1973

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A THEORY OF STRICT LIABILITY

RICHARD A. EPSTEIN*

INTRODUCTION

TORTS is at once one of the simplest and one of the most complex areas of the law. It is simple because it concerns itself with fact patterns that can be understood and appreciated without the benefit of formal legal instruction. Almost everyone has some opinions, often strong even if unformed, about his rights and responsibilities towards his fellow man; and almost everyone has had occasion in contexts apart from the judicial process to apply his beliefs to the question of responsibility for some mishap that has come to pass. Indeed, the language of the law of tort, in sharp contrast, say, to that of civil procedure, reveals at every turn its origins in ordinary thought.

But the simplicity of torts based upon its use of ordinary language is deceptive. Even if ordinary language contains most of the concepts that bear on questions of personal responsibility, it often uses them in loose, inexact, and ambiguous ways: witness, for example, the confusion that surrounds the use of "malice." While an intuitive appreciation of the persistent features of ordinary language may help decide easy cases, more is required for the solution of those difficult cases where the use of ordinary language pulls in different directions at the same time. There is need for a systematic inquiry which refines, but which does not abandon, the shared impressions of everyday life. The task is to develop a normative theory of torts that takes into account common sense notions of individual responsibility. Such a theory no doubt must come to grips with the central concerns of the common law of torts. But it need not (though it well may) embrace the common law solution to any particular problem.

This common sense approach to torts as a branch of common law stands in sharp opposition to much of the recent scholarship on the subject because it does not regard economic theory as the primary means to establish the rules of legal responsibility. A knowledge of the economic consequences of alternative legal arrangements can be of great importance, but even among those who analyze tort in economic terms there is acknowledgment of certain questions

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of "justice" or "fairness" rooted in common sense beliefs that cannot be explicated in terms of economic theory.\textsuperscript{1} Even if they cannot provide satisfactory answers to fairness questions, the advocates of economic analysis in the law still insist that their work is of primary importance because it reduces the area in which fairness arguments must be judged in order to reach a decision in a particular case. But once it is admitted that there are questions of fairness as between the parties that are not answerable in economic terms, the exact role of economic argument in the solution of legal question becomes impossible to determine. It may well be that an acceptable theory of fairness can be reconciled with the dictates of economic theory in a manner that leaves ample room for the use of economic thought. But that judgment presupposes that some theory of fairness has been spelled out, which, once completed, may leave no room for economic considerations of any sort.

In order to raise these fairness questions in the context of traditional legal doctrine, I shall focus on the conflict that has persisted in the common law between theories of negligence and theories of strict liability. The first section of this paper argues that neither the moral nor economic accounts of negligence justify its dominance in the law of tort. The second section analyzes the different contexts in which it is appropriate to assert that "A caused B harm," and argues that this proposition, when properly understood, provides a suitable justification for the imposition of liability in tort. The third section of the paper applies both the theories of negligence and of strict liability to the troublesome problem of the good Samaritan.

I. A CRITIQUE OF NEGLIGENCE

The development of the common law of tort has been marked by the opposition between two major theories. The first holds that a plaintiff should be entitled, prima facie, to recover from a defendant who has caused him harm only if the defendant intended to harm the plaintiff or failed to take reasonable steps to avoid inflicting the harm. The alternative theory, that of strict liability, holds the defendant prima facie liable for the harm caused whether or not either of the two further conditions relating to negligence and intent is satisfied.

It is most likely that theories of strict liability were dominant during the formative years of the common law. But during the nineteenth century, both in England and this country, there was a decided and express shift towards negligence.\textsuperscript{2} For the most part the impulses that supported


\textsuperscript{2} The extent of the shift can be overstated; for Rylands v. Fletcher, L.R. 3 H.L. 330 (1868), was a case which, whatever its precise scope, accepted the principle of strict
the thrust towards a system of negligence liability were grounded on moral rather than on explicitly economic considerations. Indeed, the phrase “no liability without fault” was used to summarize the opposition to a system of strict liability on moral grounds.\(^3\) At the turn of the century Ames described the transition from the early theories of strict liability to the modern theories of negligence in these confident terms:

The early law asked simply, “Did the defendant do the physical act which damaged the plaintiff?” The law of today, except in certain cases based upon public policy, asks the further question, “Was the act blameworthy?” The ethical standard of reasonable conduct has replaced the unmoral standard of acting at one’s peril.\(^4\)

But the law of negligence never did conform in full to the requisites of the “moral” system of personal responsibility invoked in its behalf. In particular, the standard of the reasonable man, developed in order to insure injured plaintiffs a fair measure of protection against their fellow citizens, could require a given person to make recompense even where no amount of effort could have enabled him to act in accordance with the standard of conduct imposed by the law. Certain defenses like insanity were never accepted as part of the law of negligence, even though an insane person is not regarded as morally responsible for his actions. But if Ames’ original premise were correct, then it should follow from the “modern ethical doctrine” that a lunatic unable to appreciate the nature or consequences of his act ought not to be responsible for the damage he has inflicted upon another.\(^5\)

Even if these exceptions to the general rule of negligence affect only a few of the cases to be decided, they do indicate a theoretical weakness that helps to explain efforts to find alternative justifications for the law of negligence couched in economic rather than moral terms. Thus, it was suggested that a defendant should be regarded as negligent if he did not take the precautions an economically prudent man would take in his own affairs, and, conversely,

\(^3\) Salmond, an influential writer at the turn of the century, often spoke of “mens rea” in the law of tort, even though he conceded that the term had a narrower meaning in the criminal law. See John Salmond, The Law of Torts 11 (7th ed. 1928).


\(^5\) “[I]f insanity of a pronounced type exists, manifestly incapacitating the sufferer from complying with the rule which has been broken, good sense would require it to be admitted as an excuse.” O. W. Holmes, Jr., The Common Law 109 (1881). See also James Barr Ames, supra note 4, at 99-100.
that where the defendant did conduct himself in an economically prudent manner, he could successfully defend himself in an action brought by another person whom he injured.

Although positions of this sort had been suggested from the beginning of this century, they received their most famous exposition in the opinion of Learned Hand in United States v. Carroll Towing Co. The narrow point for decision in Carroll Towing was whether the owner of a barge owed to others a duty to keep a bargee or attendant on board while his barge was moored inside a harbor. In his analysis of the duty question, Hand notes that no general answer has been given to the question, and in his view for good reason:

It becomes apparent why there can be no such general rule, when we consider the grounds for such a liability. Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her . . . the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions.

Hand expresses his conclusion in mathematical terms in order to demonstrate its applicability to the entire law of tort:

if the probability be called $P$; the injury, $L$; and the burden, $B$; liability depends upon whether $B$ is less than $L$ multiplied by $P$: i.e., whether $B$ [is less than] $PL$.

Despite this implicitly economic ("cost-benefit") formulation of the concept of negligence, it does not appear that Hand in his analysis of the case has broken completely from the traditional view of negligence. True, he does note, consistent with the formula, that

Applied to the situation at bar, the likelihood that a barge will break from her fasts and the damage she will do, vary with the place and time; for example, if a storm threatens, the danger is greater; so it is, if she is in a crowded harbor where moored barges are constantly being shifted about.

But after these general observations, there is a marked shift in the style and logic of opinion, which suggests that after all he is more concerned with the traditional questions of "reasonableness" than with the systematic application of his economic formula:

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6 See, e.g., Henry T. Terry, Negligence, 29 Harv. L. Rev. 40 (1915).
7 159 F. 2d 169 (2d Cir. 1947).
8 Id. at 173.
9 Ibid. The case for an economic interpretation of the Hand formula, as well as many of the subsidiary rules of negligence liability and damages, is argued in Richard A. Posner. supra note 1.
10 159 F.2d at 173.
On the other hand, the barge must not be the bargee's prison, even though he lives aboard; he must go ashore at times. We need not say whether, even in such crowded waters as New York Harbor, a barge must be aboard at night at all.\footnote{Ibid.}

The concern he expresses is unfounded. The duty imposed is a duty on the owner of the ship and not upon the bargee himself. There is no reason to assume that the owner could employ at most one bargee. The owner could have employed three bargees, each for eight hours, to protect the other ships in the harbor and still insure that his barge would not be a prison for any of his employees.

But having limited himself to a rule requiring only one bargee, Hand proceeds to examine the conduct, not of the owner, but of the bargee and in the traditional manner so often used to decide the "reasonableness" of the defendant's conduct in negligence cases. The evidence showed that the bargee had been off the ship for a period in excess of twenty-one hours before the accident took place. Moreover, all he had to offer to explain his absence was some "fabricated" tale.\footnote{Id. at 173-74.} There was "no excuse for his absence," and it followed:

In such circumstances we hold—and it is all that we do hold—that it was a fair requirement that the Conners Company should have a bargee aboard (unless he had some excuse for his absence), during the working hours of daylight.\footnote{Id. at 174.}

The use of the concept of "excuse" in Hand's formulation of the particular grounds for decision suggests that some of the elements material to determining "blameworthiness" in the moral sense are applicable with full force even after the statement of the general economic formula. But it is unclear what counts for Hand as an appropriate excuse within the framework of the law of tort. If the bargee left the ship in order to attend some emergency within the harbor, then presumably his absence would be "excused," but if so, no concept of excuse need be invoked. The formula itself covers this case because the defendant could show that the costs of prevention were high when measured against the alternative uses of the bargee's time.

Nor are other possible applications of the term clear. Suppose that the bargee was excused as a matter of contract because his employer allowed him to visit his family for the twenty-one hour period of his absence. In these circumstances the bargee could no doubt plead the release as a valid excuse to any action brought by his employer on the contract. But it is doubtful whether the excuse of the bargee would be available to his employer in a separate action in tort brought against him by the injured party. If the em-

11 Ibid.
12 Id. at 173-74.
13 Id. at 174.
ployer released the bargee from his job for the day, presumably he would be under an obligation to hire a substitute, for the same reasons that he was under a duty to provide a bargee in the first instance. Finally, if the provision for "excuses" in Hand's opinion is designed to take into account good faith, insanity, mistake of fact and the like, then it serves to introduce into the back door the very problems that were confronted (even if not solved) by the theory of negligence based upon notions of personal blameworthiness. Thus, although Hand alludes to some noneconomic concept of excuse, both its specific content and its relationship to the economic concept of negligence remain unclear.14

But even if the notion of "excuse" is put to one side, Hand's formula is still not free from difficulty. It is difficult to decide how to apply the formula when there is need for but a single precaution which one party is no better suited to take than the other. If, for example, there were two boats in a harbor, and need for but a single bargee, what result is appropriate if the two boats collide when both are unmanned? Is there negligence, or contributory negligence, or both? The formula is silent on the question of which ship should be manned. Yet that is the very question which must be answered, since in economic terms no bargee provides too little accident protection while two bargees provide too much.15

These criticisms of the Carroll Towing formula are not limited to the special case where the parties find themselves, ex ante, in identical positions. Even if that assumption is relaxed, the same problems of coordination raised above stand in the way of the successful judicial application of the formula. It may be worthwhile for the owner of Ship X to take a given precaution only if the owner of Ship Y takes some particular, although different, precaution of his own. Thus, it could be that the use of a bargee on Ship X is indicated only if the owner of Ship Y installs warning lights on his ship, which would permit the bargee to respond in time to prevent the collision between the boats. In cases like this it is clear that the Carroll Towing formula must be revised to take into account not only the activities of the defendant but also those of the

14 Indeed, it is precisely the relationship between the economic tests for responsibility and the notion of excuse that troubles Calabresi in his recent article, because a theory of fairness is required to admit "excuses" into a system of liability rules. See Guido Calabresi & A. Douglas Melamed, supra note 2, at 1102-05. Moreover, the need to take excuses into account explains why the concept of the "reasonable man" remains part of the law of negligence even after Carroll Towing.

15 For a similar treatment of this same problem in the context of the English cases and the doctrine of reasonable foreseeability see Abraham Harari, The Place of Negligence in the Law of Torts (1962). In particular, Harari argues that the law of negligence must develop some set of rules to coordinate the activities of several persons to decide which is under a duty to take precautions when each of them as a prudent man could reasonably foresee the prospect of danger. Id. at 105-24. See part III, infra, for a discussion of affirmative duties in the law of tort.
plaintiff. Indeed the problems of coordination are even more acute in those
cases where the appropriate pattern of cost minimization would
require third persons not involved in the collision to take steps to prevent the
harm in question. It is true that these difficulties do not render the Carroll
Towing formula theoretically incoherent, but they do suggest that there may
well be, despite its apparent simplicity, acute difficulties in its application.
But we need not labor the point, for Learned Hand himself stated it well
only two years after Carroll Towing was decided.

It is indeed possible to state an equation for negligence in the form, $C = P \times D$,
in which the $C$ is the care required to avoid risk, $D$, the possible injuries, and $P$,
the probability that the injuries will occur, if the requisite care is not taken. But
of these factors care is the only one ever susceptible of quantitative estimate, and
often that is not. The injuries are always a variable within limits, which do not
admit of even approximate ascertainment; and, although probability might theo-
retically be estimated, if any statistics were available, they never are; and, besides,
probability varies with the severity of the injuries. It follows that all such attempts
are illusory, and, if serviceable at all, are so only to center attention upon which
one of the factors may be determinative in any given situation.16

But even if the difficulties of application are put to one side, there are still
further reasons why both the economic and moral views of negligence provide
unsatisfactory bases for the law of tort. Both theories of negligence, for all
their purported differences, share the common premise that once conduct is
described as reasonable no legal sanction ought to attach to it. In any system
of common law liability, a court must allocate, explicitly or implicitly, a loss
that has already occurred between the parties—usually two—before it. It
could turn out that neither of the parties acted in a manner that was un-
reasonable or improper from either an economic or a moral point of view, but
a decision that the conduct of both parties was “proper” under the circum-
stances does not necessarily decide the legal case; there could well be other
reasons why one party should be preferred to another.

The point is illustrated by the famous case of Vincent v. Lake Erie Trans-
port Co.17 During a violent storm, defendant ordered his men to continue to
make the ship fast to the dock during the course of the storm in order to
protect it from the elements. The wind and waves repeatedly drove it into
the dock, damaging it to the extent of $500. Although there had been a
prior contract between the plaintiff and the defendant, the case was treated
by the court as though the parties to the suit were strangers, since the
terms of the contract did not cover the incident in question.18 Moreover, it was

16 Moisan v. Loftus, 178 F.2d 148, 149 (2d Cir. 1949).
17 109 Minn. 456, 124 N.W. 221 (1910).
18 Given that the parties had entered into contractual relations before the storm arose,
it is possible to argue that the case should be disposed of on the ground that the plaintiff
assumed the risk of damages in question. Indeed, the dissent appears to make that argu-
accepted without question that the conduct of the defendant was reasonable in that there was no possible course of action open to the captain of the ship that would have enabled him to reduce the aggregate damage suffered by the ship and the dock. On these facts the court concluded that the defendant had to pay the plaintiff for the $500 damage.

The result in Vincent seems inconsistent with either of the customary explanations, moral or economic, of negligence in the law of tort. There is no argument that the conduct of the defendant was "blameworthy" in any sense. The coercion on him was great, even though not imposed by some human agency. Any person in the position of the defendant's captain would have made the same choice under the circumstances. It is true that he knew that his conduct could damage the dock, but nonetheless the necessity of the situation would serve as an adequate defense against any charge of intentional wrongdoing. Similarly, if the economic conception of negligence is adopted, the same result must be reached once it is admitted that the conduct of the defendant served to minimize the total amount of damage suffered; the expected benefits of further precautions were outweighed by their costs.

