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The Standards of Care in Negligence Law

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I. MORAL FOUNDATIONS

In a prior essay in this collection, I argued that the Kantian-Aristotelian theory of legal responsibility, based on the foundational norm of equal individual freedom, is normatively much more attractive than its main competitor, the utilitarian efficiency theory. According to the equal freedom theory, each human being has an absolute moral worth as a free and equal member of the community. Thus, the common good to which law and politics should be directed is not the meaningless maximization of the aggregate utility or welfare of the society as a whole, as assumed by the utilitarian efficiency theory, but rather the creation of conditions that allow each person to realize his or her humanity as a self-legislating free rational being.¹

The legal economists generally do not contest the relative normative unattractiveness of the utilitarian efficiency theory. They usually acknowledge that utilitarian efficiency can be at best a secondary goal that is constrained by distinct morally justifiable goals—more particularly, the pursuit of justice. However, they explicitly or implicitly assume that this constraint is minimal.² They also argue that, although the utilitarian efficiency theory may appear to be normatively unattractive, it seems to be the moral theory that actually underlies our law and politics, since it allegedly best (or even solely) explains the content of our existing laws, particularly tort law.³

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¹ See Richard W. Wright, *Right, Justice and Tort Law*, this volume.

² See, e.g., GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970), 24–33, 291–308; WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987), 1, 8–9, 14, 18–23, 312–13; RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d edn., 1986), 11–13, 21–6.

³ See, e.g., LANDES & POSNER, *supra*, note 2; A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* (1983); STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987); Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69 (1975); Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). But see CALABRESI, *supra*, note 2, at 239–87 (criticizing tort law as inefficient).

In my prior essay, I challenged the utilitarians' descriptive claim primarily on the global level. I elaborated the Kantian concept of Right and its corollary Aristotelian concepts of distributive and corrective justice and argued that these concepts explain, justify, and illuminate the general structure of tort law and its traditional status as the preferred liability regime for interpersonal injury. In this essay, I challenge the utilitarians' claim with respect to the standards of care in negligence law. Negligence liability is the most common type of tort liability and is thought to be the most obvious example of tort law's utilitarian foundation. If the utilitarian efficiency theory cannot explain negligence liability—its prime doctrinal example in its favorite field of common-law liability—it is in very serious trouble. Conversely, if the equal freedom theory can explain and justify negligence liability, it will have cleared what many see as the biggest hurdle for a nonutilitarian theory of tort liability.

II. THE UNWORKABILITY OF THE UTILITARIAN 'HAND FORMULA'

Negligence is generally described as behavior that creates unreasonable foreseeable risks of injury. Almost all jury instructions, the vast majority of judicial opinions, and many secondary sources do not provide any test or definition of what constitutes unreasonably risky behavior, other than an often circular reference to the 'ordinary care' that would be exercised by the reasonable or prudent person in the same or similar circumstances.⁴

Legal scholars are less reticent. There is an almost universal assumption among legal scholars that a person's conduct is deemed unreasonable, and hence negligent, if and only if the foreseeable risks created by such conduct exceed its expected social utility.⁵ This aggregate risk-utility test of reasonableness was most explicitly articulated in Judge Learned Hand's famous formula in *United States v. Carroll Towing Co.*: a person's conduct X is unreasonable only if P times L is greater than B , where P is the probability of an injury occurring, L is the magnitude of the injury, and B is the expected benefit of engaging in conduct X or, conversely, the expected burden or cost that would have to be borne to avoid engaging in conduct X .⁶

The assumed prevalence of Hand's risk-utility formula as the operative test of reasonableness in negligence is deemed to be the strongest evidence

⁴ The major exception is the consumer-oriented risk-utility test for defective product designs. See *infra*, text at note 51.

⁵ See RESTATEMENT (SECOND) OF TORTS (1963), §§ 291–3 (*but see infra*, note 43); JOHN G. FLEMING, *THE LAW OF TORTS* (7th edn., 1987), 102–8 (*but see infra*, text at note 33); 3 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, *THE LAW OF TORTS* (2d edn., 1986), 467–82; W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* (5th edn., 1984), 171–3 [hereinafter PROSSER & KEETON].

⁶ 159 F.2d 169, 173 (2d Cir. 1947).

of the utilitarian efficiency foundation of tort law. Under the utilitarian efficiency theory, conduct is efficient (hence reasonable and not negligent) if it maximizes the total sum of expected benefits minus costs; it does not matter who bears the costs and who gains the benefits. The Hand formula seems perfectly to reflect this view. However, there are insurmountable problems with the Hand formula even under the utilitarian efficiency theory.

The problems are both descriptive and analytic. In order to identify the efficient levels of precaution, one must focus on marginal increments in costs and benefits attributable to marginal increments in precaution, rather than the total costs and benefits of some particular suggested precaution.⁷ Yet it is highly doubtful that courts engage in, or are even capable of engaging in, such marginal analysis.⁸

More significantly, even proper marginal analysis will not identify the efficient levels of precaution when the Hand formula is applied separately (as it must be) to the conduct of the defendant and the plaintiff. For example, assume that a \$100 loss to the plaintiff could have been avoided by (1) a unilateral \$40 precaution by the defendant, (2) a unilateral \$60 precaution by the plaintiff, or (3) a bilateral \$15 precaution by the defendant and \$15 precaution by the plaintiff. As is almost always the case in practice, the most efficient (least total cost) option is the third, which requires bilateral precaution by both parties rather than unilateral precaution by one or the other. Yet, applying the Hand formula separately to each party's conduct, the defendant would be deemed negligent if she did not adopt option (1), since her \$40 precaution would have avoided a \$100 loss, and the plaintiff would be deemed negligent if he did not adopt option (2), since his \$60 precaution would have avoided a \$100 loss. Under the traditional negligence liability rule, according to which the plaintiff cannot recover if he is contributorily negligent, the defendant will not take any precaution, since she knows the plaintiff either will adopt option (2), in which case there will be no loss and hence no liability, or will not adopt option (2) and be barred from recovering any damages due to his contributory negligence. The plaintiff, knowing that the defendant has no (economic) reason to take any precaution, will adopt option (2)—i.e., spend \$60 to avoid the \$100 loss. Using the Hand formula to determine the negligence of the parties' respective conduct thus leads to the least efficient option being chosen, rather than the most efficient option.

The Hand formula will identify the efficient precaution level for one of the parties only if it is applied using the risks, burdens, and benefits that

⁷ See John Prather Brown, *Toward An Economic Theory of Liability*, 2 J. LEGAL STUD. 323, 332-4 (1973).

⁸ See Mark F. Grady, *A New Positive Economic Theory of Negligence*, 92 YALE L.J. 799, 806-9, 821-9 (1983).

would be expected if the other party were exercising his or her efficient level of precaution—a solution blithely assumed by the legal economists.⁹ However, this solution is hopelessly circular: identifying the first party's efficient precaution level requires first knowing the second party's efficient precaution level, but the second party's efficient precaution level can be identified only if the first party's efficient precaution level is known, and so on around the circle.

Thus, from the standpoint of utilitarian efficiency, the Hand formula must be abandoned. Negligence must be defined not as a failure to satisfy the Hand formula, but rather as a failure to adopt the efficient level of precaution. As in the above example, this efficient level can only be identified by considering all the expected costs and benefits to the defendant and the plaintiff (and others) of all the possible combinations of precaution by the defendant and the plaintiff (and others) and then choosing the least cost option. Yet, as Hand himself noted, in practice it will be impossible to take into account more than a few options and their expected costs and benefits, and even for these options the expected costs and benefits generally cannot be estimated.¹⁰ Attempting to calculate and enforce efficient precaution levels based on such highly imperfect information may very well lead to greater inefficiency rather than greater efficiency, even assuming (contrary to the usual situation) that some determinate answer is suggested by the available (imperfect) information.¹¹

III. NONUTILITARIAN ATTEMPTS TO JUSTIFY THE HAND FORMULA

Although the legal economists' aggregate risk-utility interpretation of negligence, especially as embodied in the Hand formula, is undermined by major theoretical and practical problems, almost all legal scholars, including those critical of the utilitarian efficiency theory, assume it is descriptively correct. Critics of utilitarian efficiency generally have attempted to construct non-utilitarian arguments to explain and justify the supposed use of the aggregate risk-utility formula in negligence and other tort cases. They rely explicitly or implicitly on the fundamental Kantian moral duty to respect the equal absolute moral worth of yourself and others as rational (human) beings. This duty is assumed to require that in all your actions you must weigh the interests of others equally with your own, which leads immediately and inevitably to the aggregate risk-utility conception of reasonableness and negligence.

