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TEN CENTS

Harkness Chiefs Summon N.Y. Management Consultant

It's been a rough year for Harkness Commons. Beset with woes from higher wages, food costs and operating expenses which caused a price increase this year, the Dining Hall has been a source of complaint, controversy and declining patronage since September.

The situation confronted Messrs. Hall, Bevins and Dennis with the need for a reappraisal and for answers to the basic questions: What is wrong? What should be done to make the Dining Hall best serve the needs of the law and graduate students for whose benefit it exists?

Last week, with about one-fourth of the school year elapsed, the University took a step that should produce some definite answers. A New York firm of consultants, Harris, Kerr, Forster & Co., was engaged to make a comprehensive study of the operations of Harkness Commons and of Vanderbilt Hall (in the Medical School). The survey was scheduled to begin this week.

Vice Dean Livingston Hall, in announcing the survey, stated, "We want to keep the facilities adapted to fill the precise needs of the students as they develop. This is an auditing and accounting firm which specializes in restaurants and dining halls. They will interview students, individually and in groups. And they will talk to an informal committee of faculty and students, of which Messrs. [Louis] Toepfer and [Wesley] Bevins will be faculty members."

Among the objects to be studied will be a comparison with neighboring eating establishments in the area. Negotiations for the survey have been underway since the start of the school year, but the agreement was reached only last week. "We undertake a survey of the curriculum every ten years. We recognize that times change, and needs change with them. The same principle applies here," Dean Hall commented. Harkness Commons, op-

(See HARKNESS on page 5)

Harvard Coffers Grow Millions

Harvard University's Endowment Fund grew from \$168 million in 1948 to \$299 million in 1958. Over the same period the market value of its general investment account grew from \$204 million to \$539 million, an increase of 164%. It has been under the supervision of Paul C. Cabot, Treasurer of Harvard University since 1948, that the outstanding achievement evidenced by these figures has been brought about.

In his address to the Bull and Bear Club on Friday, November 21, Mr. Cabot set forth the policies which govern the investment of Harvard's large endowment fund.

The size of a university endowment fund is dependent upon three factors, he explained, (1) the number of gifts, (2) the return on their investment, and (3) the degree of efficiency with which the university uses the funds.

Mr. Cabot pointed out that one of the most important factors in causing the increase in Harvard's general investment account over the past decade has been the fact that every budgetary unit is an entity to and of itself. This principle of "each tub on its own bottom," as Mr. Cabot calls it, causes each school in the University to function independently, being responsible for preventing deficits in its operation and economizing to make them up should they occur.

In illustrating the effectiveness of this organizational system, Mr. Cabot pointed to the fact that twenty years ago Harvard's general investment account was some \$20 million larger than that of Yale. Today it is some

(See ENDOWMENT on page 5)



Livingston Hall

Cuban Lawyer Explains Sea Law

"Less than one-third of the countries of the world wish to keep the territorial sea limit at three miles. . . . If the question of Iceland's claim to exclusive fishing rights within twelve miles of its coast were to come before the International Court of Justice, Iceland would hold a very strong position before the court because of that country's dependence on its fishing industry and the present situation of world opinion behind the extension of territorial waters." These observations were made at the third general meeting of the International Law Club on December 4 by Dr. F. V. Garcia-Amador, LL.M. '43, Special Rapporteur on International Responsibility of the International Law Commission.

Dr. Garcia-Amador headed the delegation from Cuba to the Geneva Conference on the Law of the Sea which was held in the early spring of this year. The Conference, which proposed to modernize and make uniform the international law defining the rights of coastal states to territorial waters and the high seas, failed to resolve the much-publicized question of the breadth of the territorial sea.

(See SEA LAW on page 6)

Bull & Bear

G. A. Desmond, attorney for the Kohler Company, will address the Bull and Bear Club tomorrow at 1:40 p.m. in the Harkness Commons Meeting Room. His topic will be "Labor-Management Problems in an Expanding Economy."

Voss Inquest To Be Next Week

The inquest in the death of Eleanor Voss will be held December 19 in the District Court of Cambridge. At that time it will be decided whether any charges will be pressed against Francis Langone, 27, of Cambridge, the driver of the taxi involved in a collision with the motor scooter on which the pretty coed was riding on November 13 in Cambridge, which caused her almost instantaneous death.

An investigation of the circumstances of the accident has been made by the Cambridge Police Department under the direction of Detective Charles Delaney. Police procedures, however, do not permit the disclosure of any findings until the inquest is held. At the intersection where the accident occurred, Langone had a blinking red light, the scooter a blinking yellow light. The taxicab, according to reports, hit the back part of the scooter. Langone did not stop at the scene of the accident, but later appeared at a local Cambridge Police Station.

Joseph Schneider, of the Boston firm of Schneider, Reilly and McArdle, has been retained to handle the civil litigation on behalf of the Voss family. Mr. Schneider, a past president of the Massachusetts Bar Association, told the RECORD that his own investigation indicates the likelihood of strong liability on the part of the driver and his company, Regal Cab of Watertown.

Mr. Schneider plans to begin proceedings after the inquest, at which time the police reports will be released to him and to the public. He said that under Massachusetts law, there is a cause of action for wrongful death,

(See VOSS on page 6)

Griswold and Loss Argue Annual Model Appeal



Louis Loss

The 1958 Model Trial case entered its final stage last night in the James Barr Ames Courtroom when *Marsh v. Fitch* was heard on appeal before the Supreme Court of the Commonwealth of Ames.

The Model Appeal was argued by Dean Erwin N. Griswold, counsel for the defendant-appellant, and Professor Louis Loss, who represented the plaintiff-appellee. Neither of the counsel are inexperienced in advocate work in the Commonwealth of Ames.

Dean Griswold is a frequent appellate adversary in the Model Appeals. Professor Loss has not practised in this jurisdiction quite so often as his opponent. His only other appearance was when he argued *Price v. Niles* unsuccessfully against Dean Griswold in 1953. This time he is confident, however, that truth, justice and the law are on his client's side.

The Supreme Court bench was under the stern hand of Calvert Magruder, Chief Judge of the United States Court of Appeals for the First Circuit.

Associate Justices were Elliott E. Cheatham, Visiting Professor of Law and Robert Proctor, LL.B. '24 *c.l.*, of the Boston law firm of Choate, Hall & Stewart.

The case involved tort claims in libel and interference with an advantageous relationship.

The jury at the trial on November 13 was persuaded that the plaintiff's cause was just by the analysis and argument of W. Barton Leach, Story Professor of Law.

They awarded a verdict of \$13,750.80 on a count of libel. Robert

(See MODEL APPEAL on page 5)

Professor Field Attracts Visitor

A grey-haired visitor to Professor Field's third year Evidence class Monday braved the cold and the early hour to sit as an interested spectator while Professor Field discussed the mechanics of saving rights for objections on appeal.

Most of the alumni who return to audit Law School classes find sanctuary in the back benches among the late-coming students and do not participate in class activity.

Usually they sit as quietly as mice unless recognized by the professor — a rare occasion — and drawn into the discussion on a point in their particular field.

Monday's visitor was not as recalcitrant as most of the alumni and exhibited none of the reluctance to participate that is the general rule. He showed admirable bravery in coming to the front of the room and participating in the class.

But when he realized that he was the center of attention he rushed to the back of the room, much to the envy of students who have from time to time wished that they could escape professor's questioning in just that manner.

Professor Field realized that he was pressed for time and did not long detain him.

His presence in the room was highly distracting to several female members of the class, and at least one of them kept glancing uneasily around to make sure of his whereabouts.

Without uttering a word, the visitor inspired class participation by his very presence. One excitable student leaped from his seat and began to pursue the visitor across the front of the room, as Professor Field cried, "Catch him and I'll give him to the Dean."

The small grey mouse may not have been the only bewildered one in the room during that hour, but he was obviously the most active.

But perhaps the greatest pity of all is that he was a dormouse, not a Field Mouse.

—Mulroney

The American Automobile Designed for Death?

by RALPH NADER

It was a bright summer day when Robert Burelson was driving home with his wife and three small children from a vacation trip. He had just entered Mint Canyon near Los Angeles when suddenly an automobile veered across the road into his path. A split second later, Burelson, his family and the two occupants of the other car became statistics for the annual national motor-vehicle fatality count of some 40,000 victims. Other statistics will record at least 110,000 permanent disability cases, 1,500,000 injuries and \$5 billion of direct monetary cost. They will not record the toll of pain, anguish, wasted talent and devastated hopes suffered by the dead, the maimed, their kin and American society in general.

The tragedy of the highway blood-bath extends to the callousness and apathy of the public's reaction to this vast accident-injury problem. The fatalism inherent in the common description of the fatalities and injuries as products of "accidents," thereby implying the inevitable working of the law of averages, has paralyzed our sensibilities and deprived most of us of our normal sense of shock at the sight or even thought of mutilation and violent death. It also appears to have hindered action geared to cope realistically with a perennial crisis

of such magnitude.

The programs of our public authorities and interested private organizations have been of minimum efficacy. To try to stem the tide that has claimed over 1,150,000 victims and injured countless millions since 1899, more driver education and stronger enforcement of traffic laws have been urged.

