
THE VANISHING MIDDLE GROUND:

Retributive and Distributive Justice in Tort Law

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"O, when degree is shaked,
Which is the ladder of all high designs,
The enterprise is sick!"

Shakespeare
Troilus & Cressida

I. Introduction

A. The Power Lawn Mower Shine.

We are once again in a period when many writers are dredging in the murky waters of tort theory. As one recent author noted, "torts is at once one of the simplest and one of the most complex areas of the law". (Epstein, 1973: 151) With respect to negligence at least, ordinary language and ordinary understandings surround, perhaps engulf, the main concepts. Carelessness, Foresight, Ability, Knowledge, Unavoidable Accident, even The Reasonable Man all find their referents in everyday life. Everyone can judge, everyone does judge, yet there is little consensus. Dare to step beyond the common sense of the thing and you will find a hundred complexities, a dozen distinctions and even several totally different points of view.

Much of the renewed interest in tort theory springs from the desire to move away from the ambiguities of negligence. Most of the movement is toward what is commonly called Strict Liability. Almost from the instant of its birth negligence has been under the shadow of strict liability. In 1868 Rylands V. Fletcher, 159 Eng. Rep. 737 (Ex. 1865, rev'd., L.R. 1 Ex. 265 (1866), aff'd, L.R. 3 H.L. 330 (1868) stood as an early exception and rebuttal to this mode of analysis. Over the years the shadow has been lengthening. First Workmen's Compensation, the Products Liability and now No-fault Automobile Plans carve increasing areas of behavior from the jurisdiction of negligence.

Part of the movement is toward an economic analysis of torts. Beginning as early as Terry's article 60 years ago (1915: 40), and

coming to fruition in Learned Hand's test in United States v. Carroll Towing Co., 159 F. 2d 169 (2d. Cir. 1947) this approach has attempted to put an economic interpretation on negligence.

It is not surprising that these two trends (strict liability and economic analysis) have merged for they compliment one another and share much common ground. The argument for strict liability, however, is not always an argument for economic analysis or vice versa.(See; Epstein, 1973: 151, 201).

If the two are sometimes confused perhaps it is because they often share certain critiques of classical negligence formulations. Among those critiques is the belief that negligence has allowed certain groups, especially business corporations, to externalize accident costs to workers, consumers who use their products and other who are injured by the risks the enterprise generates . (See: Calabresi, 1970; Peck, 1971: 225; and other citations in Posner, 1972: 30 n 1) A second strand of the critique is that the negligence system inadequately compensates the victim for his injury even when he can prove negligence on the part of the defendant. (Conard et. al. 1964; Franklin, et. al. 1961 for empirical studies of automobile accident compensation) A third strand argues that classical negligence is a moralistic venture that tries to equate the concepts of fault and blame with the decision as to responsibility. The critics argue that notions of personal blameworthiness are out of date in an era where many if not most accidents occur because of a momentary slip of judgement or the inevitable malfunction of products and machinery (Ross, 1970). A fourth

part of the critique is that in fact, if not in theory, negligence is an inefficient allocator of accident costs because under this system an outside institution (a judge or jury) must make the appropriate cost-benefit analysis in allocating liability whereas in a strict liability system the law only has to find the party best able to make that decision and, by holding him liable, compel him to make the efficient allocation. (Calabresi & Hirschoff, 1972: 1060) (But see Posner, 1973: 214-15.)

Two points should be made about these critiques. First, some are mainly arguments for strict liability rather than an economic interpretation (critiques one and two). And some are mainly arguments for a cost-benefit analysis (critique three). Each, however, finds a common enemy in classical negligence formulations. The second point to be made is that the different critics may disagree as to what should replace negligence. Both Epstein and Calabresi agree that traditional negligence formulations are wrong but argue between themselves whether we should move to an economic analysis of torts (Calabresi, 1972: 1057) or a new type of causal analysis. (Epstein, 1973: 151; Fletcher, 1972: 537) We even have one writer ready to argue that negligence has been slandered with regard to its inability to efficiently allocate costs and that the critics have failed to carry the burden of showing how their new system will do a better job. (Posner, 1972: 29; Posner, 1973: 205, 221) (See also Blum & Kalven, 1965.)

Even Posner agrees, however, that the majority of writers hope for the passing of negligence responsibility and all it

entails.(Id. at 205). But if strict liability is to carry the day it is not altogether clear what that term is to mean. Like the arguments of what really constitutes negligence we now have arguments of what constitutes strict liability. We might surrender to the common law tradition and with H. L. A. Hart simply say:

> We do not know how strict "strict" liability really is, or how absolute "absolute" liability prohibition really is, until we see what the courts do with these ideas in practice.(Hart, 1968: 112)

Before giving up, however, we might try to understand why it is that there is so much disagreement as to where we are and what we should be doing.

Perhaps the most instructive symptom of disagreement is the present dispute as to what we should do with what traditional negligence calls contributory negligence. The question is this: What are we to do when the plaintiff, who is the putative beneficiary of a strict liability standard, does something or fails to do something which could have prevented the harm or at least reduced the likelihood of its occurance?

While the courts have, by and large, rejected contributory negligence as a defense to strict liability, most writers would agree that at some point the plaintiff's behavior upsets the logic and justice of a strict liability scheme. At some point negligence, or intentional action constituting reckless disregard for one's safety (called assumption of the risk by some) seems almost impossible to ignore.[1]

As this problem indicates, some of the concerns of the tort of negligence are very difficult to discard in their entirety. They appeal to a sense of justice that does not seem to be reflected adequately in most strict liability formulations. On the other hand, critics of negligence may, and often do, argue that in some ways negligence offends their sense of justice. Either it fails to make socially efficient allocations, or it increases inequalities or it leaves some clearly innocent parties to bear the costs of their misfortune. (Calabresi, 1970; Fletcher, 1972; Epstein, 1973).

It is the thesis of this paper that tort law, either as strict liability or as negligence, confronts a dilemma. The dilemma is that in deciding how to deal with tort cases we are simultaneously confronted with issues of distributive justice and retributive justice. In many cases the conclusions of the two conceptions coincide. The results would concur no matter how we decided the case. In other fact situations, however, their basic differences emerge. Among such fact situations are cases where the plaintiff, otherwise the beneficiary of a strict liability standard, is particularly disregarding. If, as we shall assume for the present, most strict liability rules are designed to create a just distribution of accident costs, the disregarding plaintiff in a sense upsets this distribution. He destroys the assumptions upon which our rules of distributive justice are premised. The outlandish example, such as the plaintiff who uses his power lawnmower to shine his shoes, indicates the natural limitations of distributive justice based schemes.

B. The Relationship of Distributive and Retributive Justice: A First Approximation.

The distinction between distributive and retributive justice is not simple and clear cut.[2] John Rawls observes that distributive justice is not a simple opposite of retributive justice. Especially, it is inappropriate to view retributive justice solely as a "scheme of taxes and burdens designed to put a price on certain forms of conduct and in this way to guide men's conduct for mutual advantage." (Rawls, 1971: 314-15) An essential part of retributive justice is its focus upon those among us who show bad character. Distributive justice finds its essence elsewhere, in the proper distribution of economic and social advantages. These two are not the converse of one another. One does not punish offense while the other rewards moral worth. (Rawls, 1971: 315; See Fuller, 1964).

That the two senses of justice are not opposites does not mean that the two are unrelated or that they cannot be distinguished. One distinction appears to be central. That distinction is between Ideal and non-Ideal theory. An ideal theory of justice is premised on assumption that everyone will act justly. It assumes strict compliance in arranging the distributive aspects of social relationships. (See Rawls, Sec. 2, 25, 39). Non-ideal theory does not assume strict compliance. It is in fact designed to provide rules for situations where this assumption is not met. Non-ideal theory is not premised on strict non-compliance. That, presumably, would be a theory of something like a Hobbesian state of nature, a war of all against all. Rather, non-ideal theory is premised on partial compliance. It looks for principles to govern situations of injustice

produced by the failure of actors to conform to certain standards of conduct. It is to this set of premises and problems that questions of retributive justice, broadly defined, are addressed.[3]

Given this preliminary distinction the problem of the lawn mower shoe shiner becomes somewhat clearer. The premise of strict compliance upon which a products liability scheme is constructed is so overwhelmed by the facts of the case that we feel uncertain of its application. Moreover, the behavior of the shoe shiner is so reckless (perhaps to the point of being "intentional") that we feel he, not the manufacturer, should "pay" for his action. Our sense of retributive justice appears to overwhelm the a priori assumptions upon which a theory of the just distribution of risks is based.

This preliminary distinction alone, however, is not sufficient to our task. This is so for at least two reasons. The first is that there are no agreed upon definitions of either retributive or distributive justice. In this paper we will discuss at least two meanings of each term. For retributive justice there is the meaning that derives from distinguishing between human acts and all other behaviors; and there is a competing meaning which derives from making distinctions between various types of human actions. For distributive justice there is the meaning which derives from classical and average utilitarianism, and there is the meaning which derives from contractual concepts of social justice.

The second reason that the basic distinction is not sufficient is that across a body of cases our understandings of

distributive and retributive justice interact. Since both senses of justice cannot be fully met in all cases, our understanding of each will have consequences for our understanding of the other. What just distribution is to mean will be affected by our understanding of what people can do and vice versa. In trying to unravel these interaction effects we confront the further problem of priority rules. The way in which the two conceptions of justice interact may depend upon which, if either, is the first rule of decision and how the other is subordinated to it.

These two problems, the various meanings of retributive and distributive justice and the ways they interact, will be the topic of the paper. We will argue that the history of the tort of negligence is in large part a history of trying to define these two conceptions of justice and searching for a way to pursue their different objectives siumltaneously. If the thesis of the paper is correct then no perfect synthesis of distributive and retributive justice is possible. They can, however, be balanced against one another. To attempt this balance is to look for the middle ground. With the erosion of negligence we seem less and less able to formulate a position on the middle ground.

II. Different Understandings of Distributive and Retributive Justice.

As a foil for the subsequent discussion of the meanings of distributive and retributive justice we will use George Fletcher's article on Reciprocity and Reasonableness as Paradigms of tort law.(1972: 537). Although the difficulties with the Fletcher analysis

are used as examples of our present confusion, the article is chosen because of its studious attempt to find a middle ground.

In attempting this, Fletcher does two things which are particularly valuable. First he helps clarify some of the theoretical consequences involved in the movement from Trespass to Case to negligence in the last century. Perhaps of most value is Fletcher's discussion of the distinction between the axioms of distributive justice derived from Locke, Rousseau and Kant on the one hand, and Hutchenson, Hume, Bentham and Mill on the other. (See Rawls, 1971: 11, 22)

The latter group, reflecting utilitarianism in its many forms, have dominated much of our thinking on social justice for a considerable period of time. This view is now coming under persuasive attack from the former, contractural, viewpoint, primarily at the hands of John Rawls in his writings on justice as fairness. The Fletcher article invigorates this philosophical dispute by bringing it "down to cases" in the law of torts. If, as we argue, the very process of bringing it "down to cases" highlights the dilemma of tort law, this hardly detracts from the importance of the original concern.

Briefly, Fletcher's position is as follows: There are two competing paradigms in the law of torts. He labels the paradigms Reciprocity and Reasonableness. The reciprocity paradigm may be understood in terms of three elements. First the question of who is entitled to compensation and who ought to pay should be separate questions and presumably should be decided in that order. Second,

both of these questions should be decided by looking to the activity of the victim and the risk creator, not to the society at large. Third, there is a specific criterion for determining who is entitled to recover for loss. It is all those injured persons who are harmed by a non-reciprocal risk.

By way of contrast the paradigm of reasonableness does not separate the issues of entitlement to recover and duty to pay. Rather, one general question is asked, "was the risk unreasonable?" This question is decided on the basis of a cost-benefit analysis made at a social level.

