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FAIRNESS AND UTILITY IN TORT THEORY

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Professor Fletcher challenges the traditional account of the development of tort doctrine as a shift from an unmoral standard of strict liability for directly causing harm to a moral standard based on fault. He then sets out two paradigms of liability to serve as constructs for understanding competing ideological viewpoints about the proper role of tort sanctions. He asserts that the paradigm of reciprocity, which looks only to the degree of risk imposed by the parties to a lawsuit on each other, and to the existence of possible excusing conditions, provides greater protection of individual interests than the paradigm of reasonableness, which assigns liability instrumentally on the basis of a utilitarian calculus. Finally, Professor Fletcher examines stylistic differences between the two paradigms which may explain the modern preference for the paradigm of reasonableness.

I. Two Paradigms of Liability

TORT theory is suffering from declining expectations. Commentators still chronicle cases and expound doctrine for practitioners. But the thrust of the academic literature is to convert the tort system into something other than a mechanism for determining the just distribution of accident losses. Some writers seek to convert the set of discrete litigations into a makeshift medium of accident insurance or into a mechanism for maximizing social utility by shifting the costs of accidents (or accident prevention) to the party to whom it represents the least disutility. Thus the journals cultivate the idiom of cost-spreading, risk-distribution and cost-avoidance.[1] Discussed less and less are

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[1] The leading work is G. Calabresi, The Costs of Accidents (1970) [hereinafter cited as Calabresi]. *See also* A. Ehrenzweig, Negligence Without Fault (1951), reprinted in 54 Calif. L. Rev. 1422 (1966); J. Fleming, The Law of Torts 9–14 (3d ed. 1965); Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 Harv. L. Rev. 713 (1965); Calabresi, *Does the Fault System Optimally Control Primary Accident Costs?*, 33 Law & Contemp. Prob. 429 (1968); Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 Yale L.J. 499 (1961); Keeton, *Conditional Fault in the Law of Torts*, 72 Harv. L. Rev. 401 (1959); Morris, *Hazardous Enterprises and Risk Bearing Capacity*, 61 Yale L.J. 1172 (1952).

precisely those questions that make tort law a unique repository of intuitions of corrective justice: What is the relevance of risk-creating conduct to the just distribution of wealth? What is the rationale for an individual's "right" to recover for his losses? What are the criteria for justly singling out some people and making them, and not their neighbors, bear the costs of accidents? These persistent normative questions are the stuff of tort theory, but they are now too often ignored for the sake of inquiries about insurance and the efficient allocation of resources.

The fashionable questions of the time are instrumentalist:[2] What social value does the rule of liability further in this case? Does it advance a desirable goal, such as compensation, deterrence, risk-distribution, or minimization of accident costs? True, within this instrumentalist framework some writers are concerned about the goal of vindicating the community's sense of fairness.[3] But this approach generally makes the issue of fairness look like the other goals of the tort system. Any other notion of fairness — one that is not a goal, but a non-instrumentalist reason for redistributing losses [4] — strikes some contemporary writers as akin

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[2] For a discussion of instrumentalism in legal reasoning, see Dworkin, *Morality and the Law*, N.Y. REV. BOOKS, May 22, 1969, at 29.

[3] *See* CALABRESI 291–308; 2 F. HARPER & F. JAMES, THE LAW OF TORTS 743 (1956) [hereinafter cited as HARPER & JAMES] ("[The law of torts] must satisfy the ethical or moral sense of the community, its feeling of what is fair and just."). Professors Keeton and O'Connell discuss the obligations of motorists without converting the issue into a question of community expectations. R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 256–72 (1965).

[4] This bias toward converting values which are ends in themselves into instrumentalist goals is well illustrated by the history of the exclusionary rule in search and seizure cases. The leading modern decisions establishing the exclusionary rule relied on two prominent rationales for the rule: (1) the imperative of judicial integrity, and (2) the desirability of deterring unconstitutional police behavior. *See* Mapp v. Ohio, 367 U.S. 643, 659 (1961); Elkins v. United States, 364 U.S. 206, 222 (1960). Preserving judicial integrity is a non-instrumentalist value — like retribution, fairness, and justice. One preserves judicial integrity not because it will produce good in the future but because it is "imperative" — it is in the nature of the judicial process — to do so. This is not the kind of value with which most writers in recent years could feel comfortable. As a result, the literature tended to tie the exclusionary rule almost exclusively to the goal of deterring improper police behavior. *See* Allen, *Due Process and State Criminal Procedures: Another Look*, 48 NW. U.L. REV. 16, 34 (1953); LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 1002–03 (1965); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 668–71 (1970). The implication of tying the exclusionary rule to the goal of deterrence is that if suppressing evidence does not in fact deter the police — and there is reason to believe that it does not, *see* L. TIFFANY, D. MCINTYRE, JR. & D. ROTENBERG, DETECTION OF CRIME 101, 183–99 (1967) — then the entire justification for the rule collapses. See the

to a nonrational community taboo.[5]

Reluctant as they are to assay issues of fairness, tort theorists tend to regard the existing doctrinal framework of fault and strict liability as sufficiently rich to express competing views about fairly shifting losses.[6] This conceptual framework accounts for a number of traditional beliefs about tort law history. One of these beliefs is that the ascendancy of fault in the late nineteenth century reflected the infusion of moral sensibility into the law of torts.[7] That new moral sensibility is expressed sometimes as the principle that wrongdoers ought to pay for their wrongs.[8] Another traditional view is that strict tort liability is the analogue of strict criminal liability, and that if the latter is suspect, so is the former.[9] The underlying assumption of both these tenets is that negligence and strict liability are antithetical rationales of liability. This assumed antithesis is readily invoked to explain the ebbs and flows of tort liability. Strict liability is said to have prevailed in early tort history, fault supposedly held sway in the late nineteenth century, with strict liability now gaining ground.[10]

These beliefs about tort history are ubiquitously held,[11] but to varying degrees they are all false or at best superficial. There has no doubt been a deep ideological struggle in the tort law of the last century and a half. But, as I shall argue, it is not the struggle between negligence and fault on the one hand, and strict liability on the other. Rather, the confrontation is between

portentous dissent of Chief Justice Burger in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 411 (1971).

The distinctive characteristic of non-instrumentalist claims is that their validity does not depend on the consequences of the court's decision. Whether a court protects judicial integrity or achieves a fair result turns on an assessment of the facts of the dispute, not on a correct prediction of what may follow.

[5] Calabresi's analysis is instructive. He reasons that the issue of fairness must involve "moral attitudes," CALABRESI 294, and then considers the taboo against fornication as an example of "moral attitudes." *Id.* at 295.

[6] *See, e.g.*, W. BLUM & H. KALVEN, PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM: AUTO COMPENSATION PLANS (1965); Fleming, *The Role of Negligence in Modern Tort Law*, 53 VA. L. REV. 815 (1967).

[7] *See* O. HOLMES, THE COMMON LAW 79–80 (1881); Ames, *Law and Morals*, 22 HARV. L. REV. 97, 99 (1908); p. 564 *infra*.

[8] *See, e.g.*, Lord Atkin's opinion in Donoghue v. Stevenson, [1932] A.C. 562, 579.

[9] *See* J. SALMOND, LAW OF TORTS 12–13 (6th ed. 1924); *cf.* Smith, *Tort and Absolute Liability — Suggested Changes in Classification* (pts. 1–3), 30 HARV. L. REV. 241, 319, 409 (1917).

[10] *See* Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951).

[11] Most treatise writers agree with this outline, though they may no longer regard strict liability as aberrant. *See* FLEMING, *supra* note 1, at 289–90; HARPER & JAMES 785–88; W. PROSSER, THE LAW OF TORTS 16–19 (4th ed. 1971) [hereinafter cited as PROSSER].

two radically different paradigms for analyzing tort liability [12] — paradigms which represent a complex of views about (1) the appropriate standard of liability, (2) the appropriate style of legal reasoning, and (3) the relationship between the resolution of individual disputes and the community's welfare.

These paradigms of liability cut across traditional doctrinal lines,[13] creating a deep ideological cleavage between two ways of resolving tort disputes. The conflict is whether judges should look solely at the claims and interests of the parties before the court, or resolve seemingly private disputes in a way that serves the interests of the community as a whole. From this cleavage spring divergent ways of looking at concepts like fault, rights of recovery, and excuses from liability. Do these concepts provide a medium of doing justice between the parties, or are they a medium for serving the interests of the community? A stand on this threshhold question generates an interrelated set of views, including a characteristic style of legal rhetoric. In this essay I wish to explicate these two paradigms of liability, show their operation in the case law [14] and thus enrich the conceptual tools with which we analyze tort liability and the patterns of tort history.

Of the two paradigms, I shall call the first the paradigm of reciprocity. According to this view, the two central issues of tort law — whether the victim is entitled to recover and whether the defendant ought to pay — are distinct issues, each resolvable without looking beyond the case at hand. Whether the victim is so entitled depends exclusively on the nature of the victim's activity when he was injured and on the risk created by the defendant. The social costs and utility of the risk are irrelevant, as

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[12] There is admittedly an element of fashion in using words like "paradigm" and "model." My usage is patterned after T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970), in which the concept of paradigmatic thinking is used to account for the varieties of scientific response to identical data. My underlying thought is that tort history is characterized by the same kind of conflict that marked the competition between the phlogiston and oxidation theories of burning, *id.* at 53–56, or the conflict between Ptolemaic and Copernican astronomy. This approach is useful when what one wants to know is why judges (or scientists) are curious about and responsive to particular facts at particular stages of history. Kuhn, himself, suggests the analogy between legal and scientific processes; in explaining his concept of paradigm, he likens it to "an accepted judicial decision in the common law." *Id.* at 23.

[13] *See* pp. 550–51 *infra*.

[14] The text has the limited concern of assessing problems of fairness within a litigation scheme. There is growing skepticism whether one-to-one litigation is the appropriate vehicle for optimizing accidents and compensating victims. *See, e.g.*, CALABRESI 297–99; Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967).

is the impact of the judgment on socially desirable forms of behavior. Further, according to this paradigm, if the victim is entitled to recover by virtue of the risk to which he was exposed, there is an additional question of fairness in holding the risk-creator liable for the loss. This distinct [15] issue of fairness is expressed by asking whether the defendant's creating the relevant risk was excused on the ground, say, that the defendant could not have known of the risk latent in his conduct. To find that an act is excused is in effect to say that there is no rational, fair basis for distinguishing between the party causing harm and other people. Whether we can rationally single out the defendant as the loss-bearer depends on our expectations of when people ought to be able to avoid risks. As will become clear in the course of this discussion, these expectations should not always depend upon the social utility of taking risks; rather they should often depend on non-instrumentalist criteria for judging when men ought to be able to avoid excessive risks of harm. For example, the standard of uncommon "ultra-hazardous activities," introduced by the first *Restatement* [16] is apparently a non-instrumentalist standard: one looks only to the risk and not to its social utility to determine whether it is ultra-hazardous.[17] Yet it is never made clear by the *Restatement* why extra-hazardous risks warrant "strict liability" while ordinarily hazardous risks do not.

As part of the explication of the first paradigm of liability, I shall propose a specific standard of risk that makes sense of the *Restatement*'s emphasis on uncommon, extra-hazardous

[15] There might be many standards of liability that would distinguish between the question of the victim's right to recover and the fairness of the risk-creator's rendering compensation. The writ of Trespass recognized the distinction, answering the first by determining whether the injury was directly caused, *see* Scott v. Shepherd, 96 Eng. Rep. 525, 526 (C.P. 1773) (Blackstone, J.), and the second by assessing whether the risk-creating act was attributable to inevitable accident, *see* Cotterill v. Starkey, 173 Eng. Rep. 676 (Q.B. 1839) (inevitable accident); Goodman v. Taylor, 172 Eng. Rep. 1031 (K.B. 1832) (inevitable accident); Beckwith v. Shordike, 98 Eng. Rep. 91, 92 (K.B. 1767) (Ashton, J.) (defense of involuntary trespass approved in principle but rejected on the facts); Mitten v. Faudrye, 79 Eng. Rep. 1259 (K.B. 1625) (involuntary trespass). *See generally* 8 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 455–57 (2d ed. 1937). Common law courts began to abandon the test of "directness" in the mid-nineteenth century, *see* note 86 *infra*, and in this century there has been no widely accepted criterion of risk other than the standard of reasonableness. As I shall show below, *see* pp. 556–59 *infra*, reasonableness is a standard that merges the issues of the victim's right to recover with the fairness of the risk-creator's rendering compensation.

