsidizing railroads out of the public fisc. Instead, by altering the liability system from strict liability to negligence, they freed new industries from the costs of accidents—at the expense of the plaintiff victims.<sup>37</sup>

Professor Gary Schwartz's detailed examinations of tort decisions in Maryland, Delaware, South Carolina, New Hampshire, and California overturned this thesis.<sup>38</sup> He found that courts favored plaintiffs rather than defendants and concluded that the courts did not engage in the utilitarian analysis that Horwitz contended they did.<sup>39</sup>

An alternative to both strict liability and negligence is loss spreading through insurance. Insurance acts like strict liability in that an insurance fund rather than the injured plaintiff bears the cost of unavoidable accidents. Insurance, however, can be flexible in the allocation of damages. Since insurance contributions are adjustable, industry can bear the entire burden; the employees can bear the burden; employers and employees can allocate the burden between themselves; or the burden can be placed on third parties, such as taxpayers.<sup>40</sup>

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35. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* 99 (1977).

36. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 300-02 (2d ed. 1985).

37. See *id.*; Gregory, *supra* note 33, at 382; HORWITZ, *supra* note 35, at 99. But see R.W. KOSTAL, *LAW AND ENGLISH RAILWAY CAPITALISM 1825-1875* 313-321 (1994) (arguing that English judges developed rules to favor passenger plaintiffs and to disfavor railroad worker plaintiffs because they identified with the former but not the latter).

38. See Gary T. Schwartz, *The Character of Early American Tort Law*, 36 *UCLA L. REV.* 641, 643 (1989) (studying Delaware, Maryland, and South Carolina) [hereinafter Schwartz, *The Character of Early Tort Law*]; Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 *YALE L.J.* 1717, 1717-20 (1981) (studying California and New Hampshire) [hereinafter Schwartz, *Tort Law and the Economy in Nineteenth-Century America*].

39. See Schwartz, *Tort Law and the Economy in Nineteenth-Century America*, *supra* note 38, at 1720; Schwartz, *The Character of Early Tort Law*, *supra* note 38, at 642-43.

40. How this actually works out depends on the relative strength of the economic interest groups. Some schemes, such as workers' compensation, that ostensibly place the entire cost on the employers are actually paid for by

At the very time that Holmes said state insurance was an evil,<sup>41</sup> Bismarck was proposing an insurance scheme in Germany.<sup>42</sup> The insurance scheme resulted from Prussia's early adoption of strict liability for railroads: The Prussian Railroad Law of 1838<sup>43</sup> led to the German Liability Act of 1871,<sup>44</sup> and the 1871 act led to Louis Baare's proposal of 1880<sup>45</sup> and Bismarck's Accident Insurance Law of 1884,<sup>46</sup> which was the first of all workers' compensation plans and the model for all that

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the workers through wage reductions. See, e.g., FISHBACK & KANTOR, *supra* note 31, at 69 (showing that in the United States, workers "bought" workers' compensation with lower wages). See Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L. J. 499, 517, 519, 522-23 (1961) (discussing the circumstances under which costs will be shifted forward to consumers or backwards to suppliers and labor by an industry that has to pay for accidents).

41. See *supra* text accompanying note 28.

42. See HANS BLUM, DAS DEUTSCHE REICH ZUR ZEIT BISMARCKS: POLITISCHE GESCHICHTE VON 1871 BIS 1890 [THE GERMAN EMPIRE IN THE AGE OF BISMARCK: A POLITICAL HISTORY FROM 1871 TO 1890] 408 (1893) (stating that Bismarck proposed his accident insurance program to the *Bundesrat*, the German Upper House, on January 15, 1881).

43. Gesetz über die Eisenbahn-Unternehmungen [Law Concerning Railroad Enterprises], v. 3.11.1838 (Gesetz-Sammlung für die königlichen preußischen Staaten [Collection of Prussian Laws] [PrGS] S.505). Since the older statutes cited here are not listed in the standard reference book for German legal abbreviations (HILDEBERT KIRCHNER, ABKÜRZUNGSVERZEICHNISS DER RECHTSSPRACHE [LIST OF THE ABBREVIATIONS FOR LEGAL TERMINOLOGY] (1993)), the abbreviations listed in 1 JOHANNES FRERICH & MARTIN FREY, HANDBUCH DER GESCHICHTE DER SOZIALPOLITIK IN DEUTSCHLAND [HANDBOOK OF THE HISTORY OF SOCIAL POLICY IN GERMANY] 351-57 (1993), will be used instead.

44. Gesetz betreffend die Verbindlichkeit zum Schadenersatz für die bei dem Betriebe von Eisenbahnen, Bergwerken usw. herbeigeführten Tötungen und Körperverletzungen [Law Concerning the Obligation to Compensate for Damages Resulting from Deaths and Injuries Caused By the Operation of Railroads, Mines, etc.], v. 7.6.1871 (RGBl S.207).

45. See Louis Baare, *Promemoria des Kommerzienrats Louis Baare für den preußischen Handelsminister Karl Hofmann, 1880 April 30* [*Promemoria to Prussian Minister of Trade Karl von Hofmann, Apr. 30, 1880*], in 2 VON DER HAFTFLICHTIGKEITSGESETZGEBUNG ZUR ERSTEN UNFALLVERSICHERUNGSVORLAGE [FROM STRICT LIABILITY LEGISLATION TO THE FIRST ACCIDENT INSURANCE BILL] 161 (Quellensammlung zur Geschichte der deutschen Sozialpolitik: 1867 bis 1914, Teil 1 [Collection of Sources of the History of German Social Policy: 1867 to 1914, Part 1], Florian Tennstedt et al. eds., 1993).

46. See Unfallversicherungsgesetz [Accident Insurance Law], v. 6.6.1884 (RGBl. S.21).

followed. These different choices set Germany on a very different path from Britain and the United States.

### III. THE POLITICAL STRUCTURE AND LEGAL JURISDICTIONS IN THE GERMAN STATES

Until the end of the eighteenth century, Germany was composed of a thousand small states. As late as 1815 there were forty-one German states. It was not until 1871 that they were unified into one nation. Different legal regimes within individual states (for example, French law in sections of Prussia) complicated matters further. The period of the German Confederation (1815-66) is particularly interesting for the United States reader because the arrangement was analogous to our own federal system and generated similar problems (choice of law, races to the bottom, etc.). This Part will give a brief overview of Germany's political and legal arrangements.

#### A. *The Political Structure*

The Holy Roman Empire of the German Nation included over a thousand states. By the time the changes of Napoleonic Europe were incorporated into the Final Act of the Congress of Vienna in 1815,<sup>47</sup> the number of German states had been reduced to forty-one.<sup>48</sup> Each state, from the gigantic Austria and Prussia down to the tiny Reuss-Greiz, was sovereign and had its own laws. From 1815 until 1866 all the German states were part of the German Confederation (*Deutscher Bund*), which sought to coordinate foreign policy and law.<sup>49</sup> The Confederation agreed on uniform codes for bills of exchange in 1849 and a commercial code in 1861. In 1866, war broke out between Prussia and Austria and the German Confederation dissolved. After Austria's defeat, Prussia annexed seven

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47. Acte du Congrès de Vienne [Act of the Congress of Vienna], June 9, 1815, art. 58, 2 Martens Nouveau Recueil (ser. 1) 379, 407-8, 64 Consol. T.S. 453, 474-75.

48. See Reinhard Zimmermann, *An Introduction to German Legal Culture, in* INTRODUCTION TO GERMAN LAW 1, 1 (Werner F. Ebke & Matthew W. Finkin eds., 1996). See generally GERHARD KÖBLER, HISTORISCHES LEXIKON DER DEUTSCHEN LÄNDER [HISTORICAL LEXICON OF THE GERMAN STATES] (4th ed. 1992).

49. See DEUTSCHER BUNDESTAG [GERMAN PARLIAMENT], FRAGEN AN DIE DEUTSCHE GESCHICHTE: IDEEN, KRÄFTE, ENTSCHEIDUNGEN VON 1800 BIS ZUR GEGENWART [QUESTIONS ON GERMAN HISTORY: IDEAS, POWERS, DECISIONS FROM 1800 TO THE PRESENT] 72-73, 79-80 (7th ed. 1981).

states and formed a tighter union, the North German Confederation, with all the other German states north of the Main River. The individual German states surrendered their sovereignty to the Confederation. Austria withdrew from German politics.<sup>50</sup> In 1870, the German states went to war with France. The nationalist euphoria of the Franco-Prussian War impelled the four independent German states south of the Main River to join the North German Confederation to form the German Empire on January 18, 1871.<sup>51</sup>

Each individual German state promulgated its own laws. At first only the southern states had elected legislatures.<sup>52</sup> Prussia had only provincial diets until the Revolution of 1848, when the king summoned a centrally elected legislature.<sup>53</sup> The North German Confederation and its successor, the German Empire, had a central legislature comprising an upper house, the Bundesrat, and a lower house, the Reichstag. The individual German states (Saxony, Brunswick, Prussia, and the others) sent ambassadors to Berlin who served as their representatives in the Bundesrat. The Reichstag was elected by universal male suffrage. After 1871, the King of Prussia was also the German Emperor.<sup>54</sup>

### B. *The Pattern of Legal Jurisdiction*

State borders did not indicate where one law ended and a new law began.<sup>55</sup> Prussia, the largest state after Austria, had codified its law in the Allgemeines Preussisches Landrecht [General Prussian National Law] of 1794, but this only applied in those Prussian territories that were subject to the Prussian crown in 1794.<sup>56</sup> In 1815, Prussia acquired the Rhine Province and Westphalia. Rhineland-Westphalia contains the Ruhr

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50. See *id.* at 207-8.

51. See *id.* at 208, 215-16.

52. See *id.* at 73, 79.

53. See *id.* at 137-38.

54. See *id.* at 208, 225-27.

55. See B.S. MARKESINIS, *THE LAW OF TORTS: A COMPARATIVE INTRODUCTION* 21 (3d ed. 1997) (noting that Prussian law was in force in some parts of Bavaria and other localities of Germany); Zimmermann, *supra* note 48, at 3-4.

56. See MARKESINIS, *supra* note 55, at 21-22.

coalfield, which became the heartland of German industry.<sup>57</sup> The Rhineland did not use Prussian law, but the French Civil Code promulgated by Napoleon.<sup>58</sup> The Napoleonic Civil Code was so popular in the Rhineland that the three major states that acquired territory on the left bank in 1815—Prussia, Bavaria, and Hesse-Darmstadt—left the French law in place.<sup>59</sup> Until 1900 a traveler would cross three international boundaries when she traveled from Paris to Brussels to Cologne, but it was not until after she crossed the Rhine, traveled eastward to Essen, and then crossed the border from the Rhine Province into Westphalia, arriving at the town of Bochum,<sup>60</sup> that she would leave a territory where the Napoleonic Civil Code applied and enter the territory of a new law. It was not until the promulgation of the German Code of Civil Law in 1900 that a uniform civil law applied throughout Prussia and throughout the German Empire as a whole.<sup>61</sup>

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57. The Ruhr industrial region straddles the Prussian Rhine Province and Westphalia. The coal measures stretch from the Ruhr River north to the Lippe. The largest concentration of heavy industry in Europe in 1900, it operated as an organic whole (*Verbundwirtschaft* [synergy]), densely interlinked by coal transmission belts, oil and gas pipelines, electricity cables, railroads, tramlines, and roadways. Its major cities include Dortmund, Bochum, Bottrop, Essen, Mülheim/Ruhr, Witten, Hattingen, Duisburg, Gelsenkirchen, Herne, Recklinghausen, and Castrop-Rauxel. See THOMAS PARENT, *DAS RUHRGEBIET: KULTUR UND GESCHICHTE IM "REVIER" ZWISCHEN RUHR UND LIPPE* [THE RUHR DISTRICT: CULTURE AND HISTORY IN THE "COALFIELD" BETWEEN THE RUHR AND LIPPE RIVERS] (2d ed. 1984); NORMAN J.G. POUNDS, *THE RUHR: A STUDY IN HISTORICAL AND ECONOMIC GEOGRAPHY* (Greenwood 1968) (1952).

58. See MARKESINIS, *supra* note 55, at 22.

59. See MICHAEL JOHN, *POLITICS AND THE LAW IN LATE NINETEENTH-CENTURY GERMANY: THE ORIGINS OF THE CIVIL CODE* 16 (1989); JEFFREY M. DIEFENDORF, *BUSINESSMEN AND POLITICS IN THE RHINELAND, 1789-1834* 255-56 (1980). One apparent exception to the use of French law on the left bank of the Rhine was the enclave of Birkenfeld, which was ruled by the Grand Duke of Oldenburg; it used the *Jus Commune*. See MARKESINIS, *supra* note 55, color map preceding 677.

60. The area of French law is normally described as "the left bank of the Rhine," but it also included the territories on the right bank that were part of the Prussian Rhine Province. See MARKESINIS, *supra* note 55, color map preceding 677.

61. See JOHN, *supra* note 59, at 5 (discussing the legal disunity among the German states); FREDERIC WILLIAM MAITLAND, *The Making of the German Civil Code*, in 3 *THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND* 474, 483 (photo. reprint 1981) (1911) (noting the 1900 passage of the German Code of Civil Law).

The main types of law in Germany before 1900 were the following: First, the Allgemeines Preussisches Landrecht of 1794, which applied in most of Prussia—but not in the Rhine Province and not in the area of Pomerania acquired from Sweden in 1815. This code also applied in areas of Prussia that had become parts of other states in the early nineteenth century: East Friesland, which was part of the Kingdom of Hanover, and Bayreuth and Ansbach, which were part of Bavaria. Another large area followed the *Jus Commune* (*Gemeines Recht*), the old common law of the Holy Roman Empire. This applied in formerly Swedish Pomerania (part of Prussia after 1815), the Mecklenburg grand duchies, Oldenburg (including the section of Birkenfeld on the left bank of the Rhine), Hanover, Waldeck, the Hesse states, and Brunswick. Saxon law applied in the small Saxon principalities of Thuringia, the Anhalt duchies, and the kingdom of Saxony until 1863.<sup>62</sup> In 1863 the kingdom of Saxony promulgated a civil code, which replaced the older Saxon law.<sup>63</sup> Baden, Bavaria, and Württemberg each had their own legal systems, although they did not succeed in codifying their civil law before 1871. Danish law applied in Holstein, Jute law in Schleswig, and Frisian law on the Frisian Islands in the North Sea.<sup>64</sup>

This overall scheme was made yet more complex by the persistence of many legal systems on the local level. In the Prussian province of Silesia, for example, there were in 1845 no fewer than sixty different schemes of marital property law.<sup>65</sup>

Technically, only the legislature in Germany can create law, but courts have much leeway in interpreting statutes. German legal literature often points out that there are two methods of legal innovation: through the legislature (*der Gesetzgeber*) and through judicial interpretation (*Rechtsprechung*).<sup>66</sup> Statutory construction allows German judges to engage in the legal innovation that is more often associated with Anglo-American common law judges.

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62. See MARKESINIS, *supra* note 55, color map preceding 677.

63. On the Saxon Civil Code of 1863, see JOHN, *supra* note 59, at 40.

64. See MARKESINIS, *supra* note 55, color map preceding 677.

65. See MAITLAND, *supra* note 61, at 477.

66. See, e.g., Zimmermann, *supra* note 48, at 19-20; NIGEL G. FOSTER, GERMAN LAW & LEGAL SYSTEM 4, 47 (1993).

#### IV. THE PRUSSIAN RAILROAD LAW OF NOVEMBER 3, 1838

The Prussian Railroad Law of 1838 introduced modern strict liability to Germany. This Part will discuss the legislative intent behind the law and the social factors that led Prussia to adopt this unique statute.

##### A. *The Statute*

German law imposed traditional strict liability for mining subsidence,<sup>67</sup> nuisance (*Nachbarrecht*),<sup>68</sup> eminent domain law,<sup>69</sup> damage done by wild animals,<sup>70</sup> and the principle that the loser pays the costs in a lawsuit.<sup>71</sup> Another source of strict liability was German "takings" doctrine (*Aufopferungshaftung*).<sup>72</sup> It was the Prussian Railroad Law of November 3, 1838,<sup>73</sup> however, created as a result of industrialization and po-

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67. See RUDOLF BIENENFELD, *DIE HAFTUNG OHNE VERSCHULDEN: TYPENLEHRE UND SYSTEM DER AUSSERGEWÄHRTE OBLIGATIONEN IM DEUTSCHEN, ÖSTERREICHISCHEN UND SCHWEIZERISCHEN RECHT* [LIABILITY WITHOUT FAULT: A TYPOLOGICAL ARRANGEMENT AND SYSTEMATIZATION OF NON-CONTRACTUAL OBLIGATIONS IN GERMAN, AUSTRIAN AND SWISS LAW] 18-20 (1933).

68. See *id.* at 34; OGOREK, *supra* note 26, at 51-61.

69. See BIENENFELD, *supra* note 67, at 34-35.

70. See *id.* at 18.

71. See *id.* at 32-34.

72. As in the United States, in Germany the state must pay compensation when it takes private property from an individual. This principle was expressed in the Prussian Legal Code of 1794. See I ALLGEMEINES LANDRECHT FÜR DIE PREUSSISCHEN STAATEN [GENERAL NATIONAL LAW FOR THE PRUSSIAN STATES] § 75 (1832). Compensation was typically paid for acquisition through eminent domain, damage by military action, the destruction of animals during epizootics, mass vaccinations, and anti-lice campaigns. In the twentieth century, German courts applied this doctrine to allow the plaintiff to collect where she would ordinarily be barred because the defendant had taken due care—a version of strict liability. For example, the city of Aachen dammed a river to create a reservoir. The iron ore deposits in the reservoir, however, contaminated the water so that a brewery could no longer use it to brew beer. The defendant had taken all due care—so it would not be liable under the general negligence regime—but the plaintiff brewery was allowed to collect under the "takings" doctrine. See JOSEF ESSER, *GRUNDLAGEN UND ENTWICKLUNG DER GEFÄHRDUNGSHAFTUNG* [THE FOUNDATIONS AND DEVELOPMENT OF STRICT LIABILITY] 11-12, 16-17, 75-76 (1941). German courts have expanded this concept further to apply it to private defendants as well. See I MÜNCHENER RECHTS-LEXIKON [MUNICH LEGAL ENCYCLOPEDIA] 296 (Horst Tilch ed. 1987).

73. Gesetz über die Eisenbahn-Unternehmungen [Law Concerning Railroad Enterprises], v. 3.11.1838 (PrGS S.505).

litical maneuvering, that expanded strict liability beyond these small islands of the law. Section twenty-five read:

The [railroad] company is obligated to pay compensation for all damages arising from the operation of the railroad that are incurred by passengers and goods transported on the railroad, or by other persons and their goods, and can free itself from this obligation only by proving that the damage was caused either by the fault of the claimant or by an unavoidable external circumstance.<sup>74</sup>

Prussia in the 1830s was an agricultural state, dominated by the Junker landowning class.<sup>75</sup> The agriculturalists feared the sparks from the locomotives would burn their lands.<sup>76</sup> Lo-

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74. *Id.* See also ARTHUR VON MAYER, GESCHICHTE UND GEOGRAPHIE DER DEUTSCHEN EISENBAHNEN [HISTORY AND GEOGRAPHY OF THE GERMAN RAILROADS] 106-08 (Steiger 1984) (1891); OGOREK, *supra* note 26, at 7, 61-63.

75. The Junkers were East Elbian agrarians from noble families who enjoyed feudal privileges and advocated reactionary conservative politics. See 2 DIETRICH EICHHOLTZ, JUNKER UND BOURGEOISIE VOR 1848 IN DER PREUSSISCHEN EISENBAHNGESCHICHTE [JUNKERS AND BOURGEOISIE BEFORE 1848 IN PRUSSIAN RAILROAD HISTORY] 37-40 (1962) (applying a Marxist-Leninist East German interpretation); Hans Rosenberg, *Die Pseudodemokratisierung der Rittergutbesitzerklasse* [The Pseudo-Democratization of the Feudal Landowning Class], in FESTSCHRIFT FÜR HANS HERZFELD [CELEBRATORY PUBLICATION FOR HANS HERZFELD] 459 (1958), reprinted in MODERNE DEUTSCHE SOZIALGESCHICHTE [MODERN GERMAN SOCIAL HISTORY] 287 (Hans-Ulrich Wehler ed., 1976) (expressing the views of the Social Democratic Left of the Weimar Republic). The term "Junker" is a contraction of "Jung Herr," "young gentleman." See EDA SAGARRA, A SOCIAL HISTORY OF GERMANY, 1648-1914 44 (1977).

76. On the problems of sparks from locomotives generating fires, see Mark F. Grady, *Common Law Control of Strategic Behavior: Railroad Sparks and the Farmer*, 17 J. LEGAL STUD. 15, 28-37 (1988). See also R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 29 (1960) (discussing sparks from locomotives as a special example of the problem of social cost). The legal literature on the problem of locomotive sparks in Germany is quite rich. See, e.g., Janzer, *Haftung der Eisenbahnverwaltung für die durch Funkenflug verursachten Brandschäden ausserhalb eines bestehenden Schuldverhältnisses* [The Liability of a Railroad Operator for Fire Damage Caused by Flying Sparks Outside of an Existing Contractual Relationship], 45 ZEITUNG DES VEREINS DEUTSCHER EISENBahn-Verwaltungen [NEWSPAPER OF THE ASSOCIATION OF GERMAN RAILROAD ADMINISTRATIONS] 681 (1905) (using a legal realist argument in favor of strict liability that parallels the thinking of Cardozo and other American legal realists); Prinz, *Der Ausgleichsanspruch bei Funkenflugschäden* [The Claim for Compensation for Damages Caused by Sparks], 69 ZEITUNG DES VEREINS DEUTSCHER EISENBahn-Verwaltungen 473 (1929).

comotives had to have spark arrests<sup>77</sup> and burn coke instead of coal or wood.<sup>78</sup> Strict liability ensured that the cost of any unavoidable accidents would fall upon the railroads.

### B. *Legislative Intent*

The records of the discussions in the Prussian State Council reveal the legislative intent behind the law.<sup>79</sup> Those records show that the legal theorist and Berlin professor Friedrich Carl von Savigny persuaded the State Council to adopt strict liability for railroads.<sup>80</sup> Savigny foresaw two classes of injured plaintiffs: passengers and landowners. In Savigny's model, passengers should be able to sue under strict liability because the railroad was like an innkeeper, and innkeepers were traditionally strictly liable for injuries to travelers.<sup>81</sup> He further argued that damage awards would be easier to administer if the injured passenger could sue the railroad directly, and then the railroad could sue its employee for contribution. It was difficult for the injured passenger to identify the responsible individual, but easy for the railroad company.<sup>82</sup> Savigny also

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77. When the Verein für Eisenbahn-Kunde [Association for Railroad Science] was founded in Berlin in the early 1840s, the Berlin locomotive manufacturer August Borsig delivered its first lecture on his new design for a spark arrest. See DUNLAVY, *supra* note 26, at 159.