> If the risk yields a net social utility (benefit), the victim is not entitled to recover from the risk-creator; if the risk yields a net social disutility (cost), the victim is entitled to recover. (Fletcher, 1972: 542.)

Finally, there is no separate concern with the issue of reciprocal and non-reciprocal risks between plaintiff and defendant (Id. at 541-43.)

According to Fletcher the purpose of both paradigms is to distinguish between background risks that are part of group living and other risks which represent a violation of individual interests. The difference between the two is the way in which they filter out background risks. Under the reciprocity paradigm only reciprocal risks are background risks; whereas under the reasonableness paradigm all risks that maximize the utility of the group are treated as background risks.

Fletcher argues for the preference of the reciprocity paradigm over the reasonableness paradigm. He further argues that earlier tort law, the law under the writ of trespass, came closer to the reciprocity paradigm; but with the development of the tort of negligence the reasonableness paradigm has become predominant. (Id. at 556)

What Fletcher has attempted to do in his article is to draw a parallel between reciprocity and reasonableness in tort law and Utilitarianism and Contract Theory in discussions of distributive justice. In discussing the distributive justice difference between reciprocity and reasonableness he has underestimated the crucial change in our conception of retributive justice which accompanied the movement from trespass to negligence. It is to these different understandings of retributive justice which we now turn.[4]

A. Retributive Justice: The Emergence of Negligence and the Changing Meaning of Fault.

Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850) is the case most frequently cited as the beginnings of the shift to negligence on this side of the Atlantic. (Fletcher, 1972; Malone, 1971, Harper & James, 1956) Using Fletcher's recitation, the facts, in brief, are these:

Two dogs were fighting in the presence of the plaintiff and the defendant, in an attempt to separate the animals, Kendall, began beating them with a stick. He presumably knew that Brown was nearby, as both he and Brown moved in and about the arena of combat. The imagery is important, Kendall knew that Brown was about, just as he

presumably knew a number of things about the situation, but his attention was focused upon the fighting dogs. At the moment of truth Kendall stepped back to a position in front of Brown and raised his stick to deliver another blow to the disputants. The blow never came, for on the backswing the stick caught Brown in the eye and caused a serious injury. A lawsuit followed that made the fighting dogs of Brown and Kendall as important as Davies Jackass in the history of the law of torts. Davies v. Mann, 10 M & W 546, 152 Eng. Rep. 588 (1842)

The suit was in trespass, the showing of direct injury classically being sufficient to establish a prima facie case for recovery. Fletcher argues that the crucial decision in this case is the shifting of the burden of proof. The defendant's plea was inevitable accident. In trespass this has traditionally been something for the defendant to prove. On appeal, however, Chief Justice Shaw "converted the issue of the defendant's failure to exercise ordinary care into a new premise of liability, to be proven by the plaintiff." (Fletcher, 1972: 562) Thus were the plaintiff's right to recover and the defendant's duty to pay merged.[5] Fletcher is right. This shifting of burden is a break with the past, and in that sense Brown v. Kendall stands as a key decision. Less obvious is the rather remarkable fact that both Chief Justice Shaw and the trial judge agreed that on these facts the defense of inevitable accident went to the adequacy of the defendant's care under the circumstances. Classically, Kendall's action would have completely failed to support and excuse

of inevitable accident. It is important to understand how this is so, because the slow change in torts that made such a plea appropriate in Brown v. Kendall not only tells us a good deal about the origins of the reasonableness test, but also reveals the shifting meaning of retributive justice in tort law.

To understand how much has changed one must go back to earlier cases. Consider the case of Weaver v. Ward, Hob. 134, 80 Eng. Rep. 284 (K.B. 1617). Dictum in that case is often cited as the beginnings of the notions of fault and negligence. The plaintiff and defendant were engaged in a 17th century equivalent of war games and the defendant shot Weaver. On a suit in trespass the defendant's plea, by way of confession and avoidance was that the wounding occurred accidently and with great misfortune and contrary to the defendant's intent (Casualiter et per infortunium et contra voluntatem suam). The dictum that has stirred historians is "therefore no man shall be excused of a trespass except it may be judged utterly without his fault." (Cf. Bohlen, F. "The Torts of Infants and Insane Persons," 23 Mich. L. Rev. 9 at 13)

Yet in spite of this dictum it is important to note that the plaintiff's demurrer to the plea was accepted; and no evidence was permitted to support the claim. Malone believes that the reason for this apparently contradictory result is indicated by the illustrations provided by the court to indicate what "utterly without fault."denoted (Malone, 1970)

> As if a man by force take my hand and strike you or
>
> here the plaintiff had run across his piece when it

> was discharging, or had set forth the case so as it had appeared to the court that it had been inevitable and that the defendant had committed no negligence to give occasion to the hurt.

The interpretation that explains both the dictum and the summary dismissal of the defendant's plea is that "utterly without fault" meant no "action" by the defendant that produced (caused) the harm.[6] Consider the examples given by the court. The first is clearly a case where the individual is no more the cause of the slap than if his arm were a stick. There is an obvious, although philosophically difficult, difference between signing a document by having one's hand drawn forcefully across a page and signing because someone holds a gun at one's head and threatens death if he fails to sign. No matter how overwhelming the duress engendered in the latter case there is a sense in which one could have done otherwise than sign. (J. L. Austin, 1956: 109; Brand, 1970). One could choose to die. Moreover, if one signed it may be said that he intentionally signed (although perhaps not that he signed intentionally, as his intent was to avoid being shot.)[7]

The second example given in Weaver v. Ward is somewhat less clear in that the judge wanted a hypothetical case which conformed to the general facts of the case before him. He seems to have compromised clarity for relevance. Nevertheless, the distinction apparently intended was the same as in the first example. In the actual facts of the case the defendant apparently fired his gun without knowing and foreseeing that projectile would strike the

plaintiff. Although he pleaded accident, what transpired was that he made a mistake as to the plaintiff's location. To this plea a demurrer was sustained. In the hypothetical case the gun is discharged, the defendant is now passive and while the bullet is proceeding ("plaintiff had run across the piece when it was discharging") the plaintiff moves in the way of the bullet. As noted, the example is not entirely adequate to the issue, but apparently the judge believed there to be a difference between discharging the gun when not knowing that the plaintiff was in the line of fire (a mistake based on inadequate knowledge); and discharging the gun before the plaintiff moved. The latter is an accident and is not a trespass at all, for then the plaintiff ran into the bullet as much as if one ran into the 10th car of a moving train.[8]

With this interpretation what is excused by a plea of inevitable accident is not ignorance but lack of any physical opportunity to avoid injury. Nor do Weaver v. Ward and other shooting cases stand alone for this interpretation. Epstein (1973: 166) cites the case of Smith v. Stone, Style 65, 82 Eng. Rep. 533 (1647) for a similar proposition. There the defendant was carried upon the plaintiff's land by a group of armed men. A suit in trespass failed because the action lay against "the trespasse of the party that carried the defendant upon the land, and not the trespasse of the defendant."

Somewhere between Weaver (1617) and Smith (1647), and Brown v. Kendall (1850) the grounds for defeating a <u>prima facie</u> case of trespass had expanded. Under the precedence of Weaver v. Ward, Kendall's plea could have been demurred against successfully. By

the time of Brown new 'excuses' had become available. Trespass was an ascription of responsibility that had become defeasible in new ways. (Hart, 1948-9: 171) By the time of Brown v. Kendall no one would have fundamentally disagreed that trespass could be defeated by pleas other than "not guilty of human action causing injury."[9] Other senses of being unable to avoid injury had become relevant to the issue of whether one had committed a trespass.

Such an expansion was central to the development of negligence. What changed was the very notion of what constituted "fault". At its core it concerned an expansion of available excuses to include other meanings of the statement "he could not have done otherwise". Kendall may not reasonably argue that someone moved his arm or that Brown ran into the stick, but his plea of ignorance was a permissable answer.[10] Embodied in this and other examples was the movement from "acting at one's peril" to responsibility for negligence.

The key distinction for judging excuses in early trespass cases was whether or not a person's involvement in an event was like that of an inanimate object. By the time of Brown v. Kendall the distinction was not between human actions and non-acts or mere movements, but rather between different types of human action. The tort law became more complex[11] and, by our 20th century lights, more moral. More moral that is in terms of retributive justice.

Given this larger set of possible excuses, there are few, if any, absolute, clear and unambigious lines between responsibility and non-responsibility. In the document signing example above one can always choose to be shot. There presumably are situations where to

sign is a "fate worse than death" and we might hold the signer responsible. Similarly, an unavoidable accident for one man may be the easily negotiated difficulty of another. The unforeseeable event for me may be obvious to you. The truth of avoidability mistake and ignorance may indeed be as variable as a man's foot. Vaughn v. Menlove, 3 Bing. N.C. 468, 132 Eng. Rep. 490 (C.P. 1837). As variable as his ability, knowledge, coordination, foresight, capacity, effort, etc. To judge and compare such excuses at all requires something like the invention of "the reasonable man".

The reasonable man, and all the uncertainty that concept implies, has concerned many writers. Some, like Leon Green, relegate discussions of this concept to the role of scholasticism. The man of ordinary prudence is only a sobering caution, warning jurors to use reasoned and careful judgement in deciding the fate of others.

> The law has been satisfied by the translation of one of its important issues from judge to jury through the medium of a figure of speech. No one should expect this figure of speech to stand analysis except as a figure of speech. . .
>
> It may well be that the "law of negligence" is so uncrystallized (except for an inconsequential part) that it cannot be subjected to statement other than in terms of an analysis through which the cases must be run as they arise. In other words, we may have a process for passing judgment in negligence cases, but practically no "law of negligence" beyond the process itself. (Green, 1930: 179, 184-5).

Recently Epstein (1973) has critiqued negligence on much the same ground. He argues that the failure to stay with trespass notions of causation has made the law of negligence a body of rules which is hopelessly vague when applied to particular cases. As an alternative he would like to have tort law return to a type of causal analysis not unlike that used under the writ of trespass.[12] Anyone familiar with the attempts of various writers to define the reasonable man in a precise way will be forced to give some merit to Epstein's statements.(See Seavy, 1927: 1; Edgerton, 1926: 849)

Given these problems one might wonder why the courts ever abandoned trespass notions of causation and responsibility. At least part of the answer may, I believe, be found in the history of the old companion writ of Trespass on the Case and the problems of omissions.

B. Omissions: Trespass on the Case and the Shifting Burden of Proof.

The question is why the movement from trespass to negligence? While there are certainly extra-legal reasons leading to this shift, within the law problems arising out of what are commonly called omissions give us some insight into the process of change. Trespass on the Case developed shortly after the action in Trespass vi et armis.[13] It was the appropriate writ in cases where there was no direct injury.

Note that in an action on the Case the plaintiff must show an injury. This is in contrast to trespass vi et armis where the trespass itself was sufficient.(Prosser, 1964: 29) Moreover, there must be some connection between the omission the defendant is accused of and the damage.

> Dostoyevsky has said that 'everyone is really responsible to all men for all men and for everything'; the parable of the Good Samaritan is much the same. By such reasoning Dr. Schweitzer would be a cause of the suffering in the American slums because he chose to devote himself to the relief of African natives. . .All of us, in this sense, are causes of harms that we could prevent and do not. . .The network of omissions that are hypothetical causes of harms thus quickly would become unmanageable if any attempt were made to deal with it in detail. Chosing, amongst the unlimited number of omissions that are hypothetical causes of harm, one that may be culpable, requires an evaluation which must be grounded upon reasons of some weight. (Becht & Miller, 1961: 126)

Since the action on the Case was appropriate where there was no direct injury, one must decide which omissions constitute liability. Which things did the defendant fail to do which he "should have done"? As is often noted, in the early years of the action on the Case this decision did not involve an analysis of negligence in the modern sense of that term. The distinction between Trespass and Case was not that of strict liability versus negligence. Rather, what was central to an action on the case was that the plaintiff plead an omission that was, on other grounds, unlawful.

