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NONRECIPROCAL RISK IMPOSITION, UNJUST ENRICHMENT, AND THE FOUNDATIONS OF TORT LAW: A CRITICAL CELEBRATION OF GEORGE FLETCHER'S THEORY OF TORT LAW

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Whenever I am asked to cite my favorite piece of legal scholarship, I say without hesitation that it is George Fletcher's classic contribution to the jurisprudence of torts, *Fairness and Utility in Tort Theory*.[1] This is my favorite article because, like its author, it has tremendous panache. It is bold, and even brazen in its advancement of a descriptive thesis that cuts across the standard categories of tort doctrine; it is haunting in its articulation of deep-seated moral intuitions that demand a powerful new moral agenda for the tort system; and it is playful and irreverent in its use of traditional doctrinal and theoretical dogmas. In short, it is, like its author, a show. And an absolutely wonderful one at that. And throughout all of the years of teaching it, both in my standard torts classes and in my upper-level tort theory and general jurisprudence seminars, I have marveled at its continued freshness, relevance, and staying power.

I can thus think of no greater way to pay tribute to the remarkable scholarly legacy of my dear friend and colleague, George Fletcher, than to devote this short contribution to an analysis of this wonderful old chestnut in torts scholarship. Many will no doubt consider it odd to honor George in this way, for he is surely best known, and rightly so, for his prolific contributions to our understanding of criminal law. But, in many ways, it is his work in torts that best captures his genius; for he wrote *Fairness and Utility in Tort Law* after teaching torts only once, and upon writing it, he did not teach torts again for many

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1 George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

years.[2] Few of us can imagine writing a seminal piece in an area to which we were but a one-semester tourist; and thus, as we celebrate George's remarkable contribution to law, it would do him an injustice not to honor this unusual achievement.

With all of this said, however, George would consider me an unworthy recipient of his years of mentorship were I to seek to honor his work without saying what I really think about the ability of his arguments to withstand critical scrutiny. So let me be blunt. In my view, the thesis that George articulates in *Fairness and Utility in Tort Law* is descriptively implausible, normatively unattractive, and ultimately conceptually incoherent. Or so I shall argue.

I. GEORGE FLETCHER'S FAMOUS TORT THEORY IN A NUTSHELL

In *Fairness and Utility in Tort Theory*, George contends that tort liability is normatively appropriate only when a defendant has caused a harm as a result of engaging in an activity that imposed non-reciprocal risks on the injured party. He premises his defense of this novel normative thesis—which he calls the "paradigm of reciprocity"—on an explicitly deontological moral theory: "The paradigm of reciprocity . . . takes as its starting point the personal rights of individuals in society to enjoy roughly the same degree of security, and appeals to the conduct of the victims themselves to determine the scope of the right to equal security."[3] Plaintiffs who are as likely to harm defendants as be harmed by them cannot complain when defendants' risks materialize in harm to them, for their equally risky conduct constitutes a moral waiver of their right to recover. As he puts it, "By interpreting the risk-creating activities of the defendant and of the victim as reciprocal and thus offsetting, courts may tie the denial of liability to the victim to his own waiver of a degree of security in favor of the pursuit of an activity of higher risk."[4]

In George's view, the paradigm of reciprocity competes both descriptively and normatively with what he calls "the paradigm of reasonableness"—that is, the thesis that tort liability is justified only when its imposition advances social utility. Most famously articulated by Learned Hand in *United States v. Carroll Towing Co.*,[5] and most recently

2 He did, however, eventually go on to write more about tort law. *See, e.g.*, George P. Fletcher, *Corrective Justice for Moderns*, 106 HARV. L. REV. 1658 (1993) (reviewing JULES COLEMAN, RISKS AND WRONGS (1992)).

3 Fletcher, *supra* note 1, at 569.

4 *Id.*

5 159 F.2d 169, 173 (2d Cir. 1947) ("[I]f the probability be called P; the injury, L; and the burden, B; liability [for negligence] depends upon whether B is less than L multiplied by P: i.e., whether B [is less than] PL."). For an earlier articulation of this

captured by the contemporary concern for using tort law to reduce and spread the costs of accidents, this paradigm is explicitly consequentialist.

> The reasonableness of [a defendant's] risk determines both whether the victim is entitled to compensation and whether the defendant ought to be held liable. Reasonableness is determined by a straightforward balancing of costs and benefits. If the risk yields a net social utility (benefit), the victim is not entitled to recover from the risk-creator; if the risk yields a net social disutility (cost), the victim is entitled to recover.[6]

According to George, the paradigm of reciprocity is capable of providing a comprehensive description and explanation of contemporary tort law in a way that the paradigm of reasonableness is not. For while the paradigm of reasonableness appears to make sense of core doctrines within contemporary negligence law, it appears impotent to account for the various doctrinal pockets of strict and intentional tort liability. In George's view, only the paradigm of reciprocity can explain both why tort law *simultaneously* embraces three categories of liability that superficially appear to be in conflict with one another, and why each category embodies doctrines of superficially unclear kinship.

