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Negligence in the Courts: Introduction and Commentary, in Symposium, Negligence in the Courts: The Actual Practice

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NEGLIGENCE IN THE COURTS: INTRODUCTION AND COMMENTARY[†]

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I. INTRODUCTION

The drafting of the basic negligence provisions in the *Restatement Third of the Law of Torts* has brought into sharp focus the increasing controversy in recent years over the definition of negligent conduct that should be and actually is employed by the courts. Until fairly recently, there seemed to be widespread agreement that the definition employed by the courts is an aggregate-risk-utility test,¹ as apparently stated in section 291(1) of the first Restatement and section 291 of the Restatement Second:

Where an act is one which a reasonable man would recognize as involving risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.²

The aggregate-risk-utility test is often referred to as the “Hand formula”—a reference to Judge Learned Hand’s mathematical formulation of the test in his 1947 opinion in *United States v. Carroll Towing Co.*³ According to Hand’s formula, a person’s conduct is negligent if and only if the risk (P times L) created by the conduct is greater than its utility (B), where P is the probability of an injury

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1. See, e.g., DAN B. DOBBS, *THE LAW OF TORTS* §§ 144–146 (2000); JOHN G. FLEMING, *THE LAW OF TORTS* 114–19 (8th ed. 1992); 3 FOWLER V. HARPER ET AL., *THE LAW OF TORTS* § 16.9 at 467–80 & n.37 (2d ed. 1986); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 31 at 170–73 & n.46 (5th ed. 1984); WILLIAM J. STEWART, *DELICT* 61–62 (2d ed. 1993) (Scottish law); FRANCIS TRINDADE & PETER CANE, *THE LAW OF TORTS IN AUSTRALIA* 414–18 (2d ed. 1993); cf. B.S. MARKESINIS, *THE GERMAN LAW OF TORTS: A COMPARATIVE INTRODUCTION* 74 (3d ed. 1994). But see text accompanying note 11 *infra*.

2. *RESTATEMENT OF TORTS* § 291(1) (1934); *RESTATEMENT (SECOND) OF TORTS* § 291 (1965).

3. 159 F.2d 169 (2d Cir. 1947).

occurring, L is the magnitude of the injury, and B is the burden or cost that would have to be borne to avoid engaging in the conduct, including the foregone benefits expected from engaging in the conduct.⁴

However, the general assumption that the authors of Restatement section 291 or Judge Hand meant to adopt a rigorous aggregate-risk-utility test of negligent conduct is questionable. Although it is now rarely noted, the first and second Restatements attached significant qualifications and exceptions to their risk-utility test, including the requirement that the utility of the conduct in question be assessed by its social value as recognized by the law. There is even reason to believe that the drafters of the first Restatement had in mind a non-balancing, prohibitive-cost test, which was designed to deter juries from treating as negligent the inherent, irreducible risks of socially valuable activities.⁵ As for the Hand formula, Judge Hand repeatedly cautioned against a literal reading of the formula. He viewed it as a mere pointer toward the usually relevant factors,⁶ with the ultimate resolution of the negligence issue being based on independent considerations of justice. In an opinion in a labor law case in 1944, he stated:

[T]he same question [of considering the costs and benefits to the different parties] often arises in the law of torts; e.g. negligence, trade-marks, unfair trade, indeed all questions which depend on what conduct is 'reasonable.' In all these cases the court balances

4. *Id.* at 173.

5. See Richard W. Wright, *Justice and Reasonable Care in Negligence Law*, 47 AM. J. JUR., at pt. II (forthcoming 2002) [hereinafter Wright, *Justice and Reasonable Care*].

6. In *Moisan v. Loftus*, 178 F.2d 148 (2d Cir. 1949), Hand stated:

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

Id. at 149; see *Conway v. O'Brien*, 111 F.2d 611, 612 (2d Cir. 1940) ("[The three factors] are practically not susceptible of any quantitative estimate, and the second two 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.").

the interests against each other, and awards priority as seems to it just.⁷

Recent investigations of the history of the aggregate-risk-utility test have rejected Richard Posner's claim that the courts implicitly used the test long before its apparent adoption in the first Restatement.⁸ These studies conclude that, with a few possible exceptions, the courts did not use the test, explicitly or implicitly, prior to its apparent adoption in the first Restatement, and that the Restatement's apparent adoption of the test had a minimal impact on the courts.⁹ Even today, apart from one minor exception, state pattern jury instructions do not refer to the aggregate-risk-utility test, but rather define negligence as a failure to exercise the "ordinary care" or "reasonable care" that would be exercised by the "reasonably prudent" or "reasonably careful" or "ordinary prudent" person.¹⁰ Torts treatises, although generally assuming that the aggregate-risk-utility test is the test that is actually employed by the courts, increasingly express significant reservations and qualifications about its use.¹¹

Although a number of justice-oriented scholars once argued that the aggregate-risk-utility test is consistent with and indeed required for the attainment of justice, they now almost universally agree that it is inconsistent with the principles of justice.¹² This should be clear with only a little reflection. It is not properly respectful of the equal dignity and autonomy of others, and hence not just, for you to impose substantial unaccepted risks of injury or loss upon them merely for

7. Republic Aviation Corp. v. N.L.R.B., 142 F.2d 193, 196 (2d Cir. 1944) (emphasis added). Stephen Gilles first noted this illuminating statement by Judge Hand. See Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813, 846 (2001) [hereinafter Gilles, *Hand Formula Balancing*].

8. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 85-148 (1987); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

9. See Gilles, *Hand Formula Balancing*, *supra* note 7, at 822, 837-43, 845 n.104; Stephen G. Gilles, *The Emergence of Cost-Benefit Balancing in English Negligence Law*, 77 CHI.-KENT L. REV. 489, 501-04 & nn.38 & 40 (2002) (in this issue) [hereinafter Gilles, *English Negligence Law*]; Michael D. Green, *Negligence = Economic Efficiency: Doubts*, 75 TEX. L. REV. 1605, 1615-31 (1997); Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1279 n.168 (2000); Patrick J. Kelley, *The Carroll Towing Company Case and the Teaching of Tort Law*, 45 ST. LOUIS U. L.J. 731 (2001).