Education consists, by and large, in the unimaginative and incessant reiteration ad nauseam by press and by radio of the hackneyed safety slogans with their hollow ring of "drive slowly," "when you drink, don't drive," "take a coffee break," and all the other advice that John Doe thinks applies to the other fellow.

Enforcement concentrates on impartiality, on requiring more literal observance of traffic laws many of which are obsolete, inadequate and actually contribute to the accident-injury toll.

These programs of education and enforcement should not be judged too harshly. They have taken enlightened forms such as the driver training courses and state motor vehicle inspections. Though difficult to measure, approaches such as these have contributed to some reduction of the accident rate by concentrating on conditions that cause accidents.

But the problem of causation of motor vehicle accident-injuries is only the beginning, not the end of under-

standing. Causal factors and conditions can be enumerated indefinitely from our birth rate to the fatal side glance at an alluring female. A more fertile inquiry could be phrased this way: "Our primary objective is to reduce fatalities and injuries; what are the principal avoidable causes that contribute to these casualties?"

Conception of the problem in this manner recognizes that efforts at enforcement and education center on accident-prevention rather than injury-prevention. It is true that preventing the accident prevents the injury. But is such emphasis realistic in its exclusive concern? Erratic and mistaken judgment in driving will always be characteristic, to some degree, of highway behavior though its incidence can be reduced.

Two Collisions

Most vehicular accidents can be considered as two separate collisions. First, the striking of the vehicle with another object and second, the striking by the occupant against the interior components of the vehicle (such as the steering wheel, dashboard, knobs, rear view mirror) or ejection through the door opened by the impact.

It is this second impact of the occupant against the inside of his car that does the killing and injuring, and there is nothing accidental about this.

(See DESIGN on page 2)

Book Reviews

CATHOLIC VIEWPOINT ON CENSORSHIP

By Harold C. Gardiner, S.J.
Hanover House, 1958. 192 pp.

by

PAUL BLANSHARD

(Member of the New York Bar and author of *THE RIGHT TO READ and AMERICAN FREEDOM AND CATHOLIC POWER*)

It is refreshing to have a book written by a qualified Catholic scholar which treats candidly the conflict between the official Catholic standards of censorship and the standards held by most non-Catholic liberals. Father Gardiner, for many years the literary editor of the Jesuit weekly *America*, and chairman of the Catholic Book-of-the-Month Club, has given us such a book. In it he not only states well the Catholic case against the American Civil Liberties Union, the Authors' League, the National Book Committee and John Fischer of *Harper's*, but he also states with great frankness the case for the narrow canons of his own church which are used to maintain Catholic internal censorship.

This latter feature of his book makes Father Gardiner's discussion much more useful than the rather evasive analysis of censorship written by his more noted confrere, Father John Courtney Murray, which was fulsomely praised by the *New York Times* as the last word in cultural progress. Father Gardiner at least faces the whole issue. If his conclusions seem in perspective hopelessly confused, it is because even a very able Jesuit cannot make Thomistic reasoning sound like the genuine article to a critical liberal.

The most famous instruments of the Catholic censorship system in the United States are the Legion of Decency, which covers films, and the National Organization for Decent Literature (NODL), which covers magazines and paperback books. Since they are both official organs of the American Catholic hierarchy, Father Gardiner is not permitted to criticize their fundamental purposes and principles and remain a Jesuit editor, but he is quite free to criticize what he calls "prudential operations." On that score he thinks that the Legion has done an efficient and circumspect job, and that the NODL has, here and there, become a little more aggressive than good taste enjoins, since: "It is undeniable that there is some form of coercion implicit" in NODL boycotts, especially when the organization's lists are used by police.

Obscenity

However, Father Gardiner becomes a fighting advocate of both organizations when the problem of obscenity is discussed. In defiance of Jimmy Walker he asserts that it is ridiculous to assert that "no book has ever seduced a girl," since "many a book has seduced many a girl." Although nudity may not be obscene in itself, obscenity can be defined clearly enough as "the intrinsic tendency or bent of the work to arouse sexual passion, or, to put it more concretely, the motions of the genital apparatus which are preparatory to the complete act of sexual union." Such arousal of sexual passion by a book should lead to its elimination from the market if the libidinous

character pertains to its "whole tenor" and specifically persists for at least "one whole chapter."

In describing the censoring of films under the direction of the Legion's censorship chairman, Mrs. J. F. Loomer, and her associated Catholic college alumnae, Father Gardiner denies that this is "prior censorship" and points out that Mrs. Loomer's ladies must pass through a six-month training period before they become official censors for their church. Each one — to use Mrs. Loomer's words — "is careful to check if the film treats marriage lightly, if it reflects the acceptability of divorce . . . Sin must always be shown for what it is, not a mistake but a shameful transgression." The Catholic pressures on Hollywood to make every film-treatment of Catholic history favorable are not discussed in this work.

Father Gardiner argues that the ACLU has become too extreme an opponent of censorship, although he has the fairness to print in the Appendix the ACLU's and *Harper's* attacks on the NODL. Not being a lawyer, his summation of recent cases on censorship is thin, but clear and scholarly. He agrees with Justice Brennan and the Supreme Court majority in *Roth v. U. S.* (354 U. S. 476) that obscenity does not come within the areas of speech and press protected by the First Amendment. I wish he had had more space to discuss Brennan's still fuzzy definition of obscenity, Harlan's significant dissent in the *Roth* case, and the "absolutist" position against censorship taken by Douglas and Black in their dissents. I tend to agree with Catholic critics that Douglas and Black are a bit unrealistic in their "absolutist" interpretations of the free speech clause, and that Father Gardiner is right in saying that "in any civilized society some forms of censorship are simply inherent in the fact that people live together."

Higher Freedom

When it comes to the censorship powers of his own church over its members, Father Gardiner does not flinch. Like a good soldier of the Society of Jesus, he justifies as an expression of "higher freedom" the whole censorial apparatus of Canon 1399, which forbids any Catholic to read without special permission any book attacking Catholic dogma or discipline; and which also forbids any priest to write on any subject under the sun without episcopal permission. (This book itself bears the Imprimatur of Cardinal Spellman).

To defend this position, Father Gardiner marshals the artificial definitions of freedom and duty which have become so famous in Thomistic dialectics. He says: "Freedom adequately defined, then, is, in the Catholic view, only 'freedom to act as I ought.'" And the oughtness, of course, comes primarily from divine (Catholic) reasonableness, which, in the last analysis means that it must flow through channels approved by John XXIII. If American judges could fall back continuously on such inerrant guidance, they would be relieved from many of the awful agonies of personal judgment. For certain types of minds freedom is painful, and authority is a constant comfort.

including the Automotive Crash Injury Research of the Cornell University Medical College, the Institute of Transportation and Traffic Engineering of the University of California, Motor Vehicle Research, Inc. of South Lee, New Hampshire and Cornell Aeronautical Laboratory, Inc. of Buffalo, N. Y.

Careful coverage of all available published papers and reports of these and other researches and experiments have not revealed a single dissent from the propositions that

- there are direct causal relationships between automotive design and the frequency, type and severity of injuries
- the tolerance studies of the human body to abrupt deceleration show that the forces in many accidents now fatal are within the physiological limits of survival under proper conditions
- engineering improvement in safety design and restraining devices would materially reduce the injury and fatality rate (estimates range from 20 to 30 thousand lives saved annually)
- redesign of injury causing automotive components are based on elementary principles of physics and well within the capabilities of present engineering technique without the necessity for radical changes in present style
- many design improvements have already been developed but are not in production.

The Cornell-Liberty Safety Car, an exhibition automobile embodying over 60 new safety concepts which enable an occupant to withstand a head-on collision at 50 mph with, at most, only minor scratches, was developed by Cornell Aeronautical Laboratory with only a tiny fraction of the annual advertising budget of Buick.

Knowledge

The remarkable advances in crash protection knowledge and engineering achieved by these private organizations at a cost of less than \$5 million stand in marked contrast to the glacier-like movements of the automobile manufacturers.

Automobiles have been designed for style, cost, performance, calculated obsolescence, but not in anticipation that they will be involved in a crash despite figures showing over 5,000,000 reported accidents yearly. It has

not been due to lack of skill — the industry possesses many highly skilled but frustrated safety engineers whose suggestions invariably take a backseat to those of the stylist. It has not been lack of notice — since the early thirties engineers have urged the redesign of the car structure for crash worthiness. In 1938 an expert had the following to say:

The motor industry and its corps of designers and engineers must face the fact that accidents occur. It is their duty, therefore, to so design the interiors of automobiles that when the passenger is tossed around, he will get an even break and not suffer a preventable injury. It is not beyond the realm of reason to expect that in an interior designed for perfect safety a passenger may experience no more than a shaking up in many kinds of accidents that today are taking a heavy toll of life and limb.

— H. Armand, 75 *Safety Engineering* 19.

Nearly 500,000 fatalities later, in 1954, a UCLA engineer, after mentioning safety glass and all steel bodies as principal advances in the early thirties in collision protection, could conclude that:

There has been no significant automotive engineering contribution to the safety of motorists since about the beginning of World War II; rather the emphasis has been on comfort and performance.