Had the Lake Erie Transportation Company owned both the dock and the ship, there could have been no lawsuit as a result of the incident. The Transportation Company, now the sole party involved, would, when faced with the storm, apply some form of cost-benefit analysis in order to decide whether to sacrifice its ship or its dock to the elements. Regardless of the choice made, it would bear the consequences and would have no recourse against anyone else. There is no reason why the company as a defendant in a lawsuit should be able to shift the loss in question because the dock belonged to someone else. The action in tort in effect enables the injured party to require the defendant to treat the loss he has inflicted on another as though it were his own. If the Transportation Company must bear all the costs in those cases in which it damages its own property, then it should bear those costs when it damages the property of another. The necessity may justify the decision to cause the damage, but it cannot justify a refusal to make compensation for the damage so caused.

The argument is not limited to the case where the defendant acts with the certain knowledge that his conduct will cause harm to others. It applies with equal force to cases where the defendant acts when he knows that there is only a risk that he will cause harm to others. In Morris v. Platt, the plaintiff...
requested a jury instruction that the defendant should be found liable where he accidentally shot the plaintiff in an attempt to defend himself against an attack by third persons, even if he acted prudently under the circumstances. The court rejected that request and held instead that the plaintiff, even if an innocent bystander, could not recover for his injuries; the accident had been "inevitable."

Here I wish to concentrate upon only one difference between the two cases. In *Morris* the only risk the defendant took was that his conduct would harm the plaintiff, while the defendant in *Vincent* knew that such harm would result as a matter of course. Regardless of the substantive theory of liability adopted, the cases cannot be distinguished on this ground. Under the formula of *Carroll Towing*, the difference between the situations in *Morris* and in *Vincent* is taken into account in the "P" term in the formula. In *Vincent* the probability of harm (P) equals one, since the harm was certain. Hence the application of *Carroll Towing* to it turns only on the direct comparison between the burden of prevention (B) and the loss (L). In *Morris*, the application of that formula is somewhat more complex because "P" can take on any value between zero and one.

*Morris*, moreover, is not distinguishable from *Vincent* on any principled ground even if the *Carroll Towing* formula is rejected as the rule of substantive liability. In the discussion of *Vincent* the argument proceeded on the assumption that the defendant must bear the costs of those injuries that he inflicts upon others as though they were injuries that he suffered himself. The argument applies equally to cases where there is only the risk of harm. If the defendant in cases like *Morris* took the risk of injury to his own person or property, he would bear all the costs and enjoy all the benefits of that decision whether or not it was correct. That same result should apply where a person "only" takes risks with the person or property of other individuals.

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20 See p. 175, infra, for a discussion of the relationship between the plea of compulsion by a third person and the plea of necessity.

21 Seavey appears to take the opposite view in his discussion of the risk principle in negligence cases. Thus, he argues that some of the elements to be balanced in negligence cases . . . are not considered when the actor knows or desires that his conduct will result in interference with the plaintiff or his property. Thus if, to save his life, A intentionally destroys ten cents worth of B's property A must pay; if, however, he takes a ten per cent chance of killing B in an effort to save his own life, his conduct might not be found wrongful, although obviously B would much prefer, antecedently, to lose ten cents worth of property than to submit to a ten per cent chance of being killed.

Warren A. Seavey, Negligence—Subjective or Objective? 41 Harv. L. Rev. 1, 8, n. 7 (1927).

22 "But so long as it is an element of imposed liability that the wrongdoer shall in some degree disregard the sufferer's interests, it can only be an anomaly, and indeed vindictive, to make him responsible to those whose interests he has not disregarded." Sinran v.
no need to look at the antecedent risk once the harm has come to pass; no need
to decide, without guide or reference, which risks are “undue” and which are
not. If the defendant harms the plaintiff, then he should pay even if the risk he
took was reasonable just as he should pay in cases of certain harm where the
decision to injure was reasonable.23

II. AN ANALYSIS OF CAUSATION

Implicit in the development of the prior arguments is the assumption that
the term causation has a content which permits its use in a principled manner
to help solve particular cases. In order to make good on these arguments that
concept must be explicated and shown to be a suitable basis for the assign-
ment of responsibility. Those two ends can be achieved only if much of the
standard rhetoric on causation in negligence cases is first put to one side.

Under the orthodox view of negligence, the question of causation is resolved
by a two-step process. The first part of the inquiry concerns the “cause in
fact” of the plaintiff’s injury. The usual test to determine whether or not the
plaintiff’s injury was in fact caused by the negligence of the defendant is to
ask whether, “but for the negligence of the defendant, the plaintiff would
not have been injured.” But this complex proposition is not in any sense the
semantic equivalent of the assertion that the defendant caused the injury
to the plaintiff. The former expression is in counterfactual form and requires
an examination of what would have been the case if things had been other-
wise.24 The second expression simply asks in direct indicative form what in
fact did happen. The change in mood suggests the difference between the two
concepts.

The “but for” test does not provide a satisfactory account of the concept of
causation if the words “in fact” are taken seriously. A carelessly sets his
alarm one hour early. When he wakes up the next morning he has ample time
before work and decides to take an early morning drive in the country. While
on the road he is spotted by B, an old college roommate, who becomes so

Penn. R.R., 61 F.2d 767, 770 (2d Cir. 1932) (Judge Hand). The hard question is why
one man should ever be permitted to “disregard the sufferer’s interests.”

23 Bohlen argues that the defense of necessity should be admitted when the defendant
seeks to protect not only his own interests but those of society, on the ground that “one
who acts as a champion of the public should be required to pay for the privilege of so
doing.” Francis H. Bohlen, Incomplete Privilege to Inflict Intentional Invasions of Interests
of Property and Personality, 39 Harv. L. Rev. 307, 317-18 (1926). But there is no reason
why the plaintiff should be required to bear that loss either. It is true, as Bohlen suggests,
that the ideal solution may be to have the society as a whole bear those costs, but that
prospect does not help in the resolution of the case as between these two parties to the suit.

24 The expression “things had been otherwise” is used because at this point in the
analysis, it is not clear that the negligence in question refers to the doing of things that
ought not to be done, or the failure to do those things that should be done, or both. The
consequences that flow from the distinction are discussed at length in part III.
excited that he runs off the road and hurts C. But for the negligence of A, C
would never have been injured, because B doubtless would have continued
along his uneventful way. Nonetheless, it is common ground that A, even if
negligent, is in no way responsible for the injury to C, caused by B.

Its affinity for absurd hypotheticals should suggest that the "but for" test
should be abandoned as even a tentative account of the concept of causation.
But there has been no such abandonment. Instead it has been argued that the
"but for" test provides a "philosophical" test for the concept of causation
which shows that the "consequences" of any act (or at least any negligent act)
extend indefinitely into the future. But there is no merit, philosophic or
otherwise, to an account of any concept which cannot handle the simplest of
cases, and only a mistaken view of philosophic inquiry demands an acceptance
of an account of causation that conflicts so utterly with ordinary usage.

Once the "philosophical" account of causation was accepted, it could not be
applied in legal contexts without modification because of the unacceptable
results that it required. The concept of "cause in law" or "proximate" causation
became necessary to confine the concept within acceptable limits. In the
earlier literature there was an attempt to work out in great detail specifications
of the kinds of events and acts which would serve to break the causal connec-
tion between the conduct of the defendant and the harm suffered by the plain-
tiff. That inquiry is indeed a necessary one in some cases, although it need
not be tied to the concept of "but for" causation. In recent years, the inquiry

25 "Everybody is now in accord that logically there is no escape from the doctrine of the
equivalence of conditions, according to which a defendant's conduct must be held to have
caused damage if but for that conduct, however remotely connected with it, it would not
have occurred: and that everything that ensues from it to the bitter end is its consequences."
F. H. Lawson, Negligence in the Civil Law 53 (1950) (emphasis added). "In a philosoph-
ical sense, the consequences of an act go forward to eternity, and the causes of an event
go back to the discovery of America and beyond." William L. Prosser, Handbook on the

26 The term proximate cause comes from one of Bacon's maxims. "In jure non remota
causa sed proxima spectatur." (In law not the remote but only the proximate cause is
looked to.) In many discussions, however, the term "legal" cause is used in the hope that
it will be less misleading than "proximate cause." See Robert E. Keeton, Legal Cause in the
Law of Tort, viii (1963). But the use of the term "legal" serves to establish a false opposi-
tion between its technical and its ordinary use, which again hampers the development of a
theory that is both intuitively sensible and technically sound.

27 In a separate but related development, the concept of "duty of care" was in the
alternative invoked to limit the concept of "but for" causation. See Palsgraf v. Long Is.
grounds] possessed most judges and most legal writers. To meet this doctrinal crisis the
duty concept has been developed and where accepted has greatly cleared the jungle of
negligence law." Leon Green, Foreseeability in Negligence Law, 61 Colum. L. Rev. 1401,
1408 (1961). Although the reason for the introduction of the concept is clear, its place in
the tort law is not, once "but for" is abandoned as an account of causation.

28 See pp. 180-84, infra.
has been continued and refined by Hart and Honoré in their classic work, *Causation in the Law.* Hart and Honoré do not accept the “but for” account of causation, but instead define causation in a manner which recognizes the kinds of intervening acts and events that are to be taken into account before it can be shown that the conduct of the defendant was the cause of the plaintiff’s harm; thus they argue that “an act is the cause of harm if it is an intervention in the course of affairs which is sufficient to produce the harm without the cooperation of the voluntary acts of others or abnormal conjunctions of events.” This definition, and its careful explication, however, have been rejected for the most part in the legal literature on the ground that they require courts to confront “the never-ending and insoluble problems of causation,” “together with the subtleties of *novus actus interveniens.*” In its stead, the question of proximate cause has been said to reduce itself to the question whether the conduct of the defendant is a “substantial factor” contributing to the loss of the plaintiff, or whether the harm suffered was “reasonably foreseeable.” But these formulations of the test of proximate cause do not give much guidance for the solution of particular cases.

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30 Id. at 426.
34 “Prima facie at least, the reasons for creating liability should limit it.” Warren A. Seavey, Mr. Justice Cardozo and the Law of Torts, 52 Harv. L. Rev. 372, 386; 48 Yale L.J. 390, 404; 39 Colum. L. Rev. 20, 34 (1939). If negligence is accepted as a necessary precondition for liability in torts, then the argument has some appeal, because the defendant is regarded as negligent only if he has created a “reasonably foreseeable” risk of harm to another. Those who favored “directness” as the test for remoteness of damages within a negligence framework have always had to concede that reasonable foresight was the test for liability.

The presence or absence of reasonable anticipation of damage determines the legal quality of the act as negligent or innocent. If it be thus determined to be negligent, then the question whether particular damages are recoverable depends only on the answer to the question whether they are the direct consequence of the act.

In re Polemis, [1921] 3 K.B. 560, 574 (C.A.). But once negligence is rejected as the basis for civil liability in tort, the argument of symmetry works in the opposite direction. If foresight (and negligence) are no longer treated as material on the question of liability, then they should be immaterial on the question of remoteness of damage. There is no need to worry about endless liability because “but for” is never used as the test of causation, as it is in the conventional negligence analysis. Robert E. Keeton, *supra* note 26, at viii (1963).

35 Under the foresight test the distinction between the “general kind” of damages and “its precise details,” became crucial. See Glanville Williams, *supra* note 32, at 183-85. But the application of that distinction presupposes that we have already selected the description of the events in question to which that distinction is applied. But without a standard
might think that this would be treated as a defect in an account of a concept like causation, but in large measure it has been thought to be its strength. Once it is decided that there is no hard content to the term causation, the courts are free to decide particular lawsuits in accordance with the principles of "social policy" under the guise of the proximate-cause doctrine.

But it is false to argue that systems of law that use the principles of causation to decide cases must stand in opposition to those systems that use principles of social policy to achieve that same end. As Hart and Honoré have pointed out, the major premise of most legal systems (until perhaps the recent past) is that causation provides, as a matter of policy, the reason to decide cases in one way rather than the other.36 Moreover, they properly observe that:

It is fatally easy and has become increasingly common to make the transition from the exhilarating discovery that complex words like 'cause' cannot be simply defined and have no 'one true meaning' to the mistaken conclusion that they have no meaning worth bothering about at all, but are used as a mere disguise for arbitrary decision or judicial policy. This is blinding error, and legal language and reasoning will never develop while it persists.37

But for all their force these remarks have not received general acceptance. Indeed, once it was agreed that the term "proximate cause" gave the courts room to engage in creative decisions of social policy, the next step was not hard to take. If the term "proximate cause" only masks the underlying policy considerations, then academic literature, which need not even pay lip service to precedent, should cast it aside to deal with the policy considerations in their own terms. Thus, in The Costs of Accidents Guido Calabresi uses the tools of economic analysis to develop a comprehensive theory that will provide an adequate framework to test and develop the substantive rules of tort liability. The author makes clear that he does not think the concept of causation plays any part in the development of his theory. He describes "cause" as a "weasel" word and claims that he "does not propose to consider the question of what, if anything, we mean when we say that specific activities 'cause,' in some metaphysical sense, a given accident; in fact, when we identify an act or activity as a 'cause,' we may be expressing any number of ideas."38

But the means to select the unique description, it cannot be determined whether the unforeseeable aspects of the case fall on one side of the line or the others. This is the dilemma: Foresight is not psychologically irrelevant to the solution of problems of remoteness and often affects the judgment of those who try them. Yet foresight cannot function as a test until the facts of the case are described, and since the facts are nearly always susceptible of differing descriptions which will vary the result, a foresight criterion cannot function in a true testing process. Clarence Morris, supra note 33, at 260.

37 Id. at 3.
term cannot be banished from the lexicon on the ground that it is "meta-
physical." The concept is dominant in the law because it is dominant in the
language that people, including lawyers, use to describe conduct and to deter-
mine responsibility. The importance of the concept is revealed when Cala-
bresi discusses at length the question of "what-is-a-cost-of-what" in two
chapters that address themselves to the question of "which activities cause
which accident costs." The concept may not be strictly necessary to the
development of some theory of tort if the goal of the system is the minimiza-
tion of the costs of accidents. But its presence reminds us that a system of
law which tries to banish it from use may not respond to ordinary views on
individual blame and accountability.