As George explains, the only thing that is common to the activities that are burdened by the threat of strict liability is the fact that they all impose nonreciprocal risks on those harmed by them:

> Airplane owners and pilots are strictly liable for ground damage, but not for mid-air collisions. Risk of ground damage is non-reciprocal; homeowners do not create risks to airplanes flying overhead. The risks of mid-air collisions, on the other hand, are generated reciprocally by all those who fly the air lanes.[7]

Similarly, ultra-hazardous activities such as crop dusting, blasting, and fumigating, are, by their nature, non-reciprocally risky: "They represent threats of harm that exceed the level of risk to which all members of the community contribute in roughly equal shares."[8] And wild animals and biting dogs create risks to neighbors of an order unmatched by the neighbors' goldfish and house cats.

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rule, see Hand's opinion in *Conway v. O'Brien*, 111 F.2d 611, 612 (2d Cir. 1940) ("The interest which he [the tortfeasor] would have had to sacrifice be less than the risk to which he subjects others, but it must so far fail to match that risk that some opprobrium or reproach attaches to him.").

6 Fletcher, *supra* note 1, at 542.

7 *Id.* at 548 (citing RESTATEMENT (SECOND) OF TORTS § 520A (Tentative Draft No. 12, 1966)).

8 *Id.* at 547.

In George's view, intentional tort liability, too, can be well explained by the concern for a reciprocity of risking. With an apparent straight face at which I have often marveled, he writes, "An intentional assault or battery represents a rapid acceleration of risk, directed at a specific victim" that "distinguish[es] the intentional blow from the background of risk."[9]

According to George, while a cost-benefit conception of reasonableness may well fit and make apparent sense of core doctrines in negligence law, the paradigm of reciprocity also has the necessary explanatory power to account for the instances in which negligence liability is imposed. As he argues, negligence liability is imposed whenever a defendant has created a non-reciprocal risk against a background of reciprocal risks.

> As a general matter, principles of negligence liability apply in the context of activities, like motoring and sporting ventures, in which the participants all normally create and expose themselves to the same order of risk. . . . [E]ach participant contributes as much to the community of risk as he suffers from exposure to other participants. To establish liability for harm resulting from these activities, one must show that the harm derives from a specific risk negligently engendered in the course of the activity. Yet a negligent risk, an "unreasonable" risk, is but one that unduly exceeds the bounds of reciprocity. Thus, negligently created risks are nonreciprocal relative to the risks generated by the drivers and ball players who engage in the same activity in the customary way.[10]

George certainly appreciates that in the arena of negligence law in which the paradigms of reasonableness and reciprocity overlap, they do not theoretically demand identical conclusions. There may be activities that impose non-reciprocal risks (and are hence eligible for negligence liability under George's view) that are nevertheless cost-justified (and hence non-negligent under Learned Hand's calculus of risk); e.g., operating a railroad without a spark arrester[11] or driving an SUV. And there may be activities that are not cost-justified (and, hence, are negligent according to the calculus of risk) but that are nevertheless sufficiently common as to impose symmetrical risks on others (so as to be non-negligent under George's analysis); e.g., speeding on California freeways or using cell phones while driving. In

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9 *Id.* at 550.

10 *Id.* at 548.

11 *See, e.g.*, LeRoy Fibre Co. v. Chi., Milwaukee & St. Paul Ry., 232 U.S. 340, 350 (1914) (stating that "[o]peration [of a railroad] is a legitimate use of property; other property in its vicinity may suffer inconveniences and be subject to risks by it, but a risk from wrongful operation is not one of them").

cases in which the paradigms of liability yield different conclusions, George's claim is that tort law should honor the paradigm of reciprocity. This is both because it is normatively superior and because adherence to its dictates will ultimately cohere all of tort doctrine in a manner that cannot be achieved through the pursuit of any other normative goal.

George maintains that the paradigm of reciprocity would require courts to recognize two general defenses to liability for harms caused to others: compulsion and unavoidable ignorance. A defendant is compelled to engage in non-reciprocally risky conduct, in George's view, if (1) another employs the defendant's body as an instrumentality of harm—"as if someone took his hand and struck a third person";[12] or (2) if the defendant's circumstances can fairly be characterized as an emergency—"an unexpected, personally dangerous situation"[13]—as when a cab driver leapt from a moving cab into a crowd of pedestrians in order to escape from a threatening gunman.[14] A defendant is unavoidably ignorant, according to George, if no reasonable person in his circumstances could appreciate the danger of his deeds—as when a defendant honked his horn to warn a tugboat that seemed to be heading to shore, only to have that warning confused with a prearranged signal to come ashore.