[16] RESTATEMENT OF TORTS §§ 519–20 (1938).

[17] *But cf.* RESTATEMENT (SECOND) OF TORTS § 520(f) (Tent. Draft No. 10, 1964) (recognizing "the value of an activity to the community" as a factor bearing on the classification of an activity as abnormally dangerous).

risks, but which shows that the *Restatement*'s theory is part of a larger rationale of liability that cuts across negligence, intentional torts, and numerous pockets of strict liability. The general principle expressed in all of these situations governed by diverse doctrinal standards is that a victim has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant — in short, for injuries resulting from nonreciprocal risks. Cases of liability are those in which the defendant generates a disproportionate, excessive risk of harm, relative to the victim's risk-creating activity. For example, a pilot or an airplane owner subjects those beneath the path of flight to nonreciprocal risks of harm. Conversely, cases of nonliability are those of reciprocal risks, namely those in which the victim and the defendant subject each other to roughly the same degree of risk. For example, two airplanes flying in the same vicinity subject each other to reciprocal risks of a mid-air collision. Of course, there are significant problems in determining when risks are nonreciprocal, and we shall turn to these difficulties later.[18] For now, it is sufficient to note that the paradigm of reciprocity represents (1) a bifurcation of the questions of who is entitled to compensation and who ought to pay, (2) a commitment to resolving both of those issues by looking only to the activity of the victim and the risk-creator, and (3) a specific criterion for determining who is entitled to recover for loss, namely all those injured by nonreciprocal risks.

The conflicting paradigm of liability — which I shall call the paradigm of reasonableness — represents a rejection of noninstrumentalist values and a commitment to the community's welfare as the criterion for determining both who is entitled to receive and who ought to pay compensation. Questions that are distinct under the paradigm of reciprocity — namely, is the risk nonreciprocal and was it unexcused — are collapsed in this paradigm into a single test: was the risk unreasonable? The reasonableness of the risk thus determines both whether the victim is entitled to compensation and whether the defendant ought to be held liable. Reasonableness is determined by a straightforward balancing of costs and benefits. 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.[19] The premises of this paradigm are

[18] *See* pp. 571–72 *infra*.

[19] This is a simpler statement of the blancing test known as the "Learned Hand formula," defined in United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947). The same inquiry has been used to define the defense of necessity to in-

that reasonableness provides a test of activities that ought to be encouraged and that tort judgments are an appropriate medium for encouraging them.

The function of both of these paradigms is to distinguish between those risks that represent a violation of individual interests and those that are the background risks that must be borne as part of group living. The difference between the two paradigms is captured by the test provided by each for filtering out background risks. The paradigm of reciprocity holds that we may be expected to bear, without indemnification, those risks we all impose reciprocally on each other. If we all drive, we must suffer the costs of ordinary driving. The paradigm of reasonableness, on the other hand, holds that victims must absorb the costs of reasonable risks, for these risks maximize the composite utility of the group, even though they may not be mutually created background risks.

The paradigm of reasonableness bears some resemblance to present-day negligence, but it would be a mistake to associate the two paradigms, respectively, with strict liability and negligence. As I shall argue, the paradigm of reciprocity cuts across strict liability, negligence and intentional torts, and the paradigm of reasonableness accounts for only a subset of negligence cases. A large number of negligence cases lend themselves to analysis under both paradigms. Suppose there is a collision between two drivers on the highway, neither of whom has done anything out of the ordinary. Neither would be liable to the other. That result might be explained on the ground that the risks are reciprocal; each endangers the other as much as he is endangered. Or nonliability might be explained on the ground that ordinary driving is a socially beneficial activity. As my exposition develops, I will account for this overlap and explain why some cases of negligence liability fit only under the paradigm of reasonableness.

II. The Paradigm of Reciprocity

A. The Victim's Right to Recover

Our first task is to demonstrate the pervasive reliance of the common law on the paradigm of reciprocity. The area that most consistently reveals this paradigm is the one that now most lacks doctrinal unity — namely, the disparate pockets of strict liability. We speak of strict liability or "liability without fault" in cases

tentional torts and crimes. *See* Mouse's Case, 77 Eng. Rep. 1341 (K.B. 1609) (justifying the jettisoning of ferry cargo to save the passengers); Model Penal Code § 3.02 (Proposed Official Draft, 1962).

ranging from crashing airplanes [20] to suffering cattle to graze on another's land.[21] Yet the law of torts has never recognized a general principle underlying these atomistic pockets of liability. The *Restatement*'s standard of ultra-hazardous activity speaks only to a subclass of cases. In general, the diverse pockets of strict liability represent cases in which the risk is reasonable and legally immune to injunction. They are therefore all cases of liability without fault in the limited sense in which fault means taking an unreasonable risk.[22] Beyond these characteristics distinguishing strict liability from negligence, there is no consensus of criteria for attaching strict liability to some risks and not to others.[23]

I shall attempt to show that the paradigm of reciprocity accounts for the typical cases of strict liability [24] — crashing airplanes,[25] damage done by wild animals,[26] and the more common cases of blasting, fumigating and crop dusting.[27] To do this, I shall consider in detail two leading, but seemingly diverse instances of liability for reasonable risk-taking — *Rylands v. Fletcher* [28] and *Vincent v. Lake Erie Transportation Co.*[29] The point of focusing on these two cases is to generate a foundation

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[20] RESTATEMENT (SECOND) OF TORTS § 520A (Tent. Draft No. 12, 1966).

[21] McKee v. Trisler, 311 Ill. 536, 143 N.E. 69 (1924).

[22] The word "fault" is also used to refer to the absence of excusing conditions, *see* pp. 551, 556–57 *infra*, and in this sense strict liability is not liability without fault.

[23] In Keeton, *Is There a Place for Negligence in Modern Tort Law?*, 53 VA. L. REV. 886, 894–96 (1967), the author synthesizes strict liability under the principle that every activity should be liable for its "distinctive risks."

[24] It is important to distinguish the cases of strict liability discussed here from strict products liability, a necessary element of which is an unreasonably dangerous defect in the product. *See* Davis v. Wyeth Laboratories, Inc., 399 F.2d 121 (9th Cir. 1968). *See generally* Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965). Because of the market relationship between the manufacturer and the consumer, loss-shifting in products-liability cases becomes a mechanism of insurance, changing the question of fairness posed by imposing liability. *See* BLUM & KALVEN, *supra* note 6, at 58–61.

[25] *See* p. 548 *infra* and note 20 *supra*; PROSSER 514–16.

[26] *E.g.*, Collins v. Otto, 149 Colo. 489, 369 P.2d 564 (1962) (coyote bite); Filburn v. People's Palace & Aquarium Co., 25 Q.B.D. 258 (1890) (escaped circus elephant). *See generally* PROSSER 496–503.

[27] *E.g.*, Exner v. Sherman Power Constr. Co., 54 F.2d 510 (2d Cir. 1931) (storing explosives); Western Geophysical Co. of America v. Mason, 240 Ark. 767, 402 S.W.2d 657 (1966) (blasting); Luthringer v. Moore, 31 Cal. 2d 489, 190 P.2d 1 (1948) (fumigating); Young v. Darter, 363 P.2d 829 (Okla. 1961) (crop dusting).

[28] 159 Eng. Rep. 737 (Ex. 1865), *rev'd*, L.R. 1 Ex. 265 (1866), *aff'd*, L.R. 3 H.L. 330 (1868).

[29] 109 Minn. 456, 124 N.W. 221 (1910).

for inducing the claim that unexcused nonreciprocity of risk is the unifying feature of a broad spectrum of cases imposing liability under rubrics of both negligence and strict liability.

In *Rylands v. Fletcher* the plaintiff, a coal mine operator, had suffered the flooding of his mine by water that the defendant had pumped into a newly-erected reservoir on his own land. The water broke through to an abandoned mine shaft under the defendant's land and thus found its way to the plaintiff's adjoining mine. The engineers and contractors were negligent in not providing stronger supports for the reservoir; yet because they were independent contractors, the defendant was not liable for their negligence. Though the defendant's erecting and maintaining the reservoir was legally permissible, the Exchequer Chamber found for the plaintiff,[30] and the House of Lords affirmed.[31] Blackburn's opinion in the Exchequer Chamber focused on the defendant's bringing on to his land, for his own purposes, "something which, though harmless whilst it remain there, will naturally do mischief if it escape." [32] Lord Cairns, writing in the House of Lords, reasoned that the defendant's activity rendered his use of the land "non-natural"; accordingly, "that which the Defendants were doing they were doing at their own peril." [33]

Neither Blackburn's nor Cairns' account provides an adequate rationale for liability. It may be that a body of water will "naturally do mischief if it escapes," but so may many other things, like water in a pipe, oil in a furnace tank, and fire in a fireplace. It is unlikely that Blackburn would favor liability for the harmful consequences of all these risky practices. Cairns' rationale of non-natural use, for all its metaphysical pretensions, may be closer to the policy issue at stake in the dispute. The fact was that the defendant sought to use his land for a purpose at odds with the use of land then prevailing in the community. He thereby subjected the neighboring miners to a risk to which they were not accustomed and which they would not regard as a tolerable risk entailed by their way of life. Creating a risk different from the prevailing risks in the community might be what Lord Cairns had in mind in speaking of a non-natural use of the land. A better term might have been "abnormal" or "inappropriate" use. Indeed these are the adjectives used in the proposed revision of the *Restatement* to provide a more faithful rendition of the case law tradition of strict liability.[34]

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[30] L.R. 1 Ex. 265 (1866).
[31] L.R. 3 H.L. 330 (1868).
[32] L.R. 1 Ex. at 279.
[33] L.R. 3 H.L. at 339.
[34] RESTATEMENT (SECOND) OF TORTS § 520 (Tent. Draft No. 10, 1964).

A seemingly unrelated example of the same case law tradition is *Vincent v. Lake Erie Transporation Co.*, a 1910 decision of the Minnesota Supreme Court.[35] The dispute arose from a ship captain's keeping his vessel lashed to the plaintiff's dock during a two-day storm when it would have been unreasonable, indeed foolhardy, for him to set out to sea. The storm battered the ship against the dock, causing damages assessed at five hundred dollars. The court affirmed a judgment for the plaintiff even though a prior case had recognized a ship captain's right to take shelter from a storm by mooring his vessel to another's dock, even without consent.[36] The court's opinion conceded that keeping the ship at dockside was justified and reasonable, yet it characterized the defendant's damaging the dock as "prudently and advisedly [availing]" himself of the plaintiff's property.[37] Because the incident impressed the court as an implicit transfer of wealth, the defendant was bound to rectify the transfer by compensating the dock owner for his loss.[38]

The rationales of *Rylands* and *Vincent* are obviously not interchangeable. Building a reservoir is not availing oneself of a neighbor's property. And mooring a ship to a wharf is not an abnormal or "non-natural" use of either the ship or the wharf. Yet by stripping the two cases of their rhetoric and by focusing on the risks each defendant took, one can bring the two cases within the same general principle. The critical feature of both cases is that the defendant created a risk of harm to the plaintiff that was of an order different from the risks that the plaintiff imposed on the defendant.