78. See Elfriede Rehbein, *Die Eisenbahn revolutioniert den Verkehr* [The Railroad Revolutionizes Transportation], in DEUTSCHE EISENBAHNEN 1835-1985 [GERMAN RAILROADS 1835-1985], at 43, 43 (Elfriede Rehbein ed., 1985).

79. See GUSTAV LEHMANN, KÖRPERVERLETZUNGEN UND TÖDTUNGEN AUF DEUTSCHEN EISENBAHNEN UND DIE UNZULÄNGLICHKEIT DES RECHTSCHUTZES [BODILY INJURIES AND FATALITIES ON GERMAN RAILROADS AND THE INSUFFICIENCY OF THE LEGAL SAFEGUARDS] 45-48 n.\* (Verlag von Ferdinand Enke [Publishing House of Ferdinand Enke] 1869); Theodor Baums, *Die Einführung der Gefährdungshaftung durch F.C. von Savigny* [The Introduction of Strict Liability by F.C. von Savigny], 104 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE [JOURNAL OF THE SAVIGNY FOUNDATION FOR LEGAL HISTORY] 277 (1987). Prussia had no elected central legislature before 1848, see Kenneth F. Ledford, *Judicial Independence and Political Representation: Prussian Judges as Parliamentary Deputies, 1849-1913*, 25 LAW & SOC. INQUIRY 1049, 1053 (2000), but the legislative intent behind the Railroad Law can be inferred from the discussions in the appointed Prussian State Council (*Staatsrat*).

80. See Baums, *supra* note 79, at 277-78.

81. Cf. OGOREK, *supra* note 26, at 81 (discussing the special obligations that Roman law imposed on shippers, innkeepers, and stable owners, making them strictly liable for injuries to their guests).

82. See Baums, *supra* note 79, at 279.

feared that the sparks from locomotives' smokestacks would start fires on landowners' estates. No one was at fault—for the technology did not exist to prevent all sparks—but the cost should not be left with the injured landowner. Since the damage arose from the inherent dangerousness of the industry, the cost should be placed on the railroads.<sup>83</sup>

Opponents of strict liability questioned why railroads should be treated differently from other fire-prone industries, such as steamboats, factories that use steam engines, sugar refineries, and smithies. Savigny replied that the railroad moves through the entire land, so the danger is more extensive. Landowners could not keep the railroad out, because it had the powers of eminent domain.<sup>84</sup> Savigny's proposal passed the State Council with a vote of twenty-nine in favor and only four against.<sup>85</sup>

Despite Savigny's intent, the Railroad Law soon grew to have far different implications in German law. Savigny's innkeeper analogy and his discussion of sparks reflected his assumption that the principal plaintiffs would be passengers and landowners.<sup>86</sup> The Prussian Supreme Court, however, would reinterpret the statute to favor workers.<sup>87</sup> Similarly, Savigny saw the railroad's strict liability as a *quid pro quo* for the right of eminent domain granted by the Prussian state. The courts would later make it impossible for the landowner to collect for spark damage if the landowner had given up land in an eminent domain proceeding<sup>88</sup>—the opposite of Savigny's intention.

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83. See *id.*

84. See *id.* at 281.

85. See *id.* at 281-82.

86. The documents published by Baums, *supra* note 79, at 277-81, and LEHMANN, *supra* note 79, at 45 n.\*, indicate that Savigny and the State Council wanted to protect passengers and landowners. Ogorek's claim that the original intent of the 1838 law was to protect railroad employees, OGOREK, *supra* note 26, at 63, rests on a misreading of LEHMANN, *supra* note 79, at 45 n.\*.

87. See *infra* Part V.

88. See Prinz, *supra* note 76, at 478-79.

C. *Why the Railroad Companies Accepted the Imposition of Strict Liability with Little Resistance*

The Prussian government's imposition of strict liability upon the railroads met with only token resistance from railroad investors. The explanation for this lies in the history of railroad development. At the time of the enactment of the Railroad Law, the only open line was one that ran from Berlin to Potsdam.<sup>89</sup> Thus, in 1838, there was no significant railroad interest—no investors, no railroad managers, and no bureaucrats with close links to the industry they regulated. Once more railroads were constructed, however, they became so profitable and wealthy that it was difficult to enact legislation contrary to their interests. The railroads had the money to buy off their opponents.<sup>90</sup>

In the years immediately following the passage of the Railroad Law of 1838, railroad investors attacked it.<sup>91</sup> In November 1846, when the Prussian railroads formed a lobbying group (the *Verband Preussischer Eisenbahn-Direktionen*), they sought to amend the strict liability region in section twenty-five, but the Prussian Finance Ministry refused to discuss it.<sup>92</sup> In 1847, the lobbying group allowed all German railroads to join (becoming the *Verein Deutscher Eisenbahn-Verwaltungen*).<sup>93</sup> This diluted the group's desire to alter the law, because the law did not apply to most railroads outside of Prussia.<sup>94</sup> In the fall of 1849, the lobbying group discussed section twenty-five one more time but regarded its chance to amend it as remote since the conservative reaction had defeated the liberal Revolution of 1848.<sup>95</sup> The critics could live with the law and its defects, and keep building railroads—which turned out to be so profitable that criticism of the law ceased.<sup>96</sup>

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89. See MAYER, *supra* note 74, at 259-60.

90. See 2 EICHHOLTZ, *supra* note 75, at 138-54 (explaining how the wealthy railroads found it easy to bribe the Junkers to overcome their opposition).

91. See ALEXANDER BERGENGRÜN, DAVID HANSEMANN 203-05 (1901); JAMES M. BROPHY, CAPITALISM, POLITICS, AND RAILROADS IN PRUSSIA, 1830-1870 34-36 (1998); 2 EICHHOLTZ, *supra* note 75, at 98.

92. DUNLAVY, *supra* note 26, at 163-64.

93. *Id.* at 164-65.

94. *Id.* at 166-69.

95. *Id.* at 168.

96. *Cf. infra* text accompanying notes 97-104.

In addition, the relatively low costs imposed by the strict liability regime dampened opposition to the law. Posner has suggested that strict liability slows down the spread of abnormally dangerous activities by making them expensive enterprises.<sup>97</sup> The German railroads, however, proved to be so profitable<sup>98</sup> that these extra costs were a *bagatelle*. The Nuremberg-Fürth Railroad paid dividends averaging 17.38% on the capital invested over the years 1836-88.<sup>99</sup> The Magdeburg-Halberstadt Railroad paid an average of over 12% during 1844-64.<sup>100</sup> Between 1840 and 1847, German railroads grew at three times the rate of railroads in the United States and Belgium, and twice the rate of railroads in France and Great Britain. In absolute numbers, German railroads added mileage nearly equal to that in Great Britain and the United States, while that in Belgium and France was vastly exceeded. Most of this growth took place on Prussian territory.<sup>101</sup> By 1887, Germany was second in its length of railroads only to the United States and had surpassed France and Britain.<sup>102</sup>

It is theoretically plausible to assume that the growth of Prussian railroads would have been even faster absent strict liability, but it is hard to see how this would be possible. A comparison of the growth of French and German railroads shows that their performance through 1870 was nearly identical, but if either country could be said to be ahead, it was Germany (the largest state of which, Prussia, had strict liability), not France (which had a negligence system).<sup>103</sup> Furthermore, the rate of growth of passenger and freight traffic and of the

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97. See VANDALL, *supra* note 6, at 25 (discussing Posner's theory).

98. See RAINER FREMDLING, *EISENBAHNEN UND DEUTSCHES WIRTSCHAFTSWACHSTUM 1840-1879* [RAILROADS AND GERMAN ECONOMIC GROWTH 1840-1879] 134-45 (2d ed. 1985).

99. See MAYER, *supra* note 74, at 198.

100. See *id.* at 395.

101. See 2 EICHHOLTZ, *supra* note 75, at 4, 13; see also BROPHY, *supra* note 91, at 42 (stating that Germany had twice the railroad mileage of France by the end of the 1840s surge in construction).

102. See Fletcher W. Hewes, *Statistical Railway Studies*, in THOMAS CURTIS CLARKE ET AL., *THE AMERICAN RAILWAY: ITS CONSTRUCTION, DEVELOPMENT, MANAGEMENT, AND APPLIANCES* 425 (1889).

103. See ALLAN MITCHELL, *THE GREAT TRAIN RACE: RAILWAYS AND THE FRANCO-GERMAN RIVALRY, 1815-1914* 75-79 (2000). For a description of Prussia's strict liability system, see *infra* Part IV; for France's negligence system, see *infra* text accompanying note 174.

length of railroads was faster in Prussia in 1840-60 than it was in Germany as a whole; yet Prussia had strict liability, and most other German states had negligence systems.<sup>104</sup> Prussia built railroads at one of the fastest rates in the world, despite adopting strict liability. Given that other comparable countries that had negligence systems—France, Bavaria—built railroads at slower rates, it seems fair to conclude that the early adoption of strict liability had no negative effect on Prussia's rapid industrialization and the growth of its railroads.

#### V. THE REINTERPRETATION OF THE 1838 RAILROAD LAW BY THE PRUSSIAN SUPREME COURT

The 1838 Railroad Law was extensively litigated.<sup>105</sup> As the Prussian Supreme Court (*Königlicher Ober-Tribunal*) interpreted the statute, a law designed to benefit the landowning Junkers turned into a law that benefited the railroad workers.

This Part will begin with a series of cases in which the Prussian Supreme Court interpreted the law to disfavor middle class and aristocratic plaintiffs. It allowed the railroads to defend by arguing assumption of risk and contributory negligence; it precluded landowner claims if a contract already existed, even if that contract was implied through eminent domain proceedings; and it minimized damages. The Part then turns to the cases with workers as plaintiffs, where the court reversed itself and favored the plaintiffs against the railroad defendants. The conclusion will seek to explain why the court had this pro-worker bias.

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104. See FREMDLING, *supra* note 98, at 17, 48 tbl.20.

105. I read every case construing Section 25 of the 1838 Railroad Law in three series of German reports: ARCHIV FÜR RECHTSFÄLLE AUS DER PRAXIS DER RECHTS-ANWÄLTE DES KÖNIGLICHEN OBER-TRIBUNALS [ARCHIVE FOR LEGAL CASES FROM THE PRACTICE OF ATTORNEYS BEFORE THE PRUSSIAN SUPREME COURT] [STRIETHORST'S ARCHIV, hereinafter StrA]; ENTSCHEIDUNGEN DES KÖNIGLICHEN OBER-TRIBUNALS [DECISIONS OF THE ROYAL SUPREME COURT] [PreussObTr]; and ENTSCHEIDUNGEN DES REICHS-OBERHANDELSGERICHTS [DECISIONS OF THE GERMAN SUPREME COMMERCIAL COURT]. Twenty-six cases cite Section 25 of the 1838 Prussian Railroad Law: thirteen in StrA, three in PreussObTr, of which only one is not duplicated in StrA, and twelve in the reports of the German Supreme Commercial Court.

A. *Assumption of Risk and Contributory Negligence were Recognized Defenses under the Prussian Railroad Law*

The 1838 Railroad Law operated as did traditional strict liability (as opposed to workers' compensation), in that it allowed the defenses of assumption of risk and contributory negligence.<sup>106</sup> The Prussian Supreme Court addressed these issues in two cases—the tobacco case and the guano case<sup>107</sup>—in which it reached opposite results. The distinguishing element in these two cases is whether the material was under the control of the plaintiff or the defendant when it was stored in such a way that it was damaged by rain.

The Prussian Supreme Court's decision of April 22, 1856,<sup>108</sup> demonstrated the applicability of the defenses of assumption of risk and contributory negligence. The tobacco manufacturer W. in Goyatz shipped nine metric tons of dry leaf tobacco on the Cottbus-Lake Schwieloch Railroad. He insisted on shipping it in open cars because it is harmful for tobacco to be shipped in covered cars. Two of the cars were caught in a rainstorm the following day and the tobacco was damaged.<sup>109</sup> The Prussian Supreme Court found for the defendant because, although shipping the tobacco in covered cars could have prevented the damage, the plaintiff assumed the risk by demanding open cars. Moreover, careful packing of the tobacco also could have prevented the damage, and

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106. See *infra* text accompanying notes 107-113 (describing courts' recognition of the defenses to the 1838 law); RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 967 (7th ed. 2000) (stating that "common law strict liability, properly conceived, makes allowance for affirmative defenses based on plaintiff's conduct") [hereinafter EPSTEIN, *CASES AND MATERIALS ON TORTS*]; BIENENFELD, *supra* note 67, at 31 (describing Bismarck's accident insurance law—workers' compensation—as an innovation in that it eliminated the defense of contributory negligence [*Selbstverschulden*]). Assumption of risk is called *Handeln auf eigene Gefahr* in German. As in Anglo-American law, the concepts of assumption of risk and contributory negligence can overlap and are covered under the general concept of *Mitverschulden*. See 2 MÜNCHENER RECHTS-LEXIKON, *supra* note 72, at 980-83.

107. Since German litigants are often referred to only by their initials, German legal writers cite cases by nicknames, such as the "chicken plague" case. See Zimmermann, *supra* note 48, at 21. This Note will also follow this practice where the litigants are known only by initials but will use names where they are known.

108. StrA 21, 114.

109. See *id.* at 114-16.

therefore the plaintiff's own contributory negligence was to blame.<sup>110</sup>

The opposite conclusion was reached in the court's decision of October 19, 1858.<sup>111</sup> The plaintiff, the merchant Reinholdt, gave seventy-one bails of guano to the shipper Uhlendorf in Hamm to ship via the defendant, the Westphalian Railroad, to the merchant Brülle in Lippstadt. Rainwater damaged sixty-six bails of guano.<sup>112</sup> The inadequate roofing of the rail cars allowed the rain damage. The railroad raised the defense of contributory negligence, but the court found no negligence on the part of the plaintiff—even though the plaintiff had had his employees load the guano from his wagon directly onto the railroad cars, instead of unloading it at the railroad's depot—because the guano became wet not during the loading of the train, but when the train was moving. Since the defense of contributory negligence failed, the court found for the plaintiff.<sup>113</sup>

Although these two cases were factually similar, they had opposite results. The distinguishing element is who had control over the storage of the product when it was stored in such a way that it was damaged by rain. In the tobacco case, the contributory negligence was the defective packaging of the tobacco, and that packaging was done under the control of the plaintiff.<sup>114</sup> In the guano case, the cause was defective roofing of the railroad cars, which was under the control of the defendant.<sup>115</sup>

#### B. *A Contractual Relationship is Preclusive of Landowner Claims*

In a remarkable decision of March 10, 1853,<sup>116</sup> the Prussian Supreme Court decided that strict liability did not apply to a case analogous to the Anglo-American cases of fires caused by railroad sparks. The Junker (*Rittergutsbesitzer*) R. kept ponds on his estate, Mittel-K., where he raised and sold blood leeches. In 1844 the leeches flourished, in 1845 they

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110. *See id.*

111. StrA 31, 68.

112. *See id.* at 68-69.

113. *See id.*

114. *See* StrA 21, 114 (114-16).

115. *See* StrA 31, 68 (68-69).

116. StrA 8, 337 (340).

did not, and in 1846 there were no more leeches. He contended that the leeches had died off because of the ammonia in the smoke of the coal-fired locomotives of the Lower Silesian-Mark Brandenburg Railroad.<sup>117</sup> The court held that section twenty-five of the 1838 law was only applicable to accidents on the track of the railroad or its rolling stock. Eminent domain proceedings had compensated the neighbors of the railroad generously. The court also emphasized the general economic benefits of railroads: "the importance of the institution of the railroads in promoting commerce."<sup>118</sup>

The court seemed to have been concerned that Junker R. would get compensation twice: first in the eminent domain proceedings and then again in the lawsuit. This case can be reconciled by looking at the later development of case law regarding the sparks problem. The railroad would not be liable for a fire caused if there were a pre-existing contractual relationship between the railroad and the landowner that precluded liability. This applied even if the contract did not explicitly mention the danger of sparks, even if the land was given for free, and even if the land was acquired through eminent domain proceedings.<sup>119</sup>

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117. The Lower Silesian-Mark Brandenburg Railroad was taken over by the kingdom of Prussia in a series of controversial proceedings from 1850 to 1852. See BROPHY, *supra* note 91, at 60; MAYER, *supra* note 74, at 434. This may have influenced the court to favor a government-owned railroad. The Prussian Supreme Court did hold government-owned railroads liable on later occasions, however. See, e.g., StrA 31, 68 (71-72); see also StrA 26, 359 (359) (making a statement that would be considered dictum in Anglo-American law, because the court ruled in favor of the railroad on other grounds).

118. See StrA 8, 337 (340). American courts used similar language in discussing railroads and industry generally. See, e.g., *Losee v. Buchanan*, 51 N.Y. 476, 484 (1873) ("We must have factories, machinery, dams, canals and railroads. They are demanded by the manifold wants of mankind, and [lie] at the basis of all our civilization."); *Turner v. Big Lake Oil Co.*, 96 S.W.2d 221, 226 (Tex. 1936) ("Texas has many great oil fields . . . Producing oil is one of our major industries."). Friedman has used this pro-industry language to argue that the courts were seeking to subsidize nascent industries. See Schwartz, *The Character of Early Tort Law*, *supra* note 38, at 658 n.98 (discussing Friedman's argument). Schwartz, however, points out that this is but internal improvements rhetoric; the rhetoric is essentially benign and not part of a plan to support railroads by shifting the burden to the ordinary individual plaintiff. See *id.*

119. See Prinz, *supra* note 76, at 478-79. If a railroad causes a fire on the land of A and B, and the railroad acquired the land for its tracks from B in

This gives an efficient result: Requiring landowners and railroads to reveal all the advantages and disadvantages of a new railroad line during an eminent domain proceeding prevented future litigation and ensured that the market for land had full information. Each party had access to information about the danger of sparks that the other did not. The railroad knew, from past experience, the risk that sparks from its locomotives would start fires. The landowner knew if her land had unusually valuable uses that fires would destroy (perhaps a rare strain of medically valuable leeches). If both knew that the only compensation that could be paid for sparks was that paid in the initial contract, both would reveal all their information. The landowner would reveal her information because she wanted to receive full compensation for her leeches. The railroad might be inclined to downplay the detriments of rail transport if it were entering into only one contract. Because it had to contract with many landowners over many years, however, the railroad could not afford to get a reputation as a cheat. (It was also unwise for railroads to cheat landowners in Junker-dominated Prussia.) The railroad would reveal its information to encourage other landowners to enter into contracts with it.

C. *The Damages Include Medical Expenses but not Lost Earnings*

Once liability was established, appropriate damages for a given accident still needed to be determined; courts eventually settled on a rule that although lost wages were recoverable, the speculative earnings of the middle class were not.

On December 14, 1857, the Prussian Supreme Court ruled that such damages extended to medical expenses, but not to any lost earnings of an injured party.<sup>120</sup> In the case before the court, Dr. B. was returning from Salzkotten to Paderborn on the Royal Westphalian Railroad when his train was involved in a collision. His foot was crushed and he had to stay in bed<sup>121</sup> for twenty-six days. He claimed that he could earn 9 marks<sup>121</sup> a day from his medical practice and that he should

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an eminent domain proceeding, but acquired no land from A, then A would have a claim against the railroad, but B would not.

120. See StrA 26, 359.

121. The text has the amount in thalers, the Prussian currency until the coinage act of 1873 created the mark. Three marks equaled one thaler. See

therefore be paid 234 marks. The court held that although the railroad was liable for medical expenses (which it had paid), it was not liable for lost potential earnings (*Versäumniskosten*), "which can never be understood under the concept of the damage that the other person has sustained."<sup>122</sup>

The decision not to grant Dr. B. his lost earnings may appear inconsistent when compared with the treatment of railroad workers, who regularly won their claims for lost wages when they came before the Prussian Supreme Court. This can be understood in light of the court's decision of April 24, 1854.<sup>123</sup> On December 21, 1851, W., a Junker who leased an estate (*Domainenpächter*), was crossing the tracks of the Ducal Brunswick State Railroad. This portion of the Brunswick State Railroad ran over Prussian territory. A locomotive struck W. and injured him in the head and arm. W. sued for complete satisfaction (*vollständige Genugthuung*). W. won, and the defendant appealed. The Prussian Supreme Court held that the plaintiff should not have been awarded full satisfaction. The plaintiff was entitled to compensation for any deterioration in body, liberty, honor, or wealth, but not for lost profits. Since full satisfaction includes lost profits, the plaintiff should not have been granted that.<sup>124</sup>

This concept comes from a period before the development of a middle class of salaried employees. The middle and upper classes did not earn wages, they made profits: the profits from a shop or factory, the revenues from a farm, or the earnings from a profession like law or medicine. They speculated with their assets (a factory, a farm, a profession) at their own risk. Only the working classes received wages. The middle class plaintiffs had no claim for lost revenues from their profession or business. The *Jus Commune* called the damage that actually arose from the accident the *damnum emergens*; the lost profits were known as the *lucrum cessans*. The plaintiff had the right to the *damnum emergens*, but not the *lucrum cessans*.<sup>125</sup>

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HAROLD JAMES, MONETARY AND FISCAL UNIFICATION IN NINETEENTH CENTURY GERMANY 9 (1997). For simplicity, all references to thalers are converted into marks.

122. See StfA 26, 359 (372). See also LEHMANN, *supra* note 79, at 68 n.\*, 98 n.\*.

123. See PreussObTr 28, 270.

124. See *id.*

125. See LEHMANN, *supra* note 79, at 68.

D. *The Prussian Supreme Court Construes the Law to Favor Workers as Plaintiffs*

When workers came before the Prussian Supreme Court, the court favored the plaintiffs.<sup>126</sup> An example is a decision of November 25, 1856.<sup>127</sup> Locomotive engineer F. was injured in a crash between Hadmersleben and Neu-Oschersleben on the Magdeburg-Halberstadt Railroad. The accident made it impossible for him to continue to work as an engineer. The Prussian Supreme Court held that section twenty-five applied to railroad workers injured in accidents: “[I]n its general terms the section cited also applies to the employees of railroad companies that have been injured during their service.”<sup>128</sup> F. had turned down alternative employment in the Buckau workshops of the Magdeburg-Halberstadt Railroad,

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126. In twelve of the fourteen reported cases of the Prussian Supreme Court that cite Section 25, Section 25 was decisive in at least part of the case. Where a non-worker was a plaintiff, the plaintiff prevailed in two cases, and the defendant in four cases on the Section 25 claim. *See, e.g.*, StrA 21, 114 (114-16) (non-worker plaintiff did not recover full damages). Where a worker was the plaintiff, however, the plaintiff prevailed in four cases and the defendant in two on the Section 25 claim. *See, e.g.*, StrA 22, 352. In all cases the plaintiff worker was a railroad worker, *see, e.g., id.*, except for one case in which the plaintiff was a bargee, *see* StrA 27, 128, *reprinted in* PreussObTr 37, 32 (32-34) (describing a bargee who drowned after his barge hit some piles placed in the River Oder by the Upper Silesian Railroad). The difference becomes more dramatic when the reported cases of the German Supreme Commercial Court are included. With a non-worker plaintiff, there are two cases in which the plaintiff prevailed, and eight cases in which the defendant prevailed. *See, e.g.*, ENTSCHEIDUNGEN DES REICHS-OBERHANDELSGERICHTS [DECISIONS OF THE GERMAN SUPREME COMMERCIAL COURT] 8, 420 (1873) (non-worker plaintiff prevails); 13, 426 (1874) (defendant prevails against non-worker plaintiff). But when a worker was the plaintiff, the plaintiff prevailed in seven cases and the defendant in only two. *See, e.g.*, ENTSCHEIDUNGEN DES REICHS-OBERHANDELSGERICHTS 10, 411 (1874) (worker plaintiff prevails); 9, 211 (1873) (defendant prevails against worker plaintiff). Two cases have been left out of this total in which a defendant prevailed against a worker plaintiff, but the court could not reach the Section 25 issue: in one instance because the statute of limitations had run, in the other because the railroad was still under construction and the court ruled that Section 25 only became effective after the rail line opened for traffic. *See* StrA 72, 29; ENTSCHEIDUNGEN DES REICHS-OBERHANDELSGERICHTS 12, 10 (1874). Interestingly, Kostal demonstrates that the opposite result occurred in England. *See* KOSTAL, *supra* note 37, at 256-321 (showing courts' favor for middle class plaintiffs and disfavor for working class plaintiffs).