The excuses of compulsion and unavoidable ignorance are, on George's account, already embedded within the categories of tort liability, and hence, the fact that they are demanded by the paradigm of reciprocity simply serves as further reason to think that the paradigm is descriptively robust. The voluntary act doctrine applies across intentional, negligence, and strict liability doctrines, making the instrumental use of one's body by another a valid defense to any tort suit. Within negligence law, defendants who make plausible choices between evils are deemed to have acted reasonably when their choices are forced on them in emergency circumstances.[15] And, as George notes, there have been famous cases in which "strict liability for keeping a vicious dog was denied on the ground that the defendant did not know, and had no reason to know, that his pet was dangerous."[16]

12 Fletcher, *supra* note 1, at 551.

13 *Id.* at 552.

14 *Id.*

15 *See* Cordas v. Peerless Transp. Co., 27 N.Y.S.2d 198, 201 (City Ct. 1941) ("If under normal circumstances an act is done which might be considered negligent it does not follow as a corollary that a similar act is negligent if performed by a person acting under an emergency, not of his own making.").

16 Fletcher, *supra* note 1, at 554 (discussing Fowler v. Helck, 128 S.W.2d 564 (Ky. 1939); Warrick v. Farley, 145 N.W. 1020 (Neb. 1914)).

With this thumbnail sketch of George's theory of the paradigm of reciprocity at hand, we are now in a position to assess its claims. In the Part that follows, I shall focus primarily on the conceptual coherence and normative defensibility of the central claim that tort liability is justified when, but only when, a defendant has caused harm to a plaintiff through non-reciprocally risky conduct.

II. ASSESSING GEORGE FLETCHER'S TORT THEORY

A. *The Rationale Behind the Concern for Nonreciprocal Risk Imposition and Its Fit with the Doctrines of Tort Law*

At the core of George's "equal security principle" is the view that compensation ought to redress a form of unjust enrichment. In this respect, George's tort theory embodies the concern that motivated the court in *Vincent v. Lake Erie Transportation Co.*[17] to demand recompense from a defendant whose employee quite deliberately saved his own more valuable ship at the expense of the plaintiff's less valuable dock. That such a forced wealth transfer represented a reasonable choice between two evils did not, in the court's view, relieve the defendant of an obligation to pay damages to the plaintiff. Rather, it reflected deliberate personal enrichment of a sort that, while reasonable, would be unjust absent compensation.

The unjust enrichment with which George is concerned, however, is of a different sort than the unjust enrichment at stake in *Vincent.* In *Vincent,* the defendant's personal benefit derived from the act that caused harm to the plaintiff—the lashing of his ship to the plaintiff's dock. But an airline is not benefited when one of its planes crashes and kills people on the ground; a reservoir owner is not benefited when his reservoir floods an adjacent coal mine; the owner of a wild animal is not benefited when his charge escapes and inflicts injury on a small child. Unlike *Vincent,* these examples do not appear to involve defendants who escape losses by externalizing them to others. In the typical case, an airline does not use up the people on the ground to cushion its crash; it does not benefit from their deaths or the crash in the way that the defendant in *Vincent* benefited from the use of the plaintiff's dock. And the reservoir owner does not flood the mine as a means of preserving his reservoir; that is, the flood is not a transference of a small loss for a larger gain. Like the loss to the airline, the loss of the reservoir is as much a loss for the reservoir owner as it is a destruction of the coal miner's shafts.

17 124 N.W. 221 (Minn. 1910).

So wherein lies the personal enrichment in the cases in which George would impose liability? If the benefit is not in the causing of a small harm to avoid a larger one, in what does the benefit consist? George's answer is this: the benefit unjustly accrued in the cases in which his theory would demand liability is in the enjoyment of an activity that asymmetrically *risks* harms to others. Put differently, the unjust enrichment occurs during the asymmetrical risking, not during the harming; and hence, it is for the risking, and not, as such, for the harming, that George's theory demands compensation. As he puts it, "Compensation is a surrogate for the individual's right to the same security as enjoyed by others."[18]

Now this is highly significant, and it has a number of important consequences. First, this more sophisticated unjust enrichment theory will yield different results than *Vincent*'s simple unjust enrichment theory. Under George's more sophisticated theory, there will be cases in which defendants should not be held liable for deliberate loss transfers. This will be true when the risk of loss deliberately imposed by the defendant on others is no greater than the risk of loss imposed in turn by them on him. So, if in *Vincent* the ship had risked a reciprocal amount of harm to the plaintiff's dock as the dock had risked to the ship, George's theory would suspend liability, while *Vincent*'s logic would continue to require compensation. Inversely, under George's theory there will be cases in which defendants should be liable for non-deliberate loss transfers. If in *Vincent* the defendant's ship non-reciprocally risked the plaintiff's dock (as hunch would have it, because it was made of steel while the dock was made of wood[19]), then it should not matter—contrary to the court's presupposition[20]—whether the ship was thrown into the dock by the wind or deliberately tied to the dock by a diligent employee. In both cases, the defendant would have enjoyed an activity (cargo shipping) that non-reciprocally risked those injured.