The plaintiff needed to show that the defendant failed in some positive duty, such as being in contempt of court or failing

to execute judicial process.(Kiralfy, 1951: 9). Case was appropriate where a connection could be made between the plaintiff's injury and some absolute duty of the defendant, such as controlling his fires so as not to injure others.(Id. at 99)

Only in the 18th and 19th centuries did the strict nature of responsibility begin to erode, and with it the classical distinction between Trespass and Case. Winfield and Goodhart, (1933: 359, 364) state that action on the case for negligence itself is not clearly present until the latter half of the 18th century. At this time negligence began to acquire its modern meaning.

Most would agree that negligence had its birth in Case, not in Trespass.(Malone 1970) Some have argued that this movement had at its base a new moral consciousness based on the premise that one should not have to act at his peril.(Ames, 1908: 97) This interpretation sees negligence as primarily benefiting defendants. The early emergence of negligence in Case, however, suggests that its consequence was not to provide new excuses to defendants, but rather to provide a new remedy to previously non-suited plaintiffs. Rather than an awakening of a new moral consciousness based on fault, negligence actions permitted suits where the omission was not the omission of a specific positive duty owed by a person in a specific role while he was performing that role. For traditionally, when the harm incurred by an omission occurred outside the scope of duties surrounding common callings, the defendant would be exonerated.[14]

The logic of strict liability, when tied to omissions, would in one extreme make everyone responsible for every omission producing

injury. Carriers, jailers and process servers might reasonably be singled out for strict responsibility.[15] These are typical injuries produced by specific callings (see, Ehrenzweig, 1951). But what about the 18th century Sunday driver, or the owner of a runaway horse?[16] If they are not held to be strictly responsible due to the omission of a positive duty is the plaintiff left without remedy?

One could perhaps greatly expand the specific acts which are to be omitted only at one's peril, yet this would be an extreme remedy in a society where harms produced by unexpected and unintended omissions could not be insured against. The alternative is to say that one is liable only if the omission is negligent; that is when the defendant could have supplied the omission. Such are the makings of a tort of negligence.

Traffic accidents played an important role in the emergence of a negligence understanding of actions on the Case. (Malone, 1970: 25) It is extremely difficult to generate anything like an appropriate list of specific omissions that one is strictly responsible for on the road. These cases played a significant role in breaking down the traditional distinction between trespass and Case, the distinction between direct and indirect injuries.

Moreover, at the very time when substantive distinctions between Trespass and Case were emerging, the procedural distinctions between the choice of writs was becoming less clear. Not only must it have seemed incongruous to have actions on the case decided by a negligence sense of causation while actions in trespass were decided on trespass notions of causation, it was increasingly difficult to know which writ was appropriate for which cases

The courts were clearly groping for a new synthesis. The early history of the judicial interpretation of the English Judicature Act of 1873 and 1875 reflects this uncertainty. These acts abolished the old forms of action. Left unsettled was the question of whether these acts were only to abolish pleading distinctions or were to abolish substantive differences between Trespass and Case as well. Cases such as Holmes v. Mather, L.R. 19 Ex. 261 (Ex. 1873) indicate that the issue was clearly unresolved, but also indicate that at least in highway cases the very nature of the harm argued against a purely pleading interpretation.

Unlike Brown v. Kendall, where it is mere pettyfoggery to suggest that Brown ran into the stick, in road accidents the direct-indirect distinction is often quite ambigious. While difficult examples abound, consider the simple case where two vehicles side-swipe. In Pearcy v. Walter, 6 Cur. & P. 232, 172 Eng. Rep. 120 (1834) the case turned on the question of whether a shaft was driven into a horse or the horse driven against the shaft. For substantive rules to turn upon such issues must have seemed as quixotic then as now (See Malone, 1970: 26.)[17]

Thus we are back to Brown v. Kendall. The distinction between Trespass and Case and between direct and indirect injuries seems to have run its course, and with it the notion that a suit for a direct injury should not allow certain excuses available for a suit for non-direct injury. The process of expanding the scope of Case thus led the courts to open up new defenses to Trespass. In most non-intentional torts the ascription of responsibility could be defeated in ways other than showing one had committed

no "action" at all. Clearly on this point Holmes was not altogether incorrect in saying there was a movement from acting at one's peril to "acting" only in certain ways at one's peril. A new legal definition of human action and therefore of responsibility had emerged.

A few words are in order as to Fletcher's point concerning the shifting burden of proof. Hidden by the facts of Brown v. Kendall is the fact that in suits that sound in Case, those concerning omissions where the standard is negligence, it is not unreasonable that the plaintiff must say what it is the defendant failed to do and why that failure is actionable. The plaintiff needs to show why it is reasonable to say that the defendant could have done otherwise. He needs to show that another course of action was open to the defendant, one that we might normally have expected the defendant could follow. Omissions actionable for negligence imply some shift of the burden; the plaintiff must show more to present a prima facie case. He must show that reasonable action was available. It is this shift in burden that Fletcher calls a shift in the claim of faultlessness from the status of being an excuse to the status of being a justification (Fletcher, 1972: 559-60.)

According to Fletcher the distinction between the two is that excuses "focus on the actor's personal circumstances and his capacity to avoid risk" whereas, "questions about justification . . .look solely to the risk abstracted from the personality of the risk creator. What are the benefits of the risk? What are the costs? Does the risk maximize utility?" (1972: 559). In

essence for Fletcher the justification-excuse dimension is a distinction between questions of retribution, i.e., you are excused if you are not a legally relevant cause of the accident; and questions of distribution, i.e. you are justified if your actions serve a higher (social) good. This paper agrees with Fletcher that the retributive-distributive distinction is crucial. It is inadequate, however, to call the Reasonableness Paradigm one of justifications and the Reciprocity Paradigm one of excuses and thereby to imply that each is associated with one sense of justice only.[18] Reasonableness (read Negligence) especially has attempted to pursue both simultaneously. Before we can expand on this point, however, it is necessary to examine the different meanings of distributive justice. It, like retributive justice, is open to different interpretations.

C. Distributive Justice: Equality, Unilitarianism, and Contract Theory.

In this section of the paper we rely heavily upon John Rawls recent work, A Theory of Justice (1971). The book is a culmination of fifteen years of work aimed at developing a comprehensive theory of the structure of a just society.[19] As noted earlier, the main thrust of Rawl's work has been in developing an alternative to the utilitarian conception of justice Rawl's alternative is a contractural view. He has called it "justice as fairness", not because he equates justice with fairness, but because the term conveys the idea that the principles of justice are to be worked out a priori by a group of people in a situation that is fair (1971: 12-3) Now simply saying justice should be fair in this way, that

is it should conform to what rational persons would agree to in an initially fair situation, is only a starting place. Of itself this does not give content to the concept of justice. It does, however, suggest a procedure for exploring the concept of justice. It is in this procedure, this point of view, as much as anywhere, that contractural theories differ from utilitarian ones. Utilitarianism, in its classical form, does not start from this position and, according to Rawls, does not use the contracting party as its frame of reference in constructing the concept of justice. (Rawls, Ch. I Esp. sections 3-5) Rather, it develops its position from the point of view of the impartial sympathetic spectator, a creature who is outside of and above the society. (Id. Ch. I, section 30)

To work out all of the implications of these different points of view is the task of much of Rawls' work. There are, however, two central points which must be mentioned. The first is that the impartial spectator of classical utilitarianism applies the principle of rational choice for one man as the principle of social choice as well. (Id. at 187) The second point is that the contractarian view is to be developed from an initial position where the parties are situated behind a veil of ignorance. "They do not know how the various alternatives [possible in a "just" society] will affect their own particular case, and they are obliged to evaluate principles solely on the basis of general considerations." (Id. at 136-7) This latter point distinguishes contract theory from forms of utilitarianism (average utilitarianism) which are not contingent upon an initial position of the impartial spectator. (Id. at 161ff.)

Rawls argues that one of the gravest pitfalls of classical utilitarianism is in applying the principle of rational choice for one man to the measurement of social (distributive) justice. A crude example may make the point. Suppose that a two armed person falls in love with another from a one armed society. The person may reasonably weigh the costs and benefits of his dilemma. He cannot woo his beloved as long as he suffers from the grotesque deformity of two arms, yet to him the arm has value. Is the benefit of the arm worth the cost of unrequited love? Perhaps not. In that case he would "give his right arm for her". Gruesome perhaps, but a rational, utilitarian decision. But what if he chose to keep his arm even while knowing that to do so would cause the greatest heartache to his intended, who, but for his arm, would love him intensely? He of course, may wish to take this into account. He may decide to be altruistic and on the basis of her desires give up his arm. We would generally argue, however, that this is his choice, not hers. It is not her right to say, "give up your arm so that I may be happy." Yet, Rawls argues, that is precisely the position of the impartial spectator in classical utilitarian theory. The spectator would sum costs and benefits across both persons and say the greatest good will come from giving up your right arm. Thus do principles of individual rational choice become the principles of social justice. The assumption is that just as the individual is a single entity who can be left to his overall utility schedule without considering the special interests of his right arm, likewise, society is a single entity

which can and should disregard the suffering of one part of the body politic if the value to the whole is increased.

Lest this example seem to improbable to consider, Fletcher argues that this is precisely what has occurred under the Reasonableness Paradigm.

> If the risk yields a net social utility (benefit), the victim is not entitled to recover from the risk-creator; if the risk yields a net social disutility (cost), the victim is entitled to recover. (1971: 542)

The second point central to Rawls' position is that the contractarian view is to be developed with the parties situated behind a veil of ignorance. This requirement is designed to insure that no one knows what position he might have in the proposed society. More specifically, the veil is to insure that; a) one's knowledge of different likelihoods of outcomes for himself is impossible or extremely insecure, b) one does not know his particular preferences, that is his own conception of the good, beforehand. Especially, he does not know his relative aversion to risk, and it follows c) one does not publicly and finally strike a bargain which he cannot live up to because one of its outcomes is so risky and disadvantageous as to be unacceptable. (Rawls, 1971: Secs. 26-30)

This initial position behind a veil of ignorance distinguishes a contract theory from one of average utilitarianism, which is a theory based upon the ethics of a single rational individual with no aversion to risks and who tries to maximize his own prospects. (Id. at 189)

The veil suggests a situation where the rational strategy is that of maximum minimorum (a 'mini-max' solution in Bayesian terms.) The individual wishes to minimize his maximum losses.[20] (Id. at 154) Upon this definition of the original situation Rawls develops his "special" conception of justice as fairness. The special conception is designed to insure a minimum position through the lexical ordering of principles of justice and the difference principle.

Lexical ordering is an alternative to a general balancing of all primary social goods (liberty, opportunity, income, wealth, self-respect, etc.) Instead of this general balancing, liberty is defined as the first principle, the first good, thus Rawls' first principle of justice is:

> Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.(Id. at 302)

Lexical ordering, and the priority rules it implies, require that lesser liberty not be sacrificed for other social goods, e.g. greater wealth of the society.

Rawls' second principle of justice, lexically below the first, is:

> Social and economic inequalities are to be arranged so that they are both: a) To the greatest benefit of the least advantaged, consistent with the just savings principle, and b) Attached to offices and positions open to all under conditions of fair equality of opportunity.[21] (See, Id. Sec. 12 for the development of the second principle)

Part (a) of the second principle relates to the difference principle Subject to lexical priority constraints and to the open office requirements of (b), the difference principle implies that infringements on equality are not to be allowed unless the inequality

benefits and is acceptable to those who are subordinated.(Id. at 302-3) (For a fuller discussion of lexical ordering and the difference principle, see Id. at 85ff and 42ff.)