This last point is brought home by an examination of another skeptical
account of causation. In The Problem of Social Cost, Professor Coase argues
that the concept of causation, as he understands it, does not permit the solu-
tion of individual legal disputes. Although he does not work from the "but
for" paradigm, he does adopt a model of causation that treats as a cause of a
given harm any joint condition necessary to its creation. Since the acts of both
parties are "necessary" it follows that the concept of causation provides, in this
analysis, no grounds to prefer either person to another. The problem is "re-
ciprocal" in both causal and economic terms. In effect, Coase argues that the
harms in question resulted because two persons each wished to make incon-
sistent uses of a common resource:

The question is commonly thought of as one in which A inflicts harm on B and
what has to be decided is: how should we restrain A? But this is wrong. We are
dealing with a problem of a reciprocal nature. To avoid the harm to B would in-
flict harm on A. The real question that has to be decided is: should A be allowed
to harm B or should B be allowed to harm A? The problem is to avoid the more
serious harm. I instanced in my previous article the case of a confectioner the
noise and vibrations from whose machinery disturbed a doctor in his work. To
avoid harming the doctor would inflict harm on the confectioner. The problem
posed by this case was essentially whether it was worth while, as a result of re-
stricting the methods of production which could be used by the confectioner, to
secure more doctoring at the cost of a reduced supply of confectionery products.
Another example is afforded by the problem of straying cattle which destroy
crops on neighbouring land. If it is inevitable that some cattle will stray, an in-
crease in the supply of meat can only be obtained at the expense of a decrease in
the supply of crops. The nature of the choice is clear: meat or crops. What answer
should be given is, of course, not clear unless we know the value of what is ob-
tained as well as the value of what is sacrificed to obtain it. To give another

criticisms made of Coase's position in the text are limited to his account of the concept
of causation. I accept his economic analysis.
example, Professor George J. Stigler instances the contamination of a stream. If we assume that the harmful effect of the pollution is that it kills the fish, the question to be decided is: is the value of the fish lost greater or less than the value of the product which the contamination of the stream makes possible.\textsuperscript{41}

In the first portion of this paragraph, Professor Coase argues that the question is reciprocal because “to avoid the harm to \( A \) would be to inflict harm upon \( B \).” The real question is “should \( A \) be allowed to harm \( B \) or should \( B \) be allowed to harm \( A \).” But that image of reciprocity is not carried through in the concrete description of particular cases used to support the general proposition. The first case concerns a “confectioner the noise and vibrations from whose machinery disturbed a doctor”; the second, “straying cattle . . . destroy crops on neighboring land”; in the third, “the harmful effect of the pollution . . . kills the fish.” Coase describes each situation by the use of sentences that differentiate between the role of the subject of each of these propositions and the role of the object. There is no question but that the confectioner harmed the doctor; the cattle the crops; and the contaminants, the fish. The problem only takes on a guise of reciprocity when the party harmed seeks his remedy in court. To use but the first example, the doctor wishes to call in aid the court to “harm” the confectioner, in the sense that he wishes to restrain him from acting to harm his practice. But he is justified in so doing because of the harm the confectioner either has inflicted or will inflict upon him. It would be a grave mistake to say that before the invocation of judicial remedies the grounds of dispute disclosed reciprocal harm. The confectioner did not seek to enjoin the doctor from the practice of medicine, because that practice did not and could not harm the confectioner. The notion of causal reciprocity should not be confused with the notion of redress for harm caused.\textsuperscript{42}

Both Calabresi and Coase, then, share the belief that the concept of causation should not, because it cannot, play any role in the determination of liability for harms that have occurred. The pages that follow are designed to show that the concept of causation, as it applies to cases of physical injury, can be analyzed in a matter that both renders it internally coherent and relevant to the ultimate question who shall bear the loss.

There will be no attempt to give a single semantic equivalent to the concept

\textsuperscript{41} Id. at 2.

\textsuperscript{42} The importance of reciprocity to questions of responsibility is developed in George P. Fletcher, Fairness and Utility in Tort Theory, 85 Harv. L. Rev. 537 (1972). Fletcher argues that the principles of corrective justice require the law to impose liability for harm only where the defendant has exposed the plaintiff to a “nonreciprocal risk of injury,” at least where the defendant is not otherwise excused. But Fletcher does not tell us how to determine whether two risks are reciprocal. Moreover, even if that determination could be made, its relevance is questionable once the harm has come to pass. Even if two risks were reciprocal, it does not follow that neither party should have his action when injured.
of causation. Instead, the paper will consider in succession each of four distinct paradigm cases covered by the proposition “A caused B harm.” These paradigms are not the only way in which we can talk about torts cases. They do, however, provide modes of description which best capture the ordinary use of causal language. Briefly put, they are based upon notions of force, fright, compulsion and dangerous conditions. The first of them will be the simplest to analyze. Each of the subsequent paradigms will introduce further problems to be resolved before the judgment on the causal issue can be made. Nonetheless, despite the internal differences, it can, I believe, be demonstrated that each of these paradigms, when understood, exhibits the features that render it relevant to the question of legal responsibility.

**Force.** We begin with the simplest instance of causation: the application of force to a person or thing. In a physical sense, the consequences of the application of force may be quite varied. In some cases the object acted upon will move; in others it will be transformed; in still others it will be damaged. It is this last case that will be of exclusive concern here, because it is accepted without question that the minimum condition of tort liability is damage to the person or property of the plaintiff.

The identification of causation with force does not of itself complete the first instance of the proposition “A caused harm to B.” It is still necessary to show that the force in question was applied by human and not natural agencies, and thus to tie the concept of force to that of human volition. The term “volition” is a primitive in the language whose function is to mark off the class of human acts from the class of events; to distinguish between “I raised my arm,” and “my arm went up.” But even if the term cannot be defined, its function can be made clear by some simple examples. In the old case of *Smith v. Stone*, the defendant was carried on to the plaintiff’s land by a band of armed men. The court held that the plaintiff could not recover in trespass, because it was “the trespass of the party that carried the defendant upon the land, and not the trespass of the defendant.” True, the physical requirement of entrance was satisfied in the case, but the defendant’s movement was in no sense an “action” because, if anything, it was contrary to his will. Only if some concept of volition is accepted into the language will there be a means to distinguish this case from one in which the defendant entered upon the land. In another early case, it was noted that “if a man by force take my hand and strike you,” I could not be held liable in trespass because my hand was only the instrument of some other person who, in fact, caused the harm. These two examples should be sufficient to show that we cannot do without the term “volition,” even if it cannot be defined. But one need not

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apologize for its use, because there is no alternative system for the description of human conduct or the assignment of responsibility that can do without the term, including those which turn on negligence, either in its moral or economic interpretation, when they ask what the defendant "could have" done. The concept of "volition" is thus crucial in those theories as well, even if it (along with the notion of force) can never be dispositive on questions of legal responsibility.45

The combination of force and volition is expressed in the simple transitive sentence, \( A \) hit \( B \). It is true that this proposition as stated is consistent with the assertion that \( A \) did not harm \( B \). But in many contexts the implication of harm follows fairly from the assertion, as anyone hit by a car will admit. Where the issue is in doubt, the verb can be changed, even as the form of the proposition remains constant, to bring the element of harm more sharply into relief. Thus instead of "\( A \) hit \( B \)," another proposition of the requisite form could be "\( A \) pummeled \( B \)," or "\( A \) beat \( B \)." But since the specifics of the harm go only to the measure of damages and not to the issue of liability, the proposition "\( A \) hit \( B \)" will serve as the model of the class of propositions to be considered.

The grammatical structure of the proposition "\( A \) hit \( B \)" is crucial to analysis of the problem of causation because it describes a situation both where the parties are linked to each other and where their respective roles are still differentiated. When causation is defined in this manner, the roles of the parties, contrary to Coase, are not reciprocal. The proposition that "\( A \) hit \( B \)" cannot be treated as synonymous with the proposition that "\( B \) hit \( A \)." Each of these propositions is complete without reference to either further acts, whether or not voluntary, or to natural events, whether or not abnormal. Questions of intervention are not present, and hence there are no problems about the coordination of multiple actions or events to determine responsibility for a single harm. But it may well be necessary as a matter of fact to assess the role of those forces that are the instruments of the defendant. Take a simple case where \( A \) drives his car into \( B \). It could be argued that \( A \)'s act extended no further than the depression of the gas pedal or, perhaps, \( A \)'s movement of his leg muscles.46 But the constant and inveterate use of the

45 See, e.g., Fowler v. Lanning, [1959] 1 Q.B. 426, dismissing an action where "the statement of claim alleges laconically that . . . the defendant shot the plaintiff." Id. at 431.

46 Holmes took the extreme position: An act is always a voluntary muscular contraction, and nothing else. The chain of physical sequences which it sets in motion or directs to the plaintiff's harm is no part of it, and very generally a long train of such sequences intervenes . . . When a man commits an assault and battery with a pistol, his only act is to contract the muscles of his arm and forefinger in a certain way, but it is the delight of elementary writers to point out what a vast series of physical changes must take place before the harm is done.

O. W. Holmes, supra note 5, at 91.

Holmes developed this position in order to show that the distinction between trespass
English language militates against the restriction of an act to the physical movements of A's body. "A drove his car into B" is a true description of the event; we might explain its significance away, but we can never deny it in good faith. Reference to those subsequent mechanical complications does not falsify that description. The use of the simple transitive proposition confirms the judgment that these subsequent mechanical occurrences are but the means, and nothing more, which A used to move his car.\(^47\)

Finally, the proposition of the form "A hit B" does not depend upon the two-part theory of causation developed by the law of negligence. No question of "but for" is ever raised, much less answered. It may well be that "but for the blow of the plaintiff the harm never would have occurred"; but it is not the "but for" test which establishes the causal preeminence of the application of force by the defendant to the person or property of the plaintiff. Since, moreover, the "but for" test was not used to establish cause in fact, there is no further issue to be discussed under the guise of proximate cause; the false opposition between cause in fact and proximate cause thus disappears.

Once this simple causal paradigm is accepted, its relationship to the question of responsibility for the harm so caused must be clarified. Briefly put, the argument is that proof of the proposition \(A\) hit \(B\) should be sufficient to establish a prima facie case of liability.\(^48\) I do not argue that proof of causation is equivalent to a conclusive demonstration of responsibility.\(^49\) Both the modern and classical systems of law are based upon the development of prima facie cases and defenses thereto. They differ not in their use of presumptions but in the elements needed to create the initial presumption in favor of the plaintiff. The doctrine of strict liability holds that proof that the defendant caused harm creates that presumption because proof of the non-

\(^{47}\) The case would be different if \(A\) parked his car where it was pushed by \(C\)'s car into \(B\). \(C\) did not act as the instrument of \(A\) and the question of the assignment of responsibility among several actors must be fairly confronted. The difference between the two cases is reflected in the language, because there is no simple transitive verb structure in English of the form "\(A\) hit \(B\)" that describes the case just put. It will not do at this point to say that "\(A\) caused harm to \(B\)," because thus far the term causation only covers propositions like \(A\) hit \(B\). See pp. 174-77, infra.

\(^{48}\) The argument depends upon "a deep sense of common law morality that one who hurts another should compensate him." Leon Green, supra note 27, at 1412.

\(^{49}\) This should serve to answer those who argue that a system of strict liability is an "unmoral" system of tort. James Barr Ames, supra note 4, at 97. The truth of such an assertion depends upon an assessment of the complete system including all excuses and justifications. For example, one would have a different view of the rules of strict liability if self-defense were never admitted as a justification for the harm caused. Ibid.
reciprocal source of the harm is sufficient to upset the balance where one person must win and the other must lose. There is no room to consider, as part of the prima facie case, allegations that the defendant intended to harm the plaintiff, or could have avoided the harm he caused by the use of reasonable care. The choice is plaintiff or defendant, and the analysis of causation is the tool which, prima facie, fastens responsibility upon the defendant. Indeed for most persons, the difficult question is often not whether these causal assertions create the presumption, but whether there are in fact any means to distinguish between causation and responsibility, so close is the connection between what a man does and what he is answerable for.

These arguments, however abstract in form, do have concrete application. Many cases will be decided in the same way regardless of the theory adopted, but the choice of theory in some instances can determine both the outcome of the case and the kinds of proof relevant to its decision. Such a case is *Bolton v. Stone.*\textsuperscript{50} There a batsman in a cricket match hit an unusually long ball which carried clear of the fence that surrounded the defendant's cricket grounds and struck the plaintiff in the head while she stood on the adjoining highway. She brought an action against the owners of the grounds for her personal injuries. But she was confronted by the rule that allows recovery only if the plaintiff can plead and prove that the defendant acted with either negligence or an intent to harm.\textsuperscript{51} Neither the cricket club nor the batsman meant the plaintiff any harm. To the extent that liability rested upon the single act of the batsman, it was clear that no allegation of negligence could be sustained, for before the blow the risk his activity created to the plaintiff was very small. This left the question whether the cricket club had maintained its grounds in a reasonable and safe condition, given the use to which they were dedicated. The plaintiff tried to show that it was incumbent upon the club to take some precautions to insure that no cricket balls escaped from the grounds. But the House of Lords in its application of the rules of "reasonable foresight" decided that the defendant had breached no duty of care to the plaintiff. At points the position of the House of Lords appears reminiscent of Learned Hand's opinion in *Carroll Towing.* Thus Lord Reid stated, "In my judgment the test to be applied here is whether the risk of damage to a person on the road was so small that a reasonable man in the position of the appellants, considering the matter from the point of view of safety, would have thought it right to refrain from taking steps to prevent the danger."\textsuperscript{52}

\textsuperscript{50} [1951] A.C. 850.

\textsuperscript{51} "Whatever may have been the law of England in early times I am of the opinion that as the law now stands an allegation of negligence is in general essential to the relevancy of an action of repairation for personal injuries." Read v. Lyons & Co. Ltd., [1947] A.C. 156, 170-71 (Lord MacMillan).

\textsuperscript{52} [1951] A.C. 850, at 867.
But even if the decision is consistent with the "reasonable foresight" test, it was not reached with either assurance or comfort by the House of Lords. The trial court had decided the case for the defendants, but had been reversed by a split vote in the court of appeal, before the House of Lords restored the original verdict. Lord Oaksey called it a "difficult" case; Lord Reid gave it "repeated and anxious consideration"; Lord Normand noted that the whole issue was "fairly balanced." Lord Radcliffe stated in the course of his opinion in the case that "he could see nothing unfair in the appellants being required to compensate the respondent for the serious injury that she received as a result of the sport that they have organized, but the law of negligence is concerned less with what is fair than with what is culpable. . . ."

Nor was the concern with result confined to the judges who decided the case. For example, Professor Goodhart, one of the staunchest supporters of the negligence requirement, entitled his comment on *Bolton v. Stone* "Is it cricket?" and wondered if the case were wrongly decided, since defendant could have altered the location of the cricket field. Again, in response to public concern, the Cricket Clubs of England, which had supported the appeal to the House of Lords, announced that they had taken all steps necessary to insure that Miss Stone did not suffer the financial consequences of her injury.

In light of its aftermath, it has been suggested that *Bolton v. Stone* is one of a small class of cases where it is both "right and proper" for the defendant to make compensation even though under no legal obligation to do so. The

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53 Id. at 863.
54 Id. at 867.
55 Id. at 861.
56 Id. at 868. See Abraham Harari, *supra* note 15, at 175-76, for a detailed analysis of the difficulties of Lord Radcliffe's statement.
57 67 L.Q. Rev. 460, 463 (1951). Professor Goodhart dismissed the possibility that the defendant was under a duty to increase the height of the fence around the grounds. "The fact that the absence of such a fence might be negligence in the case of a low bouncing ball, does not make it negligence in the case of a direct high hit." Id. at 463. This last observation illustrates anew the difficulty of identifying "the" risk in negligence cases against which there is a duty to guard.
58 The *Economist* and the daily newspapers made something of a case célèbre out of the case, because Miss Stone, under the English system of costs, was obligated to pay more than £3000 in court costs after she lost in the House of Lords. 67 L.Q. Rev. 461. The Cricket Clubs that supported the appeal assured the readers of Law Quarterly Review that the Cricket Club permitted Miss Stone to retain the costs and damages paid to her after the decision in her favor in the Court of Appeal. Notes, 68 L.Q. Rev. 3-4 (1952).
59 "(O)ne who is under no legal liability for damage caused to another may yet think it right and proper to offer some measure of compensation." John Salmond, *supra* note 3, at 30 (13th ed., 1961). The supporting footnote cites *Bolton v. Stone* as an instance of such a case. This notion of "ethical compensation" was first advanced by Glanville Williams, *The Aims of the Law of Tort*, 4 Curr. Legal Probs. 137, 142 (1951). But Wil-
irony of this position should be apparent. \textit{Bolton v. Stone} is an easy case under the rules of strict liability. The plaintiff's conduct provides no defense for the defendant, once the prima facie case, \textit{A hit B}, is proved. There is no cleavage between the legal result and the ethical sentiment. Only where a theory of negligence is adopted is it necessary to "explain" this case in terms of some notion of "ethical" compensation. Only "unmoral" theory of strict liability in the end produces the proper result.