127. *See* StrA 22, 352.

128. *See id.* at 352.

but the court held that F. had qualified as a locomotive engineer and should be offered work equivalent to his rank, without the dangers to which he would be exposed in the Buckau workshops. The plaintiff demanded sixty marks a month (his old salary) to be paid for the rest of his life; the court granted him this but held that it should be reduced by any other earnings.<sup>129</sup>

Another pro-plaintiff, pro-worker decision was that of December 9, 1859.<sup>130</sup> On June 13, 1858, the plaintiff, Tilch, was shunting cars. He stepped between two cars and the buffers crushed his right arm, which caused his death. The Magdeburg-Wittenberge Railroad argued that section twenty-five applied only to locomotive operations, whereas Tilch shunted with horses. The court held that when the law said "transportation on the railroad line" the language did not require locomotives, and the transportation could be accomplished by any means whatsoever.<sup>131</sup>

A parallel decision was the ruling of October 16, 1863.<sup>132</sup> Reifenstein, a worker on the Magdeburg-Leipzig Railroad, was using a horse to shunt cars. He uncoupled a car, which began to roll downhill. Reifenstein then slipped on some ice, his leg fell on the track, the car crushed his leg, and he died from the complications. The defendant argued that horses were not the type of transportation envisioned by the 1838 law. The court again held, however, that the law did not say a locomotive was required. Rather, the law addressed the dangers of rail travel of all kinds. The defendant also had argued that the ice was an Act of God. The court responded that while the ice did help cause the accident, the real cause was the danger of railroad operations. Normal falls do not kill a person, but falls onto railroad tracks are often fatal. As a result, the court found for the plaintiff.<sup>133</sup>

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129. See *id.* at 352-54.

130. See StrA 36, 69.

131. See *id.* at 69.

132. See StrA 52, 33.

133. See StrA 52, 33. The court did not cite *Tilch v. Magdeburg-Wittenberge Railroad*, even though that case would have been directly on point, see *infra* text accompanying notes 130-131. Since the statute is the only true source of law in Germany, German courts cite and distinguish fewer cases. See Klaus Vieweg, *The Law of Torts*, in INTRODUCTION TO GERMAN LAW (Werner F. Ebke & Matthew W. Finkin eds., 1996).

E. *Why did the Prussian Supreme Court Favor Suits Against Railroads Brought by Workers, but not by Merchants, Manufacturers, Professionals, and Junkers?*

In suits by non-workers, the Prussian Supreme Court favored the railroad companies whether the plaintiff was a businessman (tobacco manufacturer W. in Goyatz), a professional (Dr. B. in Paderborn) or, most remarkably, a Junker estate owner (the leech farmer R. from Mittel-K.).<sup>134</sup> When workers were plaintiffs, however, the railroads lost.<sup>135</sup> German courts sit without juries, and it is possible that just as Anglo-American juries will favor the poor worker over the wealthy medical doctor, the judges—being triers of fact as well as of law—were doing precisely that here.

The Prussian Supreme Court may have reinterpreted the law to make it less favorable to the landowner partly because the fear of damage to the Junkers' estates had turned out to be baseless. In an eminent domain proceeding of 1845, for example, when the Junker von Arnstedt of Gross-Kreutz was asked what damage the trains would do to his lands, he replied that his farm workers would stop work and gawk at the trains every time they passed. This would lose fifteen minutes of work; with four trains passing on the up line each day, and four on the down line, two hours of work would be lost.<sup>136</sup> Since the estate owners were not able to come up with more concrete damages than this, they lost the courts' sympathy.

The Revolution of 1848 did teach the Prussian ruling classes that the bourgeoisie could not succeed in staging a revolution without the support of the handicraftsmen and the industrial proletariat.<sup>137</sup> Under the reactionary Manteuffel regime of the 1850s, the Prussian government sought to favor these two classes in order to keep the liberal bourgeoisie in check.<sup>138</sup> As injured workers came before the courts, the judges would decide in their favor and against the railroad companies to

134. See *supra* text accompanying notes 107-110 (W. in Goyatz), 120-122 (B. in Paderborn), 116-118 (R. in Mittel-K.).

135. See discussion *supra* note 126.

136. See 2 EICHHOLTZ, *supra* note 75, at 45-47.

137. See GEORGES DUVEAU, 1848: THE MAKING OF A REVOLUTION xi, 8, 56, 61, 135-36 (Anne Cartei trans., 1967) (discussing urban workers' roles in the revolution).

138. See THEODORE S. HAMEROW, RESTORATION, REVOLUTION, REACTION: ECONOMICS AND POLITICS IN GERMANY, 1815-1871 228-37 (1958).

help Manteuffel's allies and hurt the bourgeoisie. Yet this theory does not explain why the courts disfavored the core supporters of the Manteuffel regime: the Junkers. If the courts were such faithful servants of the Manteuffel regime, it is hard to understand why they were not more sympathetic to Junker R. with his leech ponds or to Junker W. with his claim for full satisfaction.

#### F. Summary

By the end of the 1860s the Prussian courts had changed the character of the Prussian Railroad Law. Originally designed for a state dominated by the Junkers and intended to favor the landowners, it had metamorphosed into a social measure to help the industrial proletariat. This judicial activism did not go unnoticed. When the Prussian Supreme Court declared that the 1838 law applied to state railroads as well as private ones, the legal editor Theodor Striethorst added a footnote saying that the correctness of this holding was very questionable: Both the language and the intent of the law were against it.<sup>139</sup> The railroad official Hans Victor von Unruh felt the Prussian courts had ignored the legislative intent behind the law when they decided railroad accident litigation.<sup>140</sup>

### VI. THE SPREAD OF THE PRUSSIAN RAILROAD LAW TO OTHER STATES

Through treaties concerning railroad construction, legislative and judicial imitation of Prussian law, and conquest, the Prussian Railroad Law spread through much of Germany. This paved the way for the Reichstag's expansion of strict liability to all German railroads in 1871.<sup>141</sup>

As railroad lines were built out from Berlin, Prussian diplomacy ensured that treaties concerning lines built into neighboring states allowed for the application of the 1838 law. This proved impossible for the main line to the west, via the Duchy of Brunswick, because Brunswick built its railroads

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139. See StrA 31, 68 (71 n.1).

140. See 1 SBRT, *supra* note 20, at 453, 458 (Apr. 28, 1871) (statement of MdR Hans Viktor von Unruh).

141. See *infra* Part VII for a discussion of the 1871 expansion of strict liability to all German railroads.

before Prussia.<sup>142</sup> Similarly, the main line in Saxony, the Leipzig-Dresden Railroad, opened before any line opened in Prussia,<sup>143</sup> precluding the law's application. In the case of the other lines—the Thuringian Railroad, the Berlin-Hamburg Railroad, and the Berlin-Anhalt Railroad—Prussian treaties provided that, for the sake of uniform application of the laws, the strict liability provisions of the Prussian 1838 law were to apply.<sup>144</sup> Through these treaties, the Prussian 1838 law spread to railroads in the German states of Anhalt-Cöthen, Hamburg,

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142. See John M. Kleeberg, *The Privatisation of the Brunswick State Railways in 1869-70*, 11 J. TRANSP. HIST. 12, 13-14 (1990).

143. Although the Leipzig-Dresden Railroad did not open along its entire length until April 1839, operation along smaller sections of the line commenced in April 1837. See UDO BECHER, *DIE LEIPZIG-DRESDNER EISENBAHN-COMPAGNIE* [THE LEIPZIG-DRESDEN RAILROAD COMPANY] 145, 154 (1981) (noting that the railroad opened in 1839).

144. See *Traité entre la Prusse, Saxe-Weimar-Eisenach et Saxe-Cobourg-Gotha pour l'exécution de la route de fer de Thuringe* [Treaty Among Prussia, Saxe-Weimar-Eisenach and Saxe-Coburg-Gotha about the Construction of the Thuringian Railroad], Apr. 19, 1844, art. 7, 6 Martens Nouveau Recueil (ser. 1) 530, 534, 96 Consol. T.S. 472, 476 (Thuringian Railroad); *Traité entre la Prusse, l'Electorat de Hesse, le Grandduché de Saxe-Weimar-Eisenach et le Duché de Saxe-Cobourg-Gotha, sur la construction d'une route de fer de Halle à Cassel etc.* [Treaty Among Prussia, the Electorate of Hesse, the Grand Duchy of Saxe-Weimar-Eisenach and the Duchy of Saxe-Coburg-Gotha about the Construction of a Railroad from Halle to Cassel, etc.], Dec. 20, 1841, art. 4, 2 Martens Nouveau Recueil (ser. 1) 385, 386-87, 92 Consol. T.S. 428, 429-30 (Halle-Cassel Railroad (which became the Thuringian Railroad)); *Traité entre la Prusse, le Danemarck, le Grand duché de Mecklenbourg-Schwerin et les villes libres de Lubeck et Hambourg sur la construction d'une route de fer entre Berlin et Hambourg* [Treaty Among Prussia, Denmark, the Grand Duchy of Mecklenburg-Schwerin and the Free Cities of Lübeck and Hamburg About the Construction of a Railroad Between Berlin and Hamburg], Nov. 8, 1841, art. 4, 9 Martens Nouveau Recueil (ser. 1) 511, 523, 92 Consol. T. S. 234, 236-37 (Berlin-Hamburg Railroad); *Vertrag zwischen Preußen und Anhalt-Köthen wegen Regulierung der auf die Eisenbahnen zwischen Berlin und Köthen und zwischen Magdeburg und Leipzig bezüglichen Verhältnisse* [Treaty Between Prussia and Anhalt-Cöthen about the Regulation of the Circumstances on the Railroads Between Berlin and Cöthen and Between Magdeburg and Leipzig], Apr. 26, 1839, Prussia-Anhalt-Cöthen, art. 12 (PrGS S. 725) (Berlin-Anhalt Railroad). See also LEHMANN, *supra* note 79, at 17-18 (stating that Anhalt and the Thuringian states adopted § 25 for the Berlin-Anhalt and Thuringian Railroads; Lehmann does not, however, seem to realize that § 25 applied to the Berlin-Hamburg Railroad, too).

Holstein, Lauenburg,<sup>145</sup> Lübeck, Mecklenburg-Schwerin, Saxe-Coburg-Gotha, and Saxe-Weimar-Eisenach.

At least three German states introduced statutes that copied the Prussian 1838 law: the Duchy of Holstein by its declaration of May 19, 1840,<sup>146</sup> the Grand Duchy of Mecklenburg by its law of May 23, 1855,<sup>147</sup> and the Kingdom of Hanover by its royal decree of March 29, 1856.<sup>148</sup> Two of those states, Holstein and Mecklenburg, had had the 1838 law extended to some lines by the treaty about the Berlin-Hamburg Railroad, which acted as the thin end of the wedge for the spreading of the Prussian law.<sup>149</sup>

After the 1866 war, Prussia annexed Frankfurt, Hanover, Hesse-Cassel, Hesse-Homburg, Hesse-Nassau, Holstein,

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145. Until 1864, the duchies of Holstein and Lauenburg were ruled in personal union with Denmark. See ERIC DORN BROSE, *GERMAN HISTORY FROM 1789-1871* 226-27 (1997); Robert Hermann Tenbrock, *A History of Germany 202-03* (Paul J. Dine trans., 1968). Denmark signed the treaties on their behalf.

146. See LEHMANN, *supra* note 79, at 17-18.

147. See *id.* at 18.

148. See *Königliche Verordnung, die Anlage von Eisenbahnen durch Privatunternehmer betreffend* [Royal Decree, Concerning the Construction of Railroads by Private Enterprise], v. 29.3.1856, § 30 (Sammlung der Gesetze, Verordnungen und Ausschreiben für das Königreich Hannover, I. Abteilung [Collection of Laws, Regulations, and Decrees for the Kingdom of Hannover, Part I] [hereinafter *GVBl. Hannover I*], S.101, 108). Unlike the Prussian Railroad Law, which the Prussian Supreme Court extended through statutory interpretation to state railroads, the Hanoverian Law applied only to private railroads. It remained close to a dead letter, for only three small private lines were constructed before the Kingdom of Hannover came to an end in 1866. See *Königliches Patent, die Erlaubniß für den Georgs-Marien-Bergwerks- und Hüttenverein zum Bau und Betriebe einer Eisenbahn betreffend* [Royal Patent Concerning the Permission for the Georgs-Marien Mining and Smelting Corporation to Build and Operate a Railroad], v. 30.1.1858 (*GVBl. Hannover I S.3*); *Königliches Patent, betreffend die Erlaubniß zum Bau und Betriebe einer Eisenbahn von Peine nach der Ilseder Hütte* [Royal Patent Concerning the Permission to Construct and Operate a Railroad from Peine to the Smelter at Ilsede], v. 14.7.1864 (*HannGVOSlg S.150*); *Königliches Patent, die Erlaubniß zum Bau und Betriebe einer Eisenbahn von Salzbergen über Schüttorf, Bentheim und Gildehaus nach der Niederländischen Grenze in der Richtung über Hengelo nach Almelo betreffend* [Royal Patent Concerning the Permission to Construct and Operate a Railroad from Salzbergen via Schüttorf, Bentheim and Gildehaus to the Dutch Border in the Direction of Almelo, via Hengelo], v. 18.12.1862 (*GVBl. Hannover I S.393*).

149. See *supra* notes 144-145.

Lauenburg, and Schleswig. By a law of August 19, 1867, the Prussian Railroad Law was extended to these conquered territories.<sup>150</sup>

The largest state to copy the Prussian Railroad Law was Austria. In 1869, there was a terrible railroad accident at Harowitz on the Austrian Northwestern Railroad,<sup>151</sup> and a huge outcry followed.<sup>152</sup> To impose the cost of any future accidents on the railroads, the Austrian Reichsrat passed the law of March 5, 1869.<sup>153</sup>

In addition to strict liability for railroads being spread by treaty and by statute, the Supreme Courts of Baden and Bavaria interpreted their laws as requiring strict liability for fires caused by locomotive sparks.<sup>154</sup> Because it was impossible for locomotives to avoid emitting sparks by taking due care, plaintiffs could only recover if the courts adopted a theory of strict liability rather than negligence.

Outside of Prussia this pro-plaintiff bias did not extend to litigation for personal injuries. When Gustav Lehmann researched the matter in 1869, he found only one case on point, partly because railroads preferred to settle out of

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150. See Verordnung, betreffend die Einführung der Gesetze über die Eisenbahn-Unternehmungen vom 3. November 1838, und der Verordnung vom 21. Dezember 1846, betreffend die bei dem Bau von Eisenbahnen beschäftigten Handarbeiter, in den neuerworbenen Landestheilen [Order Concerning the Introduction in the Newly Acquired Territories of the Laws about Railroad Enterprises of November 3, 1838, and the Order of December 21, 1846, Concerning the Manual Laborers Employed in the Construction of Railroads], v. 19.8.1867 (PrGS S.1426).

151. See LEHMANN, *supra* note 79, at 76.

152. See, e.g., *id.*

153. Gesetz betreffend die Haftung der Eisenbahn-Unternehmungen für die durch Ereignungen auf Eisenbahnen herbeigeführten körperlichen Verletzungen oder Tötungen der Menschen [Law Concerning the Liability of Railroad Enterprises for the Bodily Injuries or Deaths of People Caused by Events on Railroads], v. 5.3.1869 (Reichs-Gesetz-Blatt für das Kaiserthum Oesterreich [Imperial Gazette for the Austrian Empire] S.109).

154. For Baden, see J.A. SEUFFERT, 13 J.A. SEUFFERT'S ARCHIV FÜR ENTSCHEIDUNGEN DER OBERSTEN GERICHTE IN DEN DEUTSCHEN STAATEN [J. A. SEUFFERT'S ARCHIVE FOR THE DECISIONS OF THE SUPREME COURTS IN THE GERMAN STATES] 329 (E.A. Seuffert ed., 1860) [hereinafter SEUFFERT'S ARCHIVE]. *But see* 12 *id.* at 166 (holding that the plaintiff cannot collect because the smoke damage to his house was minor and the danger from the sparks was remote; his only claim was for the fissures in his walls caused when his house was shaken by the trains). For Bavaria, see 10 *id.* at 220; 14 *id.* at 354; OGOREK, *supra* note 26, at 64.

court.<sup>155</sup> The opera singer Louise Gentiluomo-Spazzer was traveling to London to perform in a concert tour, when her westbound Hanoverian State Railroad train collided with an eastbound train at Stadthagen on February 27, 1853. She sued in contract and tort, asserting that the collision was caused by the negligence of a railroad or telegraph official. The Supreme Court of the Kingdom of Hanover at Celle (a *Jus Commune* or *Gemeines Recht* jurisdiction) held on April 20, 1855, that she only could recover in tort if she could show that the employer was at fault in choosing (*culpa in eligendo*) the personnel. As for contract, the railroad was only bound to choose suitable people (*homines idonei*) as employees. Since she could prove neither claim, the defendant won.<sup>156</sup>

Although many German courts were favorable to strict liability claims for damage done by sparks, outside of Prussia plaintiffs in personal injury cases had little prospect of prevailing against railroads.

## VII. THE GERMAN LIABILITY ACT OF 1871

At the end of the 1860s, a series of horrifying accidents led to a change in the law. In response, the Congress of German Lawyers discussed the law regarding workplace accidents and urged a modest expansion: that an employer be responsible for the acts of her supervisory personnel. The Reichstag adopted this reform in 1871<sup>157</sup> and simultaneously expanded strict liability to railroads throughout Germany. The Reichstag nearly expanded strict liability to mining as well. This attempt was beaten back, but it put heavy industry on notice. When reform proposals arose anew at the beginning of the 1880s,

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155. Cf. LEHMANN, *supra* note 79, at 8 (reporting that railroads in Saxony preferred to settle accident cases out of court).

156. See LEHMANN, *supra* note 79, at 13-15; 13 SEUFFERT'S ARCHIVE, *supra* note 154, at 188-89. The report of the case in SEUFFERT gives the plaintiff's name as Aloise Spatzer-Gentiluomo, but the name has been corrected from the entry in Kutsch and Riemens' dictionary of singers. See 2 K.J. KUTSCH & LEO RIEMENS, GROSSES SÄNGERLEXIKON [BIG LEXICON OF SINGERS] 1299-1300 (3d ed., 1999).

157. Gesetz betreffend die Verbindlichkeit zum Schadenersatz für die bei dem Betriebe von Eisenbahnen, Bergwerken usw. herbeigeführten Tötungen und Körperverletzungen [Law Concerning the Obligation to Compensate for Damages Resulting from Deaths and Bodily Injuries Caused by the Operation of Railroads, Mines, etc.], v. 7.6.1871 (RGBl S.207).

heavy industry would seek (successfully) to forestall the expansion of strict liability by proposing an alternative: workers' compensation. This Part will cover these changes in the law and the various arguments raised during the extensive Reichstag debate over this reform, which prefigure many of the issues of modern tort reform.

A. *Five Coal Mining Accidents Engender an Outcry for a Change in the Law*

In 1867-69, five terrible coalmining accidents—in Saxony, South Wales, and the Ruhr—led to calls for the expansion of strict liability.<sup>158</sup> On July 1, 1867, the collapse of the shaft of the coalmine “Neue Fundgrube” in Lugau entombed 101 miners.<sup>159</sup> At Ferndale, in South Wales, two methane explosions eighteen months apart killed 231 miners.<sup>160</sup> On January 17, 1868, a methane (firedamp) explosion at the mine “Neu-Iserlohn” in the Ruhr killed eighty-two miners. Like Ferndale Colliery, the gassy mine “Neu-Iserlohn” was a death trap: On December 12, 1870, a second methane explosion killed another thirty-five miners.<sup>161</sup> The 1868 explosion at “Neu-

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158. See Report by Judicial Counsellor Karsten, in 1 VERHANDLUNGEN DES NEUNTEN DEUTSCHEN JURISTENTAGES [DEBATES OF THE NINTH GERMAN CONFERENCE OF LAWYERS] 390, 390, 395 (Schriftführer-Amt der ständigen Deputation ed., 1870) [hereinafter Karsten].

159. See 1 SBRT, *supra* note 20, at 214 (Apr. 13, 1871) (statement of MdR Franz Duncker); Karl Biedermann, *Petition des Leipziger Ausschusses der national-liberalen Partei an den Reichstag des Norddeutschen Bundes, 1868 März 26* [*Petition of the Leipzig Committee of the National Liberal Party to the Reichstag of the North German Federation, Mar. 26, 1868*], in 2 VON DER HAFTPFLICHTGESETZGEBUNG ZUR ERSTEN UNFALLVERSICHERUNGSVORLAGE [FROM STRICT LIABILITY LEGISLATION TO THE FIRST ACCIDENT INSURANCE BILL], *supra* note 45, at 1, 3 n.6; *Vermischtes* [*Miscellaneous*], FRANKFURTER ZEITUNG UND HANDELSBLATT [FRANKFURT NEWS AND COMMERCIAL GAZETTE], July 6, 1867, at 3 (Zweites Blatt [Evening Edition]); *Vermischtes* [*Miscellaneous*], FRANKFURTER ZEITUNG UND HANDELSBLATT, July 9, 1867, at 3 (Zweites Blatt [Evening Edition]); *Vermischtes* [*Miscellaneous*], FRANKFURTER ZEITUNG UND HANDELSBLATT, July 10, 1867, at 2 (Erstes Blatt [Morning Edition]); *Vermischtes* [*Miscellaneous*], FRANKFURTER ZEITUNG UND HANDELSBLATT, July 14, 1867, at 2 (Zweites Blatt [Evening Edition]).