In terms of an overall theory of justice I find myself in considerable sympathy with Rawls' position, at least in comparison with classical utilitarianism. To build a critique of classical utilitarianism in tort law, however, is to argue against an imaginary opponent. No tort theorist to my knowledge has argued, for instance, that the franchise of Railroad Magnates might be taken away if the evidence indicated that their benefit from the vote was outweighed by the ability this gave them to influence legislation on railroad safety. More relevant to the present discussion is to assume that all sides agree with something like lexical ordering in terms of liberty and citizenship rights, and focus the discussion at the level of Rawls' second principle.(See Rawls, 1971: 316) Almost all recent discussion in the literature has focussed upon the social and economic arrangements to which the Second Principle is addressed.

At this level it is clear that various conceptions of distributive justice are still alive. Those, like Fletcher, who critique negligence, often are critiquing what they perceive to be the utilitarian bias of the economic interpretation of that theory of tort liability. In its stead they offer some (often inexplicit) alternative. And, as with retributive justice, different conceptions of distributive justice can make a difference. Rawls' second principle (especially the difference principle) would not

permit a plea of non-liability on the basis that the common good of the society as a whole is best advanced by letting locomotives spew sparks as they will. Even were this so, the second principle would require a showing that this inequality of risk was to the long run advantage to the least advantaged representative person (in this case, perhaps, the farmer.)

As yet in this section we have said nothing of equality per se. Equality, of course, is another possible interpretation of distributive justice. Under this formulation, perfect justice occurs when there is perfect equality. Plato, for one, found little to recommend this idea. Democracy is disposed of as "distributing an odd sort of equality to equals and unequals" (Republic, 588c.) Or, again, in Laws (757a), "For when equality is given to unequals the result is inequality, unless due measure is applied." As Vlastos puts it, "would anyone wish to say there are no just inequalities?" (1962: 33.) The problem of justice as equality comes in the question, "equality with reference to what?" To need? To merit? To ability? To risk? To make justice and equality coincide with reference to one of these is to make that relationship impossible with reference to another. There are such things as equitable inequalities and inequitable equalities.

Now this does not mean that Plato is correct in his condemnation of democracy. Much of Rawls' theory, and Vlastos' as well (Rawls, 1971; Vlastos, 1962: 31) is designed to justify certain types of equality as first principles. "Life, liberty and the pursuit of happiness" are arguably "among" these inalienable

rights to which all men are entitled. This list cannot be expanded too greatly, however, lest all sense of proportion is lost in the process. Such unwarranted extension is a trap into which Fletcher has apparently fallen.

D. Distributive Justice and Tort Law: Is Negligence Utilitarian?

By analogy to Rawls, Fletcher wishes to represent the Reciprocity Paradigm as a type of fairness in the contractarian sense. For Fletcher, utilitarianism has no more place in tort law than it does in general discussions of social justice. But the alternative, Reciprocity is only an analogy, and the analogy is poor.

> By analogy to John Rawls' first principle of justice, the principle might read: we all have the right to the maximum amount of security compatible with a like security for everyone else (Fletcher, 1972: 550.)

Fletcher substitutes "security" for "liberty" as the first primary good. Does he really mean that all other goods which the tort law might wish to pursue should be subordinated to this one? It seems that to make this substitution is to destroy the whole notion of lexical ordering, especially is security is to be defined as economic security. At best security (especially economic security from unintended harms) is a part, and perhaps a small part of liberty. Stated this way it is unlikely that Fletcher wishes to even attempt this ordering.

It is more reasonable to interpret Fletcher's call for equality of risk as a second level concern. What is at issue is the distribution of social and economic inequalities, including

inequalities of risk and security. Fletcher is arguing against utilitarianism as the way we should decide once we accept the primary place of equal liberty.[22] He, and we, should not be arguing against pure utilitarianism in tort theory, for to do so is to argue against a straw-man. Nevertheless, it should be clear that instead of a utilitarian approach to economic and social inequalities, Fletcher does not argue for anything like Rawls' second principle. He does not argue for a variation of the difference principle. Fletcher argues for equality. There is as much difference between Rawls and Fletcher in this respect as there is between Rawls and the utilitarian point of view. At this level we have at least three varieties of distributive justice; utilitarianism, justice as fairness (difference principle) and justice as equality (of security.)

If the above interpretation is correct, we are left with several questions. First, given Posner's recent work, is negligence basically utilitarian in this Second Principle sense? (Posner, 1972) Second, if not (and so we shall argue) why are cases like Rylands v. Fletcher decided on apparently different principles? Third, building one the answers to the above two questions, why, of all the primary goods around which one could construct a distributive justice of equality (need, etc.) does Fletcher choose security?

The first question is whether negligence is utilitarian? Fletcher says yes, but I think that it can fairly easily be demonstrated that at least in terms of the classical definition negligence is not utilitarianism. There was a movement toward a more economic analysis of tort cases, and therefore toward a greater

concern with distributive justice, but the distributive justice concept which emerged was never, in theory, utilitarian.

The movement itself is important. As noted earlier, providing a purely causal interpretation of negligence was and is very difficult. Searching for an alternative led to some stirrings of a cost-benefit analysis. The earliest important effort in this direction was that of Terry (1915). In his early article he made explicit a distributive calculus upon which tort cases might be decided.

> The reasonableness of a given risk may depend upon the following five factors: 1) The magnitude of the risk. A risk is more likely to be unreasonable the greater it is. 2) The value or importance of that which is exposed to the risk, which is the object that the law desires to protect, and may be called the principle object. The reasonableness of a risk means its reasonableness with respect to the principle object. 3) A person who takes a risk of injuring the principle object does so because he is pursuing some object of his own. This may be called the collateral object. In some cases, at least the value of importance of the collateral object is property to be considered in deciding the reasonableness of the risk. 4) The probability that the collateral object will be attained by the conduct which involves risk to the principle; the utility of the risk and, 5) The probability that the collateral object would not have been attained without taking the risk. (Terry, 1915: 244)

The first point to note about this passage is the extent to which it is retreating from a concern with retributive justice of traditional negligence. No where is there any mention of what a person could or could not do. Reasonableness is not spoken of in terms of foreseeability, and to the degree that a vision of alternative universes is important at all it would appear that this vision is to be the judge's. The best evidence of reasonableness, and therefore of responsibility, would apparently be an actuarian's tables. The view is indeed a social, distributive, point of view.

The language in point four to the contrary notwithstanding, however, the test is not classically utilitarian. It is at most a kind utilitarianism after the fact. After injury occurs (which is the first time when we know what the principle object is) the question is whether the defendant should have taken more precautions. To see how this differs from classical utilitarianism it is helpful to look at the successor to Terry's formula, Learned Hands test in United States v. Caroll Towing, 159 F. 2d 169 (2d Cir. 1947).

There the Terry test was simplified and formally brought into the case law with the following formula. In a case where the issue was whether a barge owner has a duty to keep an attendant on board when a barge is moored at harbor the test of owner negligence involved three variables. The first was the probability that the barge will break away. The second was the gravity of the resulting injury if she does. The third was the burden of adequate precautions to prevent (or further reduce) this probability. If

P = probability, and G = gravity, and B = burden, then liability depends on whether B is less than P times G.

Now even assuming that Gravity, Burden et al are to be measured on one dimension, e.g. strictly in terms of economic losses or gains, and not along qualitatively different scales, e.g. property damages versus threat to human life, negligence as defined here is not a standard designed to maximize total benefit. The Hand test (P x G B) speaks only in terms of money spent paying claims. It demands a certain equity between potential victims and potential defendants. The victims' interest is such that the test requires payment if damages whenever their protection is cheaper than keeping the money. This is not classical utilitarianism. Classical utilitarianism would not put Burden on the other side of the scale. Instead would be a term like Investment (I) so that the formula would be P x G I. The question would be: does investment in reducing accidents produce greater returns than any alternative investment the defendant could make.(Cf. Rawls, 1971: 77ff)

If not classical utilitarianism, what is the Hand test? It seems inappropriate to give any specific name to this test, but in a general sense it is a test which establishes some social minimum as a constraint to the principle of average utility. (See, Rawls 1971: 315ff) The defendant cannot plead an utilitarian economic argument until a minimum level of safety is met. Especially, he cannot argue for a riskier line of conduct (one which would increase the probability of injury) on the basis of new investment opportunities. Specifically, the representative defendant cannot alter security unless

it favors representative plaintiffs. One must be cautious lest the similarity is overdrawn, but there is a certain parallel between the Hand test and Rawls' difference principle. More appropriately we might say that the difference principle provides a more general rational for the intuitive conception of distributive justice to be found in Hand and Terry.

In this light one can understand the ultra-hazardous activities exceptions to the negligence tests as being those circumstances where the inequality of risk is too great. As Posner (1972: 76) observes, the problem with blasting, stored up water, etc. is that the unavoidable accident costs are great. Such activities are not ultra-hazardous because people engaged in them are careless, but because any slip may be disasterous.(See Epstein, 1973: 178-9) Risks (P x G) are high and cannot be altered by imposing greater Burdens. In economic terms security is inelastic and yet risk is high. An appeal to "strict" liability, that is liability beyond the P x G B test, suggests a concern with minimum protection of representative plaintiffs. Thus the examples of strict liability in the common law make sense, and are compatible with the general negligence test, if we presume that the judges are guided by some intuitionist sense of minimum security as a constraint upon the general utilitarian conception of distributive justice found in the economic interpretation of negligence.[23]

This notion of a minimum of security is not Fletcher's test. Fletcher takes the notion of a minimum of security and elevates it to a first principle. Around it he constructs the

paradigm of Reciprocity. This paradigm in fact finds precedent in Fletcher v. Rylands, L.R. 1 Ex. 265 (1866).

> Traffic on the highways. . .cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger. . .and it is believed that all the cases in which inevitable accident has been held as an excuse for what prima facie was a trespass can be explained on the same principle, viz., that the circumstances were such as to shew that the plaintiff had taken the risk upon himself.

Here are seeds of the notion that negligence is appropriate only in cases of reciprocal risk. Blackburn, however, did not have as narrow a view of reciprocity as Fletcher apparently does; for note that not only fellow highway users, but also those who live by the side of the road, must be presumed to assume the risks of inevitable accidents.

The problem of the adjacent property owner is a specific example of the general problem of what is to constitute a reciprocal risk. It is a problem to which Fletcher admits having no final solution (1972: 569ff) and a point for which his formulation has been criticized. (Posner 1973: 218) Setting this problem aside,

however, we might ask why Fletcher wants a reciprocity test to govern at all, and given this desire why he wants the test to be one of reciprocity (equality) of risks?

The first question is why equality at all? Part of the reason is that in fact, if not in theory, the negligence test has frequently been biased in favor of defendants. At least four sources of injustice may occur under the negligence test, even when it is defined as something other than classical utilitarianism. The first, as Fletcher observes, is that by placing the burden of proof upon the plaintiff to show the defendant's negligence we place him in a very uneviable position. Using the economic test of negligence it is clear that many plaintiffs are in a poor position to provide even verbal approximations of relative risks and burdens. It may be difficult for the plaintiff to show causal connection between the defendant's acts or omissions and his harms, or to indicate what the defendant might have done (or not done) to avoid injury. Concepts such as res ipsa loquitor and per se negligence have been developed to help plaintiffs over such difficulties, but they may not always suffice.

A more systematic bias of the existing system is the extent to which the Hand test (but perhaps not the Terry test) forces the defendant's utility schedule upon the plaintiff. If the accident is unavoidable as to the defendant, i.e. B is greater than P x G, the cost falls upon the plaintiff and he, not the defendant, must insure against that loss or bear its total consequences. By viewing the issue from the plaintiff's side the Gravity, in terms

of marginal costs, may be much higher than the aggregated average costs viewed from the point of view of the defendant.