Second, and somewhat relatedly, if persons are unjustly enriched when they conduct activities that are non-reciprocally risky to others, it is puzzling why George recognizes any excuses to liability. Why would he not require defendants to disgorge benefits unjustly acquired even when their acquisition was non-culpable? If I take your umbrella thinking it my own, I should surely return it, even if I was

18 Fletcher, *supra* note 1, at 550.

19 I shall argue in Part II.B.2 that talk of this sort is ultimately incoherent. I participate in its use here simply to construct the sorts of scenarios that test the normative claims underlying Fletcher's theory of liability.

20 *See Vincent*, 124 N.W. at 222.

entirely non-negligent in forming the belief that it was my own property. If I reap a profit at your expense, I should seemingly share it with you even if I had no reason, ex ante, to believe that you would be ill-served by my industry. In short, when persons are unjustly enriched, there appear no excuses for their failing to disgorge their profits. That George postulates excuses to non-reciprocal risk-impositions thus suggests that he does not quite understand the implications of the moral underpinnings of his own theory.

Third, and most significantly, George's more sophisticated theory makes causation of harm morally incidental. On the logic of his theory, liability ought to attach to non-reciprocally risky activity whether it causes harm or not. For the unjust enrichment—the breach of equal security, as George would put it—occurs at the point of the initial non-reciprocal risk imposition and endures only so long as harm does not materialize. It begins, that is, at the point that the neighbor brings home the ocelot,[21] and it ends at the point at which the owner leaves open the gate and the ocelot mauls a neighborhood child. Inasmuch as the act that proximately causes the harm is typically not itself the unjustly enriching act (indeed, it is very often the act that terminates the enrichment), its occurrence is morally irrelevant. If George's theory is concerned with redressing the unjust enrichment that derives from non-reciprocally risking others, then it entails that, other things being equal, persons should pay for all non-reciprocal risks they impose, and not just for those that materialize in harm. In short, persons should be taxed for risks, not sued for harms.

So why does not George simply say this when unpacking the implications of his paradigm of reciprocity? Why does he insist that "unexcused nonreciprocity of risk is the unifying feature of a broad spectrum of cases"[22] in tort law, and then continue to maintain that defendants should pay compensation only when their non-reciprocal risk-taking results in actual harms to those risked? The motivation is clear: he is massaging the gap between the moral implications of the paradigm of reciprocity and the fundamental requirement in tort law that there be a harm to compensate before any compensation can be owed. The most central common requirement across all three categories of tort liability—from intentional liability to negligence liability to strict liability—is the causation of harm criterion: the requirement that a defendant have, in fact and proximately, caused a plaintiff a cognizable harm before being liable in tort for damages. Inasmuch as

21 An ocelot is a medium-sized American wildcat that ranges between Texas and Patagonia and has a tawny or grayish coat with black stripes.

22 Fletcher, *supra* note 1, at 545.

George seeks to provide a descriptive account of tort doctrine, he can hardly acknowledge the seemingly embarrassing fact that the theory which he advances to do so is normatively indifferent to the most central doctrinal requirement of all. Inasmuch as tort law does not permit liability for risks alone, and inasmuch as George's theory locates the sine qua non of liability in risks themselves, rather than in any ensuing harms, George's theory would seem a poor candidate by which to make descriptive sense of tort doctrine.

But to answer the charge that he has gerrymandered his theory in order better to achieve a descriptive fit with doctrine, George might argue that the causal requirement is justified on evidentiary grounds: absent risk detectors, it is very hard to identify and assess non-reciprocal risks unless and until they materialize in cognizable harms. For this reason, George might argue, his theory presupposes the enduring relevance of the causation of harm requirement. Yet, while harm may be a reliable means of detecting antecedently risky conduct, it is surely false that we must await the materialization of risks in order to know of them. We criminalize highly risky behavior, clearly confident of our ability to declare it risky in the absence of any caused harm (e.g., reckless driving, possession offenses), and we regularly discipline our children for conduct that we quite confidently think of as dangerous. The evidentiary rationale is thus clumsy, at best.

B. Non-Reciprocal Risk Imposition as the Guiding Principle Behind Ideal Compensation Systems

In the face of having no compelling reason to think that George's sophisticated unjust enrichment theory either entails or contingently demands that defendants cause harm before being properly subject to a duty of compensation, we are entitled to ask into the defensibility of his theory absent the causal requirement. What can be said of the pure claim that persons are unjustly enriched by non-reciprocally risky activities, and hence, that corrective justice demands that they compensate those put at risk by their activities, whether their activities cause harm or not? If such a claim is ultimately attractive, then we will have good grounds to seek its implementation, and we will then have good reasons to explore the sorts of evidentiary constraints that we might need to impose in order to achieve its reliable administration. If the pure claim is, however, ultimately indefensible, then one strongly suspects that it will not be made defensible by adding to it a causal criterion that is conceptually disharmonious, and thus at best justified as a per se evidentiary addition.