160. See J. H. MORRIS & L. J. WILLIAMS, *THE SOUTH WALES COAL INDUSTRY, 1841-1875* 204-05 (1958).

161. See 12 VEREIN FÜR DIE BERGBAULICHEN INTERESSEN IM OBERBERGAMT-SBEZIRK DORTMUND ET AL. [ASSOCIATION FOR THE MINING INTERESTS IN THE DORTMUND CHIEF MINING DISTRICT ET AL.], *DIE ENTWICKELUNG DES NIEDER-*

Iserlohn" was, at the time, the largest accident ever in the Ruhr, and set a record that would stand for thirty years.<sup>162</sup>

The worst accident of all was the methane explosion at the mines "Segen Gottes" and "Neue Hoffnung" at the Plauensche Grunde near Dresden on August 2, 1869, which killed 340 miners.<sup>163</sup> At the time, it was the most terrible industrial disaster that Germany had ever experienced.<sup>164</sup> Contemporary observers were shocked to the core. When journalists got off the train at Potschappel to walk to the mine, they saw the streets filled with women and children, dressed in mourning, weeping uncontrollably.<sup>165</sup>

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RHEINISCH-WESTFÄLISCHEN STEINKOHLLEN-BERGBAUES IN DER ZWEITEN HÄLFTE DES 19. JAHRHUNDERTS: WIRTSCHAFTLICHE ENTWICKELUNG [THE DEVELOPMENT OF HARD COAL MINING IN LOWER RHINE-WESTPHALIA IN THE SECOND HALF OF THE NINETEENTH CENTURY: ECONOMIC DEVELOPMENT] pt. 3, at 100 tbl.113 (1904) [hereinafter ENTWICKELUNG DES STEINKOHLLEN-BERGBAUES]. The mine continued to kill people after this: Twenty-three miners were killed in a methane explosion on June 8, 1880, and five miners were killed in another methane explosion on January 13, 1886. See *id.* at 101 tbl.113.

162. See *id.* at 100-02 tbl.113. It remained a record for the Ruhr coal basin until the methane explosion at "Vereinigtes Carolinenglück" on February 17, 1898, which killed 116 miners. *Id.* at 102 tbl.113. The "Vereinigtes Carolinenglück" disaster in its turn remained a record until the terrible Radbod disaster, which killed 348 miners during the night of November 11, 1908. See S. H.F. HICKEY, WORKERS IN IMPERIAL GERMANY: THE MINERS OF THE RUHR 118 (1985); PARENT, *supra* note 57, at 321. Cf. GERHARD GEBHARDT, RUHRBERGBAU: GESCHICHTE, AUFBAU UND VERFLECHTUNG SEINER GESELLSCHAFTEN UND ORGANISATIONEN [RUHR COAL MINING: HISTORY, DEVELOPMENT AND INTERCONNECTIONS OF ITS COMPANIES AND ORGANIZATIONS] 362 (1957) (noting that 348 miners were killed in the Radbod disaster).

163. See *Die Grubenexplosion im Plauen'schen Grunde bei Dresden* [The Mine Explosion in the Plauen Grunde near Dresden], FRANKFURTER ZEITUNG UND HANDELSBLATT [FRANKFURT NEWS AND COMMERCIAL GAZETTE], Aug. 6, 1869, at 2 (Erstes Blatt [Morning Edition]) [hereinafter *Die Grubenexplosion im Plauen'schen Grunde bei Dresden I*]; *Die Grubenexplosion im Plauen'schen Grunde bei Dresden* [The Mine Explosion in the Plauen Grunde near Dresden], FRANKFURTER ZEITUNG UND HANDELSBLATT, Aug. 7, 1869, at 3 (Erstes Blatt [Morning Edition]) [hereinafter *Die Grubenexplosion im Plauen'schen Grunde bei Dresden II*]; *Fearful Colliery Accident in Saxony*, TIMES (London), Aug. 9, 1869, at 10; *The Colliery Explosion in Saxony*, TIMES (London), Aug. 11, 1869, at 5.

164. Its death toll was only slightly exceeded by the worst mine accident in German history, the Radbod disaster of 1908, which killed 348 miners. See *supra* note 162.

165. See *Die Grubenexplosion im Plauen'schen Grunde bei Dresden I*, *supra* note 163, at 2; *Fearful Colliery Accident in Saxony*, *supra* note 163, at 10.

There was no indication that the mine owners had done anything to cause the accident. It may have been due to the negligence of the miners, who worked with open lamps. They also smoked cigars underground, but their doctors had advised them to do so to protect themselves from the horrible odors (which were probably from the accumulation of methane). The extraordinary heat in August was held to have helped cause the accident; the methane most likely had expanded and seeped throughout the mine, until an open flame ignited it.<sup>166</sup> Under the existing negligence system, the families had no viable claim, and thus were left dependent on charity.<sup>167</sup>

### B. *Proposals for Reforming the Law to Expand Strict Liability*

These accidents led the Congress of German Economists to call for the expansion of strict liability to all industrial enterprises.<sup>168</sup> The Association of German Lawyers was more conservative: Its reporter, Karsten, pointed to the variability of the law across jurisdictions.<sup>169</sup> The Prussian Allgemeines Landrecht found the employer liable only if the employer herself had caused the accident or was at fault in selecting her managers. It took account of both the employer's own *culpa* (fault) and her *culpa in eligendo* (fault in selecting her agents).<sup>170</sup> The Saxon Civil Code only found the employer liable if the accident was caused by the employer's own fault.<sup>171</sup> It was not clear what the rule was in the *Jus Commune*. The *Jus Commune* clearly found the employer liable when it was her own *culpa*.

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166. See *Fearful Colliery Accident in Saxony*, *supra* note 163, at 10.

167. Saxony, like Prussia, did have Miners' Benefit Funds (*Knappschaftskassen*), but the benefits were not nearly as generous as in Prussia. In case of death, they were required to pay only for the burial costs; whether a pension to the decedent's survivors would be paid depended on the individual Miners' Benefit Fund. See Allgemeines Berggesetz [General Mining Law], v. 16.6.1868 (Gesetz- und Verordnungsblatt für das Königsreich Sachsen [Gazette of Laws and Regulations for the Kingdom of Saxony] [GVBl. Sachsen] S.353, 378); 1 FRERICH & FREY, *supra* note 43, at 68-69. Cf. Biedermann, *supra* note 159, at 1, 3 (pointing out that the victims of a cholera outbreak on a steamship and of the mining accidents at Lugau and "Neu-Iserlohn" and their estates had no legal claim).

168. See OGOREK, *supra* note 26, at 98-99.

169. See Karsten, *supra* note 158, at 391-95.

170. See *id.* at 391-92.

171. See *id.* at 393.

There was a debate, though, as to whether the employer was merely liable for accidents caused by her agents where she was at fault because of *culpa in eligendo*, or whether she was at fault for actions of all her agents.<sup>172</sup> The Roman *Lex Aquilia* was unclear as to whether it only allowed the employer's own *culpa, culpa in eligendo*, or liability for the acts of all agents. It was also debatable whether legal persons were liable for acts of their agents under the *Lex Aquilia*.<sup>173</sup> The French Civil Code imposed the widest obligations. Article 1384 imposed unlimited liability for accidents caused by agents of the employer. There was a split among the French courts about the liability of the employer for accidents suffered by one worker that were caused by another worker (corresponding to the traditional common law defense of "fellow servant"). The Cour de Cassation in Paris held that employers were also liable for accidents done by fellow workers. Toulon and Lyons disagreed.<sup>174</sup>

Summarizing the problem, Karsten said that four types of persons could cause accidents in a business enterprise: (a) the owner, (b) her agents or managers, (c) a worker, and (d) a stranger. Throughout Germany, the employer was always liable for the acts of (a) and never for the acts (d); the dispute was over how to treat (b) and (c).<sup>175</sup> Karsten argued that the workers assumed the risk caused by their actions. Workers had themselves chosen to enter the owner's employment.<sup>176</sup> In a large industrial establishment, the owner could take care in choosing her supervisory personnel but not in choosing her workers—there were too many of them.<sup>177</sup> Karsten recommended that there be one law for all Germany, making owners liable for the acts of their supervisory personnel but not for those of their workers.<sup>178</sup> The government adopted Karsten's conservative approach—to update the law to make it uniform throughout Germany—while rejecting the more radical proposal of expanding strict liability to mining.

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172. See *id.* at 394; OGOREK, *supra* note 26, at 68-80.

173. See Karsten, *supra* note 158, at 394.

174. See *id.* at 394-95.

175. See *id.* at 396-97.

176. See *id.* at 397.

177. See *id.*

178. See *id.* at 398; OGOREK, *supra* note 26, at 99.

### C. *Two Railroad Accidents Prevent the Extension of Strict Liability to Mining*

The terrible mining accidents of the late 1860s led to popular demands to extend strict liability to the mining industry. The German government became convinced that the railroad industry was the more pressing problem, however, because of a series of terrible railroad accidents. On August 20, 1868, the Irish Mail smashed into two wagons loaded with paraffin at Abergele in Wales. The paraffin ignited, and thirty-three passengers in the first cars were burnt to death.<sup>179</sup> In 1869, another bad railroad accident occurred, this time in Austria, at Harowitz on the Austrian North-Western Railroad. A passenger train was stopped by snow; a freight train following behind thought the passenger train was a snowdrift and plowed into it, killing over 30 and injuring over 100.<sup>180</sup> The Harowitz accident led Austria to copy the Prussian 1838 law and introduce strict liability for railroads.<sup>181</sup>

The Austrian law was an advance in another respect: Many Prussian railroads forced their employees to waive their rights under section twenty-five by contract. The Austrian law forbade this, and Prussia in its turn incorporated this measure into its own law.<sup>182</sup> Once Prussia and Austria established strict liability for railroads, the next logical step was to make the law uniform throughout the other German states.

### D. *The Reichstag Passes the German Liability Act of 1871*

This uniformity was achieved by the passage of the German Liability Act of 1871.<sup>183</sup> The bill received broad support

179. See JACK SIMMONS, *THE RAILWAYS OF BRITAIN* 211 (3d ed. 1986).

180. See LEHMANN, *supra* note 79, at 76.

181. See Gesetz betreffend die Haftung der Eisenbahn-Unternehmungen für die durch Ereignisse auf Eisenbahnen herbeigeführten körperlichen Verletzungen oder Tötungen der Menschen [Law Concerning the Liability of Railroad Enterprises for the Bodily Injuries or Deaths of People Caused by Events on Railroads], v. 5.3.1869 (Reichs-Gesetz-Blatt für das Kaiserthum Oesterreich [Imperial Gazette for the Austrian Empire] S.109).

182. See Gesetz betreffend einen Zusatz zu § 25 des Gesetzes über die Eisenbahn-Unternehmungen vom 3. November 1838 [Law Concerning an Addition to § 25 of the Law Concerning Railroad Enterprises of November 3, 1838], v. 3.5.1869 (PrGS S.665).

183. Gesetz betreffend die Verbindlichkeit zum Schadenersatz für die bei dem Betriebe von Eisenbahnen, Bergwerken usw. herbeigeführten Töd-

in the Reichstag, partly because the government did not extend strict liability to mining. The railroad industry argued that it was unfair for the legislature to impose strict liability on railroads when mining was more dangerous.<sup>184</sup> The mining industry's advocates responded by playing up the dangers of railroads.<sup>185</sup>

Government minister Adalbert Falk tried to distinguish railroads from coalmining. In the case of railroads, there was an argument for a type of *res ipsa loquitur*: Railroads were so advanced that when there was an accident, one could assume there was negligence, even if one could not prove it. In contrast, coalmines have many dangerous, unavoidable conditions, such as the presence of methane.<sup>186</sup>

The main advocate in the Reichstag of expanding strict liability to mining was the National Liberal leader Hermann Schulze-Delitzsch. Schulze-Delitzsch sought to improve the condition of the working classes by organizing cooperative savings institutions.<sup>187</sup> Workers' cooperatives enabled workers to save for bad times, but there was no way workers' cooperatives, no matter how advanced, could self-insure against a disaster on the scale of what had happened in Saxony. Schulze-Delitzsch told the Reichstag that strict liability should be applied

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tungen und Körperverletzungen [Law Concerning the Obligation to Compensate for Damages Resulting from Deaths and Injuries Caused by the Operation of Railroads, Mines, etc.], v. 7.6.1871 (RGBl S.207).

184. See 1 SBRT, *supra* note 20, at 201-04 (Apr. 13, 1871) (statement of a railroad official and MdR Hans Viktor von Unruh).

185. See *id.* at 213-14 (Apr. 13, 1871) (statement of the Silesian mining magnate and MdR Count Bethusy-Huc).

186. See *id.* at 206 (Apr. 13, 1871) (statement of Minister Adalbert Falk). This argument turns the normal rationale for strict liability, abnormally dangerous activities, on its head. The argument suggests that industries pass through a continuum of different liability rules—strict liability, negligence, and then strict liability again. When industries are new, they are abnormally dangerous activities and so strict liability can be imposed upon them. When they have existed for many years, they are considered to be so safe that any accident must be due to negligence, even if it cannot be proven, so strict liability is imposed again, by means of *res ipsa loquitur*. It is only when industries are “middle-aged” that they can enjoy the benefits of the negligence regime. On strict liability being imposed on advanced industries through *res ipsa loquitur*, see Mark F. Grady, *Res Ipsa Loquitur and Compliance Error*, 142 U. PA. L. REV. 887, 933-35 (1994).

187. See Eheberg, *Franz Hermann Schulze-Delitzsch*, in 33 ALLGEMEINE DEUTSCHE BIOGRAPHIE [UNIVERSAL GERMAN BIOGRAPHY] 18 (1891).

to the industries that were prone to mass accidents: railroads and mines. He defined these industries as, in effect, abnormally dangerous activities and argued that efficiency required strict liability:

There are certain businesses where we know from experience that [mass] accidents can never be entirely avoided even through careful operation. So the entrepreneur who undertakes such a business to make a profit, to derive an advantage therefrom, must take this element into account and calculate that such cases will occur, just as he will take into account possible damage to his machinery and the like.<sup>188</sup>

The only reason strict liability was applied to railroads and not to mines was because, Schulze-Delitzsch said, in railroad accidents both passengers and workers were hurt, but in mining accidents only workers were hurt. Fairness as well as efficiency required applying strict liability to mines.<sup>189</sup>

A second fairness argument put forward by Schulze-Delitzsch was a comparison to Germany's soldiers, recently victorious in the Franco-Prussian war. The draft meant that all adult males bore the risk of war. The danger of mining accidents, on the other hand, fell only on a certain class of workers. By imposing strict liability on mines this unfairness would be lifted. The price of coal would rise to cover the cost of strict liability. All coal consumers—in effect, everyone—would then pay for the costs of such accidents.<sup>190</sup>

Schulze-Delitzsch also argued that mine owners had the better access to evidence, so the liability should be placed on them, unless they could prove that only the negligence of the worker had caused the accident. The injured miner, the only other person who would know more about the causes of the accident, often was dead.<sup>191</sup> Ulrich, a mining regulatory official, confirmed this: The mining regulatory authorities investigated and forwarded the evidence to the state's attorney for possible prosecution after every accident that caused death or

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188. See 1 SBRT, *supra* note 20, at 446 (Apr. 28, 1871) (statement of Mdr Hermann Schulze-Delitzsch).

189. See *id.*; OGOREK, *supra* note 26, at 102.

190. See 1 SBRT, *supra* note 20, at 448 (Apr. 28, 1871) (statement of Mdr Hermann Schulze-Delitzsch).

191. See *id.* at 447.

severe bodily injury. A guilty party was rarely identified because the witnesses were dead and the conditions of the scene of the accident were significantly changed by the accident.<sup>192</sup>

The Reichstag did discuss whether a miner assumed the risk of accident as a condition of employment. This idea arose from the “insurance premium” theory of the jurist August Ubbelohde. Ubbelohde argued that wages for dangerous jobs included an “insurance premium” as an equivalent for the dangers caused by the worker’s fellow servants.<sup>193</sup> The theory implied that risk-averse workers could buy insurance with the extra wages. The speakers who addressed the issue all rejected Ubbelohde’s theory. They remembered the recent, bitter strike in the Waldenburg coal basin in Lower Silesia at the end of 1869, which had ended in the defeat of the miners.<sup>194</sup> Hans Viktor von Unruh said that the Waldenburg strike had shown that the miners had only two options: to work in the mines or to starve.<sup>195</sup> Franz Duncker attacked Ubbelohde’s concept, arguing that a miner’s wage was only enough to replace the natural wear and tear on the labor capacity that comes from such a strenuous job; there was no insurance pre-

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192. See *id.* at 470 (Apr. 29, 1871) (statement of MdR Ulrich). For another argument emphasizing the problem of proof, see *id.* at 469 (statement of MdR Klotz).

193. See OGOREK, *supra* note 26, at 77; August Ubbelohde, *Wie weit haftet nach gemeinem Rechte der Schuldner als solcher für diejenigen Personen, deren er sich zum Zwecke der Erfüllung seiner Verbindlichkeit bedient?* [To What Extent is, According to the Jus Commune, a Contractor Liable for the Acts of Those Persons whom He Employs to Fulfill His Obligations?], 7 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT [JOURNAL FOR ALL COMMERCIAL LAW] 199, 245-53 (1864). Ubbelohde did a thorough analysis of the Roman legal sources, including some insights that foreshadow the reasoning of the law and economics school in the United States. An example is this hypothetical: *A* sells a house to *B*, but *A* includes as a term that she will not move out of the house until six months after the closing. The price that *B* pays will be reduced by six months rent. See *id.* at 249. Ubbelohde argued that this also applied to wage negotiations—hence the insurance premium theory. See *id.* Cf. KOSTAL, *supra* note 37, at 317 (referring to Lord Bramwell’s advocacy of the “insurance premium” theory in England).

194. See GESCHICHTE DER FRANKFURTER ZEITUNG [A HISTORY OF THE FRANKFURT NEWS] 187-88 (1911).

195. See 1 SBRT, *supra* note 20, at 203 (Apr. 13, 1871) (statement of MdR Hans Viktor von Unruh).

mium for such extraordinary occurrences as mining accidents.<sup>196</sup>

The participants in the Reichstag debate had a good grasp of the efficiency issues. The Reichstag realized that if strict liability imposed the cost for unavoidable accidents on the employer, she would shift the cost forward to the consumers in the form of a coal price increase. The National Liberal Karl Braun-Wiesbaden argued that the bill would introduce incentives. Its purpose was not to compensate for accidents, but to prevent accidents. If the employer would not hire an extra switchman, or made her workers work such long hours that they were overtired and made mistakes, her greed caused the accident, and she would be punished in her pocketbook.<sup>197</sup> Employers could insure against this, and they would then pass on the insurance costs to consumers by charging higher prices. Braun said that he happily would pay higher prices on coal, because he would save money on his municipal taxes. If there were fewer accidents, fewer disabled people would end up in the local poorhouse, which was funded by municipal taxation.<sup>198</sup>

The Prussian Conservatives and the German government opposed the expansion of strict liability to mining.<sup>199</sup> The Conservatives' chief motive was probably loyalty to the government. Furthermore, Prussian Junkers had many industrial-type enterprises on their estates—paper mills, distilleries, brickworks, and sawmills—that injured many people.<sup>200</sup> The government feared that if strict liability was expanded to industry, the next candidate would be agriculture, which was contrary to the interests of the landowning elites. The states also owned many mines. In Prussia, for example, although the mines in the Ruhr coalfield were in private hands, the Saar

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196. See 1 SBRT, *supra* note 20, at 215 (Apr. 13, 1871) (statement of Mdr Franz Duncker).

197. See *id.* at 454-55 (Apr. 28, 1871) (statement of Mdr Karl Braun).

198. See *id.* at 455.

199. See OGOREK, *supra* note 26, at 103; BLUM, *supra* note 42, at 408.

200. Eduard Lasker proposed extending strict liability to other industrial facilities, such as steam boilers and engines. See 1 SBRT, *supra* note 20, at 464 (Apr. 29, 1871) (speech of the National Liberal leader and Mdr Eduard Lasker).

coalmines were state owned,<sup>201</sup> as were many mines in Upper Silesia. In the potash industry, the largest mines were the Royal Prussian Mine Stassfurt and the Ducal Anhalt Mine Leopoldshall.<sup>202</sup> The Prussian state also owned numerous saltworks.<sup>203</sup>

As finally adopted, section one of the German Liability Act of 1871 made railroads strictly liable for personal injuries. Section two of the law made operators of mines, quarries, and factories liable for injuries caused by themselves or by their managers—the reform that Karsten had proposed. Section five said that no one could contract around these obligations. Section nine said that any laws of the individual German states that imposed higher obligations were not pre-empted by this law of the Reich.<sup>204</sup>

The Liability Act had one omission. The government thought that the only claims against railroads for property damage would involve passengers' luggage and freight shipments, which were covered by the German Commercial Code of 1861. It overlooked the fires caused by sparks falling on landowners' estates. This sowed the seed for ample litigation about sparks damage in the early twentieth century.<sup>205</sup> It was not until 1940 that the Act was updated so that railroads were strictly liable for damage to property as well.<sup>206</sup>

The liberals looked back upon the 1871 German Liability Act as a lost opportunity. To them, the solution to the costs of accidents was to take the next step: to expand strict liability to

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201. MARTIN F. PARNELL, *THE GERMAN TRADITION OF ORGANIZED CAPITALISM: SELF-GOVERNMENT OF THE COAL INDUSTRY* 12 (1994).

202. See KARL THEODOR STOEPEL, *DIE DEUTSCHE KALIINDUSTRIE UND DAS KALISYNDIKAT: EINE VOLKS UND STAATSWIRTSCHAFTLICHE STUDIE* [THE GERMAN POTASH INDUSTRY AND THE POTASH CARTEL: A STUDY IN ECONOMICS AND FISCAL POLICY] 28-32 (1904).

203. See GEBHARDT, *supra* note 162, at 374.

204. Gesetz betreffend die Verbindlichkeit zum Schadenersatz für die bei dem Betriebe von Eisenbahnen, Bergwerken usw. herbeigeführten Tötungen und Körperverletzungen [Law Concerning the Obligation to Compensate for Damages Resulting from Deaths and Injuries Caused by the Operation of Railroads, Mines, etc.], v. 7.6.1871 (RGBl S.207).

205. See, e.g., Prinz, *supra* note 76, at 482.

206. See Gesetz über die Haftpflicht der Eisenbahnen und Straßenbahnen für Sachschaden [Law on the Liability of Railroads and Streetcars for Damage to Property], v. 29.4.1940 (RGBl. I S.691); MARKESINIS, *supra* note 55, at 696, 706-07.

mines and factories. This was the counter-argument that they put up against Bismarck's proposals for a social insurance system.<sup>207</sup>

### VIII. FURTHER EXPANSION OF THE PRUSSIAN RAILROAD LAW AFTER 1871

Continued pro-worker decisions applying the Prussian Railroad and German Employer Liability Laws encouraged employers to seek alternatives to litigation. One decision, *Streb v. Main-Weser Railroad*,<sup>208</sup> in which the court read contributory negligence out of the act as a defense, explains why workers' compensation was introduced without that defense: It had already been eliminated through judicial construction.