In 1956 Ford initiated some interior safety designs with the rest of the industry following. However, styling has still remained the dominant consideration in these improvements, the effectiveness of many of which are still controversial. Tests have failed to establish, for example, an advantage for the deep-dish steering wheel compared with the wheel having a hub, spokes and rim in the same plane. The motorist will still collapse the rim to the hub.

The half-hearted attempts at safety design in 1956-57 have largely disappeared. "A square foot of chrome sells ten times more cars than the best safety door latch," declared one industry representative. It should be added in passing that most foreign car makes offer far less protection to the motorist than American models.

Excuse?

It will not suffice for the manufacturers to say that they build what the consumer demands. The average consumer is not in a position to know of the inter-relationships between design and injury. He does not think of collision performance upon stepping into the showroom. Even if he wishes to protest, how can he make it effective when one model is as unsafe as another and there are no alternatives open for selecting one manufacturer over another?

The "too little too late" efforts by the industry in safety design have been blown up by advertising campaigns to brainwash the consumer into thinking that progress has been phenomenal. He has been indoctrinated into believing that main attention should be given to stricter enforcement and better driving habits. Consumer opinion is as much formed by industry advertisement as it is generated independently. The consumer is tutored to want the type of styling that brings in the greatest sales with the minimum cost regardless of safety.

Even if all the facts were laid before the public without a consequent increase in consumer demand for safety design (which is unlikely), the manufacturers should not be relieved of the obligation to build safety into cars. There are innumerable precedents where the public has had to be protected from its own indiscretion and vanity.

The problem of educating the public concerning the relation between automotive design and highway casualties is fraught with difficulties. The press, radio and television have not and are not likely to undertake this task when millions are being poured into their coffers by the advertising programs of the industry. What little information has been disseminated has appeared in small circulation publications for the technical or hobby market. Even here there has been little evaluation of the significance of these facts in terms of industry responsibility.

Private Disgust

Private researchers, such as those mentioned previously, have been reluctant to stray from their scholarly and experimental pursuits, especially when cordial relations with the industry is necessary to continue their projects with the maximum of success. The manufacturers have thought it best to cooperate with some of these programs and in one instance have given financial support. This policy is bearing fruits; most of the investigators discreetly keep their private disgust with the industry's immobility from seeping into the public limelight.

For the past two years, a Special House Subcommittee on Traffic Safety has been conducting extensive hearings on automobile design. The industry and research organizations have all submitted their testimony and reports. Some sensational facts came out of these hearings but the press, despite perfect copy material, chose to ignore them.

The Subcommittee is proceeding at too cautious a pace in view of the urgency of the problem. It has been too solicitous of recommendations to wait for more basic research by some investigators who see automotive design more from the viewpoint of engineering perfection than from that of a national health emergency requiring immediate even if not perfect engineering remedy.

Dr. Sheldon, writing one of the numerous articles on the subject that has appeared in

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recent years in the medical journals focuses the issue well:

The automobile industry has an important public health and welfare problem on its hands . . . The industry could decide the entire matter without outside intervention, but, considering their past performance with regard to safety devices, I doubt seriously if there is any likelihood of such an occurrence. If left to them, a new but minor change would be made each year as fitted their overall plan, as has been done in exterior styling and design. Such a delaying action may be a satisfactory policy in business but not in a matter of health and public safety. Translated into medicine, it would be comparable to withholding known methods of life-saving value . . .

In the case of automobile safety devices, the need is recognized and the design changes are known, but there the whole program grinds to a discouraging halt. The known hazards in interior design should be eliminated immediately. Over the years, new and better methods can be developed, tested, and installed to replace the earlier methods . . . Every facet of automotive safety does not have to be statistically proved before improvements in design are made. Every possible source of injury should be considered and some attempt made to eliminate each particular hazard. The change this year may have to be modified in a year or two, but at least during this time the public will have had added protection.

— 159 *Journal of the American Medical Association* 985-6.

Coping with dangerous automotive design does not involve the framing of new concepts of responsibility for the manufacturing of products for the national market. The protection of the public through legislative control of safety measures is well established. For example, meat must pass federal inspection before distribution; dangerous drugs cannot be dispensed without a licensed physician's prescription; airline, railroads and other interstate carriers are required to meet safety standards regarding their equipment. There is compulsory periodic inspection of motor vehicles in many states. Yet there are no federal statutes or regulations establishing minimum design standards for the manufacturers of automobiles known to be faulty in safety design and known to be a major contributor to an epidemic disease taking 40,000 lives a year.

Competition

Competition within the industry does not work, in this area, for public safety. One manufacturer is hesitant to initiate safety design changes that might add to the cost of production without a commensurate enhancement of the model's selling power, while the company's competitor increases its share of the market by an imaginative new twist to the fin structure.

Recourse to the courts for judgment against a manufacturer by a plaintiff injured by the defective interior design of his car while involved in an accident stands a dim chance of success. While courts have extended the *MacPherson* doctrine of defective construction to products defectively designed, the closest they have come in motor vehicle cases has been to hold the manufacturer liable for defective design of a component that was instrumental in causing the accident (e.g., defective braking system design, center of gravity of the vehicle too high, etc.).

As far as this writer could determine, there have been no reported cases involving the issue of manufacturer's liability for defective interior design as the traumatic agent in causing the injury to a plaintiff involved in an accident caused by the negligence of a third party.

The problems of proof, of obtaining evidence and expert witnesses willing to testify are tremendous.

Defective automotive design can not be properly dealt with by the limited authority and resources of the judiciary, although a few decisions in this area might provide some incentive for the industry to improve design. By all relevant criteria, a problem with such sweep, technicalities and ramifications can best be handled by the legislative process with delegation to an appropriate administrative body. It remains to be seen whether the necessary *elan*, so long absent, will be generated by our public representatives.

(Note: Space limitation prevents discussion of design defects that contribute to accidents, such as the terrific visual distortion of the wrap-around windshield, leakage of carbon monoxide, rear end fishtailing in hard turns, undue brake fade and dozens more.)

The Case For Comparative Negligence

by

THOMAS F. LAMBERT, JR.

Editor-in-Chief

NACCA Law Journal

Introduction

This article is written in support of the proposition that the harsh and feral rule of contributory negligence should be abolished. That Draconian doctrine is a wen on the fair face of justice: it should be removed and follow the tribal gods to limbo. It is a melancholy fact, however, that the contributory negligence rule represents the prevailing law of the United States. The fault of the claimant, contributing in however slight a degree to his injury, will totally defeat his action against a negligent defendant, no matter how clear the latter's negligence and obvious its causal connection with the harm. This rigorous and rancorous rule has been properly branded as the all-or-nothing rule, a black-and-white rule. The patent injustice of the rule is that, in a both-to-blame accident, it casts the entire loss caused by the fault of two parties on one of them alone, the injured plaintiff, the one normally least able to bear it, while the possibly more blameworthy defendant goes scot free. No man born of woman has ever succeeded in justifying that as a policy, and we have Dean Prosser's assurance that no one ever will. Prosser, "Comparative Negligence," 51 *Mich. L. Rev.* 465, 469 (1953).

The contention is that contributory negligence should be abolished as a complete defense to be replaced by a rule of divided damages. While plaintiff's fault should affect his recovery, it should not completely bar recovery against a negligent defendant. In short, the claimant's fault should operate to diminish his damages but not defeat his claim. If the wool-gathering pedestrian is 40 percent to blame and the sheep-counting motorist 60 percent responsible for a running-down accident, the pedestrian should be allowed to recover 60 percent of his damages instead of having to bind up his own wounds and absorb 100 percent of his loss under the arbitrary fiat of the contributory negligence rule that 100 percent of the responsibility rests with the victim and zero with the defendant. The latter, of course, is outrageously and demonstrably wrong.

Rejection of Contributory Negligence in Other Countries

The pernicious doctrine of contributory negligence as a complete defense is uniquely ours. The United States is virtually the last citadel of contributory negligence. As a general rule, continental Europe divides the damages; as a complete defense, it is there at one with the whooping crane. It has even been discredited and discarded in England, the land of its birth. Contributory Negligence Act, 1945, 8 & 9 Geo. 6, Ch. 28, Stat. 221. "Great Britain, all of the Canadian provinces, New Zealand and Western Australia now have come to the same result, so that very little of the British Empire is left with the common law rule." Prosser, "Comparative Negligence," 41 *Cal. L. Rev.* 1, 2 (1953).

American Experience With Comparative Negligence

Even in the United States, we have had a more spacious experience with comparative negligence than is commonly realized. Dean Prosser tells us that there are some 40 comparative negligence statutes on the books, "apparently in successful operation; and it is a fair estimate that there are about twelve hundred cases in which they have been applied." Prosser, "Comparative Negligence," 51 *Mich. L. Rev.* 465, 467 (1953). In 1908 the Federal Employers' Liability Act, applicable to all negligence actions, in the state or federal courts, for injuries to railway workers engaged in interstate transportation, brought home to most of the country the rule of divided damages. The apportionment rule of the FELA was assimilated by reference into the Jones Act, applicable to injuries to seamen and other maritime employees. In addition, 6 states and Puerto Rico have enacted across-the-board comparative negligence legislation: Georgia (judicial extension of statute, applicable in terms to railroad companies, to motorists and other non-railroad defendants), Arkansas, Mississippi, Nebraska, South Dakota, and Wisconsin.