In the sections that follow, I will raise three difficulties for the pure claim that forms the core of George's theory: the first is an administrative difficulty, the second a conceptual difficulty, and the third a moral difficulty. As I shall suggest, while the first is only as significant as administrative difficulties ever can be, the second is damning, and the third surely dispels any motivation to solve the second.

1. The Administrative Argument

The first thing to observe is that the pure claim would entail the abolition of the tort system as we know it in favor of a social insurance scheme into which asymmetrical riskers pay according to the relative disproportionality of their risks, and from which victims of asymmetrical risks draw according to the relative degree to which they have been unequally imperiled.[23] Barring the evidentiary difficulties that for the time we are setting aside, not only would young, male automobile drivers with speeding records continue to pay higher premiums than middle-aged housewives, but pit bull owners would pay to make up for the disproportionate risks that they impose on poodle owners, SUV-owners would pay to make up for the disproportionate risks that they impose upon small- and medium-sized automobile drivers, and snowmobile drivers would pay to make up for the disproportionate risks that they impose on cross-country skiers.[24] Losses would lie where they fall if occasioned by reciprocally risky activities, because, over time, true reciprocal riskers would be expected to cause harm as much and as often as they sustain harm; hence, any transfer of losses would simply accrue transaction costs for no long-term gain. If there remained a role for the tort system, it would simply be to adjudicate when activities pose non-reciprocal risks for purposes of determining who should pay into, and who should recover from, the general fund.

It takes little imagination to appreciate the enormous administrative difficulties that would be engendered were we to attempt to generalize our current scheme of car insurance premiums so as to demand risk equalizing payments from owners of rottweilers, defective barbecue grills, unlit staircases, handguns, unshovelled sidewalks, dead trees, and so forth. And one could hardly be simplistic about it,

23 It might be argued that such a scheme should pay out only when risks have materialized in harm. But this would fail to honor Fletcher's core notion that persons are wronged when risked asymmetrically. If true, corrective justice would demand redress for the risk, not just for the materialization of that risk in harm.

24 Once again, if I am right in Part II.B.2, then talk of this sort is literally nonsense.

on pain of violating the basic equality principle that the scheme would be designed to honor. To assess whether a pit bull in fact poses a non-reciprocal risk on its owner's neighbor, one would need to do more than ask into the animals kept by the neighbor. One would need to tally all of the risks imposed by the neighbor on the pit bull owner so as to determine whether the risk of the pit bull (and the cumulative risks otherwise imposed by the pit bull owner on his neighbor) still outweigh the risks imposed in return by the neighbor on the pit bull owner. If the neighbor owns a tractor that can roll, a pond that can flood, a boomerang that can be thrown by a child, a store of poison that can kill the pit bull, etc., there may be good reasons to think that, despite the fact that the neighbor only owns goldfish, the pit bull owner does not asymmetrically risk his neighbor.

Yet, while it is fair to say that the administrative difficulties involved in tabulating and comparing all risks created by all persons would surely defeat the implementation of George's pure theory, these administrative difficulties are ultimately rendered moot by the conceptual incoherence into which they philosophically bleed.

2. The Conceptual Argument

There are, it seems to me, several ways of unpacking the claim that I want to make that talk of non-reciprocal risk imposition presupposes a theory of risk individuation that is conceptually unavailable. Let us begin with the observation that in constructing his theory, George seemingly assumes that there are such things as "objective risks." That is, he seemingly presupposes that risks have an independent ontological status of their own. It is this presupposition that best grounds his normative claim that one has been wronged when one has been risked: one has, as it were, been hit by a risk in a manner akin to having been hit by a fist. And it is this presupposition that best makes sense of his casual assumption that risks can be readily deciphered and compared: just as one can compare two tables or two persons because they are metaphysically distinct entities, so for the same reason, one can compare two risks.

Yet assuming physical determinism, at least at the macro-level, events objectively have a probability of either one or zero. Thus, as I have argued in the past,[25] and as Lawrence Crocker nicely puts it,

> On this assumption, the bullet that misses the victim's head by an inch imposed no risk in the fundamental physical sense. From no

25 *See* Heidi M. Hurd, *The Deontology of Negligence*, 76 B.U. L. REV. 249, 263–64 (1996); Heidi M. Hurd, *What in the World Is Wrong?*, 5 J. CONTEMP. LEGAL ISSUES 157, 200–01 (1994).

> prior state of the world was it physically possible in this sense that the bullet would strike the victim. Given determinism, what fails to happen is impossible in the sense of possibility defined in terms of what is permitted under physical law from actual state descriptions.[26]

Judgments of risk, then, are in fact nothing more than probabilistic calculations derived inductively from past experience. That is, risks are epistemic constructs, not ontological entities. The concept of a risk responds to our inability to know whether a particular consequence has an objective probability of one or zero. A risk assessment summarizes reasons to believe that an event either will or will not occur, where its occurrence or nonoccurrence is preordained.