10. See Stephen G. Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1015, 1016-20 (1994) [hereinafter Gilles, *The Invisible Hand Formula*]; Patrick J. Kelley & Laurel A. Wendt, *What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions*, 77 CHI.-KENT L. REV. 587 (2002) (in this issue); text accompanying notes 69-70, 75-78 *infra*.

11. See Wright, *Justice and Reasonable Care*, *supra* note 5, at pt. II.

12. See *id.* at pt. V; Richard W. Wright, *The Standards of Care in Negligence Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 249, 252-54 (David G. Owen ed., 1995) [hereinafter Wright, *Standards of Care*].

your own personal benefit, even if your gain will exceed their loss. Indeed, corporations and individuals who are thought to have done so are at great risk of being held liable for punitive damages.¹³ Conversely, even though it is morally praiseworthy for a person voluntarily to impose significant burdens or risks upon herself in order to attempt to rescue another from a dangerous situation that she did not create, it is not just to legally require her to do so, even if the risk to her seems to be substantially less than the expected utility of the rescue attempt.¹⁴ If she nevertheless decides to expose herself to serious risk in an attempt to save another helpless person from a dangerous situation that was negligently created by a third party, and she is injured or even killed while making the attempt, she will properly be praised as a hero rather than being judged contributorily negligent, even if the risk of her suffering injury was greater than the chance of her saving the other, unless her attempt was foolhardy, rash, wanton, or reckless because there was no fair chance of saving the other.¹⁵ In sum, although it makes no difference under the aggregate risk-utility test who is getting the benefits and who is suffering the losses, or who is putting whom at risk for whose benefit, it makes a big difference as a matter of common morality and the principles of justice that are a part of that common morality.¹⁶

Considering all of the above, one might expect that the drafters of the negligence provisions in the Restatement Third would take a hard look at the actual resolution of the negligent-conduct issue in the courts in the various types of recurring situations, and that, having done so, they would back off from or at least further qualify the risk-utility balancing language that is contained in the first two Restatements. At first glance, they seem to have done so. Although the blackletter definition of negligence and its opposite, reasonable care, in section 3 of the draft Restatement Third does not mention (as it should) the importance of considering the respective rights positions of the parties, it lists the three Hand-formula factors as primary rather than exclusive factors to be considered, and it does not explicitly incorporate them into an aggregate-risk-utility test:

13. See Gilles, *The Invisible Hand Formula*, *supra* note 10, at 1046–47; Wright, *Standards of Care*, *supra* note 12, at 263; Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013, 1035–38 (1991).

14. See RESTATEMENT (SECOND) OF TORTS § 291 cmt. f, § 314 & cmt. c (1965).

15. See Wright, *Standards of Care*, *supra* note 12, at 270–71.

16. See *id.*, *passim*.

A person acts with negligence if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that it will result in harm, the foreseeable severity of the harm that may ensue, and the burden that would be borne by the person and others if the person takes precautions that eliminate or reduce the possibility of harm.¹⁷

However, the seeming retreat from the prior Restatements' apparent aggregate-risk-utility test turns out to be a mirage. In fact, the comments and notes to section 3 in the draft Restatement Third go much further than the first two Restatements in explicitly setting forth an unlimited and unqualified cost-benefit version of the aggregate-risk-utility test. Comment *e* states:

Balancing risks and benefits. Insofar as this section identifies primary factors for ascertaining negligence, it can be said to suggest a "risk-benefit test" for negligence, where the "risk" is the overall level of the foreseeable risk created by the actor's conduct and the "benefit" is the advantages that the actor or others gain if the actor refrains from taking precautions. (Hence this benefit is the same as the burdens which the precautions, if adopted, would entail.) The test can also be called a "cost-benefit test," where "cost" signifies the cost of precautions and the "benefit" is the reduction in risk those precautions would achieve. Overall, this section can be referred to as supporting a "balancing approach" to negligence.

The balancing approach rests on and expresses a simple idea. Conduct is negligent if its disadvantages outweigh its advantages, while conduct is not negligent if its advantages outweigh its disadvantages. The disadvantage in question is the magnitude of the risk that the conduct occasions: as noted, the phrase "magnitude of the risk" includes both the foreseeable likelihood of harm and the foreseeable severity of harm, should an incident ensue. The "advantages" of the conduct relate to the burdens of risk prevention that are avoided when the actor declines to incorporate some precaution. The actor's conduct is hence negligent if the magnitude of the risk outweighs the burden of risk prevention. . . .¹⁸

Moreover, the draft Restatement abandons the prior Restatements' emphasis on evaluating the affected interests in terms of their social value as recognized by the law. All such language has been completely eliminated. The draft Restatement defines the legally cognizable benefits as "the advantages that the actor or others gain if the actor refrains from taking the precautions . . . [including] the

17. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 3 (Tentative Draft. No. 1, May 2001) [hereinafter DRAFT RESTATEMENT THIRD].

18. *Id.* § 3 cmt. e at 41.

burdens which the precautions, if adopted, would entail,” and it notes that the burden of precautions [i]n many cases . . . is a financial burden borne originally by the actor, though likely passed on, to a substantial extent, to the actor’s customers.”¹⁹ While comment *h* to section 3 admits that “in certain cases there may be burdens of risk prevention that negligence courts properly discount or decline to acknowledge,” giving as an example the foregone excitement that some motorists might obtain by racing a railroad train to a highway crossing, it asserts that “[i]n most circumstances, negligence law takes into account and credits whatever burdens of risk prevention are actually experienced by the actor and others.”²⁰ The reporters’ note to comment *h* erroneously claims that the relevant comments in the prior Restatements “generally equate[] social value with private value” and “deal[] with ‘social value’ in ways that render uncertain any difference between social value and ordinary private value.”²¹ It also erroneously asserts that “modern cases applying the negligence standard have given little or no attention to the Second Restatement’s distinction between ‘legal opinion’ and ‘popular opinion’ and its distinction between ‘social value’ and private value,”²² adding, “To be sure, this lack of attention may not be inconsistent with the Restatement Second, which recognizes the distinctions but explains them in ways that diminish their significance.”²³

In sum, as commentators have universally stated in criticizing the draft Restatement Third,²⁴ the draft explicitly adopts an almost totally

19. *Id.* at 41–42.