Additionally, since 1951 such forward-looking legislation has been introduced in the legislatures of at least 18 states. Institute of Judicial Administration, *Comparative Negligence* 9 (1955) (listing states). With this fund of judicial and legislative experience concerning comparative negligence behind us, in advocating the extension of the rule of apportionment of damages, nobody is suggesting that we should hurl ourselves over the cliff, without light in the night. There is a pragmatic fund of experience available to any legislature considering the actual operation of damage apportionment statutes. The pivotal question becomes, rather, why put off until tomorrow what should have been done in the 1860's? If we can do justice on board ships (Jones Act), in the railroad yards (FELA), in the mines and lumber mills (specific state apportionment-of-damages statutes), then why not on the American highways where, in 1957, 38,700 persons died in automobile accidents and over 2½ millions were injured or in any of the other major sectors of accident loss which are still ruled by the monolithic, all-or-nothing doctrine of contributory fault? Contributory negligence *delenda est*.

Judicial Repudiation Of Contributory Negligence

Commentators favoring the obliteration of contributory fault as a complete defense seem to assume *sub silentio* that a statutory corrective or legislative amelioration is necessary. With respect, this may be doubted. The doctrine of contributory negligence is a court-made rule and hence can properly be changed or repudiated by any court which is convinced that it is unfair. Virtually all American Courts have overruled earlier cases involving the analogous doctrine of imputed contributory negligence, i.e., cases in which a passenger in an automobile, a spouse, or a child, was denied recovery for harm negligently caused by a third party where the negligence of the driver, spouse, or parent contributed to the harm. The same fate, judicial extirpation, should be visited upon the contributory negligence rule. Cf. the superb opinion of Smith, J., in *Sherman v. Korf*, 91 N.W. 2d 485 (Mich. 1958) (preventing an attempted partial reincarnation of the baneful imputed contributory negligence doctrine in a passenger-driver, husband-and-wife case). Courts thus have the power to abolish the contributory negligence rule without legislative intervention. The common law is not a cataleptic compound of judicial impotence and irredeemable error.

Injustice Of Contributory Negligence

It was stated at the outset that comparative negligence was a more just rule than contributory negligence. The primary function of the law, of course, is justice. The fact that we do not know with certitude what justice requires in many situations does not, of course, dissuade or discourage us from trying to approximate it. "A man's reach should exceed his grasp, else what's a heaven for?"

In addition to those ventured above, arguments abound to demonstrate the immortality of the contributory negligence rule. It is generally agreed that the doctrine of last clear chance was created to soften the harshness and outflank the rigors of the all-or-nothing rule. This doctrine is itself unjust for it merely shifts the loss caused by both parties from the injured plaintiff to defendant, adding the expense of a trial. It has been aptly described as a "transitional doctrine," a half-way house on the road to the apportionment of damages.

The contributory negligence rule has been condemned by the United States Supreme Court. In *Pope & Talbot, Inc. v. Hawk*, 346 U. S. 406 (1953), Mr. Justice Black, speaking for the majority, characterized the rule as "a discredited doctrine which automatically destroys all claims of injured persons who have contributed to their injuries in any degree, however slight." *Id.* at 409. In *Sun Oil Co. v. Seamon*, 84 N. W. 2d 840 (Mich. 1957), the Supreme Court of Michigan was urged to apply the rule so as to immunize a drunk driver who, without warning, on a wet and hazardous night, crossed in front of two vehicles attempting to pass him in the passing lane. Careening back and forth across the 4-lane highway, de-

fendant caused a scramble resulting in a pile-up of three vehicles. Brought to book in a court of law for the resulting widespread destruction of property by one of the imperiled and injured parties, defendant proposed that the Michigan court "permit him to walk from court scot-free and unscathed because, it is said, his victim was contributorily negligent." *Id.* at 841. Justice Talbot Smith, whose judicial prose is a glory of the modern judiciary, gave this "invitation to recklessness without retribution" short shrift. Speaking for the majority of the Michigan court, Justice Smith forthrightly refused to "apply the doctrine of contributory negligence to shield the very person whose prior reckless acts caused the crisis which gave rise to negligence 'as a matter of law' on the part of plaintiff's driver. This is poor morals, poor government, and poor law all rolled into one, and while we have no primary jurisdiction in the first two fields, we have ample with respect to the third, and I urge that we use it" (at 841). A judgment for plaintiff was affirmed.

Hague v. Sprague, Warner & Co., 281 N. W. 261 (1938), a striking case, brought to the Minnesota court the predicament of a motorist who entered an intersection, having failed to yield the right of way on the mistaken belief that the speeding defendant would slow down for him. The court addressed an eloquent appeal to the legislature, which still remains unanswered, to "serve justice" by supplanting contributory negligence with the divided-damages rule. And see the unsparing condemnation of the contributory fault rule by Chief Justice McWhorter, in *Louisville & N. R. v. Yniestra*, 21 Fla. 700 (1886).

Views of Tort Experts

Roscoe Pound, Dean Emeritus of the Harvard Law School and facile princeps among the world's great jurists, has leveled his criticism against the contributory negligence rule. "It must be recognized that with contributory negligence as a doctrine that even the slightest want of due care on the part of a plaintiff will bar recovery for even the most serious injury through the negligence of another is *fundamentally and radically unjust and ought to be given up*." Pound, "Comparative Negligence," 13 *NACCA Law Journal*, 195, 197 (1954).

Professor Warren A. Seavey, whose virtuosity and surehanded authority in the torts field are everyone's reward, similarly has lent the impressive weight of his name to a condemnation of contributory negligence as a complete defense. Seavey, "Cogitations on Torts" (1954) 55-57. Professor Fleming James, Jr., of Yale Law School, co-author of the monumental work, Harper and James, *The Law of Torts*, tells us in arresting phrase that, "Almost from the very beginning there has been serious dissatisfaction with the Draconian rule sired by a medieval concept of cause out of a heartless *laissez faire*." In a timely and telling passage, Professor James adds, "[T]here is no justification — in either policy or doctrine — for the rule of contributory negligence, except the feeling that if one man is to be held liable because of his fault, then the fault of him who seeks to enforce that liability should also be considered. But this notion does not require the all-or-nothing rule, which would exonerate a very negligent defendant for even the slight fault of his victim. The logical corollary of the fault principle would be a rule of comparative or proportional negligence, not the present rule." *Id.*, §22.3, p. 1207. And see James, "Comparative Negligence," 26 *Utah Bar Bull.* 109 (1956); "Contributory Negligence," 62 *Yale L. J.* 691 (1953).

In concluding his classical article on the subject, Dean Prosser drops like a diving hawk on the decisive argument that comparative negligence, in addition to being a workable rule, is manifestly more just than contributory negligence. "No effort has been made in these pages to argue the desirability of the division of damages in contributory negligence cases. It speaks for itself, and the question always has been one of feasibility rather than of justice. It is too late, in the light of the long history, the many statutes, and the multitude of cases, to contend that the thing cannot be done at all." Prosser, "Comparative



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Negligence," *Selected Topics on the Law of Torts* (1953) 67.

Laurence H. Eldredge, prominent Pennsylvania lawyer and law teacher at Columbia, Temple, and the University of Pennsylvania Law Schools, in a notable article in *The American Bar Association Journal*, urged the abolition of the doctrine of contributory negligence as a complete defense. In condemning the doctrine as "shocking and immoral," he pointed out that it was "contrary to the settled convictions of the community," and stated that "a law which is contrary to the settled convictions of the community is a bad law. It cannot be enforced. It breeds contempt for law in general and it breeds contempt for judges and lawyers." In beefing up this proposition, Mr. Eldredge reported that he had recently attended a three-day conference with the Committee on Torts of the American Law Institute. "Experts on tort law were present from various parts of the United States. I took an informal poll of them and they were unanimously opposed to the rule of contributory negligence as a complete defense, and they unanimously favored an apportionment of damages." Eldredge, "Contributory Negligence: An Out-moded Defense That Should Be Abolished," 43 *A. B. A. J.* 52, 53 (1957).

The Right Honorable Arthur L. Goodhart, Editor of the *Law Quarterly Review*, Professor of Jurisprudence at Oxford, Master of University College, who assisted in the drafting of the present English Comparative Negligence Act, has written: "It seems to me astonishing that there should be any opposition to the change in the law which you advocate. Although at the time when the law was altered here in England there was some opposition to the amendment, all objections to it have now disappeared. The fear that there would be an inordinate increase in litigation has proved unfounded. Parties are much more ready to reach a reasonable settlement as they know that the answer is no longer 'all or nothing.' In other words, if the law is reasonable it is probable that litigants will also act in a reasonable manner." Eldredge, *op. cit. supra*, 54.

Professor Frank E. Maloney, after a comprehensive and acute analysis of the two competing rules, including a discussion of the entire body of existing literature bearing on the problem, concludes with high plausibility, "The superiority of the comparative negligence approach appears obvious." Maloney, "From Contributory to Comparative Negligence: A Needed Law Reform," 11 *U. Fla. L. Rev.* 135, 174 (1958) (highly recommended).