#### A. *The German Supreme Commercial Court Overturns the Junker W. Doctrine that Lost Earnings are Not Compensated*

The string of pro-worker decisions continued after 1871, when the jurisdiction for the Prussian Railroad Law was transferred to the German Supreme Commercial Court (*Reichsoberhandelsgericht*).<sup>209</sup> In the case of *Upper Silesian Railroad Company v. Schulz*,<sup>210</sup> decided on May 7, 1872, the German Supreme Commercial Court again interpreted the law to favor workers. Schulz was a luggage manager who was injured in a derailment and pensioned off. In his job, he had received travel money and a uniform. The railroad contended that this was a lost

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207. See WALTER VOGEL, *BISMARCK'S ARBEITERVERSICHERUNG: IHRE ENTSTEHUNG IM KRÄFTESPIEL DER ZEIT* [BISMARCK'S INSURANCE FOR WORKERS: ITS ORIGIN IN THE PLAY OF THE FORCES OF THE TIME] 70-71 (1951) (reporting the view of the liberal trade union leader Max Hirsch); OTTO QUANDT, *DIE ANFÄNGE DER BISMARCKSCHEN SOZIALGESETZGEBUNG UND DIE HALTUNG DER PARTEIEN: DAS UNFALLVERSICHERUNGSGESETZ 1881-1884* [THE BEGINNINGS OF BISMARCK'S SOCIAL INSURANCE LEGISLATION AND THE STANCES OF THE POLITICAL PARTIES: THE ACCIDENT INSURANCE LAW 1881-1884] 32 (1965).

208. *ENTSCHEIDUNGEN DES REICHS-OBERHANDELSGERICHTS* [DECISIONS OF THE GERMAN SUPREME COMMERCIAL COURT] 10, 411 (1874).

209. The North German Confederation set up a common supreme court for commercial matters, the Federal Supreme Commercial Court (*Bundesoberhandelsgericht*), on June 19, 1869; on August 5, 1871, it was renamed the Imperial Supreme Commercial Court (*Reichsoberhandelsgericht*). On October 1, 1879, the new Imperial Court at Leipzig (*Reichsgericht*) took over its functions. See 3 MÜNCHNER RECHTS-LEXIKON, *supra* note 72, at 97.

210. *ENTSCHEIDUNGEN DES REICHS-OBERHANDELSGERICHTS* [DECISIONS OF THE GERMAN SUPREME COMMERCIAL COURT] 6, 9 (1872).

profit. The German Supreme Commercial Court disagreed: The 1838 law said "all damages," requiring the railroad to replace even lost profits. The court found that the case involving Junker W., who was injured at Oschersleben while crossing the Brunswick State Railroads and had not been allowed to claim full satisfaction, had been wrongly decided.<sup>211</sup> *Schutz*, therefore, explicitly overruled the *Junker W.* full satisfaction case and implicitly overruled the case of Dr. B. and his crushed foot.<sup>212</sup> Significantly, it was not until a worker brought his claim before the court that the law was reinterpreted.

B. *The German Supreme Commercial Court Reads the Facts so that Contributory Negligence Disappears as a Defense*

In a decision of September 10, 1873, *Streb v. The Main-Weser Railroad*,<sup>213</sup> the German Supreme Commercial Court reinterpreted the facts in a way so favorable to the plaintiff as to read the contributory negligence defense out of the act. Streb was a foreman of the repair shops of the Main-Weser Railroad in Frankfurt am Main. A freight car left the shop and was placed upon the weighing scale track. Streb climbed onto the car's roof to touch-up the paint job. Unfortunately, locomotives often came by to shunt freight cars on the weighing scale track. The shunting locomotive pushed the freight car, and Streb toppled off the roof, fell between two cars, and was crushed to death. The railroad contended that Streb had been negligent because (1) cars were not to be painted while on the weighing scale track, (2) it was not Streb's job to paint the cars, and (3) a colleague had shouted out "Careful!" when he saw the shunting locomotive approaching. The court held that none of these actions constituted contributory negligence.<sup>214</sup> In cases following this decision, when a worker was involved, the German Supreme Commercial Court never found contributory negligence. In 1880, when Louis Baare and Bismarck devised a workers' compensation scheme that did not take account of contributory negligence, it was, on pa-

211. *See id.*

212. For the *Junker W.* and *Dr. B.* cases, see *supra* text accompanying notes 107-110 (*Junker W.*) and 120-122 (*Dr. B.*).

213. ENTSCHEIDUNGEN DES REICHS-OBERHANDELSGERICHTS [DECISIONS OF THE GERMAN SUPREME COMMERCIAL COURT] 10, 411 (1874).

214. *See id.*

per, a major innovation;<sup>215</sup> in reality, it acknowledged this development in the case law of the German Supreme Commercial Court.

## IX. INDUSTRIALISTS AS ADVOCATES OF STRICTER LIABILITY

Steel industrialists were among the chief advocates of stricter liability. This was because it increased the market for steel, the most effective prophylactic against accidents. This Part will discuss the views of three leading German steel industrialists—Krupp, Stumm, and Baare—all of whom advocated stricter liability. It was Baare who proposed workers' compensation, which became the pattern for Bismarck's social insurance.

### A. *Alfred Krupp*

Gregory,<sup>216</sup> Horwitz,<sup>217</sup> and Friedman<sup>218</sup> describe industry as if it were monolithic, with a single interest in a negligence standard rather than strict liability. This was not the case in Germany.<sup>219</sup> There were several industrialists who believed in adopting a higher standard of obligation for their own purposes. Three of the most important came from the steel industry, which stood to gain from investment in safer machinery.

The German steel industrialist Alfred Krupp of Essen experienced much difficulty selling his product because the quality was too good. There was no need to use steel when iron would suffice. Only if steamship companies had to pay out huge amounts whenever the shaft of a side-wheeler broke, only if railroads had to pay compensation each time an axle

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215. See BIENENFELD, *supra* note 67, at 31 (observing that Bismarck's accident insurance law—workers' compensation—was an innovation in that it eliminated the defense of contributory negligence [*Selbstverschulden*]).

216. See Gregory, *supra* note 33, at 368, 396.

217. See HORWITZ, *supra* note 35, at 253-54.

218. See FRIEDMAN, *supra* note 36, at 300-02.

219. Cf. MONIKA BREGER, DIE HALTUNG DER INDUSTRIELLEN UNTERNEHMER ZUR STAATLICHEN SOZIALPOLITIK IN DEN JAHREN 1878-1891 [INDUSTRIAL ENTREPRENEURS' ATTITUDE TOWARDS STATE SOCIAL POLICY 1878-1891] 81-88, 223-227 (1982) (arguing that the overwhelming majority of German industrialists supported Bismarck's social insurance plans) [hereinafter BREGER, INDUSTRY'S ATTITUDE].

shattered,<sup>220</sup> could these potential customers be convinced to pay the extra money for steel shafts and steel axles. The railroads were willing to buy steel for parts that underwent tremendous stress, but they used wrought iron or even wood for other parts. On their passenger trains, railroads used wooden coaches, which smashed like matchwood in a collision. The ultimate safety precaution, passenger coaches built out of steel, was not adopted until the early twentieth century, a safety measure in which (unusually) the United States led the way.<sup>221</sup> Another early danger on the railroads, boiler explosions, was also lessened by the use of Bessemer and Siemens-Martin steel.<sup>222</sup>

The importance of steel in preventing accidents was emphasized by the Tay Bridge disaster in Scotland. The bridge was constructed using wrought iron. On December 28, 1879, the bridge collapsed in a gale while a train passed over it; nearly eighty people drowned.<sup>223</sup> This discredited the use of wrought iron, and the second Tay Bridge was built of steel.<sup>224</sup>

Krupp paid careful attention to accidents, but he was unwilling to pay damages if the accident was the fault, not of the steel, but of the handling of the steel parts. When his London representative reported that the shaft on a side-wheel steamship had broken and the quality of the steel was blamed, Krupp replied:

I have discussed the matter about the shaft yesterday and today in four letters to [my London representative] . . . . The short story is overheating and then subsequent cooling, once it was too late. That was also the cause of the wreck of the *Delaware*.<sup>[225]</sup> That

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220. See DUNLAVY, *supra* note 26, at 122 (mentioning the problem of broken axles in 1842 on the Berlin-Stettin Railroad).

221. See VON STOCKERT, *supra* note 23, at 81.

222. See ROLT, *supra* note 23, at 74.

223. See *id.* at 95-104.

224. See SIMMONS, *supra* note 179, at 97-99.

225. The *Delaware* was wrecked on the Scilly Isles on December 20, 1871; forty-seven lives were lost. The ship had stopped its engines because the bearings became overheated. While the engines were stopped, the ship drifted towards the rocks. When the engines were started up again, the crew was unable to prevent the ship from drifting onto the rocks. The court of inquiry that investigated the accident put most of the blame on the violent gale-force weather, but this may have been to forestall liability of the owners or the manufacturers of the ship. Krupp appears to be better informed

is not our problem. When one does not cool the shaft before it overheats, one deserves all the consequences of that stupidity. Every engineer knows that a shaft should not be allowed to run hot . . . . This negligence must be punished like a crime. It is just as bad as if one were to set a house on fire . . . .<sup>226</sup>

In this letter, Krupp's chief focus was on the problem of proof. His analysis was similar to that of *res ipsa loquitur*, a presumption that an accident would not happen in the absence of negligence—effective strict liability.<sup>227</sup> The shaft of the steamship had been destroyed, leaving a problem of proof, but Krupp pointed out that this type of accident would have been caused most likely by negligence on the part of the engineer of the steamship, who allowed the shaft to run hot. Although he focused on the engineer's negligence, his ultimate conclusion—that it was comparable to arson—was the language of strict liability.

In 1876, some rails that Krupp had supplied to Russia broke. Krupp decided that the steel had been contaminated by phosphorous in the coal. He summed up: "I acknowledge no pardon or excuses for what has happened and what has been omitted, no more than a sick or a dying man, when one explains to him that one has served poisoned mushrooms or trichinae in his food."<sup>228</sup> With this remark—selling bad steel is just as bad as selling poisoned food—Krupp was again speaking the language of pure strict liability.

Although Krupp argued for a stricter form of liability, he did not take the further step that his competitor, Louis Baare, did, in advocating accident insurance. Krupp introduced many social amenities for his workers, including health insurance in 1853, which became a compulsory plan in 1858, and

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about the cause than the court of inquiry. See *The Wreck of the Delaware*, TIMES (London), Dec. 29, 1871, at 8; *The Loss of the Delaware*, TIMES (London), Jan. 13, 1872, at 9; *The Loss of the Delaware*, TIMES (London), Jan. 15, 1872, at 6; *The Loss of the Delaware*, TIMES (London), Jan. 18, 1872, at 9.

226. See 2 WILHELM BERDROW, ALFRED KRUPP 211 (1927).

227. On *res ipsa loquitur* as a form of strict liability, see Gregory, *supra* note 34, at 381-82, and Witt, *supra* note 4, at 771-72.

228. Letter from Alfred Krupp, a German industrialist (Mar. 4, 1876), in ALFRED KRUPPS BRIEFE 1826-1887 [THE LETTERS OF ALFRED KRUPP 1826-1887] 330, 331 (Wilhelm Berdrow ed., 1928).

disability pensions in 1858.<sup>229</sup> The missing piece in the Krupp plans was accident insurance. Krupp feared the wrong incentives would result if workers were paid for accidents. Krupp workers only obtained accident insurance as a result of Bismarck's state insurance program. The revision of the rules for Krupp death and disability pensions in 1884 included transitional rules that applied until government accident insurance became fully operational. These rules granted Krupp workers a death or disability pension unless they were grossly at fault (*grobes Verschulden*). The pension was no more than the equivalent under the government insurance program. The claim was lost if the worker sued under the German Liability Act.<sup>230</sup>

His advocacy for a heightened obligation for industry rebounded to the benefit of Krupp. Industry did not want to buy expensive Krupp steel if they could use iron instead. The railroads and the steamship companies would have to buy the better quality, more expensive Krupp steel, however, if they knew they would be found liable in the event of an accident. Krupp was an enlightened industrialist, but his enlightenment also served his own interests.

### B. *Karl Stumm*

Two other advocates of a heightened obligation for industry were the steel industrialists Karl Stumm, of the Saar coal basin, and Krupp's closest competitor, Louis Baare, the General Director of the Bochumer Verein für Bergbau und Gussstahlfabrikation.

The Stumm Works in Neunkirchen in the Saar had a disability fund before 1848.<sup>231</sup> In 1867 and 1869, Stumm, speaking in the North German Reichstag, called for obligatory pen-

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229. See Tony Kellen, *Die Firma Krupp und ihre soziale Tätigkeit* [*The Krupp Firm and its Social Activity*], in 22 FRANKFURTER ZEITGEMÄÙE BROSCHEUN [FRANKFURT PAMPHLETS ON CONTEMPORARY ISSUES] 141, 160-61 (Johann Michael Raich ed., 1903); 1 WOHLFAHRTSEINRICHTUNGEN DER GUSSSTAHLFABRIK VON FRIED. KRUPP ZU ESSEN A. D. RUHR [THE WELFARE ESTABLISHMENTS OF THE CAST STEEL FACTORY OF FRIEDRICH KRUPP IN ESSEN ON THE RUHR] 79, 87 (3d ed. 1902) [hereinafter WOHLFAHRTSEINRICHTUNGEN].

230. See 3 WOHLFAHRTSEINRICHTUNGEN, *supra* note 229, at 111 (provisions under § 29 of the Krupp pension fund, dated Oct. 22, 1884).

231. See GÜNTER BRAKELMANN, CARL-FERDINAND STUMM (1836-1901): CHRISTLICHER UNTERNEHMER, SOZIALPOLITIKER, ANTISOZIALIST [CARL-FERDI-

sion and support funds.<sup>232</sup> In 1878-79, Stumm called for old age and disability insurance modeled upon the already existing Miners' Benefit Funds (*Knappschaften*).<sup>233</sup>

Stumm was opposed to accident insurance, however, because it would introduce the wrong incentives and moral hazard: If workers were compensated for accidents, they would become sloppy and cause more accidents. Stumm preferred an expansion of the German Liability Act.<sup>234</sup>

### C. *Louis Baare of the Bochumer Verein and his Workers' Compensation Plan*

Although two of the leading steel industrialists in Germany, Krupp and Stumm, were willing to place more of the cost of accidents on industry (which would have the happy effect of increasing the market for steel), it was a third steel industrialist, Baare, who led the way to a workers' compensation plan.<sup>235</sup>

Baare was concerned that 80% of the accidents did not fall under the 1871 German Liability Act, and the remaining 20% of claims usually required litigation. Baare's concerns led to an innovative proposal, titled "Promemoria," which he pre-

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NAND STUMM (1836-1901): CHRISTIAN ENTREPRENEUR, SOCIAL POLITICIAN, ANTI-SOCIALIST] 11 (1993).

232. See *id.* at 30, 99; 2 HENRY AXEL BUECK, DER CENTRALVERBAND DEUTSCHER INDUSTRIELLER 1876-1901 [THE CENTRAL ASSOCIATION OF GERMAN INDUSTRIALISTS 1876-1901] 19-20 (1905).

233. See BUECK, *supra* note 232, at 20-22; WALTHER DÄBRITZ, BOCHUMER VEREIN FÜR BERGBAU UND GUSSTAHLFABRIKATION IN BOCHUM: NEUN JAHRZEHNTE SEINER GESCHICHTE IM RAHMEN DER WIRTSCHAFT DES RUHRBEZIRKS [THE BOCHUM CORPORATION FOR MINING AND CAST STEEL MANUFACTURE IN BOCHUM: NINE DECADES OF ITS HISTORY WITHIN THE CONTEXT OF THE ECONOMY OF THE RUHR DISTRICT] 200 (1934); VOGEL, *supra* note 207, at 31-32 n.33.

234. See QUANDT, *supra* note 207, at 51-52.

235. See BREGER, INDUSTRY'S ATTITUDE, *supra* note 219, at 81-82; Monika Breger, *Der Anteil der deutschen Großindustriellen an der Konzeptualisierung der Bismarckschen Sozialgesetzgebung* [*The Share of German Heavy Industrialists in the Conceptualization of Bismarck's Social Legislation*], in BISMARCK'S SOZIALSTAAT: BEITRÄGE ZUR GESCHICHTE DER SOZIALPOLITIK UND ZUR SOZIALPOLITISCHEN GESCHICHTSSCHREIBUNG [BISMARCK'S SOCIAL STATE: CONTRIBUTIONS TO THE HISTORY OF SOCIAL POLICY AND TO SOCIAL POLITICAL HISTORIOGRAPHY] 25, 26-27 (Lothar Machtan ed., 1994) [hereinafter Breger, *The Share of German Heavy Industrialists*].

pared for the Prussian Minister of Trade, Karl von Hofmann, on April 30, 1880.<sup>236</sup>

Baare saw the negligence standard of the 1871 law as too expensive for industry. Workers were winning high damages: A daily wage of three marks a day would result in damages of 12,000 marks. If several workers were killed, damages could be enough to bankrupt a factory.<sup>237</sup> The workers were gaming the accident system: If they won, they became rentiers; if they lost, they were beggars.<sup>238</sup> The uncertainty of the law, which held an employer liable only if she or her managers were at fault, fostered litigation.<sup>239</sup> In addition, local municipalities were willing to testify that individuals were poor (so they could litigate *in forma pauperis*)<sup>240</sup> to encourage accident litigation, which had the potential to remove individuals from the poor relief rolls.<sup>241</sup> Companies needed to insure themselves against this risk. Insurance increased the willingness of judges to grant awards, however, because judges thought the insurance companies could afford to pay them.<sup>242</sup> Baare also attacked the lengthy statute of limitations (two years), during which

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236. See GESCHÄFTSFÜHRUNG DER INDUSTRIE- UND HANDELSKAMMER ZU BOCHUM, AUS DER GESCHICHTE DER INDUSTRIE- UND HANDELSKAMMER ZU BOCHUM [THE MANAGEMENT OF THE CHAMBER OF INDUSTRY AND COMMERCE OF BOCHUM, FROM THE HISTORY OF THE CHAMBER OF INDUSTRY AND COMMERCE OF BOCHUM] 36 (1932) [hereinafter IHK BOCHUM].

237. See Baare, *supra* note 45, at 163; WALTER BACMEISTER, LOUIS BAARE: EIN WESTFÄLISCHER WIRTSCHAFTSFÜHRER AUS DER BISMARCKZEIT [LOUIS BAARE: A WESTPHALIAN BUSINESS LEADER FROM THE AGE OF BISMARCK] 220 (1937).

238. See Baare, *supra* note 45, at 163; BACMEISTER, *supra* note 237, at 221. Although Baare's argument was cold-hearted, others echoed it, too. See, e.g., OGOREK, *supra* note 26, at 118.

239. See Baare, *supra* note 45, at 163-64; BACMEISTER, *supra* note 237, at 221.

240. The German term is *Armenrecht*. An accident insurance cooperative of the Siegerland iron ore mines, the Unfallversicherungsverein der rechtsrheinischen Erz-Bergwerke und Hütten [Accident Insurance Association of the Iron Ore Mines and Smelters on the Right Bank of the Rhine], with its domicile in Siegen, estimated that a lawsuit with appeals (*Berufung und Revision*) would cost the plaintiff 490 marks. Since the annual salary of a Siegerland iron ore miner was only 750 marks, the workers could only sue by using *Armenrecht*. See JOSEF BOYER, UNFALLVERSICHERUNG UND UNTERNEHMER IM BERGBAU: DIE KNAPPSCHAFTS-BERUFSGENOSSENSCHAFT, 1885-1945 [ACCIDENT INSURANCE AND EMPLOYERS IN MINING: THE MINERS' BENEFIT FUND RISK GROUP, 1885-1945] 22 (Klaus Tenfelde ed., 1995).

241. See Baare, *supra* note 45, at 164; BACMEISTER, *supra* note 237, at 221.

242. See Baare, *supra* note 45, at 165; BACMEISTER, *supra* note 237, at 221.

memories faded and perjury became easier.<sup>243</sup> He argued that awards should be kept to a maximum of 500 marks, or two-thirds of the average yearly income.<sup>244</sup> (Baare is thus the inventor of the principle that workers' compensation pays two-thirds of final salary, which workers' compensation schemes all over the world have copied.) The limit was to prevent disabled workers from receiving higher pensions than soldiers or civil servants.<sup>245</sup> Baare suggested splitting the premium evenly between the worker, employer, and local municipality.<sup>246</sup> Finally, he eliminated the negligence issue, thereby reducing the cost of litigation.<sup>247</sup>

Although Baare emphasized the part of his plan that would save industry money, he was aware that it was more expensive than the existing negligence system. He estimated the cost of his two-part plan (which included insurance against death, disability, and extensive loss of earnings from accidents) would be about thirty marks per worker. This would be too much for industry to bear, so Baare proposed his one-third split between the worker, the employer, and the municipality.<sup>248</sup>

Given Baare's sense that a workers' compensation scheme could end up being more expensive,<sup>249</sup> why did he propose it? Baare feared that the German Liability Act would be expanded, and he wanted to shift the reform so that it was more favorable to industry. In 1871, the Reichstag nearly had ex-

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243. See Baare, *supra* note 45, at 166-67; BACMEISTER, *supra* note 237, at 222.

244. See Baare, *supra* note 45, at 167; BACMEISTER, *supra* note 237, at 222.

245. See Baare, *supra* note 45, at 167; BACMEISTER, *supra* note 237, at 222.

246. See Baare, *supra* note 45, at 168; BACMEISTER, *supra* note 237, at 222.

247. See Baare, *supra* note 45, at 168-69; BACMEISTER, *supra* note 237, at 223; IHK BOCHUM, *supra* note 236, at 36-37; VOGEL, *supra* note 207, at 39-40.

248. Baare, *supra* note 45, at 168-69; DÄBRITZ, *supra* note 233, at 201. Cf. BOYER, *supra* note 240, at 28 (arguing that Baare's proposed figures for accident insurance did increase compensation to the worker, but employers would end up paying less due to the three-way split).