⁹ See LANDES & POSNER, *supra*, note 2, at 87–91.

¹⁰ See *Moisan v. Loftus*, 178 F.2d 148, 149 (2d Cir. 1949); *infra*, text at note 32.

¹¹ See LANDES & POSNER, *supra*, note 2, at 20–1, 24; Brown, *supra*, note 7, at 333–4, 340–1, 343–4.

For example, Ronald Dworkin, while not explicitly invoking Kant's (or any other) moral theory, attempts to explain the assumed use of the aggregate risk-utility formula in negligence and private nuisance cases by arguing that in such cases there are competing claims of 'abstract right' (also more accurately described as mere 'interests') which must be resolved by using the basic principle of 'equal concern and respect' to 'compromise' the competing claims so as to maximize the 'collective utility' of the parties.¹² Similarly, Ernest Weinrib, explicitly relying on Kantian moral theory, assumes that the categorical imperative, which requires one to act in accord with a maxim that one would adopt as an equal member of the 'kingdom of ends', forbids any self-preference in conception or action. He argued, until recently, that this alleged requirement of complete impartiality of interest mandates an objective 'comparison of interests' conception of reasonableness for both defendants and plaintiffs.¹³ Charles Fried also purports to find in Kantian morality a requirement of complete impartiality, which he at one time used not only to justify the aggregate risk-utility conception of negligence but also to construct a social risk pool from which persons supposedly can draw, within certain unclear limits, to expose others to minor or major risk.¹⁴

These arguments, although meant to be non-utilitarian, are based directly on the utilitarian conception of equality, according to which treating people as equals simply means counting each person's interests equally while maximizing the total satisfaction of interests. This conception of equality is directly opposed to the Kantian conception of equal individual freedom, according to which each individual must always be treated as an end in himself rather than solely as a means to the satisfaction of the interests of others. Kant's doctrine of Right mandates proper respect for the equal absolute moral worth of others by requiring—as legal as well as ethical duties—that resources be distributed to promote each person's equal

¹² See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (rev. edn., 1978), 93-4, 98-100, 306-8. Dworkin now notes that a duty always to weigh others' interests equally with your own would completely undermine personal autonomy and is not an accepted part of ordinary morality. Yet he continues to assert that such a duty exists in negligence and nuisance cases, which allegedly involve conflicts in individuals' 'abstract legal rights' that must be resolved by applying the preferred conception of equality of concern to define individuals' 'concrete rights' in particular interactions: see RONALD DWORKIN, *LAW'S EMPIRE* (1986), 291-312.

¹³ See Ernest J. Weinrib, *Toward A Moral Theory of Negligence Law*, 2 *LAW & PHIL.* 37, 40, 49-55 & note 27 (1983). Weinrib recently has been persuaded that English and Commonwealth courts usually ignore the utility side of the risk-utility formula and focus on the creation of significant foreseeable unaccepted risks to others: see Ernest J. Weinrib, *Understanding Tort Law*, 23 *VAL. U. L. REV.* 485, 518-19 & note 61 (1989), citing Stephen R. Perry, *The Impossibility of General Strict Liability*, 1 *CAN. J.L. & JUR.* 147, 169-70 (1988); see also Richard W. Wright, *Allocating Liability Among Multiple Responsible Causes*, 21 *U.C. DAVIS L. REV.* 1141, 1179-81 (1988).

¹⁴ See CHARLES FRIED, *AN ANATOMY OF VALUES: PROBLEMS OF PERSONAL AND SOCIAL CHOICE* (1970), 41-4, 183-91, 196-200.

positive freedom (distributive justice) and that conduct which might affect another person's existing stock of resources be consistent with that other's equal negative freedom (corrective justice). Kant's doctrine of virtue requires—as a solely ethical duty—proper concern for the equal absolute moral worth of others as well as yourself by making their happiness one of your own ends. It does not, however, require that you weigh others' interests equally with your own in everything you do. Such a requirement would completely undermine individual autonomy and freedom.¹⁵

Although he is a non-utilitarian moral theorist, George Fletcher usually equates 'reasonableness' in tort law with utilitarian efficiency. In an early article, he argued that negligence and tortious conduct in general should be understood in terms of a non-utilitarian paradigm of non-reciprocal risk-creation and lack of excuse, as an alleged implementation of the right to 'equal security' that is embodied in corrective justice, rather than in terms of the utilitarian efficiency paradigm of reasonableness.¹⁶ Now, however, Fletcher accepts the utilitarian efficiency interpretation of negligence. He claims that a 'collaborative principle' underlies the law of negligence: 'By entering into certain spheres of risk-taking, plaintiff and defendant both come under duties to act with a view to the [aggregate] costs and benefits of their actions. They become a unit, acting under an implicit obligation to optimize the [aggregate] consequences of their actions' and have 'a shared duty to find the optimal level of harmful activities'.¹⁷

'Ethic of care' feminists such as Leslie Bender travel the same path as Dworkin, Weinrib, Fried, and Fletcher, although they seem unaware of the destination toward which they are traveling and might be shocked to learn of their traveling companions. Bender equates the reasonableness standard in negligence and, more generally, the liberal concepts of reason, autonomy, rights, equality, fairness, and justice with a 'masculine' ethic of anti-social, self-interested, wealth-based, dehumanizing utilitarian calculation. She seeks to replace the reasonableness standard and its 'masculine' ethic with a 'feminine' ethic of care and concern for the needs and welfare of others, according to which a person in cases of both misfeasance (putting others at risk) and nonfeasance (failure to protect others from risks you did not create) should be held to a legal standard of 'conscious care and concern of a responsible neighbor or social acquaintance for another under the same or similar circumstances'.¹⁸

¹⁵ See Wright, *supra*, note 1; *infra*, note 72 and accompanying text.

¹⁶ See George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 537-43, 550, 556-7, 560, 569-71 (1972).

¹⁷ See George P. Fletcher, *Corrective Justice for Moderns*, 106 HARV. L. REV. 1658, 1677, 1678 (1993).

¹⁸ Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 31 (1988); see *id.* at 25, 28, 30-36 & n. 113.

Bender's 'feminine' ethic of care might well be *less* caring than the complete impartiality requirement espoused by Dworkin, Weinrib, Fried, Fletcher, and the (mostly male) utilitarian efficiency theorists, according to which others' interests and welfare must always be treated as being equally as important as your own. Recognizing that 'we all care differently for family and friends than we do for strangers' and that 'we could not possibly have the energy to care about every person as we do our children or lovers', Bender prescribes varying levels of required care depending on the closeness of the relationship.¹⁹ Yet, given her rejection of the 'masculine' notions of autonomy and self-interest and her emphasis on the 'feminine' ethic of care and concern for the needs and welfare of all others, it is not at all clear how she could justify such preferred treatment for one's family or friends (or oneself). Conversely, assuming a variable standard based on closeness of relationship, she seems unable to justify her proposed requirement that the concern appropriate for neighbors and acquaintances must also be afforded to strangers.

The proposed displacement of the 'masculine' ethic of reason, autonomy, rights, equality, fairness, and justice by a 'feminine' ethic of care and concern for others would seem to be, as feminists such as Catharine MacKinnon and Margaret Radin have argued, a trap for women—especially since, being a 'feminine' rather than a 'masculine' ethic, it apparently would only apply to women.²⁰ In a recent article, Bender seems to acknowledge this problem. She now states that 'reason has its place in tort law, but that reason is a richer and deeper concept than tort law has historically acknowledged', and she urges the usefulness of 'the reason/care paradigm' in suggesting 'reconceptualizations that make law more reflective of human experience and more responsive to concerns of justice'.²¹

IV. THE EQUAL FREEDOM STANDARDS OF CARE

If Bender were further to investigate Kantian–Aristotelian moral and legal theory, she would find a powerful elaboration of the moral and legal obligations to respect and care for the humanity in others as well as oneself that she hopes to capture in her 'reason/care paradigm'. These obligations include (although they are often overlooked) the legally enforceable duties of distributive justice and the purely ethical duties of beneficence as well as the legally enforceable duties of corrective justice.

¹⁹ See *id.* at 32.