A third source of injustice, in economic terms, is that traditionally contributory negligence is a complete defense so that once proven, costs remain with the victim even if avoidance by the defendant would have cost less than avoidance by the plaintiff. (Calabresi & Hirschoff, 1972: 1057-8) If the economic analysis were systematically carried through then contributory negligence should only be a bar to recovery when for both plaintiff and defendant the burden of avoidance is less than P x G and where the burden for the plaintiff is less than the burden for the defendant. This point perhaps more than any other robs the negligence formula of its distributive symmetry and is a strong argument in favor of people supporting strict liability formulas. Their argument is that since contributory negligence is a complete bar to recovery it prevents efficient distribution of accident costs, and that any attempt to make interpersonal comparisons of relative utility (Burdens, Probability of injury, and average Gravity) for plaintiffs and defendants is practically an impossible task. (Calabresi & Hirschoff, 1972: 1074-6)

Parallel to the third point is the fourth, that the victim bears the burden of unavoiable accidents. Calabresi & Hirschoff make this point in comparing the Hand test with what they call the reverse Hand test. In the reverse Learned Hand test the costs of an accident would be borne by the injurer unless it could be shown that for the plaintiff P x G B. Adding a reverse contributory negligence test to this formula the, "victim (plaintiff) would

bear the costs only if the defendant could not also have avoided the accident at less cost than the accident entailed". (Id. at 1059)

Calabresi and Hirschoff claim not to be playing with mirrors when proposing the reverse Hand test, but in the abstract and from an aggregate viewpoint it is not clear that the choice of test makes a distributive difference. If all individuals were randomly assigned to the victim or injurer role by the vagaries of fate, then the choice of a rule for "unavoidable accidents" might turn on "secondary" concerns such as loss spreading and administrative costs. (Id. at 1059 n. 15)

The difference between the tests, however, does assume importance when we can in a general way describe the victim and injurer populations a priori. The bias of the Hand test is relevant when there is a class of victims who are systematically discriminated against by its application.

This, or so it seems to me, is near the root of Fletcher's misgivings about the negligence formula when applied to non-reciprocal risks. Where one group or class of people are always in the position of playing the plaintiff's role they systematically suffer these four sources of bias in favor of defendants. To correct this Fletcher proposes the radical surgery of strict liability for non-reciprocal risks.

Posner discredits this whole notion of non-reciprocity by making the point that in the abstract most torts arise from a conflict between two morally innocent activities, such as railroading and farming, and that there is no point in ethics that should make

the railroad strictly liable because they injure crops by fire if in fact the farmer more easily than the railroad could guard against the costs of such accidents. (Posner, 1973: 216) The farmer crowds the railroad as much as the railroad crowds the farmer. The point is well taken until we remember that in disputes between the two it is the farmer who is the plaintiff, and he systematically suffers the biases inherent in that position. In terms of conflict over scarce resources the farmer and railroad may be in a reciprocal relationship, in terms of their status in law suits they are not.

Non-reciprocal risks should be handled differently, so goes the argument, because in these cases a definable group of persons will find themselves at the mercy of a type of distributive justice which leaves them to bear the costs of unavoidable accidents. This compels them to bear the costs of avoidable accidents when they themselves, in any degree, could have avoided the outcome. If Fletcher's concern were solely distributional, however, why select security as the primary good to be equalized? To put the question another way, why limit what is apparently strict liability to those cases where risks are not reciprocal? The answer is clear. Fletcher is also interested in desert, and desert is at heart a question of retributive, not distributive justice.[24] Rejecting an equality which would hinge upon the relative ability of certain defendants to pay or spread losses (equality of need and ability) Fletcher says:

> Using the tort system to redistribute negative wealth (accident losses) violates the premise of corrective

> justice, namely that liability should turn on what the defendant has done, rather than who he is.(Fletcher, 1972: 547 n. 40)

Fletcher wants to concern himself with questions of both distributive and retributive justice, and for his pains he is criticized by both the strict liability people (Calabresi & Hirschoff, 1972: 1078-80) and the negligence people.(Posner, 1973: 216) Their complaint is that he should concern himself at all with retributive justice issues in torts.

Fletcher leaves himself open to this attack in part because he overstates the utilitarianism of the traditional negligence standard and partly because he is unwilling to carry through to anything like a consistent position on retributive justice. He does the latter in two ways. First he appears unwilling to entertain almost all arguments of contributary negligence when risks are not reciprocal, and thus the man who shines his shoes with his lawnmower is allowed to recover. Second, he uses both the Trespass and the Negligence conceptions of what constitutes retributive justice responsibility, and thus leaves us with a sense that what responsibility consists of has no firmer foundations than a judgement as to whether a risk is reciprocal. This latter point is revealed in the above quote. There, Fletcher argues that what a person has done is central to corrective justice, yet in discussing reciprocity it is clear that what is important is not what one has done but what he was doing in a general way. It is not how you run your railroad that is important, but rather that you performed

the action of running a railroad at all. The very act of running one makes you responsible when an accident occurs to a plaintiff who did not create a reciprocal risk. This conception of responsibility for action is clearly the Trespass notion. Yet when accidents are reciprocal, Fletcher falls back to the negligence conception of action.

This movement is justified by Fletcher by saying that negligent conduct by the defendant in situations of reciprocal background risks destroys the initial reciprocity.(Fletcher, 1972: 548) From the individual victim's point of view this is strange justice indeed. Not being concerned with some imaginary category of possible plaintiffs which the tort theorists or the courts have invented, he finds that his rights in a lawsuit are contingent upon who hurt him and the relationship he has with the person. If one is bitten by a dog and contracts lockjaw do we want a rule system that makes one's recovery contingent upon whether one also owns a dog? Such are the problems of having two standards of retributive justice.[25] In this sense Fletcher has fallen back into the trap common law courts found themselves in when substantive rights appeared to depend upon whether one's cause of action sounded in Trespass or Case. (See, supra p. 18)

In being unable to settle upon a set of criteria for retributive justice, Fletcher eventually founders in the larger attempt to strike a balance between it and distributive justice. In the attempt, however, he compels us to ask what balance is possible. More specifically, he invites us to pull decision making logics

apart to see how decisions are reached. One of his critiques of negligence is that it often fails to attend to exactly what is at issue in deciding a case. Distributive justice and retributive justice issues become so entwined that it is difficult to know how different objectives are being pursued. Nevertheless, negligence in many ways comes closer to a concern with both types of justice than Fletcher will admit. Ideally, under the negligence formula, distributive and retributive concerns interact to form a decision. It is to the interaction of retributive and distributive justice concerns which we now turn.

III. The Interaction of Distributive and Retributive Concerns

A. The Negligence Balance

As we noted above (page 20 supra) retributive and distributive justice considerations interact in many negligence determinations. In fact, the key concept of negligence, the person of ordinary prudence, is an individual (or group of individuals) who is to be concerned with both issues.

Consider the following imaginary case. Let us presume that a train collides with a person when it jumps the tracks. A lawsuit ensues and we begin to inquire into the circumstances surrounding the collision. The investigation reveals that no action of the engineer (and no omission of his) can be ascertained to have made a difference. The engineer drove at a slow speed, he kept his eyes on the rails ahead, he negotiated curves carefully. He had, let us say, no way of foreseeing that an accident was immenent. He had no knowledge of faulty equipment, he could not

do anything once the car jumped the tracks. Impact was inevitable. On every criterion we consider we conclude the engineer could not have done otherwise and continued to drive the train. For him events were in the saddle.

But we may not wish to stop here. We may wish to extend our analysis. Presume that it is discovered that the accident was immediately caused by a broken spike causing the rails to spread under the weight of the car. What about that broken spike? We may wish to ask how long it had been weak. We would like to know when was the last time the roadbed was inspected. Was the spike defective when put into the cross-tie? Would it have held if the train were going slower?

In such situations the negligence analysis is leading us back in time to consider a wider set of circumstances; and questions arise as to whether from this perspective something could have been done to avoid the accident. The concern is now directed toward the Railroad as well as the engineer. Should the company have foreseen the broken spike, or would it have found it if it had looked. Learned Hand burden questions naturally arise. Should the Railroad build in a back-up system by placing two spikes on each side of each rail in each cross-tie? How frequently should the railroad examine the roadbed? In addressing these issues we might want to know if a spike had broken before. Never before? Once before? Last week? Once six years ago? Once to a railroad in England in 1874?[26]

The questions of reasonableness and prudence cannot always be decided by solely considering immediate circumstances. An extended analysis helps define the defendant's general line of conduct, and given this extended view we are helped in deciding what one could and could not have done.

Economic questions are not irrelevant to such an inquiry and they may serve a dual function. They go to the costs and benefits of various lines of actions and thus address questions of distributive justice, but at the same time they go to what the defendant can be expected to do. The comparing of the costs of inspecting a roadbed once a day with the likelihood that this would reduce the costs occurring because of broken spike is not only probative as to how to run a railroad, but is also probative as to whether the omission of the railroad of not examining the tracks in the last day is such that the omission is negligent. Of course the railroad could examine the tracks daily. They could station an employee next to each spike twenty-four hours a day. They could do this in the opportunity sense that no one presumably is blocking access to the tracks. But the railroad company could not do these things and continue to run a railroad. To require such things of the railroad to avoid negligence responsibility would be to tell it to act at its peril.[27] If, on the other hand, it is discovered that the railroad had not examined the bed in two years, we might well conclude they reasonably should have done so, not only in the strictly economic sense of the Hand test, but also in the common sense equation that tests carelessness.

Not only might we extend our analysis backward in time and horizontally over a larger set of circumstances, we may typify the event as a certain type of circumstance. In fact an extended analysis is likely to lead to a typification of the event as one of a class of events, a railroad derailment case for instance. Rather than involve ourselves in the thousands of ways in which this particular accident is unique, we may establish a set of rules for such events. At one time Justice Holmes hoped that each type of harm could be so typified and a set of particular duties assigned to each harm.

> If now, the ordinary liabilities in tort arise from failure to comply with fixed and uniform standards of conduct, which every man is presumed to know, it is obvious that it ought to be possible, sooner or later, to formulate these standards at least to some extent, and that to do so must at least be the business of the court. (Holmes, 1923: 42)

This attempt was carried through in Baltimore & O. R.R. v. Goodman, 275 U.S. 66, 72 L. Ed. 167 (1927) for blind railroad crossing cases. The duty of the traveler was to be to "stop, get out and go see" if a train was coming. Concerns with immediate circumstances in later cases, however, made the test seem inappropriate. In Pokora v. Wabash R.R., 292 U.S. 98, 78 L. Ed. 1149 (1934) the only effective stop the driver could make was on the tracks. The court found this procedure so obviously fraught with danger that it discarded any "get out and look" rule as "an uncommon precaution, likely to be futile and sometimes even dangerous."

The problem of uniqueness of circumstances and the problem of extended analysis are important for analyzing the interaction between distributive and retributive questions found in negligence. To decide retributive questions particularistic understanding of the unique circumstances of a harm is generally most appropriate. If we wish to aks whether a person could have done otherwise the information most useful is that which informs us as to his knowledge of this situation, the foresight he can bring to bear upon that possible circumstance, and his ability to act so as to avoid the harm given knowledge and foresight. In our imaginary case our particularistic inquiry makes it clear that the engineer, if not the railroad, could not have done otherwise in the negligence sense of that term.

In general we seem to be most certain about the correctness of retributive justice decisions when we have the most particularistic "causal" information about what one can do. On the other hand, this kind of information is not at all likely to facilitate an economic analysis. For such an analysis to work at all the events must be typified to some extent. For instance in assessing the relevance of the railroad's maintenance of the roadbed in our imaginary case an economic analysis of costs and benefits compels us toward overall maintenance costs and all harms occurring from faulty roadbeds in general. To speak only of the costs of maintaining one certain section of the roadbed and the benefits in terms of derailment causing the train to hit passers-by is both unintelligible and probably impossible. (See Calabresi & Hirschoff, 1972: 1057 n. 11)

As a distributive justice rule designed to most effectively minimize accident costs at railroad crossings Holmes' test may

be the best rule. In terms of specific crossings, however, it may not apply. Yet to make a specific economic calculation in each and every case would be to tell the driver and the railroad little more than the traditional admonition to behave reasonably.[28]

Negligence attempts to balance retributive and distributive questions, yet on the margins both set requirements which may veto any conclusions based upon the other analysis. There is, from retributive justice, some minimal concern with acting with due case which may apply regardless of a cost-benefit analysis. The Vincent v. Lake Erie Transportation Company, 109 Minn. 456, 124 N.W. 221 (1910) is such a case. To batter your ship against the plaintiff's dock evidences such a disregard for his property that responsibility ensues regardless of the economic compulsion of a Great Lakes storm. From the other perspective certain distributive concerns may compel liability regardless of due care. Rylands v. Fletcher, and other areas of "strict liability" evidence such a concern.