249. *But see* BOYER, *supra* note 240, at 28 (stating that Baare's three-way split would make it cheaper for employers); BREGER, *INDUSTRY'S ATTITUDE*, *supra* note 219, at 107-09 n.162 (quoting a number of authorities, including Henry Axel Bueck of the Central Association of German Industrialists, who argued that even with industrialists' bearing the entire cost, workers' compensation turned out to be cheaper than the previous negligence system). See also *id.* at 213 (stating that state social insurance turned out to be cheaper for heavy industry, at least in the short term, than previous systems).

panded strict liability to mining.<sup>250</sup> Without a credible alternative, the Reichstag might impose strict liability on mining in the next wave of reform. If this happened, the Bochumer Verein could incur great expense because it had vertically integrated and operated its own coalmine in the Ruhr, "Vereinigte Maria Anna und Steinbank."<sup>251</sup> One could not be sure, either, that the Reichstag would limit its expansion of strict liability to mining. Switzerland provided a model for a broad application of strict liability, extending it to factories.<sup>252</sup>

Not only was there legislative pressure to expand strict liability, but the courts construed the German Liability Act broadly, with a detrimental effect on industrialists' interests. In 1879, the German Supreme Court (the *Reichsgericht*) decided a case interpreting the German Liability Act.<sup>253</sup> The defendants were railroad contractors. They were building a railroad for the state of Prussia, using a narrow gauge work train, when the work train injured the plaintiff. The defendants argued that they were not operating a railroad but building one. The German Supreme Court held, however, that section one of the German Liability Act was applicable, relying on legislative intent and plain meaning. First, the legislature intended that the statute be read broadly (*Gesetzeszweck*): Prussia's plenipotentiary in the Reichstag debate acknowledged that they were leaving open many concepts in the statute for the courts to define.<sup>254</sup> Second, the plain language (*Wortlaut*) of the stat-

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250. See *supra* text accompanying footnote 187.

251. See GEBHARDT, *supra* note 162, at 244.

252. See *Loi Fédérale concernant le travail dans les fabriques* [Federal Law Concerning Factory Labor], RO 1877 227 (art. 5(b)); VOGEL, *supra* note 207, at 40 (noting that Switzerland expanded strict liability); F. von Wyß, *Die Haftpflichtfrage nach dem in der Schweiz geltenden Rechte* [The Liability Question According to the Laws of Switzerland], in HAFTPFLICHTFRAGE: GUTACHTEN UND BERICHTE [THE LIABILITY QUESTION: ASSESSMENTS AND REPORTS] (Schriften des Vereins für Socialpolitik [Writings of the Association for Social Policy], Vol. 19, Leipzig, Duncker & Humblot 1880).

253. See RGZ 1, 247.

254. The National Liberal leader Eduard Lasker had also emphasized this in the Reichstag debates. Rather than the "casuistry" that dominated in interpreting the *Allgemeines Preussisches Landrecht*, the Reichstag would leave much to the discretion of the judge, "who is truly a glory of the German nation, because he is called to participate in the formation of the law (*Rechtsbildung*) and applies the idea that the legislator puts into his hands to the individual case." See 1 SBRT, *supra* note 20, at 440 (Apr. 28, 1871) (statement of Mdr Eduard Lasker).

ute stated that *Eisenbahn* (railroad) means a road of iron for the purpose of moving items upon it.<sup>255</sup>

This judicial decision extended strict liability throughout Ruhr industry. Ruhr coalmines had been using work trains since the middle of the 1850s.<sup>256</sup> The use of work trains also spread rapidly above ground. In 1876, the firm of Orenstein & Koppel was established, specializing in the construction of industrial railroads.<sup>257</sup> By the early twentieth century, Ruhr companies had substantial railroad enterprises within their own industrial plants. In 1912, the Krupp factory at Essen had a railroad network of 145 kilometers, with fifty-five locomotives and 2,501 wagons.<sup>258</sup> Since any factory or mine with an industrial railroad could be found strictly liable, much of the Ruhr now fell under the strict liability provisions of the German Liability Act. An early draft of the Accident Insurance Law put company-owned railroads and steamboats within those provisions. Lobbying by the Central Association of German Industrialists persuaded the government to shift those accidents to the workers' compensation system.<sup>259</sup>

Industrialists were also concerned by the rapidly increasing number of cases brought under the German Liability Act.<sup>260</sup> In 1878, one insurance company, the Magdeburger Allgemeine Versicherungs-AG, said that the Liability Act was causing "an avalanche of litigation" (*Prozesslawine*).<sup>261</sup> Al-

255. See RGZ 1, 247 (251-52); MARKESINIS, *supra* note 55, at 702-03.

256. See GUSTAV ADOLF WÜSTENFELD, *AUF DEN SPUREN DES KOHLENBERGBAUS: BILDER UND DOKUMENTE ZUR GESCHICHTE DES RUHRBERGBAUS IM 18. UND 19. JAHRHUNDERT* [ON THE TRACES OF COALMINING: PICTURES AND DOCUMENTS CONCERNING THE HISTORY OF RUHR MINES IN THE EIGHTEENTH AND NINETEENTH CENTURY] 114-15 (1985).

257. See KURT ZIELENZIGER, *JUDEN IN DER DEUTSCHEN WIRTSCHAFT* [JEWS IN THE GERMAN ECONOMY] 167-69 (1930).

258. See FRIEDRICH KRUPP AG, *STATISTISCHE ANGABEN* [STATISTICAL FACTS] 71 (1912).

259. See *Unfallversicherungsgesetz* [Accident Insurance Law], v. 6.6.1884 (RGBl. S.21); BUECK, *supra* note 232, at 113.

260. The Siegerland cooperative insurance fund for the iron mining and smelting industry tried to settle out of court and was usually successful at this. From 1877 to 1881, only five workers took their cases to trial and they all lost. From 1879 to 1881, the association received reports of about 220 accidents, and it agreed to pay compensation for 50 of these. In the 1880s, however, litigation rose. Nine cases went to trial in 1884 alone. From 1882 to 1887, the association lost four cases. See BOYER, *supra* note 240, at 25.

261. See *id.* at 26-27.

though this was not true for all industries,<sup>262</sup> this overall picture was correct. The decisions of the German Supreme Commercial Court, which had jurisdiction over the German Liability Act from 1871 until 1880, provide a good indication of the trend. Its decisions were published in twenty-five volumes. In the first ten volumes, three cases cited the German Liability Act; in volumes eleven to fifteen, twenty-three cases; in volumes sixteen to twenty, twenty-one cases; and in the last five volumes, forty-four cases cited the German Liability Act.<sup>263</sup>

Another motive behind Baare's proposal may have been to raise costs for his competitors. Krupp and the Bochumer Verein had expanded the social benefits for their workforce during the boom years of 1871-73. Now they had to maintain these benefits during the severe depression of 1873-79. Many competitors had no such social commitments. By making accident insurance compulsory, the Bochumer Verein could level the playing field within Germany. If the costs for everyone else rose, the Bochumer Verein would be better placed to negotiate a larger share for itself within the Rhenish-Westphalian Rail Cartel.<sup>264</sup> Competition from outside Germany could be excluded through tariff walls, and foreign markets could be secured through export subsidies.<sup>265</sup>

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262. Notably, this was not true for the Siegerland iron industry, the source of the only documents discovered so far with information about compensation for accidents before the introduction of accident insurance. *See id.* at 25.

263. *See* 1-4 GENERAL-REGISTER ZU DEN . . . ENTSCHEIDUNGEN DES REICHS-OBERHANDELSGERICHTS [GENERAL INDEX TO THE DECISIONS OF THE GERMAN SUPREME COMMERCIAL COURT] (1874-80) (a general index to the decisions of the German Supreme Commercial Court, indicating which laws are cited in which cases).

264. *Cf.* ULRICH WENGENROTH, UNTERNEHMENSSTRATEGIEN UND TECHNISCHE FORTSCHRITT: DIE DEUTSCHE UND DIE BRITISCHE STAHLINDUSTRIE, 1865-1895 [ENTREPRENEURIAL STRATEGIES AND TECHNICAL PROGRESS: THE GERMAN AND THE BRITISH STEEL INDUSTRY, 1865-1895] 162 (Veröffentlichungen des Deutschen Historischen Instituts London, Bd. 17 [Publications of the German Historical Institute, London, Vol. 17], 1986) (listing the quotas in the Rhenish-Westphalian rail cartel).

265. *Cf.* 2 ROBERT LIEFMANN, DIE UNTERNEHMUNGEN UND IHRE ZUSAMMENSCHLÜSSE, [BUSINESS ENTERPRISES AND THEIR MERGERS], KARTELLE, KONZERNE UND TRUSTS [CARTELS, CONGLOMERATES AND TRUSTS] 144-47, 151 (1930) (discussing cartels, especially the rail cartel, selling at lower prices overseas than in the domestic market and the grant of subsidies to the domestic manufacturing industry so that its exports could remain competitive).

## X. BISMARCK'S SOCIAL INSURANCE PROGRAM

Bismarck adopted Baare's proposal and made it part of his social insurance program. This Part briefly reviews the well-known story of the enactment of Bismarck's social insurance program, including accident insurance—the first state workers' compensation scheme in the world.

By the end of the 1870s, pressure had increased for the government to pass social legislation. Bismarck, however, did not want the passage of additional workers' safety legislation.<sup>266</sup> He wanted to create a tobacco monopoly and needed a rationale for collecting the new revenue it would generate.<sup>267</sup> He saw the provision of state accident insurance as a potential answer, as well as a subsidy to industry, still suffering after the Crash of 1873.<sup>268</sup> The German government would subsidize industry's accident costs using revenue from the tobacco monopoly. The government subsidy would allow industry to pay lower insurance premiums than would be necessary if the scheme were fully self-supporting.<sup>269</sup>

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266. See also Arbeiterschutz [Workers' Safety], in 3 VON DER REICHSGRÜNDUNG BIS ZUR KAISERLICHEN SOZIALBOTSCHAFT (1867–1881) [FROM THE FOUNDING OF THE GERMAN EMPIRE TO THE IMPERIAL MESSAGE ON SOCIAL POLICY (1867–1881)] xix, xxiii, 477 n.23 (Quellensammlung zur Geschichte der Deutschen Sozialpolitik 1867 bis 1914, Teil 1 [Collection of Sources on the History of German Social Policy 1867 to 1914, Part 1], Wolfgang Ayass ed., 1996) (stating that Bismarck was opposed to workers' safety legislation in principle).

267. See 2 ERNST ENGELBERG, BISMARCK: DAS REICH IN DER MITTE EUROPAS [BISMARCK: THE EMPIRE IN THE MIDDLE OF EUROPE] 392 (1990); *Von der zweiten Unfallversicherungsvorlage bis zum Unfallversicherungsgesetz vom 6. Juli 1884* [From the Second Accident Insurance Bill to the Accident Insurance Law of July 6, 1884], in 2 VON DER KAISERLICHEN SOZIALBOTSCHAFT BIS ZU DEN FEBRUARERLASSEN WILHELMS II (1881–1890) [FROM THE IMPERIAL MESSAGE ON SOCIAL POLICY TO THE FEBRUARY DECREES OF WILLIAM II (1881–1890)] xxii–xxiii (Quellensammlung zur Geschichte der Deutschen Sozialpolitik 1867 bis 1914, Teil 1 [Collection of Sources on the History of German Social Policy 1867 to 1914, Part 1], Florian Tennstedt et al. eds., 1995); VOGEL, *supra* note 207, at 150–51.

268. See LOTHAR GALL, BISMARCK: DER WEISSE REVOLUTIONÄR [BISMARCK: THE WHITE REVOLUTIONARY] 608 (1980) (quoting the view of the Radical MdR Eugen Richter that accident insurance was actually a subsidy to industry rather than to labor); *From the Second Accident Insurance Bill to the Accident Insurance Law of July 6, 1884*, *supra* note 267, at xxiii; VOGEL, *supra* note 207, at 154.

269. See VOGEL, *supra* note 207, at 154.

Bismarck's personal interests strongly influenced his policies. Civil servants who advocated social policy, such as Theodor Lohmann, were astonished by how much Bismarck favored industrialists and lacked any true social commitment.<sup>270</sup> Bismarck, however, understood himself to be an industrialist, and as such his actions are unsurprising. He described himself as "crazy about trees" (*Holzmann*)<sup>271</sup> and added more and more forests to his North German estates at Friedrichsruh and Varzin.<sup>272</sup> He became an important lumber merchant and paper manufacturer.<sup>273</sup> His lumber was sold to the Ruhr lumber merchant Friedrich Vohwinkel, who sold it to the coalmine "Hibernia" for pit props.<sup>274</sup> Bismarck detested factory inspectors—with good reason, given that they found violations in his lumberyards and paper mills.<sup>275</sup> Bismarck did not want to follow the lead of British factory legislation and forbid Sunday work, child labor, and female labor, since all of these elements were necessary to run his industrial establishments at a profit.<sup>276</sup>

Social insurance, combined with a government subsidy, could act as a spur to industry rather than an impediment to it. Bismarck knew that grain and iron tariffs were regressive taxes. He planned to introduce another regressive tax by creating a tobacco monopoly. If he could spend some of the new revenue on benefits for workers, he could mitigate the regressive effects. In return, he hoped the grateful workers loyally would serve their new benefactor, the German Empire.<sup>277</sup>

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270. *See id.* at 164.

271. *See* FRITZ STERN, *GOLD AND IRON: BISMARCK, BLEICHRÖDER AND THE BUILDING OF THE GERMAN EMPIRE* 296 (1977).

272. *See id.* at 291.

273. *See id.* at 293, 296-97.

274. *See id.* at 297.

275. 2 OTTO PFLANZE, *BISMARCK AND THE DEVELOPMENT OF GERMANY, THE PERIOD OF CONSOLIDATION, 1871-1880* 307-10 (1990). On July 12, 1877, an inspector viewed Bismarck's paper factories. Among several dangerous conditions, the inspector pointed out that the saws and drills had no protective covers; walkways and staircases lacked guardrails; gas-operated machinery was next to an open fire; and a technically deficient gasworks was in danger of exploding. *Id.* at 307.

276. *See* VOGEL, *supra* note 207, at 136-37. *See also* Arbeiterschutz, *supra* note 266, at xix, xxiii, 477 n.23 (stating that Bismarck was opposed to workers' safety legislation in principle).

277. BLUM, *supra* note 42, at 430-34. *Cf.* Breger, *The Share of German Heavy Industrialists*, *supra* note 235, at 41 (quoting Henry Axel Bueck of the Central

Bismarck's social insurance program had three parts: accident insurance, health insurance, and old age and disability insurance.<sup>278</sup> Accident insurance was introduced first because the government considered the German Liability Act of 1871 in need of emendation.<sup>279</sup> The proposal was sent to the upper house, the Bundesrat, on January 15, 1881. The accident insurance scheme failed to pass the lower house, the Reichstag, twice, partly because the Reichstag objected to the state subsidy. It finally passed in 1884 without any overt state subsidy; employers were to bear the full cost of the scheme.<sup>280</sup> Employers were classified into different risk groups by industry (*Berufsgenossenschaften*).<sup>281</sup> The Rhenish-Westphalian iron and steel

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Association of German Industrialists, who said that one was deceiving oneself by believing that the workers would turn away from the Social Democrats because of the insurance program and that even Bismarck was subject to this self-deception). Historians traditionally viewed Bismarck's social insurance scheme as the "carrot" of his policies towards the working classes; the "stick" was the Anti-Socialist Law. Some contemporaries perceived Bismarck's social policy as a deliberate "carrot and stick" combination, as well. This in part explains the Social Democratic opposition to the social insurance legislation. On the Socialist reaction to Bismarck's social insurance plans, which caused severe fissures within the Social Democratic Party, see VERNON L. LIDTKE, *THE OUTLAWED PARTY: SOCIAL DEMOCRACY IN GERMANY, 1878-1890* 155-75 (1966). Modern researchers have concluded, however, that the social insurance policy developed along its own internal dynamic and was unconnected to the Anti-Socialist Law. See Kristian Kähler, *Zur Entwicklung der sozialpolitischen Geschichtsschreibung in den 1950er Jahren* [On the Development of Historiography of Social Policy in the 1950s], in *BISMARCK'S SOZIALSTAAT*, *supra* note 235, at 451, 471 (observing that Karl Erich Born questioned the validity of the "carrot and stick" theory in 1960); Lothar Machtan, *Hans Rothfels und die sozialpolitische Geschichtsschreibung in der Weimarer Republik* [Hans Rothfels and the Historiography on Social Policy in the Weimar Republic], in *BISMARCK'S SOZIALSTAAT*, *supra* note 235, at 310, 364.

278. See EGHIGIAN, *supra* note 5, at 26.

279. See BLUM, *supra* note 42, at 408; QUANDT, *supra* note 207, at 12-13; VOGEL, *supra* note 207, at 152.

280. See Unfallversicherungsgesetz [Accident Insurance Law], v. 6.6.1884 (RGBl. S.21). There was still a small state subsidy in the Accident Insurance Act of 1884 because the government paid the operating costs of the Imperial Insurance Office. Additionally, the Post Office would pay claimants, the industrial risk groups would then reimburse the Post Office, and the lost interest on this money was a government subsidy to the industrial risk groups. See Breger, *The Share of German Heavy Industrialists*, *supra* note 235, at 34 n.60.

281. BLUM, *supra* note 42, at 414-19; I FRERICH & FREY, *supra* note 43, at 96. See also EGHIGIAN, *supra* note 5, at 79 (explaining how employers' risks were assigned within each industrial risk group).

industry, for example, formed one such group, the state railroads another, the private railroads a third, the coalmines a fourth.<sup>282</sup>

Health insurance proved to be less controversial than accident insurance because rudimentary health insurance programs already existed on the municipal level, and the new law was more in the nature of housekeeping. Health insurance was paid for by premiums divided among the worker, the employer, and the local municipality. The health insurance bill became law in 1883.<sup>283</sup> Old age and disability insurance became law in 1889, and these final insurance schemes received a subsidy from the imperial government.<sup>284</sup>

When the tobacco monopoly proposal was voted down, Bismarck lost interest in social insurance. Social insurance is regarded today as one of Bismarck's greatest achievements; ironically, Bismarck did not even mention it in his memoirs.<sup>285</sup>

## XI. THE CONSEQUENCES OF BISMARCK'S SOCIAL INSURANCE

This Part examines the various consequences of Bismarck's social insurance: first, the shift of the cost of workers' compensation to consumers through cartels; second, the rise in claims litigation; third, the role of social insurance as a factor in causing the increasing reformism of the German Social Democratic Party and the decreased alienation of the German worker; fourth, the change in the courts from taking an activist role in expanding social measures to deferring to the legislature; and finally, fifth, the effect that social insurance had on overall accident rates based on international comparisons of Germany's accident record.

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282. The industry risk groups were enumerated each year in the STATISTISCHES JAHRBUCH FÜR DAS DEUTSCHE REICH [STATISTICAL YEAR BOOK FOR THE GERMAN EMPIRE]. See, e.g., 13 KAISERLICHEN STATISTISCHEN AMT [IMPERIAL STATISTICAL AUTHORITY], STATISTISCHES JAHRBUCH FÜR DAS DEUTSCHE REICH 199, 200 (Berlin, Puttkammer & Mühlbrecht 1892).

283. Gesetz betreffend die Krankenversicherung der Arbeiter [Law Concerning Workers' Health Insurance], v. 15.6.1883 (RGBl. S.73). See BLUM, *supra* note 42, at 421, 423; 1 FRERICH & FREY, *supra* note 43, at 97-99.

284. Gesetz betreffend die Invaliditäts- und Altersversicherung [Law Concerning Disability and Old Age Insurance], v. 22.6.1889 (RGBl. S.97). See BLUM, *supra* note 42, at 438; 1 FRERICH & FREY, *supra* note 43, at 99-101.

285. See VOGEL, *supra* note 207, at 131.

### A. *Cartels Shift the Cost of Accident Insurance to Consumers*

Because Bismarck could not persuade the Reichstag to subsidize accident insurance, all the costs of the program were placed on employers. Employers, in turn, sought to transfer these costs to consumers or workers and were more or less successful depending upon the negotiating strength of these various economic interest groups. As a result, the weakest among them would bear most of the cost.<sup>286</sup> It is not possible, however, to state definitively who paid for Bismarck's accident insurance because reliable data about costs before the introduction of accident insurance do not exist.<sup>287</sup>

Some of the best data comes from the Ruhr coalmining industry. This industry had had an accident insurance plan in place before 1885—the Miners' Benefit Funds (*Knappschaften*). Prior to the Accident Insurance Law, these Benefit Funds coped with the Depression by cutting benefits.<sup>288</sup> The Accident Insurance Law now forbade the Benefit Funds from cutting benefits. Ostensibly, the employers had to bear the additional cost of accident insurance, but they could recover their costs by cutting wages. During the recessions of the 1880s, the Ruhr coalmining industry cut wages<sup>289</sup> and increased productivity,<sup>290</sup> suggesting that, in recessions, mine-workers paid for accident insurance. During economic

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286. Calabresi, *supra* note 40, at 517, 519, 522-23 (discussing the circumstances under which costs will be shifted forward to consumers or backwards to suppliers and labor by an industry that has to pay for accidents).

287. See BOYER, *supra* note 240, at 32. Cf. FISHBACK & KANTOR, *supra* note 31, at 69 (showing that in the United States, workers "bought" workers' compensation with lower wages).

288. See KLAUS TENFELDE, *SOZIALGESCHICHTE DER BERGARBEITERSCHAFT AN DER RUHR IM 19. JAHRHUNDERT* [SOCIAL HISTORY OF THE MINE WORKERS IN THE RUHR IN THE 19TH CENTURY] 286-87 (2d ed. 1981).

289. See CARL-LUDWIG HOLTFRERICH, *QUANTITATIVE WIRTSCHAFTSGESCHICHTE DES RUHRKOHLENBERGBAUS IM 19. JAHRHUNDERT: EINE FÜHRUNGSSSEKTORANALYSE* [QUANTITATIVE ECONOMIC HISTORY OF RUHR COAL MINING IN THE 19TH CENTURY: A LEADING SECTOR ANALYSIS] 55 (*Untersuchungen zur Wirtschafts-, Sozial- und Technikgeschichte* [Investigations in Economic, Social, and Technological History], Band 1 [Vol. 1], 1973) (demonstrating that wages were cut in 1884 and 1886). See also *id.* at 60 (table including wages plus insurance costs under the Miners' Benefit Funds and under the Accident Insurance Law, which indicates that total costs did not become appreciably higher until the 1889 Ruhr Miners' Strike).

290. Cf. *id.* at 68 (showing that productivity peaked in 1888).

booms, the cost was shifted to consumers by raising prices.<sup>291</sup> In 1889, the Ruhr coalminers undertook their most massive strike, demanding increased wages.<sup>292</sup> After 1889, mine owners could no longer transfer the cost of accident insurance to the mineworkers through wage cuts and productivity increases, so they passed the cost onto consumers. To secure themselves against price decreases during recessions, the coalmines formed the Rhenish-Westphalian Coal Cartel in 1893.<sup>293</sup>

### B. *The Distribution of Litigation Costs*

The new scheme relieved workers of litigation costs. Employers had to pay the cost of the disputes before the risk groups (*Berufsgenossenschaften*).<sup>294</sup> The German government paid for the cost of the final round of appeals as part of the administrative expenses of the Imperial Insurance Office.<sup>295</sup> With litigation now costless for the plaintiffs, the number of cases exploded. By 1912, there were 424,855 appealable accident pension decisions, of which 134,567 were litigated, and, of these, 42,795 came before the Imperial Insurance Office.<sup>296</sup>

### C. *The Influence of Social Insurance in Decreasing German Workers' Alienation from the State*

The Social Democratic Party, initially distrustful of social insurance, used claims litigation to fight for working class interests.<sup>297</sup> The elaborate process of appeals could be construed as part of the class struggle. This process encouraged the reformist tendencies among the Social Democrats. Social insurance helped change the Social Democratic Party from

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291. *Cf. id.* at 23-25 (showing high coal prices during booms).

