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Torts and Just Compensation: Some Personal Reflections

By Dale W. Broeder*

I. Introduction

Briefly stated, the broad purpose here is to explore and hopefully at least in some measure to explain some of the complex interrelationships between the law of torts and the just compensation clause of the fifth amendment and its numerous state constitutional analogues. The introduction is extended. The nature of the various problems involved requires this, as does the unconventional nature of the article’s overall approach.

The subject was chosen for several reasons, but the main one, let it be made clear, is intensely personal. I have now taught torts for ten years, and no part of the course has more persistently confounded, irritated and frustrated my students and me over the years than this one. It is a plague, a pedagogical nightmare. It consumes enormous chunks of class time and, unless somehow summarily checked, cancerously bores into large areas of any conventional torts curriculum.

Of course, there is another side. The subject magnetically, enigmatically attracts. Complexity always challenges, and there are many challenges of this sort here. Obvious and subtle questions of policy abound, and there is enough in a technical way to delight the most dedicated and sophisticated distinction-drawer. Also, there are legal history, comparative law, torts and constitutional law (by definition), contracts, restitution, municipal corporations, criminal law, and just name it. Not even state and local taxation wholly escape.

Often as not, the complexity and dimensions of the problem first appear in a conventional torts course in connection with Vincent v. Lake Erie Transp. Co.,¹ a case ordinarily dealt with fairly early in the course. A torts law classic, Vincent held a shipowner liable for intentionally destroying plaintiff’s dock, notwithstanding that the shipowner

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*Professor of Law, University of Toledo. The author is deeply indebted to the University of Toledo for financial assistance in making this article possible. Thanks also go to Mr. Tom Sponsler, a senior in the University of Toledo Law School, for his invaluable research help. Professor Wallace Rudolph of the University of Nebraska Law School must also be mentioned as he and I worked on many of the ideas hereto presented while teaching together in Lincoln.

¹ 109 Minn. 456, 124 N.W 221 (1910), noted, 10 Colum. L. Rev. 372 (1910); 23 Harv. L. Rev. 499 (1910).
was not at fault and acted only to save his ship and crew from almost certain loss in a severe and apparently unexpected storm. If this case is discussed at any length, one easily touches upon not only such obvious factual extrapolation problems as the proper result had the ship been laden with dynamite and/or the shipowner and crew been wholly impecumous (along with related privilege problems) but also such superficially disparate matters as the wisdom of a fault system's basic premises, court-costs and lawyers' fees in criminal cases, zoning, jury service, self-defense, arrest, the “erroneously-but-constitutionally-convicted-defendant” problem and even, on a particularly bad day, the fairness and/or constitutionality of the Selective Service Act.

In necessarily abbreviated form, a not atypical list of student questions (excluding most of those implied by the examples just mentioned) looks something like this:

1) Why, if the shipowner had a privilege to destroy the dock, does he have to pay? Neither the shipowner nor the dockowner was culpable, and the latter did not benefit. He merely escaped impoverishment. A police officer intentionally destroying a fence in order to catch a dangerous fleeing felon would not be liable to the fence owner, would he? Or is that different because his government would have to pay? But that cannot be, because of sovereign immunity. Or is this case an exception to that doctrine because of the just compensation clause?

2) Would the case against the government in the police-officer-fence case be different if the police officer acted unreasonably? Then we would simply have a tort, and surely the just compensation clause would not apply. On the other hand, why shouldn't it?

3) Is the just compensation clause self-executing?

4) Forget constitutional law. How do you reconcile Vincent with the trespass cases in which airplanes non-negligently crashed into farm
houses and so forth, and we concluded that the airlines probably wouldn't be liable.\footnote{See text accompanying notes 134-137 infra.}

5) How is Vincent to be squared with the hypothetical we discussed in connection with Gilbert v. Stone,\footnote{Sty. 72, 82 Eng. Rep. 539 (K.B. 1648). In Gilbert, defendant was forced to trespass and to take plaintiff's gelding because of third party threats to employ deadly force against defendant.} the trespass-gelding case, where the student put a gun at your head and told you he would fire unless you immediately killed Farmer Jones' cow. You argued there that duress was a defense. Why was not duress, or something like it, a defense in Vincent? After all, it was a human life against property in both cases.

6) What I do not understand, apart from historical exceptions like conversion,\footnote{See generally, Ames, The History of Trover, 11 Harv. L. Rev. 277, 374 (1897), reprinted in 3 Select Essays in Anglo-American Legal History 417 (1909); Warren, Qualifying as Plaintiff in an Action for Conversion, 49 Harv. L. Rev. 1064 (1936).} is why anyone should ever be liable unless he's culpable. Of course, taking Blackacre for an interstate road is different because of the just compensation clause. The Blackacre case, furthermore, does not involve culpability.

7) If the government can't take Blackacre for a road, a park, or a school without paying for it, why doesn't the government have to pay me the market value of my time when I'm called upon to chase a felon, put out a fire, serve as a juror or witness or soldier, or, for that matter, to fill out my income tax and social security tax forms?\footnote{See text accompanying note 202 infra.}

8) Under the just compensation clause, is there a difference between taking a man's services and taking his property? That cannot be, because I know that the Supreme Court once held that a city could zone a good business out of existence just because conditions in the neighborhood changed. No compensation was required in that case.\footnote{See text accompanying notes 230-233 infra.}

9) Let's get back to the emergency situation cases. Does Vincent present the same liability problems as the case in which I dynamite my neighbor's home in order to save my own and/or my neighbor's, or to save an entire city, or where I run into Farmer Jones' fence in order to avoid killing myself and/or myself and a non-negligent child situated in the middle of the road?\footnote{See text accompanying notes 127-128 infra.}

10) What about men constitutionally but erroneously convicted? Are they entitled to just compensation clause recovery?\footnote{See text accompanying notes 220-225 infra.}
11) Suppose an accused is acquitted? Must he pay his lawyer?21

And so on. One can spend months attempting satisfactorily to answer such questions, and these questions are merely a small illustrative sample. Student-teacher frustration is both inevitable and understandable. There is, after all, the usual pressure "to get along," and a thing called "negligence" remains to be covered. Yet students insist upon answers, especially from torts teachers, most of whom appear wedded to the "one-case-a-week, in-some-way-suggest-answers-to-all-even-half-way-reasonable-questions" method.

To repeat, then, the first reason for the topic chosen is simply a sanguine attempt to alleviate instructional frustrations.

The second reason is that the problem is made topical by several developments, not the least of which is the recent decision of Federal District Judge East in Dillon v. United States.22 Without at this point going into detail, Judge East's Dillon decision held in a section 2255 context,23 that the indigent petitioner's court-appointed attorney was entitled to just compensation recovery for his work in connection with the hearing. An attorney's learning, experience and time were "property," Judge East reasoned, and, because of the peculiar nature of his property, Dillon's attorney was in effect drafted for society's benefit and was accordingly entitled to just compensation recovery Dillon, flying as it did in the face of an almost24 (though not quite)25 universal group of Anglo-American decisions to the contrary, was not unexpectedly—certainly not for Judge East26—reversed by the Ninth Circuit Court of Appeals.27 Still, the question remains open, as the United States Supreme Court has just denied certiorari28 and has otherwise spoken only obliquely on the question.29 Whatever the constitutional

21 See text accompanying note 229 infra.
24 See the numerous cases cited in United States v. Dillon, 346 F.2d 633 (9th Cir. 1965).
26 Judge East's opinion makes this crystal clear. He was obviously mad about having previously been reversed on procedural grounds by the court of appeals.
27 United States v. Dillon, 346 F.2d 633 (9th Cir. 1965).
29 The closest the Court has ever come to passing on the question is Coleman v. United States, 152 U.S. 96 (1893), denying recovery on evidence grounds to various lawyers who expended monies and time in working upon a case which ultimately proved financially beneficial to the United States but who did not have an express contract with the federal government.
rule ultimately turns out to be, *Dillon* operated as a catalyst to national news media and triggered even *Time* magazine\(^{30}\) to consider the plight of the young lawyer appointed to defend an unpopular cause without pay\(^{31}\).

Along with Judge East's *Dillon* opinion, of course, there is the widely publicized Kennedy Bill,\(^ {32}\) so named for the then Attorney General and present Junior Senator from New York, which provides some compensation for lawyers appointed to defend indigent federal criminal defendants. The American Bar Association, probably on the theory that something is better than nothing, lobbied strongly for the bill, but, as can be seen from the President's Page of the November, 1965 American Bar Association Journal,\(^ {33}\) the association is currently unhappy with what Congress and the Administration have thus far wrought. And understandably so. United States Supreme Court preparations and presentations are not covered, nor are collateral attack proceedings, such as *coram nobis* and habeas corpus proceedings brought on behalf of either state or federal prisoners—to say nothing of less glaring defects.\(^ {34}\) And the pay, even for jury trial work, is a paltry twenty dollars per day.

The analytical relationship between such cases as *Vincent*, Judge East's brilliant and ground-breaking opinion in *Dillon*, and the Criminal Justice Act of 1964, however incongruously associated, is nonetheless obvious. The matter is further explored below\(^ {35}\).

Topicality is further illustrated by the recent decision of the Pennsylvania Supreme Court in *Giacco v. Commonwealth*.\(^ {36} \) *Giacco* held

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\(^{30}\) *Time*, July 10, 1964, p. 46.


\(^{33}\) President Kuhn therein states that the Bar is extremely interested in remedying the Kennedy Bill's inadequacies. Kuhn, 41 A.B.A.J. 991 (1965).

\(^{34}\) Some of these are mentioned in Judge East's *Dillon* opinion. See also *In re Hagler*, 246 F. Supp. 716 (D. Hawaii 1965), concerning whether the Criminal Justice Act of 1964 applied to a habeas corpus proceeding where *Fed. R. Crim. P.* 12 and 48 were involved. See United States v. Thompson, 34 U.S.L.W. 2322 (2d Cir. Dec. 6, 1965) (attorney appointed as counsel for indigent criminal defendant before effective date of Criminal Justice Act not entitled to compensation even though most of his work performed prior to the Act's effective date); Dirrung v. United States, 353 F.2d 519 (1st Cir. 1965) (indigent defendant, who had counsel through appeal not entitled to appointed counsel to prosecute post-appeal motion for new trial). Compare United States v. Boyden, 246 F. Supp. 291 (S.D. Cal. 1965) (attorney assigned to represent indigent defendant in probation revocation proceeding is entitled to compensation under Criminal Justice Act).

\(^{35}\) See text accompanying note 226 infra.

constitutional a Pennsylvania statute providing that a person acquitted of a misdemeanor can be compelled to pay both his and the government's court costs if the acquitting jury in its discretion sees fit so to assess them. Not surprisingly, the United States Supreme Court noted probable jurisdiction last term, and reversal came in January, 1966. While the Court's decision was based on relatively narrow vagueness grounds, the basic issue was really one of just compensation twice over. For Pennsylvania not only denied (albeit impliedly) the acquitted Giaccio the right to recover for loss of reputation and humiliation and for out-of-pocket expenses such as loss of wages and lawyers' fees, but also forced him to pick up the court costs for Pennsylvania's own mistake, however excusable. The United States Supreme Court would have done the same had it affirmed. The Giaccio problem, in other words, is fundamentally only a dramatic sequel to the traditional plight of the "constitutionally-but-erroneously-convicted defendant" and, as such, its relationship to the broad prob-


Perhaps further light on the basic problem raised by Giaccio will be afforded by the court's decision Rinaldi v. Yeager, 238 F Supp. 960 (D.N.J. 1965), Rinaldi holds that an indigent New Jersey state prisoner's federal constitutional rights were not violated by state's application, pursuant to statute, of his institutional wages to payment of cost of transcript furnished him for use on an unsuccessful appeal from his conviction. The Court reversed by a vote of 9 to 0. Giaccio v. Pennsylvania, 86 Sup. Ct. 518 (1966). Mr. Justice Black went solely upon the ground that the Pennsylvania Act was constitutionally invalid (because too vague) both as written and as explained by the Pennsylvania courts. Mr. Justice Black expressly refrained from passing upon any equal protection question or upon the constitutional propriety of assessing costs against acquitted defendants. The Court also went out of its way to state that its judgment was not intended "to cast doubt on the constitutionality of the settled practice of many states to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits." Id. at 522 n.8.

Mr. Justice Stewart and Mr. Justice Fortas briefly concurred in separate opinions. Both justices obviously felt that the Court's disclaimer as regards passing upon the constitutionality of submitting the punishment issue to juries was not enough to overcome certain indirect radiations from its opinion. These justices concurred in reversal on the sole ground that assessing costs against acquitted defendants under any circumstances violates due process. Ibid.