Such cases are troublesome to us in part because it is in them that distributive and retirbutive concerns do not overlap. It is these cases and those like them that the critics point to when attacking the negligence solution to torts.(Cf. Epstein, 1973: 156 n. 14)

B. The Breakdown of the Negligence Balance.

The negligence balance is not a synthesis of distributive and retributive justice concerns. It is the position of this paper that no synthesis is possible. The ordering of social arrangements under an ideal state of affairs is not completely compatible with ordering in non-ideal situations.(Rawls, 1971: 245) Nevertheless, for most

of the first part of this century the negligence balance met with considerable favor. Beginning with the Workman's Compensation movement, however, the negligence balance began to erode. (see, Friedman & Ladinsky, 1967: 50) By and large, retributive justice concerns, at least as expressed in the negligence sense of retributive justice, have seemed less and less relevant. The shift in workman's compensation, in products liability and in automobile accidents has been consistently away from retributive concerns.

The reasons for such shifts are varied and in each case there are particularistic causes of the change. Certain common threads, however, run through each area of change; and a brief examination of these commonalities helps explain the erosion of the negligence balance.

The first commonality of these areas is the complexity of the facts of cases and the ensuing complexity of rules surrounding these cases. Leon Green made this point well in speaking of automobile accidents.

> The duties placed by statute and common law upon the operator during any moment of his operation of a motor vehicle can scarcely be catalogued in a dozen pages. Summarized only in part and in the briefest fashion they are the following: The operator must observe the operation of other vehicles, front and rear and to the sides --those he is meeting, those that pass, and those that may cross his path. He must observe road signs, stop signs, cautions, traffic lines, light signals and those of traffic officers. He must watch for signals of other

motorists and give proper signals himself. He must know the operating mechanisms of his machine, check their operations as he travels and maintain his rapidly moving and complex machine under control at all times. These and other duties may be required of him every moment of his travel, made specific for the particular situation and all overtopped by the common law duty to use reasonable care under all the circumstances.

Multiply the same duties and hazards by any number of other operators in the immediate vicinity; add the duties and hazards of highway maintenance, passengers, pedestrians, and adjacent landowners, the conduct of any one or more of whom may impose upon all operators in close proximity duties and hazards requiring instant and perhaps unerring judgment and action. Add further the hazards of climatic conditions; the imperfections of the human being in sight, judgment, muscular reaction, health, strength and experience. Bring any combination of these duties and hazards into focus on a collision at high speed at a particular point of time and place. Who can name all the factors involved in causing the collision? Who can know or discover or describe the conduct of the parties involved? Who in retrospect from the tangled fragments of evidence given by the participants or bystanders and those who arrived on the scene at a later time; from marks and measurements, calculations of time and speed, is expert enough to

> reconstruct the fleeting scene with any assurance of its accuracy? If the picture by some miracle could be truly presented, who could pass a rational judgment in the allocation of responsibility as between the parties on any basis of fault? (Green, 1958: 66-8)

Similar difficulties may arise surrounding the manufacture and distribution of products in the marketplace and the working conditions in places of employment. In automobile cases many per se rules have grown up around different aspects of driving behavior in an attempt to simplify decision. As Ross observes in his recent book on insurance claims adjustors, a type of mechanical jurisprudence may arise to resolve cases in an efficient and straightforward fashion. (Ross, 1970; Pound, 1933: 156)

A second commonality of these areas is the ability of typical defendants to calculate accident costs. It is in fact upon this ability that Calabresi hinges his whole line of analysis.(Calabresi, 1970; Calabresi & Hirschoff, 1972: 1055-1073 n. 66) Industrial employers and products manufacturers rather clearly stand in this position. Automobile drivers do not, but, importantly, automobile insurers do. (See James, 1948: 549; Ehrenzweig, 1951: 41-3) Thus most defendants in lawsuits in these areas possess, or may be assumed to possess, a type of super-individual consciousness which allows them to know and foresee a certain aggregate frequency of accidents and their mean costs. The corporate defendant, or its stand-in the insurance company, has radically changed the face of the tort law; and with the growing use of insurance to cover many, if not most types of harm a certain

"corporate consciousness" has permeated most areas of tort law. This consciousness involves an extended analysis of certain typical types of harms, and attributes to the tortfeasor a "normal" consciousness with relation to the risks that produce these harms.

Normal understanding, as distinguished from a personal introspective understanding, has always been part of tort law. This is part of what is meant when we say that negligence is measured by an "objective" standard. One cannot claim to have failed to see what was plainly visible, or to be unaware of risks which were patently obvious. This is the case even where on other grounds we might know that the individual did not in fact see something or appreciate some risk. Yet with the corporate consciousness this normalization takes on an exaggerated form. Such defendants are assumed to have knowledge of a wide and expansive range of circumstances, to be able to foresee many risks as typical to their activity, and to be able to act to reduce these risks. The expanded and typified description of harms leads to an expanded and typified normal understanding of risks.

In sum, a certain aggregate, demographic understanding has come to pervade these situations.[29] It is an understanding which is conducive to a distributive justice analysis, while at the same time contrary to a retributive justice analysis such as is found in negligence.

The aggregation of harms which corporations and insurance companies are capable of making distills out the pecular aspects of individual events and leaves as a residue the systemic causes of injury. Arthur Stinchcombe discusses this process in the abstract, and it is worth quoting him at length to see how it works.

Perhaps it would be useful to outline why we can very often explain aggregate phenomena very well, when our understanding of individual behavior is very imperfect. . .

Suppose that we have a causal force, f, which bears on every member of an aggregate. . .Then also for each individual [here individual accident] there is a large number of idiosyncratic causes [which may be thought of as random measurement errors due to many small causes such as individual carelessness, etc.] The effect in the population would then look like this:

Individual	Causal Forces Bearing on the Individual
1	$f + i_1$
2	$f + i_2$
3	$f + i_3$
.	
.	
n	$f + i_n$

Some of the idiosyncratic forces (the i's) will tend in the opposite direction from f, some in the same direction. If we have a good theory of the systematic forces, the average of these idiosyncratic forces will be zero. Let us suppose that the "average" size of these idiosyncratic forces is (actually in statistical theory, refers to the square root of the mean square of the forces.) Gauss showed that under these conditions, with reasonable restrictions on the distribution of idiosyncratic forces, the mean

force bearing on the individual is $f + \frac{\sigma}{\sqrt{n}}$. So the aggregate force bearing on the entire group would be $nf + \sqrt{n}\sigma$. Now let us suppose that the idiosyncratic forces that we do not understand are four times as large as the systematic forces that we do understand--that is, $\sigma = 4f$. Consider the aggregate force exerted on populations of different sizes. The entry at the left is the number of people [accidents] in the population we are stuyding, n. In column (1) is the systematic force applied to that population, nf. In column (2) is the total effect of the idiosyncratic forces, $\sqrt{n}\,4f$. In column (3) is the ratio of the idiosyncratic forces we do not understand to the systematic forces which we do understand.

Population (accidents) of size	(1) Systematic forces	(2) Idiosyncratic forces	(3) Ratio (2)/(1)
1	f	4f	4.0
100	100f	40f	0.4
10,000	10,000f	400f	0.04
1,000,000	1,000,000f	4,000f	0.004

As the size of the population increases from 1 to 100, the influence of the unknown individual idiosyncratic behavior decreases from four times as large as the known (foreseeable) part to four-tenths as large as the known (foreseeable) part. As we go to an aggregate of a million, even if we understand only the systematic one-fifth of individual behavior as assumed in the table, the part we do not understand of the aggregate behavior decreases to less than 1 percent (0.004). (Stinchcombe, 1968: 67-8 n. 8)[30]

Thus this demographic perspective allows us to foresee and predict with a fair degree of accuracy the probability and gravity of a set of typical accidents. It is from such a model that the National Safety Council can produce estimates of the number of automobile fatalities which will occur in a given period of time. Note that the larger the N (e.g. a whole year of driving rather than a given holiday weekend) the more accurate the predictions will be; but regardless of aggregate accuracy (statistically, the confidence intervals surrounding the estimated mean) we know no more about the "causes" of the individual event.[31]

The judge, or jury, or claims adjustor, or arbitration board, or whoever is determining the causes of a particular accident to see whether someone was negligent, may in complex cases feel himself remarkably ignorant. The reconstruction problems may seem insurmountable. To understand one-fifth of the event would not necessarily be counted as a failure. A corporate planner, or insurance company actuary can, however, with the same theory, feel himself a failure when failing to predict within five percentage points.

In our individual lives we do not address our various enterprises from such a dispassionate, actuarial viewpoint. It is easy to see why this is so. With an N of one such estimates as we might make over any relevant time period would be relatively inaccurate. Knowing idiosyncratic information is a more precise way to proceed. We may drive more carefully when it rains, but it avails us little to know that if we are an average driver we will make a negligent mistake behind the wheel once every X number of miles. This information may

help our insurance company, but the best we can do is be careful. This individual perspective is the perspective upon which traditional tort law is built. With the emergence of the "corporate" defendant, however, such a perspective seems less realistic. From them we can, and do expect a more demographic analysis, and this aggregate, societal viewpoint is the stuff out of which distributive justice concerns arise. There is a push toward the economic interpretation of negligence and from there it is but a short step to an economic (cost-benefit) analysis of accident costs per se. At the end of the road is some type of strict (or no) responsibility based upon distributive concerns.

Moreover, once this point of view takes hold negligence retributive justice issues are submerged, for lack of negligence based on non-foreseeability seems less and less relevant. From the aggregate perspective foreseeability becomes nearly perfect. Given this foresight and knowledge it is difficult to plead that there was no point in the past when one did not have the requisite ability to act.

This point about the demographic view is in agreement with Fletcher's observation about non-reciprocal risks. It is not the non-reciprocity of the risk per se, however, that generates what he calls the "reasonableness" paradigm, rather it is the "corporate" nature of the defendants.

A third commonality, discussed in part on pages 32-3 supra, is that without a strict liability standard retributive justice issues may remain intact in suits where the issue is the plaintiff's conduct.

The plaintiff oftentimes is an individual and for him no systemic information is available. More importantly, his alleged acts of contributory negligence will be judged on the basis of more idiosyncratic criteria. This implies a more immediate and unique analysis of circumstances and a negligence "causal" model. This bias transcends any secret motivations on the part of judges to facilitate the economic development of the Republic.[32] If individual plaintiffs tend to be judged on the basis of a causal test and "corporate" defendants on the basis of an "economic" (cost-benefit) test, this is as much a consequence of the different types of consciousness attributed to each as it is any political or economic bias of the adjudicator.[33]

These three elements: accident complexity, ability to calculate costs, and the bipolar analysis of plaintiff and defendant behavior, have eroded the balanced interaction of retributive and distributive justice concerns in negligence. The reduced relevance of retributive issues for defendants has led to many arguing for the inappropriateness of any retributive justice analysis, for both plaintiff and defendant alike. In its place is emerging a general "strict liability" model. This new model is not meant to apply only to certain specific delineated areas of tort law. According to this view, most, if not all, civil wrongs should be handled in terms of strict liability.