In the light of the foregoing uniform and unanimous condemnation of the harsh contributory negligence rule by the leading tort scholars of America and their testament to the superiority of the comparative negligence approach, over the granitic all-or-nothing rule, it would seem to call for heroic *sang-froid* and hardihood to defend the latter rule.

If the support of "the organized plaintiffs' bar" for comparative negligence is discounted because of partisan self-interest and the same is done for the hostility of habitual defendants, for similar reasons, what is left? The unanimous preference of the great teachers of the great legal academies, who have strong title to being the "keepers of the Republic's conscience," for apportionment of damages and their single-voiced condemnation of the inequitable contributory fault rule. It remains for our legislatures to give a deserved full faith and credit to the unanimous judgments of our great writers and authorities, such as Pound, Seavey, Prosser, James, and others, who, without dissenting voice, have con-

firmed that the decadent contributory fault rule must be abolished.

(Ed. note: Lewis F. Powell, Jr., LL.M. '32, of the Virginia Bar and a member of the American Law Institute, has prepared a preliminary statement and seven critical questions concerning the wisdom of a widespread adoption of the standard of comparative negligence in the United States. These are printed in bold face type below. Mr. Lambert's answers follow the questions *seriatim*.)

For a systematic exposition of Mr. Powell's views on this subject, see Powell, "Contributory Negligence: A Necessary Check on the American Jury," 43 *A.B.A.J.* 1105 (1957).

Preliminary Statement

Most of those who advocate the abolition of the "harsh and archaic" rule of contributory negligence seek to replace this common law doctrine with a rule of comparative negligence to be applied by juries only. Many of these advocates are frank to admit that their proposal would result in increased awards for an increased number of plaintiffs. This, they conceive, is a desirable social result which will benefit injured persons — and their lawyers.

Other equally thoughtful people feel that the contributory negligence rule is harsh only in theory, and is a necessary "check and balance" against excesses of the American jury system. They are disturbed at the prospect of extending further the already large and loosely controlled discretion of juries to compensate injured persons. This concern is not lessened by experience under the Federal Employers' Liability Act (FELA) where the comparative negligence rule has resulted virtually in liability without fault.

The cleavage between the two schools of thought is accentuated by the failure of many advocates of pure comparative negligence (like the FELA and the Mississippi statute) to recognize that this rule, which has worked satisfactorily when applied by judges (as in England and civil law countries), probably cannot be superimposed on the American jury system without drastic changes in such system. The following questions are framed with the foregoing thoughts in mind:

Questions

1. Under our jury system, with the general verdict and relatively little control by the courts, is it not true that the rule of comparative negligence (e.g. the FELA type statute advocated by the organized plaintiffs' bar) tends to result in practice in a system of liability without substantial fault? If the answer to the foregoing question is in the negative, please point out specifically the fault of the defendant in each of the following cases: *Rogers v. Missouri Pac. R. Co.*, 352 U. S. 500 (1957); *Webb v. Illinois Central R. Co.*, 352 U. S. 512 (1957); and *Ringhiser v. Chesapeake & Ohio Ry. Co.*, 354 U. S. 909 (1957).

A comparative negligence statute does not tend to result in practice in a system of liability without fault. It merely divides the damages between the parties in accordance with the degree of their fault. The only cases within the four corners of our discussion are those in which both parties are at fault. Thus, if defendant is free from all fault, if he is guilty of no primary negligence at all, there is no submissible issue for the jury, even under comparative negligence. But if the jury finds that 40 percent of the total fault rests with the lady who walks out into the street in the path of a bus, and 60 percent with the driver who is not looking and runs her down, under comparative negligence her lesser fault will not totally bar her, it will merely diminish her damages. She will recover 60 percent of her damages, whereas the rule defended by Mr. Powell casts the entire loss caused by both parties on the victim alone. Allowing her diminished damages, however, does not impose liability without fault upon the bus company. On the contrary, the defendant is held liable in accordance with the degree of his fault. Proportionate damages payable by a negligent wrongdoer are patently the reverse of liability without fault. Otherwise phrased, the rule of divided damages is an inherent corollary of the fault concept. Plaintiff's fault affects but does not foreclose recovery from a wrongdoer.

Mr. Powell appears to be in error in stating that the "organized plaintiffs' bar" advocates the FELA type of comparative negligence statute. The model act published in 13 *NACCA Law Journal* 302 is a verba-

tim copy of the text of the act drafted by Dean Prosser, set forth in 51 *Mich. L. Rev.* 465, at 508. As is well known, Dean Prosser's draft, unlike the FELA, contains special verdict provisions bearing on the apportionment of damages as a control upon the verdict. As a matter of fact, there is no known reason why Federal Rules of Civil Procedure 49(a) (special verdicts) and 49(b) (special interrogatories) could not be employed in FELA cases. See, e.g., *Bolan v. Lehigh Valley R. Co.*, 167 F.2d 934 (2d Cir. 1948).

It is suggested that the FELA is a negligence, not a liability-without-fault, statute. In *Wilkerson v. McCarty*, 336 U. S. 53, 68 (1949), Mr. Justice Douglas, in a concurring opinion, stated, "The [FELA] was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations." In eleven cases decided during the 1956-57 Term, the Supreme Court has made it clear that the court has a special stewardship in FELA cases and resolutely demonstrated that the jury's prerogative in FELA cases was not merely a parchment guarantee. Despite the wide swath cut by the Supreme Court through the stubborn ranks of state appellate courts and lower federal courts who persist in trespassing on the jury's province in FELA cases, we apparently must continue to expect such appellate court invasion of the jury's function. If such judicial poaching occurs, however, the Supreme Court will review and reverse, for to the majority the jury's prerogative in FELA cases is something more than a genial fiction and idle chatter. Since you cannot measure negligence and causation with the mathematical precision with which an acre is measured, and inferences from conflicting evidence are inevitable and tolerable so long as rational, it follows that the jury's reasoned "guesstimate" is undisturbable. The jury's calculus does not demand certainties but only reasoned inferences.

Viewed against this backdrop, the answers to Mr. Powell's questions as to the fault of defendant in *Rogers, Webb*, and *Ringhiser* come readily to hand. In *Rogers*, the evidence warranted a finding of employer negligence in requiring the plaintiff workman to burn off weeds with a crude hand torch along defendant's sloping right of way. He had been instructed to watch for hotboxes. While observing a passing train, plaintiff suddenly became enveloped in smoke and flames, fanned by the train. The evidence revealed that the burning of vegetation was ordinarily done with flame throwers from cars on the track and not by workmen on foot using crude hand torches. This plus the uncontradicted testimony that plaintiff was on the narrow path atop a "dirt dump" with sloping sides under explicit orders to watch for hotboxes rendered it not unlikely that he would fall backwards down the slope when overwhelmed with flames. "Common experience teaches both that a passing train will fan the flames of a fire, and that a person suddenly enveloped in flames and smoke will instinctively react by retreating from the danger and in the process pay scant heed to other dangers which may imperil him." 352 U. S. at 503.

In *Webb*, a brakeman injured his kneecap in a fall on a cinder roadbed when he slipped on an unnoticed and partially covered clinker, about the size of his fist, embedded in the soft but level roadbed. Three weeks before, defendant used 15 cubic yards of cinder and ballast in elevating switch and tracks 5 inches. The foreman neglected to screen the ballast, merely visually inspecting it for large clinkers. Additionally, the injury-inducing clinker was permitted to remain for 3 weeks in the roadbed, despite semi-weekly inspections made of the location for the purpose of reducing hazards to workmen. The Supreme Court properly held that the evidence justified with reason the jury's finding that the substandard method of inspecting ballast and work location was causal negligence contributing to plaintiff's injuries.

Ringhiser, 354 U. S. 909 (1957), involved a leg amputation suffered by a switchyard worker while using a low-sided gondola car, loaded with steel plates, to answer an urgent call of nature. While he was thus engaged, defendant's servants switched two cars onto the track, bumping the gondola car, causing the steel plates to shift and crush plaintiff's leg. There was evidence that defendant knew that its employees sometimes used gondola cars for such necessitous purposes due to inadequate toilet facilities.



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ties. The result, injury to the overtaken workman who had resorted to the gondola car, was within the risk created by switching cars into the gondola car. The jury could properly find that defendant had knowledge of conditions foreseeably subjecting workmen in plaintiff's position to an unreasonable risk of harm. Consequently, the Supreme Court reversed per curiam the action of the lower courts in granting defendant's motion for judgment n.o.v., after a \$40,000 verdict for plaintiff.