Moreover, the shift in thinking from trespass to negligence serves to change the entire complexion of the arguments in the case. Under a pure trespass theory, the defendant is the batsman who hit the ball that struck the plaintiff.\textsuperscript{60} The paradigm of \textit{"A hit B"} applies without question to the case. But since trespassory notions were rejected in \textit{Bolton v. Stone} the plaintiff had to make a case against the defendant on the theory that its cricket grounds were negligently maintained\textsuperscript{61} and this opened up a vast range of questions—on the appropriate size for the cricket field; the location of the pitch; the height of the fence; the year the cricket club began to use its grounds; the land use patterns in the neighborhood both at and since that time;\textsuperscript{62} the number of cricket balls hit into Mr. Brownson's neighboring garden;\textsuperscript{63} the number hit into the street; the defendants' views about the safety of their own grounds. It cannot be a point in favor of the law of negligence, either as a theoretical or administrative matter, that it demands evaluation of almost everything, but can give precise weight to almost nothing.

\textsuperscript{60} Lord Porter noted that the defendants, who were the trustees of the field, admitted that they were "responsible for the negligent actions of those who use the field in the way intended that it be used." [1951] A.C. at 858. But once the action is brought on a trespass theory, the principle of vicarious liability must be invoked before either cricket club could be sued. That principle applies easily enough to the team which employed the batsman. In \textit{Bolton v. Stone}, however, the defendants were the trustees of the home team while the batsman was a member of the visiting team. Hence, in a sense, the result in the case might be correct after all.

\textsuperscript{61} The question of liability in trespass was raised in \textit{John Salmond}, \textit{supra} note 3, at 194, n.76 (13th ed., 1961). A claim based upon a nuisance theory was not pursued to the House of Lords. [1951] A.C. at 868.

\textsuperscript{62} Beckenham Road, where the plaintiff was standing when hit, had been built in 1910, while the Cricket Club had used its field since 1864. [1951] A.C. at 851. The House of Lords rejected the argument that some precautions should have been taken, or the matter at least considered, when the road was made. \textit{Id.} at 862 (Lord Normand). But it is not clear how this particular piece of information is relevant under the \textit{Carroll Towing} formula.

\textsuperscript{63} Nor do I think that the respondent improves her case by proving that a number of balls were hit into Mr. Brownson's garden. It is danger to persons in the road not to Mr. Brownson or his visitors which is being considered. [1951] A.C. at 859 (Lord Porter). It is not quite clear whether it was material that the garden was closer to the field than the place where Miss Stone stood. \textit{Id.} at 861. See also Glenville Williams, \textit{supra} note 32, at 188.
Fright and Shock. The structure of the prima facie case for assault—the historical companion to trespass to the person—parallels the paradigm for the prima facie case of the tort of trespass, and illustrates the means by which the concept of causation can be extended in a principled manner. The case in assault is A frightened B. That paradigm indicates, as in trespass, that A and B do not have symmetrical roles. There is the same close connection between the conduct of the defendant and the harm of the plaintiff. There is, however, a difference between the cases of assault and those of trespass. In trespass actions the plaintiff's conduct is not in issue in the prima facie case. But the reactions of the plaintiff must be taken into account before the prima facie case of assault can be completed. Still, the roles of the parties are not identical. The reactions of the plaintiff do not rise to the level of acts because they are in no sense volitional.

Nonetheless, the paradigm does raise some troublesome issues. Suppose, for example, the defendant frightened the plaintiff when he raised his hand to mop the sweat off his face at a time when the plaintiff was standing about fifty yards away. Do facts such as these disclose a prima facie case of assault? Our first response to the allegation does not address the issue of substantive law at all. Rather, it says that the harm suffered by the plaintiff is so trivial that it is inappropriate to use, at public expense, the legal machinery to resolve the case. Such a rule, of course, applies with full force both to theories of strict liability and to those of negligence and intent, and does not help choose between theories when both are applicable.

But the case can be made more difficult by assuming that the plaintiff has suffered serious injuries as a result of his fright. If anyone could be frightened by that kind of conduct, however, most likely he could not have survived long enough in life's hustle and bustle to be injured by the defendant. Thus in a sense, the initial statement of fact turns out to be simply unbelievable even where it is assumed for the sake of argument. In cases like these the defendant should be able to deny the allegation contained in the prima facie case, and be able to claim with some truth that the plaintiff had induced his own fright.

The relationship is not always regarded as significant today. Thus, in one of the recent casebooks on the law of tort, the specific discussion of the tort of assault has been removed from its traditional place beside the tort of battery to a point in the text where it is considered in conjunction with the more modern torts concerned with defamation and the right of privacy. Charles O. Gregory & Harry Kalven, Jr., Cases and Materials on Torts (2d ed. 1969). Although there may well be pedagogical justifications for the shift of materials within a casebook, there are strong reasons as a matter of theory why assaults should be examined in conjunction with trespasses.

The position in the text is not an altogether happy one even if sound. In order to escape the problem, it is possible to argue that the plaintiff should not be allowed to recover, even if frightened, because he was extrasensitive. This position, however, itself has difficulties because it is inconsistent with the position, which I defend in part III,
But even after these odd cases are put to one side, the paradigm of assault does raise problems of proof that are not present in trespass cases since the allegation "A frightened B," unlike the allegation "A hit B," can be proved in the given case only after the responses of B are taken into account. Courvoisier v. Raymond puts the issue well, even though it is the defendant who raises the issue of assault as an affirmative defense. The plaintiff was a plainclothesman who was sent to investigate at the scene of a riot in a small frontier town; the defendant was the owner of a store which had already been robbed several times during the course of the evening. When the defendant saw the plaintiff, he thought that he intended to rob the store and shot him. Under a theory of strict liability, the statement of the prima facie case is evident: the defendant shot the plaintiff. The only difficult question concerns the existence of a defense which takes the form, the plaintiff assaulted the defendant. That question is a question of fact, and the jury found in effect that the plaintiff did not frighten the defendant into shooting him. Rather, the defendant either made the judgment to shoot the plaintiff in light of all that he knew about the situation or was frightened by the activities of third persons. One could, perhaps, quarrel with that determination, but at least the answer put is to the right question, a question that does not arise where physical invasions are in issue.

The result in Courvoisier was much less satisfactory when the case was taken on appeal. The court reverted to the traditional models that predicate responsibility on negligence or intent, and the choice of theories again affected the outcome of the case. The court held that the defendant should be given an opportunity to prove in justification of his act that he acted reasonably and in apparent self-defense given the riot, even though he intended to hurt the plaintiff. Unlike the court in Vincent, it allowed the defendant to shift his problems to the plaintiff.

The arguments for strict liability carry over from cases of trespass to cases of assault. Negligence and intent should be immaterial to the prima facie case of assault, and for the same reasons as with trespass. Nonetheless, the law in fright cases has followed the pattern of the physical injury cases and at a minimum has insisted that the defendant show either negligence or intent. Indeed, in many cases even the basic rules of negligence are hedged about with further limitations. Although the cases exhibit no consistent pattern, it

that the defendant must take his victim as he finds him. Nonetheless it is possible to recognize the defense in assault cases only, on the ground that in these cases the causal relationships can never be established with the clarity appropriate to physical injury cases. Thus it is the difficulties with the causal question that invite the recognition of the defense. Consistent with that position, it should be possible to limit the use of this defense to cases where there is no "substantial" ground for fright at all, because only there is the causal question difficult.

66 23 Colo. 113, 47 Pac. 284 (1896).
has been held that the plaintiff is allowed to recover for his harm only if there was a physical trespass to the plaintiff, or, in the alternative, a threat of physical injury. In other cases, there is the strong suggestion that a person can recover in fright cases where he is not subject to threat of physical injury only if he can show that some member of his immediate family was in danger of physical harm.

It is true that all of these elements could well be material as a matter of evidence in a fright case. It may well be that a person is more apt to be shocked if he is in danger of physical injury, or if a member of his immediate family is in such danger. But they are only matters of evidence. The crucial question is that of causation and if a defendant frightens or shocks a plaintiff, the recovery should, prima facie, be allowed even if none of the further conditions sometimes placed on recovery are satisfied.

Compulsion. The concept of causation is not limited to cases of the form “A hit B” or “A frightened B.” There are other relationships that exhibit more complex grammatical forms to which it also applies. Indeed, the proposition “A hit B” represents only a special case of a more complex relationship, capable of indefinite extension, which for three persons takes the form “A compelled B to hit C.”


68 Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935). Bourhill v. Young, [1943] A.C. 92 (Scot.). Waube expressly relied on the duty limitation in the Palsgraf case, while the opinion of Lord Wright in Bourhill is reminiscent of Palsgraf, which however, is not cited. Both of those cases show how the “duty” requirement can operate to deny liability in cases where the question of causation, far from being philosophical, is simple.

69 Thus, the remarks of Denning, L.J., as he then was, in King v. Phillips, [1953] 1 Q.B. 429, 441:

Some cases seem plain enough. A wife or mother who suffers shock on being told of an accident to a loved one cannot recover damages from the negligent party on that account. Nor can a bystander who suffers shock by witnessing an accident from a safe distance. . . . But if the bystander is a mother who suffers from shock by hearing or seeing, with her own unaided senses, that her child is in peril, then she may be able to recover from the negligent party, even though she was in no personal danger herself: Hambrook v. Stokes Brothers [1925] 1 K.B. 141. Lord Wright said that he agreed with that decision. So do I.

70 These limitations could well be necessary but not as a matter of substantive theory, in order to control a flood of fraudulent and frivolous claims in the court. But if that is the problem, the techniques of procedure, evidence and jury control seem better suited to insure exclusion of groundless claims.

71 The most famous decided case of this form is Scott v. Shepherd, 2 Wm. Black. 892, 96 Eng. Rep. 525; 3 Wilson 403, 95 Eng. Rep. 1124 (1773). There four persons were involved in the chain of causation. Shepherd (the defendant) compelled Ryals to compel Willis to strike Scott. In principle the argument could be extended indefinitely but there quickly comes a point where the truth, not the coherence, of the proposition comes into doubt.
Cases of this form are more difficult to treat than simple trespass cases, because the verb "compel" is not a simple transitive verb. It is rather an instance of a small class of verbs which are "hypertransitive" or "causative" in nature. The logical object of "compel" is not a person (or thing) as it is in the case of the proposition $A$ hit $B$ (or $B$'s car), but an embedded (and transformed) proposition—$B$ to hit $C$—which itself sets out a causal relationship between two persons.

In the discussion of the proposition "$A$ hit $B$," it was noted that $A$ and $B$ assumed different positions in the proposition because of the different roles which they played. In the analysis of this more complex proposition and its relationship to the question of responsibility, there is the same interaction between nonreciprocity and causation as in the simple cases already analyzed. In order to unpack these relationships, consider the case from the standpoint of the injured party, $C$. If the proposition "$A$ compelled $B$ to hit $C$" is true, then it follows that "$B$ hit $C$." The last proposition can be analyzed in accordance with the notions of causation based upon force and volition that have already been developed. Given that paradigm, it follows that $C$ has a prima facie case against $B$. $B$ cannot escape liability by showing that he did not hit $C$, for a demonstration that he acted under compulsion is not the same as a demonstration that he did not act at all: *Smith v. Stone* is a different case from *Vincent v. Lake Erie*. Nor, if the observations about the defense of "necessity" made earlier are sound, can $B$ plead as a defense that he was compelled by $A$ to hit $C$. Even if this conduct were reasonable, it does not follow that $B$ need not pay. Nor is this result unfair: *Vincent v. Lake Erie* holds a person in $B$'s position liable for the harm he inflicts in cases of necessity even though the defendant has neither a defense nor an action over. $B$ will have an action over against $A$ after he has paid $C$, on the theory that $A$ compelled him (to his loss) to hit $C$.

The analysis is not yet complete, because $C$ is not limited to an action against $B$. He can bring in the alternative an action against $A$. That action, however, could not rely on trespassory theories of causation. $A$ did not hit $C$; $B$ did. But the roles of $A$ and $C$ are still both linked, and differentiated, because $A$ compelled $B$ to hit $C$; $C$ did not compel $B$ to hit $A$. Coase's requirement of nonreciprocal conduct can be met here as well as in trespass cases, even after the intermediate act of $B$ is taken into account. That act, done under the compulsion of $A$, does not sever the causal connection, even if it changes the specific theory of relief in question. $B$ in effect drops out of the picture in

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72 Indeed, under the modern law, there is never a difficult question of causation at all in the action of $C$ against $A$, perhaps in part because the "but for" analysis tends to overstate the linkage between events. Only with the kind of causation analysis developed here must the remoteness issue be confronted. If it must be shown that $B$ acted with either negligence or intent, then $C$ will have no action against $B$.  

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the action between $A$ and $C$ once it is shown that he has acted under compulsion.\footnote{That result is often reached in an intuitive sense when acts performed under compulsion are said, inexacty, to be "involuntary," and hence "no acts at all." Raphael Powell, 'Novus Actus Interveniens' in Roman Law, 4 Curr. Legal Probs. 195 (1951). The affinity between cases under this last paradigm and those of trespass is illustrated by the resort to simple transitive verbs in the declaration in \textit{Scott v. Shepherd}: Trespass and assault for throwing, casting, and tossing a lighted squib at and against the plaintiff, and \textit{striking} him therewith on the face and \textit{burning} one of his eyes, that he lost the sight of it, whereby, etc. 2 Wm. Black. 892, 96 Eng. Rep. 525 (1773) (emphasis added).}

The changes in causal theory have their effect on questions of proof. Proof of compulsion upon $B$ is crucial if $C$'s action against $A$ is to succeed. The inquiry on that issue, moreover, is more complex than those required under either of the two paradigms of causation already considered. In trespass cases, no conduct of the plaintiff had to be taken into account to complete the prima facie case. In assault cases, only the reactions of the plaintiff to the act of the defendant were material. Thus neither of these paradigm cases required the examination of an intermediate act.

In particular, two points must be observed. First, the question whether $B$ was negligent under the circumstances is, at best, evidence on the question of compulsion. It may well be that a reasonable man would have acted differently under all the circumstances, including his peril. But this actor $B$ may not be that man, and it is his conduct, not that of some legal construct, that is the subject of inquiry: where $B$ was compelled by $A$, the prima facie case is made out, even if $B$ was negligent. Second, it is not strictly material whether $B$ intended to harm $C$, because he could have been compelled to act as he did whether or not that harm was intended. Nonetheless, where harm was intended by $B$, it must be determined that $B$ did not use the act of $A$ as a cloak or excuse to further his own private interests.

One further problem remains. Suppose $C$ is able to bring actions against both $A$ and $B$. He will not be entitled to a double recovery for the single harm, so it will be necessary to decide whether $A$ or $B$ will be saddled with the ultimate loss. Here again the causal paradigm permits us to link and differentiate the roles of the parties to the suit. $A$ compelled $B$ to hit $C$; $B$ did not compel $A$ to hit $C$. Hence it follows that, prima facie, $B$ should prevail over $A$.

When all of these distinct actions are considered together, the results of this discussion can be reduced to quite simple terms—$C$ over $B$, $B$ over $A$, and hence $C$ over $A$. Since the relationship is transitive, $C$ must be preferred prima facie to $A$ in any action between them. The equities seem correct, because $C$ did nothing at all; $B$ hit $C$; and $A$ compelled $B$ to so act.

The argument developed in trespass and extended to assault applies with equal force here, once the expanded, nonreciprocal notion of causation is accepted. In each two party situation, one person must win and the other lose,
while the rights and duties of third parties need not be taken into account until raised in suits in which they participate. With this kind of scheme, the question of "who is responsible" must be settled between the parties to the lawsuit. And again, it is the notion of causation that prima facie provides the answer.

_Causation and Dangerous Conditions._ The forms of causation thus far developed are the easiest to comprehend and accept. But an analysis of causation is seriously incomplete if made only in terms of force, fright, and compulsion. Both ordinary thought and legal theory also use a causal paradigm which covers cases involving the creation of dangerous conditions that result in harm to either person or property.