IV. The Vanishing Middle Ground

A. The "Strict Liability" Model(s).

What is to replace negligence? The answer is not clear. Empirically there are some rather obvious trends. By and large, manufacturers are to pay for the harms caused by their products. At least they are to diffuse the costs of these harms throughout the society by adjusting their price structure to reflect liability for these harms. Persons injured in automobile accidents are to pay much of their own way, with appropriate limits set to keep the personal injury bar employed. Workman's compensation statutes are here to stay. The empirical consequences, however, are clearer than the underlying theory of the business. The why rather than the who is not as obvious. A large part of the case for various forms of strict liability is based upon real or imagined faults of the negligence system, but some of the same problems confront emerging model.

One of the most significant problems is the lack of a clear sense of what kind of distributive justice we wish to pursue in tort law. Much of the literature focuses on efficiency. That and nothing more, is close to a classical utilitarian approach to distributive justice. Even here there is disagreement as to whether an economic test of negligence or some form of strict liability best achieves this objective (Calabresi, 1970; Posner, 1972: 29; Calabresi & Hirschoff, 1972: 1055; Posner, 1973: 205.) This problem aside, however, there is a general sense that utilitarian efficiency is not the only appropriate criteria. What the other criteria should be is not clear. Calabresi & Hirschoff (1972: Sec. VI) suggest cost spreading, wealth

equality, dynamic efficiency (i.e. favoring the doers) and the reward of merit as four possible additional goals. While recognizing that these may at times compete with efficiency in the decision of cases, they do not appear to be clear as to how all of this might be put together to develop a theory of liability (Id. at 1084)

Others, such as Epstein (1973: 151), develop their theory without fully considering efficiency consequences (See Posner, 1973: 220 n. 35) This is not surprising in as much as this line of theory, like Fletcher's reciprocity paradigm, is more nearly premised upon the old Trespass notions of retributive justice (acting at one's peril) than upon any concerns with efficiency or other distributive issues. (Id. at 203) In fact while both Epstein and Calabresi both do battle under the banner of "strict liability" the gulf between their decision making rules is wider than the gulf between either one of them and traditional negligence.

We have two competing theories of "strict liability." The first, which we might call the Calabresi model, generally disregards retributive questions to further distributive concerns. (But see, Calabresi & Melamed, 1972: 1104 for a general concern with retributive questions.) The other, which we might call the Epstein model, generally disregards distributive issues in order to advance a "causal" scheme based upon old Trespass notions of retributive justice.

In part the development of the latter model is based on the fear that the economic analysis of negligence as found in the Learned Hand test would, on the grounds of efficiency, compel Good Samaritans to come to the assistance of persons in peril.(Epstein, 1973: 190ff)

This example is revealing because on this line of analysis Epstein has much more to fear from the "strict liability" of Calabresi than he does from traditional negligence. Although Epstein is correct in suggesting that negligence has difficulty with Good Samaritans (See Ratcliffe, 1966) it is also clear that some notions of retributive justice have deterred any movement to extend general responsibility to persons discovering others in peril. It is not obvious that the "strict liability" of the Calabresi variety would chaffe under any such compunctions.[34] In the strict liability models being expounded today there appears to be little by way of a middle ground.

B. Searching for the Balance.

The various authors recognize that there is a lack of balance in the new theories, or to state this another way, they realize that there must be some limitations to the more extreme conclusions to which the unrestricted theories might lead us. Epstein (1973: 204) is concerned with pleas of excuse and justification[35] which may limit his form of strict liability. Calabresi in turn is concerned with assumption of the risk and misuse defenses to actions based on his efficiency model of strict liability.(Calabresi & Hirschoff, 1972: 1064-6)

In the Calabresi case, based on products liability type problems, there is the implication that an intentional and voluntary use of an object which creates a probability of harm which is significantly greater than the probability of harm typically associated with the use of the object should create a defense against any claims of liability

for actual harms incurred. This, ultimately, is by way of a retributive limitation on the demographically-oriented cost-benefit analysis of liability. At some point authors of their own folly must not expect the rest of us to pay for the consequences of that folly.[36] In general, however, Calabresi and Hirschoff have not worked out any rules for when such exceptions to strict liability should apply, or who should decide if they apply.(Id. at 1067) Such caution is prudent. Striking a balance is a difficult task. Yet without some such balance tort law seems destined to slowly drift into a pattern where representative groups will be allocated into responsible and non-responsible categories on the basis of some, still uncertain criteria. If on these criteria one is in the responsible category, then one's status will be sufficient to establish responsibility. If, on the other hand, a person is in the non-responsibility category, then no action that he performs will be sufficient to upset the scheme. Not only will strict liability be more and more the case, but also strict non-liability will be more and more the case as well. There will be no middle ground.

The questions remain, what are we to understand as distributive justice and what, if any, role will retributive justice play in relationship to distributive questions? The first question has, as yet, no definitive answers. Some of the alternatives may be foreclosed by circumstances. Whether or not we wish for tort law to consider cost spreading the growth of insurance (public and private) is likely to make this the case for most injurers, and probably most victims.(See, e.g. Escola v. Coca Cola Bottling Company, 24 Cal. 2d 453, 750 P2d. 436 (1944) (Traynor concurring)) Relatively fewer and fewer victims seem likely to be left without any assistance.

Whether other distributional objectives will or should be pursued by tort law is not clear. Tort law plays but a small role in the general problems of social justice. One point should be repeated, however. Tort law has not been nor is it now some variety of classical utilitarianism. Victims as a group, simply because they have been hurt, have certain minimal claims which should not, on distributional grounds, be totally submerged to the greater good of society.

The second question, what role retributive justice should continue to play in torts, is perhaps even less clear. Yet it is the question of the proper interaction of retributive and distributive justice which rests at the heart of the tort law dilemma. First, some notion of what people can and cannot do in various circumstances (however those circumstances are understood) does in fact interact with our understanding and implementation of distributive justice.

Posner is correct in arguing that in theory any system of distributive justice which completely refuses to consider such questions is less efficient than a system which does. Even if strict liability (i.e. no non-negligence defenses are open to the defendant) is the rule, failure to have contributory negligence as a second priority rule (i.e. easily avoided carelessness on the part of the plaintiff helped "cause" the accident and this carelessness would more easily have avoided the accident than anything the defendant might have done or failed to do) makes a system less efficient than a system that has such a rule. Whether we wish to have a contributory negligence rule is part of the first question of what distributive objectives the law of torts should strive for. It is not an unreasonable position to agree with Posner's

assertion and yet opt for strict liability without contributory negligence.[37] To do so is to admit, at least in theory, that efficiency (in the purely economic sense of primary accident cost reduction) is not the only distributive goal of tort law.

Questions of retributive justice, however, play a role over and beyond their relation to distributive justice decisions. Issues of what it is to be a human "cause" serve at least two functions beyond the role of helping to define a just distribution. First they inform the rest of us that we are not fools in attempting to behave ourselves as ideally as possible. Without any such rules and the assurance they provide persons who would be good citizens are placed in a difficult and sometimes untenable position. Such persons would, as Hart says, risk going to the wall (1968: .)

It may be that the imposition of some behavioral standard should be relegated entirely to the criminal law. Negligent, or at least grossly negligent injurors might be subject to non-insurable penalties. Moreover, in terms of injured victim-plaintiffs we may wish to conclude that their injury itself is sufficient to enforce behavioral standards. In extreme cases, however, our notions of proper distribution of liability may come in conflict with our notions of retributive justice. At the limits, as in the shoe-shining example, we may still wish to say, on retributive and not distributive grounds, that such reckless abandon, such non-ideal behavior, forfeits one's right to a remedy under preexisting distributive principles.

Finally, retributive justice, as Epstein observes in the last section of his article, may define some limits beyond which any distributive concerns should not be allowed to operate. From this viewpoint

the old theory of "action" expressed in the Writ of Trespass is relevant not as the primary decision rule as to responsibility but rather as a statement that no one should be compelled to compensate another when no action component is present.

The traditional law of negligence creates a much more liberal standard than that of Trespass as to what one could not do; and further created a burden on plaintiffs to show that the other party could do something to prevent harm. Such a standard may be too liberal for our present conscience; the demands of distributive justice may be too strong to permit such a rule to have first priority. Yet the more conservative view of Trespass might stand as a bedrock of retributive concerns, a reminder that after all tort law is related in some way to what it is to be a human actor.

1. There is still controversy over contributory negligence and assumption of the risk, both in the articles (Calabresi & Melamed, 1972: 1089; Calabresi & Hirschoff, 1972: 1055; Posner, 1972: 29; Coase, 1960: 1; Epstein, 1973: 151) and in the case law, (Brown v. General Motors Corporation, 355 F. 2d 814 (4th Cir. 1966); Helene Curtis Industries, Inc. v. Pruitt, 385 F. 2d 841 (5th Cir. 1967); Dachner v. Pearson, 479 P. 2d 319 (Alaska, 1970); Barth v. B. F. Goodrich Tire Co., 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1968) (all opposing contributory negligence), and Maiorino v. Weco Products, 214 A. 2d 18 (N.J. 1965), where New Jersey accepts contributory negligence, but has abolished the distinction between it and assumption of the risk.

2. An interesting article which distinguishes "corrective" and "distributive" principles of justice is to be found in a recent issue of Modern Law Review. (1973: 233, 234) There Samuel Stoljar focuses upon the deterrent effects of "corrective" principles to argue for their continued importance. (Id. at 235) The author believes that the deterrent effects of "corrective" justice and the assistance goals of "distributive" justice can easily co-exist. (Id. at 234) The present article will not discuss deterrent effects of tort systems, except in passing. The empirical evidence for the deterrent effect of tort law seems entirely too speculative to advance as a primary argument for corrective schemes. (See, Ross, 1970; Keeton & O'Connell, 1965) Clearly, however, the deterrent issue is still alive. (See, Blum & Kalven, 1967: 239, 268)

Further, as this article will try to show, the co-existence of "retributive" and "distributive" principles is not as easy as Stoljar would have it. The balance is always precarious (cf. Piaget, 1965.)

3. A few words are in order about the use of the term retributive justice. In a sense retributive justice is too strong a word for a discussion of most tort law. It connotes criminal sanctions and punishment, whereas the tort law typically eschews the retribution aspects of the criminal law. Given this, several alternative terms might be employed. Among them are, "corrective" justice (Stoljar, 1973: 233; Fletcher, 1972: 537) or "compensatory" justice (Rawls, 1971: 351.) These terms are truer to the outcome of most tort suits, damages to replace loss. Nevertheless, the use of retributive justice is chosen for two reasons. The first is that it, more than the other terms, sharpens the distinction we want to discuss. The second reason is that what we want to focus upon is the liability logic, not the damage logic of tort law. The term retribution keeps these two things analytically separate. In some situations, of course, the distinction is misleading, e.g. where the doctrine of de minimus bars recovery. Usually, however, the law tries to keep these two issues separate, and we shall follow suit.

4. Fletcher's analysis is not as simple as that stated in the text. He is in fact deeply concerned with retributive justice, and in part tries to make the distinction between reciprocity and reasonableness turn upon retributive questions at a different level. We will return to this point later in the paper.

5. Fletcher notes that the trial judge and Chief Justice Shaw did disagree as to the standard to be applied to the defendant in proving accident. The trial judge thought the standard to be one of extra-ordinary care, Judge Shaw saw it to be ordinary care.(1972: 562 n. 88)

6. It is relevant to note that at the time of Weaver v. Ward Hume and Mill had not yet muddied the waters of the concept "cause." One of the consequences of their writings was to blur the distinction between human causation and other ideas of cause. In fact it has been argued that before their work (18th century) cause was primarily a term used to speak of human actions.(Collingwood, 1938: 85) In the earlier sense the term cause is not appropriate, at least in a legal sense, simply because a person is part of a "chain of events" leading to the event in question. To be a "cause" one's action must directly cause injury.(See, Hart & Honore, 1959)

7. See, Hart, 1968: on oblique intention. A full discussion of the various ways of understanding human action and the many verbal distinctions which may be made concerning this elusive thing can only be referred to in passing. For instance, see J. L. Austin's article on "Three Ways of Spilling Ink" (1966) in which the author distinguishes between acting "intentionally, deliberately and on purpose." See generally, Peters, 1958; Ofstad, 1961; and Langford, 1971.