That railway companies can win FELA cases is attested by *Herdman v. Pennsylvania R.R.*, 352 U. S. 518 (1957). An employee riding in a caboose was harmed when a freight train stopped suddenly. There was no evidence to indicate that unscheduled or sudden stops of freight trains were unusual or extraordinary. Even plaintiff testified, "We got to expect them or think about them." The Supreme Court ruled that it was proper to direct a verdict for defendant railroad. *Herdman* and other recent decisions show that the courts have not imposed absolute liability on the railroads or transformed the FELA into a glorified workmen's compensation act. *Brady v. Southern R.R.*, 320 U. S. 476 (1943); *Hunter v. Texas Elec. R.R.*, 332 U. S. 827 (1947); *Eckenrode v. Pennsylvania R.R.*, 335 U. S. 329 (1948); *Moore v. Chesapeake & O. R.R.*, 340 U. S. 573 (1951); *Milom v. New York Cent. R.R.*, 248 F.2d 52 (7th Cir. 1957), cert. denied, 78 S. Ct. 537 (1958); *Wergin v. Monessen Southwestern Ry.*, 258 F.2d 806 (3d Cir. 1958); *Tittman v. Great Northern R.R.*, 252 F.2d 793 (9th Cir. 1958); *Reiner v. Northern Pac. Terminal Co. of Oregon*, 259 F.2d 438 (9th Cir. 1958).

It would seem that, implicit in Mr. Powell's questioning on the three FELA cases is the doubtful premise that negligence means creating a probability of harm. This is not so. Negligence is conduct creating an unreasonable risk of harm. A slight risk of great harm can justify the triers in condemning defendant's conduct as unreasonable, where the burden of adequate precautions is relatively slight. In other words, if the foreseeable harm is great, conduct threatening it may be negligent even though the statistical probability of its happening is very slight indeed. The allergy cases demonstrate this very neatly, viz., that it is negligent to threaten serious harm though the chance of its incident is slight, e.g., *Wright v. Carter Products Co.*, 244 F.2d 53 (1957) (contact dermatitis suffered by hypersensitive plaintiff from under arm deodorant; failure to warn); *Pease v. Sinclair Refining Co.*, 104 F.2d 186 (2d Cir. 1939) (mislabeling water as kerosene); *Paris v. Stepney Borough Council*, [1951] A. C. 367 (H. L. 1950) (failure of garage employer to furnish one-eyed man a pair of goggles; held to be negligent in view of gravity of harm and drastic consequences threatened from possible eye injury, even though defendant may not have owed a similar duty to other workmen).

It need hardly be observed that the trainmen, mariners and stevedores of our country who work along an intricate warp of iron rails or in ill-lighted holds are subjected to special and extra danger. And in the interpretation of statutes instinct with protective policies toward these imperilled workmen, the Court may well be justified in both its expanded FELA certiorari policy and in broadening the role of the jury. In response to special claims on her compassion, Justice may sometimes be obliged to lean forward to keep her scales in balance.

2. Why do the Railway Brotherhoods prefer the FELA with its comparative negligence rule to a Federal Workmen's Compensation Act mod-

eled after the various State Acts? Is not this preference for the FELA based on the virtual certainty of recovery thereunder, without limitation upon the amount or even reasonable control thereof by the courts?

For the same realistic reason that any sensible man would prefer a crust of bread to a crumb. The Brotherhood of Railroad Trainmen understandably prefers present FELA compensatory recoveries to the shriveled benefits of a workmen's compensation plan. There is nothing mystifying or reproachful about this rational preference. State compensation schedules are notoriously low, lag behind the spiraling cost of living, ravaged by inflation, and only grudgingly increased if at all. Whereas FELA and tort recoveries and settlements tend to stay within hailing distance of the cost of living. Benefits to injured workers or their survivors are grossly inadequate, especially in the case of fatal injuries and permanent-total disabilities where help is most needed. By bright contrast, FELA at least provides the possibility of adequate awards in serious cases. Of all the major fields of social legislation, the real Cinderella, the most neglected of them all has been workmen's compensation. Katz, "Workmen's Compensation in the United States," *Insurance Law Journal* (August 1958) 519, 528. While most state compensation acts declare their intention of fixing compensation rates at from one-half to two-thirds of average wages, they generally superimpose maximum weekly amounts which make ludicrous the stated "paper" percentage relationship. The ratio of benefits to wage loss under workmen's compensation has declined to less than one-third. Somers and Somers, *Workmen's Compensation* 81 (1954). By contrast, even counting all the small settlements, most of which are made out-of-court, the overall ratio of net benefits to wage loss in the railroad industry was, in 1938-1940, about 46 percent; since then the percentage has risen considerably. *Id.*, 321. See also Pollack, "The Crisis in Work Injury Compensation On and Off the Railroads," *Law and Contemporary Problems* (Spring 1953) 315. Cf. Arthur Larson, "Model-T Compensation Acts in the Atomic Age," 18 *NACCA Law Journal* 39 (1956). For these and related reasons, the proposal to swap FELA compensatory awards for the below subsistence payments of a workmen's compensation act rings like a lead dollar on the bar to the BRT and to any other rational group of workmen.

3. Where the pure comparative negligence rule is being applied by a jury rendering a general verdict (as desired by the organized plaintiffs' bar), is it not generally recognized by experienced trial judges and lawyers that there is no effective way to assure the diminution of damages required in theory by the rule?

It has been pointed out, supra, that the only comparative negligence statute sponsored or approved by NACCA is that drafted by Dean Prosser, 51 *Mich. L. Rev.* 465, 508 (1953) which contains the jury-control feature of the special-verdict procedure. See 12 *NACCA Law Journal* 293; 13 *id.* 301-302. There can be little doubt that a special-verdict provision in a comparative negligence statute would give habitual defendants added protection against unduly sympathetic juries. Certainly the insurance industry feels that the special-verdict procedure should go along with the divided-damages statute "as one of the Siamese twins goes along with the other." Lipscomb, "Comparative Negligence," 1951 *Ins. L. J.* 667, 673. It is interesting to note, however, that the Arkansas statute, enacted in 1955, originally required special verdicts and applied even when plaintiff's fault was greater than defendant's. In 1957, its legislature abolished the special-verdict procedure but added the Wisconsin limitation, roundly disapproved by Dean Prosser, that in order to recover plaintiff must be less negligent than defendant.

4. Trial lawyers and judges know that juries tend to ignore the legal refinements of instructions and render what they conceive to be substantial justice regardless of the fact of contributory negligence. In view of this well known tendency, is it not true that the alleged "harshness" of the contributory negligence rule exists more in theory than in fact? Cf. *Karcesky v. Laria*, 382 Pa. 227, 114 A.2d 150, 154 (1950).

This is a disturbing question. It seems to say that, since juries frequently in fact ignore their oaths and

allow contributorily negligent plaintiffs to recover diminished damages, is there a pressing need for the passage of the comparative negligence statute? But if comparative negligence is sound sub rosa, what legitimate objection can there be to an open and aboveboard statute explicitly providing for this needed reform. If the rule is just, as we believe it to be, it should not be applied covertly or in a concealed fashion below the Plimsoll line. In most states today, if the jury, revolted by the harsh doctrine of contributory fault, applies the comparative negligence approach, it is ignoring its oath and deepening its disrespect for the law. As lawyers who are proud of our judicial system, we do not like to see jurors flout their oaths and figuratively defy the robed law-giver on the bench. Moreover, I believe Mr. Powell may have overlooked the fact that a jury can ignore the contributory negligence rule only if the judge lets the case reach them. As one whose professional work compels a reading of all tort appellate opinions handed down by all state and federal courts, I can testify that there are hundreds of directed verdict cases annually where the plaintiff's negligence, however slight in comparison with that of defendant, is still indisputable, and the court is obliged to declare it as a matter of law. And there are still juries which understand and obey the court's instructions on the fatal effects of contributory negligence.

The *Karcesky* case suggests to me a compromise verdict, possibly based on a concealed use of comparative negligence by the jury, in which the damages awarded did not cover plaintiff's admitted losses. The refusal of the reviewing court to overrule the trial judge, who denied a new trial on these facts, seems out of line with common-law procedure.

5. In England and other countries, which follow the comparative negligence rule, tort cases are tried by judges rather than juries. If we are to have any further extension of comparative negligence in America, where jury trial is a constitutional right, would it not be desirable to provide that where the parties are willing to waive a jury trial the rule of comparative negligence will apply, but where either party insists upon a jury trial the rule of contributory negligence will apply?

Emphatically not. This would renounce or sacrifice the merits of comparative negligence in too many cases. If the comparative negligence approach is just and feasible, as we have sought to indicate above, its application should be maximized not circumscribed. The question seems to bespeak a deep distrust of the people's constitutional jury or disabling doubt as to their capacity to compare fault with fault. The United States Supreme Court has not shared the curled lip service given to jury trial in certain quarters. Speaking of the "Twelve" in *Sizoo City & P. R. Co. v. Stout*, 84 U. S. 657, 663 (1874), the Court said, "Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring, than can a single judge."