This paradigm shares many of the characteristics of the three paradigms already considered. Although it includes both cases where the dangerous condition is created by human acts and those where it is the result of natural events, the defendant’s responsibility depends on a showing that he created the dangerous condition in question. The concept of volition thus remains necessary to mark off the class of human acts from the class of natural events. Moreover, the arguments on the question of responsibility parallel those already developed. A created the dangerous condition that resulted in harm to B; B did not create the dangerous condition that resulted in harm to A. The initial balance between the parties is upset, here as before, in a manner which links the parties to each other as it differentiates their roles.

But there are significant differences between this paradigm and those that have come before. First, it makes use of the expression, "result in." While it could be objected that this term defines causation in terms of itself, that is not the case. The term “result in” is intended to cover only those cases of causation—force, fright and compulsion—already developed in previous sections of this paper. In each individual case, it can, and must, be replaced with a description of the particular act or event which is the immediate cause of the harm, where the term “immediate” is used in its literal sense. The creation of a dangerous condition, without more, does not cause harm in the narrow sense of the term. Some further act or event of the kinds already considered must be identified before the causal analysis is completed, and the term “results in” calls attention to that fact. In effect, therefore, this paradigm, unlike those that preceded it, will require a detailed examination of these subsequent acts and events under a wide range of circumstances and conditions.

Second, this paradigm applies only to dangerous conditions. It is possible to divide the most common instances of dangerous conditions into three classes. The first includes things that are "inherently" dangerous, of which

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74 The classification that follows was developed in John Charlesworth, Liability for Dangerous Things (1922).
stored explosives are the most common example. They are inherently dan-
gerous because they retain their potential energy in full, even if they are
stored or handled with the highest possible care.\textsuperscript{75} A small application of force,
or small change in conditions, like temperature and humidity, can release or
otherwise set in motion large forces that can cause harm in the narrow sense
of that term. The potential for danger remains great even if its probability is
low.

The second kind of dangerous condition is created when a person places a
thing—not dangerous in itself—in a dangerous position. Instances of this
form of dangerous condition are of two sorts. The first class presupposes the
recognition of rights of way: highways, footpaths, and the like. Thus, \textit{A}
leaves a roller skate in a walkway such that someone can slip and fall, should
he step on it. Or \textit{B} leaves his truck on the highway where it blocks or ob-
structs the road to oncoming traffic.

Other situations in this class involve any unstable position where the ap-
lication of a small force will permit the release of some greater force. Here
again the term "unstable" is to be taken in its narrow physical sense. \textit{C}
places a large rock in an unstable position on top of a steep hillside where a light
rain or the brush of a hand could send it tumbling to the base of the hill. \textit{D}
drops a vase, or places it on the edge of a table where it can be easily pulled
to the ground by the force of gravity. \textit{Vincent v. Lake Erie}, taken in its own
terms, is a case of this sort: in the words of the court, "those in charge of
the vessel deliberately and by their direct efforts held her in such a position
that damage to the dock resulted."\textsuperscript{76} The damage "resulted" not from gravity
but "because of the wind and waves striking her starboard quarter with such
force that she was constantly being lifted and thrown against the dock."

The third kind of dangerous situation concerns products or other things
dangerous because defective. Thus, \textit{E} fashions a chair that cannot support
the weight of a 150 lb. man because its legs are insecurely fastened to the
seat; \textit{F} manufactures a rifle with a weak barrel that can shatter when it is
fired; or \textit{G} constructs a lathe with inadequate screws to hold the wood in
place when the lathe is in operation.\textsuperscript{77} In each of these cases, the person who
made the product has created a dangerous condition that causes harm when
subjected to the stress that it was designed to receive when used in its
intended manner. It is this concept of dangerous because defective that is
crucial to the formulation of products liability rules (even when strict

\textsuperscript{(1937)}; pp. 191-92, infra.

\textsuperscript{76} 109 Minn. at 459, 124 N.W. at 222. The "deliberately" is in principle immaterial to
the case given the theories of strict liability. 109 Minn. at 457-58, 124 N.W. at 221.

liability principles are not adopted), and the term here is used only in that standard sense.\textsuperscript{78}

The use of this paradigm requires us to distinguish between these kinds of dangerous condition on the one hand and "mere" conditions on the other.\textsuperscript{79} If all conditions, and not only dangerous ones, were given causal status, then in almost every case the conduct of both the plaintiff and the defendant would both be the "cause" of the harm in question, as a few examples help make plain. $H$ leaves her carving knife in her kitchen drawer. A thief steals the knife and uses it to wound $I$. Has $H$ caused $I$ harm in any sense of the term? $J$ leaves his car parked on the street. During the night a cyclone picks the car up and carries it along for a half mile until it falls on top of $K$. Has $J$ caused $K$ harm? The answer to these questions is no. Unlike the cases of dangerous conditions above, neither $H$ nor $J$ could be sued on a theory which alleges that they created a dangerous condition that resulted in harm. It might be possible to show on the strength of other facts not present that these acts were dangerous when performed. But they are not dangerous as described, for in none of these cases did the prospective defendants make a store of energy which was released by the act of a third party or by natural events. It is also possible to state cases that are quite close to this line. The term "dangerous" has a residual vagueness that makes it difficult to apply in some

\textsuperscript{78} See Restatement of Torts 2d, § 402A.

\textsuperscript{79} The distinction between types of dangerous conditions is immaterial for the development of the general theory, and probably is immaterial in the law today. Nevertheless, the distinction between things inherently dangerous and things dangerous because defective was important in the development of the law. In the effort to limit the effect of the privity requirement imposed in Winterbottom v. Wright, 10 M. & W. 109 (Exch. 1842) (itself an easy case for liability on the facts), it was early held that the privity limitation did not apply to products that were inherently dangerous when negligently labelled. Thomas v. Winchester, 6 N.Y. 396 (1852). Indeed in one sense McPherson v. Buick, 217 N.Y. 382, 111 N.E. 1050 (1916), stands, within the framework of the law of negligence, only for the proposition that neither things inherently dangerous, nor things dangerous because defective, are subject to the rule of Winterbottom v. Wright. Thus Cardozo states (217 N.Y. at 389, 111 N.E. at 1053):

We hold, then, that the principle of Thomas v. Winchester is not limited to poisons, explosives, and things of like nature, to things in their normal operation are implements of destruction.

In this view of the defendant's liability there is nothing inconsistent with the theory of liability on which the case was tried. It is true that the court told the jury that 'an automobile is not an inherently dangerous vehicle.' The meaning, however, is made plain by the context. The meaning is that danger is not to be expected when the vehicle is well constructed. The court left it to the jury to say whether the defendant ought to have foreseen that the car, if negligently constructed, would become 'imminently dangerous.' Subtle distinctions are drawn by the defendant between things inherently dangerous and things imminently dangerous, but the case does not turn upon these verbal niceties. If danger was to be expected as reasonably certain, there was a duty of vigilance, and this whether you call the danger inherent or imminent.
instances. But unless one is prepared to argue that these situations could not be distinguished from the three classes set out above, then it must be accepted that there is some content to the term. Indeed, it seems idle to treat the concept as though it were immaterial, since it pervades the entire fabric of the law of tort. The important question concerns its place in the scheme of liability.

The analysis of this last paradigm is not completed by proof that causal significance attaches only to dangerous conditions. It is also necessary to consider the kinds of acts and events that operate upon the condition so created to complete the causal chain. To consider the question of intermediate acts first, it is best to divide them into the three categories in which they are analyzed by Hart and Honoré: accidental, negligent, and deliberate.

Accidental acts cause little difficulty. On all views of the law, they do not break the causal connection between the plaintiff's injury and the defendant's conduct, whether performed by the plaintiff or a third party. Indeed, if they did not complete the causal link, then in effect no dangerous conditions could ever rise to causal significance. There could, for example, be no recovery in the simplest cases of products liability, because the very use of the defendant's product would serve on causal grounds to defeat an action for injuries sustained.

Again, the acts of either the plaintiff or a third party do not break the causal connection between the defendant's conduct and the plaintiff's harm, even if negligently performed. Negligence in this context means, as ever, the failure to take reasonable steps that could have prevented or avoided the harm in question. Since the forces attributable to the plaintiff or the third party operate on the dangerous condition created by the defendant, proof that either the plaintiff or a third party failed to exercise reasonable care does not deny the causal allegations contained in the prima facie case; it remains true that the dangerous condition created by the defendant resulted in the harm to the plaintiff. Force and dangerous conditions are still the only issues material to the causation question.

To make the discussion concrete, consider again the case where A slips and

80 Indeed, Vincent v. Lake Erie would have been decided differently if the defendant's ship had been fastened to the dock with heavy rope, before the storm developed. The dissent makes a forceful point when it notes:

The reasoning of the opinion admits that if the ropes or cables, first attached to the dock had not parted, or if, in the first instance, the master had used the stronger cables, there would be no liability.

109 Minn. at 461, 124 N.W. at 222. See also the remarks of Lord Macmillan in Read v. Lyons, [1947] A.C. 156, 172-73.

81 Restatement of Torts § 519 (ultrahazardous activities); Restatement of Torts 2d, § 402 (defective products). See also W.T.S. Stallybrass, Dangerous Things and the Non-natural User of Land, 3 Camb. L.J. 376 (1929).
falls on a roller skate placed by $B$ on the walkway. Even if it could be shown that $A$ could have avoided the harm if he had looked where he stepped, it is still the case that he slipped and fell upon the skate: only the act that created the dangerous condition and that which was the immediate cause of the harm need be taken into account to complete the causal description of the events in question. The requisites of this paradigm of causation—the slip and the fall—are met whether or not $A$ was careless.

$A$’s carelessness might be regarded as sufficient to support the defense of contributory negligence. The acceptance of contributory negligence as a defense is natural in a system that presupposes that the plaintiff must allege negligence in order to complete his prima facie case. But let the defendant’s negligence be regarded as immaterial to the prima facie case, and it is then difficult to see why the plaintiff’s negligence should raise a valid affirmative defense. All the objections to Hand’s account of negligence and its place in the scheme of tort law apply with equal force to the defense of contributory negligence to the statement of the prima facie case. If notions of efficient resource allocation do not provide the proper measure of the defendant’s conduct, they should not be introduced by the back door in the judgment of the plaintiff’s conduct.

By like reasoning, if the act requirement is crucial in the statement of the prima facie case, it should be crucial as well in the analysis of any possible defenses. The plaintiff’s act, reference to his want of precautions apart, does not, for the reasons just discussed in conjunction with the accidental conduct of the plaintiff, provide the basis for an affirmative defense. Hence the case for the defendant must rest upon his ability to demonstrate that the plaintiff owes him a duty at common law to take reasonable steps for self-protection, a question that is discussed at length in the last section of this article. But even if such a duty is recognized, the point is that the allegation of carelessness by the plaintiff does not affect the judgment that the conduct of the defendant was, under the paradigm of dangerous conditions, the cause of the harm in question.

It remains only to examine the causal connection between the dangerous condition created by the defendant and the harm to the plaintiff in the most difficult case, where the intermediate actor deliberately inflicted the harm in question. In *Causation in the Law*, Hart and Honoré argue that it is not possible to establish causal antecedents to a deliberate act designed to inflict harm. On their view, one could never hold responsible a person who creates a dangerous condition of which the intermediate actor takes advantage out of his own desire to inflict the harm. "The general principle of the traditional doctrine is that the free, deliberate and informed act or omission of a human being, intended to produce the consequence which is in fact produced, nega-
tives causal connexion." In support of this "common sense" position, they argue that "voluntary acts" (deliberate acts where neither mistake nor coercion is present) enjoy a special status because "precautions against such acts are specially difficult, since a man who is bent on harm will usually find some way of doing it." The case appears to be overstated. It does not follow, because a man bent upon harm usually can find some way of doing it, that one must never seek to go behind a deliberate infliction of harm. There are many cases where the harm, even if deliberate, could be inflicted only because of the dangerous condition created by the defendant. For example, assume that the defendant has placed a boulder perilously close to the edge of a ravine. One day when the plaintiff is in the ravine—it matters not why—X, his bitter enemy, sees him from the side of the ravine and, bent upon his destruction, tips the boulder over the side of the ravine where it falls upon the plaintiff, severely injuring him. X, even if bent upon destruction, took advantage of the dangerous condition created by the defendant, especially if X had no alternative means at his disposal to execute his plans. If alternative means were available, the defendant should be required to prove the fact as an affirmative defense to the cause of action. Such proof does not deny the causal allegations contained in the prima facie case, but only shows that they do not, in the circumstances, support the claim to relief. The issues of causation and responsibility should be kept distinct. The relationship between them is not parallel. Where it is clear that the ground for regarding conduct as negligent, or the reason for prohibiting it by rule, is the very fact that it provides an opportunity, commonly exploited by others, for deliberate wrongdoing, it would obviously be senseless to treat their voluntary intervention as a ground for relieving the person who has provided the opportunity for it of the responsibility for the harm which they have done. This class of events extends the notion of causation to its outer limits because it insists that a condition by the defendant be regarded as dangerous because it exposes the plaintiff or his property to the risk of deliberate harm inflicted by a third party. There is much sense in this position, because it is quite likely that a thief will steal goods from a stand or a cart that has been, say, overturned which he would not and could not steal if the confusion had not been created. See, e.g., Brower v. New York Central R.R., 91 N.J.L. 190, 103 A. 166 (1918), where a sharply divided court held the defendant liable.

82 H.L.A. Hart & A.M. Honoré, supra note 29, at 129. Note that Hart and Honoré argue that the same principle applies to both acts and omissions. But the cases cannot be regarded as parallel after they are placed in the framework of the causal paradigms already developed. If X deliberately chooses not to prevent A from hitting B when he is able to do so, B still has an action against A of the form "A hit B." But that action will not be open to B where the act of X is the immediate cause of the harm. X hit B, not A. Hence if B is to have any case in tort against A it must come to grips with the paradigm of dangerous conditions. Where A hits B, B must then come to grips with the good Samaritan problem, discussed in part III of this article, in order to maintain his action against X.

83 Id. at 129. There is one exception to the general rule: Where it is clear that the ground for regarding conduct as negligent, or the reason for prohibiting it by rule, is the very fact that it provides an opportunity, commonly exploited by others, for deliberate wrongdoing, it would obviously be senseless to treat their voluntary intervention as a ground for relieving the person who has provided the opportunity for it of the responsibility for the harm which they have done.

84 See Mayor of New York v. Lord, 18 Wend. 126, 130 (N.Y. Sup. Ct. 1837).
clarified by the invocation of a per se rule that states that the causal connection is severed wherever a third party seizes upon the dangerous situation so created in order to deliberately inflict harm. The intent of X should be of no concern in the action between the plaintiff and the defendant. Its role, if any, is to insure that the defendant should have an action over against X if he should be able to find him.

Nonetheless, cases of the deliberate infliction of harm by an intervening action do raise particularly difficult problems of proof, because there will be many situations where the third party will not seize upon the dangerous aspects of the situation created by the defendant. For example, assume that the defendant leaves a vase precariously perched on the edge of a high shelf. Y picks up that vase and throws it upon the head of the plaintiff who was sitting in a position where he could have been struck by the vase if it had fallen. Here the defendant is not liable because there is no causal connection between his conduct and the plaintiff's harm. Y could have caused the same destruction even if that vase had been placed in a safe and stable position in the middle of the shelf. The dangerous potential in the antecedent situation did not "result in" harm to the plaintiff. In cases like these Hart and Honoré are correct, but it is improper to generalize from them to the broad proposition that it is never proper in a causal sense to go behind the deliberate act of a third person.85

Thus far we have considered the effects that intervening acts have on the causal connection between the dangerous condition created by the defendant and the harm suffered by the plaintiff. A similar analysis applies when we consider the effect of intervening events. In Causation in the Law, Hart and Honoré divide forces of nature essentially into "big" and "little" forces.86 In their view, the little forces never break the chain of causation; when operative they serve only to complete it.87 That position has received general

85 The position of the Restatement has this in common with the argument in the text: it holds that the intervening act of a third person breaks the causal connection in only some cases. Nevertheless, it falls back upon the distinction between "foreseeable" and "unforeseeable" intervening acts as the means to decide particular cases, Restatement of Torts 2d, § 442(B) & comment c at 471 (1965). But given the analysis in the text, it is possible to handle these questions without reference to the concept of foresight and its attendant difficulties.