Without the factor of nonreciprocal risk-creation, both cases would have been decided differently. Suppose that Rylands had built his reservoir in textile country, where there were numerous mills, dams, and reservoirs, or suppose that two sailors secured their ships in rough weather to a single buoy. In these situations each party would subject the other to a risk, respectively, of

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[35] 109 Minn. 456, 124 N.W. 221 (1910).

[36] *See* Ploof v. Putnam, 81 Vt. 471, 71 A. 188 (1908) (defendant dock owner, whose servant unmoored the plaintiff's ship during a storm, held liable for the ensuing damage to the ship and passengers).

[37] 109 Minn. at 460, 124 N.W. at 222.

[38] This case is not entirely apt for my theory. The existence of a bargaining relationship between the defendant and the plaintiff poses the market adjustment problems raised in note 24 *supra*. *See* Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713, 726 (1965) (arguing the irrelevance of the result in *Vincent* as to *both* the efficient allocation of resources and the welfare of the parties). Accordingly, I treat the case as though the defendant were a type of ship owner who never had to enter into bargains with wharf owners. The case is also a seductive one for Professor Keeton. *See* Keeton, *supra* note 1, at 410–18; Keeton, *supra* note 23, at 895.

inundation and abrasion. Where the risks are reciprocal among the relevant parties, as they would be in these variations of *Rylands* and *Vincent*, a rule of strict liability does no more than substitute one form of risk for another — the risk of liability for the risk of personal loss.[39] Accordingly, it would make little sense to extend strict liability to cases of reciprocal risk-taking, unless one reasoned that in the short run some individuals might suffer more than others and that these losses should be shifted to other members of the community.[40]

Expressing the standard of strict liability as unexcused, nonreciprocal risk-taking provides an account not only of the *Rylands* and *Vincent* decisions, but of strict liability in general. It is apparent, for example, that the uncommon, ultra-hazardous activities pinpointed by the *Restatement* are readily subsumed under the rationale of nonreciprocal risk-taking. If uncommon activities are those with few participants, they are likely to be activities generating nonreciprocal risks. Similarly, dangerous activities like blasting, fumigating, and crop dusting stand out as distinct, nonreciprocal risks in the community. They represent threats of harm that exceed the level of risk to which all members of the community contribute in roughly equal shares.

The rationale of nonreciprocal risk-taking accounts as well for pockets of strict liability outside the coverage of the *Restatement*'s sections on extra-hazardous activities. For example, an individual is strictly liable for damage done by a wild animal in his charge, but not for damage committed by his domesticated pet.[41] Most people have pets, children, or friends whose presence

[39] A student note nicely develops this point in the context of ultra-hazardous activities. Note, *Absolute Liability for Dangerous Things*, 61 HARV. L. REV. 515, 520 (1948).

[40] One argument for so shifting losses would be that some individuals have better access to insurance or are in a position (as are manufacturers) to invoke market mechanisms to distribute losses over a large class of individuals. This argument assumes that distributing a loss "creates" utility by shifting units of the loss to those who may bear them with less disutility. The premise is the increasing marginal utility of cumulative losses, which is the inverse of the decreasing marginal utility of the dollar — the premise that underlies progressive income taxation. *See* Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 517–19 (1961); Blum & Kalven, *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417, 455–79 (1952). This is an argument of distributive rather than corrective justice, for it turns on the defendant's wealth and status, rather than his conduct. 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 on who he is. *See* THE NICOMACHEAN ETHICS OF ARISTOTLE, Book V, ch. 4, at 114–15 (Ross transl. World's Classics ed. 1954). What is at stake is keeping the institution of taxation distinct from the institution of tort litigation.

[41] *See, e.g.*, Fowler v. Helck, 278 Ky. 361, 128 S.W.2d 564 (1939); Warrick v. Farley, 95 Neb. 565, 145 N.W. 1020 (1914).

creates some risk to neighbors and their property. These are risks that offset each other; they are, as a class, reciprocal risks. Yet bringing an unruly horse into the city goes beyond the accepted and shared level of risks in having pets, children, and friends in one's household. If the defendant creates a risk that exceeds those to which he is reciprocally subject, it seems fair to hold him liable for the results of his aberrant indulgence. Similarly, according to the latest version of the *Restatement*, airplane owners and pilots are strictly liable for ground damage, but not for mid-air collisions.[42] Risk of ground damage is nonreciprocal; homeowners do not create risks to airplanes flying overhead. The risks of mid-air collisions, on the other hand, are generated reciprocally by all those who fly the air lanes. Accordingly, the threshold of liability for damage resulting from mid-air collisions is higher than mere involvement in the activity of flying. To be liable for collision damage to another flyer, the pilot must fly negligently or the owner must maintain the plane negligently; they must generate abnormal risks of collision to the other planes aflight.

Negligently and intentionally caused harm also lend themselves to analysis as nonreciprocal risks. As a general matter, principles of negligence liability apply in the context of activities, like motoring and sporting ventures, in which the participants all normally create and expose themselves to the same order of risk.[43] These are all pockets of reciprocal risk-taking. Sometimes the risks are grave, as among motorists; sometimes they are minimal, as among ballplayers. Whatever the magnitude of risk, each participant contributes as much to the community of risk as he suffers from exposure to other participants. To establish liability for harm resulting from these activities, one must show that the harm derives from a specific risk negligently engendered in the course of the activity. Yet a negligent risk, an "unreasonable" risk, is but one that unduly exceeds the bounds of reciprocity. Thus, negligently created risks are nonreciprocal relative to the risks generated by the drivers and ballplayers who engage in the same activity in the customary way.

If a victim also creates a risk that unduly exceeds the reciprocal norm, we say that he is contributorily negligent and deny

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[42] *See* note 20 *supra*.

[43] Negligence is, of course, prominent as well in the analysis of liability of physicians to patients and occupiers of land to persons injured on the premises. *See* Cohen, *Fault and the Automobile Accident: The Lost Issue in California*, 12 U.C.L.A. REV. 164, 179 (1964). These are cases of injuries in the course of consensual, bargaining relationships and therefore pose special problems. *Cf.* note 24 *supra*.

recovery.[44] The paradigm of reciprocity accounts for the denial of recovery when the victim imposes excessive risks on the defendant, for the effect of contributory negligence is to render the risks again reciprocal, and the defendant's risk-taking does not subject the victim to a relative deprivation of security.[45]

Thus, both strict liability and negligence express the rationale of liability for unexcused, nonreciprocal risk-taking. The only difference is that reciprocity in strict liability cases is analyzed relative to the background of innocuous risks in the community, while reciprocity in the types of negligence cases discussed above is measured against the background of risk generated in specific activities like motoring and skiing. To clarify the kinship of negligence to strict liability, one should distinguish between two different levels of risk-creation, each level associated with a defined community of risks. Keeping domestic pets is a reciprocal risk relative to the community as a whole; driving is a reciprocal risk relative to the community of those driving normally; and driving negligently might be reciprocal relative to the even narrower community of those driving negligently. The paradigm of reciprocity holds that in all communities of reciprocal risks, those who cause damage ought not to be held liable.[46]

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[44] *E.g.*, Butterfield v. Forrester, 103 Eng. Rep. 926 (K.B. 1809) (defendant put a bar across the highway; plaintiff was riding without looking where he was going). In many cases of contributory negligence the risk is self-regarding and does not impose risks on the defendant. RESTATEMENT (SECOND) OF TORTS § 463 (1965); PROSSER 418–20. In these cases the rationale for denying recovery is unrelated to the paradigm of reciprocity. There is considerable dispute about what the rationale may be. *Id.* at 417–18; HARPER & JAMES 1193–1209.

[45] If the "last clear chance" doctrine is available, however, the victim may recover despite his contributory negligence. Peterson v. Burkhalter, 38 Cal. 2d 107, 237 P.2d 977 (1951) (motorist's last clear chance vis-a-vis a negligent motor scooter driver); RESTATEMENT (SECOND) OF TORTS §§ 479–80 (1965). A rationale for this doctrine might be that the defendant's risk is nonreciprocal even as to the class of victims taking negligent risks.

[46] Suppose a motorist runs down a pedestrian on the way to his parked car. Or suppose that an ambulance injures a pedestrian while speeding through the streets to rescue another injured pedestrian. These hypothetical problems pose puzzles at the fringes of the paradigm of reciprocity. The first is the question whether reciprocity must be temporal; the second, whether the interests of the victim or of the class he represents ought to bear on the analysis of reciprocity. These problems require further thought. *Cf.* Professor Fried's theory of the risk pool, which treats risks occurring at different times as offsetting. C. FRIED, AN ANATOMY OF VALUES 177–93 (1970).

Problems in defining communities of risks may account for the attractiveness of the reasonableness paradigm today. The increased complexity and interdependence of modern society renders legal analysis based upon a concept of community that presupposes clear lines of membership, relatively little overlapping, and a fair degree of uniformity in the activities carried on, exceedingly difficult in many cases. *Cf.* pp. 571–72 *infra*.

To complete our account of the paradigm of reciprocity, we should turn to one of its primary expressions: intentional torts, particularly the torts of battery and assault. Several features of the landlord's behavior in *Carnes v. Thompson*[47] in lunging at the plaintiff and her husband with a pair of pliers make it stand out from any of the risks that the plaintiff might then have been creating in return. An intentional assault or battery represents a rapid acceleration of risk, directed at a specific victim. These features readily distinguish the intentional blow from the background of risk. Perceiving intentional blows as a form of nonreciprocal risk helps us understand why the defendant's malice or animosity toward the victim eventually became unnecessary to ground intentional torts.[48] The nonreciprocity of risk, and the deprivation of security it represents, render irrelevant the attitudes of the risk-creator.[49]

All of these manifestations of the paradigm of reciprocity — strict liability, negligence and intentional battery — express the same principle of fairness: all individuals in society have the right to roughly the same degree of security from risk. By analogy to John Rawls' first principle of justice,[50] the principle might read: we all have the right to the maximum amount of security compatible with a like security for everyone else. This means that we are subject to harm, without compensation, from background risks, but that no one may suffer harm from additional risks without recourse for damages against the risk-creator. Compensation is a surrogate for the individual's right to the same security as enjoyed by others. But the violation of the right to equal security does not mean that one should be able to enjoin the risk-creating activity or impose criminal penalties against the risk-creator. The interests of society may often require a disproportionate distribution of risk. Yet, according to the paradigm of reciprocity, the interests of the individual require us to grant compensation whenever this disproportionate distribu-

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[47] 48 S.W.2d 903 (Mo. 1932).

[48] *See* Vosburg v. Putney, 80 Wis. 523, 50 N.W. 403 (1891). Animosity would obviously be relevant to the issue of punitive damages, *see* PROSSER 9–10, the formal rationales for which are retribution and deterrence, not compensation.

[49] This account of battery also explains the softening of the intent requirement to permit recovery when the defendant "knew to a substantial certainty" that his act would result in the victim's falling. Garratt v. Dailey, 46 Wash. 2d. 197, 279 P.2d 1091 (1955) (defendant, a young boy, pulled a chair out from the spot where the victim was about to sit down).

[50] Rawls, *Justice as Fairness*, 67 PHILOSOPHICAL REV. 164, 165 (1958) ("[E]ach person participating in a practice, or affected by it, has an equal right to the most extensive liberty compatible with a like liberty for all."). The ideas expressed in *Justice as Fairness* are elaborated in J. RAWLS, A THEORY OF JUSTICE (1971).

tion of risk injures someone subject to more than his fair share of risk.[51]

B. Excusing Nonreciprocal Risks

If the victim's injury results from a nonreciprocal risk of harm, the paradigm of reciprocity tells us that the victim is entitled to compensation. Should not the defendant then be under a duty to pay? Not always. For the paradigm also holds that nonreciprocal risk-creation may sometimes be excused, and we must inquire further, into the fairness of requiring the defendant to render compensation. We must determine whether there may be factors in a particular situation which would excuse this defendant from paying compensation.