²⁰ See *Feminist Discourse, Moral Values and the Law—A Conversation*, 34 *BUFF. L. REV.* 11, 20–8, 73–4 (1985) (remarks of Catharine MacKinnon); Margaret J. Radin, *The Pragmatist and the Feminist*, 63 *S. CAL. L. REV.* 1699, 1699–701, 1712–19 (1990).

²¹ See Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 *CORNELL L. REV.* 575, 580 (1993).

Tort law falls within the domain of corrective justice, although distributive justice considerations are interwoven in certain tort doctrines. Corrective justice aims at securing each person's existing stock of resources against conduct by others that would be inconsistent with the equal negative freedom of all. One's negative freedom—the freedom from unjustified interference with one's use of one's existing resources to pursue one's projects or life plan—will be completely undermined if one must always weigh the interests of all others equally with one's own when deciding how to deploy one's existing resources, as required by the utilitarian efficiency theory, the principle of 'equal concern and respect' as interpreted by Dworkin and others, and Bender's feminist 'ethic of care'. Under these theories, no one is treated as a distinct person with one's own life to lead. Rather each 'person' is merely a fungible addend in the calculation of some mystical aggregate social welfare. For any particular activity, it does not matter whom is being put at risk, by who, or for whose benefit; all that matters is the maximization of aggregate social welfare. This is the morally unattractive message and effect of the utilitarians' conception of reasonableness.

Under the Kantian-Aristotelian theory, which is based on the foundational norm of equal individual freedom rather than the maximization of aggregate social welfare, the respective weights to be given to an actor's interests and the interests of others who might be affected by that action will vary considerably depending on (among other factors) who is being put at risk, by whom, and for whose benefit. For example, given the Kantian requirement of treating others as ends rather than merely as means, it is impermissible to use someone as a mere means to your ends by exposing him (or his resources) to significant foreseeable unaccepted risks, regardless of how greatly the benefit to you might outweigh the risk to him. Conversely, sacrificing your interests for the benefit of someone else is regarded as morally meritorious, although not legally required, even if the risk to you greatly outweighs the expected benefit to the other person, as long as your exposing yourself to the risk does not constitute a failure to properly respect your own humanity.

It is the equal freedom conception of reasonableness, rather than the utilitarian efficiency conception, that is reflected in actual tort-law doctrines and decisions. Under the utilitarian-efficiency theory, it is as inefficient to be above the optimal level of care as to be below it: either form of divergence therefore should be considered negligent. However, consistent with the equal freedom theory, defendants and plaintiffs are only deemed negligent for being below the required level of care, not for being above it. Only when one is below the required level of care is there an impermissible interference with the rights of others (defendant's primary negligence) or a failure properly to respect one's own humanity (plaintiff's contributory negligence).

Moreover, although the utilitarian efficiency theory would apply the same aggregate risk-utility standard of care to plaintiffs and defendants in all situations, taking into account all risks and benefits to everyone, actual tort law—consistent with the equal freedom theory—applies quite different standards of care in different situations. This is evident for all three aspects of the standards of care: the risks taken into account, the perspectives applied, and the substantive criteria of reasonableness.

A. Risks Taken into Account

Different risks are taken into account in analyzing the alleged negligence of defendants and plaintiffs. The analysis of a defendant's alleged negligence focuses on the foreseeable risks *to others* created by the defendant's conduct, rather than the risks to everyone including herself, while the analysis of a plaintiff's alleged negligence focuses on the foreseeable risks *to the plaintiff himself* created by his conduct, rather than the risks to others as well as himself.²² This differential treatment is inexplicable under the utilitarian efficiency theory, which views defendants and plaintiffs as morally and economically indistinguishable causes of the effects of their interacting activities and seeks to construct liability rules that will maximize the aggregate net benefits of such interactions, taking into account all expected costs and benefits to everyone.²³ In contrast, the equal freedom theory easily explains and justifies the different risks taken into account. As a matter of Right or justice, the defendant is liable for an interactional injury if and only if her conduct foreseeably affected the person or property of another in a manner that was inconsistent with his Right to equal negative freedom, thus generating a corrective justice obligation of rectification.²⁴ In the analysis of the plaintiff's contributory negligence, a quite different issue arises: whether the defendant's *prima facie* corrective justice obligation to the plaintiff should be barred or reduced because, in the light of the foreseeable risks to himself, the plaintiff failed to act with proper respect for his own humanity and thus also bears moral responsibility for his injury.²⁵

B. Perspective Applied (Objective or Subjective)

Similarly, different perspectives are applied in analyzing the alleged negligence of defendants and plaintiffs. When assessing a defendant's alleged negligence, an objective perspective generally is applied: the defendant is required to take at least as much care as would be taken by the (ideal)

²² See RESTATEMENT (SECOND) OF TORTS (1963), § 283 cmt. f, § 463 & cmt. b, § 464 cmt. f; FLEMING, *supra*, note 5, at 96, 242.

²³ See Coase, *supra*, note 3.

²⁴ See Wright, *supra*, note 1.

²⁵ See *infra*, text at notes 28–9.

prudent person with ordinary physical and mental abilities. The standard is not lowered to conform with the defendant's particular physical and mental (dis)abilities. Although a defendant with an obvious physical incapacity is not required to do what she is incapable of doing, she is required to take whatever additional precautions are necessary to reduce the foreseeable risks to others to the objectively specified acceptable level. On the other hand, although it often is not explicitly mentioned by the courts, it is generally recognized by courts and commentators that a more subjective perspective is applied when assessing a plaintiff's alleged contributory negligence.²⁶

Under the utilitarian efficiency theory, a subjective perspective ideally should be applied to both defendants and plaintiffs. It would be inefficient to require all defendants or plaintiffs to attain the same level of risk reduction despite widely varying physical, mental, technical, and economic capacities to achieve such risk reduction. Instead, each defendant or plaintiff should be required to invest in care only to the point where the marginal cost of such care does not exceed the marginal benefits in reduced risk. Due to differing capacities and thus costs of care, this point will vary for each individual. It is only the very high administrative costs of attempting to apply the subjective perspective that require adoption in most instances of the objective perspective, which is assumed (but not shown) to be a second-best efficient solution for both defendants and plaintiffs. Thus, when personal (in)capacities are easily ascertainable, they should be taken into account for both defendants and plaintiffs.²⁷

Under Kant's moral theory, a subjective perspective would be required if the question were the moral *blameworthiness* or *merit* of the defendant's or plaintiff's conduct. But, when evaluating the defendant's conduct in a tort (rather than a criminal) action, that is not the relevant question (unless punitive damages are at issue). Instead, the relevant question is the defendant's moral *responsibility* for having adversely affected someone else's person or property. As such, the question is one of objective Right rather than subjective virtue. The external exercise of freedom depends on sufficient security against interferences by others with one person and property. Regardless of measurement problems, using a subjective perspective to determine the negligence of defendants would make such security impossible, since the risks to which one could permissibly be exposed by others

²⁶ See, e.g., *Snider v. Callahan*, 250 F. Supp. 1022, 1023 (W.D. Mo. 1966); GUIDO CALABRESI, *IDEALS, BELIEFS, ATTITUDES, AND THE LAW* (1985), 24-7, 32-3, 46-54, 147 note 131; FLEMING, *supra*, note 5, at 102-4, 258-60; 3 HARPER, JAMES & GRAY, *supra*, note 5, at 387-93, 421-66; 4 *id.* at 334-42; Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1743-7, 1750-2, 1761-3 & note 333 (1981). A more subjective perspective is applied to defendants in situations in which the defendant's own rights are directly at issue. See *infra*, text at notes 46-9 and following note 70.