As I have elsewhere observed, the rationale of Robinson v. California, 370 U.S. 660, rehearing denied, 371 U.S. 905 (1963), seems to me almost mescapably to require the federal constitutional invalidation of the practice of submitting punishment questions to juries. See Broeder and Merson, Robinson v. California: An Abbreviated Study, 3 Am. Crim. L.Q. 203 (1965).

Appellant understandably argued the case largely in terms of vagueness and equal protection. Brief for Appellant, p. 4, Giaccio v. Pennsylvania, supra note 37.


See text accompanying note 222 infra.
lem herein considered is apparent. Vincent and Dillon are not legal light years apart from cases such as Giacco, though Giacco, to be sure, involves a government mistake.

Of course, the “innocent victim of a government mistake problem” is hardly new. Turn to any history book, or examine a municipal government treatise or even today’s newspaper. Yet over the years the dimensions of the problem have markedly increased. Government, at least in the United States, has progressively grown larger and, almost by definition, so has the number of its mistakes. The innocent victim’s ability to obtain political redress of any particular government mistake, in contrast, has commensurately diminished, notwithstanding the vastly increased seriousness of modern-day governmental meptitude.

So, too, modern government means “sophisticated” government, and this in turn means still more innocent victims of government mistakes. A recent case in point is Fleshour v. United States,41 which, for want of negligence, denied recovery under the Federal Tort Claims Act to a federal prisoner viciously assaulted by a fellow inmate who was being “rehabilitated” by prison officials by associating him with “good prison risks” such as plaintiff. What is this but a modern version of the ancient “constitutionally-but-erroneously-convicted-defendant” problem? Historic legalistic distinctions abound, of course, but the district court’s remarks in denying relief are applicable to both situations and to others later to be discussed:

The court reaches this conclusion with some reluctance since it seems unfortunate that plaintiff who here may be euphemistically characterized as an “innocent bystander” should not be compensated for his injuries. Risk of serious physical damages or even death should not be an inherent and uncompensated element of every prison sentence. If the experts are correct that sound penology requires the taking of such calculated risks, some provision should be made to compensate a prisoner who, through no fault of his own and in the absence of negligence by prison officials, nevertheless is seriously injured.

This is not to suggest that the Government should become the insurer of the physical well being of every prisoner. But where, as here, a prisoner is attacked in his sleep with no provocation or other action on his part and the attacker has the opportunity to strike because it is desirable as a matter of broad penal policy to give it to him, the innocent and fortuitous victim, if not compensated, pays a far greater penalty than the sentence imposed upon him and that

41 244 F Supp. 762 (N.D. III. 1965).
paid by others given the same term but luckily not injured during incarceration.

Our society has recognized that the taking of calculated risks is sometimes desirable or even necessary. By and large, we have sought to compensate persons injured as a result of taking such risks even though the law generally precludes compensation for damages resulting from risks taken by the person injured. The Federal Employers' Liability Act, other federal laws as well as most state Workmen's Compensation Laws, exclude assumption of risk as a defense to a claim. The reasons are obvious and sound. We ask people to take risks in the interest of the entire community. If, as a result, they are injured, they should be compensated.

Similarly, we ask prisoners to take risks in the process of attempting to rehabilitate as many as possible, a result greatly in the community interest. If, as a consequence, one is injured through no fault of his own it seems unfortunate and unfair that he be made to accept his injuries as additional punishment. To date at least the law gives a prisoner so injured no right to compensation. In the opinion of this judge, at least, it should.

The point, in other words, is that government legally ought to pay for at least some of its non-negligent mistakes and that in many situations we are still forced to work with an outmoded body of tort and just compensation law. The reader might profitably ask himself at this point whether the result might possibly have been different in the "rehabilitative-prison" case had plaintiff Fleishour sued directly on just compensation grounds under the Tucker Act. Certainly Fleishour's body was taken for the public benefit.

But there is another side. As our industrial and material wealth has increased, so has our collective psychological and social concern for society's injured victims. Certainly the above-quoted remarks reflect such concern, as do our vast state and federal social welfare programs. And, it should be noted, as least one state, California, following England's lead (why must we generally follow England on the legal domestic side even with our fifty states and thousands of local government units?) has recently enacted legislation designed partially to compensate innocent victims of crime. California acted in part, of course, because of commiseration with these people, but

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42 Id. at 767-768.
45 Scottish Home & Health Dept., Report of Secretary of State and Secretary of State of Scotland, Cmd. No. 2323 (1963-64). It is axiomatic that we domestically lag behind England in almost every social welfare endeavor.
more probably on account of a realization that those directly responsible for the plight of such victims were already or hopefully soon would be in jail and that tort recovery against jailed and ordinarily impecunious criminals is, for the most part, a practical impossibility.

Our collective guilt complex vis-à-vis both the non-negligently and negligently injured is also mirrored in recent judicial developments expanding the area of tort recovery. Such developments are by no means picayune and accordingly furnish still another reason for writing. Traditional charitable corporation and intra-familial immunity doctrines have in many states been abandoned or eroded. The scope of immunity of municipal corporations has almost everywhere been narrowed and, in a few states, abolished. Indeed, the courts of several states have boldly abolished the tort immunity of all levels of government. Congress, of course, earlier moved in the same general direction with the Federal Torts Claims Act. Sovereign immunity in one form or another, it need hardly be said, has been one of the historical legal bugaboos in terms of which many otherwise meritorious just compensation and tort claims have gone to grief.

Increased judicial concern for the plight of injured plaintiffs by

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46 Mr. Justice Goldberg is one of the few ever directly to address himself to the question:

Whenever the government considers extending a needed service to those accused of crime, the question arises: But what about the victim. We should confront the problem of the victim directly; his burden is not alleviated by denying necessary services to the accused. Many countries throughout the world, recognizing that crime is a community problem, have designed systems for government compensation of victims of crime. Serious consideration of this approach is long overdue here. The victim of a robbery or an assault has been denied the “protection” of the laws in a very real sense, and society should assume some responsibility for making him whole.

In note 95, the Justice said, “One effect of requiring the accused to employ his available funds to pay the costs of his defense may be to exhaust or limit the funds from which the victim may recover in a civil suit for damages against the accused. This is among the problems worthy of consideration.” Goldberg, Equality and Government, 39 N.Y.U.L. Rev. 205, 224-225 (1964).

47 Consult Seavey, Keeton & Keeton, Cases on Torts 261 ff. (2d ed. 1964).


49 Ibid.


51 See Mitau, op. cit. supra note 48.
no means ends with the erosion of various tort immunity doctrines. The "privity concept" in products liability cases, for example, is now largely dead, and several states have adopted strict (i.e., "warranty" and "products-misrepresentation") liability in most of such cases, with the economic loss situations constituting the only major remaining exception. Warranty theory is likewise slowly replacing negligence as the liability touchstone in commercial bailment cases. Similarly, and more importantly for present purposes, the traditional "no duty to act" principle has to a large degree been emasculated. The most dramatic illustration is probably Judge Hofstader's opinion in *Bachrach v. 1001 Tenants Corp.*, holding a cooperative apartment liable on both common law tort and statutory grounds for refusing to rent to a Jew on account of his religion. Many other illustrations could readily be put, among them the novel and widely discussed decision in *Wilmington General Hospital v. Manlove*. Twisting the traditional concept of duty to act completely out of shape, *Wilmington* apparently holds a hospital liable for failing to render emergency room assistance to a child on the sole ground that the hospital possessed such a room. *O'Neill v. Montefiore Hospital*, involving an adult heart attack victim, is similar.

Indeed, learned and penetrating academic attacks on the entire "no duty to act" principle, particularly as regards emergency situations, have recently been mounted. The excellent and incisive studies of Professors Rudolph and Dawson are illustrative, as are the numerous and well-considered papers delivered at the recent "Good Samaritan" Conference of the University of Chicago Law School.

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53 Ibid.


59 The various papers in question were graciously made available to me by Dean Ratcliffe. Doubtless they have in many respects been subconsciously drawn upon here. The authors' names and their respective papers follow: Barth, The Vanshing Samaritan; Fingarette, Good Samaritan; Freedman, No Response to the Cry for Help and General Remarks, An International Experiment on the Effects of a Good Samaritan Law; Goldstein, Citizen Cooperation: The Perspective of the Police; Gregory, The Good Samaritan
Such papers, edited by Dean Ratcliffe, are scheduled for almost immediate publication and deal with all facets of the “duty to act” problem, legal, moral, and psychological. Triggered in large part by the nationwide guilt complex engendered by the failure of a large number of persons to lift so much as a telephone in order to prevent the murder of Kitty Genovese, the University of Chicago Conference is probably only the first of its type.

The fact of the matter, of course, is that both the courts and the legal academic community have become progressively disenchanted with the fault system’s individualistic premise that only the culpable should pay and then but sometimes. For good or ill, risk-distribution theory has come to sit ever more firmly in the saddle. Aside from the above-noted developments, the revised Restatement of Torts reflects this shift of emphasis in a host of ways, among them fundamental, plaintiff-oriented changes in such widely disparate areas as occupier-responsibility, products liability and duty to act. Of course, the trend, even in the Restatement, is by no means uniform. Risk-distribution theory, for example, is hardly compatible with the position taken by the Council in Tentative Draft Number Eleven to the effect that airlines should not normally be liable for ground damage occasioned by their falling non-negligently operated and maintained aircraft. But, as discussed below, there is an ambiguous legal ringer even here.

One final point. Aside from instructional frustrations and topicality, the subject chosen here is hopefully appropriate for still another reason. As professor Dunham recently pointed out, the Court has thus far done little to give even generalized guidance concerning the


\textit{Authority is unnecessary.}

60 Restatement (Second), Torts §§ 340-341 (1965).


63 Restatement (Second), Torts § 520A (Tent. Draft No. 11, 1965).

meaning of the fifth amendment's just compensation clause, and there is virtually nothing from the Court on the relationship of that clause to sovereign immunity or to tort law. One cannot even say whether the clause is self-executing, let alone what constitutes "property" or a "taking." Indeed, as everyone dealing with the problem (including the Court)68 concedes, the area is principally characterized by its highly ambiguous and irreconcilable decisions.69 Probably no other clause of the Bill of Rights has been so sorrowfully neglected by the Court, notwithstanding that it was the first to be applied to the states through the fourteenth amendment's due process clause.70

So much, then, and it was probably far too much, by way of introduction. A brief word now concerning organization. Conventional tort law problems beginning with cases such as Vincent are dealt with first. Just compensation problems are next considered, followed by the usual "law-review-form reflections and conclusions." There is, to be sure, considerable overlapping in the first two sections and to demonstrate its extent is one of the article's principal purposes.

Torts

The broad message here, as in the Just Compensation section which follows, is that the traditional legal distinctions are for the most part indefensible so far as many of the cases posed in the Introduction are concerned and that the losses in such cases, and in many related ones, should, so far as possible, fall upon the better risk-bearer who, in most situations, will be the acting party.

Vincent, canonized by the Restatement,71 is, as previously implied,72 the logical starting place. Most of the pertinent facts have previously been related although the point that neither the shipowner nor the dockowner was culpable was, for present purposes perhaps, not sufficiently stressed. The shipowner, to be sure, destroyed the dock in order to save his ship and the lives of himself and his crew, but he was also, in Restatement parlance, "incompletely privileged" to do so.73 In other words, as cases such as the classic Ploof v.

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69 See Sax, supra note 66, at 45.
71 RESTATEMENT (SECOND), TORTS § 197, illustration 2 (1965).
72 See text accompanying note 1 supra.
73 See, e.g., RESTATEMENT (SECOND), TORTS § 263, comment on Subsection (2), at 497 (1965).
Putnam make clear, the dockowner in Vincent would certainly have been liable had he sought to prevent his dock's destruction at the shipowner's expense. Still, as there is little, if anything, to choose between the Vincent shipowner and the dockowner on a risk-bearer basis, it seems only fair that the former should pay What, if any, liability to either the shipowner (on a contribution or indemnity theory) or the dockowner should exist on the part of the crew members and/or third parties whose cargo was saved by the shipowner's action is, to say the least, unclear. Such matters have been adequately dealt with elsewhere. They are mentioned here merely to show the complexity of the issues involved.

Oddly enough, however, Vincent rests not on the suggested ground but on the obviously indefensible ground that the shipowner, after the storm arose, strengthened the cables which held his ship to the dock. As the Vincent dissent cogently observes, the majority result would presumably have been different had the original cables been as strong as the later ones and/or had the ship never been tied to the dock in the first place. Even the majority concede that there would have been no liability had the ship initially been uncabled and the dock destroyed by reason of the storm's blowing of the ship against it. Such distinctions are difficult to explain.