Though the King's Bench favored liability in its 1616 decision of *Weaver v. Ward*,[52] it digressed to list some hypothetical examples where directly causing harm would be excused and therefore exempt from liability. One kind of excuse would be the defendant being physically compelled to act, as if someone took his hand and struck a third person.[53] Another kind would be the defendant's accidentally causing harm, as when the plaintiff suddenly appeared in the path of his musket fire.[54] The rationale for denying liability in these cases, as the court put it, is that the defendant acted "utterly without . . . fault." [55]

If a man trespasses against another, why should it matter whether he acts with "fault" or not? What the King's Bench must have been saying is that if a man injures another without fault on his part, there is no rational and fair basis for charging the costs of the accident to him rather than to an arbitrary third person. The inquiry about fault and excusability is an inquiry about rationally singling out the party immediately causing harm as the bearer of liability. Absent an excuse, the trespassory, risk-creating act provides a sufficient basis for imputing liability. Finding that the act is excused, however, is tantamount to per-

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[51] It might be that requiring the risk-creator to render compensation would be economically tantamount to enjoining the risk-creating activity. *See* note 115 *infra*. If imposing a private duty of compensation for injuries resulting from nonreciprocal risk-taking has an undesirable economic impact on the defendant, the just solution would not be to deny compensation, but either to subsidize the defendant or institute a public compensation scheme.

[52] 80 Eng. Rep. 284 (K.B. 1616).

[53] *Id.*

[54] *Id.*

[55] "[T]herefore no man shall be excused of a trespass (for this is the nature of an excuse, and not of a justification, prout ei bene licuit) except it may be judged utterly without his fault." *Id.*

ceiving that the act is not a factor fairly distinguishing the trespassing party from all other possible candidates for liability.

It is important to note that the inquiry whether the act sets the actor apart and makes him a fit candidate for liability was originally a non-instrumentalist inquiry. The King's Bench in 1616 did not ask: what good will follow from holding that physical compulsion and unavoidable accident constitute good excuses? [56] The question was rather: How should we perceive an act done under compulsion? Is it the same as no act at all? Or does it set the actor off from his fellow men? Thus, excusing is not an assessment of consequences, but a perception of moral equivalence. It is a judgment that an act causing harm ought to be treated as no act at all.

The hypotheticals of *Weaver v. Ward* correspond to the Aristotelian excusing categories of compulsion and unavoidable ignorance.[57] Each of these has spawned a line of cases denying liability in cases of inordinate risk-creation. The excuse of compulsion has found expression in the emergency doctrine, which excuses excessive risks created in cases in which the defendant is caught in an unexpected, personally dangerous situation.[58] In *Cordas v. Peerless Transportation Co.*,[59] for example, it was thought excusable for a cab driver to jump from his moving cab in order to escape from a threatening gunman on the running board. In view of the crowd of pedestrians nearby, the driver clearly took a risk that generated a net danger to human life. It was thus an unreasonable, excessive, and unjustified risk. Yet the overwhelmingly coercive circumstances meant that he, personally, was excused from fleeing the moving cab.[60] An example

[56] This is not to say that utilitarians have not attempted to devise an account of excuse based on the beneficial consequences to society of recognizing excuses. *See* J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 173 (1907). For an effective critique of Bentham, see H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, 60 ARISTOTELIAN SOC'Y PROCEEDINGS 1 (1959), in H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968).

[57] THE NICOMACHEAN ETHICS OF ARISTOTLE, *supra* note 40, Book III, ch. 1, at 48 ("Those things, then, are thought involuntary, which take place under compulsion or owing to ignorance.").

[58] *See e.g.*, St. Johnsbury Trucking Co. v. Rollins, 145 Me. 217, 74 A.2d 465 (1950); Majure v. Herrington, 243 Miss. 692, 139 So. 2d 635 (1962). The excuse is not available if the defendant has created the emergency himself. *See* Whicher v. Phinney, 124 F.2d 929 (1st Cir. 1942). *See generally* PROSSER 168–69.

[59] 27 N.Y.S.2d 198 (N.Y. City Ct. 1941).

[60] The rhetoric of reasonableness obscures the difference between assessing the risk and excusing the defendant on the ground that pressures were too great to permit the right decision. *Cf.* p. 560 *infra*. Yet it is clear that the emergency doctrine functions as a personal excuse, for the defense is applicable even if the actor made the wrong choice, *i.e.*, took an objectively unreasonable risk. *See* St. Johnsbury Trucking Co. v. Rollins, 145 Me. 217, 222, 74 A.2d 465, 468 (1950)

of unavoidable ignorance excusing risk-creation is *Smith v. Lampe*,[61] in which the defendant honked his horn in an effort to warn a tug that seemed to be heading toward shore in a dense fog. As it happened, the honking coincided with a signal that the tug captain expected would assist him in making port. Accordingly the captain steered his tug toward the honking rather than away from it. That the defendant did not know of the prearranged signal excused his contributing to the tug's going aground. Under the facts of the case, the honking surely created an unreasonable risk of harm. If instantaneous injunctions were possible, one would no doubt wish to enjoin the honking as an excessive, illegal risk. Yet the defendant's ignorance of that risk was also excusable. Under the circumstances he could not fairly have been expected to inform himself of all possible interpretations of honking in a dense fog.

As expanded in these cases, the excuses of compulsion and unavoidable ignorance added dimension to the hypotheticals put in *Weaver v. Ward*. In *Cordas* and *Smith* we have to ask: What can we fairly expect of the defendant under the circumstances? Can we ask of a man that he remain in a car with a gun pointed at him? Can we require that a man inform himself of all local customs before honking his horn? Thus the question of rationally singling out a party to bear liability becomes a question of what we can fairly demand of an individual under unusual circumstances. Assessing the excusability of ignorance or of yielding to compulsion can be an instrumentalist inquiry. As we increase or decrease our demands, we accordingly stimulate future behavior. Thus, setting the level of excusability could function as a level of social control. Yet one can also think of excuses as expressions of compassion for human failings in times of stress — expressions that are thought proper regardless of the impact on other potential risk-creators.

Despite this tension between thinking of excusing conditions in an instrumentalist or non-instrumentalist way, we can formulate two significant claims about the role of excuses in cases decided under the paradigm of reciprocity. First, excusing the risk-creator does not, in principle, undercut the victim's right to recover. In most cases, it is operationally irrelevant to posit a right to recovery when the victim cannot in fact recover from the excused risk-creator. Yet it may be important to distinguish between victims of reciprocal, background risks and victims of

(admonishing against assessing the risk with hindsight); Kane v. Worcester Consol. St. Ry., 182 Mass. 201, 65 N.E. 54 (1902) (Holmes, C.J.) (the choice "may be mistaken and yet prudent").

[61] 64 F.2d 201 (6th Cir.), *cert. denied*, 289 U.S. 751 (1933).

nonreciprocal risks. The latter class of victims — those who have been deprived of their equal share of security from risk — might have a claim of priority in a social insurance scheme. Further, for a variety of reasons, one might wish in certain classes of cases to deny the availability of particular excuses, such as insanity in general or immaturity for teenage drivers.[62] Insanity has always been a disfavored excuse; even the King's Bench in *Weaver v. Ward* rejected lunacy as a defense.[63] However, it is important to perceive that to reject the excuse is not to provide a rationale for recovery. It is not being injured by an insane man that grounds a right to recovery, but being injured by a nonreciprocal risk — as in every other case applying the paradigm of reciprocity. Rejecting the excuse merely permits the independently established, but previously unenforceable right to prevail.

Secondly, an even more significant claim is that these excuses — compulsion and unavoidable ignorance — are available in all cases in which the right to recovery springs from being subjected to a nonreciprocal risk of harm. We have already pointed out the applicability of these excuses in negligence cases like *Cordas* and *Smith v. Lampe*. What is surprising is to find them applicable in cases of strict liability as well; strict liability is usually thought of as an area where courts are insensitive to questions of fairness to defendants. Admittedly, the excuses of compulsion and unavoidable ignorance do not often arise in strict liability cases, for men who engage in activities like blasting, fumigating, and crop dusting typically do so voluntarily and with knowledge of the risks characteristic of the activity. Yet there have been cases in which strict liability for keeping a vicious dog was denied on the ground that the defendant did not know, and had no reason to know, that his pet was dangerous.[64] And doctrines of proximate cause provide a rubric for considering the excuse of unavoidable ignorance under another name.[65] In *Madsen v. East Jordan*

[62] Daniels v. Evans, 107 N.H. 407, 224 A.2d 63 (1966) rejected the defense of immaturity in motoring cases and thus limited Charbonneau v. MacRury, 84 N.H. 501, 153 A. 457 (1931) to cases in which the activity is "appropriate to [the minor's] age, experience and wisdom." 107 N.H. at 408, 224 A.2d at 64.

[63] "[T]herefore if a lunatick hurt a man, he shall be answerable in trespass . . . ." 80 Eng. Rep. at 284. *See* Alexander & Szasz, *Mental Illness as an Excuse for Civil Wrongs*, 43 NOTRE DAME LAW. 24 (1967).

[64] *See* Fowler v. Helck, 278 Ky. 361, 128 S.W.2d 564 (1939); Warrick v. Farley, 95 Neb. 565, 145 N.W. 1020 (1914).

[65] In Fletcher v. Rylands, L.R. 1 Ex. 265, 279–80 (1866), Blackburn, J., acknowledges the defenses of vis major and act of God. Both of these sound in a theory of excuse. Vis major corresponds to the excuse of physical compulsion recognized in Weaver v. Ward, 80 Eng. Rep. 284 (K.B. 1616), and acts of God are risks of which the defendant is presumably excusably ignorant.

Irrigation Co.,[66] for example, the defendant's blasting operations frightened the mother mink on the plaintiff's farm, causing them to kill 230 of their offspring. The Utah Supreme Court affirmed a demurrer to the complaint. In the court's judgment, the reaction of the mother mink "was not within the realm of matters to be anticipated." [67] This is precisely the factual judgment that would warrant saying that the company's ignorance of this possible result was excused,[68] yet the rubric of proximate cause provided a doctrinally acceptable heading for dismissing the complaint.[69]

It is hard to find a case of strict liability raising the issue of compulsion as an excuse. Yet if a pilot could flee a dangerous situation only by taking off in his plane, as the cab driver in *Cordas* escaped danger by leaping from his moving cab, would there be rational grounds for distinguishing damage caused by the airplane crash from damage caused by *Cordas'* cab? One would think not. Both are cases of nonreciprocal risk-taking, and both are cases in which unusual circumstances render it unfair to expect the defendant to avoid the risk he creates.

The analysis of excuses in cases of strict liability would apply as well in cases of intentional torts. Yet there are some intentional torts, like trespass to land, where the excuse of unavoidable ignorance is unavailable.[70] Where the tort fulfills subsidiary noncompensatory purposes, such as testing the title to land, these divergent purposes might render excuses unavailable.[71]

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[66] 101 Utah 552, 125 P.2d 794 (1942).

[67] *Id.* at 555, 125 P.2d at 795.

[68] *Madsen* is somewhat different from *Smith v. Lampe*, discussed at p. 553 *supra*. In *Smith* the driver was ignorant that honking could have any harmful result. Here it is just the particular harm of which the defendant was unaware.

[69] There seem to be two different types of proximate cause cases: (1) those that function as a way of raising the excuse of unavoidable ignorance and (2) those that hold that the damage is so atypical of the activity that even if the actor knew the result would occur, he would not be liable. If there were a replay of the facts in *Madsen*, with the defendant knowing of the risk to the mink, one would be surprised if the result would be the same; on the other hand, if the oil company in Mauney v. Gulf Refining Co., 193 Miss. 421, 9 So. 2d 780 (1942) knew of the risk that negligently starting a fire might startle a woman across the street, causing her to fall over a chair and suffer a miscarriage, the court would probably still find for the defendant. If this distinction is sound, it suggests that foreseeability is an appropriate test of proximate cause only in the first category, namely when the issue is really the excusability of the defendant's ignorance of the risk. *Cf.* pp. 571–73 *infra*.