²⁷ See LANDES & POSNER, *supra*, note 2, at 123-6.

would depend on the subjective capacities of the particular others with whom one happens (often unpredictably) to interact. To have sufficiently secure expectations, one's rights in one's person and property must be defined by an objective level of permissible risk exposure by others which, under the moral categorical imperative and its corollary (the supreme principle of Right), must be equally applicable to all and objectively enforced. Thus, an objective standard of 'legal fault' (moral *responsibility*), rather than a subjective standard of moral *fault* (blame), is required when considering legal responsibility for the adverse effects of a defendant's conduct on the person or property of others.²⁸

When the contributory negligence of a plaintiff is at issue, the question is whether the plaintiff's recovery from a defendant who infringed his rights by negligently injuring him should be barred or reduced because of the plaintiff's contribution to his own injury. Since we are concerned with an injury to the plaintiff himself, rather than an injury to the person or property of others, no issue of Right immediately arises. Instead the issue is whether the plaintiff, by exposing himself to the particular risk, failed to properly respect his own humanity and thus shares with the defendant moral responsibility for his injury. When assessing the plaintiff's moral responsibility for his own injury, the reason just given for departing from the subjective perspective of moral fault or virtue and instead applying the objective perspective of 'legal fault' or Right to the defendant's conduct does not directly apply to the plaintiff's conduct. Rather, the issue of Right arises indirectly and applies in a much more limited manner. Proper regard for the equal freedom of the defendant suggests that the plaintiff's conduct be deemed negligent and affect his right of recovery, even if it was subjectively reasonable in the light of his physical and mental capacities and beliefs, if it was unforeseeably idiosyncratic—i.e., if it fell outside the (broad) range of foreseeable behavior for the great mass of persons in similar situations. Thus, the plaintiff's conduct should be judged by a limited semi-subjective perspective rather than a fully subjective perspective.²⁹

²⁸ Kant's doctrine of virtue, while specifying objective moral duties based on the categorical imperative, assesses the moral *blame* or *merit* of conduct in terms of one's subjective capacity and effort in attempting to ascertain and satisfy those duties. Kant's doctrine of Right, on the other hand, directly applies the objective requirements of the categorical imperative in determining one's moral and legal *responsibility* for the adverse effects that one causes to the person or property of others. Thus, as Kant repeatedly emphasizes, an action's *legality* is judged by its external conformity with the objective requirements of Right, while its *morality* is judged by one's internal subjective capacity and efforts to conform one's conduct to the objective requirements of the categorical imperative, which grounds all duties of Right and virtue: see IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary Gregor trans., 1991) (1797); *214, 218–32, 312, 382 n.*, 379–80, 381–3 & n.*, 389–94, 401, 404–5, 446–7, 463; Wright, *supra*, note 1.

²⁹ Yet the range of behavior deemed reasonable under the more subjective perspective applied to plaintiffs is sometimes very broad, especially in cases involving religious belief: see CALABRESI, *supra*, note 26, at 46–54.

C. The Substantive Criteria of Reasonableness

Finally, different criteria of reasonableness are used in evaluating the alleged negligence of defendants and plaintiffs in different contexts. Contrary to what is commonly assumed, the courts rarely use the aggregate risk-utility formula or any other uniform definition of reasonableness. Rather, different factors are taken into account and different weights are given to those factors depending on a number of considerations that are highly relevant under the equal-freedom theory but irrelevant under the utilitarian efficiency theory.

In an article published in 1915 that is often cited as presaging Judge Hand's formula, Henry Terry noted five factors that may be relevant, including [1] the probability and [2] the magnitude of any injury that might result from the conduct at issue and, '*in some cases, at least*', [3] the probability and [4] the magnitude of the benefit expected to be attained by such conduct discounted by [5] the probability that the benefit would be attained in the absence of such conduct.³⁰ In 1927, Warren Seavey warned against 'assum[ing] that we can rely upon any formula in regard to "balancing interests" to solve negligence cases', and he stated that the utility of the defendant's conduct usually is not considered or is weighted very low when the defendant for her own benefit puts another's property or especially person at risk, or intentionally interferes with the person or property of another.³¹ Judge Learned Hand himself, the author of the risk-utility formula, noted that the formula's factors

are practically not susceptible of any quantitative estimate, and the second two [L and B] are generally not so, even theoretically. For this reason a solution always involves some preference, or choice between incommensurables, and it is consigned to a jury because their decision is thought most likely to accord with commonly accepted standards, real or fancied.³²

Similarly, after elaborating the usual academic aggregate risk-utility interpretation of reasonableness, John Fleming warns:

But negligence cannot be reduced to a purely economic equation. . . . [I]n general, judicial opinions do not make much of the cost factor [of eliminating the risk], and for good reasons. For one thing, our legal tradition in torts has strong roots in an individualistic morality with its focus primarily on interpersonal equity rather than broader social policy. . . . [T]he calculus of negligence includes some important non-economic values, like health and life, freedom and privacy, which defy comparison

³⁰ See Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40, 42-4 (1915) (emphasis added).

³¹ See Warren A. Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1, 8 note 7 (1927).

³² *Conway v. O'Brien*, 111 F.2d 611, 612 (2d Cir. 1940), *rev'd on other grounds*, 312 U.S. 492 (1941).

with competing economic values. Negligence is not just a matter of calculating the point at which the cost of injury to victims (that is the damages payable) exceeds that of providing safety precautions. The reasonable man is by no means a caricature cold blooded, calculating Economic Man.³³

Very little scholarly attention has been paid to the criteria of reasonableness that are actually applied in different situations. In the remainder of this essay, I attempt to begin to fill this gap. The different situations will be distinguished primarily by who put whom at risk for whose benefit and by whether the person put at risk consented to such risk exposure. More specifically, I examine the standards of care in the following (non-exhaustive) contexts: (1) defendants' treating others as means, (2) defendants engaged in socially essential activities, (3) defendant occupiers' on-premises risks, (4) defendants' activities involving participatory plaintiffs, (5) paternalistic defendants, (6) plaintiffs' self-interested conduct, (7) plaintiffs' self-sacrificing conduct, and (8) defendants' failure to aid or rescue.

1. Defendants' Treating Others as Means

The first category, the 'involuntary DPD' category, encompasses situations in which the defendant (D) put the plaintiff (P) at risk to benefit the defendant (D) or some third party, and the plaintiff did not seek to benefit directly from the defendant's risk-creating activity. Recently, a few scholars have noted that the actual test of negligence in such cases is not the utilitarians' aggregate risk-utility test but rather (consistent with the equal freedom theory) the defendant's creation of a significant, foreseeable, and unaccepted risk to the person or property of others.³⁴ A risk is significant, and hence unreasonable unless accepted by the plaintiff, if it is a level of risk to which an ordinary person would be unwilling to be exposed without his consent.

The best known case of this type is the British House of Lords' decision in *Bolton v. Stone*, in which the plaintiff, while standing in the road in front of her house, was seriously injured when she was struck by a ball that had been propelled by an 'exceptional' hit out of the nearby cricket grounds over an intervening house and into the street.³⁵ Each of the Law Lords assumed that the defendant cricket club would be liable in negligence if the risk were foreseeable and of a sufficiently high level, regardless of the utility of the defendant's conduct or the burden of avoiding creating the risk. Each lord concluded that the risk, although foreseeable, was not of a sufficiently high level to be deemed unreasonable as a matter of law, given the very low probabilities of a ball's being hit into the road and also

³³ FLEMING, *supra*, note 5, at 108-9 (citations omitted).

³⁴ See *supra*, note 13.

³⁵ [1951] A.C. 850, 851-2.

hitting someone on the little-used residential side street. Lord Reid was the most explicit. He stated that in order to be negligent, a risk must not only be foreseeable but also be one that a reasonable person, 'considering the matter from the point of view of safety', would consider 'material' or 'substantial':

In considering that matter I think that it would be right to take into account not only how remote is the chance that a person might be struck but also how serious the consequences are likely to be if a person is struck; but I do not think that it would be right to take into account the difficulty of remedial measures. If cricket cannot be played on a ground without creating a substantial risk, then it should not be played there at all. . . . I do not think that a reasonable man considering the matter from the point of view of safety would or should disregard any risk unless it is extremely small.³⁶

In a subsequent case, the Law Lords sitting as the Privy Council in a Commonwealth case on appeal from Australia, *The Wagon Mound (No. 2)*, held that, even when the foreseeable risk is insubstantial (small), the defendant will still be held negligent if, but only if, the risk was 'real' rather than 'far-fetched' or 'fantastic' and the defendant had no valid reason for failing to take steps to eliminate it. A valid reason could be 'that it would involve considerable expense to eliminate the risk. [The defendant] would weigh the risk against the difficulty of eliminating it.' *Bolton v. Stone*, the court said, had involved such a real but insubstantial risk. But, the court reiterated, if the risk were real and substantial, it would be unreasonable not to take steps to eliminate it, regardless of the utility of the risk or the burden of eliminating it.³⁷

The Wagon Mound (No. 2) is sometimes misread as abandoning *Bolton v. Stone*'s substantial risk criterion and replacing it with the risk-utility formula. But the Privy Council clearly states that the risk-utility formula, rather than being the universal test of defendants' negligence, is applicable only in those situations in which the risk ordinarily would be considered insubstantial. If the risk is substantial, the utility of the defendant's conduct is irrelevant. The risk-utility formula is used to *expand* the defendant's liability, to encompass situations in which the risk ordinarily would be deemed insubstantial but is nevertheless deemed unacceptable because it is real, rather than fantastic, and the cost of eliminating it would be similarly

³⁶ *Id.* at 864, 867-8; *see id.* at 858-9 (Lord Porter), 861-3 (Lord Normand), 863 (Lord Oaksey), 868 (Lord Radcliffe).