8. Sullivan v. Boone, 205 Minn. 437, 286 N.W. 350 (1939). Standing trains, however, may be a different matter. See, for example, Finn v. Spokane, P. & S. R.R., 189 Or. 126, 214 P. 2d 354, 218 P. 2d 720 (1950).

9. In the philosophy of human action this sense of can is usually referred to as a physical possibility sense or an opportunity sense.

Brand (1970: 224-6) discusses several further meanings of the term, including an ability sense, a second order ability sense (where one has the ability or capacity to acquire the requisite skill, and others. Another, and relevant sense is discussed by Canfield.(1962: 359-60) He notes that we sometimes say we cannot do something because of the ill-consequences of the act. This is an extremely slippery use of the term. It is appropriate not only to the situation of a man with a gun at his head, but also to the situation of a railroad which argues that to take a certain precaution would invite economic ruin. As we shall see, this sense of can is important in the economic understanding of negligence.

10. (See, Hart, 1949: 171).

11. It is worth noting that except in those cases where can means physical opportunity philosophers find it impossible to analyze the phrase "he could have done otherwise" in some non-human action vocabulary. In other meanings of the word the phrase is so enmeshed with what it is to be human; with the teleological nature of our vocabulary about that condition; and ultimately with the free will-determinism issue, that no successful physicalist solution to the phrase has been advanced. See, Brand, 1970; McIver, 1964; Lehrer, 1966.

12. Epstein's discussion goes well until he comes to the fourth type of causation which is to come under his new rule: causation and dangerous conditions.(1973: 177ff) At this point several of the traditional problems which have plagued the negligence analysis re-emerge. First, there is the problem of distinguishing between dangerous conditions and "mere" conditions. Unless we are to have some absolute

list of dangerous things, the label of "dangerous" would seem to be contingent in part upon the reasonable foresight and knowledge of circumstances to be imputed to the defendant. Secondly, simply the fact of injury because of some condition does not settle the dangerousness issue. We might well ask whether the injured party was reasonable in failing to discover the danger in time to avoid harm. Such an analysis comes very close to the "but for" test that Epstein argues so streniously against. (See, e.g. Id. at 192 n. 99) Perhaps Epstein plans to allow a plaintiff to argue such contributory negligence as an excuse to the strict liability rule of dangerous conditions, but if so, he has moved the problem of cause as understood by negligence from the defendant's side of the case to the plaintiff's.

13. The earliest discovered trespass writs are circa 1250-1272. (Pollack & Maitland, 1895: 525) After the adoption of the Statute of Westminster II in 1285 providing for new writs when old writs failed to cover cases similar to cases where a writ was found, the companion form, Trespass on the Case, arose. Kiralfy (1951: 17) indicates that the new action had become familiar by the first part of the next century.

14. Malone (1970: 18) cites Beale (1909: 157) for cases on this point. For example a carrier who was responsible for theft on the road but not at an inn.

15. Note that for these persons liability under Case was in some ways stricter than liability under Trespass. They approach being the insurers of the plaintiffs. Malone (1970: 18) cites an early case where a sheriff was held responsible for non-return of a writ

in the face of the fact that he pled that he gave the writ to the coroner, who was robbed. The court's response was, "The duty to guard was yours."14 Ass. 254, pl. 12 (1366)

16. The latter type of case was exluded from Trespass actions in 1695.(Gibbons v. Pepper, 11 Raym. 38, 91 Eng. Rep. 922 (K.B. 1695))

17. This line of argument agrees with Epstein's statement (1973: 187) that under such circumstances the distinction between Trespass and Case made little sense, but submits that given the absurdity of the distinction, the circumstances the courts found themselves in made it more reasonable to move to one negligence standard for both direct and indirect harms than to move in the opposite direction of a non-negligence standard for both.

18. Again we have oversimplified Fletcher's argument. His argument, taken as a whole, does not make such a simple dichotomy. We might add, however, that the justification-excuse distinction made by Fletcher is not as useful for most tort cases as it appears to be. Fletcher's use of criminal cases to delineate the distinction can lead to confusion when the points made there are freely transferred to non-intentional torts. Most of the things called justifications in the law, e.g. self-defense, and actions taken in the prevention of felonies in progress, are actions where, by definition, there is no question but that one did the thing on purpose. In justifying the act one is giving a reason for why the act was a right and sensible thing to do. Such justifications might be stated in terms of distributive justice framework, but they might be based on different criteria.(See, Davis, 1966: 43-4, 93-4; Scott & Lyman, 1968: 47; J. L. Austin, 1956-7: 1)

Excuses, on the other hand, are usually about things one did not intend, or perhaps did not fully intend, or about things one only obliquely intended. Duress, mistake and accident fall into this category. The transplanting of the excuse-justification distinction to non-intentional tort law runs the risk of failing to realize that insofar as the immediate event is concerned justifications of the harm itself are unusual precisely because there is rarely an intentional act in need of that kind of defense.

19. See, Rawls, 1971: x n. 1, for references to his earlier works in this area, especially his earliest piece, "Justice as Fairness" (1958).

20. See Rawls' discussion at page 154 and following for the general conditions where a mini-max solution is most reasonable. Rawls cites Fellner (1965: 140-42) for a general discussion of these conditions.

21. The issues of just savings principle and open offices are beyond the present discussion. In brief the former is important in dealing with the problem of justice between generations (Rawls, 1971: 284-93), and the latter with the general problem of redress of undeserved inequalities, such as inequalities of birth. (Id. at 100)

22. Once we make the initial commitment to the primacy of liberty we no longer, strictly speaking, have a utilitarian theory. Theories which would use utilitarian criteria only to make choices under the second principle are a variety of what Rawls calls mixed theories. (Rawls, 1971: 315ff)

23. See, Rawls, 1971: 317 for the notion of some minimum constraint in intuitionistic conceptions of justice. See also, Rescher, 1966.

24. Calabresi & Hirschoff (1972: 1079) recognize that the issue of desert might arguably be relevant to tort law but apparently fail to recognize it as a retributive justice question. They do, however, appreciate the fact that if it is to be introduced into tort law at all it may upset conclusions based upon distributive principles.

25. Epstein makes a similar observation.(1973: 165 n. 42)

26. Note how labels like direct and indirect injury are of little help in defining the nature of the issue when we begin an extended analysis. At this point whether the railroad ran into the plaintiff or vice versa is irrelevant.

27. And, as Posner (1973: 207 n. 6) points out, even under a strict liability standard the railroad would do no such thing. The costs of these drastic remedies so obviously exceeds the probable damages occurring from broken spikes that the railroad would just as soon pay the judgements.

28. This point was recognized by Judge Hand not long after the Carroll Towing case. See, Maison v. Loftus, 178 F. 2d 148 (2nd Cir. 1949.)

29. This is Ehrenzweig's position in advancing the Typicality test in his seminal work on Negligence Without Fault. The logic of the Typicality test was "Anticipation of harm at the time of the start of the activity rather than the time of the injurious conduct determines the scope of liability." (1951: 54)

30. This discussion is in general agreement with Calabresi, 1970: 255, and Calabresi & Hirschoff, 1972: 1075 n. 74.

31. In criminal law cases, where retributive justice questions predominate, and where, therefore, extended distributive questions are

less relevant, proof from demographic analyses is less readily acceptable. See, People v. Collins 66 Cal. Rptr. 497, P. 2d 33 (1968)

32. It is admittedly difficult to know exactly how jurors, judges, and in general other actors do the work of attributing responsibility. The statements in the paragraph in the text are informed by a body of social science literature which goes by the name of Attribution Theory. While there is no particular study known to the author which directly supports this specific point, the general thrust of the literature at least makes this a good working hypothesis.(See, Jones, et. al., 1971-2; Jones & Nisbitt, 1971-2: 79; Kelly, 1967: 192) It should be kept in mind that the argument must be made at an aggregate level, and does not refer to any particular adjudicator in a given case. Additional empirical work is essential in this area.

33. Note, it is not always the case that this dual standard works to the detriment of plaintiffs. While jury behavior is still largely a mystery to us, many have argued that some juries may dispense with retributive justice issues in an attempt to effect some redistribution to individual plaintiffs. For instance, Keeton and O'Connell comment:

> Obviously, judges and juries often proceed on the assumption that the defendant is insured. This means that they are often inclined to strain the rules of law concerning negligence to find the defendant liable so that the insurance proceeds can be used to pay the victim.(1965: 23; See also, 1965: 73.)

Such views gain some slight empirical support from the following comment by a juror in an accident case reported by Broeder.

> This is a case where the plaintiff is a family man and the defendant is insured. If you (referring to two fellow jurors favoring the defendant) can't see that you can't see anything.(Broeder, 1965: 135)

In general, if extended cost-benefit analysis are largely unavailable to plaintiffs, so too immediate, unique excuses may be less available to these defendants.

34. Forced to make a choice Epstein would probably prefer the reverse Learned Hand test advanced by Calabresi & Hirschoff (1972: 1059) to their strict liability test. For instance Epstein's chagrin with the decision in Bolton V. Stone, (1951) A.C. 850 is largely premised upon the fact that under the normal Learned Hand test one who performs no action and is injured may not hold responsible the actor who injured him, albeit non-negligently. In the situation of "unavoidable accidents" the reverse Hand test places liability on the actor-defendant, not the no-action-plaintiff. This is very close to what Epstein wants strict liability to mean.(See Epstein, 1973: 169-71)

35. It is not altogether clear what Epstein would have these terms mean. It is inevitable, however, that defendants would no longer have at their disposal all of the array of "excuses and justifications" they presently enjoy to prove their behavior was reasonable. What is uncertain is whether defendants could use these arguments against plaintiffs to show contributory negligence. Epstein has deferred a full discussion of this topic to a later work.(1973: 204)

36. In their discussion of assumption of risk Calabresi & Hirschoff try to convince us that assumption of the risk, unlike contributory

negligence, has nothing to do with retributive questions.

> The issue was not, in other words, whether the owner of the land ought to build a reservoir. . .Neither was it whether the victim acted "reasonably" in engaging in an unnatural use of his land. . .Instead it was whether his situation made him better suited than the owner to compare the benefits and the costs of the risks he took. (Id. at 1066)

Taking our shoe-shining lawnmower user as an example, Calabresi & Hirschoff would try to argue that the reason he might fail to recover from the lawnmower manufacturer is not because he did a foolish, reckless or unreasonable thing, but because he, rather than the manufacturer was in the best position to assess the risks of such unnatural use. It is not obvious, however, that misuse per se alters a distributive calculus of efficiency. After all the lawnmower manufacturer knows that a certain percentage of its consumers are damn fools and will use their device in bizarre ways. Why, simply because one misuses a product, is he in a better position to evaluate costs and benefits involved? More importantly, why only in cases of misuse are Calabresi and Hirschoff even willing to consider an immediate and unique examination of the circumstances? If such a level of analysis were to be used in every case then in many cases of "ordinary" use it might be concluded that the plaintiff could make a better cost-benefit analysis. Finally, why, on any solely distributive grounds, should Calabresi & Hirschoff wish to restrict the assumption of the risk defense only to those situations where the plaintiff had full and free choice in using an object? (Id. at 1065.) It may be true

that the plaintiff could not have done otherwise in some relevant sense, but then neither could the manufacturer, except perhaps he could withhold the product from the marketplace. Ehrenzweig, on the other hand, presumably would argue that if the harm were not typical no responsibility lies, regardless of the plaintiff's freedom of choice.(1951: 56ff)

37. Recall that this is what most courts have done. Supra, note.1.

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