[70] *See, e.g.*, Maye v. Tappan, 23 Cal. 306 (1863) (mistake of miner as to boundary between mines); Blatt v. McBarron, 161 Mass. 21, 36 N.E. 468 (1894) (mistake of process server as to right of entry); RESTATEMENT (SECOND) OF TORTS § 164 (1965).

[71] If the defendant could prevail by showing that his mistake was reasonable, the court would not have to resolve the conflicting claims of title to the land. Similarly, if the defendant in a defamation action could prevail by showing that

Where compensation is the primary issue, however, one may fairly conclude that the basic excuses acknowledged in *Weaver v. Ward* — compulsion and unavoidable ignorance — transcend doctrinal barriers and apply in all cases of nonreciprocal risk-taking.

Recognizing the pervasiveness of nonreciprocity as a standard of liability, as limited by the availability of excuses, should provide a new perspective on tort doctrine and demonstrate that strict liability and negligence as applied in the cases discussed above are not contrary theories of liability. Rather, strict liability and negligence appear to be complementary expressions of the same paradigm of liability.

III. The Paradigm of Reasonableness

Until the mid-nineteenth century, the paradigm of reciprocity dominated the law of personal injury. It accounted for cases of strict liability and of intentional torts and for the distinction implicit in the common law writ system between background risks and risks directly violating the interests of others.[72] In the course of the nineteenth century, however, the concepts underlying the paradigm of reciprocity gradually assumed new contours. A new paradigm emerged, which challenged all traditional ideas of tort theory. The new paradigm challenged the assumption that the issue of liability could be decided on grounds of fairness to both victim and defendant without considering the impact of the decisions on the society at large. It further challenged the assumption that the victim's right to recovery was distinguishable from the defendant's duty to pay. In short, the new paradigm of reasonableness represented a new style of thinking about tort disputes.

The core of this revolutionary change was a shift in the meaning of the word "fault." At its origins in the common law of torts, the concept of fault served to unify the medley of excuses available to defendants who would otherwise be liable in trespass for directly causing harm.[73] As the new paradigm emerged, fault came to be an inquiry about the context and the

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he was reasonably mistaken about the truth of the defamatory statement, the court would never reach the truth or falsity of the statement. To permit litigation of the truth of the charge, the law of defamation rejects reasonable mistake as an excuse. *See* Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 126 N.E. 260 (1920); Hulton & Co. v. Jones, [1909] 2 K.B. 444, *aff'd*, [1910] A.C. 20. In both of these cases, it was held irrelevant that the defendant did not intend his remarks to refer to the plaintiff.

[72] *See* notes 15 *supra* and 86 *infra*.

[73] *See* pp. 551–52 *supra*.

reasonableness of the defendant's risk-creating conduct.[74] Recasting fault from an inquiry about excuses into an inquiry about the reasonableness of risk-taking laid the foundation for the new paradigm of liability. It provided the medium for tying the determination of liability to maximization of social utility, and it led to the conceptual connection between the issue of fault and the victim's right to recover. The essence of the shift is that the claim of faultlessness ceased being an excuse and became a justification. The significance of this transformation is difficult to appreciate today, for the concepts of excuse and justification have themselves become obscure in our moral and legal thinking.[75] To clarify the conceptual metamorphosis of the fault concept, I must pause to explicate the difference between justifying and excusing conduct.

[74] Unreasonable risk-taking — doing that which a reasonable man would not do — is now the standard measure of negligence. *See, e.g.*, PROSSER 145–51; RESTATEMENT (SECOND) OF TORTS §§ 282–83 (1965). *But cf.* MODEL PENAL CODE § 2.02(2)(d) (Proposed Official Draft, 1962) (defining negligence as the taking of a "substantial and unjustified risk" and invoking the reasonable man only to account for the blameworthiness of the negligent conduct).

[75] Inadequate appreciation for the distinction between excuse and justification is clearly seen today in negligence per se cases. Courts and commentators use the terms "justification" and "excuse" interchangeably to refer to the criteria defeating the statutory norm. *See, e.g.*, Alarid v. Vanier, 50 Cal. 2d 617, 327 P.2d 897 (1958); HARPER & JAMES 1007–10. As a consequence, they are unable to satisfactorily rationalize giving conclusive effect to the legislature's determination of safe conduct while at the same time permitting the jury to make the final determination of the defendant's negligence. If excuse and justification are just two different labels for a univocal concept, these goals do appear incompatible; the statute cannot be conclusive on the issue of negligence if the jury also decides the same issue. Recognizing that the concept of fault is dualistic, that excusability is a separate dimension of fault, would enable courts to regard the violation of a statute as conclusive on negligence, but inconclusive on the excusability of the negligent conduct. Thus, the legislature would be given its due without sacrificing justice to the individual defendant who can show, for example, that he was compelled to run the illegal risk or prevented from perceiving its magnitude.

The distinction between excuse and justification in these cases was not always so obscure. *See* Martin v. Herzog, 228 N.Y. 164, 168, 126 N.E. 814, 815 (1920) (Cardozo, J.) (defining "the *unexcused* omission of the statutory signals" as negligence per se) (emphasis added).

The MODEL PENAL CODE §§ 3.04(1), 3.11(1) (Proposed Official Draft, 1962) (excused force is nevertheless unlawful force, but privileged or justified force is not), maintained a distinction between excuse and justification in formulating a definition of unlawful force for the purpose of delimiting the scope of self-defense. But this distinction did not survive adoption of the CODE in Illinois and Wisconsin. ILL. REV. STAT. ch. 38, § 7 (1969); WIS. STAT. § 939.42–.49 (1969). *See also* GA. CODE § 26–1011 (1933) ("There being no rational distinction between excusable and justifiable homicide, it shall no longer exist."), *as amended* § 26–901. The distinction is very much alive among philosophers, *see, e.g.*, Austin, *A Plea for Excuses*, 57 ARISTOTELIAN SOC'Y PROCEEDINGS 1 (1956–57), in FREEDOM AND RESPONSIBILITY 6 (H. Morris ed. 1961).

The difference between justifying and excusing conditions is most readily seen in the case of intentional conduct, particularly intentional crimes. Typical cases of justified intentional conduct are self-defense [76] and the use of force to effect an arrest.[77] These justificatory claims assess the reasonableness of using force under the circumstances. The questions asked in seeking to justify an intentional battery as self-defense relate to the social costs and the social benefits of using force and to the wrongfulness of the initial aggressor's conduct in attacking the defendant. The resolution of this cost-benefit analysis speaks to the legal permissibility and sometimes to the commendability of the *act* of using force under the circumstances. Excuses, in contrast, focus not on the costs and benefits of the *act*, but on the degree of the *actor*'s choice in engaging in it. Insanity and duress are raised as excuses even to concededly wrongful acts.[78] To resolve a claim of insanity, we are led to inquire about the *actor*'s personality, his capacities under stress and the pressures under which he was acting. Finding that the *actor* is excused by reason of insanity is not to say that the *act* was right or even permissible, but merely that the actor's freedom of choice was so impaired that he cannot be held accountable for his wrongful deed.

Justifying and excusing claims bear different relationships to the rule of liability. To justify conduct is to say that in the future, conduct under similar circumstances will not be regarded as wrongful or illegal. Excusing conduct, however, leaves intact the imperative not to engage in the excused act. Acquitting a

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[76] Self-defense is routinely referred to today as an instance of justification. *See, e.g.*, MODEL PENAL CODE § 3.04 (Proposed Official Draft, 1962) (including self-defense in article 3 of the CODE, which is titled "General Principles of Justification"); CAL. PENAL CODE § 197 (West 1970) ("justifiable homicide"); note 75 *supra*. In contrast, Blackstone described *se defendendo* as an instance of excusable homicide. 4 W. BLACKSTONE, COMMENTARIES *183–84. In Blackstone's day, the rubric of excusable homicide applied to those cases in which the defendant suffered only forfeiture of goods, but not execution or other punishment. *See* R. PERKINS, CRIMINAL LAW 892 (1957).

[77] The clearest case of common law justification was that of a legal official acting under authority of law. *See* 4 W. BLACKSTONE, COMMENTARIES *178–79.

[78] The MODEL PENAL CODE (Proposed Official Draft, 1962) acknowledges that claims of insanity and duress are distinguishable from claims of justification and does not include them within article 3's "General Principles of Justification." Rather, they appear in §§ 4.01 and 2.09 respectively.

The common law is ambivalent on the status of duress. The defense is not recognized in homicide cases, State v. Nargashian, 26 R.I. 299, 58 A. 953 (1904), thus suggesting that the focus of the defense may be the rightness of the defendant's act, rather than the involuntariness of the actor's response to external coercion. German law unequivocally acknowledges that duress is an excuse and that it applies even in homicide cases. StGB § 52 (C.H. Beck 1970); A. SCHÖNKE & H. SCHRÖDER, STRATGESETZBUCH: KOMMENTAR 457 (15th ed. 1970).

man by reason of insanity does not change the norm prohibiting murder. Rather, it represents a judgment that a particular person, acting under particular pressures at a particular time, cannot be held accountable for violating that norm. The difference between changing the rule and finding in a particular case that it does not apply is best captured by asking whether in finding for the defendant the court recognizes a right to engage in the activity. To justify conduct as self-defense is to recognize a right to use force, but to excuse homicide under duress is not to acknowledge a right to kill. It is rather to recognize that an actor cannot be fairly blamed for having succumbed to pressures requiring him to kill.[79]

The distinction between justifying and excusing conduct applies with equal coherence in analyzing risk-creating behavior. Questions about the excusability of risk-creation focus on the actor's personal circumstances and his capacity to avoid the risk. Could he have resisted the intimidations of a gunman in his car? Could he have found out about the risks latent in his conduct? Questions about justification, on the other hand, 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? As the inquiry shifts from excusing to justifying risks, the actor and his traits become irrelevant. At the level of justification, the only relevant question is whether the risk, on balance, is socially desirable. Excusing a risk, as a personal judgment about the actor, leaves the right of the victim intact; but justifying a risk recognizes the defendant's right to run that risk vis-à-vis the victim. If the risk is justified in this sense, the victim could hardly have a claim against the risk-creator. The right of the risk-creator supplants the right of the victim to recover.[80]

That the fault requirement shifted its orientation from ex-

[79] This is fairly clear in the law of *se defendendo*, which is the one instance in which the common law recognized an excuse to a homicide charge based on external pressure rather than the propriety of the act. *See* E. COKE, THIRD INSTITUTE *55; note 78 *supra*. For the defense to be available, the defedant had to first retreat to the wall if he could do so without risking his life and had to have no other means than the use of force for preserving his own life. Coke speaks of the killing in these cases as "being done upon inevitable cause." COKE, THIRD INSTITUTE *55.

These issues are more thoroughly discussed in Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis*, 119 U. PA. L. REV. 401 (1971). For a general account of the deficiencies in the common law approach to excusing conditions, see G. Fletcher, The Individualization of Excusing Conditions, 1971 (unpublished manuscript on file at the Harvard Law School Library).