³⁷ *Overseas Tankship (U.K.) Ltd. v. The Miller S.S. Co. ('Wagon Mound (No.2)'),* [1967] 1 A.C. 617, 633, 641-4 (P.C.), *per* Lord Reid. Landes and Posner ignore these statements in *Bolton* and *The Wagon Mound (No. 2)*. *See* LANDES & POSNER, *supra*, note 2, at 99. All the 'DPD' cases they discuss as alleged illustrations of the Hand formula actually turn on the significance of the foreseeable risk: *see id.* at 96-100.

small (no precise quantitative balancing of risk and utility seems to be feasible, implied or justified even in these situations).³⁸

Although not usually employing language as explicit as Lord Reid's in *Bolton*, and despite sometimes employing balancing language, courts in the United States and elsewhere generally also find a defendant negligent if she created a foreseeable significant unaccepted risk of injury to the person or property of others.³⁹ As we previously noted, jury instructions on a defendant's negligence rarely, if ever, refer to the aggregate risk-utility formula, focusing instead on the care expected of the reasonable ordinary or prudent person who acts with proper concern for the effects of her activity on the persons and property of others. Courts have upheld jury findings of negligence even though the jury has specifically found that the benefits 'as a whole' of the defendant's conduct outweighed the risks.⁴⁰ In a careful, documented study of all nineteenth century California and New Hampshire appellate court decisions on tort liability, Gary Schwartz reports:

The factor of private profit was seen as a reason for being skeptical, rather than appreciative, of the propriety of risky activity engaged in by enterprise. In general, the New Hampshire and California Courts were reluctant to find that economic factors justified a defendant's risktaking. Neither Court even once held mere monetary costs rendered nonnegligent a defendant's failure to adopt a particular safety precaution.⁴¹

Defense lawyers carefully avoid making arguments to judges or jurors that seek to justify risks imposed on the plaintiff by allegedly offsetting enhancements of the defendant's utility. Defendants that are thought to have deliberately made such risk-utility decisions are often deemed by juries and judges not only to have been negligent, but also to have behaved so egregiously as to justify a hefty award of punitive damages, as occurred in the Ford Pinto and asbestos cases.⁴²

³⁸ Cf. *Lucy Webb Hayes Nat'l Training School for Deaconesses and Missionaries v. Perotti*, 419 F.2d 704, 711 (D.C. Cir. 1969) (although risk of mental patient's jumping through window in unsecured area of hospital may have been very small, it remained unreasonable and a proximate cause of patient's death if there was no good reason for allowing him to be there).

³⁹ See, e.g., *Brown v. Kendall*, 60 Mass. (6 Cush.) 292, 296 (1850): '[o]rdinary care . . . means that kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger. . . . To make an . . . inevitable accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency.' See also *Depue v. Plateau*, 111 N.W. 1, 2 (Minn. 1907) (stating a similar 'comprehensive principle'); *infra*, text at note 52.

⁴⁰ See, e.g., *Curtis v. State ex rel. Dep't of Transp.*, 180 Cal. Rptr. 843, 853-6 (Cal. Ct. App. 1982).

⁴¹ Schwartz, *supra*, note 26, at 1757 (footnotes omitted); see also Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641, 641-3 & note 8 (1989). Schwartz's studies demolish Posner's efficiency interpretation of nineteenth century tort law.

⁴² See *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (1981); *Jackson v. Johns-Mansville Sales Corp.*, 781 F.2d 394, 399-409 & n. 12 (5th Cir. 1986); Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013, 1035-8 (1991).

2. Defendants Engaged in Socially Essential Activities

While the purely private utility to the defendant of his conduct is rarely taken into account, the social utility of the defendant's conduct is taken into account in some situations, although not through a utilitarian balancing. A couple of these situations are the subject of the Wisconsin Supreme Court's illustrations of appropriate 'balancing of the social interests' in negligence cases under an 'ordinary care' jury instruction:

One driving a car in a thickly populated district, on a rainy day, slowly and in the most careful manner, may do injury to the person of another by throwing muddy or infected water upon that person. Society does not hold the actor responsible because the benefit of allowing people to travel under such circumstances so far outweighs the probable injury to bystanders that such conduct is not disapproved. Circumstances may require the driver of a fire truck to take his truck through a thickly populated district at a high rate of speed, but if he exercises that degree of care which such drivers ordinarily exercise under the same or similar circumstances, society weighing the benefits against the probabilities of damage, in spite of the fact that as a reasonably prudent and intelligent man he should foresee that harm may result, justifies the risk and holds him not liable.⁴³

The court's first illustration reflects the fact that in any society certain risks—such as those posed by properly constructed, maintained, and operated electrical generation and transmission facilities, dams, trains, automobiles, and planes—will be unavoidable aspects of activities essential or important to all persons in the society. Under the supreme principle of Right (universalizable equal freedom), all members of society will be deemed to have accepted such activities and their unavoidable risks as being reasonable (but not necessarily as being immune from strict liability for damages caused to those not seeking to directly benefit from a particular risky activity). Yet, as the Wisconsin court notes, the socially important activity must be operated in 'the most careful manner' to minimize the risks to others, and the activity will be deemed reasonable only if the risks to others are not too serious (in the illustration they are *de minimis*) and are greatly (not merely marginally) outweighed by the activity's social utility.

The Wisconsin court's second illustration involves the operation of public emergency vehicles by defendants seeking to alleviate serious threats to people's lives or property. In such emergency situations, the defendant is

⁴³ *Osborne v. Montgomery*, 234 N.W. 372, 376 (Wis. 1931). See also *RESTATEMENT (SECOND) OF TORTS* (1963), § 291, which interprets reasonableness in terms of a risk-utility balance, but emphasizes in comment *d* that the legal rather than the popular evaluation of the social value of the competing interests governs and in comment *e* that '[t]he law attaches utility to general types or classes of acts as appropriate to the advancement of certain [public] interests rather than to the [private] purpose for which a particular act is done, except in the case in which the purpose is of itself of such public utility as to justify an otherwise impermissible risk.'

held to be justified in engaging in practices (e.g., driving at high speeds, on the wrong side of the road, and through traffic signals) that ordinarily would be deemed negligent, but only if she undertakes additional precautions or warnings (such as slowing down at intersections, sounding sirens, and flashing lights) so that those thereby put at risk can, without significant interference with their legitimate activities, avoid being exposed to a substantial or significant risk.⁴⁴ Defendants in emergency situations are thus treated similarly to defendants with physical incapacities, who as we have noted are not required to do what they are incapable of doing but are required to take other steps to avoid exceeding the objectively acceptable level of risk.⁴⁵

3. Defendant Occupiers' On-Premises Risks

In a few situations, where the defendant's own rights are directly implicated, the defendant's private utility is taken into account and a semi-subjective perspective is sometimes applied. One of these situations involves risks, to persons who come on the defendant's property, that result from activities or conditions on the property. Whether formulated as distinct duties or as a single all-encompassing duty of reasonable care, the standard of care varies according to whether the plaintiff was a business invitee, a social guest, a licensee, a child trespasser, or an adult trespasser.⁴⁶ The highest, objective standard of care is required for business invitees, while the lowest, semi-subjective standard of care is required for adult trespassers. Of the various categories of on-premises plaintiffs, only business invitees are afforded approximately the same protection as off-premises plaintiffs.⁴⁷

These distinctions are fairly easily explained and justified under the equal freedom theory, which would not require the defendant to significantly sacrifice her own interests to protect from on-premises risks those (especially adults) who have wrongfully trespassed on her property, or to go beyond providing warnings and moderate safeguards to make the premises safer for licensees or social guests than she is willing and able to make it for herself. This equal-freedom reasoning appears often in the cases. For

⁴⁴ In many jurisdictions, even operators of emergency vehicles are not allowed to depart from the ordinary rules of the road in the absence of explicit statutory authorization, and they must strictly comply with the additional precautions specified in the statute as a minimum requirement for avoiding being held negligent: *see* J. H. Cooper, Annotations, 82 A.L.R.2d 312 (1962) (fire department vehicles), 83 A.L.R.2d 383 (1962) (police vehicles), 84 A.L.R.2d 121 (1962) (ambulances).