86 H.L.A. Hart & A.M. Honoré, supra note 29, at 31-38, 152-53. Hart and Honoré do not single out the forces of nature for separate consideration. But to the extent that the distinction between "normal" and "abnormal" conditions applies to them, the uncertain line is between "big" and "little" forces.

87 "Thus if X lights a fire in the open and, shortly after, a normal gentle breeze gets up and the fire spreads to Y's property, X's action is the cause of the harm, though without the subsequent breeze no harm would have occurred; the bare fact that the breeze was subsequent to X's action (and also causally independent of it) does not destroy its status as a mere condition or make it a 'superseding' cause. To achieve the latter status, a subsequent occurrence must at least have some characteristic by which
acceptance, and for the same reason that accidental acts never serve to negate the causal connection. If these forces of nature broke the causal connection, then the concept of causation would have to be restricted to cases of trespass, assault, and compulsion; dangerous conditions would have no role in causal analysis.

But the other portion of their argument, which holds that vis major or other "abnormal events" serve to break the causal connection, does not appear to be correct in all circumstances. Here the argument is the same as in the case of intervening acts designed to inflict deliberate harm. In some cases forces of nature, no matter how great, can operate only upon the antecedent dangerous conditions created by the defendant. For example, if a huge storm pushes the boulder off the edge of a cliff when a gentle rain could have had the same effect, it is hard to see why the storm should break the causal connection that would otherwise have been completed by the breeze. Here the large force, like the small one, only places the boulder in a position where it could be pulled downward by the force of gravity. The storm did not hurl the boulder onto the plaintiff. Again, the gale winds in Vincent did not break the causal connection (and no one even suggested it did) when the defendant continued to hold its ship firm in a position when the winds would dash it against the dock.

Nonetheless, the distinction between large forces and small ones does have importance, because the larger the force, the greater the probability that the defendant did not create a dangerous condition upon which the force acted, and the easier to accept the assertion that the force of nature accomplished all of its destruction on its own without operating upon a dangerous condition created by defendant. For example, if the defendant leaves his automobile atop a hill with its brakes released and its wheels away from the curb, the position of the car, although dangerous, would be quite immaterial if a cyclone lifted the car and carried it a great distance until it landed upon the plaintiff's house. Here the proof of those events shows, as with the case of deliberate harms, that the antecedent dangerous condition bore no causal relationship to the harm.

The theory of causation just developed—that of dangerous conditions—must in all its aspects be distinguished carefully from the "but for" analysis of causation rejected earlier. When a "but for" theory of causation is adopted, the proposition in question takes the form, "but for the negligence (or act) of the defendant, the harm to the plaintiff would never have occurred." That proposition is, to repeat, counterfactual in form, and thus differs linguistically from the assertion, just made, of the form: "The dangerous conditions created by the defendant resulted in harm to the plaintiff," where the proposition

common sense usually distinguishes causes from mere conditions." H.L.A. Hart & A.M. Honoré, supra note 29, at 36.
remains in the indicative mood throughout, with its emphasis upon what the defendant did. The verb "resulted in" covers only the specific kinds of causes discussed in the previous paradigms. Its use does not suggest that the consequences of a given act may extend indefinitely.

A series of examples should clarify both the similarities and differences between the two theories. A digs a hole in a public highway which is a menace to all traffic that uses it. B, even several days later, rides along that highway and is thrown from his car when he drives into that hole. He should be able to maintain his prima facie case against A on the ground that A created the dangerous condition that resulted in B's harm, even though B had to drive his car into the hole in order to complete the causal connection. Similarly, if B lost control of his car and hit C, then C should have an action against A as well. Thus far, there is no distinction between the results under the two theories because one could say with equal force that but for the fact that A dug the hole in the highway, the injuries to B or C would never have happened. But there are instances where a person would escape liability on the causal principles developed here even if his conduct was judged the cause of injuries under the "but for" test. Assume, for example, that when A dug his hole in the highway, it was immediately brought to the attention of the public authorities, who sent D out to repair the road. Assume further that, after he completed the job, D struck E at an intersection when he ran the light in an effort to get home in time for an early dinner. On these facts, the but-for analysis would hold that A (or his negligence) was the "cause" of the harm in question, even if not its only cause. It is true that A might not be held liable for the injuries that occurred, but this would require the invocation of some ad hoc limitation upon causation based upon a notion of foresight or duty. In many cases those tests will achieve only the results which follow from theories of causation that reject "but for" doctrines. In those circumstances they are inelegant but harmless. In others, like Bolton v. Stone, their use is fatal. Once the concept of causation is limited to dangerous conditions that release or otherwise redirect forces in the narrowest sense of causation, it is clear that there is no causal connection between A's act of digging the hole and the subsequent injuries to B. No one tripped, fell, or drove into the hole, or even swerved to avoid it. The causal connection ends once the road is repaired, regardless of the results that would follow from the use of the "but for" theories.

It can also be shown that this account of causation is consistent with the rules of strict liability. It is true that the term "dangerous" often carries with it suggestions of both the degree of risk and the probability of harm, but in the restricted sense the term is used here—with the emphasis upon the "potential" to cause harm in the narrow sense of that term—more than a verbal mutation is at stake. The law of negligence, as expressed in the
formula of Learned Hand, requires balancing the risk and probable extent of harm against the burden of the costs needed either to eliminate or reduce it. No cost-benefit analysis is required, however, when the theories of dangerous conditions are used to establish the causal connection between the defendant’s conduct and the plaintiff’s harm. It could well be that the defendant acts in a reasonable manner when he creates a dangerous condition that results in harm to the plaintiff. It may not be worthwhile for him to see that all of his manufactured products are free from defects; but nonetheless he will be held liable if any of them should prove defective and cause harm.

Again, take the case of a defendant who digs a hole in a back road because he is made to do so at gunpoint. Here the use of a cost-benefit analysis suggests that the expected harm of the activity is much less than the expected harm of the alternative. Moreover, the specific defense of compulsion by a third person should be available to the defendant under the standard negligence theories. Nonetheless, a given plaintiff who is injured when he falls into that hole should be able, prima facie, to recover from the defendant on the theories of causation developed here. The compulsion by the third party has precisely the same effect that it has in the trespass cases. It supports the defendant’s (ordinarily futile) action over against the gunman, should he be sued by the plaintiff. It also supports the plaintiff’s direct action against the gunman, the latter action taking the form that the gunman compelled another person to dig a hole in the highway into which the plaintiff fell (which resulted in his injury). But it is not a defense in the immediate action.

The parallels to the trespass cases can be extended. If the defendant dug the hole in an effort to find water to quench his thirst, then the action would still be allowed, because the defense of private necessity is inapplicable here as in trespass cases. The rules of causation based upon the paradigm of a dangerous condition differ from the rules of negligence because they do not permit the defenses of either compulsion by a third party or private necessity. In all these cases, the defendant created a dangerous condition even though he acted as a reasonable man. The dangerous condition is only the causal substitute for the force required in the trespass cases. Otherwise, the pattern of argumentation in the two theories remains precisely the same.

But even though all these theories of causation are theories of strict liability, there are differences between them. The prima facie cases of trespass and assault turned on (in addition to “volition”) only notions of force and fright. Mention of “dangerous” activities in trespass cases does not serve to explicate the concept of causation. The “force” applied by the defendant makes the concept nonreciprocal; the concept of “dangerous” need not be invoked for that end. Its use in the trespass context as an equivalent to “risky” only adds an additional substantive requirement, much akin to negligence, to the prima facie case. A hit B could not set up the prima facie case
if it had to be shown that A’s activities were dangerous. Once the trespass actions are put to one side and attention is turned to the causal significance of conditions, the term “dangerous” no longer functions as a substitute for “risky,” no longer functions as a separate substantive requirement. Instead, in each of its senses it becomes part and parcel of the extended notion of causation which requires us to take into account at least one further act or event in order to explain the harm in question.

The distinction between the kinds of causation is thus crucial to the development of the law. Moreover, its importance was recognized in imperfect form at common law. During the years that the forms of action controlled, English lawyers drew the distinction between trespass and trespass on the case. Each of these actions was governed by its own writ, and in the early stages at least case could lie only if trespass did not. The mistake of the common lawyers lay not in their recognition of the distinction between the forms of action, but in their insistence that trespass actions (where the causal link is clear) were actions of strict liability, while actions on the case for “indirect” harm required proof of negligence or intent. That distinction makes no more sense than the modern rules which hold that automobile accidents (usually collision cases) are governed by negligence principles while products liability cases (which are never trespass cases) are governed by the principles of strict liability. Both kinds of cases are governed by strict liability principles, once the causation rules are well developed. The line between trespass and case, stated at common law and implicitly followed today, is crucial only on the question whether the causal paradigm of force or that of dangerous conditions is applicable to the case. “The forms of action we have buried, but they still rule us from their graves.”

The rules of liability thus far developed have not relied upon any form of cost-benefit analysis. But even though they have not sought to take into account any economic principles, it does not follow that they must offend them. Consider the two most difficult cases—simple accident and necessity—that could arise under any of these causal paradigms. In both these cases the rules imposing liability upon the defendant should not in principle create any new incentives, once it is settled that the plaintiff’s conduct is not in issue. For example, in Bolten v. Stone the defendant will not take any precautions, because it is cheaper to satisfy the judgment if the accident should occur. There is no question of resource allocation. There is only the question whether the courts will compel the transfer of wealth from one person to another, and on that issue it seems appropriate that the decision should be made on grounds of fairness.

88 See generally C.H.S. Fifoot, History and Sources of the Common Law 66-73 (1949); O.W. Holmes, Jr., The Common Law 90 (1881).
89 F. W. Maitland, The Forms of Action at Common Law 2 (1936 ed.).
The same analysis applies to the case of necessity. Defendants in cases like *Vincent* will be required to make compensation for avoidable damages, regardless of the theory of recovery invoked. The theories of strict liability diverge from those of negligence only with regard to that portion of the damages against which no prudent precautions could have been taken. As to these the economic situation is exactly what it was in *Bolton v. Stone*; it will be cheaper for the defendant to pay the damages than to take the precautions, so the precautions will not be taken. There is still no question of resource allocation, and as before, it is appropriate to rely upon fairness grounds in order to decide whether the transfer payment will be required.

Finally, it can be argued that rules of strict liability are in the end preferable on economic grounds because they reduce the administrative costs of decision. The point is clear in cases like *Vincent* because rules of strict liability eliminate the need to allocate between recoverable and nonrecoverable damages. But more importantly, the rules of strict liability tell the courts that they need not take into account any form of economic analysis in order to decide the concrete case. There is no need to ask the hard question of which branch of government is best able to make cost-benefit determinations, because the matter is left in private hands where it belongs. It is true that the rules of strict liability may in the aggregate lead to some small increase in the number of cases to be decided by the courts, but even that is doubtful since it is so simple for plaintiffs to include some allegation of negligence in their complaint in order to state a prima facie case.

Nor need the point be left only to theoretical speculation. In this context it is interesting to note the observations that sociologist H. Laurence Ross makes about the methods which insurance adjusters use to settle cases under the "fault" system:

The formal law of negligence liability, as stated in casebooks from the opinions of appellate courts, is not easily applied to the accident at Second and Main. It deals with violation of a duty of care owed by the insured to the claimant and is based on a very complex and perplexing model of the "reasonable man," in this case the reasonable driver.... In their day-to-day work, the concern with liability is reduced to the question of whether either or both parties violated the rules of the road as expressed in common traffic laws. Taking the doctrine of negligence *per se* to an extreme doubtless unforeseen by the makers of the formal law, adjusters tend to define a claim as one of liability or of no liability depending only on whether a rule was violated, regardless of intention, knowledge, necessity, and other such qualifications that might receive sympathetic attention even from a traffic court judge. Such a determination is far easier than the task proposed in theory by the formal law of negligence.

To illustrate, if Car A strikes Car B from the rear, the driver of A is assumed to be liable and B is not. In the ordinary course of events, particularly where
damages are routine, the adjuster is not concerned with why A struck B, or with whether A violated a duty of care to B, or with whether A was unreasonable or not. These questions are avoided, not only because they may be impossible to answer, but also because the fact that A struck B from the rear will satisfy all supervisory levels that a payment is in order, without further explanation. Likewise, in the routine case, the fact that A was emerging from a street governed by a stop sign will justify treating this as a case of liability, without concern for whether the sign was seen or not, whether there was adequate reason for not seeing the sign, etc. In short, in the ordinary case the physical facts of the accident are normally sufficient to allocate liability between the drivers. Inasmuch as the basic physical facts of the accident are easily known—and they are frequently ascertainable from the first notice—the issue of liability is usually relatively easy to dispose of.\(^9\)

The cleavage between the appellate rules and the daily practices is sharp and clear. There is abundant theoretical support, however, for the common sense rules of thumb adopted in the daily resolution of accident cases. Here is one case where the theories of law should be changed to conform to the common practice.

### III. The Problem of the Good Samaritan

The first two portions of this paper have compared the common law rules of negligence with those of strict liability in cases where the defendant has harmed the plaintiff's person or property. If that analysis is sound, then the rules of liability should be based upon the harm in fact caused and not upon any subsequent determination of the reasonableness of the defendant's conduct. The question of liability is thereby severed from both general cost-benefit analysis of the defendant's conduct and a moral examination of his individual worth. In the cases of affirmative action, the rules of strict liability avoid both the unfairness and complications created when negligence, in either its economic or moral sense, is accepted as the basis of the tort law.

The purpose of this section is to show that these conclusions are capable of extension to areas in which the law has traditionally not allowed recovery. The theories of strict liability explain and justify, as the rules of reasonableness cannot, the common law's refusal to extend liability in tort to cases where the defendant has not harmed the plaintiff by his affirmative action.\(^9^1\)

The problem arises in its starkest form in the case of the good Samaritan. A finds himself in a perilous situation which was not created by B, as when A is overwhelmed by cramps while swimming alone in a surging sea. B, more-


\(^9^1\) I put aside here all those cases in which there are special relationships between the plaintiff and the defendants: parent and child, invitor and invitee, and the like.
over, is in a position where he could, without any danger of injury to himself, come to A's assistance with some simple and well-nigh costless steps, such as throwing a rope to the plaintiff. The traditional common law position has been that there is no cause of action against B solely because B, in effect, permitted A to drown.

It is important to note the manner in which such cases should be decided under a negligence system. In the verbal formulation of the law of negligence, little attention is paid to the distinction between those cases in which the defendant acted and those cases in which he did not act, failed to act, or omitted to act. "Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."\(^9\) The distinction between acts and omissions is of no consequence to the economic analysis of negligence contained in cases like Carroll Towing, for there the emphasis is placed in part upon those precautions which a defendant should have taken (but did not take) in order to prevent those instrumentalities which he owns (here the boat in the harbor) from causing harm to other persons.