20. *Id.* § 3 cmt. h at 47.

21. *Id.* § 3 cmt. h, Reporters’ Note, at 69–70; see Wright, *Justice and Reasonable Care*, *supra* note 5, at pts. II & III.

22. DRAFT RESTATEMENT THIRD, *supra* note 17, § 3 cmt. h, Reporters’ Note, at 70. The reporters even overlook statements in modern cases on which they rely. For example, the court in *Phillips v. Croy*, 363 N.E.2d 1283 (Ind. App. 1977) (cited in DRAFT RESTATEMENT THIRD, *supra*, § 3 cmt. d, Reporters’ Note, at 55), noting that “[t]he definition of ‘reasonableness’ includes ‘just,’ or ‘proper,’” emphasized that “the determination of what constitutes ‘reasonableness’ or the ‘reasonable man’ includes a law policy element” and stated “[i]f it were purely a fact standard, then would not the conclusions of the trier of fact be unassailable and community polls as to what is reasonable be outcome determinative?” *Id.* at 1285 & nn.1–2 (citations omitted); see text accompanying note 78 *infra*.

23. DRAFT RESTATEMENT THIRD, *supra* note 17, § 3 cmt. h, Reporters’ Note, at 70.

24. See, e.g., Gilles, *Hand Formula Balancing*, *supra* note 7, at 854; John C.P. Goldberg, *Introduction*, 54 VAND. L. REV. 639, 643 (2001); Stephen Hetcher, *Non-Utilitarian Negligence Norms and the Reasonable Person Standard*, 54 VAND. L. REV. 863, 864, 872 n.38 (2001); Stephen R. Perry, *Cost-Benefit Analysis and the Negligence Standard*, 54 VAND. L. REV. 893, 895–96 (2001); Kenneth W. Simons, *The Hand Formula in the Draft Restatement (Third) of Torts: Encompassing Fairness As Well As Efficiency Values*, 54 VAND. L. REV. 901, 915–17, 936–39 (2001).

unconstrained, reductionist cost-benefit test of reasonableness in negligence law. The reporters claim to find support for this reductionist cost-benefit test in the American and British case law, jury instructions, treatises, and articles by interactive (“corrective”) justice scholars as well as economic efficiency scholars, and they claim that it is supported by principles of fairness and justice as well as overall social welfare.²⁵

As I discuss in another article, the reporters’ assertion that their aggregate-risk-utility test is normatively supported by principles of fairness and justice is simply not plausible, as almost all interactive justice scholars now agree.²⁶ This symposium was organized to evaluate the reporters’ descriptive claims, by investigating and reporting on the way(s) in which the courts understand and apply the negligent-conduct requirement in actual practice. Although the primary focus is meant to be descriptive, the theoretical implications of the descriptive findings are discussed. The symposium was organized on short notice, and I am very grateful to the outstanding scholars who agreed to participate and who produced such thorough and useful articles.

Stephen Gilles’s article adds to his previous valuable investigations of the historical development and application of the negligence concept in the Anglo-American common law.²⁷ He focuses this time on British negligence cases. He finds that in Britain as in the United States there was minimal use of cost-benefit language or analysis by the courts prior to the middle of the twentieth century, when references to the burdens of precaution became more frequent, especially in workplace injury cases. His careful exposition of the British cases discloses that the references to the burdens of precaution have generally been part of an explicit or implicit prohibitive-cost analysis, rather than an aggregate-risk-utility balancing analysis. For the limited categories of cases that he investigated, almost all of which involve defendants putting others at risk, a defendant is deemed negligent for failing to take precautions unless the risk was relatively

25. See DRAFT RESTATEMENT THIRD, *supra* note 17, § 3 cmt. d, Reporters’ Note, at 54–63. For discussion of “interactive justice” as a term preferable to “corrective justice,” see Richard W. Wright, *The Principles of Justice*, 75 NOTRE DAME L. REV. 1859, 1883 & n.113 (2001) [hereinafter Wright, *The Principles of Justice*].

26. See Wright, *Justice and Reasonable Care*, *supra* note 5, pts. III–V; text accompanying notes 12–16 *supra*.

27. See Gilles, *Hand Formula Balancing*, *supra* note 7; Gilles, *The Invisible Hand Formula*, *supra* note 10; Stephen G. Gilles, *Inevitable Accident in Classical English Tort Law*, 43 EMORY L.J. 575 (1994).

small and the burden of further precautions would be great and would result in a significant adverse impact on the desired benefits that the activity provides to those (such as the defendant's employees) who are being put at risk or to everyone in society. Gilles also confirms, as I have previously claimed, that the applicable standard of care varies depending on the relationship between the parties, and in particular depending on who is putting whom at risk for whose benefit.²⁸

Patrick Kelley and Laurel Wendt investigate the "pattern" jury instructions that judges in the various states use to instruct juries on the negligent-conduct issue. They have performed an invaluable service for practicing attorneys, judges, and tort scholars by successfully undertaking the difficult task of gathering, collating, and analyzing all of the states' current pattern jury instructions on the negligent-conduct issue. The pattern instructions are presented in an appendix to their article. In their article, they summarize the history of and rationales for the adoption of pattern jury instructions, categorize and analyze the various types of pattern instructions on the negligent-conduct issue, and discuss the compatibility of the instructions with various theories regarding the proper definition of negligent conduct. They find that the instructions, which generally focus on the "ordinary" or "reasonable" care exercised by the "reasonably prudent," "reasonably careful," or "ordinary prudent" person and, with one very limited exception, make no mention of risk-utility or cost-benefit balancing, are incompatible with the aggregate-risk-utility interpretation of negligent conduct.²⁹

Ron Allen and Ross Rosenberg's investigation of American courts' employment of the aggregate-risk-utility test of negligent conduct is a fortuitous occurrence, since neither of them specializes in tort law. They were drawn to the negligent-conduct issue as part of their ongoing study of the interrelationship of legal theory and legal practice. Noting that a significant portion of general "top-down" legal theories misconceive the nature of the legal phenomena they are meant to explain, they hypothesize that certain areas of the law—those characterized by "ambiguity" (indefiniteness or gaps in the law that are not resolved until a decision is reached in a particular dispute), unpredictability ("computational intractability" due to the complexity of relevant considerations), and "common-sense"