⁴⁵ *See supra*, text at note 26.

⁴⁶ As more than one court has noted, the varying standards of reasonable care with respect to on-premises risks do not, as is sometimes assumed, constitute departures from or limitations on the general duty of reasonable care, but rather are elaborations of this general duty in the context of the different types of situations that may arise: *see, e.g.*, *Dillon v. Twin State Gas & Elec. Co.*, 163 A. 111, 113 (N.H. 1932).

⁴⁷ *See FLEMING, supra*, note 5, at 417-53; *PROSSER & KEETON, supra*, note 5, at 386-434.

example, in the House of Lords' decision in *British Railways Board v. Herrington*, Lord Reid stated:

Normally the common law applies an objective test [to defendants]. If a person chooses to assume a relationship with members of the public, say by setting out to drive a car or to erect a building fronting a highway, the law requires him to conduct himself as a reasonable man with adequate skill, knowledge and resources would do. He will not be heard to say that in fact he could not attain that standard. If he cannot attain that standard he ought not to assume the responsibility which that relationship involves. But an occupier does not voluntarily assume a relationship with trespassers. By trespassing they force a 'neighbour' relationship on him. When they do so he must act in a humane manner—that is not asking too much of him—but I do not see why he should be required to do more.

So it appears to me that an occupier's duty to trespassers must vary according to his knowledge, ability, and resources. It has often been said that trespassers must take the land as they find it. I would rather say that they must take the occupier as they find him.

. . . [The occupier] might often reasonably think, weighing the seriousness of the danger and the degree of likelihood of trespassers coming against the burden he would have to incur in preventing their entry or making his premises safe, or curtailing his own activities on his land, that he could not fairly be expected to do anything. But if he could at small trouble and expense take some effective action, . . . I think most people would think it inhumane and culpable not to do that. . . .

It would follow that an impecunious occupier with little assistance at hand would often be excused from doing something which a large organisation with ample staff would be expected to do.⁴⁸

More succinctly, Lord Pearson stated: 'There is also a moral aspect. . . . [T]respassing is a form of misbehaviour, showing lack of consideration for the rights of others. It would be unfair if trespassers could by their misbehaviour impose onerous obligations on others.'⁴⁹

Under the utilitarian efficiency theory, it would seem that (contrary to the cases) defendant landowners should be at least as concerned about on-premises risks as off-premises risks, regardless of the status of the plaintiff, and indeed arguably should be subject to greater (strict or absolute) liability for on-premises risks as the usual cheapest cost avoider. The legal economists' attempts to explain the defendant landowner's greatly relaxed duty of care to trespassers as plaintiffs and, conversely, the related strict (sometimes punitive) liability of trespassers as defendants, rely on a convoluted and *ad hoc* 'encouraging market transactions' rationale that is riddled with exceptions for alleged infeasible bargaining situations.⁵⁰

⁴⁸ [1972] A.C. 877, 898–9; see *id.* at 936–7 (Lord Diplock).

⁴⁹ *Id.* at 925; see *id.* at 909–10 (Lord Morris), 916 & 919–21 (Lord Wilberforce), 924–7 (Lord Pearson), 936–7 & 941–3 (Lord Diplock). See also Schwartz, *supra*, note 26, at 1766–7 & nn. 366 & 367 (noting the American courts' attention to such equal freedom concerns in nineteenth- and twentieth-century on-premises injury cases).

⁵⁰ See, e.g., POSNER, *supra*, note 2, at 46–7, 158–9, 170–1; cf. *infra*, text at note 59.

4. Defendants' Activities Involving Participatory Plaintiffs

Another major category of negligence cases, the 'voluntary DPP' category, encompasses situations in which the defendant (D) put the plaintiff (P) at risk at least partially to benefit the plaintiff (P), and the plaintiff sought to benefit directly from the defendant's risky activity. This category includes situations in which the plaintiffs were customers of, participants in, or willing spectators of the defendant's risky activity. In these situations, the risk will be deemed reasonable even if it was substantial if it was one that the plaintiff implicitly accepted as being worthwhile given the benefits he expected to obtain from the risky activity (including the benefit of not having to pay any increased precaution costs that would likely be passed on to him). Hence, in this context a type of risk-utility test is proper under the equal-freedom theory. But the benefits taken into account are limited to those expected by the typical plaintiff, rather than also including (as the utilitarian efficiency theory would mandate) any independent utility to the defendant or aggregate social utility. Moreover, the comparison of risk and utility is not a simple quantitative comparison of non-weighted factors, as is assumed by the utilitarian efficiency theory. Depending on the values involved, the comparison may be qualitative rather than quantitative, or may involve weighted or lexically ordered factors, or both. For example, rarely, if ever, would serious risks to life or health be deemed outweighed by mere economic benefits.

There are many examples of cases in this category. Among the most common nowadays are suits by a product purchaser or user alleging defective design by the product's manufacturer. A common (but not exclusive) test of defect or reasonableness in such cases is an explicit risk-utility test, which in all but a handful of cases focuses solely on the risks and benefits to the typical consumer, rather than on any independent utility to the defendant or aggregate social utility.⁵¹ In a typical non-product liability case, the plaintiff, a passenger on the defendant's train, apparently fainted in a wash-room and received severe burns on her face when it came into contact with an exposed heating pipe under a water cooler, which pipe could only be reached by persons kneeling or lying down on the floor. Assuming that failing to guard against such an occurrence would be unreasonable if it were 'reasonably foreseeable', the court held that it was not.⁵² The risk concededly was foreseeable and perhaps could have been deemed significant ('*reasonably foreseeable*'). Yet, given the very small risk, it is unlikely that the

⁵¹ See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Tentative Draft No. 2, 1995), § 2 cmt. e at 24 (listing a number of consumer-related risks and benefits as relevant factors, and stating 'it is not a factor . . . that the imposition of liability would have a negative effect on corporate earnings, or would reduce employment in a given industry'); *id.* at 27.

⁵² *Hauser v. Chicago, R.I. & P. Ry.*, 219 N.W. 60, 62 (Iowa 1928).

typical passenger would have been willing to pay, through increased ticket prices, the distributed costs of eliminating the risk by shielding the pipes in every washroom on every train.

5. Paternalistic Defendants

A distinct and infrequently encountered category, the 'involuntary DPP' category, encompasses situations in which the defendant (D) put the plaintiff (P) at risk for what the defendant considered to be the plaintiff's (P's) best interest, but the plaintiff did not consent to or seek to benefit from the creation of the risk. Consistent with the equal-freedom theory but contrary to the utilitarian-efficiency theory, defendants generally are not allowed to do this without the plaintiff's consent, even if the expected benefits allegedly greatly outweigh the risks, unless the plaintiff is incapable of giving consent and there is authorized substituted consent.

The most common cases involve medical treatment. Although some jurisdictions leave to the medical profession the judgement of what risks should be disclosed to the patient, many United States jurisdictions today follow the patient-centered standard, according to which the physician has the duty to disclose risks that would be deemed material by the typical patient, or which the physician otherwise knows or has reason to know are material to the particular patient.⁵³ The patient-centered standard has also been approved by the High Court of Australia and the Supreme Court of Canada,⁵⁴ and was favored by Lords Scarman and Templeman in the British House of Lords' decision in *Sidaway v. Bethlem Royal Hospital*.⁵⁵

However, a bare majority of the Law Lords in *Sidaway* affirmed the Court of Appeal's adoption of the physician-centered medical-practice standard, based on England's more paternalistic approach to doctor-patient relations and a concern that the 'transatlantic approach' was both impractical and 'would do nothing for patients or medicine, although it might do a great deal for lawyers and litigation'.⁵⁶ Nevertheless, the majority in the House of Lords agreed with the minority that the doctor's judgement on proper risk disclosure would have to give way when

⁵³ See, e.g., *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972); *Cobbs v. Grant*, 502 P.2d 1 (Cal. 1972); cf. *Mohr v. Williams*, 104 N.W. 12 (Minn. 1905) (battery). If there was no consent at all to the medical treatment or if the consent was invalid, a battery action is appropriate. However, if the plaintiff was aware of the nature of the treatment and freely assented to it, but was not informed of attendant material risks, a negligence action is appropriate: see, e.g., *Sidaway v. Board of Gov'rs of Bethlem Royal Hosp. & Maudsley Hosp.* [1985] A.C. 871, 883, 885, 892, 894; *Reibl v. Hughes* (1980) 114 D.L.R.3d 1, 10-11 (Can.); *Mink v. University of Chicago*, 460 F. Supp. 713 (N.D. Ill. 1978).