Thus, if one considers the low costs of prevention to B of rescuing A, and the serious, if not deadly, harm that A will suffer if B chooses not to rescue him, there is no reason why the Carroll Towing formula or the general rules of negligence should not require, under pain of liability, the defendant to come to the aid of the plaintiff. Nonetheless, the good Samaritan problem receives special treatment even under the modern law of torts. The reasons for the special position of this problem are clear once the theories of strict liability are systematically applied. Under these rules, the act requirement has to be satisfied in order to show that the defendant in a given lawsuit caused harm to the plaintiff. Once that is done, the private predicament of the defendant, his ability to take precautions against the given risk, and the general economic rationality of his conduct are all beside the point.\(^9\) Only the issue of causation, of what the defendant did, is material to the statement of the prima facie case. The theory is not utilitarian.\(^9\) It looks not to the

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93 Whatever the historical motivation behind the rule, its validity does not rest on the assumption that "the individual [is] competent to protect himself if not interfered with from without." Francis H. Bohlen, Studies in the Law of Torts 295 (1926). If that were the basis of the rule, it could not apply to infants or lunatics about whom the assumption of "competence" has never been made.

94 But see James Barr Ames, Law and Morals, supra note 4, at 110: The law is utilitarian. It exists for the realization of the reasonable needs of the community. If the interest of an individual runs counter to this chief object of the law, it must be sacrificed.
consequences of alternate course of conduct but to what was done. When
that theory with its justification is applied to the problem of the good Samari-
tan, it follows in the case just put that A should not be able to recover from
B for his injuries. No matter how the facts are manipulated, it is not possible
to argue that B caused A harm in any of the senses of causation which were
developed in the earlier portions of this article when he failed to render as-
sistance to A in his time of need. In typical negligence cases, all the talk of
avoidance and reasonable care may shift attention from the causation require-
ment, which the general ‘‘but for’’ test distorts beyond recognition. But its
importance is revealed by its absence in the good Samaritan cases where the
presence of all those elements immaterial to tortious liability cannot, even
in combination, persuade judges who accept the negligence theory to apply
it in the decisive case.

The principles of strict liability do more than explain the reasons behind
the general common law refusal to require men to be good Samaritans. They
also explain why it is that in some cases there are strong arguments to support
apparent exceptions to the common law position. The point is best illustrated
by two cases. The first case is put by Ames:

We may suppose again that the situation of imminent danger of death was
created by the act, but the innocent act, of the person who refuses to prevent the
death. The man, for example, whose eye was penetrated by the glancing shot of
the careful pheasant hunter, stunned by the shot, fell face downward into a shallow
pool by which he was standing. The hunter might easily save him, but lets him
drown.95

The second situation, that of Montgomery v. National C. & T., is described
by Gregory as follows:

Consider this situation. Two of defendant’s trucks, due to no fault of the drivers,
became stalled on a narrow road, completely blocking the highway. Also, without
fault, the men were unable to get the trucks started again. This was at the foot
of a short hill, which obscured the view of approaching drivers. Moreover, the
hill was somewhat icy. Plaintiff came driving along at a normal speed. By the time
he saw the stalled trucks, he was unable to stop and crashed into them. Had one
of defendant’s truck drivers climbed the hill and posted a warning, this accident
would not have happened.96

The first of these cases was not the subject of a judicial decision, but Ames
was of the opinion that under the modern law ‘‘a lawyer who should try to
charge the hunter would lead a forlorn hope,’’ because the defendant ‘‘simply

95 James Barr Ames, supra note 4, at 112.
96 Charles O. Gregory, The Good Samaritan and the Bad, in The Good Samaritan and
the Law 22, 27 (James Ratcliffe ed. 1966).
failed to confer a benefit upon a stranger.97 In the second case, however, the South Carolina court found that the defendant could be held liable on account of the actionable negligence of its employees in the course of their employment, because on the facts of the case the employees had both the opportunity and the means to place warnings in some form at the top of the hill which would have enabled the plaintiff to avoid the crash in question. The court insisted that this duty rested upon the defendant's employees even though two propositions are settled: first, that no passerby would have been charged with that duty, even if he had the time and means to have taken those steps; and second, that the defendant's employees would have been under no duty to place those warnings if the road had been blocked, say, by a falling tree.98 In effect, the position of the court is that simply because the defendant's employees blocked the road, they were under a duty to take those precautions reasonably calculated to prevent possible injury to other users of the highway.

Under the theories of strict liability neither of these defendants could take advantage of the good Samaritan doctrine. The hunter should be liable in a trespass action because he shot the plaintiff. Once negligence is no longer regarded as the lynchpin of the law, it should not matter that after the shooting the defendant was in a position to give aid to the plaintiff. He would be held liable even if he were not. The case no longer raises the problem of the good Samaritan; it is a simple case of trespass governed by the rules of strict liability set out above.

The second case is subject to a similar analysis, only here the appropriate theory of causation is the theory of dangerous conditions. The defendant is liable because harm resulted when the plaintiff's car ran into its truck after his employees blocked the road. It is immaterial that the defendant's employees had an opportunity to place warnings at the top of the hill, because the theory of dangerous conditions, too, is a theory of strict liability. Once it is shown that the plaintiff's conduct (he hit the defendant's truck) only serves to complete the prima facie case, the liability follows, because the facts do not even suggest the basis for an affirmative defense.99

Theories of strict liability, therefore, support the results in both these cases in a simple and direct fashion. But it is not clear that these results are correct under a system of negligence which accepts as one of its premises that a

97 James Barr Ames, supra note 4, at 113, 112.

98 Charles O. Gregory, supra note 96, at 27.

99 If the owner of the truck brought an action against the driver, claiming as its prima facie case, "you struck my truck," that action would fail because the defendant could plead as its affirmative defense, "you (plaintiff) blocked my right of way." Observe that there is no appeal here to a notion of contributory negligence, even though the defense puts plaintiff's conduct into issue.
man is under no duty to confer aid upon a stranger. In both these cases, the claim for liability is based upon the assumption that the defendant's conduct, although insufficient to create a prima facie case, is nonetheless sufficient to create some duty of care. Once created, each of these cases is to be treated as though it were a typical negligence case in which the defendant is under a duty to take reasonable steps to aid the plaintiff.

At common law, as Ames acknowledges, the "hunter" would have been liable "simply because he shot the other." But if that allegation fails to state a prima facie case (or in the alternative is subject to the affirmative defense that the defendant was not negligent), then it has been decided that the defendant should not be responsible for the harm to the plaintiff, even though he has caused it. On what grounds, therefore, can it be argued that the trespass does not create a prima facie case, but does create an affirmative duty of care? In his attack upon the rules of strict liability, Holmes argued that to hold a man liable only because he has harmed someone else is little better than to compel him to insure his neighbor against lightning. If Holmes is correct, then it follows that the defendant in the hunting case should be subjected to no additional burden because he shot the stranger. The conclusion is inescapable once accidental harms caused by the defendant are treated on a par with acts of God.

These arguments apply with equal force to Montgomery v. National C. & T. Defendant's drivers would have been under no duty to warn oncoming vehicles of the possible danger if the road had been blocked by a falling tree. Once it is accepted that an allegation that the defendant blocked the highway does not create a prima facie case, then, as in Ames' case, it seems improper to take refuge in a halfway house which says that the conduct of the defendant is nonetheless sufficient to obligate him to take reasonable steps for the benefit of the plaintiff. Again the act of the defendant must be treated like an Act of God whether the issue is immediate liability or the recognition of a duty of care.

These variations on the good Samaritan rule illustrate the evasive responses that courts are prepared to make in order to restrict a rule that they accept but do not like. The point of the above discussion is that in some cases adoption of the theories of strict liability will reduce the potential scope of the good Samaritan problem because the cases will be governed by one of the causation paradigms set out in part II of the article. But in a closely related context, the theories of strict liability will not work to expand liability. Assume that the defendant has caused harm to the plaintiff for which he is

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100 James Barr Ames, supra note 4, at 113.
101 It is odd that the assertion "The defendant was not negligent" would be treated as an affirmative defense.
102 O.W. Holmes, Jr., supra note 5, at 96.
not liable solely because he has open to him a good affirmative defense, such as contributory negligence. The Restatement of Torts, for example, states that the defendant, although not liable for the initial injuries, is under a duty to render aid to the plaintiff.\(^\text{103}\) In effect, this position holds that conduct insufficient to create liability may nonetheless call forth a duty of care. But once it is accepted that the defendant was not responsible for the harm he caused, then he should be able to treat the plaintiff as though he were a stranger who placed himself in a position of danger. At that point the general common law position on the good Samaritan question should govern, for the availability of a good defense eliminates the force of the prima facie case. The defendant could, if he chose, render him assistance, but should not be under obligation to do so.

There is a further class of exceptions to the good Samaritan rule, motivated by the same judicial distaste for the doctrine, which also cannot be rationalized by an appeal to the theories of strict liability. Consider the case where the defendant gratuitously takes steps to aid the plaintiff only to discontinue his efforts before the plaintiff is moved to a position of comparative safety. For example, \(A\) sees \(B\) lying unconscious on the public street. Immediately, he runs to the phone, dials an emergency room, and then hangs up the receiver. Or, in the alternative, he picks \(B\) up and places him in his automobile, only to return him to his original position on the sidewalk when he thinks, for whatever reason, better of the involvement.

It has often been argued that the good Samaritan doctrine in these situations is of no application on the ground that once the defendant undertakes to assist the plaintiff in distress, he can no longer claim that his conduct amounted to a “simple nonfeasance,” no longer maintain that the two were still strangers in the eyes of the law. The general refusal of the law to require one man to come to aid another is only a consequence of the act requirement in the law of tort. But once the defendant dials the phone or moves the plaintiff, the act requirement is satisfied; and once satisfied, the defendant cannot disregard the welfare of a plaintiff whom he has taken into his charge.

This position must be rejected. The act requirement in the law of tort is but a combination of the volition and the causation requirements already discussed. The law of tort cannot be invoked simply because the defendant has done something; it must be shown that the act in question has caused harm to the plaintiff. Where the defendant has dialed the phone only to put the receiver back on the hook, he has acted, but those acts have not caused harm. The theories of force, fright, compulsion and dangerous condition are inapplicable, either alone or in combination, to the facts as described. The

\(^{103}\) Restatement of Torts § 322. Contributory negligence is taken as a good defense only for the purposes of this argument.
same result applies even where the defendant has moved the plaintiff's body. It is true that there is a technical trespass in that case, but unless it could be shown that the plaintiff was worse off afterward because he was moved, the causation requirement has not been satisfied even if there was more than simple nonfeasance by the plaintiff.

Properly conceived, these situations should be discussed together with other forms of gratuitous undertakings and the obligations they generate. The common law has never found a home for such obligations. They should not be part of the law of tort because they do not satisfy the causation requirement; and the unfortunate doctrine of consideration prevents their easy inclusion in the law of contracts. But even though the obligations attached to gratuitous undertakings stand in need of systematic examination, it is still in general the case that a defendant should not be compelled to complete a gratuitous undertaking against his will even where he has made an express promise to do so. And that result applies even if the defendant has taken steps to discharge his promise. A bare promise to pay $1000 does not become enforceable simply because the plaintiff has written a check for that amount; delivery is still required. Nor does the payment of $100 as the first of ten gratuitous instalments obligate the donor to pay the other $900. In the case just put where the plaintiff is unconscious, there cannot of course be any question of an express promise. But it is only appropriate to hold that once a defendant begins to help a plaintiff in distress, he should be in no worse a position than a defendant who had made an express promise to assist. Even if the defendant has been of a partial assistance to the plaintiff, that does not of itself obligate the defendant to provide him with still further benefits. It follows that the defendant can discontinue his efforts at will and escape all liability unless he has caused harm to the plaintiff in one of the senses developed above.

The same issue involved in the good Samaritan problem frequently arises when it is the defendant who claims in effect that the plaintiff was under an affirmative duty to take steps for his, the defendant's, benefit. The point is most clearly raised in connection with the maxim that a tortfeasor takes his victim as he finds him. The maxim applies where the defendant has tortiously harmed the plaintiff, and the issue is whether the latter is entitled to recover for those injuries which would not have occurred had the plaintiff had, in all material respects, a "normal" constitution.

The hardest case of this sort arises where the defendant places the plaintiff in a position where he is no longer able to get help from others who might wish to aid him. Under those circumstances it is proper to hold the defendant liable, even though it is difficult to establish whether the help from some third party would indeed be forthcoming. See Zelenko v. Gimbel Bros., 158 Misc. 904, 287 N.Y. S. 134 (Sup. Ct. 1935). "Defendant segregated this plaintiff's intestate where such aid could not be given and then left her alone." Id. at 905, 287 N.Y.S. 135 (emphasis added). The act requirement is satisfied in this statement of the cause of action.
The situation is illustrated by the facts of *Vosburg v. Putney*. The plaintiff was suffering from the after effects of a prior injury to his leg. The defendant kicked the leg at its sore point and caused a serious inflammation. Little or no harm would have been done to an individual with a sound leg. Once it is accepted that the plaintiff has a prima facie case against the defendant, whether on a theory of strict liability, negligence, or "wrongful" intent, the question arises whether the plaintiff should be able to recover for that portion of the damages that would not have been suffered by a plaintiff with a healthy constitution. If he takes no precautions to protect his knee, it should be possible for the defendant to argue that the plaintiff's negligence bars his recovery if the *Carroll Towing* formula is used to determine the reasonableness of the plaintiff's conduct. It could well be argued that, as between the two parties, the plaintiff is in a better position to take steps which will reduce the harm that will result from contact, and so should be required to take those steps.

105 80 Wis. 523, 50 N.W. 403 (1891). *Vosburg* is not a clean case on its facts. Given that the incident took place in the classroom, there are overtones of assumption of risk which are not present in a case like *Bolton v. Stone*. Indeed the maxim, you take your victim as you find him, would have found its clearest application in a case like *Bolton v. Stone* if Miss Stone had had an unusually thin skull. Note, moreover, that if assumption of risk could be proved in *Vosburg v. Putney*, it would apply whether or not the plaintiff had a sore knee.

106 The language in *Vosburg v. Putney* on the wrongful intent question is incomprehensible:

But this is an action to recover damages for an alleged assault and battery. In such case the rule is correctly stated, in many of the authorities cited by counsel, that plaintiff must show either that the intention was unlawful, or that the defendant is in fault. If the intended act is unlawful, the intention to commit it must necessarily be unlawful. Hence, as applied to this case, if the kicking of the plaintiff by the defendant was an unlawful act, the intention of defendant to kick him was also unlawful.

80 Wis. at 527, 50 N.W. 403. Indeed, the case is a good illustration of the general proposition that the prima facie case is complete without reference to negligence or intent. Here the "intent" requirement is not satisfied if the specific intent to harm must be shown on the strength of the criminal law analogies, for the jury found expressly for the defendant on this point. The court in effect eliminates the intent requirement by fiction, and allows the plaintiff full recovery on the ground that the defendant kicked him.