28. See Gilles, *English Negligence Law*, *supra* note 9; text accompanying notes 39–65 *infra*.

29. See Kelley & Wendt, *supra* note 10; text accompanying notes 66–93 *infra*.

understanding and reasoning (rather than the application of special expertise)—are not amenable to modeling or explanation through such general “top-down” legal theories.³⁰ They view negligence law, with its focus on reasonableness and its applicability to a broad range of accidental harms, as an example of such an area of the law, and they contrast it with antitrust law.³¹ After noting courts’ and legislatures’ general disregard of theoretical scholarship, as opposed to doctrinal scholarship,³² they focus specifically on the extent to which courts resort to the general principles of either of the two primary, competing general theories of tort liability—the efficiency theory and the interactive (“corrective”) justice theory—when resolving the negligent-conduct issue in particular cases. While they present substantial evidence of the American courts’ lack of use of the Hand formula’s aggregate-risk-utility test, which is championed by efficiency theorists, their only evidence of the American courts’ alleged lack of resort to the principle of interactive justice is the lack of any significant change in jury instructions as a result of the outpouring of theoretical interactive justice scholarship in the last thirty years.³³

Unlike the other contributors to this symposium, Anita Bernstein does not address the substantive criteria of reasonableness that are employed by the courts. She focuses instead on the important yet relatively neglected issue of the perspectives—objective or subjective—that are used when applying the substantive criteria to evaluate individuals’ conduct in different types of situations. She elaborates a novel communities-of-constraint explanation for the courts’ application of a more subjective perspective, rather than the usual objective perspective, to plaintiffs and certain categories of defendants, and she criticizes the draft Restatement Third’s rationales and its failure to recognize the more subjective perspective that is often applied to plaintiffs, especially mentally deficient plaintiffs.³⁴

This symposium initially was supposed to have two other contributors, Ellen Bublick and me. Bublick, expanding on her earlier valuable discussion of the (improper) application of the contributory

30. See Ronald J. Allen & Ross M. Rosenberg, *Legal Phenomena, Knowledge, and Theory: A Cautionary Tale of Hedgehogs and Foxes*, 77 CHI.-KENT L. REV. 683, 683–88 (2002) (in this issue).

31. See *id.* at 684–89, 706–07.

32. See *id.* at 690–95.

33. See text accompanying notes 94–163 *infra*.

34. See Anita Bernstein, *The Communities That Make Standards of Care Possible*, 77 CHI.-KENT L. REV. 735 (2002) (in this issue); text accompanying notes 164–244 *infra*.

negligence defense to rape victims,³⁵ planned to discuss the standards the courts apply in a variety of situations to determine whether a plaintiff's contributory conduct was negligent. Unfortunately, she had to withdraw from the symposium for compelling reasons beyond her control. My expected contribution was to be a detailed examination of the cases cited in the reporters' notes of the draft Restatement Third that allegedly show widespread judicial acceptance and use of the aggregate-risk-utility test of negligent conduct. Being unable to timely complete the written analysis of the many cited cases, I had to withdraw that article, which will be published elsewhere.

However, I can report here the substance of my not-quite-completed analysis of the cited cases: in very few (if any) of the cases that are cited by the reporters for the draft Restatement Third did the courts actually use the aggregate-risk-utility test to resolve the negligence issue. In at least one of the cited cases, the court explicitly rejected the Restatement's aggregate-risk-utility test.³⁶ In a substantial number of the cases, there was no reference to risk-utility balancing. In all but a few cases, the references to risk-utility balancing that did occur were mere window-dressing. In those cases in which the courts purported to apply risk-utility balancing, the actual holdings usually are inconsistent with risk-utility balancing and are based on other (justice-related) grounds. This is true even for the two judges most identified with the aggregate-risk-utility test of negligence: Learned Hand and Richard Posner.³⁷

As a substitute for my planned contribution, I provide below more detailed summaries and commentaries on the articles by the other contributors, hopefully in a manner that ties the several articles together in furtherance of the overall objective of this symposium: shedding light on the conception of negligent-conduct that prevails in actual practice in the courts. As a further contribution to that effort, I include at an appropriate point a discussion of the previously unpublished results of empirical studies that I conducted in 1994 on the American courts' actual use of the aggregate-risk-utility test, partially revised and elaborated for this symposium.³⁸ At the end of this *Introduction and Commentary*, I propose for consideration by the

35. Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413 (1999).

36. See text accompanying notes 110–11 *infra*.

37. See Richard W. Wright, *Hand, Posner, and the "Hand Formula"*, 4 THEORETICAL INQUIRIES L. (forthcoming 2002).

38. See text accompanying notes 108–20, 124–27, 135–57 *infra*.

American Law Institute, and independently by the courts, revised blackletter statements on the evaluation of persons' alleged negligent conduct, which I believe are more descriptively accurate and normatively attractive than the blackletter sections and accompanying comments in the draft Restatement Third.

II. STEPHEN GILLES: BRITISH NEGLIGENCE CASES

Stephen Gilles focuses on British negligence cases for two cogent reasons. First, in contrast to the unexplained (and little studied) jury findings on the negligent-conduct issue in the United States, which generally are based on an unelaborated "reasonable prudent person" instruction and are subject to very deferential judicial review, the almost total abandonment of the use of the jury in civil cases in Britain during the first third of the twentieth century has required that British trial judges make and explain findings on the negligent-conduct issue, and these findings by the trial judges are subject to less deferential review than that accorded (in Britain or the United States) to juries' unexplained findings. Thus, British cases generally will result in more elaboration of the standards that are employed to evaluate alleged negligent conduct and of the actual application of those standards to the facts in the particular case.³⁹

Second, Gilles notes, various scholars have relied on the British cases to support their claims, on the one hand, that the courts accept the Hand formula's aggregate-risk-utility test of negligent conduct and, on the other hand, that the courts reject the Hand formula's aggregate-risk-utility test and instead adopt one or more tests based on the concept of interactive justice.⁴⁰ An in-depth look at the British cases can usefully evaluate these competing claims.