Yet, according to at least two Restatements, Vincent supposedly stands for the proposition that one is liable for intentionally destroying another's life, limb or property in order to save either his own and/or a third party's. A few decisions superficially appear to support this, but even these for the most part can be otherwise explained, and, as a basic proposition, the assertion falls flat. Indeed, at least one case, albeit in a pleading context, rejects Vincent altogether. Even the Restatement of Torts, with an inconsistency born either of expediency or oversight, apparently finds Vincent inapplicable in certain false imprisonment contexts. Thus, while retail merchants are

74 81 Vt. 471, 71 Atl. 188 (1908).
75 RESTATEMENT (SECOND), TORTS § 77, illustrations 4 & 5 (1965).
78 See RESTATEMENT (SECOND), TORTS § 197, illustration 2 (1965); RESTATEMENT, RESTITUTION § 122 (1937).
79 See generally PROSSER, TORTS, 125, 129 n.6 (3d ed. 1964) and authorities therein cited.
80 Hopefully, the text discussion which follows sufficiently illustrates this.
privileged to detain customers reasonably though mistakenly suspected of shoplifting.\textsuperscript{82} the merchants so acting presumably do not have to pay for the value of their customers' time while so detained, nor need they compensate for loss of reputation or embarrassment or attendant economic and/or property losses resulting from such privileged detentions. Why the Restaters think the freedom of locomotion in this context is less deserving of compensation than the dock involved in \textit{Vincent} is nowhere explained.

The cases, such as they are, are unclear, and only God knows what the law is for situations such as \textit{Turner v. Mellon},\textsuperscript{83} where a divided California Supreme Court denied recovery against a telephone company whose employee took the initiative in reasonably though mistakenly identifying plaintiff to the police as the man who had robbed the company's office on three separate recent occasions. Because of the high value society places on the interests of privacy and freedom of locomotion, probable cause has, even in temporary detention situations, traditionally not been a defense to false imprisonment actions.\textsuperscript{84} Yet \textit{Turner} goes the other way, and the entire \textit{Turner} problem is confused by the "private citizen arrest cases" which have almost always been thought to invest private citizens with legal authority to arrest without warrant anyone reasonably though mistakenly thought to have committed a felony provided only that the felony for which the arrest is made has in fact been committed.\textsuperscript{85} Interestingly, however, \textit{Turner} fails even to discuss the law of private citizen arrest, and neither the majority nor the dissenting opinions mention any sort of a \textit{Vincent} problem. Nor, in these respects, is \textit{Turner} atypical.

In light of the position here generally assumed, of course, \textit{Turner} seems wrong, for defendant was obviously the better risk-bearer, and the individual's interest in privacy and freedom of locomotion is more important on \textit{Turner} facts than society's interest in crime prevention and detection. The \textit{Restatement of Torts} position in the "reasonably though mistakenly suspected shoplifter cases" should be rejected for similar reasons.\textsuperscript{86}

The late Professor Morris, while rejecting the reasoning of the

\textsuperscript{82} \textit{Restatement (Second), Torts} § 120A (1965).
\textsuperscript{83} 41 Cal. 2d 45, 257 P.2d 15 (1953).
\textsuperscript{84} See Prosser, \textit{Torts} 61 (3d ed. 1964) and authorities therein cited.
\textsuperscript{85} See generally \textit{Restatement (Second), Torts} § 119 (1965); Moreland, \textit{The Use of Force in Effecting or Resisting Arrest}, 33 Neb. L. Rev. 408 (1954); Warner, \textit{The Uniform Arrest Act}, 28 Va. L. Rev. 315 (1942).
\textsuperscript{86} The Restatement position, of course, justifies "reasonable detentions." \textit{Restatement (Second), Torts} § 120A (1965).
Vincent majority opinion, once sought to justify its result on the ground of the necessity of securing the dockowner's cooperation in saving the ship, crew and cargo. That is, the dockowner, unless legally assured of recovery for his dock, would be strongly tempted to save it at the expense of the ship and crew. I have yet to find the student who would buy the analysis, and I seriously doubt whether Professor Morris ever did either. Aside from the point that the explanation reflects an unduly bleak view of human nature and contemporary moral standards, there is the further point, previously made, that cases such as Ploof render any "dock-saving-at-the-expense-of-ships-and-crews" activities by dockowners tortious. If Ploof and related cases are not sufficient to preclude dockowner interference, certainly the fact that Vincent can somewhere be found in the reports can hardly be expected to do so.

Furthermore, the Morris argument untenably assumes that the dockowner either is law-trained or has a lawyer handy for all unexpected "dock-endangered-by-ship-type" storms and suggests, perhaps unintentionally, that dockowner interference would be non-tortious provided that the dockowner knows (and/or had probable or reasonable cause to know?) that the shipowner (and/or the crew?) was uninsured and otherwise impecunious.

Finally, the dockowner is here not being asked to do anything. Rather he need only refrain from acting in order not to endanger the lives and valuable property of third parties. Parenthetically, it should be noted that the Morris analysis logically compels the repudiation of the "no duty to act" principle for emergency situations. For if tort law is not to impose liability upon one who fails to telephone the police in order to prevent the murder of Mrs. Genovese nor to compensate (on either tort or quasi-contract grounds) the citizen who does, it can hardly compensate a dockowner for sitting on his hands and merely refraining from destroying or substantially endangering other people's lives and property in order to save his own. Perhaps, as many have argued, the "no duty to act cases" are indefensible, but to repudiate them simply in order to explain Vincent is a bit too much.

87 Momus, Torts 42-46 (1953).
88 See text accompanying notes 73-77 supra.
89 Ploof v. Putnam, 81 Vt. 471, 71 Atl. 188 (1908).
Morris' reasoning is still of interest, however, for he employs it to explain a large body of otherwise irreconcilable cases which the Restaters and other authoritative spokesmen (Seavey, for example) have ordinarily seen fit to ignore when discussing and expanding upon Vincent. Morris employs Cordas v. Peerless Transp. as illustrative of the cases in question and the same is done here. In Cordas, as Morris states it,

a pursued armed bandit jumped into a taxicab and ordered the driver to get going. The driver put the cab in low gear, accelerated as fast as he could, suddenly slammed on his brakes to throw the bandit off balance, and leaped from the cab. The cab motor kept running, and the moving vehicle veered onto the sidewalk and injured the pedestrian plaintiff. The court held the driver not liable in spite of the great likelihood that his intentional act, done in a congested downtown locale, would cause injury and was done to save his own hide.

While noting several minor differences between Vincent and cases such as Cordas, Morris basically reconciles them by observing that in Cordas “the pedestrian could do nothing to impede the cab driver from executing his plan of escape. No promise of compensation is needed to affect the pedestrian’s behavior—he [sic] need not be given compensation to encourage cooperation [whereas the dockowner in Vincent does].” The distinction appears unsupportable not only for the reasons above-stated but also because the cab company is patently the superior risk-bearer and because its driver, at least on Morris’ assumption, non-negligently assumed the role on behalf of himself and the company of a private executioner with a ninety percent probability of success. One can only speculate on what Morris would have said had evidence in the cab case shown that the driver acted exclusively or primarily to capture the bandit for society’s benefit, rather than to protect himself and/or the company, and had himself been injured. Should the driver’s affirmative cooperation for society’s benefit (on an a fortiori Vincent analogy) then be paid for by society on some novel just compensation basis, or should we simply forget about “cooperation payment” because of the absence of a solvent private-citizen defendant?

91 There is really no page citation that can be indicated here. That the cases in question have been overlooked, however, is apparent from the juxtaposition of the cases and other materials in all editions of the Seavey, Keeton & Keeton torts casebooks.
92 27 N.Y.S.2d 198 (City Ct. of N.Y. 1941).
93 Morris, op. cit. supra note 87, at 45.
94 Ibid.
Unfortunately, Cordas is no legal freak. Wrong as it may be, judicial backing for it is considerable. Cases such as Noll v. Marian,95 while a step further removed from cases like Cordas in terms of relative indefensibility, should also be noted. The Noll problem, in sum, is somewhat like this. A bandit, brandishing an apparently loaded revolver and attempting to rob defendant's bank, informs the teller that he will take deadly action against both the teller and the bank customers present if the teller fails to hand over certain cash immediately or attempts to impede the robbery's success in any way. The teller nevertheless sounds an alarm, and the bandit murders a customer. The conventional and Restatement of Torts approach to this and related problems is that the bank is not liable for the death provided the teller acted "reasonably" under all of the circumstances (whatever this may mean in such a context) and that an important factor in determining "reasonableness" is the bank-teller's interest in saving his employer's cash. How this materially differs from Vincent I fail to understand, particularly as the bank not only is the better risk-bearer vis-à-vis its customer but also has a duty of care with respect to the customer that is lacking in cases such as Cordas.

This last point, however, is by no means intended to suggest that the result in a Noll situation should depend upon the status of the injured or deceased party on the land. Indeed, for my part (though no case even remotely supports the suggestion), it is arguable that the bank should be liable to the bandit's lookout-confederate should the confederate fortuitously happen to be killed or injured by the bandit on account of the teller's action. Assumption of risk is in judicial disfavor,96 and would not, save for ambiguous visceral reactions and a large body of ill-considered felony murder cases,97 conventionally cover a look-out concealed from view and killed by the bandit's fortuitously-miscarrying bullet.98 The case of a pedestrian hit while walking on the sidewalk adjacent to the bank is a fortiori.

One final point. It should be noted that, while Noll went for defendant on "no negligence as a matter of law" grounds, the modern

96 Authority is not needed for this proposition.
97 See generally Hall, General Principles of Criminal Law, ch. 4 (2d ed. 1960); Moreland, A Rationale of Criminal Negligence (1944); Mueller, Where Murder Begins, 2 N.H.B.J. 214 (1960); and Seavey, Negligence—Subjective or Objective?, 41 Harv. L. Rev. 1 (1927).
98 It is basic to assumption of risk theory that the plaintiff consciously assents to the risk, and the lookout, provided he is sufficiently well-hidden, certainly does not consent to being shot or even, in many situations, to the risk thereof.
judicial trend on similar facts is otherwise—at least to the extent of permitting the case of an injured or deceased plaintiff-customer to get to the jury.\footnote{See, e.g., Genovay v. Fox, 50 N.J. Super. 538, 143 A.2d 229 (1958), rev'd on its particular facts, 29 N.J. 436, 149 A.2d 212 (1959). Here, the New Jersey Superior Court held a bowling-alley-bar proprietor liable when plaintiff patron was shot and wounded by a gunman who was jumped by another patron while the bowling alley was being robbed. The court expressly stated, and this was the agreed assumption on appeal to the New Jersey Supreme Court, that the proprietor was under a duty to conduct himself so as to avoid inducing or encouraging resistance to the bandit if resistance reasonably appeared to entail a substantially increased risk of serious injury or death to those present. See also Liberty Life Insurance Co. v. Weldon, 287 Ala. 171, 100 So. 2d 696 (1957).}

\textit{Noll},\footnote{Noll v. Marian, 347 Pa. 213, 32 A.2d 18 (1943).} \textit{Cordas}\footnote{Cordas v. Peerless Transportation, 27 N.Y.S.2d 198 (City Ct. of N.Y. 1941).} and \textit{Vincent},\footnote{Vincent v. Lake Erie Transp. Co., 109 Minn. 456, 124 N.W 221 (1910).} are all self-defense cases in one sense, although \textit{Vincent} differs from \textit{Noll} and \textit{Cordas} in that the self-defensive action taken in \textit{Vincent} was 100 per cent, rather than just 90 per cent or 80 per cent, certain to result in serious harm to innocent parties. \textit{Noll} also differs from the other two cases in that the teller in \textit{Noll} acted primarily to protect the bank's cash rather than his own person or property.

However, none of these cases involves what would academically be regarded as a conventional self-defense problem. The usual such case goes off either on "dwelling house" grounds or on some version of the so-called "retreat doctrine,"\footnote{See generally \textit{Hall \& Mueller, Criminal Law and Procedure: Cases and Readings}, 663ff. (2d ed. 1965) and authorities therein cited.} and, in my experience, the vital point of whether or not an acting party is liable for employing deadly force against one reasonably but mistakenly suspected of endangering the actor's life without legal cause is often missed.\footnote{Of course, one could go on \textit{ad infinitum}. Obviously all of the possibilities cannot here be exposed. See, e.g., \textit{Restatement (Second)}, Torts §§ 70, 131 (1965).} Of course, there is no liability in situations where the actor is both reasonable and correct in his thinking.\footnote{Of course, one could go on \textit{ad infinitum}.} The \textit{Restatement of Torts}, however, draws no distinction between the two groups of cases, positing no liability in both.\footnote{See \textit{Restatement (Second)}, Torts §§ 65-75 (1965).} Fortunately, most cases do not support such an "all or nothing at all" approach, and certainly traditional tort law...
has been that one acting in self-defense does so at his peril, i.e., the actor is liable if the facts turn out to be different from what he reasonably supposed them to be.\textsuperscript{107} This, furthermore, is the lesson to be drawn from traditional arrest cases in which a private citizen or even a police officer employs deadly force while reasonably but mistakenly supposing the existence of facts which, if true, would legally afford him the right to employ such force in order to effectuate an arrest.\textsuperscript{108}

Even less defensible, though involving the use of deadly force in order to prevent crime rather than to arrest, is the \textit{Restatement of Torts} view concerning the liability of one using a gun in order to save the life or limb of one whom the actor reasonably though mistakenly believes is about to suffer such harm at the hands of a third party. The \textit{Restatement}, of course, finds no liability.\textsuperscript{109} A more difficult case from the \textit{Restatement} standpoint (which, oddly enough, is easier in terms of the position here taken) would be one in which both the actor and the person on whose behalf deadly force was employed reasonably but mistakenly thought that its use was necessary.