[80] T. COOLEY, A TREATISE ON THE LAW OF TORTS 81 (1879) ("That which it is right and lawful for one man to do cannot furnish the foundation for an action in favor of another.").

cusing to justifying risks had the following consequences: (1) fault became a judgment about the risk, rather than about the responsibility of the individual who created the risk; (2) fault was no longer a question of fairness to the individual, but an inquiry about the relative costs and benefits of particular risks; (3) fault became a condition for recognizing the right of the victim to recover. These three postures of the fault requirement diverged radically from the paradigm of reciprocity. Together, they provided the foundation for the paradigm of reasonableness, a way of thinking that was to become a powerful ideological force in tort thinking of the late nineteenth and twentieth centuries.[81]

The reasonable man became a central, almost indispensable figure in the paradigm of reasonableness.[82] By asking what a reasonable man would do under the circumstances, judges could assay the issues both of justifying and excusing risks. Reasonable men, presumably, seek to maximize utility; therefore, to ask what a reasonable man would do is to inquire into the justifiability of the risk.[83] If the risk-running might be excused, say by reason of the emergency doctrine or a particular defect like blindness or immaturity, the jury instruction might specify the excusing condition as one of the "circumstances" under which the conduct of the reasonable man is to be assessed. If the court wished to include or exclude a teenage driver's immaturity as a possible excusing condition, it could define the relevant "circumstances" accordingly.[84] Because the "reasonable man" test so adeptly encompasses both issues of justification and excuse, it is not surprising that the paradigm of reasonableness has led to the blurring of that distinction in tort theory.[85]

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[81] The impact of the paradigm is not so much that negligence emerged as a rationale of liability, for many cases of negligence are compatible with the paradigm of reciprocity. *See* pp. 548–49 *supra*. The ideological change was the conversion of each tort dispute into a medium for furthering social goals. See Prosser's discussion of "social engineering," PROSSER 14–16. This reorientation of the process led eventually to the blurring of the issues of corrective justice and distributive justice discussed at note 40 *supra*.

[82] For early references to "reasonableness" as the standard of negligence, see Blyth v. Birmingham Waterworks Co., 156 Eng. Rep. 1047 (Ex. 1856); COOLEY, *supra* note 80, at 662. *But cf.* Vaughan v. Menlove, 132 Eng. Rep. 490, 493 (C.P. 1837) ("a man of ordinary prudence"). Notions of "ordinary" and "normal" men are compatible with the paradigm of reciprocity; reciprocal risks are those that ordinary men normally impose on each other. The shift to the "reasonable" man was significant, for it foreshadowed the normative balancing of the interests implicit in the concept of reasonableness as an objective standard.

[83] *See* pp. 558–59 *supra*.

[84] *See* note 62 *supra*.

[85] It is especially surprising that courts and commentators have not explicitly perceived that the emergency doctrine functions to excuse unreasonable risks. *See* cases cited note 58 *supra*; HARPER & JAMES 938–40; PROSSER 168–70.

No single appellate decision ushered in the paradigm of reasonableness. It derived from a variety of sources.[86] If there was a pivotal case, however, it was *Brown v. Kendall*,[87] decided by the Massachusetts Supreme Judicial Court in 1850. The facts of the case were well-suited to blurring the distinction between excusing the defendant's ignorance and assessing the utility of the risk that he took. In an effort to separate two fighting dogs, Kendall began beating them with a stick. Brown was standing nearby, which Kendall presumably knew; and both he and Brown moved about with the fighting dogs. At one point, when he had just backed up to a position in front of Brown, Kendall raised his stick, hitting Brown in the eye and causing serious injury. Brown sought to recover on the writ of trespass, whereby traditionally a plaintiff could establish a prima facie case simply by proving that his injuries were the direct result of the defendant's act — a relationship which clearly existed in the case.

In order for the defendant to invoke the defense of inevitable accident, he would have had to show that he neither knew nor could have been expected to know Brown's whereabouts at the

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[86] One can distinguish among the following strains that converged in the course of the nineteenth century:

(1) the tendency to regard more and more affirmative conduct as equivalent to passive, background activity. The English courts took this view of activities that one had a right to engage in. *See* Tillett v. Ward, 10 Q.B.D. 17 (1882) (right to drive oxen on highway; no liability for damage to ironmonger's shop); Goodwyn v. Cheveley, 28 L.J. Ex. (n.s.) 298 (1859) (right to drive cattle on highway; no liability to neighboring property). The American courts started with the suggestion in Vincent v. Stinehour, 7 Vt. 62, 65 (1835), that duty-bound acts were to be treated like background risks. Brown v. Kendall, 60 Mass. (6 Cush.) 292, 296 (1850), extended this category to include all acts "lawful and proper to do," thus obliterating the distinction between background risks and assertive conduct.

(2) the judgment that those who go near dangerous areas, like highways, "[take] upon themselves the risk of injury from that inevitable danger . . . ." Fletcher v. Rylands, 65 L.R. 1 Ex. 265, 286 (1866) (Blackburn, J.).

(3) the indulgence by courts in a fallacious reinterpretation of older decisions, such as Gibbons v. Pepper, 87 Eng. Rep. 469 (K.B. 1695), to stand for the proposition that if the act is "not imputable to the neglect of the party by whom it is done, or to his want of caution, an action of trespass does not lie . . . ." Harvey v. Dunlop, Hill & Denio Supp. 193, 194 (N.Y. 1843); *cf.* Vincent v. Stinehour, 7 Vt. at 64 (If "no degree of blame can be imputed to the defendant, the conduct of the defendant was not unlawful."). The fallacy of this reasoning is the assumption that recognizing faultlessness as an excuse entailed an affirmative requirement of proving fault as a condition of recovery (fallacy of the excluded middle).

(4) the positivist view that tort liability was functionally equivalent to criminal liability. I J. AUSTIN, LECTURES ON JURISPRUDENCE 416, 516–20 (3d ed. R. Campbell 1869); J. SALMOND, LAW OF TORTS 12 (3d ed. 1912). According to this view, requiring an activity to pay its way is to impose a sanction for unlawful activity.

[87] 60 Mass. (6 Cush.) 292 (1850).

moment he last raised the stick. Thus, to argue that he should be excused on the ground of ignorance, he would have had to show that the situation was such that it was expectable and blameless for him not to inform himself better of Brown's position before the fateful blow. But an inquiry about the acceptability of the defendant's ignorance as an excuse leads to a broader assessment of the defendant's conduct in putting himself in a position where he unwittingly created a risk of harm to Brown. There is an important difference between (1) looking at the narrower context to determine whether at the moment of heightened risk — when Kendall raised the stick — his ignorance was excusable and (2) broadening the context and thereby leveling the risk by shifting the inquiry from the moment of the stick-raising to the general activity of separating the dogs. Observing that distinction was essential to retaining faultlessness as a question of excusing, rather than justifying trespassory conduct. Yet it was a distinction that had lost its conceptual force. The trial judge and Chief Justice Shaw, writing for the Supreme Judicial Court, agreed that the defense of inevitable accident went to the adequacy of the defendant's care under the circumstances.[88] But the two judges disagreed on the conceptual status of the issue of the required care. The trial judge, in line with several centuries of case authority, saw the issue as an exception to liability, to be proven by the defendant.[89] 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, thus signaling and end to direct causation as a rationale for prima facie liability.[90]

Admittedly, *Brown v. Kendall* could be read as a revision of the standard for excusing unwitting risk-creation: instead of extraordinary care, ordinary care should suffice to admit ignorance as an excuse; and it should be up to the plaintiff to prove the issue. Though the case might have yielded this minor modification of the law, Chief Justice Shaw's opinion created possibilities for an entirely new and powerful use of the fault standard, and the judges and writers of the late nineteenth and early twentieth centuries responded sympathetically.[91]

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[88] Their difference was one of degree. The trial judge thought the issue was whether the defendant had exercised extraordinary care, *id.* at 293; Judge Shaw saw the issue as one of ordinary care, *id.* at 296.

[89] *Id.* at 294.

[90] *Id.* at 297.

[91] American authorities readily came to the conclusion that fault-based negligence and intentional battery exhausted the possibilities for recovery for personal injury. *See* COOLEY, *supra* note 80, at 80, 164; *cf.* 3 S. GREENLEAF, EVIDENCE 74 (2d ed. 1848) (pre-*Brown v. Kendall*). Trespass survived much longer in the English literature. *See* Goodhart & Winfield, *Trespass and Negligence*, 49 L.Q.

Shaw's revision of tort doctrine made its impact in cases in which the issue was not one of excusing inadvertent risk-creation, but one of justifying risks of harm that were voluntarily and knowingly generated. Consider the following cases of risk-creation: (1) the defendant operates a streetcar, knowing that the trains occasionally jump the tracks;[92] (2) the defendant police officer shoots at a fleeing felon, knowing that he thereby risks hitting a bystander;[93] (3) the defendant undertakes to float logs downriver to a mill, knowing that flooding might occur which could injure crops downstream.[94] All of these victims could receive compensation for their injuries under the paradigm of reciprocity, as incorporated in the doctrine of trespassory liability; the defendant or his employees directly and without excuse caused the harm in each case. Yet as *Brown v. Kendall* was received into the tort law, the threshold of liability became whether, under all the circumstances, the defendant acted with ordinary, prudent care. But more importantly, the test of ordinary care transcended its origins as a standard for determining the acceptability of ignorance as an excuse, and became a rationale for determining when individuals could knowingly and voluntarily create risks without responsibility for the harm they might cause. The test for justifying risks became a straightforward utilitarian comparison of the benefits and costs of the defendant's risk-creating activity.[95] The assumption emerged that reasonable men do what

REV. 359 (1933); Roberts, *Negligence: Blackstone to Shaw to ? An Intellectual Escapade in a Tory Vein*, 50 CORNELL L. REV. 191 (1965). However, Roberts argued that trespass died among English practitioners well before the academic commentators wrote its obituary. *Id.* at 207–08.

[92] *See* Felske v. Detroit United Ry., 166 Mich. 367, 371–72, 130 N.W. 676, 678 (1911); Kelly v. United Traction Co., 88 App. Div. 234, 235–36, 85 N.Y.S. 433, 434 (1903). *But cf.* Chicago Union Traction Co. v. Giese, 229 Ill. 260, 82 N.E. 232 (1907) (applying res ipsa loquitur). Some of the earlier cases exonerating transportation interests were Beatty v. Central Iowa Ry., 58 Iowa 242, 12 N.W. 332 (1882) (employing cost-benefit analysis to hold railroad need not eliminate all risk when designing a grade crossing); Bielenberg v. Montana Union Ry., 8 Mont. 271, 20 P. 314 (1889) (statute making railroads absolutely liable for injury to livestock held unconstitutional; liability had to be based on negligence); Steffen v. Chicago & N.W. Ry., 46 Wis. 259, 50 N.W. 348 (1879) (train caused rock to shoot up and hit employee standing nearby; judgment for plaintiff reversed).

[93] *Brown v. Kendall* had an immediate impact in Morris v. Platt, 32 Conn. 75, 79–80 (1864) (liability for gun shot wound to bystander only if firing was negligent as to bystander); *see* Paxton v. Boyer, 67 Ill. 132 (1873); Shaw v. Lord, 41 Okla. 347, 137 P. 885 (1914).

[94] *See* Hopkins v. Butte & M. Commercial Co., 13 Mont. 223, 33 P. 817 (1893) (defendant's floating logs caused stream to dam, flooding plaintiff's land and destroying crops; no liability in the absence of negligence).

[95] The utilitarian calculus did not become explicit until Terry explicated the courts' thinking in his classic article, Terry, *Negligence*, 29 HARV. L. REV. 40 (1915).

is justified by a utilitarian calculus, that justified activity is lawful, and that lawful activities should be exempt from tort liability.

In the cases mentioned above, the arguments are readily at hand for maximizing utility by optimizing accidents: (1) the expense of providing rails to prevent streetcars from leaving the tracks would require a substantial increase in streetcar fares — it is better that occasional accidents occur; (2) capturing fleeing felons is sufficiently important to warrant a few risks to onlookers; (3) transporting logs sufficiently furthers the social good to justify some risks to farmers. More generally, if promoting the general welfare is the criterion of rights and duties of compensation, then a few individuals must suffer. One might fairly wonder, however, why streetcar passengers, law enforcement, and the lumber industry should prosper at the expense of innocent victims.