Gilles identifies three competing conceptions of a general test of negligence that have a plausible basis in the British cases: (1) a "substantial foreseeable risk" approach, according to which an actor is "negligent—regardless of the difficulty of taking additional precautions—for creating substantial, reasonably foreseeable risks of harm to others"; (2) a "cost-benefit balancing" approach, which Gilles equates with the familiar Hand-formula test, according to which an actor is negligent if and only if "the burden of avoiding a reasonably foreseeable risk is outweighed by the benefits of doing

39. See Gilles, *English Negligence Law*, *supra* note 9, at 489–90.

40. See *id.* at 491, 499–500.

so”; and (3) a “disproportionate-cost balancing” approach, according to which an actor is negligent for creating a reasonably foreseeable risk of harm to others “unless the burden of precautions [required] to avoid [the risk] would have been ‘disproportionate’ to [i.e., much greater than] the risk.”⁴¹

Gilles correctly states that I believe that American as well as British courts rarely employ the Hand formula’s “cost-benefit balancing” test, but rather employ different tests (some of which “leave room for balancing”) in different types of situations.⁴² However, Gilles incorrectly states that “[Wright] appears to agree with Weinrib that the substantial risk approach is the norm, and balancing the exception(s).”⁴³ In the article of mine that he cites, I claimed that a version of the “substantial foreseeable risk” test applies only in situations in which the defendant is engaging in the risky conduct solely for the *purely private* benefit of the defendant or some third party. In all other contexts, I describe quite different tests, all of

41. *Id.* at 490–91; *see id.* at 496–98.

42. *Id.* at 500 (citing Wright, *Standards of Care*, *supra* note 12); *see id.* at 566–69.

43. *See id.* at 500 (citing Wright, *Standards of Care*, *supra* note 12). Michael Green, in an otherwise excellent article, has similarly misstated my position. *See* Green, *supra* note 9, at 1625 n.90 (quoting Wright, *supra*, at 263). Green also states that I view the risk-utility test for defective product designs as a “true risk-balancing test that balances the risk of the design to consumers with the benefits that the design provides,” and he wonders “why, if it is ‘highly doubtful’ that courts can do the marginal analysis required by [the economic efficiency interpretation of] the Hand formula in negligence cases, as Wright claims, that they can do it in design defect cases.” *See* Green, *supra*, at 1611 n.28. He again fails to note my explicit contrary statements:

[I]n this [participatory plaintiff] 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 [and the Hand formula] 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.

Wright, *supra*, at 267 (citing language from the *Restatement Third of Torts on Products Liability* that affirms such a limited, consumer-oriented, “risk-utility” test for defective product designs); *see id.* at 270 (“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.”).

which *consider* certain benefits in addition to the risks (depending on who is putting whom at risk for whose benefit and the acceptability of the risk to those being put at risk), but none of which employ unlimited cost-benefit balancing or, often, any balancing.⁴⁴

To properly understand Gilles's descriptive claims, not simply with respect to my position but more importantly with respect to the British cases, one must pay careful attention to his very broad and inconsistent use of the word "balancing" and the phrase "cost-benefit balancing." References to "balancing" tests of negligence, especially when referring to the Hand formula, are generally understood to mean a literal or "straight" balancing of aggregate risks or costs against aggregate utilities or benefits, according to which the actor is negligent if and only if the aggregate risks or costs are greater (by whatever amount) than the aggregate utility or benefits.⁴⁵ As we have noted, the draft Restatement Third's "balancing" test of negligent conduct adopts such a rigorous (but not necessarily marginal) comparison of total risks and benefits.⁴⁶ It thus is potentially misleading to use the term "balancing" to refer to any test of negligence, such as Gilles's so-called "disproportionate-cost balancing" test or several of the tests that I have attributed to the courts, that does not assume such literal or "straight" balancing.⁴⁷

44. See Wright, *Standards of Care*, *supra* note 12, at 261–74. Gilles assumes that the "foreseeable significant risk" test of negligence does not require that there have been some feasible means for the defendant to avoid creating the risk. See Gilles, *English Negligence Law*, *supra* note 9, at 501–02 n.34. However, such ability to affect the foreseeable risk through one's conduct constitutes the required volitional-conduct aspect of "tortious conduct," which must be satisfied prior to any inquiry into whether such volitional conduct was negligent or otherwise tortious, as all proponents of the "foreseeable significant risk" test have assumed. See, e.g., OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 76–78 (Mark DeWolfe Howe ed., Little, Brown & Co. 1963) (1881).

45. See, e.g., Green, *supra* note 9, at 1642 ("Learned Hand, likely influenced by Bohlen's work [as reporter for the first Restatement], set forth in *Carroll Towing* a very rigorous statement of a risk-benefit test Yet, at the same time, much of what has been termed as risk benefit [in the defective product design cases] deviates in varying degrees from a rule that would provide optimal deterrence."). At one point, even Gilles assumes the more usual interpretation of "Hand formula balancing." He states that an argument that "implies that the defendants may be negligent even if the costs of abandoning the cricket ground are greater than the expected accident costs . . . is plainly inconsistent with a Hand Formula balancing approach, in which costs and benefits are compared at the margin." Gilles, *English Negligence Law*, *supra* note 9, at 522.