The actor should be liable in all three situations. While there is nothing to choose between the actor and victim in any of such cases, these cases in terms of culpability and there will sometimes be nothing to distinguish them on a risk-distribution basis, the defendant in most such cases will still, because of both the \textit{respondeat superior} doctrine and the notion of "which party will more likely be insured," ordinarily be the better risk-bearer.

Furthermore, all of these cases involve an extremely serious and difficult plaintiff-proof problem. The fortuitously-miscarrying-bullet problem (in which A fires at B and accidentally kills C) can for present purposes be ignored. Probably no court would today distinguish between one who lawfully and intentionally aims at and hits his intended victim and one whose bullet under the above circumstances accidentally kills a person at whom his gun was not intentionally aimed. The exceptions would involve congested-area-negligence situations and certain indefensible criminal cases.\textsuperscript{110} Not even the \textit{Restatement of Torts} allows anyone to become a private-executioner 100 per cent likely to succeed, and the problem of determining


\textsuperscript{108} \textit{Ibid.}

\textsuperscript{109} \textit{Restatement (Second), Torts} § 76 (1965).

\textsuperscript{110} See generally Moreland, \textit{Modern Criminal Procedure} 28-48 (1958).
whether or not the actor employed deadly force lawfully to arrest his victim, and/or to protect his dwelling house from forcible and unlawful entry, or to prevent serious crime, or to protect someone's life or limb, rather than out of revenge or for other legally impermissible reasons is, under the Restatement view, left to the vagaries of the jury system. Enough has been written about these to justify ignoring them here.\textsuperscript{111} The mixed-motive and/or intent problem is further discussed below\textsuperscript{112} Case law and Restatement of Torts subtleties as to whether the force in question is “deadly” and/or “reasonably employed” under differing facts are beyond this article’s scope.

The Laidlow \textit{v. Sage}\textsuperscript{113} problem furnishes still an additional reason for allowing recovery in the above-mentioned situations. The case is deservedly a classic in its own right but has become famous for all time, even to laymen, because of its treatment by Stryker in his justly renowned \textit{Art of Advocacy}.\textsuperscript{114}

Russell Sage, it seems, whatever his “will-death-bed” change of heart, was a miserly, distrustful man during his lifetime, and, in consonance with the “robber baron” ethics of his day, accumulated a vast fortune. Sage’s human frailties, more than his beneficient Foundation, ensure him an everlasting place in history Sage’s torts law combatant, the almost equally famous Laidlow, was in contrast a gentleman whose ultimate physical fate was, according to him, determined by Sage’s action on the afternoon of December 4, 1891. Sage was nationally known as a man who hated banks and kept an abnormally large amount of cash in his Boston office, a miserable hovel. Laidlow had the misfortune of being present when Sage was called from his inner office by one Norcross, small bag in hand, and was presented with a note by Norcross demanding $1,200,000. The note read as follows: “The bag I hold in my hand contains ten pounds of dynamite. If I drop this bag on the floor, the dynamite will explode, and destroy this building in ruins, and kill every human being in the building. I demand $1,200,000 or I will drop the bag. Will you give it? Yes or no?”\textsuperscript{115}

\textsuperscript{112} See text accompanying note 124 infra.
\textsuperscript{114} \textit{Stryker, The Art of Advocacy} (1954).
As stated by the New York Court of Appeals, Sage read the letter twice, folded it, handed it back to Norcross, and then commenced parleying with him, stating that he had an engagement with two gentlemen, that he was short of time, and, if it was going to take much time, he wanted him to come later in the day. Norcross, after a second, said "Then, do I understand you to refuse my offer?" Norcross held the bag at the end of his fingers, walked backward towards the door through which he came, and, when he reached the threshold, he stopped, and looked at the defendant. The defendant stepped back a little towards the desk that was in the anteroom, while Norcross was going the other way. As he reached the threshold, he looked at the defendant, and said, "I would rather infer from your answers that you refuse my offer." Norcross then gave one look, stepped to one side, when the flash came, and it was all over in two seconds.\footnote{Id. at 78-79, 52 N.E. at 680-81.}

Customer Laidlow was at this point a vegetable. Sage, who emerged virtually unscathed, had, according to Laidlow, deliberately employed him as a human shield in order to protect Sage from the effects of the almost certainly forthcoming blast.

Sage's defense was that his action was "instinctive" rather than "voluntary," and such defense, while unfortunately never passed upon by the New York Court of Appeals, was sanctioned at least twice by the Appellate Division, although somewhat ambiguously the second time:

\textbf{[Defendant's counsel.]} requested the court to charge that "if the jury find from the evidence that the defendant did take the plaintiff and use him as a shield, but that this action was involuntary, or such as would instinctively result from a sudden and irresistible impulse in the presence of a terrible danger, he is not liable to the plaintiff for the consequences of it." The court: "I will not charge it exactly in those words. I will charge it that the essence of the liability must be a voluntary act." The proposition requested to be charged the defendant was entitled to have submitted to the jury. The essence of the liability is not entirely whether the act of Sage was voluntary or not. An instinctive action may be voluntary. An act done upon the spur of the moment, in anticipation of impending evil, may be voluntary. But such acts are not the result of an intent based upon reasoning; and upon the previous appeal, therefore, we held that, according to the testimony of the plaintiff, the jury might find that the act of Sage in placing the plaintiff between himself and anticipated danger was not an instinctive act, but rather proceeded from calculation and design. We considered it manifest that the jury might have come to this conclusion because
the defendant expressly refrained from giving the answer which he
had reason to believe would precipitate the catastrophe until he had
placed himself, as he supposed, in a place of comparative safety,
behind the plaintiff.\footnote{Laidlow v. Sage, 80 Hun 550, 553, 30 N.Y. Supp. 496, 498-99 (1894).}

*Laidlow v. Sage* was tried four times\footnote{STRYKER, op. cit. supra note 114.} the final result being an
out-of-court settlement, but the cream of the late-nineteenth-century
Boston Bar, including the famed Joseph Choate, participated. Choate,
like almost everyone else, detested Sage and sought vengeance.\footnote{Id. at 76-84.}
Choate’s ultimate success, however, accomplished nothing constructive
for tort law

The two Appellate Division opinions in the case, nevertheless, do
point up an additional problem of proof for plaintiff which is present
not only in *Laidlow* but also in *Vincent, Noll,* and *Cordas.* How, ex-
cept in terms of jury magic, can a given act reasonably be found
“voluntary” rather than “instinctive” on conflicting and, generally,
equally creditable proof? Yet the *Restatement of Torts,* reflecting
relevant case law,\footnote{The leading case is *Scott v. Shephard,* 2 Black. W 892, 96 Eng. Rep. 525 (1773),
3 Wils. K.B. 403, 95 Eng. Rep. 1124 (K.B. 1773), the so-called “Squib Case.”} regards the distinction as determinative.\footnote{Restatement (Second), Torts § 14 (1965):
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All of these losses should fall upon the actor. An interesting footnote, however, is that the
*Restatement of Torts,* while adopting the “instinctive
action” distinction for cases such as *Laidlow,* apparently rejects it
and would deny liability in duress cases such as the previously men-
tioned *Gilbert v. Stone,*\footnote{Sty. 73, 82 Eng. Rep. 839 (K.B. 1648).} where defendant was forced at gun point
to step on plaintiff’s land and take plaintiff’s gelding. Of course, the
Restaters, like everyone else, would impose liability in any duress
situation where one, threatened with immediate death, premeditatedly
kills another in order to save his own life.\footnote{One might attempt to appear very learned about propositions like this, but the
cases, in fact, largely involve extraordinary situations in which people are in rafts in the
middle of the ocean eating one another. Modern cases generally involve some sort of
duress defense to murder in which the defendant says that he had to kill somebody}
Another problem, as the cases, if not the Restatement of Torts, make clear is that of mixed motives; of whether defendant acted for himself and/or third persons with whom he stood in some kind of legal relation (land occupier and licensee, for example), or for a group of strangers, or for society at large. The Restatement of Torts, to be sure, draws a rough distinction between "private" and "public necessity" cases (i.e., one is not liable if he takes another's life or property for the "public" as contrasted with his own "private" benefit), but to apply the Restatement rule to particular facts is something else again. Take, for example, two of the Restatement's own "private necessity" illustrations:

2. A, a pharmacist, refuses to sell B a bottle of medicine available only from A and necessary to save the life of B. B takes the medicine and uses it. B is privileged to do so, but is subject to liability to A for the value of the medicine.

3. The same facts as in Illustration 2, except that B is a physician who takes the medicine to save the life of his patient. B is privileged to do so, but is liable to A for the value of the medicine.

Similar illustrations are given by the Restatement of Restitution. But the illustrations of neither Restatement, it is submitted, are supportable with reference to practical problems of proof. Furthermore, one is left at sea, even in terms of meaningful generalized guidance with respect to what constitutes a "public" as contrasted with a "private" necessity. What, for example, would the Restaters do with a case where a volunteer policeman crashes into a drugstore in order to obtain insulin to save the life of a legally unrelated person known by him to be a diabetic? Perhaps the volunteer police officer's government should be liable to the druggist on just compensation grounds, but to hold the policeman himself would be a travesty on justice. The best risk-bearer is the government. At the same time, a cross-action by the government against the diabetic for the market value of the insulin and for damage to the drugstore would obviously be justified. This is so because the diabetic would certainly have taken the action the police officer did had the diabetic been in a position to do so.

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124 See, e.g., the Vincent case itself, 109 Minn. 456, 124 N.W. 221 (1910). Who can say, on reading such a case, whether the shipowner wanted primarily to save his ship or his person, or his crew, or merely his cash?

125 The quoted example raises an interesting question of patent law. Many experts would capsize if somebody perfected a cancer pill.

126 RESTATEMENT (SECOND), TORTS § 263 (1965).

127 RESTATEMENT, RESTITUTION § 122 (1937).
Of course, it would be far easier to hold the policeman liable to the
druggist if the policeman broke into the drugstore not only for a
diabetic third party's benefit but also because he, too, was a diabetic
suffering from lack of insulin. But, again, the proof problem would in
most cases be impossible. One could go on endlessly Suppose, for
example, that the policeman was not a diabetic and acted for two
"third persons," or three, or ten, or an entire society of diabetics? Thus,
at least as regards our hypothetical "diabetic society," is the domain
of the just compensation section which follows.

Before proceeding further, a superficially related group of cases
must be considered and distinguished. Students repeatedly stumble
over such cases and equate them not only with Vincent and like cases
but with Noll as well. A typical illustration of the cases in question
would involve a pleasure car driver non-negligently carrying five guests
to a picnic. A small child suddenly stumbles into the path of his car,
and the driver is confronted with the dilemma of choosing between
killing or seriously maiming the child (who might or might not be
negligent) and seriously injuring or killing himself or his guests.

Of course, just as in Peerless and Noll, the respective "certainty"
and "seriousness of danger" percentages as between the car occupants
and the child can be changed, and Farmer Jones' fence can be thrown
in for good measure, so that the child, the driver, and his guests could
all have been saved had the driver only chosen to take the fence. There
is in all of these cases, too, the intriguing matter of who, under varying
circumstances, pays, and to what extent, for the damage sustained by
the driver's car. Such matters are elsewhere discussed.\(^{128}\) However, a
hypothetical "driver-guest" case fundamentally differs from the basic
problem here considered in that it raises the question of an actor's tort
liability when confronted with an emergency necessitating an active,
affirmative choice between third parties and himself and persons with
whom he is associated.