IV. Utility and the Interests of the Individual

The accepted reading of tort history is that the rise of the fault standard in the nineteenth century manifested a newly found sensitivity to the morality of legal rules. James Barr Ames captured orthodox sentiments with his conclusion that "[t]he ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril." [96] This reading of the case law development finds its source in Holmes' dichotomy between acting at one's peril and liability based on fault.[97] The assumption of Holmes' influential analysis is that there are only two doctrinal possibilities: the fault standard, particularly as expressed in *Brown v. Kendall*,[98] and strict or absolute liability. The latter is dubbed unmoral; therefore, the only option open to morally sensitive theorists would appear to be liability for fault alone.

The mistake in this reading of legal history is the unanalyzed assumption that every departure from the fault standard partakes of the strict liability expressed in the maxim "a man acts at his peril." There are in fact at least four distinct points on the continuum from strict liability to the limitation on liability introduced by *Brown v. Kendall*. In resolving a routine trespass dispute for bodily injury, a common law court might, among other things:

(1) reject the relevance of excuses in principle and rule for the plaintiff;

[96] Ames, *Law and Morals*, *supra* note 7, at 99.

[97] *See* Holmes, *supra* note 7, at 79–80.

[98] *See* pp. 561–62 *supra*.

(2) recognize the principle of excusing trespassory conduct, but find under the facts of the case that the defendant's conduct was unexcused;
(3) find that the defendant's conduct was excused and therefore exempt from liability;
(4) recognize reasonableness as a justification for directly causing harm to another.

If the maxim "acting at one's peril" connotes a standard that is "unmoral" — a standard that is insensitive to the fairness of imposing liability — then the charge properly attaches only to the first of the above four categories. It is only in this situation that authoring harm is conclusive on liability. Yet there are few, if any, unequivocal examples of this form of decision in the common law tradition.[99] After *Weaver v. Ward*,[100] one can hardly speak of the common law courts maintaining, as a principle, that excusing conditions are irrelevant to liability.[101]

Cases of the second type did abound at the time of Holmes' writing.[102] They represent victories for injured plaintiffs, but they affirm, at least implicitly, the traditional requirement that the act directly causing harm be unexcused. Yet Holmes treats these cases as instances of absolute liability, of "acting at one's peril." [103] In so doing, he ignores the distinction between reject-

[99] Even in The Thorns Case, Y.B. Mich. 6 Edw. 4, f.7, pl. 18 (1466), reprinted in C. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW 195 (1949), where the defendant was liable in trespass for entering on plaintiff's land to pick up thorns he had cut, Choke, C.J., said the defendant would have a good plea if "he [had done . . . all that was in his power to keep them out]." *Id.* at 196.

[100] 80 Eng. Rep. 284 (K.B. 1616); *see* pp. 551–52 *supra*.

[101] *See generally* Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 441 (1894); Winfield, *The Myth of Absolute Liability*, 42 L.Q. REV. 37 (1926).

[102] In some cases, the unexcused nature of the defendant's risk-taking was obvious on the facts. *See* Leame v. Bray, 102 Eng. Rep. 724 (K.B. 1803) (defendant was driving on the wrong side of the highway; issue was whether trespass would lie); Underwood v. Hewson, 93 Eng. Rep. 722 (K.B. 1724) (defendant cocked gun and it fired; court held trespass would lie). In Dickenson v. Watson, 84 Eng. Rep. 1218 (K.B. 1682) the court said that the claim of "unavoidable necessity" was not adequately shown. In a third type of case, plaintiffs received verdicts despite instructions requiring the jury to assess the excusability of the defendant's act. *See* Goodman v. Taylor, 172 Eng. Rep. 1031 (K.B. 1832); *cf.* Castle v. Duryee, 2 Keyes 169, 174 (N.Y. 1865) (suggesting that the instructions were too favorable to the defendant).

[103] HOLMES, *supra* note 7, at 87–89. Holmes relies heavily on a quote from Grose, J., in Leame v. Bray, 102 Eng. Rep. 724, 727 (K.B. 1803): "[I]f . . . the act of the party . . . be the immediate cause of [the injury], though it happen accidentally or by misfortune, . . . he is answerable in trespass." Yet Grose, J., relies on Underwood v. Hewson, 93 Eng. Rep. 722 (K.B. 1724), and Weaver v. Ward, 80 Eng. Rep. 284 (K.B. 1616), *see* pp. 551–52, both of which at least implicitly recognize excusing conditions. Holmes supposed that if one were liable

ing excuses in principle (type one) and rejecting an alleged excuse on the facts of the case (type two). There is an obvious difference between finding for the plaintiff regardless of fault and finding for the plaintiff because the defendant fails to convince the trier of fact that he acted "utterly without fault." By ignoring this difference, as well as the distinction between denying fault by claiming an excuse and urging reasonableness as a justification, Holmes could generate a dichotomy that made *Brown v. Kendall* seem like an admirable infusion of ethical sensitivity into tort doctrine.

But the issue in the nineteenth century was not the choice between strict liability on the one hand and liability based on fault on the other. Nor was it a simplistic choice between an "unmoral" standard and an ethical one. Rather, the question of the time was the shape that the fault standard would take. Should the absence of fault function as an excuse within a paradigm of reciprocity? Or should it function as a standard for exempting from liability risks that maximize utility? That was the moral and policy question that underlay the nineteenth century revolution in tort thinking. The question posed by the conflict of paradigms was whether traditional notions of individual autonomy would survive increasing concern for the public welfare. If the courts of the time had clearly perceived and stated the issue, they would have been shaken by its proportions.

The same fundamental conflict between the public interest and individual autonomy arose even more sharply in criminal cases that reached the courts in the late nineteenth century. The public interest found expression in tort disputes by decisions protecting activities thought to be socially useful, and in criminal cases by decisions designed to deter activities thought to be socially pernicious. Just as one goal of social policy might require some innocent accident *plaintiffs* to suffer their injuries without compensation, the other might require some morally innocent *defendants* to suffer criminal sanctions. Indeed, both matters received decisive judicial action in the same decade. Shortly before Chief Justice Shaw laid the groundwork in *Brown v. Kendall* [104] for exempting socially useful risks from tort liability,[105] he expressed the same preference for group welfare over individual autonomy in criminal cases. In *Commonwealth v. Mash* [106] he

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for an "accidental" injury, then liability, in some sense, violated principles of fairness; but the terms "accident" and "misfortune" are perfectly compatible with unexcused risk-taking.

[104] 60 Mass. (6 Cush.) 292 (1850).

[105] *See* pp. 561–62 *supra*.

[106] 48 Mass. (7 Met.) 472 (1844).

generated a rationale for a bigamy conviction against a woman who sincerely regarded her absent husband as dead. Shaw tacitly conceded that Mrs. Mash was not blameworthy for entering into the second marriage.[107] Yet that mattered little, he argued, for preventing bigamy was "essential to the peace of families and the good order of society. . . ." [108] Thus, in Shaw's mind, the social interest in deterring bigamy justified convicting a morally innocent woman.[109] Shaw's decision in *Mash* was of the same ideological frame as his rewriting of tort doctrine in *Brown v. Kendall.* If a judge is inclined to sacrifice morally innocent offenders for the sake of social control, he is also likely to require the victims of socially useful activities to bear their injuries without compensation.[110] It is not at all surprising, then, that the rise of strict liability in criminal cases parallels the emergence of the paradigm of reasonableness in the law of negligent torts.[111] If it is unorthodox to equate strict liability in criminal cases with a species of negligence in tort disputes, it is only because we are the victims of the labels we use. If we shift our focus from the magic of legal rubrics to the policy struggle underlying tort and criminal liability, then it is quite clear that the appropriate analogy is between strict criminal liability and the limitation imposed by the rule of reasonableness in tort doctrine.

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[107] Shaw acknowledged the distinction between the "criminal intent" that rendered an actor blameworthy and the "criminal intent" that could be imputed to someone who voluntarily did the act prohibited by the legislature. *Id.* at 474. It was only in the latter sense, Shaw conceded, that Mrs. Mash acted with "criminal intent." *Id.*

[108] *Id.* at 473.

[109] Before sentence was pronounced, Mrs. Mash received a full pardon from the Governor. *Id.* at 475.

[110] Recent decisions of the California courts express the opposite position. The California Supreme Court has sought to protect morally innocent criminal defendants, People v. Hernandez, 61 Cal. 2d 529, 393 P.2d 673, 39 Cal. Rptr. 361 (1964) (recognizing reasonable mistake as to girl's age as a defense in statutory rape cases); People v. Vogel, 46 Cal. 2d 798, 299 P.2d 850 (1956) (recognizing reasonable mistake of marital status as a defense in bigamy cases), and at the same time it has extended protection to innocent accident victims, Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969) (strict products liability extended to bystanders).

[111] If this thesis is correct, it suggests that the change in judicial orientation in the late nineteenth century was both beneficial and harmful to large business enterprises. Limiting tort liability to negligence was obviously helpful in reducing the costs of doing business; but imposing strict liability on corporate officers raised the nonmonetary costs of production and marketing. *See, e.g.*, People v. Roby, 52 Mich. 577, 18 N.W. 365 (1884) (proprietor held strictly liable for Sunday sale of liquor by his clerk without proprietor's knowledge or intent); Regina v. Stephens, [1866] L.R. 1 Q.B. 702 (quarry owner held strictly liable for his workmen's dumping refuse).

Not surprisingly, then, the contemporary arguments against the utilitarianism expressed in strict criminal liability [112] yield a critique of the rule of reasonableness in tort doctrine. As applied in assessing strict criminal liability, the utilitarian calculus treats the liberty of the morally innocent individual as an interest to be measured against the social interest in deterring criminal conduct; it is a matter of judgment whether to favor the interests of the individual or the interests of society. But there are some sacrifices of individual liberty that persons cannot be expected to make for the welfare of their neighbors. In criminal cases, the claim of those opposing strict liability is that no man should be forced to suffer a condemnatory sanction just because his conduct happens to cause harm or happens to contravene a statute. Something more is required to warrant singling out a particular defendant and subjecting him to sanctions in the interest of deterring would-be offenders. There must be a rationale for overcoming his prima facie right to be left alone. That rationale is provided in the contemporary critical literature by the insistence that only culpable offenders be subject to sanctions designed to deter others.[113] Culpability serves as a standard of moral forfeiture.[114] It provides a standard for assessing when, by virtue of his illegal conduct, the defendant should be treated as having forfeited his freedom from sanctions.

Just as an individual cannot be expected to suffer criminal sanctions for the sake of the common good, he cannot fairly be expected to suffer other deprivations in the name of a utilitarian calculus. His life, bodily integrity, reputation, privacy, liberty and property — all are interests that might claim insulation from deprivations designed to further other interests. Insulation might take the form of criminal or injunctive prohibitions against conduct causing undesired deprivations. But criminal and injunctive sanctions are questionable where the activity is reasonable in the sense that it maximizes utility and thus serves the interests of the community as a whole. Protecting the autonomy of the individual does not require that the community forego activities that serve its interests. In the case of socially useful activities, then, insulation can take the form of damage awards shifting the cost of the deprivation from the individual to the agency unexcusably

[112] *See, e.g.*, H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 62–135 (1968); Dubin, *Mens Rea Reconsidered: A Plea for A Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322 (1966); Griffiths, Book Review, 79 YALE L.J. 1388 (1970).

[113] *See* PACKER, *supra* note 112, at 62–70; Dubin, *supra* note 112, at 365–66.