292. *See* HICKEY, *supra* note 162, at 173-77.

293. *See* 2 LIEFMANN, *supra* note 265, at 63-64. *Cf.* HOLTFRERICH, *supra* note 289, at 23-25 (showing Ruhr coal prices on a permanently high plateau after 1890).

294. *See* Unfallversicherungsgesetz [Accident Insurance Law], v. 6.6.1884 (R.GBl. S.21) (prescribing that the administrative costs of risk groups be borne by the employers).

295. *See id.* § 91 (requiring that the administrative costs of the Imperial Insurance Office be paid by the German government).

296. *See* EGHIGIAN, *supra* note 5, at 69 tbl.3.

297. *See id.* at 97-101.

the revolutionary party of 1870 into the pro-governmental party of August 1914.<sup>298</sup>

The workers did not turn away from the Social Democrats. Instead, the vote for the Social Democrats steadily increased,<sup>299</sup> and by 1912 more than a third of the electorate was voting Social Democrat.<sup>300</sup> When the First World War began, the German Social Democrats broke with their internationalist traditions and voted for war credits.<sup>301</sup> Although Bismarck considered his insurance program a failure, it played an important role in decreasing the alienation of the workers from the state and winning their loyalty.

One indication that social insurance accomplished its goals, at least in making the German working classes more satisfied, was the end of mass emigration from Germany. German immigration to the United States peaked at 250,630 persons in 1882.<sup>302</sup> It then plunged downward, hitting a pre-1914 low of 17,111 in 1898.<sup>303</sup>

D. *The German Courts Abandon their Activist Role and Defer to the Legislature on Expanding Strict Liability and Other Social Measures*

The Prussian Supreme Court, the Supreme German Commercial Court, and the German Supreme Court had played active roles in increasing the spread of strict liability between 1838 and 1880, but the courts now ceased their activism. The

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298. See Machtan, *supra* note 277, at 335-36 (quoting German nationalist historian Wilhelm Shüßler, who argued that social insurance prepared the Social Democrats to vote for war credits on August 4, 1914).

299. See 3 OTTO PFLANZE, BISMARCK AND THE DEVELOPMENT OF GERMANY, THE PERIOD OF FORTIFICATION, 1880-1898 171-72 (1990).

300. See JÜRGEN BERTRAM, DIE WAHLEN ZUM DEUTSCHEN REICHSTAG VOM JAHRE 1912 [THE ELECTIONS TO THE GERMAN REICHSTAG IN 1912] 214 (Beiträge zur Geschichte des Parlamentarismus und der politischen Parteien [Contributions to the History of Parliamentarism and Political Parties], Vol. 28, 1964).

301. See CARL E. SCHORSKE, GERMAN SOCIAL DEMOCRACY 1905-1917: THE DEVELOPMENT OF THE GREAT SCHISM 285-91 (Harvard Historical Studies, Vol. 65, 1955).

302. See 1 U.S. DEPT. OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, ser. 95, at 105 (1975) [hereinafter 1 HISTORICAL STATISTICS].

303. See *id.* at 106 ser. 95.

German Supreme Court declared that expanding strict liability was a matter for the legislature.

This transition is evident in the 1912 Zeppelin case.<sup>304</sup> On the morning of August 5, 1908, the defendant<sup>305</sup> was traveling in an airship from Mainz to Friedrichshafen when a defect in the forward motor required an emergency landing at Echterdingen. Thousands came to watch; the military formed a cordon around the airship. At three in the afternoon a storm arose causing the airship to break free, explode, and burn up. An anchor chain injured the plaintiff. The plaintiff could collect only if Count Zeppelin were found strictly liable because all due care had been taken to prevent people being hurt by the emergency landing. The plaintiff argued that either the German Liability Act or the 1909 law that made automobile drivers strictly liable should apply. The court held those laws to be exceptional and not analogous to travel by airship.<sup>306</sup> This case has come to stand for the proposition that any further extension of strict liability requires an act of the legislature. An active Reichstag and ministers—Berlepsch, Brefeld, Posadowsky-Wehner—thereafter expanded insurance and other social legislation.<sup>307</sup>

Public opinion may have played a role in the court's decision in 1912. In 1838, when the government imposed strict liability upon railroads, Prussia did not yet have a "railroad interest." In 1908, Count Zeppelin's experiments captured the imagination of the German public, making him a popular hero.<sup>308</sup> It was easy to impose strict liability on the friendless

304. See RGZ 28, 171.

305. Many German law reports refer to litigants only by their initials, likely to preserve their anonymity. See BASIL S. MARKESINIS & HANNES UNBERATH, *THE GERMAN LAW OF TORTS* 8-9 (4th ed. 2002). In this particular case, the reference to the defendant as "Graf Z" (Count Z) does little to preserve his anonymity, since not many counts whose names began with Z were traveling the skies in airships in 1908.

306. See RGZ 28, 171 (171-72); MARKESINIS, *supra* note 55, at 704, 863-66.

307. See KARL ERICH BORN, *STAAT UND SOZIALPOLITIK SEIT BISMARCKS STURZ* [STATE AND SOCIAL POLICY AFTER THE FALL OF BISMARCK] 112 (Otto Brunner et al. eds., 1957).

308. See FÜNFUNDSIEBZIG JAHRE INDUSTRIEGEWERKSCHAFT 1891 BIS 1966: VOM DEUTSCHEN METALLARBEITER-VERBAND ZUR INDUSTRIEGEWERKSCHAFT METALL [SEVENTY-FIVE YEARS OF INDUSTRIAL UNION 1891 TO 1966: FROM THE GERMAN METAL WORKER ASSOCIATION TO THE INDUSTRIAL METAL UNION] 113-16 (Industriegewerkschaft Metall für die Bundesrepublik Deutschland [In-

railroads in 1838. It would have been immensely unpopular to find Count Zeppelin liable in 1908. The court also may have been naturally less sympathetic to an onlooker who had come to gawk at an airship disaster, as opposed to an injured railroad worker.

E. *The Effect of Accident Insurance on Germany's Accident Rate as Contrasted with the United States Accident Rate*

Bismarck's social insurance scheme was effective at spreading losses. It failed, however, to reduce the overall number of accidents, which experienced an initial upward blip. Critics of the social insurance contended that since people were rewarded more for having an accident than for taking due care, there were more accidents (the concept of "moral hazard"). Accident insurance advocates argued that the apparent increase was actually due to more accurate recording of accidents: Previously unreported accidents were now reported, since the injured worker could be sure of compensation.<sup>309</sup> The critics were probably correct about the increase in fatal accidents (which were more likely to be reported than before) and the advocates about the apparent increase in non-fatal accidents.<sup>310</sup>

As seen below, however, the early adoption of strict liability had set Germany on a virtuous path of decreasing accident rates. This trend counterbalanced the upward blip caused by the adoption of social insurance. Despite social insurance, the

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dustrial Metal Union of the Federal Republic of Germany] ed., 1966) (quoting an article from the newspaper of the Metal Workers' Union indicating that even the Social Democrats, considered to be enemies of the German state, were thrilled by the achievements of Count Zeppelin and hoped that, after this temporary setback at Echterdingen, he would soon build a new airship).

309. See, e.g., Tonio Bödiker, *Die Gestaltung der Unfallversicherung in Deutschland* [The Organization of Accident Insurance in Germany], in CONGRÈS INTERNATIONAL DES ACCIDENTS DU TRAVAIL: 2<sup>E</sup> SESSION, TENUE A BERNE DU 21 AU 26 SEPTEMBRE 1891, RAPPORTS ET PROCÈS VERBAUX [INTERNATIONAL CONGRESS OF WORKPLACE ACCIDENTS: 2ND SESSION, HELD AT BERNE FROM SEPTEMBER 21 TO 26, 1891, REPORTS AND ORAL PROCEEDINGS] 271, 281 (Comité Suisse D'Organisation [Swiss Organizational Committee] ed., 1891).

310. BLUM, *supra* note 42, at 425-26; E. P. HENNOCK, BRITISH SOCIAL REFORM AND GERMAN PRECEDENTS: THE CASE OF SOCIAL INSURANCE 1880-1914 64-65 (1987). Cf. Bödiker, *supra* note 309, at 279-82 (arguing that the apparent increase in accidents was a function of increased reporting).

accident rate of United States railroads remained double that of German railroads. Moreover, in the Ruhr coal industry, strong trade unions and cartels were able to reduce a high accident rate in the 1890s.

Social insurance fostered advances in rehabilitative medicine, which reduced the fatality rate. When the Accident Insurance Scheme began in 1886, 24.91% of all accidents resulted in death, 15.92% resulted in total disability, 38.88% in partial disability, and 20.29% in only temporary disability. By 1911, the proportions had shifted to 8.28% resulting in death, 0.59% resulting in total disability, 32.49% in partial disability, and 58.64% in only temporary disability.<sup>311</sup> Although some of this change can be accounted for by increased reporting and compensation of minor accidents, most was the result of a sophisticated approach to rehabilitation and physical therapy.<sup>312</sup> The social insurance program provided the funds to expand this new branch of medicine.<sup>313</sup>

Accident rates can be compared across countries for two dangerous and highly regulated industries: coalmining and railroads. The statistics for fatal accident rates in coalmining in the early twentieth century show that Germany had the second highest rate for industrialized countries, after the very high levels in the United States.<sup>314</sup> The fatal accident rate in Ruhr coalmining had been lower than that in England until 1880, when England began to apply effective mine inspection. Thereafter, the accident rate in the Ruhr was higher than in

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311. See 34 KAISERLICHEN STATISTISCHEN AMT [IMPERIAL STATISTICAL AUTHORITY], STATISTISCHES JAHRBUCH FÜR DAS DEUTSCHE REICH [STATISTICAL YEAR BOOK FOR THE GERMAN EMPIRE] 363 (1913); Bödiker, *supra* note 309, at 280 (arguing that the increase in accidents with partial disability is compensated by the decrease in accidents resulting in total disability). See also M. HAGENKÖTTER, SOZIALE EINFLÜSSE UND HÄUFIGKEIT DER ARBEITERSUNFÄLLE IM RUHRBERGBAU [SOCIAL IMPACT AND FREQUENCY OF EMPLOYMENT ACCIDENTS IN RUHR COAL MINING] 70 (Schriftenreihe Arbeitsschutz [Publications Series on Workers' Safety], No. 4, 1974) (demonstrating that, since 1888, fatal accidents in coalmining have fallen, but nonfatal accidents have risen).

312. See EGHIGIAN, *supra* note 5, at 132-45.

313. See *id.*

314. See H. STANLEY JEVONS, THE BRITISH COAL TRADE 374 (Augustus M. Kelley 1969) (1915).

England. Since 1860, the Ruhr mining accident rate had been higher than that in Belgium and France.<sup>315</sup>

This picture, however, conceals a great success: In the 1880s, the fatal accident rate in the Ruhr had been higher than that in the U.S. The successful reduction below the U.S. rate was probably a consequence of the Ruhr miners' strike of 1889. Until the strike, mine owners had increased profits by increasing productivity, and safety had to yield to productivity.<sup>316</sup> After the strike, the miners were powerful enough to resist these productivity increases and could demand that proper safety measures be taken. After 1893, productivity was no longer the only way for mine owners to increase profits: The formation of the Rhenish-Westphalian Coal Cartel allowed them to shift costs to the consumers. The mineworkers' victory in the 1889 Ruhr strike<sup>317</sup> and the creation of the Coal Cartel in 1893<sup>318</sup> help explain why the Ruhr's safety record became better than that of the United States in the 1890s.

Another factor fostering the decrease in accident rates was the amendment of the Prussian Mining Law in 1892,<sup>319</sup> which increased the powers of the state mine inspectors and

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315. See TENFELDE, *supra* note 288, at 225-27 & n.14. For similar statistics, see MAX JÜRGEN KOCH, DIE BERGARBEITERBEWEGUNG IM RUHRGEBIET ZUR ZEIT WILHELMS II, 1889-1914 [THE MINeworkERS' LABOR MOVEMENT IN THE RUHR DISTRICT IN THE AGE OF WILHELM II, 1889-1914] 19 (Beiträge zur Geschichte des Parlamentarismus und der politischen Parteien, Heft 5 [Contributions to the History of Parliamentarism and Political Parties, Vol. 5], 1954).

316. The classic way in which an increase in productivity in coalmining comes at the expense of safety occurs when miners spend more time on coal hewing and less time on installing pit props, which results in more frequent roof falls. Cf. HICKEY, *supra* note 162, at 119 (discussing how inadequate timbering led to frequent roof falls at the end of a shift when miners hurried to fill trucks with coal); MORRIS & WILLIAMS, *supra* note 160, at 190-91 (explaining how South Wales colliers were paid for the coal cut, not for timbering, and often neglected timbering for the sake of hewing).

317. See *supra* text accompanying note 292.

318. Before the Coal Cartel, mine owners raised profits by increasing productivity at the expense of safety. With the formation of the Coal Cartel in 1893, the mine owners increased profits by ratcheting up the cartel price. The industry was more willing to adopt protective safety measures because any expenses caused by these measures promptly could be passed on to the consumers through cartel prices. See *supra* text accompanying note 293.

319. Gesetz betreffend die Abänderung einzelner Bestimmungen des Allgemeinen Berggesetzes [Law Concerning the Amendment of Individual Provisions of the General Mining Law of June 24, 1865], v. 24.6.1892 (PrGS S.131, 134-35).

empowered workers' committees to negotiate with employers over work regulations.<sup>320</sup>

FATAL ACCIDENT RATES IN U.S. AND RUHR COALMINING<sup>321</sup>

Year	Fatalities in U.S. Coalmining (Per 1000 Employees)	Fatalities in Ruhr Coalmining (Per 1000 Employees) (After 1904, per 1000 insured, and excluding the left bank of the Rhine but including Ibbenbüren)
1870	5.93 (anthracite only)	3.777
1871	5.60 (anthracite only)	3.723
1872	4.98 (anthracite only)	3.050
1873	5.46 (anthracite only)	3.345
1874	3.87 (all coal types henceforth)	3.277
1875	3.06	3.352
1876	2.83	3.271
1877	2.77	3.420
1878	2.62	3.227
1879	3.30	3.203
1880	2.21	4.158
1881	2.93	3.665
1882	2.75	4.314
1883	3.34	3.972
1884	2.80	3.504
1885	2.58	2.976
1886	2.25	3.107
1887	2.20	3.285
1888	2.55	2.902
1889	2.36	2.857
1890	2.52	2.966
1891	3.08	3.272
1892	3.12	2.552

320. See *id.*; BORN, *supra* note 307, at 109-11; 1 FRERICH & FREY, *supra* note 43, at 138. The German government often favored the mine workers over the mine owners, because Germany's military strength was based on rapid mobilization of its army in accordance with tight railroad schedules. The railroads only could operate if they were furnished with coal. To ensure that its army could mobilize rapidly, Germany needed to ensure uninterrupted coal supplies. This made the German government willing to grant concessions to the coalminers. See BORN, *supra* note 307, at 111-12.

321. 1 HISTORICAL STATISTICS, *supra* note 302, ser. M276, at 607 (listing the fatal accident rates in U.S. coalmining; 1870-73 figures are high because they are only for Pennsylvania anthracite fatalities); HAGENKÖTTER, *supra* note 311, at 84 tbl.A; ENTWICKELUNG DES STEINKOHLLEN-BERGBAUS, *supra* note 161,

1893	2.70	3.107
1894	2.67	2.398
1895	3.04	2.631
1896	2.85	2.533
1897	2.55	2.584
1898	2.71	3.315
1899	3.14	2.540
1900	3.44	2.459
1901	3.27	2.484
1902	3.38	2.144
1903	3.46	1.981
1904	3.48	2.16
1905	3.63	2.34
1906	3.39	2.17
1907	4.81	2.32
1908	3.60	3.11
1909	3.96	2.62
1910	3.89	2.25
1911	3.65	2.33
1912	3.35	2.95
1913	3.73	2.57
1914	3.22	2.65

One cause of the high accident rates in U.S. and German mines was geology. Ruhr mines are deep. By 1900, the average depth was half a kilometer below the surface.<sup>322</sup> Deep mines suffer more fatal accidents because of the increasing pressure of the overburden and the difficulty of egress.<sup>323</sup> U.S. mines had a similar problem because they mined anthracite and other types of hard coal that required stronger explosive charges to mine,<sup>324</sup> which increased the frequency of acci-

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at 104-05 tbl.114 (listing the fatal accident rates in the Ruhr). The figures from the publication of the Rhenish-Westphalian Mining Association are used through 1903; Hagenkötter's figures are used thereafter. Hagenkötter does not include the coalmines on the left bank of the Rhine, but does include the small Ibbenbüren coalfield, which is in Westphalia but not in the Ruhr proper. The sudden jumps in the Ruhr fatality rates in 1898 and 1908 were due to the "Carolinenglück" and "Radbod" disasters. Hagenkötter's Table A makes this evident by separating out the effects of the big methane explosions. See HAGENKÖTTER, *supra* note 311, at 84 tbl.A.

322. See PARENT, *supra* note 57, at 19.

323. See MARK ALDRICH, *SAFETY FIRST: TECHNOLOGY, LABOR AND BUSINESS IN THE BUILDING OF AMERICAN WORK SAFETY 1870-1939* 59-60 (1997).

324. See PRISCILLA LONG, *WHERE THE SUN NEVER SHINES: A HISTORY OF AMERICA'S BLOODY COAL INDUSTRY* 37 (1989).

dents.<sup>325</sup> The high death rate in U.S. coalmining can be attributed to deeper mines, the use of more explosives (this is especially true of the hard coal anthracite mines), and liability rules that made accidents cheap for the mine owners.<sup>326</sup>

Unique geological conditions hinder strict comparisons of coalmining accident rates from country to country, but railroad accident rates are more readily comparable. Here, too, the United States had one of the highest accident rates in the world. Railroad workers were killed in fatal accidents on U.S. railroads at a much higher rate than on German railroads, often twice as high:

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325. See ANTHONY F.C. WALLACE, *ST. CLAIR: A NINETEENTH CENTURY COAL TOWN'S EXPERIENCE WITH A DISASTER-PRONE INDUSTRY* 250 (1987) (showing that accident rates were higher in Pennsylvania counties with deeper coal mines); 1 *HISTORICAL STATISTICS*, *supra* note 303, at 607 ser.M276 (showing the high death rate in Pennsylvania anthracite mines: 5.93 per 1,000 in 1870-1873); Witt, *supra* note 4, at 719 (comparing the higher death rate in anthracite mines with that in bituminous mines). Anthracite mining provides an example of the trade off of injuries between different groups of the population in a manner similar to Coase's example of the farmer, the railroad, and the sparks. Anthracite mining causes many fatalities among miners, but anthracite produces less ash and other pollutants, so when consumers switch from bituminous to anthracite coal, there are fewer deaths from respiratory diseases. Cf. JEVONS, *supra* note 314, at 33-37 (showing that there is a large amount of hydrogen, oxygen, sulfur, and ash in bituminous coal as opposed to anthracite coal); HILMAR STEPHEN RAUSHENBUSH, *THE ANTHRACITE QUESTION* 7 (1924) (commenting that "[a]ny woman who has to wash the family clothes or curtains can tell the difference between the two coals"); WALLACE, *supra*, at 7 (stating that anthracite burns smokeless). Bituminous coal caused killer fogs in London: The December 1952 fog killed 4,000 people, and the December 1957 fog killed approximately 1,000, plus another 87 killed in the Lewisham train disaster, which was caused by the fog. See *Fogs*, in *THE LONDON ENCYCLOPÆDIA* 296-97 (Ben Weinreb & Christopher Hibbert eds., 1993). See also Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 *HARV. L. REV.* 713, 716 n.6 (1965) (suggesting that the Mont Blanc tunnel may save more lives than it took to build it).

326. See ALDRICH, *supra* note 323, at 75.

WORKERS KILLED ON GERMAN AND UNITED STATES  
RAILROADS<sup>327</sup> (Rates per 1000 Employees)

Year	United States	Germany
1890	3.27	1.44
1891	3.39	1.54
1892	3.11	1.37
1893	3.12	1.45
1894	2.33	1.42
1895	2.31	1.27
1896	2.25	1.54
1897	2.06	1.41
1898	2.24	1.51
1899	2.38	1.43
1900	2.50	1.49
1901	2.50	1.36
1902	2.50	1.30
1903	2.50	1.25
1904	2.75	1.30
1905	2.43	1.40
1906	2.58	1.31
1907	2.71	1.31
1908	2.37	1.53
1909	1.74	0.83
1910	1.99	0.81
1911	2.16	1.44
1912	2.12	1.55
1913	2.05	0.71
1914	1.91	0.71

Bismarck's accident insurance did not succeed in reducing the overall fatal accident rate, but it did not raise it appre-

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327. See 2 U.S. DEPARTMENT OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, at 404 ser.Q 404, 740 Q.398 (1975) (dividing Q404 by Q398 yields the United States rates); 13-37 KAISERLICHEN STATISTISCHEN AMT [IMPERIAL STATISTICAL AUTHORITY], STATISTISCHES JAHRBUCH FÜR DAS DEUTSCHE REICH [STATISTICAL YEAR BOOK FOR THE GERMAN EMPIRE] (Berlin, Puttkammer & Mühlbrecht 1892-1916). The German statistics were derived by summing the average number of people insured for the private railroads and the state railroads, summing the private and state railroad fatal accidents, dividing the latter figure by the former, and, finally, multiplying that by 1000. It also should be noted that only the private railroad figure is given from 1908 onwards; the number employed on state railroads in 1907 was 435,538, compared to 27,622 on private railroads.

ciably either. Germany's accident rates on the railroads were respectable in international terms. In coalmining, Germany's accident rate remained high in comparison to international levels, yet it was reduced during the 1890s, thanks to a strong labor movement and a coal owners' cartel. The exceptional case was the U.S., a country whose regimen to prevent and compensate accidents was extraordinarily bad.

## XII. THE ADOPTION OF EMPLOYERS' LIABILITY AND WORKERS' COMPENSATION IN BRITAIN AND THE UNITED STATES

The adoption of Employers' Liability Laws and workers' compensation in Britain and the U.S. paralleled development in Germany. This Part briefly reviews the Anglo-American story.