On the other hand, Vincent and the other cases here considered,
all involve somebody destroying another's life, limb or property where
the plaintiff is passive and in no way—legally, factually or otherwise—
occasions the emergency. The dockowner in Vincent, for example,
merely had a dock wholly unrelated to the storm. However, the hypo-
thetical child, whether or not negligent is analogically tantamount to
the unexpected storm involved in Vincent. Both created emergency
situations. To put it another way: The hypothetical driver, in contrast

\(^{128}\) See generally Rudolph, The Duty to Act: A Proposed Rule, 44 Neb. L. Rev. 499
(1965).
to the dockowner in *Vincent*, who at all times remained passive, was required to take affirmative action to the detriment of either himself and/or third parties with whom he was associated.

The leading case on the point is probably *Lucchese v. San Francisco-Sacramento R.R.*\(^{129}\) This was a personal injury action against a railroad and the driver of a truck in which plaintiff was riding when the truck collided with a train at a crossing. The principal issue on appeal was whether the railroad was liable because its motorman failed to employ an alternative and admittedly quicker means of stopping the train. The motorman failed to employ such alternative means because its use might possibly have thrown some of his passengers to the floor and injured them, even though its use would have averted the collision. In holding for defendant railroad, the court stated: "[The motorman’s] reason was sound. The defendant [railroad] owed to its passengers the first duty, and that was to exercise utmost care for their safety. To the plaintiff it owed the duty of exercising ordinary care. It did so. The plaintiff may not complain."\(^{130}\)

To put it more bluntly, the railroad in *Lucchese* appears to have escaped liability largely because it was a common carrier and as such owed a duty of "extreme" or "utmost" care to its passengers. The negative implication, of course, is that a private carrier might well have been liable in *Lucchese*.

Be this as it may, *Lucchese*-type cases are here relevant only in that they involve the "mixed-motives" problem and involve the question of whether or not the actor’s personal interests (or those of third parties) ought to have weight in determining liability. The *Lucchese* answer is affirmative, and its principle has even been carried by a few courts to the point of exonerating drivers who, in order to save themselves and their cars, drive into and kill persons either negligently or non-negligently present in their paths.\(^{131}\) At the same time, *Lucchese* and like cases do involve a significant "mixed-motives" problem and likewise obliquely support the proposition that the actor (in *Lucchese*, the railroad) is not liable even when acting largely in order to save cash. To this extent, and with the important caveat previously noted,\(^{132}\) the *Lucchese* line of cases undercuts *Vincent* and the various *Restatement of Torts* hypothetics predicated on *Vincent*.\(^{133}\)

\(^{129}\) 106 Cal. App. 242, 289 Pac. 188 (1930), noted, 44 Harv. L. Rev. 303 (1930).
\(^{130}\) 106 Cal. App. at 244, 289 Pac. 189.
\(^{132}\) See text accompanying notes 127-130 supra.
\(^{133}\) See text accompanying notes 123-125 supra.
Let me now turn to the so-called "airplane-ground-damage" cases. The typical situation involves a non-negligently operated and maintained airplane inexplicably going to grief in the air, so that the pilot must choose to make his a forced landing in the planted cornfield of either A or B. The pilot chooses A's cornfield, rather than B's, and destroys A's corn and farmhouse. The Restatement of Torts, as previously mentioned, makes A, rather than the airline, bear the loss. This position, it is submitted, is untenable for the reasons above-discussed and also because A would have the almost insuperable burden of showing not only that the pilot and/or his airline was negligent but that the pilot's action was not "instinctive." The frame of reference here, of course, is Laidlow v. Sage. The legal difference between "instinctive" and "deliberate" action in a forced-landing context, however, wholly escapes me. There is, on reflection, much to be said for the ancient trespass cases (rejected by the Restaters) imposing liability under the aforementioned circumstances. The Restaters, while responding to economic changes and imposing strict liability in such areas as products liability, unjustifiably and inconsistently get carried away with fault notions when it comes to farmers and airlines.

The "fire" cases likewise deserve mention. The typical case here involves A dynamiting B's house solely in order to save his own from destruction on account of an onrushing fire. This, according to most writers as well as the Restatement of Torts, results in liability. Yet only He knows what the result would be according to the Restaters in a "small-non-incorporated-town" situation where there are only two houses, or ten, or fifteen, or where it turns out that the destruction of A's house, retrospectively viewed, was not necessary to save the ten or fifteen houses or the entire small non-incorporated town.

The cases, along with the Restatement of Torts, as previously noted, draw a distinction according to whether or not there is a "public" as contrasted with a "private" necessity. Plaintiff proof prob-

134 These cases are exhaustively discussed in Restatement (Second), Torts § 402A (Tent. Draft No. 10, 1964).
135 See text accompanying note 64 supra.
137 Restatement (Second), Torts § 520A (Tent. Draft No. 11, 1965).
139 See, e.g., Hall and Wigmore, Compensation for Property Destroyed to Stop the Spread of a Conflagration, 1 Ill. L. Rev. 501 (1907).
140 The Restatement of Torts, as repeatedly noted in the text, takes the position throughout that one can seldom, if ever, destroy another's person or property solely or even principally to save his own without liability.
141 See text accompanying notes 124-127 supra.
lems here, as in most of the cases heretofore considered, appear insuperable and for the same reasons.

There is, furthermore, another vital distinction. It is, oddly enough, one ignored by the vast bulk of the cases and by the *Restatement of Torts*. The distinction is between value and no value. Suppose, for example, A dynamites B’s house solely in order to save his own in a situation where B’s house would in any event have been totally demolished by an onrushing fire. Liability should not exist. The simple reason is that B’s house, under the circumstances, has a market value of zero. Who, in his right mind, after all, would pay anything for a house about to be destroyed by an onrushing fire? The matter is further explored below.

Inseparable from the problem of liability in these cases are various privilege issues. Students ordinarily ask, for example, whether, on *Vincent* facts, the shipowner would legally be entitled to employ force against the dockowner in the event that the latter sought forcibly to prevent the strengthening of the cables. Would a druggist, viably available on the premises, to take the above *Restatement of Torts* hypotheticals, legally have been justified in using force to prevent the taking of his insulin?

The answer in all of these cases depends, in the first place, on whether a privilege to act exists and, in the second, on whether the amount of force employed was “reasonable.” Just one example. Suppose I non-negligently park my car in front of A’s house, and the car inexplicably bursts into flame. A is at the time twenty feet away watering his roses with a garden hose. *A*, because of the “no duty to act” rule, does not have to assist me. But suppose I forcibly attempt to take his hose in order to save my car? The legally correct answer (according to the cases) is uncertain, to say the least. However, the position taken by some courts and the *Restatement of Torts* that the force which may immediately and lawfully be employed by any “legally privileged” person against a “resister” (such as a hypothetical “resisting” dockowner in *Vincent*) even extends (in a “force-meeting-force” situa-

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142 The cases are collected in Annot., 14 A.L.R.2d 74 (1950).
143 This is difficult to understand except on the assumption that most judges and lawyers have not sufficiently been exposed to classical economics.
144 See text accompanying notes 125-126 supra.
145 No case directly in point was found. As regards the confusion, see Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality*, 39 Harv. L. Rev. 307 (1926).
146 See, e.g., People v. Doud, 223 Mich. 120, 193 N.W. 884 (1923).
147 The *Restatement (Second), Torts* (1965) never expressly makes the point. It is, however, implicitly made throughout numerous sections.
tion) to the taking of life, seems unjustified. In most such cases, the "trial-judge-jury" vagaries involved in determining the very existence of the privilege are too much, to say nothing of practical plaintiff-proof difficulties.

The privilege problem is further compounded by cases such as *Southern Counties Ice Co. v. RKO Radio Pictures, Inc.*, holding that a trespasser is virtually liable as an insurer for damage done to the premises while trespassing. A correlative principle, adopted by the *Restatement of Torts*, is that persons privileged for some reason to enter another's land (say, a "non-negligent-deliberate-choice" forced airplane landing case) are liable for incidental non-intentionally and/or non-negligently inflicted damages occasioned by their behavior while on the land. Staying with the forced airplane landing case, for example, Tentative Draft No. 11 of the Second *Restatement of Torts*, and many cases would lead us to believe that there is no liability on the part of the airline for non-negligently, though intentionally, destroying A's cornfield in the first place, but that the airline is liable for the remainder of the cornfield if the pilot, when getting out of his plane, non-negligently drops a cigarette and burns it. Not surprisingly, the *Restatement* is silent regarding the proper result where Officer X reasonably destroys a fence or breaks down a door in order lawfully to arrest B's tenant. B's door, in contrast to the previously discussed case of A dynamiting B's house where such house is about to be destroyed by an onrushing fire, possesses market value. Unfortunately, no "breaking down of a door" case was found by this writer. The broad point simply is that risk-distribution theory is ignored in all of these cases and the result left either to juryroom vagaries or to unintelligible

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148 The case hypothesized is one in which slight force is initially employed but where the fight builds up to the point where it becomes necessary for one combatant to take his opponent's life.


150 *Restatement (Second), Torts* §§ 196-197 (1965).

151 *Restatement (Second), Torts* § 520A (Tent. Draft No. 11, 1965). The distinction between the principle mentioned in the previous note and the cases referred to in 520A of this note is the Laidlow v. Sage distinction between "deliberative" and "instinctive" action. It is one thing, in other words, for a plane to crash without pilot control and another where though the plane is out of control, the pilot still has a choice concerning the land upon which he will crash.

152 See *ibid.* and cases there cited.

153 The closest applicable section of the *Restatement (Second), Torts* (1965) is § 204, comment e which appears to immunize the police officer in cases such as those hypothesized in the text.

154 See text accompanying notes 136-141 *supra.*
legal distinctions which take insufficient account of practical proof problems.

One final group of cases. A modern version of the classic Mouse’s Case\textsuperscript{155} should be illustrative. Suppose, for example, that I am transporting a heavy object in my boat on Lake Erie. A storm unexpectedly arises, and it becomes necessary for me either to throw over the heavy object or to suffer myself and the object to undergo a deep Lake Erie death. Admralty law to one side, I am here clearly justified in jettisoning the object in order to save myself. This is because the object itself threatened my life under the circumstances. The case differs from Vincent in that the dock therem involved was not threatening anybody. An alternative basis for denying liability in a Lake Erie-type case would be the overlooked distinction referred to above\textsuperscript{156} in connection with the “fire” cases. In other words, the heavy object in question, about to go down in Lake Erie anyway, has no market value. Here, at least, the Restaters do draw a distinction. The Restatement would impose no liability where the object itself poses the threat and is destroyed in order to avert disaster.\textsuperscript{157} Conventionally, Mouse’s Case and like cases are dealt with under the heading of “actual public menace.”

There are “apparent public menace” cases, too. McGuire v. Amyx\textsuperscript{158} is probably the leading authority. While dealt with in greater detail below,\textsuperscript{159} the case involved a doctor who reasonably but mistakenly committed plaintiff to a smallpox institution. Plaintiff contracted smallpox and was demed recovery on analogy from “actual public menace” cases such as Mouse’s Case and because of the societal interest involved in having doctors utilize their best judgment without having to worry about reasonable mistake of fact problems. McGuire seems wrong. The doctor is obviously the better risk-bearer. Most McGuire-type cases will involve government officials. Accordingly, McGuire is principally dealt with in the just compensation section.

In concluding the torts section, the following points are evident: (1) The cases, such as they are, cannot be reconciled. (2) Many of the decisions, albeit sometimes justifiably, do violence to basic fault notions. (3) Risk-distribution theory is almost entirely ignored. (4) Plan
tiff-proof problems, certainly in terms of conventional decisions, are impossible. How, for example, can one rationally distinguish between "instinctive" and "deliberative" action on conflicting proof? (5) Impossible "privelege to act" problems abound. (6) The entire area is characterized by a complete lack of consistent societal policy.

Suggested solutions to the above-mentioned problems are not offered at this point. The concluding section contains them, such as they are.

II. Just Compensation

Much which has gone before is here in one sense necessarily repeated. There is, for almost every torts case considered, a relevant and correlative just compensation clause analogue. To take the most obvious illustration, the torts problem of whether or not A can lawfully dynamite B's house in order to save his own from an onrushing fire without paying finds an approximate parallel on the just compensation side in a case such as United States v. Caltex. Government troops in Caltex dynamited plaintiff's oil refinery in the Philippines during World War II in order to prevent it from falling into Japanese hands. Caltex is as much an "actual public menace" case as the fire case above-noted and can be extended, as was the fire case in the torts section, to cases involving "apparent menaces." To employ Caltex, for example, the "apparent public menace" just compensation analogue would be a case which, when retrospectively viewed, involved the unnecessary destruction of an oil refinery. The "constitutionally but erroneously convicted defendant" case is another "apparent public menace" example. Similarly, on the just compensation side, Vincent and like cases are little, if any, different from a case in which the government commandeers my car in order to chase a fleeing felon or drafts me to work on a road or to put my finger in a dike.