46. See text accompanying notes 17–25 *supra*; Wright, *Justice and Reasonable Care*, *supra* note 5, at pt. III.

47. In a footnote, Gilles states "[j]ust how this balancing should be conducted is a different question—and one to which a variety of different answers can be given," citing articles by himself and Ken Simons that seem to treat essentially any negligence test as a "Hand Formula balancing" test. See Gilles, *English Negligence Law*, *supra* note 9, at 496 n.14 (citing Gilles, *Hand Formula Balancing*, *supra* note 7, at 816–21; Simons, *supra* note 24, at 906–25). In his

Gilles's inconsistent use of the phrase "cost-benefit balancing" is also likely to mislead the unwary. Despite his initial distinction between "cost-benefit balancing" and "disproportionate-cost balancing"—a distinction that reinforces the natural impression that "cost-benefit balancing" is meant to be understood in its usual literal or "straight" balancing sense—Gilles frequently describes courts' explicit or implicit resort to the "disproportionate-cost" test as alleged "cost-benefit balancing."⁴⁸ Indeed, he treats *any* reference to precaution costs as involving "cost-benefit balancing"—for example, the statements of the judges in *Herrington* that a land occupier is not required to incur significant burdens (as perceived by the land occupier and measured by his own resources and needs) to avert accidental injuries to trespassers, but need only take non-onerous precautions involving slight trouble and expense.⁴⁹

Only this very expansive interpretation of "cost-benefit balancing" enables Gilles to claim that "cost-benefit balancing is now a major (but not dominant) feature of English negligence law."⁵⁰ He himself admits, in answering his immediately following question,

cited article, Gilles states that "the Hand Norm—in its most general, inclusive form—stands for the pragmatic proposition that persons should choose to take greater care when the expected good consequences outweigh or overbalance the expected bad consequences." Gilles, *Hand Formula Balancing*, *supra* note 7, at 820. He includes within "Hand Formula balancing" not only Richard Posner's aggregate-wealth maximization and utilitarians' social-welfare maximization, but also Greg Keating's "social contract approach" that "interprets the Hand Norm as balancing freedom of action against security so as to maximize the overall well-being of individuals," Ronald Dworkin's "equality of resources" approach that "interprets the Hand Norm as supporting an egalitarian norm of equal resources, and deploys the willingness-to-pay criterion for that purpose," and James Gordley's "virtue-based approach" that "interprets the Hand Norm as commanding that persons choose prudently and jettisons the Hand Formula, but uses the Hand Factors to try to arrive at an intuitive understanding of which course involves the lesser evil." *Id.* at 819–20 (citations omitted).

Simons's conception of "balancing" is so broad that, as Simons himself says, it "verges on the vacuous" as a limitation on possible tests of negligent conduct. See Simons, *supra*, at 903. It encompasses (without explaining how) an approach that he describes as utilitarian and as maximizing social welfare even though it includes "such values as equality and distributive justice." See *id.* at 919. It even encompasses an alleged "balancing" approach, "not exclusively utilitarian" and not subject to any maximization requirement, that allows the decision maker to consider "morally relevant features of the situation other than aggregate welfare . . . including intentions, motives, rights, consent, social role or responsibility, justifiable expectations or reliance of others, and reciprocity and distribution of risk." See *id.* at 919, 923.

48. See, e.g., Gilles, *English Negligence Law*, *supra* note 9, at 491, 492–93, 502 n.35, 509, *passim*.

49. *Id.* at 569–70; cf. Wright, *Standards of Care*, *supra* note 12, at 265–66. Gilles describes the standard of care articulated in *Herrington* as being "[i]n effect, . . . a reverse disproportionate-cost test: there is no liability unless the benefits of precautions are disproportionately greater than the burdens." Gilles, *English Negligence Law*, *supra* note 9, at 570 n.334.

50. See Gilles, *English Negligence Law*, *supra* note 9, at 493.

“[but] which version [of “cost-benefit balancing”]—straight cost-benefit balancing or disproportionate-cost balancing—predominates?,” that “if forced to choose one formulation to describe balancing in English negligence law, I would say that actors must take reasonably practical precautions, that is, precautions whose costs are not disproportionate to their benefits.”⁵¹ He later states:

[T]here is no rule that the judge is to decide for the defendant if the costs of avoidance are found to be even a tiny bit larger than its benefits. Indeed, I have yet to come across a judicial statement to that effect. The “mood” in which English judges balance seems more akin to the disproportionate-cost test. . . .⁵²

Moreover, from what I can gather from reading Gilles’s careful descriptions of the cases, the “disproportionate-cost” test as employed by the courts is more stringent than Gilles acknowledges. It is not “a relatively relaxed version” of the test that merely requires, in order to avoid a finding of negligence, that the benefits of the defendant’s conduct “plainly outweigh” the risks.⁵³ Rather, it is a prohibitive-cost test that requires that the risk not be too serious (in the cases that Gilles discusses it generally was considered to be very low), be necessary for the obtaining of some benefit desired by those being put at risk or by everyone in society rather than merely a private benefit to the defendant, be reduced to the maximum extent feasible without significantly impairing the desired benefit (i.e., no “extreme” or “drastic” precaution costs), and be significantly outweighed by the desired benefit.

As Gilles notes, this prohibitive-cost test resembles the test that I claim that the courts use when assessing the alleged negligence of defendants engaged in socially essential or important activities.⁵⁴ Viewed through different lenses, it is the test, as Gilles again seems to concede, that is applied in situations in which the persons being put at risk are willing participants (employees, customers, consumers, spectators, etc.) in the defendant’s risky activity, which takes into account only the benefits to the participants in the activity unless the activity is socially essential or important.⁵⁵ Contrary to Gilles’s

51. *Id.* at 493; *see id.* at 500 (“English judges do not routinely and overtly balance B against PL except in employment cases, and when they do they often use the ‘disproportionate-cost’ approach.”).

52. *Id.* at 584–85.

53. *See id.* at 500.

54. *See id.* at 567; Wright, *Standards of Care*, *supra* note 12, at 264–65.

55. *See* Gilles, *English Negligence Law*, *supra* note 9, at 568, 569–70; Wright, *Standards of Care*, *supra* note 12, at 267–68; note 43 *supra*.

assertions, in both categories of cases (which Gilles believes constitute “probably a majority” of British tort litigation) the prohibitive-cost test, which does not even involve any balancing, is quite different from the Hand formula’s unlimited “cost-benefit balancing.”⁵⁶

Gilles acknowledges that “there is at least some truth in Wright’s contention that English courts apply the negligence standard differently depending on the relationship between plaintiff and defendant, and in particular depending on who is seen as creating the risk and benefiting from it.”⁵⁷ He adds, “[I]n addition to the *Herrington* [trespasser] case, which strongly supports Wright’s position, it seems fair to say that English judges have been more attracted to the substantial-risk approach in stranger cases than in employment or other consensual settings.”⁵⁸ Indeed, in the only stranger case that Gilles discusses in which the relevant benefits of the risky activity were viewed by the court as purely private benefits to the defendant, which is the only type of situation in which I claim that the “substantial foreseeable risk” test of negligence applies, the court refused to take into account those private benefits.⁵⁹