To fix a risk, then, one requires an epistemic vantage point. The ideal one would, of course, be God's, since from God's point of view, there would never be any doubt about the future occurrence or nonoccurrence of an event. But inasmuch as we seek to make probabilistic judgments precisely because we are unable to share God's unique vantage point, we are forced to specify the epistemic conditions under which risk assessments can be thought to be reliable. Now, clearly, George would have to reject proposals that we measure the nonreciprocality of the risks created by a defendant's conduct from either the epistemic vantage point of the defendant or the epistemic vantage point of the plaintiff. Why should the plaintiff's conduct be judged from the epistemic vantage point of the defendant, and why should the defendant's conduct be judged from the epistemic vantage point of the plaintiff? And how can we compare the risks taken by each if we judge the risks each takes from his or her own unique vantage point? That would be to compare apples and oranges, so to speak. So in order to make sense of the notion that tort law can and should be in the business of comparing the risks created by defendants and plaintiffs, George will have to specify some objectively independent vantage point—short of God's—from which to assess those risks.

Now there is a very serious moral question to be asked about postulating such an objectively independent vantage point removed from both the defendant's and the plaintiff's epistemic positions, and removed, as well, from the epistemic vantage point within which God achieves certainty. Why would we think it moral to assess the riskiness of a defendant's conduct from an epistemic vantage point that is not his, nor the plaintiff's, nor God's? What normative bite attaches to

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26 Lawrence Crocker, *Justice in Criminal Liability: Decriminalizing Harmless Attempts*, 53 OHIO ST. L.J. 1057, 1098 (1992).

being found to be a non-reciprocal risker when, *ex hypothesi*, one had no reasonable basis for inferring that fact within one's own epistemic position; when, *ex hypothesi*, the plaintiff had no reasonable basis for concluding as such; and when the claim lacks the veridicality of a God's-eye view? It is unintelligible to think that the defendant has done a wrong under such circumstances, because the "wrongfulness" (i.e., non-reciprocality) of the risk associated with his behavior is judged to be such only relative to a particular epistemic vantage point. And it is similarly impossible to find any moral culpability in such risk-taking, because the epistemic vantage point from which the risks are assessed is not the defendant's.

In the absence of there being objective (non-epistemic) risks, there is no moral basis for finding a defendant to have been unjustly enriched by helping herself to extra risk-impositions. Now it is true that there are objective notions of probability. These are tied to the statistical frequencies that link types of events. Given clouds of a certain type, for example, past evidence may show that it is 10% likely that it will rain. Such conditional probability statements seem as objective as any other inductively established scientific truths.

Yet, notice that George's theory cannot rely on isolated conditional probabilities. Rather, his theory demands that we compare total risk packages imposed by one person on another. This means we need a theory of how to type risks—a theory that individuates risks so as to enable us to assess not just the risk of rain, but the discounted value of all the harms that can befall a person as a result of another's actions. Are there any resources within George's idealized epistemic vantage point by which to non-arbitrarily specify the size of the types that are to be used in comparing risks? Is there any principled means of answering whether the ideal judge should compare the likelihood of the defendant and plaintiff causing one another a rottweiler bite, or a dog bite, or an animal bite, or a penetration from a sharp instrumentality, or physical harm, or harm *simplicatur*? If one neighbor owns an ocelot while another has a predilection for suspending heavy safes over the public sidewalk, should we think of them as posing reciprocal or non-reciprocal risks on one another? Inasmuch as ocelots tend to pounce from high places, both appear to impose "risks from above." If the judge should compare the "risks from above" that each imposes on the other, then those who fly airplanes or keep pigeons or play golf might be similarly counted as reciprocal riskers, inasmuch as they all create "risks from above."

The conceptual point is this: at one extreme, nothing is like anything else. At the other extreme, all things are like all other things. In other words, all things share infinite similarities and dissimilarities.

And, *crucially*, there appears no principled means of typing the risks created by activities in order to compare them. We could, of course, type risks at the level of generality about which we happen to have information. So if we have data about dog bites, but not about penetrations by sharp instrumentalities, then a judge should use that fact as a reason to inquire into the likelihood that the defendant and plaintiff will cause one another dog bites, rather than penetrations from sharp instrumentalities. But this solution makes judgments of risk reciprocality turn on the accidents of data collection. If the idealized epistemic vantage point from which to compare the risks of defendants' and plaintiffs' conduct does not idealize our data base, then even if it has a means of fixing its descriptions of the types of risks to compare, such a means comes at the cost moral arbitrariness.

At the close of George's explication of the paradigm of reciprocity, George makes this point better than have I:

> [T]he assumption necessarily implicit in the concept of reciprocity [is] that risks are fungible with others of the same "kind." Yet how does one determine when risks are counterpoised as species of the same genus? If one man owns a dog, and his neighbor a cat, the risks presumably offset each other. But if one man drives a car, and the other rides a bicycle? Or if one plays baseball in the street and the other hunts quail in the woods behind his house? No two people do exactly the same things. To classify risks as reciprocal risks, one must perceive their unifying features. Thus, risks of owning domestic animals may be thought to be of the same kind. And, theoretically, one might argue with equal vigor that all sporting activities requiring the projection of objects through the air create risks of the same order, whether the objects be baseballs, arrows, or bullets.[27]

What is puzzling is that George does not take this discussion to require the abandonment of his theory. For any theory that requires a machine-gun wielding contract killer, an archer hunting deer, and a seven year-old frisbee-throwing child to be compared with one another because all expose the others to the same *type* of risk—namely, the projection of objects through the air—and that simultaneously excludes from the comparison those who supply uninsulated power lines, or store dangerous chemicals, or drive too fast, because they are not projecting objects through the air, ought to be put out of its conceptual misery.