While an historical exegesis of the sovereign immunity doctrine is at this point indicated, it is not here undertaken. The question has been exhaustively explored elsewhere. Suffice it to say here only that the

160 See text accompanying notes 138-46 supra.
162 See, e.g., Mitau, What Has Happened to the Study of State Public Law by Political Scientists? A Note on Achievements and Lacunae in the Study of State Constitutional Law Since 1950, 14 J. Pub. L. 90 (1965). See also, James, Jr., Tort Liability of Governmental Units and Their Officers, 23 U. Chi. L. Rev. 610 (1955); Peterson, Governmental Responsibility for Torts in Minnesota, 26 Minn. L. Rev. 293 (1942). The question of what constitutes a "taking" within the meaning of the fifth amendment and corresponding state constitutional provisions is not here expressly considered. See also Annot., 2 A.L.R.2d 677 (1948) and Annot., 77 A.L.R.2d 1355 (1961).
doctrine has repeatedly been invoked on both state and federal levels in order to deny liability for government behavior which, if engaged in by a private citizen, would unquestionably be tortious. However, it goes without saying that the sovereign immunity ipse dixit ordinarily makes little sense in a democratic society and absolutely none in any "Great Society" where most domestic legitimate legislative efforts are directed toward socializing the adverse effects of an industrial age. After all, sovereign immunity was initially put into Anglo-American law by the circumstance that England was once an absolute monarchy.

Still, sovereign immunity does exist, and a statement concerning its relationship to the fifth amendment and corresponding state constitutional provisions is necessary. On the federal level, of course, the Tucker Act and the federal Court of Claims have to some extent long taken care of the matter. But the Tucker Act has many limitations, and the same is true of its state-law counterparts. Furthermore, Tucker-type statutes have received an extremely hostile judicial reception on both the state and federal levels.

Of course, and this point has never sufficiently been made clear, sovereign immunity doctrine and just compensation recovery are two sides of the same coin. In other words, assuming that the plaintiff does have a just compensation case, denying liability on a sovereign immunity basis effectually reads out the just compensation clause from any applicable constitution. The matter has perhaps best been put by the South Carolina court in a "just compensation" flooding context:

To hold [that the Just Compensation clause is not self-executing] would be to say that the Constitution itself gives the right which the Legislature may deny by failing or refusing to provide a remedy. Such a construction would indeed make the constitutional provision a hollow mockery instead of a safeguard for the rights of citizens.

It is inconceivable but that, where the Constitution has prescribed in unmistakable terms that the property of no citizen shall be taken for a public use without just compensation, that [other than] a guarantee that compensation will be made whether the taking be a political subdivision or by the state itself.

It would indeed be a travesty upon justice if the State should give

163 Authorities cited note 162 supra.
166 Clock Springs Water Co. v. State Highway Dep't, 159 S.C. 481, 157 S.E. 842 (1931). See generally Abend, supra note 165.
167 Clock Springs Water Co. v. State Highway Dep't, supra note 166, at 502, 157 S.E. at 850.
by its constitution a right and then deny liability upon the ground that its Legislature had not provided a remedy by statute waiving immunity.\textsuperscript{168}

So far as a conventional torts course is concerned, the \textit{Case of the King's Prerogative in Saltpetre}\textsuperscript{169} is the decision usually employed as the vehicle for expounding upon the inter-relationship between torts and just compensation law and theory. Another classic, \textit{Saltpetre} holds that the King is liable for taking plaintiff's saltpetre for gunpowder to be used for the realm's defense notwithstanding that he need not pay for his technical trespass on plaintiff's land in order to obtain the saltpetre. \textit{Saltpetre} was one of the few cases the framers of the fifth amendment must have had in mind when drafting it. Thus \textit{Saltpetre} and similar cases established from the earliest times that the government was legally obligated to pay for property taken, even where that property was to be used for the benefit of an entire nation.

From \textit{Saltpetre} and like cases grew the now well-established principle that, certainly whenever real property is involved, the government must pay when the property is taken for a public purpose whether in or out of wartime.\textsuperscript{170} There is an unfortunate problem as to what constitutes a "taking."\textsuperscript{171} Passing this, however, and notwithstanding occasional judicial statements and decisions to the contrary,\textsuperscript{172} the principle in question now clearly covers personalty as well as realty.\textsuperscript{173} The duPont Corporation, for example, would clearly be entitled to just compensation recovery for chemicals taken from it by the government in order to win a war. The case is not very different from \textit{Vincent} on the torts side. Unlike tort law, however, conventional just compensation law inexplicably appears to draw a fundamental distinction between the taking of "property" and the taking of "personal services."\textsuperscript{174}

\textsuperscript{168} Id. at 503, 157 S.E. at 850.
\textsuperscript{170} Certainly, no member of the United States Supreme Court drew any realty-personalty distinction in United States v. Caltex, 344 U.S. 149 (1952).
\textsuperscript{171} See, e.g., Rabm v. Lake Worth Drainage District, 82 So. 2d 353 (Fla. 1955), cert. denied, 350 U.S. 958 (1956). See generally Abend, supra note 166.
\textsuperscript{172} James, Jr., \textit{Tort Liability of Governmental Units and Their Officers}, 22 U. C. L. Rev. 610 (1955).
\textsuperscript{173} See note 170 supra.
\textsuperscript{174} The United States Supreme Court, however, has never squarely drawn the distinction. Indeed, United States v. Russell, 80 U.S. 623 (1871), comes very close to holding that there is no such distinction and that, assuming plaintiff is otherwise entitled to recovery, services must be "justly compensated" in the same sense as tangible property. \textit{Id.}, especially at 630, where the Court speaks of the government's obligation "to reimburse the owner for the use of [certain commandeered] steamboats and for his own services and expenses, and for the services of the crews during the period the steamboats were employed"
Thus the Government may draft me into the army and even order me to almost certain death without paying me a nickel, while duPont's stockholders at the same time fatten on their chemicals' just compensation rights. The distinction, to say the least, is an intriguing one, especially for a "Great Society" professedly dedicated to the proposition that human and civil-liberties rights are more valuable than property interests.

But one does not need a "Great Society" program in order to point up the distinction's absurdity. Take, for example, a healthy male adult citizen, called upon by a fire-department official to help put out a fire. If the requested assistance extends to the appropriation of the citizen's water and/or garden hose, just compensation theory (the subsequently discussed Blackman case to the contrary) dictates recovery. On the other hand, the commandeered "fire fighting" citizen cannot, under a conventional just compensation clause analysis, recover against the government for the reasonable value of his time, nor, presumably (either in tort or in quasi-contract), against the person or company benefited by his having been commandeered. Here, of course, the insurer of the fire-engulfed house profits, perhaps unjustifiably, by government involvement, rather than du Pont's aforementioned stockholders. The basic point is simply that, so far as just compensation law is concerned, property owners get wealthy (even in time of war or fire), while citizens who have little else but their bodies often lose even them.

It is worse than this. Personalty commandeered as "incidental" to commandeering a person in order to put out a fire or to chase a fleeing felon may also be lost if one happens to be in the right place at the wrong time. The leading case here is Blackman v. City of Cincinnati. Blackman involved an Ohio citizen ordered by an Ohio policeman to employ his car in order to capture a fleeing felon. The police officer got into plaintiff's car and seated himself at plaintiff's right side, all the while giving directions. The police officer's directions were bad, and plaintiff's car was destroyed as a result of the directions and the circumstances.

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178 68 Ohio App. 495, 35 N.E.2d 164 (1941), aff'd, 140 Ohio St. 25, 42 N.E.2d 158 (1942).
cumstances attendant upon the chase. Plaintiff sued on Ohio just compensation grounds and lost. The various Ohio courts involved deemed relief on four different grounds: (1) The taking of plaintiff's car was "incidental" to the commandeering of plaintiff's person, and plaintiff, for the reasons above stated, was surely not entitled to just compensation recovery for the value of his services. (2) State police power (a singularly unhelpful term), was ample justification for what was done. (3) Ohio had a penal statute, reflecting what was doubtless the ancient common law rule,\textsuperscript{179} that every able bodied male adult was legally obligated to assist in effectuating the arrest of an "outlaw" (4) "[T]here was no divestiture of title nor any interruption to [plaintiff's] possession. If the officer had not ridden in the automobile, there would have clearly been no change in the possession of the automobile. The fact that [the officer] did ride in [the car] is immaterial. [Plaintiff] still had possession of [the car] The use of the automobile resulted from authority over the [plaintiff] and not from any assertion of title over his property."\textsuperscript{180}

\textit{Blackman} is interesting for several reasons. In the first place, it seems wrong. Why should plaintiff Blackman have to pay for society's interest in crime detection and prevention simply because he had the misfortune of being present with his car when the police officer needed help? The government is obviously the better risk bearer, and \textit{Blackman} cannot conceivably be squared with the \textit{Saltpetre} case nor with the hypothetical \textit{duPont} and garden hose cases.

\textit{Blackman} is indefensible for two additional reasons: (1) Mentioning and relying upon the Ohio statute in order to deny recovery is about the same as a cat chasing its own tail. Why an Ohio statutory obligation to assist police officers in effectuating lawful arrests should have anything to do with the meaning of the Ohio and federal just compensation clauses passes all understanding. (2) The intermediate Ohio court opinion negatively but clearly implies that the result might have been different had the police officer not entered the car but had directed Mr. Blackman to chase the fleeing felon by himself. Unfortunately, \textit{Blackman} appears to be the only reported decision involving the question under consideration. Shepardizing yielded nothing. It should also be noted that there was no claim made in \textit{Blackman} for the

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\item[180] \textit{Blackman} v. \textit{City of Cincinnati}, 66 Ohio App. 495, 499, 35 N.E.2d 164, 166 (1941).
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reasonable market value of Mr. Blackman’s services, for the loss of use of his car, for gas, or for car-depreciation.

Of course, Mr Blackman’s car could have been destroyed in a variety of ways. For example, the police officer could have shot at it for the purpose of killing or maiming the felon. Other complications readily suggest themselves. Blackman, for instance, could have been guilty of contributory negligence, or the police officer might have been negligent had he chosen to drive rather than to direct Mr. Blackman to do so. All of the aforementioned cases should be decided for plaintiff. Fault notions appear largely irrelevant in such contexts. It should be enough for liability that the government is the better risk bearer and that the plaintiff, even if legally entitled to the reasonable market value of his time, has independently been discommoded.

How does one rationally square Blackman with Vincent? The government in Blackman was in a far better position to pick up the tab than Vincent’s shipowner, notwithstanding that the police officer’s behavior in Blackman was unintentional.

The “policeman shooting at fleeing felons” cases must also be noted. A typical case involves a police officer who lawfully fires at a fleeing felon but whose bullet fortuitously miscarries, killing an innocent bystander and/or destroying an innocent third party’s property. Traditional tort law denies recovery. The most difficult cases in this connection involve “volunteer policemen,” for it is harder accurately to ascertain their real purpose in firing than is true in the case of either professional police officers or private citizens. The weight of modern torts case law weighs almost equally heavy on the side of no liability in cases where police officers, reasonably mistaken regarding the dangerous fleeing felon status of persons at whom they aim and fire, hit such persons, who subsequently prove to be innocent of any wrongdoing.

Just compensation law currently denies relief against the government in all of the aforementioned cases on one or another variety of the several theories employed by the Ohio courts in Blackman, or on a straight sovereign immunity basis. In contrast to Blackman, however, “fleeing felon” cases denying recovery ordinarily lay heavy stress on the non-culpable nature of the policeman’s action. The innocent victims of fortuitously miscarrying bullets as well as persons shot because reasonably although mistakenly suspected of being dangerous fleeing

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181 Restatement (Second), Torts § 75 (1965).
182 No case in point was found.
183 Restatement (Second), Torts § 137 (1965).
felons are traditionally viewed for just compensation purposes as "incidental" unfortunate by-products of the police-power right to shoot in the first place.