Gilles describes the “varying standards” that he acknowledges are applied in these and other distinct types of situations, such as the medical treatment and informed-consent situations,⁶⁰ as “cost-benefit balancing (suitably tailored),”⁶¹ and as thus, along with his own discussion of the British cases, rendering “plainly incorrect” my claim that British courts rarely engage in cost-benefit balancing.⁶² For the reasons briefly stated above, I believe that Gilles’s discussion of the British cases, even though the cases encompass only a few of the

56. See Gilles, *English Negligence Law*, *supra* note 9, at 569.

57. See *id.*; note 61 *infra*.

58. Gilles, *English Negligence Law*, *supra* note 9, at 569 n.331; see *id.* at 538 n.181, 571–72, 579–81; note 49 and accompanying text *supra*.

59. See Gilles, *English Negligence Law*, *supra* note 9, at 577 n.371 (discussing *H. & A. Scott v. J. Mackenzie Stewart Co.*, 1972 S.L.T. (Notes) 69); text accompanying note 44 *supra*.

60. See Gilles, *English Negligence Law*, *supra* note 9, at 568–69, 570; Wright, *Standards of Care*, *supra* note 12, at 268–69.

61. See Gilles, *English Negligence Law*, *supra* note 9, at 569–70; *id.* at 582 n.398 (acknowledging that “the nature of the relationship is a factor in the application of the negligence standard,” but arguing that “the relational focus complements balancing rather than supplanting it”). Gilles does not discuss two situations in which the existence of distinct, non-balancing tests of negligent conduct is especially clear: those involving defendants’ “nonfeasant” failure to attempt to rescue or otherwise aid someone whom the defendant did not put at risk, and those involving plaintiffs who voluntarily put themselves at great risk in an attempt to save someone else. See Wright, *Standards of Care*, *supra* note 12, at 270–74.

62. See Gilles, *English Negligence Law*, *supra* note 9, at 569.

situations that I have discussed, greatly reinforces rather than undermines my claim. Gilles himself states, as a “simple but fundamental point,” that “English judges balance: intuitively, qualitatively, verbally, impressionistically, and on the basis of their largely tacit assessments of *what is fair and socially valuable*.”⁶³ Furthermore, he notes, “English judges continue to use the reasonable man standard . . . , sometimes without resort to balancing.”⁶⁴ It seems to me that Gilles’s article not only disproves, as Gilles states, Richard Posner’s and William Landes’s efficiency-based, marginal “cost-benefit balancing” test of negligent conduct,⁶⁵ but also disproves the existence in British law of any “cost-benefit balancing” test of negligent conduct, given the usual interpretation of “cost-benefit balancing.”

III. PATRICK KELLEY AND LAUREL WENDT: AMERICAN PATTERN JURY INSTRUCTIONS

As we noted above, unlike in Britain, in the United States the negligent-conduct issue is still usually decided by juries, and juries’ determinations on this issue are usually subject to deferential judicial review. Therefore, to get an idea of how the standards of negligence are actually conceived and applied in the United States, one needs to know how they are conceived and applied by juries. In their contribution to this symposium, Patrick Kelley and Laurel Wendt tackle this difficult problem. They focus on the content of the “pattern” or uniform jury instructions that exist in almost all states, which judges generally use to instruct juries on the standard that the jury should employ to resolve the negligent-conduct issue. Given the “black box” nature of the jury—which simply returns a verdict of liability or no liability or at most an unelaborated and unexplained finding (through a special verdict) on the negligent-conduct issue—and the lack of empirical studies on how juries actually resolve the negligent-conduct issue, the instructions provided to the jury are the only information we have on how juries view the negligent-conduct issue.⁶⁶

63. *Id.* at 494 (emphasis added). Compare Judge Hand’s similar comment, quoted in the text accompanying note 7 *supra*.

64. Gilles, *English Negligence Law*, *supra* note 9, at 500.

65. *See id.*

66. This assumes, of course, that juries actually understand and attempt to follow the judge’s instructions. In part IV of their article, Kelley and Wendt cite various empirical studies, all of which conclude that juries generally are conscientious and attempt to follow the judge’s

In addition, Kelley and Wendt observe, the pattern jury instructions provide the closest-to-the-action view of judges' actual working conception of the negligent-conduct issue. The pattern instructions are usually drafted by a committee of highly respected practitioners (trial lawyers and judges) and "the occasional practical-minded law professor," who "attempt to embody in the pattern instructions an accurate and understandable statement of the law as it has been set out by the state's highest appellate court" rather than according to some academic theory of what the negligence standard supposedly is or should be.⁶⁷ The pattern instructions thus also provide a means for assessing the descriptive accuracy of the various academic theories regarding the negligent-conduct issue, which is a question that Kelley and Wendt also pursue.

With respect to the basic instructions defining negligent conduct, Kelley and Wendt find that "[t]he only formulation that did not show up in any of the pattern instructions was the conduct of the ordinary, reasonable person, the long-time favorite of torts scholars."⁶⁸ The great majority of instructions instead state that a person is negligent if he or she fails to exercise "reasonable care" or "ordinary care," which is further defined as the care that is exercised by the "reasonably prudent," "reasonably careful," or "ordinary prudent" person (not, Kelley and Wendt point out, the "ordinarily" prudent or careful person as is stated in a few states' instructions—a phrasing that erroneously implies that occasional lapses in care are not negligent).⁶⁹ Many of the formulations are paraphrases of the language in a leading English case: "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."⁷⁰

Kelley and Wendt consider the extent to which the definitions of negligence embodied in the pattern jury instructions are consistent with various academic conceptions of the meaning of negligence. They worry initially about whether any "single descriptive theory" is possible given what they seem to view as significant variations in the states' instructions, e.g., the specification of "ordinary" versus "rea-

instructions. Some studies, however, conclude that juror comprehension could be improved by simpler, clearer instructions. See Kelly & Wendt, *supra* note 10, at 612–16.

67. *Id.* at 592–93.