27 Fletcher, *supra* note 1, at 572.

3. The Moral Argument

Let us disregard for the remainder of the discussion the conceptual difficulties that independently defeat George's sophisticated unjust enrichment theory. Let us instead ask into the moral defensibility of George's fundamental notion that persons suffer what ought to be thought of as legally cognizable wrongs when they are asymmetrically risked, because, by being so risked, they are deprived of the equal distribution of security to which they are entitled. Do risks qua risks harm people? Can one be hit by a risk in any manner that would make it morally akin to being hit by a car?

Certainly if there were such things as objective (non-epistemic) risks then George might have some reason to suppose that a plaintiff is harmed by being risked in a manner analogous to (but perhaps not of the same magnitude as) being hit by a car. He might have some basis upon which to claim that a defendant is enriched by risking alone; for risking on such an objective theory would be like polluting—it would constitute an activity generating metaphysically distinct entities the cumulative effect of which tends to harm others. It is, I think, George's view that non-reciprocal risks are like pollution or pollen that grounds his conviction that those who create a disproportionate amount of them are harming others, even if others never know of the asymmetrical risks to which they have been exposed, and even if those risks, like particles of smog, never materialize in visible physical maladies.

But is freedom from risk—George's so-called "security"—really a good that requires equal distribution? If one never knows of a risk to which one has been exposed (so as to be free from any psychological trauma), and if the risk never materializes, can one meaningfully say that one has been harmed? Is one worse off than another who was never exposed to such a risk, so that distributive justice demands a redistribution of that risk? If the safe does not fall, and if one never gains knowledge that one has stood under it, can one say that one's life has gone worse, or that one has been the victim of more harm than one would otherwise have been if one had never stood under the unknown suspended safe? It would seem that to be hit with an unknown risk is not to be hit at all! Freedom from being harmed is a real good, but freedom from an unknown risk of being harmed—when the unknown risk never materializes in harm—seems to be

nothing at all, and hence, it can hardly be something that can be thought to be a good.[28]

George might argue that while one is not harmed by being subjected to an unknown nonreciprocal risk, one is nevertheless wronged, because another has reaped an advantage at one's expense. But it would seem that our best theory of wrongdoing would require us to subscribe to the maxim "No harm, no foul." That is, while someone who risks bringing harm to another may be *culpable* for so doing—if the risk is a non-reciprocal one (whatever that would mean in light of the above discussion), or if, in conventional consequentialist terms, the risk is not outweighed by a greater benefit, or if, on deontological grounds, the risk, if it materialized, would constitute a rights violation—it would seem that if one does another no harm, one does another no wrong. Now, of course, to say this is to drive a conceptual wedge between culpability and wrongdoing, and to reserve for the term "wrongdoing" a meaning that parts company from the meaning that it is given in idiomatic English. I have elsewhere devoted considerable ink to defending the view that legal theorists ought to give the concept of wrongdoing the technical meaning necessary to distinguish it from culpability, because only then will we have the vocabulary by which separately to evaluate the actor and her act.[29] On pain of conflating the blameworthiness of the actor with the blameworthiness of his act, I would thus urge George to resist the temptation to say that conduct that is culpable is therefore conduct that is wrongful.

There may be good reasons to extract penalties for culpability alone, but these are typically thought to fall within the proper province of the criminal law, not the law of torts. That is, we may want to punish persons for attempts and for instances of reckless or negligent risking (e.g., reckless driving), but if we do so, we are seemingly counting culpability alone as sufficient for criminal liability. In light of either the retributive or deterrent goals typically assigned to the criminal law, that may be fully appropriate. But on pain of losing the distinction between the point of tort law and the point of criminal law, tort law cannot plausibly be thought to have as its principal goal either retribution or deterrence of socially undesirable conduct. Rather, to claim a non-redundant purpose, it must set for itself the goal of achieving corrective justice. Its penalties must thus be imposed not

28 For an excellent critical discussion of theories that equate risks and harms, see Stephen R. Perry, *Risk, Harm and Responsibility, in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 321–46 (David Owen ed., 1995).