As to the inability of the jury to measure fault with fault, this problem is no more difficult than placing a \$5,000 price tag on the nagging pain of a cracked skull, valuing the damage to reputation in a defamation case, estimating the worth of an old wife or a "worthless" child in a death action, assessing damages for the humiliation of disfiguring scars, or estimating the amount and present worth of future earnings in a death-of-a-breadwinner case. Where the dreamy bus driver negligently runs down the abstracted pedestrian, a jury's determination that the pedestrian is 40 percent to blame and the bus driver 60 percent responsible is at best an imprecise estimate. But as Dean Prosser irrefutably states, "The estimate might quite as well be anywhere between 25-75 and 75-25. Yet it is equally clear that a division of the plaintiff's damages on any such basis is at least more accurate than

one based on the arbitrary conclusion that 100 percent of the responsibility rests with the plaintiff and none whatever with the defendant, or, if the last clear chance is applicable, 100 percent with the defendant and none with the plaintiff — both of which are demonstrably wrong." Prosser, "Comparative Negligence," *Selected Topics on the Law of Torts* (1953) 15-16.

6. As there is little reason to believe that the advocates of the comparative negligence rule would be willing to trust judges (rather than juries) to administer such rule, would it not be desirable as minimum restraints upon jury excesses to require, in cases where the rule is applicable, (A) that the jury shall render a special verdict stating expressly (i) the amount of damages suffered by the plaintiff, (ii) the amount of negligence attributable to the plaintiff, and (iii) the amount of negligence attributable to the defendant; and (B) that the court may review all the evidence, and not merely that favorable to plaintiff, in determining whether the damages awarded are excessive?

(A) This may be agreed to, if for no other reason than to make the bill for comparative negligence more acceptable to insurance interests. In addition to novelty phobia and general inertia on the part of the legal profession, it is an open secret that chief resistance to the comparative negligence reform is from the insurance lobbies. Robert N. Filmore, Jr., Assistant Counsel, Association of Casualty and Surety Companies, an association of 133 stock companies, states, "Our association is opposed to comparative negligence in any form . . ." 10 *Ark. L. Rev.* 82 (1955). Note that despite the free-wheeling prophecies of disaster, calamity has not overtaken those states which have provided for divided damages. The statutes have not been repealed. Liability insurance companies continue to compete eagerly for business in Wisconsin, Mississippi, Arkansas and other states which have reformed their law. The underwriters have not abandoned the FELA and Jones Act business. The forebodings of disaster have come from the tongues of false prophets.

(B) No. Whether under comparative negligence or the contributory fault rule, and whether the issue is excessiveness of damages or concerns liability, the settled rule is that an appellate court will review only the evidence favorable to the prevailing party. No sufficient reason is advanced for departing from this basic principle. The adoption of the superior rule of divided damages affords no reason to abandon a sound rule of limited appellate review of jury determinations.

7. The basic question, urgently requiring a broad solution, is whether the American system of tort law, administered by juries subject to little control by courts, is adequate to deal with the staggering problem of accidental injuries. Congestion in the courts, intolerable delay in the trial of cases, lack of any degree of uniformity of justice both to plaintiffs and defendants, the uncollectible judgments against uninsured defendants, the "personal injury racket" involving solicitation of claims and fictitious or exaggerated injuries — are all elements of this massive problem. Adopting a rule of comparative negligence will do nothing to relieve this problem, and indeed will aggravate it in many respects. Is it not desirable, therefore, to seek some broader and more fundamental solution?

It might cheerfully be observed that this somewhat shot gun question omits mention of the problems of juvenile delinquency, recognition of Red China, and population control. Adoption of comparative negligence will not cure these vexed problems nor will it solve *eo instanti* all phases of the ramifying problems listed in this omnibus question. Since 1066, if no single unjust rule could be eliminated until all problems in the legal order were solved, our law would have remained frozen in its plantagenet molds. Adopting comparative negligence will not bring the millennium. It will not solve all problems, including the practice of insurance adjusters who seek out their victims while still in a comatose condition. But one thing it will do. It will abolish the disfiguring doctrine of contributory negligence. This is the business at hand. Recasting the corpus of accident law and practice is matter for another day. We must make the shoes we would walk with today before the wings we would fly with tomorrow.

HARKNESS

(Continued from page three)

ened in 1950, has had a history of rising costs and prices, paralleling the economic pattern of the past decade.

Dean Hall stressed that informality will be a feature of the survey, and indicated that the consultants would seek to talk not only to dormitory residents and representatives of the Dormitory Council, but to others who use, or might use, the Dining Hall. "Recommendations will be made as to type of operations, menus, prices, and policies. We expect the survey to take about a month, and we hope to get some idea of how best to make use of the Dining Hall," the Vice Dean continued.

Fewer Meals Served

Latest figures for the Dining Hall show a sharp drop in the number of meals served last November in comparison with November, 1957. However, the sign-offs at the end of the month were fewer than the corresponding figures a year ago. The 51,239 meals served last month was 18% less than the 62,758 total for November, 1957. However, only 48 students (25 Law, 23 Graduate) signed off last week, compared with the 72 students (42 Law, 30 Graduate) who left the rolls a year ago. However, only 366 students (164 Law, 202 Graduate) are presently signed on, in contrast with the corresponding 1957 figures of 465 (208 Law, 257 Graduate).

As this edition went to press, final official financial figures for November's operations were not yet available. However, unofficial statistics, according to Vice Dean Hall, indicated that the Dining Hall operated in the black in November, "although by a lesser margin." Dean Hall expressed the hope that Harkness will continue to operate successfully on a pay-as-you-go basis for the remainder of the year.

Suggestions

Another development in the Harkness situation was a "presentation of economizing suggestions for initial consideration" by the Harkness Com-

ENDOWMENT

(Continued from page one)

\$200 million larger, despite the fact that Yale's gifts over this period exceeded those which Harvard received. Mr. Cabot said that this situation was largely due to the fact that Yale did not employ the system of "each tub on its own bottom."

Harvard's Endowment Fund is comprised of the gifts which it receives less the "bricks and mortar" — the cost of buildings such as the International Legal Studies Building presently being constructed. Each budgetary unit is allotted a portion of the Endowment Fund. For example, the Law School's portion is \$9.3 million. Mr. Cabot's department guarantees each of the 45 budgetary units in the University a fixed rate of interest on its portion of the Endowment Fund. For the fiscal year beginning in July, 1959, the rate of interest has been set at 5.3%. Knowledge of the exact rate of interest which each unit will receive from year to year enables the units to plan their budgets accordingly and the end result, as Mr. Cabot explained, is over-all efficiency throughout the University.

Securities

The general investment account is composed of bonds, both long and short term, and common stocks. Mr. Cabot stated that no rules are set down which govern the proportion invested in any one medium. At present the account is composed of roughly 50% common stock, 40% long term bonds and 10% short term bonds. Mr. Cabot, as Treasurer, is given complete power and authority to invest the tremendous sum of money making

mons Subcommittee of the Dormitory Council last month. The proposals were:

- Compulsory sign-on for all first year students.
- A 5½ day week ending with Saturday's luncheon; cutting the weekly sign-on rate by \$2.
- Institute an a la carte line, or give only a la carte service.
- Institute self-service to replace dishing out portions by hired help.

The first two of these proposals are similar to the system in effect at the Business School, where all dormitory residents must sign-on, and almost all unmarried students must live in dormitories, and where no Saturday evening or Sunday meals are served.

— Borden

up the investment account. He uses the State Street Management and Research Department to aid in determining what the appropriate medium for investment is at any given time. As an indication of the importance of Harvard's Endowment Fund, Mr. Cabot stated that today students are paying only about 40% of the actual cost of their education.

Mr. Cabot, who was educated at Harvard College and the Harvard Business School, is chairman of the State Street Investment Corporation, an open-end diversified investment trust with assets of over \$140 million, a director of National Dairy Products Corp., J. P. Morgan & Co., B. F. Goodrich, Co., Continental Can Co., and the Ford Motor Co.

— Longstrech

MODEL APPEAL

(Continued from page one)

W. Meserve, Lecturer on Law, was counsel for the defendant.

Frank J. Murray, Judge of the Superior Court of Massachusetts, sitting by special appointment in the case, entered a judgment on the verdict.

The Appellant contended in his brief on appeal that the court below had erred in instructing the jury and that in any event there had not been sufficient evidence of malice shown to justify the finding against the appellant.

The briefs were prepared by David W. Maher, 3L of Chicago, and Robert M. Royalty, 3L of Danville, Ill., for the plaintiff-appellee; and by Ian R.

MacLeod, 3L of Erie, Pa., and Robert C. McCartney, 3L of Pittsburgh, for the defendant-appellant.

Professor Donald Trautman, Faculty Adviser to the Teaching Fellows, states that perhaps the greatest problem concerning the Model Appeal (this year's Appeal was the eleventh held at the Law School) is getting the briefs printed in time to make them available to students before the date of the Appeal.

— Mulroney

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Men 'Equal' But Not 'Same' Asserts South African

The fact that all men are *equal* does not mean that all men are the *same*. This, W. C. duPlessis, ambassador to the United States from the Union of South Africa, told the Law School Forum last Friday evening, is a critical distinction to be made in forming a policy for a bi-racial society.

Once it is recognized, he asserted, the equity of a system which gives to each race that which it deserves, not attempting to foist the standards of the one on the other, is immediately apparent. This policy is strictly adhered to in South Africa. While the pure-blood Bantu has few political rights in white areas, the whites have no rights in Bantu areas "except for a few temporary supervisory functions."