The importance of the German precedent for the adoption of workers' compensation in Britain and the U.S. in the early twentieth century often has been noted.<sup>328</sup> In Britain and the U.S., the introduction of workers' compensation followed the same basic framework that had played out in Germany, beginning with a series of terrible accidents that awoke the public conscience. Next came the passage of Employers' Liability Acts.<sup>329</sup> The Employers' Liability Acts fostered litigation, which was perceived as an unsatisfactory outcome, so they were replaced by workers' compensation programs.

### A. Great Britain

In Britain, the Abergele train disaster of 1868 inaugurated more than a decade of terrible accidents, culminating in the Tay Bridge disaster of 1879.<sup>330</sup> Furthermore, after the House

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328. See, e.g., HENNOCK, *supra* note 310, at 168-69 (quoting Winston Churchill's plea to H. H. Asquith, in 1908, to make Bismarckianism part of the Liberal program); DANIEL P. MOYNIHAN, *THE POLITICS OF A GUARANTEED INCOME: THE NIXON ADMINISTRATION AND THE FAMILY ASSISTANCE PLAN 5* (1973) (stating that United States political reform programs of the mid-twentieth century were based on ideas that originated with Bismarck); DANIEL T. RODGERS, *ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE* 247-50 (1998) (stating that United States reformers designed workers' compensation after German and British models).

329. See Employers' Liability Act, 1880, 43 & 44 Vict., c. 42 (Great Britain); Federal Employers' Liability Act (FELA), ch. 149, 35 Stat. 65 (1908) (codified as 45 U.S.C. §§ 51-60 (2001) (United States)).

330. See SIMMONS, *supra* note 179, at 211.

of Lords' decision in the 1868 case *Wilson v. Merry*,<sup>331</sup> workers could not sue even if supervisory personnel, such as foremen, were negligent; such negligence was part of the fellow servant defense. In 1880, Britain passed an Employers' Liability Act,<sup>332</sup> which resembled the German Liability Act in both imposing strict liability for the actions of supervisory personnel and maintaining the fellow servant (common employment) defense.<sup>333</sup> For railroads, the liability of the company extended as far down the chain of command as engineers, signal workers, and switch workers, but, unlike German railroads since 1871 (and Prussian railroads since 1838), British railroads still had a possible fellow servant defense.<sup>334</sup> Most important, unlike Prussian and Austrian law since 1869 and German law since 1871, employers and employees could contract out of the arrangement.<sup>335</sup> By the 1890s, it was clear that the law was in need of amendment. Although the Conservative Party then in power wanted to do something for the workers to woo them away from the Liberals, the Conservatives could not pass a measure that abolished contracting out without offending their core supporters.<sup>336</sup> To find a way out of this impasse, Joseph Chamberlain copied Bismarck's accident insurance and introduced workers' compensation to Britain in 1897.<sup>337</sup> This remedied the problems of the Employers' Liability Act, but at the same time allowed the government not to offend its supporters directly by eliminating contracting out. Unlike the German plan, there was no compulsory state insurance: The

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331. See 1 L.R.-S. & D. App. 326, 337-39 (H.L. 1868) (citing English cases, so, although this is a Scottish appeal, there is no doubt that this case law applies to England and Wales as well). See also Epstein, *Historical Origins*, *supra* note 30, at 787 (noting general unhappiness with the rule of common employment as propounded by *Wilson v. Merry*).

332. Employers' Liability Act, 1880, 43 & 44 Vict., c. 42.

333. See BARTTRIP & BURMAN, *supra* note 19, at 149-55; Epstein, *Historical Origins*, *supra* note 30, at 787-89.

334. See Employers' Liability Act, 1880, 43 & 44 Vict., c. 42., at § 1. See also HENNOCK, *supra* note 310, at 47 (discussing the survival of the common employment defense in the 1880 Act).

335. See HENNOCK, *supra* note 310, at 47-48.

336. See *id.* at 57-58.

337. See Workmen's Compensation Act, 1897, 60 & 61 Vict., c. 37. See also BARTTRIP & BURMAN, *supra* note 19, at 201-06 (discussing the 1897 passage of the bill); HENNOCK, *supra* note 310, at 52-53 (discussing Chamberlain's use of German compulsory accident insurance as a model for his legislation).

employer could buy insurance from a private company, or could choose to bear all the risk.<sup>338</sup> General compulsory state accident insurance for workers, which had existed in Germany since 1884, was not introduced in Britain until 1946.<sup>339</sup>

### B. *The United States*

By 1900, it was generally perceived that there was a serious industrial accident crisis in the U.S.<sup>340</sup> In the single month of December 1907, 703 miners were killed in coalmine explosions, including the worst disaster in United States history, the disaster at the Monongah (West Virginia) mines number 6 and 8, which killed 362 miners.<sup>341</sup> These accidents woke the public conscience and led to the passage of Employers' Liability Acts and workers' compensation.

The first Employers' Liability Act applied to railroads only and was enacted by Georgia in 1856—possibly the first jurisdiction outside Prussia to pass such a law. The Georgia law eliminated the fellow servant defense.<sup>342</sup> By 1900, a confusing state-by-state patchwork of Employers' Liability Acts addressed the problem of industrial accidents. The laws weakened the common law trinity of defenses (contributory negligence, assumption of risk, and fellow servant). Some laws applied only to mining; some applied only to railroads. Other laws forbade contracting out.<sup>343</sup> Contracting out, however, which caused such trouble in the development of British legislation, was not an issue in the United States, since courts struck down these contracts as against public policy.<sup>344</sup>

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338. See HENNOCK, *supra* note 310, at 76.

339. See National Insurance (Industrial Injuries) Act, 1946, 9 & 10 Geo. 6, c. 62 (Eng.). See also HENNOCK, *supra* note 310, at 93-94 (insurance not introduced until 1946).

340. See Witt, *supra* note 4, at 726-28 (noting "growing concern for the accident problem" at the end of the nineteenth century).

341. See ALDRICH, *supra* note 323, at 41, 72-74.

342. See STEPHEN D. FESSENDEN, THE PRESENT STATUS OF EMPLOYERS' LIABILITY IN THE UNITED STATES 18 (United States Department of Labor Exhibit, Pan-American Exposition, Monographs on Social Economics, Charles H. Verrill ed., 1901).

343. For a summary of these laws, see FISHBACK & KANTOR, *supra* note 31, at 251-54.

344. See Witt, *supra* note 4, at 774.

There was a major gap in coverage over railroads in interstate commerce. Congress passed the first Federal Employers' Liability Act (FELA) in 1906,<sup>345</sup> but a badly fractured Supreme Court ruled this unconstitutional.<sup>346</sup> A unanimous court upheld a second version in 1911.<sup>347</sup> FELA eliminated the fellow servant defense, replaced contributory negligence with comparative negligence, and eliminated assumption of risk where the railroad had violated a statute. It also eliminated contracting out of this liability. The statute was given more teeth in 1939, when it was amended to eliminate the assumption of risk defense entirely.<sup>348</sup>

In 1910, the state of New York introduced a workers' compensation scheme. This was struck down by New York's highest court, the Court of Appeals,<sup>349</sup> but New York amended its state constitution,<sup>350</sup> and the next workers' compensation statute (passed in 1913) was upheld.<sup>351</sup> Other states copied the

345. Federal Employers' Liability Act (FELA), ch. 3973, 34 Stat. 232 (1906).

346. See *The Employers' Liability Cases*, 207 U.S. 463, 504 (1908).

347. Federal Employers' Liability Act (FELA), ch. 149, 35 Stat. 65 (1908) (codified as 45 U.S.C. §§ 51-60 (2001)). See *Second Employers' Liability Cases*, 223 U.S. 1 (1911) (Van Devanter, J.) (upholding the statute); EPSTEIN, *CASES AND MATERIALS ON TORTS*, *supra* note 106, at 787 n.28 (noting Supreme Court rulings on the statute). Because of FELA, U.S. railroad employees are in the unusual position that they, unlike almost any other employees in the world (and unlike Prussian railroad employees since 1838), must show negligence by their employer in order to collect. Courts and juries seek to ameliorate this high standard by finding employers' liable where there is but the slightest negligence. See *Wilkerson v. McCarthy*, 336 U.S. 53, 65-66 (1949) (Frankfurter, J., concurring) (noting the difficulty of deciding cases under FELA because "questions of negligence are questions of degree").

348. See Pub. L. No. 382, sec. 4, §§ 51, 54, 53 Stat. 1404, 1404 (1939).

349. See *Ives v. S. Buffalo R.R.*, 94 N.E. 431, 448 (N.Y. 1911) (striking down the workers' compensation statute as a violation of the due process clause of the N.Y. Constitution). See also FISHBACK & KANTOR, *supra* note 31, at 102 (discussing the New York decision); Gregory, *supra* note 34, at 385 (same).

350. See N.Y. CONST. art I, § 18 ("Nothing contained in this constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment . . . of compensation for injuries to employees or for death of employees . . ."). See also Gregory, *supra* note 34, at 387 (noting that the N.Y. Constitution was changed to allow the statute).

351. See *Jensen v. S. Pac. Co.*, 109 N.E. 600, 603 (N.Y. 1915) (deciding unanimously that since the N.Y. Constitution had been amended, the workers' compensation statute did not violate the N.Y. due process clause), *rev'd*

model of New York: Between 1910 and 1920, workers' compensation statutes spread throughout the United States.<sup>352</sup>

Another element of Bismarck's insurance program was copied and enacted during the New Deal, when the Federal government introduced Social Security—insurance for old age and disability.<sup>353</sup> Interestingly, Health Secretary Frances Perkins and Rexford Tugwell recognized the major problem with this scheme; like all social insurance schemes, it acted as a tax on jobs.<sup>354</sup> Franklin D. Roosevelt acknowledged this critique but would not change the scheme for political reasons. If Social Security were financed from general tax revenues, the president argued, it could be legislated away; as an insurance program, it would never disappear.<sup>355</sup> In Roosevelt's own words, "[N]o damn politician can ever scrap my social security program."<sup>356</sup> For political reasons, Roosevelt, contrary to advice, enacted a measure that was a tax on jobs and raised unemployment during the Depression.

### XIII. CONCLUSION

Professor Gary Schwartz has shown that the classic version of the Gregory and Horwitz thesis is not sustainable. Schwartz's study of decisions in four states shows that, rather than favoring defendants to provide a subsidy to industry, courts actually favored plaintiffs. In spite of this preference, the United States industrialized very rapidly.<sup>357</sup> This study has shown that Horwitz's thesis is not sustainable even in a country that adopted strict liability. Despite opting for strict liability, railroads grew even faster in Prussia than in other countries.

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*on other grounds*, 244 U.S. 205 (1918); *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 209 (1917) (Pitney, J.) (holding that the N.Y. workers' compensation statute did not violate the due process clause of the Federal constitution). *See also* Gregory, *supra* note 33, at 387.

352. *See* FISHBACK & KANTOR, *supra* note 31, at 102-04.

353. *See* Social Security Act, ch. 531, 49 Stat. 620 (1935) (current version at 42 U.S.C. §§ 401-433 (2000)). *See also* SCHLESINGER, *supra* note 32, at 297-15 (discussing the passage of the Social Security Act).

354. *See* EDWARD D. BERKOWITZ, *AMERICA'S WELFARE STATE: FROM ROOSEVELT TO REAGAN* 20-21 (1991) (arguing that the payroll tax was regressive but adopted for political reasons); SCHLESINGER, *supra* note 32, at 308.

355. *See* SCHLESINGER, *supra* note 32, at 308-09.

356. *See id.*

357. *See supra* text accompanying notes 38-39.

This is partly because, in the early stages, the railroads were making such high profits that the costs of accidents were a minor expense. The railroad might make a return of 9% instead of 10%, but the difference did not matter because there were no competing investments that offered higher returns than railroad stock.<sup>358</sup> During the 1850s and 1860s, the Prussian Supreme Court reinterpreted the Prussian Railroad Law so that it did not benefit the Junker landowning class (as originally intended), but instead became a social measure for the workers.

After the Crash of 1873 and the decline in profit margins during the Depression of the 1870s, businessmen became more concerned about the costs of different accident liability systems. The coalmining disasters of 1867-69 shifted much influential opinion in favor of strict liability for mining. Prominent industrialists, including Krupp, Stumm, and Baare, advocated stricter liability. Baare chose workers' compensation partly because he thought that industry would not end up bearing the entire cost alone—the premiums would be split three ways, and there would be a subsidy from the German government—and partly because, since no one had ever run a full-scale workers' compensation scheme, he underestimated the potential cost. Other advantages included imposing costs that the Bochumer Verein had already sustained on competitors who had not chosen to insure against accidents. Finally, the steel industry could most successfully sell its products if it could convince railroads and steamship lines to take utmost due care against accidents by using steel tires, axles, shafts, and bridges, so elite steel industrialists, like Krupp, Stumm, and Baare, were advocates of stricter forms of liability.<sup>359</sup>

Bismarck explicitly conceived of accident insurance as a subsidy for industry. A national tobacco monopoly was an integral part of his plan. The Reichstag changed the plan so that it imposed all the costs on industry. The tobacco monop-

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358. See BROPHY, *supra* note 91, at 42.

359. See BREGER, *INDUSTRY'S ATTITUDE*, *supra* note 219, at 225-26 (acknowledging that heavy industry in particular welcomed state social policy, but saying that all German industry agreed; heavy industry's advocacy of state social insurance is prominent only because its lobbying was better organized).

oly was voted down, and, instead of paying a third of the premiums, the employers had to pay all of them.

Although accident insurance did cause a temporary upward blip in the accident rate in Germany, the long term trend was a virtuous course downwards, partly because of the early adoption of strict liability. Comparisons of accident rates in railroads and coalmining show that the U.S. had a fatal accident rate that was double the rate of Germany. There was good cause for the tremendous amount of tort litigation in the U.S. in that period—people suffered more accidents there than did people in Europe. This remains the case today:

ACCIDENTAL DEATH RATE IN MAJOR INDUSTRIAL COUNTRIES,  
2000-2002 (Per 100,000 People)<sup>360</sup>

	France (2000 figures)	Germany (2001 figures)	United Kingdom (2002 figures)	United States (2000 figures)
Motor Vehicle Accidents	13.01	9.7	5.85	15.2
All Accidents	N/A	19.9	20.86	34.0

Why does the United States' record for accidents remain so exceptionally bad? The criticisms of observers around 1900 retain much of their relevance.<sup>361</sup> Although many conditions

360. See MINISTÈRE DE L'ÉCONOMIE, DES FINANCES ET DE L'INDUSTRIE [MINISTRY OF ECONOMY, FINANCES, AND INDUSTRY], 2003 ANNUAIRE STATISTIQUE DE LA FRANCE [STATISTICAL YEAR BOOK OF FRANCE] 41 tbl.B.01-1, 455 tbl.L.02-9 (2003) (France); STATISTISCHES BUNDESAMT [FEDERAL OFFICE OF STATISTICS], STATISTISCHES JAHRBUCH 2003 FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [STATISTICAL YEARBOOK 2003 FOR THE FEDERAL REPUBLIC OF GERMANY] 442 tbl 18.4 (Germany); OFFICE FOR NATIONAL STATISTICS, 2002 ANNUAL ABSTRACT OF STATISTICS, 26, 56-58 (United Kingdom); U.S. CENSUS BUREAU, 2002 STATISTICAL ABSTRACT OF THE UNITED STATES 80 tbl.101 (United States). For France and the United Kingdom, dividing the number of deaths by the total population, and multiplying by 100,000, gives the rate per 100,000. The population figures were 58,748,700, see MINISTÈRE DE L'ÉCONOMIE, DES FINANCES ET DE L'INDUSTRIE, *supra*, at 41 tbl.B.01-1 (France, 2000), and 59,501,000 (United Kingdom), see OFFICE FOR NATIONAL STATISTICS, *supra*, at 26.

361. See ALDRICH, *supra* note 323, at 63 (quoting the English *Colliery Guardian* of 1908, which commented that “in safeguarding its workmen” the U.S. is “the most backward of the civilized nations”); CRYSTAL EASTMAN, WORK-ACCIDENTS AND THE LAW v (Paul Underwood Kellogg ed., 1916); JEVONS, *supra* note 314, at 374 (observing that “human life is valued lightly in the States”). In addition, see the comment of Eastman's editor, Paul U. Kellogg, which contrasts the U.S. law of industrial accidents to that of Europe. According to

of the early twentieth century no longer exist, the infrastructure that was built on the cheap and unsafe "American System"<sup>362</sup> continues to claim its victims through steam pipe explosions,<sup>363</sup> gas main fires,<sup>364</sup> train derailments,<sup>365</sup> and subway collisions.<sup>366</sup> Level crossing accidents killed 352 people in 2002 alone.<sup>367</sup>

To attribute the tort litigation problem in the United States to greedy plaintiffs and manic attorneys<sup>368</sup> is to confuse a symptom with a cause. At its base remains an accident rate that is much higher than in other economically advanced nations. The tort problem can be solved only by addressing the underlying causes of accidents, not by shutting off the ability to sue for compensation. True tort reform must replace the

Kellogg, U.S. law is "law-made anarchy" whereas European law is "law and order;" Europe "has brought its statutes abreast of industrial progress," but "we have not." EASTMAN, *supra*, at v.

362. See ALDRICH, *supra* note 323, at 17-25 (contrasting the cheap American system of railroad construction with the more solid method used in Britain).

363. See, e.g., David E. Pitt, *Pipe Explosion Leaves 2 Dead and 2 Missing*, N.Y. TIMES, Aug. 20, 1989, at A34 (reporting a steam pipe explosion that killed three and forced the evacuation of thousands); Eric Schmitt, *3d Victim Dies in an Explosion of a Steam Pipe: Thousands Return to Gramercy Park Homes*, N.Y. TIMES, Aug. 21, 1989, at B3; James Barron, *Beneath the Streets, Steam Pipes Give No Hint of Impending Disaster*, N.Y. TIMES, Aug. 22, 1989, at B1 (reporting that steam pipes from 1952 are not especially old); David E. Pitt, *Con Ed Says Asbestos Tied to 17 Blasts*, N.Y. TIMES, Sept. 2, 1989, at A25.

364. See, e.g., Robert D. McFadden, *Fiery Blast Shuts Off Power to Many New Yorkers*, N.Y. TIMES, Dec. 30, 1990, at A1.

365. See, e.g., John T. McQuiston, *At Least 5 Dead and 150 Hurt as Subway Derails*, N.Y. TIMES, Aug. 28, 1991, at A1; Calvin Sims, *Newest Safety Equipment Lacking at Union Square Switching Point*, N.Y. TIMES, Aug. 30, 1991, at B4 (stating that the safety equipment is antiquated and vulnerable to human error).

366. See, e.g., James Barron, *Subway Crash in Brooklyn Injures 45*, N.Y. TIMES, Oct. 8, 1993, at B1; Seth Faison, *A Safety System, and Inexplicable Failure*, N.Y. TIMES, Oct. 8, 1993, at B8 (suggesting that the collision may have been caused by the unsafe practice of "keying" past red signals). Cf. SHAW, *supra* note 23, at 431 (explaining that "keying by" red signals was recognized as a dangerous practice on the IRT and the BMT in 1929).

367. Federal Railroad Administration, Office of Safety Analysis, Highway-Rail Casualties at Public and Private Crossings, at <http://safetydata.fra.dot.gov/OfficeofSafety/Query> (last visited on April 15, 2003). In 2001, level crossing accidents killed 421 people. *Id.*

368. See, e.g., Philip K. Howard, *There is No "Right to Sue."* WALL ST. J., July 31, 2002, at A14 (rehearsing the arguments of the advocates of "tort reform" and attributing the problem to "personal greed").

level crossings and other parts of the antiquated U.S. infrastructure that foster these accidents. It must extend social insurance to health insurance, so that people no longer resort to tort litigation to cover gaps in their health coverage.

Likewise, the German system of extensive social insurance forestalls much litigation. The "German advantage"<sup>369</sup> is the result of an elaborate social safety net,<sup>370</sup> not just procedural differences.

A pure state social insurance scheme (like Social Security) is a payroll tax that fosters unemployment. Government subsidies of insurance plans, using revenues raised through progressive taxation, can counteract the regressive payroll tax. There is a trade-off. Insurance is politically palatable. If health care is paid through general taxation, government may spend too little, as is the case in the United Kingdom. Bismarck's mixture of a government subsidy plus an insurance plan solves both problems. The answer may be to make social insurance a counter-cyclical subsidy. During times of high unemployment, the plans will run a deficit, which will be covered from general tax revenues. In that way the insurance schemes will not act as a tax on jobs.

A final point is the importance of comparative law in helping to understand domestic law. Mr. Chief Justice Rehnquist has criticized the use of foreign law to interpret U.S. law. Attacking the Court majority's decision to "place weight on foreign laws," Rehnquist has argued, "[V]iewpoints of other countries simply are not relevant."<sup>371</sup> As Professor Karl Llewellyn observed, however, "Recognizing and solving a problem becomes much easier when it shows up wearing a peculiar foreign dress."<sup>372</sup> A study of the emergence of workers' insurance

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369. Cf. John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985) (praising the more efficient and fair civil procedure in German courts, which is less prone to manipulation by unscrupulous attorneys).

370. See MARKESINIS, *supra* note 55, at 707-10. Cf. Witt, *supra* note 4, at 697, 839 (arguing that the United States' refusal to develop further social insurance in the early twentieth century is one reason it saw so much tort litigation at the end of the century).

371. See *Atkins v. Virginia*, 536 U.S. 304, 322-25 (2002) (Rehnquist, C. J., dissenting).

372. See KARL LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* 1 (Michael Ansaldi trans., Paul Gewirtz ed., 1989).

in Germany shows that Llewellyn has the better argument. Where Germany led, Britain followed (except in enacting unemployment insurance, in which Britain led the way), and the United States would eventually bring up the rear. This can best be expressed in a table:

	Germany	Great Britain	United States
Modern strict liability	1838 (Prussia)	1865 ( <i>Rylands v. Fletcher</i> )	Rule of <i>Rylands</i> accepted by Massachusetts in 1868; at first rejected by most U.S. jurisdictions, but by 1971 accepted by about thirty U.S. jurisdictions <sup>373</sup>
Employers' Liability Act	1871	1880	1856 (Georgia); 1906/8 (FELA)
Health insurance	1882	1911 (National Insurance)	1965 (Medicare) <sup>374</sup>
Workers' comp.	1884	1897	1910/13 (New York); most other states by 1920
Old Age and Disability Insurance	1889	1911 (National Insurance)	1935 (Social Security)
Unemployment Insurance	1918 (transitional for demobilization); 1927 (permanent) <sup>375</sup>	1911 (National Insurance)	1932 (Wisconsin) <sup>376</sup>

Comparative jurisprudence tells us, in part, where our law has come from; it also suggests the directions in which it should develop further.

373. See W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 548-49 (5th ed. 1984).

374. See Health Insurance for the Aged Act, Pub. L. No. 89-97, 179 Stat. 290 (1965) (currently codified at 42 U.S.C. §§ 1395-1395ggg (2001)).

375. See I FRERICH & FREY, *supra* note 43, at 196-203.

376. See BERKOWITZ, *supra* note 354, at 31.