Strangely enough, the conventional criminal law result in the "fortuitously-miscarrying-bullet-bystander" problem is to hold the policeman for manslaughter or perhaps even murder, at least in situations where he intentionally shoots at and kills a person reasonably suspected by him of having committed a dangerous felony but who in fact has not. 184

In contrast, the Model Penal Code, takes a consistent position in denying criminal liability in all of the aforementioned cases. 185 Just compensation law likewise denies recovery in all such cases. Nor is the innocent victim's case better from a just compensation standpoint if the police officer and, a fortiori, any private citizen, fires at and kills or injures persons or property under negligently acquired beliefs which, if true, would lawfully have justified the use of deadly force. 186

Dillon v. United States, 187 of course, is no "fleeing felon" case. It lacks an emergency context, for one thing. Dillon approximates the taking of Blackacre for an interstate highway in that Blackacre (like the lawyer's services in Dillon) is taken deliberately. Of course, Dillon differs from both the "fleeing felon" and eminent domain highway cases in that it involves the taking of personal services. 188 "Personal services" cases are further discussed below. But it is no justification for commandeering a lawyer's knowledge and/or experience to say that lawyers have it or them and that society direly needs lawyers. It is, furthermore, difficult to understand a democratic and enlightened legal system in which a lawyer's knowledge and experience take second place to real or personal property or why a lawyer is less entitled to constitutional protection than an alien working in a restaurant. I have always thought that Truax v. Raich 189 established beyond doubt that the right to work for a living is a form of property right, entitled to con-

186 See Moreland, op. cit. supra note 184 at 23 ff.
188 See text accompanying note 164 supra. There is yet another distinction, probably best put by Professor James, Jr., "The constitutional provision is held not to cover personal injury or wrongful death." James, Jr., Tort Liability of Governmental Units and Their Officers, 22 U. Chi. L. Rev. 610, 619 (1955). Professor James also had much to say concerning the fifth amendment's "taking" concept. Id. at 618.
189 239 U.S. 33 (1915).
stitutional protection. It follows that “services” are “property” in a fifth amendment sense and that they cannot be taken for the “public benefit” or otherwise without paying reasonable market value. Indeed, the taking of a lawyer’s knowledge and experience as in Dillon is a fortiori from the aliens involved in Truax in that only one lawyer is involved, whereas it was an entire community (i.e., the entire, and relatively large, alien community) in Truax. The fact that the lawyer is being appropriated for the public benefit cannot be avoided by saying, as the Ninth Circuit Court of Appeals chose to do, that the lawyer, by reason of his bar admittance oath, owes a duty to the courts and society simply because he is a lawyer. Apply such reasoning to an interstate highway. Such reasoning would be a nice way to reduce highway construction costs, too, but I doubt whether even the most socialistic-minded would seriously argue that such a practice could be squared with the just compensation clause.

The Dillon situation is a fortiori for still another reason. If we say that lawyers who are pressed into public service to defend persons accused of crime are not entitled to just compensation recovery as contrasted with people who have their land taken for an interstate highway, we necessarily say that we value land more than we do the defense of persons accused of crime. Thus far, unfortunately, only a few state courts have seen this. Most states and the federal government—the Kennedy Bill is woefully inadequate—still think that the entire matter is one of legislative grace. Indeed, many states do not even have a Kennedy-type statute, and lawyers appointed to defend, no matter how unpopular the cause, are not entitled to anything, notwithstanding that the cause which they are appointed to represent may financially and otherwise destroy them and their families. Being able to go to work for the American Civil Liberties Union on account of such a sacrifice is, for most lawyers, not adequate recompense.

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190 See note 174 supra. Probably the best statement of the point is to be found in Gray v. Building Trades Council, 91 Minn. 171, 182, 97 N.W 663, 667 (1903): “A person’s occupation or calling, by means of which he earns a livelihood and endeavors to better his condition, and to provide for and support himself and those dependent upon him, is property within the meaning of the law, and entitled to protection as such; and as conducted by the merchant, by the capitalist, by the contractor or laborer, is, aside from the goods, chattels, money, or effects employed therewith, property in every sense of the word.”

191 United States v. Dillon, 346 F.2d 633 (9th Cir. 1965).

192 Most of the cases are from Indiana and predicated on an unusual type of just compensation clause. The leading case is Blythe v. State, 4 Ind. 525 (1853).

193 See text accompanying notes 32-34 supra.

194 See text accompanying notes 32-34 supra.
Doctors do not fare well either. Suppose, for example, an epidemic in an isolated Alaskan town. In the town there are doctors and a drugstore possessing the medicines necessary to quell the epidemic. Under existing just compensation cases, the doctors in question may constitutionally be drafted without pay, whereas not a single pill can be taken without "justly compensating" the druggist. In these days, of course, such situations seldom arise, and so doctors are seldom drafted in this manner. In contrast, thousands of lawyers are drafted every day to defend persons accused of crime. It is an ironic commentary upon our profession that various medical associations hire us to pass their so-called "Good Samaritan" statutes and otherwise to help them while we seem unable to help ourselves.

After observing that contemporary just compensation law denies recovery to court-appointed attorneys and to physicians caught up by epidemics, we should hardly be surprised to find that persons can be commandeered without pay in order to repair dikes, to put out fires, and to chase fleeing felons and perhaps even misdemeanants as in the days of Richard II. Posse comitatus and "public necessity" remain as infallible legal foundations for the denial of government liability in any and all such cases. It is submitted, just to take the fleeing felon case, that this makes no sense for 1966. The apprehension of criminals, even those fleeing from the scenes of their crimes, is too delicate and sophisticated an undertaking for persons untrained in law enforcement. The United States is no longer principally made up of frontier communities.

It used to be, in frontier days, that we called upon every able-bodied citizen to work on roads for a certain number of days each year. I seriously doubt today, however, that the legal hangover of this and related rules (currently typified, for example, by the Nebraska statute imposing a head or poll tax on men between 21 and 50 on the sole ground that this is in lieu of their "road working" responsibilities), would or should pass federal constitutional muster. Frontier roads are no longer needed. Highways today primarily need engineers, and there are unfortunately too many able-bodied unemployed men around to do the manual labor required without picking on the 21-50 male citizenry.

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195 See Note, 41 Neb. L. Rev. 609 (1962) and authorities therein cited.
197 "Each city of the first class shall provide that all male residents there, between the ages of 21 and 50 years shall be notified to appear and perform two days labor on the streets of said city Provided, all persons so notified may commute the labor so required by the payment of three dollars " Neb. Rev. Stat. § 16-710 (1962).
as a whole. Constitutional objections to statutes of the Nebraska type are sufficiently obvious to obviate discussion.

This is not to say that citizens have no responsibility to their governments. There must, on the other hand, be an independent justification if they are to be commandeered without pay. Jury service would be a case in point. The jury system's basic premise is that people in trouble are constitutionally entitled to be judged by their peers rather than by often-cynical law-trained persons. Furthermore, it is estimated that there are approximately one million jury trials in the United States each year. We may well be affluent, as Professor Galbraith suggests, but we are not yet in a position to pay just compensation for the loss of time of the thousands of higher wage-bracket people we must have in order to keep the jury system functioning properly.

The Selective Service Act is a slightly different story. As mentioned in the Introduction, this is one of the problems encountered on a particularly bad teaching day. A typical question on such a day is why, if a man may not constitutionally be required by his government to work on the roads without pay, he may nevertheless be drafted into the army without pay and even be sent to his death. The answer, unfortunately, is not simply any clear-cut analogy to the above-discussed jury-service cases. At least not now.

Soldiering in an atomic age is largely professional. We need citizen soldiers, to be sure, as witness Viet Nam, but it is still natural for students to wonder why only comparatively few citizens are called upon in this connection and are then, by legislative grace, paid barely enough to live on. Married men with children are currently exempted

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200 See text accompanying note 10 supra.
201 As bearing upon the fairness though not, of course, on the constitutionality of the Selective Service Act, an attempt was made authoritatively to determine: (a) How many men are required to support one fighting man in the field; (b) The extent to which a soldier's compensation in the form of wages, food, clothing, etc., actually compensates him as contrasted with traditional pecuniary compensation; and (c) Whether or not the conscription of women to replace men currently supporting field combat forces would be practical.

An extremely kind, but unfortunately unintelligible letter, dated October 18, 1964, was received by me from the Office of the Secretary of Defense. The letter is on file at the University of Toledo Law School, but it would serve no useful purpose to quote it here.

The constitutionality of the draft was settled for all time by the Selective Draft Law Cases, 245 U.S. 366 (1917). See also, Commers v. United States, 66 F. Supp. 943 (D. Mont. 1946) and cases cited therein.
from the draft, and there are a host of physical, mental and professional exemptions. We presently do not call upon women, nor is there any “in lieu of service” tax levied upon the exempt. Still, the various Selective Service Act inequities, however appalling from a layman’s equal protection standpoint, scarcely fall within the scope of the fifth amendment. This is not to minimize the numerous inequities. Indeed, they bear stressing, especially in view of the Negro leadership’s complaint that we are currently drafting a disproportionately large number of Negroes. However justified this last complaint may be (and in some Selective Service Districts there is doubtless an arguable equal protection problem as regards Negroes), the fact remains that, given the necessity for citizen soldiers, we simply are not now in an economic position to pay “just compensation” wages for the thousands of individuals required for our armies.

The cases of filling out tax and social security forms are explicable in the same terms and are obviously a fortiori from the draft and jury service cases.

The witness cases are harder. Currently, just compensation law does not require that any “ordinary” (e.g., an innocent bystander) witness

The most recent case involving the constitutionality of the Selective Service Act, and probably the most interesting, is United States v. Mitchell, 246 F. Supp. 874 (S.D. N.Y. 1965). The case involves, inter alia, the question of the constitutional duty of one drafted to serve in an undeclared war, i.e., Viet Nam. The case is further interesting in the light of the sentence imposed upon the defendant:

It is the strong recommendation of this Court, and I underscore “strong recommendation” in a most emphatic way, that no parole be considered by the Federal Parole Board at any time unless and until Mr. Mitchell [the defendant] unequivocally assures the Parole Board of his intention to report for induction into the Armed Forces of the United States. In other words, while the ultimate discretion is with the Parole Board as a matter of law, for whatever the recommendation of this Court may be worth, it is the intention of this Court that the full maximum penitentiary term provided by statute, that is, five years, be served unless the defendant, after serving for 18 months, makes clear his intention to report for induction.

In addition to the penitentiary sentence which I have just imposed, the Court orders that you pay a committed fine in amount of five thousand dollars. It is ordered that the fine be paid forthwith. And of course, being a committed fine, you may not be released until it is paid. Id. at 908.

The committed fine aspect of the sentence, I would be prepared elsewhere to argue, is probably unconstitutional under the eighth amendment. See generally Broeder & Merson, Robinson v. California: An Abbreviated Study, 3 Am. Cmnl. L.Q. 203 (1965).

The most exhaustive conventional legal study of Selective Service Act problems is probably Annot., 142 A.L.R. 1510 (1943).

There is no doubt, of course, that a disproportionately large number of Negroes are drafted. Prejudice may play a part in certain sections of the country but the presence of so many Negroes in our armies is largely explained by the fact that much of the Negro community is unable to qualify for the various and sundry Selective Service Act exemptions.
be paid. Society simply cannot afford it. The jury service cases furnish
the most appropriate analogy. There are simply too many trials.

The expert witness, however, both historically and currently, presents more of a problem. The courts are presently divided on
whether or not the expert witness is entitled to just compensation recovery. The expert witness case differs from the Dillon situation in
that it involves only a temporary taking of time and no final responsibility for the results of the trial. Comparatively few witnesses weep as
contrasted with losing lawyers. For those interested in counting cases,
however, the majority view is that expert witnesses are not entitled to
just compensation recovery, even when summoned to testify in their
field of expertise and solely because of it. Many reasons have been
assigned to explain this, but the main one has always been that people
are people and that experts under subpoena are no different from any-
one else under subpoena. The majority reasoning is that an expert as
well as a non-expert can witness a murder and should be treated no
differently. This is true, so far as it goes. There are, of course, many
trials and witnesses. The difference is that experts are sometimes picked
on simply because they are experts. The distinction was obvious
enough to be noted specious as early as the Thirteenth Century.

In the very early days of English practice it was customary to pay
lawyers and physicians and possibly clericals and statesmen, or others
competent from position or study to give expert testimony in a case,
extra compensation for such services. And it is quite evident that the
statute of 5 Eliz. Ch. 9 merely formulated this pre-existing custom by
providing that witnesses should be paid according to their counte-
nance and calling, a reasonable sum. And the early practice referred to was firmly and finally established
for modern English law by Mr. Justice Maule's opinion in Webb v.

203 See the many authorities cited in Bomar, Jr., The Compensation of Expert Wit-
204 Ibid.
205 Ibid. See also, 8 Wigmore, Evidence § 2203 (McNaughton rev. 1961); Annot.,
77 A.L.R.2d 1182 (1961); Annot., 16 A.L.R. 1457 (1922).
206 See authorities cited in note 207 infra.
207 See generally Bomar, Jr., The Compensation of Expert Witnesses, 2 Law & Con-
temp. Prob. 210 (1935); Finkelstein, Cost of the Expert in Civil Litigation, 2 Syracuse
L. Rev. 324 (1951); Lobingier, Compensation of Expert Witnesses, 59 Am. L. Rev. 266
(1925); Porterfield, The Right to Subpoena Expert Testimony and the Fees Required to
be Paid Therefor, 5 Hastings L.J. 50 (1953); Effective Expert Testimony and Compensa-
tion for Expert Witness—a Symposium, 2 J. For. Sci. 73 (1959). See also Expert
Witness Fees—Protection for the Indigent Party, 48 Nw. U.L. Rev. 106, 43 J. Crim. L.,
912 (1965), is probably the most recent case.
208 Bomar, Jr., supra note 203 at 513, n.19.
Page,\textsuperscript{209} decided in 1843. The expert witness compensation problem is, of course, but a minor version of the just compensation problem presented by such cases as Dillon. The United States Supreme Court has yet to speak on the question.