[114] Culpability may also function as a standard of moral desert. I have attempted to clarify the difference between these two functions in Fletcher, *supra* note 79, at 417–18.

causing it. The burden should fall on the wealth-shifting mechanism of the tort system to insulate individual interests against community demands. By providing compensation for injuries exacted in the public interest, the tort system can protect individual autonomy by taxing, but not prohibiting, socially useful activities.[115]

V. The Interplay of Substance and Style

The conflict between the paradigm of reasonableness and the paradigm of reciprocity is, in the end, a struggle between two strategies for justifying the distribution of burdens in a legal system. The strategy of utility proceeds on the assumption that burdens are fairly imposed if the distribution optimizes the interests of the community as a whole. The paradigm of reciprocity, on the other hand, is based on a strategy of waiver. It takes as its starting point the personal rights of individuals in society to enjoy roughly the same degree of security, and appeals to the conduct of the victims themselves to determine the scope of the right to equal security. By interpreting the risk-creating activities of the defendant and of the victim as reciprocal and thus offsetting, courts may tie the denial of liability to the victim to his own waiver of a degree of security in favor of the pursuit of an activity of higher risk.

These two paradigms, and their accompanying strategies for distributing burdens, overlap in every case in which an activity endangers outsiders not participating in the creation of the risk. Where the courts deny liability, say, for leaving a golf club where a child might pick it up and swing it,[116] they must decide whether to appeal either to the paradigm of reciprocity and argue that the risk is an ordinary, reciprocal risk of group living, or to the paradigm of reasonableness and argue that the activity is socially beneficent and warrants encouragement. They must decide, in short, whether to focus on the parties and their relationship or on the society and its needs. In these cases where the paradigms overlap, both ways of thinking may yield the same result. Yet the rhetoric of these decisions creates a pattern that influences reasoning in cases in which the paradigms diverge.

The major divergence is the set of cases in which a socially useful activity imposes nonreciprocal risks on those around it.

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[115] *But cf.* New York Times v. Sullivan, 376 U.S. 254 (1964), expressing the view that in some situations tort liability impermissibly inhibits the exercise of freedom of the press. If the liberty to create risks were conceived as analagous to free speech, the same criticism would apply to the argument of the text.

[116] *See* Lubitz v. Wells, 19 Conn. Supp. 322, 113 A.2d 147 (Super. Ct. 1955).

These are the cases of motoring, airplane overflights, air pollution, oil spillage, sonic booms — in short, the recurrent threats of modern life.[117] In resolving conflict between those who benefit from these activities and those who suffer from them, the courts must decide how much weight to give to the net social value of the activity. In *Boomer v. Atlantic Cement Co.*,[118] the New York Court of Appeals reflected the paradigm of reciprocity by defining the issue of holding a cement company liable for air pollution as a question of the "rights of the parties," [119] rather than the "promotion of the general public welfare." [120] Similarly, in its recent debate over the liability of airplane owners and operators for damage to ground structures, the American Law Institute faced the same conflict. It too opted for the paradigm of reciprocity.[121]

A variation on this conflict of paradigms emerges when a bystander, injured by a motorist, sues the manufacturer of the vehicle on the theory that a defect in the vehicle caused the accident. In these cases, the ultimate issue is whether the motoring public as a whole should pay a higher price for automobiles in order to compensate manufacturers for their liability costs to pedestrians. The rationale for putting the costs on the motoring public is that motoring, as a whole, imposes a nonreciprocal risk on pedestrians and other bystanders. In addressing itself to this issue in *Elmore v. American Motors Corp.*,[122] the California Supreme Court stressed the inability of bystanders to protect themselves against the risk of defective automobiles. Though it grouped pedestrians together with other drivers in extending strict products liability, the *Elmore* opinion appears to be more oriented to questions of risk and of who subjects whom to an excessive risk than it is to the reasonableness and utility of motoring.

[117] There is considerable support among commentators for classifying many of these activities as ultra-hazardous in order to impose liability regardless of their social value. *See, e.g.*, Avins, *Absolute Liability for Oil Spillage*, 36 BROOKLYN L. REV. 359 (1970); Baxter, *The SST: From Watts to Harlem in Two Hours*, 21 STAN. L. REV. 1, 50–53 (1968).

[118] 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

[119] 26 N.Y.2d at 222, 257 N.E.2d at 871, 309 N.Y.S.2d at 314.

[120] *Id.* In deciding whether to grant an injunction in addition to imposing liability for damages, however, the court did consider the economic impact of closing down the cement factory. 26 N.Y.2d at 225, 257 N.E.2d at 873, 309 N.Y.S.2d at 316.

[121] The Institute initially took the position that only abnormal aviation risks should generate liability for ground damage, *see* RESTATEMENT (SECOND) OF TORTS § 520A (Tent. Draft No. 11, 1965), and then, reversing itself the following session, voted to encompass all aviation risks to ground structure within the rule of strict liability, *see* RESTATEMENT (SECOND) OF TORTS § 520A, Note to Institute at 1 (Tent. Draft No. 12, 1966).

[122] 70 Cal. 2d 615, 451 P.2d 84, 75 Cal. Rptr. 652 (1969).

Thus, this opinion, too, hints at a reawakening of sensitivity to the paradigm of reciprocity.

On the whole, however, the paradigm of reasonableness still holds sway over the thinking of American courts. The reasonable man is too popular a figure to be abandoned. The use of litigation to pursue social goals is well entrenched. Yet the appeal to the paradigm might well be more one of style than of substance.

In assessing the reasonableness of risks, lawyers ask many seemingly precise questions: What are the consequences of the risk, its social costs and social benefits? What specific risks are included in the "ambit of the risk"? One can speak of formulae, like the Learned Hand formula,[123] and argue in detail about questions of costs, benefits and trade-offs. This style of thinking is attractive to the legal mind. Its tracings in proximate cause cases are the formulae for defining the scope of the risk. Thus *Palsgraf* enthrones the "eye of reasonable vigilance" to rule over "the orbit of the duty." [124] And the standard of "foreseeability" has become the dominant test of proximate cause.[125] With close examination one sees that these formulae are merely tautological constructs designed to support an aura of utilitarian precision. Only if remote consequences are defined out of existence can one total up the benefits and the costs of all (known) consequences. The test of "foreseeability" permits balancing by restrictively defining the contours of the scales. Unforeseeable risks cannot be counted as part of the costs and benefits of the risk; for, after all, they are unforeseeable and therefore unknowable.[126] There may be much work to be done in explaining why this composite mode of thought — the idiom of balancing, orbits of risk and foreseeability — has captured the contemporary legal mind. But there is little doubt that it has, and this fashionable style of thought buttresses the substantive claims of the paradigm of reasonableness.

The paradigm of reciprocity, on the other hand, for all its substantive and moral appeal, puts questions that are hardly

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[123] *See* note 19 *supra*.

[124] Palsgraf v. Long Island R.R., 248 N.Y. 339, 343, 162 N.E. 99, 100 (1928).

[125] PROSSER 267; WINFIELD ON TORT 91–92 (8th ed. J. Jolowicz & T. Lewis 1967). The case adopting the test for the Commonwealth is Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound), [1961] A.C. 388. *But cf.* RESTATEMENT (SECOND) OF TORTS § 435 (no liability for "highly extraordinary" consequences).

[126] Though this aspect of the test is only dimly perceived in the literature, many scholars favor the test of "foreseeability" (or its equivalent) on the ground that it renders the issue of proximate cause symmetrical with the issue of negligence. *See* R. KEETON, LEGAL CAUSE IN THE LAW OF TORTS 18–20 (1963); Pollack, *Liability for Consequences*, 38 L.Q. REV. 165, 167 (1922).

likely to engage the contemporary legal mind: When is a risk so excessive that it counts as a nonreciprocal risk? When are two risks of the same category and thus reciprocally offsetting? It is easy to assert that risks of owning a dog offset those of barbecuing in one's backyard, but what if the matter should be disputed? There are at least two kinds of difficulties that arise in assessing the relationship among risks. The first is that of protecting minorities. Does everyone have to engage in crop dusting for the risk to be reciprocal, or just half the community? A tempting solution to the problem is to say that as to someone not engaged in the activity, the risks are per se nonreciprocal. But the gains of this simplifying stroke are undercut by the assumption necessarily implicit in the concept of reciprocity that risks are fungible with others of the same "kind." Yet how does one determine when risks are counterpoised as species of the same genus? If one man owns a dog, and his neighbor a cat, the risks presumably offset each other. But if one man drives a car, and the other rides a bicycle? Or if one plays baseball in the street and the other hunts quail in the woods behind his house? No two people do exactly the same things. To classify risks as reciprocal risks, one must perceive their unifying features. Thus, risks of owning domestic animals may be thought to be of the same kind. And, theoretically, one might argue with equal vigor that all sporting activities requiring the projection of objects through the air create risks of the same order, whether the objects be baseballs, arrows, or bullets. Determining the appropriate level of abstraction is patently a matter of judgment; yet the judgments require use of metaphors and images — a way of thinking that hardly commends itself as precise and scientific.

In proximate cause disputes the analogue to this style of thinking is the now rejected emphasis on the directness and immediacy of causal links, as well expressed in the *Polemis* case [127] and Judge Andrews' dissent in *Palsgraf*.[128] As Hart and Honore have recognized,[129] we rely on causal imagery in solving problems of causal connection in ordinary, nonlegal discourse. Why, then, does the standard of "direct causation" strike many today as arbitrary and irrational? [130] Why does metaphoric thinking command so little respect among lawyers? [131] Why not agree

[127] *In re* Polemis, [1921] 3 K.B. 560.

[128] Palsgraf v. Long Island R.R., 248 N.Y. 339, 347, 162 N.E. 99, 101 (1928).

[129] H.L.A. HART & A. HONORE, CAUSATION IN THE LAW 24–57, 64–76 (1959).

[130] *See, e.g.*, PROSSER 264 ("this approach [*i.e.* direct causation] is obviously an arbitrary one"); Seavey, *Mr. Justice Cardozo and the Law of Torts*, 39 COLUM. L. REV. 20, 37, 52 HARV. L. REV. 372, 389, 48 YALE L.J. 390, 407 (1939) ("those using the test of directness are merely playing with a metaphor").

[131] Part of the reaction against writers like Beale, *The Proximate Consequences*

with Judge Andrews that the issue of proximate cause is akin to assessing when a stream merges with waters of another source? [132]

Metaphors and causal imagery may represent a mode of thought that appears insufficiently rational in an era dominated by technological processes. Yet why should the rhetoric of reasonableness and foreseeability appeal to lawyers as a more scientific or precise way of thinking? The answer might lie in the scientific image associated with passing through several stages of argument before reaching a conclusion. The paradigm of reasonableness requires several stages of analysis: defining the risk, assessing its consequences, balancing costs and benefits. The paradigm of reciprocity requires a single conclusion, based on perceptions of similarities, of excessiveness, and of directness. If an argument requires several steps, it basks in the respectability of precision and rationality. Yet associating rationality with multistaged argumentation may be but a spectacular lawyerly fallacy — akin to the social scientists' fallacy of misplaced concreteness (thinking that numbers make a claim more accurate).

Whether or not multistaged argumentation is more rational than a perception of directness or excessiveness, one cannot but be impressed with the interplay of substantive and stylistic criteria in the conflict between the two paradigms of tort liability. Protecting innocent victims from socially useful risks is one issue. The relative rationality of defining risks and balancing consequences is quite another. That there are these two levels of tension helps explain the ongoing vitality of both paradigms of tort liability.

The courts face the choice. Should they surrender the individual to the demands of maximizing utility? Or should they continue to protect individual interests in the face of community needs? To do the latter, courts and lawyers may well have to perceive the link between achieving their substantive goals and explicating their value choices in a simpler, sometimes metaphoric style of reasoning.

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of an Act, 33 HARV. L. REV. 633 (1920), is that metaphoric thinking is "mechanical" and insensitive to issues of "policy." PROSSER 264. Legal realism made it unfashionable to try to solve policy problems with verbal formulae and common sense rules. *See* HART & HONORE, *supra* note 129, at 92–93.

[132] 248 N.Y. at 352, 162 N.E. at 103.