⁵⁴ See *Rogers v. Whitaker*, 109 A.L.R. 625 (Austl. 1992); *Reibl v. Hughes* (1980) 114 D.L.R.3d 1, 12-13 (Can.).

⁵⁵ [1985] A.C. 871, 882, 885-90, 903-5.

⁵⁶ *Sidaway v. Bethlem Royal Hosp. Gov'rs*, [1984] 1 All E.R. 1018, 1027 (C.A.) (Donaldson M.R.); see *id.* at 1030-1 (Dunn L.J.); *aff'd*, [1985] 1 A.C. at 890-5 (Lord Diplock), 895-901 (Lords Bridge and Keith).

necessary to respond fully to a patient's query about the risks involved.⁵⁷ Moreover, Lord Bridge, joined by Lord Keith, stated that, while the issue of proper risk disclosure is 'to be decided primarily on the basis of expert medical evidence', exceptional cases might arise:

[T]he judge might in certain circumstances come to the conclusion that disclosure of a particular risk was so obviously necessary to an informed choice on the part of the patient that no reasonably prudent medical man would fail to make it. . . . The kind of case I have in mind would be an operation involving a substantial risk of grave adverse consequences. In such a case, in the absence of some cogent clinical reason why the patient should not be informed, a doctor, recognising and respecting his patient's right of decision, could hardly fail to appreciate the necessity for an appropriate warning.⁵⁸

Despite the disagreements on the doctor-centered versus patient-centered standard for determining which risks are material to the patient, it is universally recognized that the patient has the right, regardless of the doctor's opinion, to decide whether or not to undergo some medical treatment and that the doctor has a correlative duty to disclose material risks to the patient. This right and duty seem obvious under the equal freedom theory, but they are difficult to explain under the utilitarian efficiency theory.

The legal economist might argue that the medical treatment cases are low transaction-cost situations in which the doctor should be precluded from bypassing (fully informed) market bargaining by failing to disclose risk information that is knowably or foreseeably material to the patient.⁵⁹ But a patient's refusal to undergo some treatment—e.g., a refusal to accept blood transfusions because of religious beliefs or other reasons—may greatly endanger his health and life, thereby creating substantial expected disutility not only to himself but also to others economically or emotionally dependent on him. The transaction costs of negotiating with such affected third parties will generally be very high, yet the competent patient's right to refuse treatment remains clear, even though under the utilitarians' impartial calculus the aggregate benefits to the patient and others of going ahead with the treatment might be thought to greatly outweigh the psychic and/or religious costs to the patient.

6. Plaintiffs' Self-Interested Conduct

We turn now to the plaintiff's contributory negligence. The principal category, the 'PPP' category, encompasses situations such as *Carroll Towing* in which the plaintiff (P) put himself (P) at risk for his own (P's) benefit.⁶⁰ Since we are only concerned with the risk the plaintiff imposed on himself,

⁵⁷ See [1985] 1 A.C. at 895 (Lord Diplock), 898–9 (Lords Bridge and Keith).

⁵⁸ *Id.* at 900; accord, *Bly v. Rhoads*, 222 S.E.2d 783, 787 (Va. 1976).

⁵⁹ *Cf. supra*, text at note 50.

⁶⁰ In *Carroll Towing*, the plaintiff's employee, as a result of his absence for some unknown purpose, put the plaintiff's barge at risk of being damaged or sunk through negligent

no issue of Right is directly involved, but rather only whether the plaintiff failed properly to respect his own humanity and thus also is morally responsible for his injury. When engaged in such purely self-interested behavior, it would be irrational for a person to expose himself to risks which subjectively exceed the expected benefits.

As in the 'voluntary DPP' defendant category, this risk-utility test reflects the equal-freedom approach rather than the utilitarian efficiency approach. Only risks and benefits to the plaintiff are taken into account, rather than (as required by the utilitarian efficiency theory) all risks and benefits to anyone who might be affected by the plaintiff's conduct. The risks and benefits are evaluated from the subjective perspective of the plaintiff (as long as that perspective is not too idiosyncratic), rather than the objective perspective of the ideal prudent person. And the comparison of risks and benefits is not a quantitative measurement and balancing of marginal risks and expected utilities, but rather a common-sense assessment of the relevant risks and utilities, which may be and often are assessed qualitatively or lexically rather than quantitatively.⁶¹

7. Plaintiffs' Self-Sacrificing Conduct

This penultimate category, the 'PPX' category, encompasses situations in which the plaintiff (P) put himself (P) at risk for some third party's (X's) benefit. Under the utilitarian-efficiency theory, the plaintiff should be deemed contributorily negligent if the risks to the plaintiff (and others), objectively considered, outweigh the expected benefit to the third party (and others). Under the equal freedom theory, however, the plaintiff's willingness to sacrifice his own interests to benefit someone else is considered not only reasonable, but also morally praiseworthy, even if (under the utilitarian calculus) the risks to the plaintiff seem much greater than the expected benefit to the third party, as long as the plaintiff's conduct does not constitute lack of respect for his own humanity.

The equal-freedom theory is consistent with the cases, while the utilitarian-efficiency theory is not. Probably the most common situation is when the plaintiff puts himself at risk to rescue some helpless person who has been put in serious danger by the defendant's negligence. In these rescue situations, courts hold that, no matter how much the risk to the plaintiff may seem to exceed the expected benefit to the potential rescuee, the plaintiff's conduct is morally meritorious rather than morally blameworthy or unreasonable unless it was 'foolhardy', 'wanton', 'rash', or 'reckless'.⁶²

mishandling by others: *see* *United States v. Carroll Towing Co.*, 159 F.2d 169, 173-4 (2d Cir., 1947).

⁶¹ *See supra*, text at notes 22-9, 32, 51-2.

⁶² *See, e.g., Baker v. T. E. Hopkins & Son, Ltd.* [1959] 3 All E.R. 225 (C.A.) ('wanton' or 'foolhardy'); *FLEMING, supra*, note 5, at 155-7 ('utterly foolhardy').

When the life of the potential rescuer is at issue, the risk to the plaintiff is considered 'foolhardy' or 'rash' only if there was no real chance of saving the potential rescuer.

One of the best known cases is *Eckert v. Long Island Railroad*,⁶³ which was (mis)used by Terry to illustrate the utilitarian balancing of the five factors that he identified as being relevant to a determination of a defendant's or plaintiff's negligence.⁶⁴ The rescuer in *Eckert* jumped in front of the defendant's negligently driven train to save a child on the tracks, pushing the child off the tracks just barely in time but being hit and killed himself. If we plausibly assume that the lives (L) of the rescuer and the child were equally valuable (although economists might consider the remaining life of the presumably productive adult to be more valuable than that of the as yet unproductive child), the probability of the rescuer's being killed was at least 75 per cent, the probability of the rescuer's rescuing the child was at best 25 per cent, and the probability of the child remaining on the tracks without any rescue attempt was around 90 per cent, then the risk to the rescuer ($0.750 L$) greatly exceeded the expected benefit to the child ($0.25 \times 0.9 L = 0.225 L$). The court nevertheless held that the rescuer's conduct, rather than being contributorily negligent, was morally meritorious, and that it would be contributorily negligent only if it was 'rash or reckless'.⁶⁵ The utilitarian efficiency theorists ignore the *Eckert* court's 'rash or reckless' language and implausibly assume that the risk to the rescuer was less than the expected benefit to the rescuer.⁶⁶

8. Defendants' Failure to Aid or Rescue

The last category, the 'nonfeasance DPD' category, is the reverse of the 'PPX' category that we have just discussed. It encompasses situations in which the defendant failed to aid a person who needed her help, but the defendant's failure to aid was 'nonfeasance' rather than 'misfeasance' since the defendant did not create or worsen the plaintiff's needy condition. The defendant (D) did not *put* the plaintiff at risk for the defendant's benefit, but rather let the plaintiff (P) remain at risk in order to avoid a burden to or loss of benefit by the defendant (D). In such situations, the general common law rule is that the defendant has no legal duty to aid the plaintiff. In civil-law jurisdictions and a few common-law jurisdictions, there is a limited legal (criminal law and sometimes also tort law) duty of 'easy rescue'—i.e., a duty to render aid in emergency situations to a person whose life or health is seriously threatened, if the rescuer can do so without exposing herself to significant risks or burdens. The general no-duty rule in common law jurisdictions is riddled by an expanding list of categories of persons held

⁶³ 43 N.Y. 502 (1871).