\textit{Dillon} and expert witness cases aside, however, probably the most indefensible abuse of the just compensation clause involves material witnesses. For present purposes it is enough to define a material witness as one who has observed a crime. Material witnesses may not only be arrested and committed to jail\textsuperscript{210} but, unlike every other arrested person save one charged with a capital offense (and even this only where the "presumption of guilt" is strong), are not even entitled to liberty on bond. The matter will not further be explored here except to note that even the material witness is not currently entitled to just compensation recovery. This is far worse than \textit{Dillon}, and, again, the United States Supreme Court has thus far declined to speak.

One further point. There are many cases (decided both before and after \textit{Griffin v. Illinois})\textsuperscript{211} to the effect that an indigent criminal defendant is entitled to out-of-state witnesses only where he tenders the statutory witness and mileage fees in advance.\textsuperscript{212} Such cases are obviously bad under \textit{Griffin} but are rendered even more indefensible in light of the aforementioned just compensation cases denying in-state witness fees altogether. To put it another way: If the government is under no constitutional obligation to reimburse even an in-state witness, how can it constitutionally compel an indigent criminal defendant to pay for an extra-state witness merely on the ground that the government has passed a witness-fee-mileage statute?

As previously noted, the "actual public menace" and "apparent public menace" problems are, almost by definition, found in the just

\begin{itemize}
\item \textsuperscript{209} 1 Carr. & K. 23, 174 Eng. Rep. 695 (N.P. 1843).
\item \textsuperscript{210} See Note, \textit{Confining Material Witnesses in Criminal Cases}, 20 Wash. & Lee L. Rev. 164 (1963) and authorities cited therein. Jobson v. Henne, 355 F.2d 129 (2d Cir. 1966) is also interesting in this regard. The court held, Judge Moore dissenting, that compelling a mental defective to work sixteen hours a day, six days a week, violated the thirteenth amendment's involuntary servitude clause notwithstanding that various defendant psychiatrists asserted that such treatment was physically and psychiatrically indicated. While the court conceded that some work programs were constitutionally permissible in the case of mental defectives and, a fortiori, convicted felons, the court thought that New York had simply gone too far. Compare Stone v. City of Paducah, 120 Ky. 322, 86 S.W. 531 (1905).
\item \textsuperscript{211} 351 U.S. 12 (1956). See generally Schafer, \textit{Federalism and State Criminal Procedure}, 70 Harv. L. Rev. 1 (1956). \textit{Griffin}, of course, holds that an indigent criminal defendant cannot constitutionally be effectively denied the right of appeal solely on account of his poverty, and thus must be furnished a free transcript.
\item \textsuperscript{212} See, e.g., Vore v. State, 158 Neb. 222, 63 N.W.2d 141 (1954).
\end{itemize}
compensation area. Little need be said about them here. Insofar as "actual public menaces" are concerned, they may obviously be abated under the police power. The nuisance cases are probably the closest in point. Any person or object which in fact endangers the public must obviously be free government prey. This is simply Mouse's Case revisited on the just compensation side. It is also the previously mentioned United States v. Caltex where the United States Supreme Court held that the government was not constitutionally obligated to pay Caltex for the dynamiting of its oil refineries to prevent them from falling into enemy hands. It may be significant, however, that a Scottish court recently held otherwise on almost identical facts.

Many other "actual public menace" cases could be put, but Harrison v. Wisdom is probably the best example as regards just compensation. General Sherman's troops, while marching through the Southland, came upon a small town apparently populated largely by distillers. The town council ordered all liquor destroyed, and plaintiff, a liquor dealer, sued defendant, a government official, for having destroyed his liquor. Recovery was denied on the basis that the liquor was, under the circumstances, an "actual public menace." In other words, plaintiff's liquor, if not destroyed, would certainly have found its way into the stomachs of Northern troops to the obvious detriment of the town's women and property.

The "apparent public menace" cases are as difficult on the just compensation side as on the torts side. So far as torts law is concerned, the reader will recall that the take-off was McGuire v. Amyx, where a doctor was exonerated after erroneously but non-negligently institutionalizing a person reasonably thought to possess smallpox.

For present purposes, the major problem is in the area of the "constitutionally but erroneously convicted defendant." Contemporary just compensation law denies him relief. The analogy here is to McGuire v. Amyx. Of course, certain states and the federal government have statutes granting some relief. But the relief in question is in all cases...

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213 This is a legal truism.
214 See generally Restatement (Second), Torts §§ 160(b), 202, 203, 264(2), 265(b) (1965).
216 344 U.S. 149 (1952).
218 7 Heisk. 99 (Tenn. 1872).
219 317 Mo. 1061, 297 S.W. 968 (1927).
220 Ibid.
221 The federal statutes bearing on the question are 28 U.S.C. §§ 2513, 1495 (1964).
pitiful, and the just compensation clause for some reason is never invoked by anybody in interpreting them.\textsuperscript{222} As the late Professor Borchard's research and writing show,\textsuperscript{223} and as Jeremy Bentham long ago wrote,\textsuperscript{224} to deny liability in this situation is incredible. As the Rhode Island court recently put it in granting relief pursuant to a legislative resolution authorizing payment to a material witness:

Liberty is precious beyond compare. Indeed, it was once eloquently proclaimed, at a critical moment of our country's history that life itself would be too dear if purchased at the price of chains and slavery To the innocent even a momentary deprivation of liberty is intolerable; 158 days is an outrage. Confinement of the plaintiff for so long a period among criminals and forcing him to wear prison garb added the grossest insult to injury. Such maltreatment cannot be fully compensated for by pecuniary damages. However, the general assembly has recognized the justice of at least a token satisfaction. . . should be far more substantial than $1,250. After careful consideration of the evidence and bearing in mind the privilege nature of the


\textsuperscript{223} Borchard, 	extit{Convincing the Innocent} (1932); Borchard, 	extit{Governmental Liability in Tort}, 26 CAN. B. REV. 399 (1948); Borchard, 	extit{State Indemnity for Efforts of Criminal Justice}, 21 B.U.L. REV. 201 (1941); Borchard, 	extit{Government Liability in Tort}, 34 YALE L.J. 1, 129, 229 (1924-25), 36 YALE L.J. 1, 757, 1039 (1926-27), 28 COLUM. L. REV. 577, 734 (1928). See also Allen, 	extit{Law and Orders} 356 (2d ed., 1956); Frank & Frank, 	extit{Not Guilty} (1957). The most recent study is Bratholm, 	extit{Compensation of Persons Wrongfully Accused or Convicted in Norway}, 109 U. PA. L. REV. 833 (1961) and the accompanying note at 845. The Bratholm article and the note raise questions: whether, for example, there ought to be a distinction in "erroneously" convicted defendants' cases according to the way in which a given defendant is ultimately exonerated. Many such distinctions have been drawn in Scandinavian countries and, as Ambassador Goldberg, then, of course, Mr. Justice Goldberg, recently pointed out: "[W]e can learn much from the Scandinavian countries in these respects." Goldberg, 	extit{Equality and Governmental Action}, 39 N.Y.U.L. REV. 205, 223 (1964).

\textsuperscript{224} As Borchard describes the history:

In England, Jeremy Bentham was the first champion of the doctrine of state indemnification for errors of criminal justice. He considered the obligation of the state so obvious that any attempt to demonstrate it could only obscure it. On May 18, 1808, Samuel Romilly, an apostle of criminal law reform in England, introduced a bill in Parliament leaving it to the trial court to determine whether, if any, and how much indemnity is due to an innocent individual acquitted after an unjust conviction. Solicitor General Plumer opposed the bill on the ground that it created a distinction between those acquitted with and without the approval of the judge, and declared thus a task equally dangerous and unconstitutional. The bill was withdrawn and no attempt has since been made in England to regulate the question.

plaintiff's cause of action we are of the opinion that $2,500 would more nearly approximate fair and reasonable compensation.\textsuperscript{225}

This brings us back to \textit{Giaccio v. Commonwealth}.\textsuperscript{226} There, it will be recalled, Pennsylvania compelled an acquitted misdemeanant to pay his own court costs. Although, as previously stated, the case was reversed on its particular facts by the United States Supreme Court, it raises the far more important question, curiously ignored in the large-scale academic debate over the propriety of \textit{Gideon v. Wainwright},\textsuperscript{227} of whether it is constitutional to require any defendant, however wealthy, to pay his own lawyer.\textsuperscript{228} There is nothing judicially authoritative on the point. Law review writers, other than Mr. Justice Goldberg,\textsuperscript{229} have also thus far been silent. There is, accordingly, little anywhere on whether legal distinctions exist according to whether a given defendant is acquitted by a judge or jury or has had his conviction upset either by the trial court, an intermediate appellate state court, a state supreme court, the United States Supreme Court, or a federal district court or circuit court of appeals in a habeas corpus context. And so forth.

Though not here directly involved, one cannot possibly, whatever the context, bring up such a matter without observing that the logic of cases such as the Pennsylvania Supreme Court \textit{Giaccio} case compel a convicted murderer sentenced to the gas chamber to pay for his own pellets.\textsuperscript{230}

\textsuperscript{225} Quince v. State, 94 R.I. 200, 205, 179 A.2d 485, 487 (1962).
\textsuperscript{227} 372 U.S. 335 (1963).
\textsuperscript{228} This is a matter falling within the "$30 or 30 days" category. That is, it has for so long been commonplace to require criminal defendants, even acquitted ones, to pay their own lawyers, that almost everyone assumes that there is nothing constitutionally wrong with the practice. Yet any protracted criminal case can financially destroy even a wealthy man. Society should constitutionally be forced to pay on a just compensation basis, certainly as regards any acquitted defendant.
\textsuperscript{229} Even if we choose not to go as far as the Scandinavian countries, we should certainly consider adopting procedures whereby persons erroneously charged with crime could be reimbursed for their expenditures in defending against the charge. Without such procedures, acquittal may often be almost as ruinous to the defendant and his family as conviction. At the very least we should extend our provision of free legal services in criminal cases to include many hardworking people who, although not indigent, cannot, without extraordinary sacrifice, raise sufficient funds to defend themselves or a member of their family against a criminal charge.
\textsuperscript{230} The problem is exhaustively discussed in Note, \textit{Criminal Costs Assessment in Missouri Without Rhyme or Reason}, 1962 Wash. U.L.Q. 76.
The zoning cases remain. As stated in the Introduction, torts stu-
dents persistently want to know why it is that a government must pay
just compensation recovery for taking my land for an interstate high-
way but does not have any legal obligation to pay for zoning my non-
obnoxious business out of existence when neighborhood conditions
change and sometimes even when they do not. The cases on the point
in the United States Supreme Court are, as previously adumbrated,\textsuperscript{231}
irreconcilable. A recent reconciliation attempt, however, was under-
taken by Professor Sax.\textsuperscript{232} And it makes excellent sense. The distinction
is this: The government need only pay just compensation recovery
when it takes one’s property for its own benefit. A government is not
liable where it takes property primarily in order to adjust conflicting
claims among citizens. In other words, a government, acting for itself,
must pay for taking my land for its school but need not pay for pro-
ihibiting me from raising horses on my farm. In the horse raising case
the government acts, not for its own primary benefit, but rather in
order to protect the rights of adjacent land owners. Horses, after all,
do smell. To put it in another way: The government, when it takes my
land for a school, does so for society’s benefit. Rezoning my farm
property, on the other hand, is simply a means by which the govern-
ment adjusts my rights vis-à-vis the rights of my neighbors who wish
to erect 100,000 dollar houses. To be sure, as Professor Sax admits,\textsuperscript{233}
the cases are difficult to reconcile.

III. Conclusion

Any broad and finalized statement here would be inappropriate.
Nevertheless, the following points bear mention: (1) just compensa-
tion and tort law issues are inextricably intertwined. (2) Risk-distribu-
tion theory should, but does not currently, explain either tort or just
compensation cases. (3) Both groups of cases are internally inconsis-
tent as well as inconsistent vis-à-vis the other. (4) Both groups of
cases appear, at least sometimes, to draw an unjustifiable distinction
between the rich and the poor. (5) It will take judicial constitutional
interpretation in order to rectify the problems here discussed. Legis-
latures, unfortunately, if past performance is any criterion, cannot in
this area by relied upon.

\textsuperscript{231} See text accompanying notes 17-18 supra.
\textsuperscript{233} Id. at 37.