107 The doctrinal basis for the defense of contributory negligence in battery cases is not clear under the modern law. There are statements that it should not be applied in cases of intentional torts because "where the defendant's conduct is actually intended to inflict harm upon the plaintiff, there is a difference, not merely in degree but in the kind of fault; and the defense never has been extended to such intentional torts." William L. Prosser, *supra* note 25, at 426. But this argument is flawed because it assumes that all cases of battery require proof of specific intent to harm. However, in his earlier discussion of intentional torts Prosser notes that the term does not cover only cases in which there is "a desire to do any harm. Rather it is an intent to bring about a result which will invade the interests of another in a way that the law will not sanction." *Id.* at 31. Since Vosburg does not involve specific intent to harm, it should be a case of battery in which the defense is admitted, even if the general rule is to the contrary.
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If this line of reasoning is accepted, the defendant in cases like Vosburg v. Putney could argue that the plaintiff was in breach of his duties to the defendant when he failed, say, to wear a shinguard which at low cost would protect him from accidental harm. The distinction between acts and omissions that appears to be immaterial in the formulation (though not the practice) of negligence law when applied to the defendant's conduct should be immaterial as well when it is plaintiff's conduct that is to be taken into account. But the law does not take this position. It holds instead that the plaintiff is under no duty to package and bandage himself (though the costs are low) in order to reduce the damages to be paid by those who might harm him. Where the plaintiff is in a weakened condition, he has not caused the harm in any of the senses developed in part II, even if he had the opportunity to prevent them from occurring. As in the case of the good Samaritan, one man is not under a common law duty to take steps to aid a stranger.\footnote{108}

The common law position on the good Samaritan question does not appeal to our highest sense of benevolence and charity, and it is not at all surprising that there have been many proposals for its alteration or abolition. Let us here examine but one of these proposals. After concluding that the then (1908) current position of the law led to intolerable results, James Barr Ames argued that the appropriate rule should be that:

One who fails to interfere to save another from impending death or great bodily harm, when he might do so with little or no inconvenience to himself, and the death or great bodily harm follows as a consequence of his inaction, shall be punished criminally and shall make compensation to the party injured or to his widow and children in case of death.\footnote{109}

\footnote{108} The application of this maxim is not limited to cases of personal injury. In the famous case of Leroy Fibre v. Chicago, Mil. & St. Paul R.R., 232 U.S. 340 (1914), the Supreme Court ruled that the defendant could not make out a good defense of contributory negligence by showing that the plaintiff stored flammable flax within 75 to 100 feet of the defendant's tracks even though it might have been cheaper for the plaintiff to move his flax than for the defendant to control the sparks emitted by the operation of its trains.

\footnote{109} James Barr Ames, supra note 4, at 113. See also Wallace M. Rudolph, The Duty to Act: A Proposed Rule, 44 Neb. L. Rev. 499 (1965), for a more complicated rule which states:

A person has a duty to act whenever:
1. The harm or loss is imminent and there is apparently no other practical alternative to avoid the threatened harm or loss except his own action;
2. Failure to act would result in substantial harm or damage to another person or his property and the effort, risk, or cost of acting is disproportionately less than the harm or damage avoided; and
3. The circumstances placing the person in a position to act are purely fortuitous.

\textit{Id.} at 509. The first and second conditions are open to the same sorts of objections as Ames' rule, but the third seeks to limit the scope of its application. Nonetheless, its effect does not appear to be too great, for Rudolph says:

Thus though condition three protects the classic rich from being obligated to the classic
Even this solution, however, does not satisfy the *Carroll Towing* formula. The general use of the cost-benefit analysis required under the economic interpretation of negligence does not permit a person to act on the assumption that he may as of right attach special weight and importance to his own welfare. Under Ames' good Samaritan rule, a defendant in cases of affirmative acts would be required to take only those steps that can be done "with little or no inconvenience." But if the distinction between causing harm and not preventing harm is to be disregarded, why should the difference in standards between the two cases survive the reform of the law? The only explanation is that the two situations are regarded at bottom as raising totally different issues, even for those who insist upon the immateriality of this distinction. Even those who argue, as Ames does, that the law is utilitarian must in the end find some special place for the claims of egoism which are an inseparable byproduct of the belief that individual autonomy—individual liberty—is a good in itself not explainable in terms of its purported social worth. It is one thing to allow people to act as they please in the belief that the "invisible hand" will provide the happy congruence of the individual and the social good. Such a theory, however, at bottom must regard individual autonomy as but a means to some social end. It takes a great deal more to assert that men are entitled to act as they choose (within the limits of strict liability) even though it is certain that there will be cases where individual welfare will be in conflict with the social good. Only then is it clear that even freedom has its costs: costs revealed in the acceptance of the good Samaritan doctrine.

But are the alternatives more attractive? Once one decides that as a matter of statutory or common law duty, an individual is required under some circumstances to act at his own cost for the exclusive benefit of another, then it is very hard to set out in a principled manner the limits of social interference with individual liberty. Suppose one claims, as Ames does, that his proposed rule applies only in the "obvious" cases where everyone (or almost everyone) would admit that the duty was appropriate: to the case of the man upon the bridge who refuses to throw a rope to a stranger drowning in the waters below. Even if the rule starts out with such modest ambitions, it is difficult to confine it to those limits. Take a simple case first. X as a representative of a private charity asks you for $10 in order to save the life of poor, it does allow, under limited circumstances, a person of means who is temporarily without funds to require someone else to lend him money, if the resources to be saved by lending the money exceed substantially the risk of losing the money. *Id.* at 510. See p. 199, *infra*, for a discussion of forced exchanges.

110 "Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many." John Rawls, A Theory of Justice 3-4 (1971).
some starving child in a country ravaged by war. There are other donors available but the number of needy children exceeds that number. The money means "nothing" to you. Are you under a legal obligation to give the $10? Or to lend it interest-free? Does $10 amount to a substantial cost or inconvenience within the meaning of Ames' rule? It is true that the relationship between the gift to charity and the survival of an unidentified child is not so apparent as is the relationship between the man upon the bridge and the swimmer caught in the swirling seas. But lest the physical imagery govern, it is clear in both cases that someone will die as a consequence of your inaction in both cases. Is there a duty to give, or is the contribution a matter of charity?

Consider yet another example where services, not cash, are in issue. Ames insists that his rule would not require the only surgeon in India capable of saving the life of a person with a given affliction to travel across the subcontinent to perform an operation, presumably because the inconvenience and cost would be substantial. But how would he treat the case if some third person were willing to pay him for all of his efforts? If the payment is sufficient to induce the surgeon to act, then there is no need for the good Samaritan doctrine at all. But if it is not, then it is again necessary to compare the costs of the physician with the benefits to his prospective patient. It is hard to know whether Ames would require the forced exchange under these circumstances. But it is at least arguable that under his theory forced exchanges should be required, since the payment might reduce the surgeon's net inconvenience to the point where it was trivial.

Once forced exchanges, regardless of the levels of payment, are accepted, it will no longer be possible to delineate the sphere of activities in which contracts (or charity) will be required in order to procure desired benefits and the sphere of activity in which those benefits can be procured as of right. Where tests of "reasonableness"—stated with such confidence, and applied with such difficulty—dominate the law of tort, it becomes impossible to tell where liberty ends and obligation begins; where contract ends, and tort begins. In each case, it will be possible for some judge or jury to decide that there was something else which the defendant should have done, and he will decide that on the strength of some cost-benefit formula that is difficult indeed to apply. These remarks are conclusive, I think, against the adoption of Ames' rule by judicial innovation, and they bear heavily on the desirability of the abandonment of the good Samaritan rule by legislation as well. It is not surprising that the law has, in the midst of all the clamor for reform, re-

111 For an extended discussion of the duties of a professional physician see Wallace M. Rudolph, supra note 109, at 512-19, whose proposed rule indeed requires a high standard of conduct.
mained unmoved in the end, given the inability to form alternatives to the current position.\textsuperscript{112}

But the defense of the common law rule on the good Samaritan does not rest solely upon a criticism of its alternatives. Strong arguments can be advanced to show that the common law position on the good Samaritan problem is in the end consistent with both moral and economic principles.

The history of Western ethics has been marked by the development of two lines of belief. One line of moral thought emphasizes the importance of freedom of the will. It is the intention (or motive) that determines the worth of the act; and no act can be moral unless it is performed free from external compulsion.\textsuperscript{113} Hence the expansion of the scope of positive law could only reduce the moral worth of human action. Even if positive law could insure conformity to the appropriate external standards of conduct, it, like other forms of external constraints, destroys the moral worth of the act. Hence the elimination of the positive law becomes a minimum condition for moral conduct, even if it means that persons entitled to benefits (in accordance with some theory of entitlements respected but not enforced) will not receive them if their fellow men are immoral.

On the other hand there are those theories that concern themselves not with the freedom of the will, but with the external effects of individual behavior. There is no room for error, because each act which does not further the stated goals (usually, of the maximization of welfare) is in terms of these theories a bad act. Thus a system of laws must either require the individual to act, regardless of motive, in the socially desired manner, or create incentives for him to so behave. Acceptance of this kind of theory has as its corollary the acceptance, if necessary, of an elaborate system of legal rules to insure compliance with the stated goals of maximization even if individual liberty (which now only counts as a kind of satisfaction) is sacrificed in the effort.

At a common sense level, neither of these views is accepted in its pure form. The strength of each theory lays bare the weaknesses of the other. Preoccupation with the moral freedom of a given actor ignores the effects of his conduct upon other persons. Undue emphasis upon the conformity to external standards of behavior entails a loss of liberty. Hence, most systems of conventional morality try to distinguish between those circumstances in which

\textsuperscript{112} "Such decisions are revolting to any moral sense. They have been denounced with vigor by legal writers. Thus far the difficulties of setting any standards of unselfish service to fellow men, and of making any workable rule to cover possible situations where fifty people might fail to rescue one, has limited any tendency to depart from the rule to cases where some special relation between the parties has afforded a justification for the creation of a duty, without any question of setting up a rule of universal application." William L. Prosser, supra note 25, at 341 (3d ed.).

a person should be compelled to act for the benefit of his fellow man, and
those cases where he should be allowed to do so only if prompted by the ap-
propriate motives. To put the point in other terms, the distinction is taken
between that conduct which is required and that which, so to speak, is beyond
the call of duty. If that distinction is accepted as part of a common morality,
then the argument in favor of the good Samaritan rule is that it, better than
any possible alternatives, serves to mark off the first class of activities from
the second. Compensation for harm caused can be demanded in accordance
with the principles of strict liability. Failure to aid those in need can
invoke at most moral censure on the ground that the person so accused
did not voluntarily conform his conduct to some "universal" principle of
justice. The rules of causation, which create liability in the first case, deny
it in the second. It may well be that the conduct of individuals who do not
aid fellow men is under some circumstances outrageous, but it does not follow
that a legal system that does not enforce a duty to aid is outrageous as well.

The defense of the good Samaritan rule in economic terms takes the same
qualified form. The cost-benefit analysis has in recent literature been regarded
as the best means for the solution of all problems of social organization in
those cases where market transactions are infeasible. On that view, the basic
principles of economics become a most powerful instrument for the achieve-
ment of social justice. But there is another strand of economic thought—more
skeptical in its conclusions—which emphasizes the limitations of economic
theory for the solution of legal problems.

Most economics textbooks accept that the premises of economic theory do
not permit so-called interpersonal comparisons of utility. Thus Kenneth Arrow
states: "The viewpoint will be taken here that interpersonal comparison of
utilities has no meaning and, in fact, that there is no meaning relevant to
welfare comparisons in the measurability of individual utility."114 In effect,
all attempts to compare costs and benefits between different persons require
in the end some noneconomic assumption to measure trade-offs in utility be-
tween them. Where no noneconomic assumptions are made, it follows that,
in strict theory, an economist can make utility comparisons between alterna-
tive social arrangements only under a very restricted set of conditions. One
social arrangement can be pronounced superior to a second alternative only
if (1) it can be shown that everybody is at least as well off under the first
alternative as he is under the second, and (2) at least one person is better
off under the first system than he is under the second. If these conditions
are respected, then no strictly economic judgment can be made between alter-
native social states where one person under the allegedly preferred state
is worse off than he is under the next best alternative. Yet it is precisely that

kind of situation that is involved whenever there is a legal dispute. In economic terms, the resolution of every dispute requires a trade-off between the parties, for no one has yet found a way in which both parties could win a lawsuit. In order to decide the case of the good Samaritan, therefore, we must make the very kind of interpersonal comparisons of utility which economic theory cannot make in its own terms.

There is one possible escape from this problem. It could be argued that the defendant should be held liable because if the parties had the opportunity to contract between themselves, they doubtless would have agreed that the defendant should assume the obligation to save the plaintiff in his time of distress. Thus one could argue that (in the absence of externalities) an agreement between two persons can only have favorable welfare effects since each person will be better off on account of the voluntary exchange. On this view the function of the law of tort is to anticipate those contractual arrangements which parties would have made had the transactions costs been low enough to permit direct negotiations.

This position, however, is subject to objections. The courts have struggled for years to determine the content of incomplete and ambiguous contracts which were actually negotiated by the parties. There at least they could look to, among other things, the language of the relevant documents, the custom of the trade, and the history of the prior negotiations. In the good Samaritan context, there are no documents, no customs, and no prior negotiations. The courts have only the observation that the parties would have contracted to advance their mutual interests. Given the infinite variation in terms (what price? what services?) that we could expect to find in such contracts, it is difficult to believe that that theoretical observation could enable us to determine or even approximate any bargain which the parties might have made if circumstances had permitted. It is for good reason that the courts have always refused to make contracts for the parties.

But there is a further point. We are concerned with the enforcement of a contract by private action when one of the parties objects to its performance. It no longer seems possible to argue that both parties are better off on account of the contract since one party has indicated his desire to repudiate it. Even though the theory of the underlying action is shifted from tort to some extended form of contract, the difficulties raised by the rule that forbids interpersonal comparison of utilities still remain. At the time of the enforcement, one party argues not for an exchange which makes both parties better off, but for a transfer of wealth which makes him better off. Again we must find some way—some theory of fairness—which can explain which of them is to be made better off. Welfare economics cannot provide the answer because it cannot accommodate the trade-offs which are part and parcel of legal decisions.
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Even after these arguments are made many people will be concerned with the social costs of a system of rules which does not purport to have an economic base. But in a social sense it should be clear that people will act in a manner to minimize their losses, regardless of the legal rules adopted. Once people know that others are not obliged to assist them in their time of peril, they will on their own take steps to keep from being placed in a position where they will need assistance where none may be had. These precautions may not eliminate losses in the individual case, but they should reduce the number of cases in which such losses should occur.

In addition, the incentive effects created by the absence of a good Samaritan rule must be examined in the context of other rules of substantive law. Thus it is critical to ask about the incentives which are created by rules which permit a rescuer to bring an action against the person he saved on quasi-contractual theories. It is also important to ask what modifications of behavior could be expected if the scope of this kind of action were expanded, and important, too, to know about the possible effects of systems of public honors and awards for good Samaritans. None of these arguments is designed to show that the common law approach can be justified on economic grounds, but they do show how perilous it is to attempt to justify legal rules by the incentives that they create.

The same kinds of observations apply to the maxim that a tortfeasor must take his victim as he finds him. It is true that the rule reduces the plaintiff's incentives to take care of himself even where he is able to do so efficiently. But it is a mistake to think that any legal rule on this question can create strong incentives. Indeed, it seems far more likely that few plaintiffs will be prepared to take unnecessary risks of personal injury even if they know that they will be able to recover in full for the injuries from a defendant who caused them. Damages in tort still do not permit a plaintiff to make a profit; and in some cases it is arguable that they do not permit recovery of adequate compensation. Some men may be moved to guide their conduct by general statements of substantive law, but in most cases any incentives created by the selection of one legal rule in preference to another will be masked by the fear of injury which is shared by defendants and plaintiffs alike.

But it is a mistake to dwell too long upon questions of cost, for they should not be decisive in the analysis of the individual cases. Instead it is better to see the law of torts in terms of what might be called its political function. The arguments made here suggest that the first task of the law of torts is to define the boundaries of individual liberty. To this question the rules of strict liability based upon the twin notions of causation and volition provide a better answer than the alternative theories based upon the notion of negligence, whether explicated in moral or economic terms. In effect, the principles of strict liability say that the liberty of one person ends when he causes harm.
to another. Until that point he is free to act as he chooses, and need not take into account the welfare of others.

But the law of tort does not end with the recognition of individual liberty. Once a man causes harm to another, he has brought himself within the boundaries of the law of tort. It does not follow, however, that he will be held liable in each and every case in which it can be showed that he caused harm, for it may still be possible for him to escape liability, not by an insistence upon his freedom of action, but upon a specific showing that his conduct was either excused or justified. Thus far in this paper we have only made occasional and unsystematic references to the problems raised by both pleas of excuses and justification. Their systematic explication remains crucial to the further development of the law of tort. That task, however, is large enough to deserve special attention of its own.