29 *See* Heidi M. Hurd, *Justification and Excuse, Wrongdoing and Culpability*, 74 NOTRE DAME L. REV. 1551, 1558–67 (1999); *see also* Hurd, *The Deontology of Negligence*, *supra* note 25, at 262–65; Hurd, *What in the World Is Wrong?*, *supra* note 25, at 193–96.

for culpable conduct, but for wrongdoing, where wrongdoing constitutes the infliction of an unjustified harm on another.[30] That tort law has never imposed damages for risking in the absence of harming reflects the fundamental claim that risking does not in itself constitute the commission of a wrong that stands in need of redress. Only when a risk materializes in harm has one done another a wrong, even if one can plausibly be said to have acted culpably absent any such wrongdoing.

It would thus seem that even if George can overcome the seemingly insurmountable obstacles to defending the conceptual coherence of his theory, his theory rests on morally suspect foundations. If persons are not wronged unless and until they are caused harm by others, it would seem that a theory that locates the reason for redress in periods of risking that may or may not lead up to the infliction of harm misidentifies the trigger for the obligations of corrective justice that it is tort law's unique task to enforce.

CONCLUSION

I have argued that George's famous suggestion that tort law substitute a "paradigm of reciprocity" for a "paradigm of reasonableness" is ultimately both conceptually incoherent and morally unattractive. In the face of these arguments, it might be suggested that I am not entitled to the philosophical fondness that I bear for George's classic article, *Fairness and Utility in Tort Theory*. For presumably affection should always take worthy objects, and an argument that is neither true nor morally attractive should seemingly be cast from one's philosophical heart.

But try as I might to displace it, my admiration for George's theory endures despite my own conviction that it fundamentally does not work. Perhaps this is because it persists in having apparent explana-

30 Jules Coleman's now-abandoned "annulment theory" surely stood in opposition to this claim. For as Coleman argued when defending that version of an unjust enrichment theory, "wrongful gain can arise without resulting harm," and even when there is a harm, the wrongful gain "is causally independent of the loss it causes." Jules L. Coleman, *Property, Wrongfulness and the Duty To Compensate*, 63 CHI.-KENT L. REV. 451, 462 (1987). Inasmuch as wrongful gains thus derived from the risking of losses to others, and inasmuch as corrective justice demanded the annulment of wrongful gains, Coleman's annulment theory required the imposition of damages in the absence of any harm to the person risked. For an extended critique of Coleman's old annulment theory, see Heidi M. Hurd, *Correcting Injustice to Corrective Justice*, 67 NOTRE DAME L. REV. 51 (1991). For Coleman's articulation of his revised theory, see JULES L. COLEMAN, RISKS AND WRONGS 361–85 (1992); Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427 (1992).

tory power at crucial moments in the analysis of tort doctrines. Think, for example, of tort law's refusal to exonerate defendants who are insane. *Ex hypothesi*, such defendants are neither culpable nor rationally receptive to legal incentives, and, hence, standard theories of tort law that rely on concepts of desert or deterrence are hard-pressed to explain tort law's willingness to hold insane persons strictly liable for the injuries they cause. But intuitively, the insane would seem to impose risks unmatched by those whose behavior is checked by reason, and hence, the puzzling absence of a tort excuse of insanity is offered a rare explanation by George's theory. Or think of the textbook case of *Herskovits v. Group Health Co-op. of Puget Sound*[31] in which the court held the defendant liable for wrongful death when his negligence reduced the chance that the plaintiff would live more than five years. Inasmuch as the plaintiff's chance of living more than five years was already less than 50%, it could hardly be said by a preponderance of the evidence that the defendant *killed* the plaintiff (as one would have to be able to say in order to make out a wrongful death suit). The best explanation of the case, therefore, is that the court was extracting liability from the defendant for risking, rather than causing, death. No other tort theory save George's can seemingly provide a defense of this result (including a utilitarian one, given that such liability would seemingly prompt defendants to over-invest in prolonging the lives of those who are dying). And while the arguments above suggest that this is so much the worse for the holding in *Herskovits*, one cannot help but admire the fact that George's theory, on its surface, makes intuitive sense of a much-discussed doctrine that is otherwise without any apparent theoretical explanation.

Of course, perhaps my enduring attraction to George's theory derives from an over-developed commitment to the Golden Rule, and thus, from my general attraction to any theory that appeals to egalitarian principles. There is no doubt that when I do not risk others as they seemingly risk me, I am outraged by the license that they appear to be taking with my safety. But, of course, if I am right above, the most that I can be outraged at is their obvious culpability. In the absence of any harm (including any fear), there is literally nothing that has been unequally distributed, and hence, while I can worry for their souls, I am not entitled to feel wronged by their deeds.

So in the end, I think that the enduring philosophical joy that George's classic article continues to give me is born of its aesthetic qualities. I love its bravado. I admire its flashiness. I delight in its

31 664 P.2d 474 (Wash. 1983) (involving survivorship action alleging that doctor's failure to make an early diagnosis of lung cancer was the proximate cause of death).

celebration of the counter-intuitive. I am in awe of its unabashed arrogance. And I respect its author for refusing to be cowed by the conventions of a discipline that, no doubt rightly but rather dully, prefers what is modestly true to what is interestingly false.