⁶⁴ See Terry, *supra*, note 30, at 42–4; *supra*, text at note 30.

⁶⁵ 43 N.Y. at 505–6.

⁶⁶ See LANDES & POSNER, *supra*, note 2, at 100–1; Terry, *supra*, note 30, at 43–4.

subject to a duty of easy rescue, usually but not always based on some 'special relationship' with the plaintiff or the plaintiff's assailant.⁶⁷

Although it might seem efficient to impose a duty to aid whenever the expected benefits to the plaintiff outweigh the risk or burden to the defendant, if applied generally this duty could promote inefficient general laziness (the economists' 'moral hazard' problem). Thus, utilitarian efficiency theory probably would reject a general moral or legal obligation of beneficence or charity, and limit the defendant's duty to emergency situations involving significant risks to the plaintiff's life or health. It has been suggested that utilitarians might also exclude as practically unenforceable (and hence economically wasteful) any requirement that the defendant impose on herself a significant risk to her own life or health.⁶⁸ However, this exclusion would concede the lack of acceptance of the utilitarian moral theory, since under that theory a defendant should willingly incur such a risk if it were outweighed by the expected benefit to the plaintiff. In any event, utilitarian efficiency theory would require a defendant to impose significant non-health threatening burdens on herself in emergency situations involving significant risks to the plaintiff's life or health if the expected benefits to the plaintiff exceeded the burdens on her.⁶⁹ Yet no jurisdiction imposes such a duty of non-easy rescue.

Landes and Posner put forth various efficiency arguments to try to explain the lack of a general duty to attempt rescue. One argument is that a 'causation' (misfeasance) requirement, although usually irrelevant to efficiency determinations, is needed (for unexplained reasons) in this one context to avoid excessive administrative costs in identifying who would have been efficient or cheapest-cost rescuers. Another implausible argument is that a duty to rescue would inefficiently reduce the number of potential rescuers because people would avoid activities which might give rise to a duty to rescue. Yet *any* activity might give rise to a duty to rescue; to completely avoid such a duty one would have to cease to exist. Conversely, given the rare occurrence of emergency-rescue situations, even a duty of non-easy rescue should have little impact on people's choice of activities. A third implausible argument is that a duty to rescue would create a 'moral hazard' problem: that, relying on the duty to rescue, people would take insufficient precautions for their own safety or even place themselves in exigent circumstances in order to be able to sue for non-rescue.⁷⁰

The lack of a legal duty of non-easy rescue is easily explained and justified under Kantian moral theory. No person can be used solely as a means for the benefit of others, which means that no one can be legally

⁶⁷ See PROSSER & KEETON, *supra*, note 5, at 373-7 & nn. 21 & 31.

⁶⁸ See Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 280-6 (1980).

⁶⁹ See POSNER, *supra*, note 2, at 174.

⁷⁰ See *id.*; LANDES & POSNER, *supra*, note 2, at 143-6.

required to go beyond the requirements of Right (corrective justice and distributive justice) if such an obligation would require a significant sacrifice of one's autonomy or freedom for the alleged greater good of others. Corrective justice defines the scope of one's equal negative freedom not to have one's person or existing stock of resources adversely affected by others. It is thus limited to situations involving misfeasance, in which the defendant's conduct has put the person or property of the plaintiff in a worse position than if the defendant had not been present. Although distributive justice obligates persons with more than their just share of society's resources to redistribute that excess to those who have less than their just share, these distributive justice duties generally are multilateral rather than bilateral and thus are necessarily or best implemented through legislative and administrative (re)distribution schemes.⁷¹ In addition to these requirements of Right, Kant specifies a duty of beneficence as one of the principal duties of virtue, but he insists that this is solely an ethical duty because it is only specifiable as an indeterminate 'broad' duty, which varies depending on each would-be benefactor's own resources and needs, rather than as a determinate (and hence legally enforceable) 'strict' duty.⁷²

Thus Kantian moral philosophy, while recognizing a legal duty of distributive justice and a purely ethical duty of beneficence, rejects a general legal duty of non-easy rescue or beneficence. It is often thought to go further and to support the no-duty rule, rejecting even a duty of easy rescue.⁷³ Yet this is far from clear. Kant himself never addressed the issue of a limited legal duty of easy rescue. Although Kant sometimes said that the issue of need is irrelevant to Right (legal obligation), he said this in the context of distinguishing the solely ethical duty of beneficence.⁷⁴ Given Kant's fundamental focus on equal individual freedom, both negative and positive, it would seem that Kant's moral philosophy would support (indeed require) a legal duty of easy rescue, which by definition would not entail any significant burden on the defendant's substantive freedom and yet would be essential to the plaintiff's continued freedom, if such a duty could be determinately specified and practicably enforced. This legal duty could be based, given the exigent circumstances, either on distributive justice's securing of

⁷¹ See Wright, *supra*, note 1.

⁷² 'How far [the duty] should extend depends, in large part, on what each person's true needs are in view of his sensibilities, and it must be left to each to decide this for himself. For a maxim of promoting others' happiness at the sacrifice of one's own happiness, one's true needs, would conflict with itself if it were made a universal law. Hence this duty is only a *wide* one; the duty has in it a latitude for doing more or less, and no specific limits can be assigned to what should be done. The law holds only for maxims, not for specific actions:' KANT, *supra*, note 28, at *393; see *id.* at *390, 452-4.

⁷³ See Ernest J. Weinrib, *Law as a Kantian Idea of Reason*, 87 COLUM. L. REV. 472, 488-9 (1987).

⁷⁴ See, e.g., KANT, *supra*, note 28, at *230.

equal positive freedom or directly on the underlying foundational norm of equal individual freedom.

The primary objection to a duty of easy rescue, even by ardent libertarians such as Richard Epstein, has been the supposed indeterminateness and impracticality of implementing such a duty. Epstein suggests the intractable difficulty of deciding who should be held liable when many people were present who easily could have aided the plaintiff.⁷⁵ Yet doctrines such as joint and several liability can be used here as in other multiple defendant situations. Epstein also suggests that it is difficult if not impossible to distinguish easy-rescue situations from non-easy-rescue situations. For example, he argues that a duty of easy rescue would require most persons to respond affirmatively to a charitable appeal for \$10 'to save the life of some starving child in a country ravaged by war'.⁷⁶ But this is not true: if one had such a duty, one would be forced to respond to repeated indistinguishable claims that would quickly add up to a significant burden. The feasibility of implementing a legal duty of easy rescue seems to be demonstrated by its actual implementation in civil-law jurisdictions.

Nevertheless, there is a legitimate concern that no legal duty to rescue should be imposed in nonfeasance situations that would significantly interfere with the defendant's Right of equal freedom. I believe this concern justifies applying a subjective perspective and raising the burden of proof from 'a preponderance of the evidence' to 'clear and convincing' evidence when determining whether the rescue attempt actually would have been easy (i.e., would not have been a significant intrusion on the defendant's autonomy). In addition, I acknowledge some doubts about the justice of imposing extensive tort damages which might bankrupt the defendant when the defendant is being charged merely with nonfeasance (failure to benefit someone else) rather than misfeasance (affirmatively putting someone else at risk). Such doubts might suggest that only minor criminal penalties or significantly restricted tort damages be made available for breach of the duty of easy rescue.

V. CONCLUSION

The Kantian-Aristotelian theory of legal responsibility, which is based on the normatively attractive premise of equal individual freedom, explains, justifies, and illuminates the various aspects of the multiple standards of care in negligence law. On the other hand, the utilitarian-efficiency theory, which treats plaintiffs and defendants as indistinguishable and fungible

⁷⁵ See Richard A. Epstein, *Causation and Corrective Justice: A Reply to Two Critics*, 8 J. LEGAL STUD. 477, 491 (1979).

⁷⁶ See Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL. STUD. 151, 198-9 (1973).

addends in the maximization of aggregate social welfare, is a complete failure. It not only is normatively unattractive, as sometimes is conceded, but also, contrary to what is generally assumed, fails to explain or justify any of the various aspects of the standards of care in negligence law. This failure is a critical one for the utilitarian-efficiency theory of law, which generally has offered tort law, and more particularly negligence law, as the prime illustration of the theory's own utility.