Observing that he had come to explain rather than defend his country's racial policies, Ambassador duPlessis asked his audience what policy they would adopt in a similar multi-racial situation. He specifically rejected any basis of comparison between the racial problems of South Africa and those of the United States with regard to the application of a common solution. Pointing out that the proportion of white to colored people in South Africa is inverse to the ratio in the United States, he said that a radically different solution is required. This solution is being found, he stated, in a policy of equality with strict separation or "apartheid."

Ambassador duPlessis admitted that there was indeed "discrimination," in the strict sense of the word, in South Africa, but that this was not based on a superiority-inferiority relationship and thus was better termed "separation" or "differentiation." He said that this policy of separation is the only possibility for getting the best rather than the worst standards to prevail for the whole. Acceptance of the proposition of his country's critics that equality of men means the sameness of men would result in a "sodden, dead, grayness of society," he declared. It is essential, he added, that the competitively superior whites lift the numerically superior Bantus in education and industry for the benefit of the whole, and this cannot be accomplished with the immediate adoption of democracy. Until such time as the Bantu is educated to exercise the responsibilities of democracy, he said, he cannot exercise its rights. The educational policy of the government is aimed at training him for the assumption of responsibilities, he asserted, and already, as the Bantu advances, he is being granted limited rights of self-government in his assigned areas.

The ambassador admitted that the South African economy is heavily dependent upon Bantu labor, but said that this is not sweated labor, as there is no discrimination built into the government's wage legislation. If the charges of oppression made against his government are correct, why is it that tens of thousands of Bantus from elsewhere on the continent are clamoring to get into the country, he asked?

In the interest of protecting its Bantu citizens, he pointed out, the government has enacted a protective immigration barrier to keep out cheap labor which would lower domestic standards.

In his conclusion, Ambassador duPlessis specifically rejected two solutions proposed by "outsiders," integration and universal suffrage. He said that even limited integration leads inevitably to mixed marriages, which cannot be allowed, and universal suffrage in a population largely unprepared for it would amount to national suicide. The only alternative, he declared, is separation as the government decrees it. It is the view of the South African government that this policy is the only one which will achieve national advancement by evolution rather than revolution. He pointed to the discouraging performance of democracy and Western institutions in other Asian nations where the populace was unprepared for such concepts and observed that apartheid avoids the period of disillusionment through which those countries are now passing. With regard to the many criticisms levelled at his government, he observed, "South Africa is not insensitive to world opinion, but the world doesn't have to govern South Africa. We do."

Criticism from Panel

Following the ambassador's address, a panel consisting of Dean Erwin N. Griswold and Professors Jeffrey Butler and Oscar Handlin discussed his remarks. Dean Griswold, who had visited South Africa last summer as an observer at the famous "treason trial" then in progress there, observed that one of the tragedies of the government's policy is that it refuses to recognize any gradations of development, but rather makes broad assumptions as to absolute differentials between Bantu and white. He said that a more equitable solution had been reached in the Cape Province a generation ago, but that this has been destroyed by the doctrinaire view of the present government.

Dean Griswold noted also that while wage legislation might not discriminate on the basis of color, other measures of the government have the same economic effect. Quoting from correspondence he has received from South Africa, he pointed out that government policies resulted in the separation of families in which parents were working only by special permit in white districts. They could not keep their new-born children with them because the infants were not immediately eligible for the "work permits." He asserted that other legislation permits segregation in worship and forbids the Bantu to strike, or bargain collectively, and more important, makes it a crime for him to leave his job. He declared also that

SEA LAW

(Continued from page one)

However, it was a success, Dr. Garcia-Amador observed, in that it showed conclusively that the traditional three-mile limit is no longer widely supported, and it pointed the way to a resolution of this problem in the future. Moreover, the Conference did obtain agreement of the necessary two-thirds majority of its record eighty-five delegations in the resolution of two issues.

Continental Shelf

One of these concerned the redefinition of the "continental shelf." Previous to the Conference, coastal nations were permitted certain rights of exclusive exploitation of resources of the bed and subsoil of the sea which constituted its "continental shelf." The shelf was defined for this purpose as the submarine land mass extending from the shore of a coastal nation into the sea to a depth of 100 fathoms. Because the definition was framed in terms of depth rather than distance it discriminated against countries with sharply falling shorelines, making them comparatively "shelfless" and thus mitigating the value of their right of exclusive exploitation.

Because of the tremendous economic importance that such rights, affecting power over undersea deposits of oil, coal and other minerals, have, the Conference considered an International Law Commission proposal that the granting of undersea rights be put on a more rational and uniform base. To effect this aim the Conference resolved that the rights to the undersea estate should be restricted only by the technical limitations inherent in extracting the resources.

The second new issue resolved concerned conservation of the living resources of the high seas. Traditionally all nations of the world were permitted almost completely unrestricted freedom to use these because the living resources of the sea were thought to be inexhaustible. The high seas were *res communis*. If, for example, any country wanted to take

the Bantu educational set-up could be easily turned into an instrument for exploitation rather than advancement.

Professor Butler, a native of South Africa, commented that were he back there he would likely vote against much that the present government is doing, but he doubted that the education policy is as exploitive as had been suggested. He observed that he found it hard to attribute the almost universal hatred of South African policy to radical agitators, as the government seems to do.

Professor Handlin declared that under present South African policy the not wholly colored or wholly white, of which there are more than three million, have practically no future at all. He stated that the final solution is not the most important thing, but rather the direction of development. The present direction of development in South Africa is squarely opposite to that which would lead to genuine national advancement, he said.

In a brief rejoinder, Ambassador duPlessis objected to the criticism voiced by the panel on the ground that he felt it did not fairly meet the equity in the "two area concept" which is the basis of South African policy.

Louis M. Lyons, curator of the Nieman Fellowships, moderated the program.

—Skornia

Law Wives

The Harvard Law Wives are sponsoring their 6th Annual Baristers Ball Saturday night, December 13th, in Harkness Commons. Tickets are \$1.75 a couple, and the dress is semi-formal. Set ups will be provided.

Tickets are being sold by the receptionist in Langdell Hall today and tomorrow, and in Harkness Commons from 12:30 to 1:30 p.m. They will also be available at the door Saturday night.

measures to conserve fish in the high seas off its territorial waters, it could regulate the practices of its own nationals, but could exert no control over the citizens of other countries. However, as a result of the use of modern fishing methods, the supply of the sea has ceased to be inexhaustible, and there is a need to limit the free nature of the high seas where the special interests of coastal states demand.

Fishing Limitations

In recognition of this need the Convention has granted coastal states the power to take unilateral action on conservation measures concerning fishing in the high seas off territorial waters that is binding on other states that fish in that area. Since this places tremendous power in the hands of the coastal states, the Convention included built-in safeguards providing that the initiating nation must show an urgent need for taking such steps and that such measures must apply without discrimination to all nations fishing in the affected waters. It is further stipulated that if any dispute between nations arises, the disputants must submit to negotiations, or arbitration if necessary.

Dr. Garcia-Amador explained that there were several reasons for the failure of the Conference to reach a decision on the question of the breadth of the territorial sea. The territorial limits no longer have much importance for security purposes, but they have come to have great economic significance. Because eighty percent of the world's deep-sea fishing takes place within twelve miles of some national coastline, he said, an extension of the territorial limits would have a tremendous effect on countries whose economies rest heavily on traditional rights to fishing off foreign coasts.

—Baron

VOSS

(Continued from page one)

but not for compensatory damages. "Massachusetts is one of two states that do not permit an action for pecuniary loss in such a situation," he noted.

Under the Massachusetts statute, a wrongful death judgment is subject to the limits of a \$2000 minimum and a \$20,000 maximum. The amount is based on the degree of culpability involved, as determined by the trier of facts (the jury, or the judge if a jury is waived). The possibility of a settlement, however, is always present.

Miss Voss, 22, of New York City, was a third year student in the Law School and one of the most popular members of her class. Her death occurred about a week after she had completed work on a problem in the semi-final round of the Williston Competition. Her team, which included Robert Borden and Lionel Savadove, both 3L of Philadelphia, was a winner in its round. However, the decision was not handed down in time for Miss Voss to have the satisfaction of knowing of her triumph.

A trust fund in memory of Miss Voss is being established by her family. Its purpose will be to provide financial assistance for a graduate of Goucher College to do graduate work at Harvard University, with a priority for a Goucher graduate entering Harvard Law School.

Donations are being received by Eric Osterweil, 77 Sacramento St.; Flora Schnall, 49 Langdon St.; and Robert Borden, 55 Hastings. Contributions can also be made at the offices of the RECORD, 23 Everett Street.

Osterweil announced that the Voss family intends to use the bulk of whatever amount may be recovered in their tort claim against Langone and Regal Cab Co. to fund the trust.

So far, according to Osterweil, over \$200 has already been received at the law school, and another \$100 was donated by a group of teachers in the school where Mrs. Voss is a teacher.

Ira Rabkin, 3L of Camden, N. J., the operator of the motor scooter, is now attending classes regularly. He had suffered from multiple injuries and spent a week in Stillman Infirmary following the crash. Mr. Rabkin describes his present condition as "greatly improved." He has declined to comment upon the accident, preferring to wait until the inquest to tell his story.

—Borden

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