68. *Id.* at 622.

69. See *id.* at 595–97.

70. *Blyth v. Birmingham Waterworks Co.*, 156 Eng. Rep. 1047, 1049 (Ex. 1856).

sonable” care and the existence or nonexistence of supplementary instructions elaborating the basic definition in specific circumstances.⁷¹ However, they eventually focus on the central or “focal” concept that seems to underlie all of the instructions: the concept of “ordinary care” that is defined as “the conduct of the reasonably careful or reasonably prudent person.”⁷² They then contrast this central concept with five different academic conceptions, the first two of which are also discussed by Gilles in his contribution to this symposium.

The first academic conception is the “(significant) foreseeable risk” standard, as suggested by Oliver Wendell Holmes, Jr., and others. Kelley and Wendt dismiss this standard on the grounds that most instructions fail to explicitly mention the foreseeable risk issue and those that do mention it do not treat it as the sole criterion for negligence but rather also focus on the lack of ordinary or reasonable care.⁷³ With regard to their first point, I think the foreseeability of some risk of harm is assumed in all the instructions, since a person cannot be careful or prudent or reasonable with respect to unforeseeable consequences. Their second point, on the other hand, although not conclusive seems valid: if the creation of a significant foreseeable (avoidable) risk were sufficient for a finding of negligence, one would certainly expect a clearer statement of this in the jury instructions.

The second academic conception of negligence is the Hand formula’s aggregate-risk-utility test. Kelley and Wendt echo others who have argued that jurors are not likely to interpret the typical “reasonably prudent” or “reasonably careful” person instruction as an invitation to engage in cost-benefit analysis, and that if such an interpretation were intended one would expect an explicit cost-benefit instruction.⁷⁴ Kelley and Wendt note that only Louisiana’s

71. See Kelley & Wendt, *supra* note 10, at 617.

72. See *id.* at 617–18. They identify *Vaughan v. Menlove*, 132 Eng. Rep. 490 (1837), as the focal case from which all the current instructions are presumed to be ultimately derived. See Kelley & Wendt, *supra* note 10, at 617 & n.124.

73. Kelley & Wendt, *supra* note 10, at 591, 618.

74. See *id.* at 591, 618–19; Allen & Rosenberg, *supra* note 30, at 699–700, 704–06; Gilles, *The Invisible Hand Formula*, *supra* note 10, *passim*; Green, *supra* note 9, at 1630–31 & n.118; Hetcher, *supra* note 24, at 878 (“One thing is certain; ordinary morality bears little resemblance to utilitarianism.”) (citations omitted); Michael Wells, *Scientific Policymaking and the Torts Revolution: The Revenge of the Ordinary Observer*, 26 GA. L. REV. 725, 732–36 (1992). Gilles, who believes that jurors should be given some version of a cost-benefit instruction, has argued that judges’ general refusal to give such instructions, which was demonstrated most dramatically by the non-use and eventual elimination of a California risk-utility pattern jury instruction, is not based on disagreement with the Hand formula’s aggregate-risk-utility test but rather on

pattern jury instructions contain an explicit cost-benefit instruction, which however is only an optional instruction that may be given to elaborate the basic “ordinarily prudent person” standard,⁷⁵ which is also better stated as the conduct of a “person of ordinary prudence.”⁷⁶ Moreover, even if the instruction is given, it makes the cost-benefit analysis optional with the jury and, contrary to the draft Restatement Third,⁷⁷ emphasizes consideration of the “importance to society” of the defendant’s conduct: “you *may* weigh the likelihood that someone might have been injured and the seriousness of that injury against *the importance to society* of what the defendant was doing and the advisability of the way in which he was doing it.”⁷⁸

Although it is not noted by Kelley and Wendt, the authors of the draft Restatement Third would interpret language in a number of the states’ instructions, which declares that the amount of care exercised should be commensurate with the degree of foreseeable risk or danger,⁷⁹ as essentially incorporating the Hand formula’s aggregate-risk-utility test.⁸⁰ However, as Gilles correctly points out and as Kelley and Wendt assume, such language does not necessarily implicate the Hand-formula test but rather is a commonsense, simple idea that would enter into any test of negligence: ordinarily, the greater the danger, the greater is the need to take care.⁸¹

Kelley and Wendt combine their discussion of the third, fourth, and fifth academic conceptions of negligence. The third conception, which they attribute to Catharine Wells, treats a person’s conduct as negligent if it was “morally wrong according to the prevailing community moral values.”⁸² The fourth conception is Heidi Feldman’s

concerns about drafting comprehensible instructions, jury nullification, and invading the province of the jury. See Gilles, *supra*, at 1041–52; Gilles, *Hand Formula Balancing*, *supra* note 7, at 856–61. New Mexico incorporates language in its instructions that, while open to differing interpretations, reflects a version of the “single owner heuristic” that Gilles advocates. See Kelley & Wendt, *supra* note 10, at 599. I discuss Gilles’s arguments in Wright, *Justice and Reasonable Care*, *supra* note 5, at pt. V.

75. Kelley & Wendt, *supra* note 10, at 600, 620.

76. 18 H. ALTON JOHNSON, III, LOUISIANA CIVIL LAW TREATISE, CIVIL JURY INSTRUCTIONS § 3.01 (1994 & Supp. 2001); see Kelley & Wendt, *supra* note 10, app. at 645.

77. See text accompanying notes 19–23 *supra*.

78. See Kelley & Wendt, *supra* note 10, at 600 (emphasis added) (citation omitted).

79. See *id.* at 598, 605–06.

80. See DRAFT RESTATEMENT THIRD, *supra* note 17, § 3 cmt. d at 57, 62.

81. See Gilles, *English Negligence Law*, *supra* note 9, at 503–04 n.38, 508–09; Gilles, *The Invisible Hand Formula*, *supra* note 10, at 1017–18 n.6; Kelley & Wendt, *supra* note 10, at 598.

82. Kelley & Wendt, *supra* note 10, at 591–92 (citing Catharine Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2402–13 (1990)).

“virtue ethics” theory, which makes the standard of care what a hypothetical person with the virtues of reasonableness, prudence, and carefulness would have done in the circumstances that existed.⁸³ The fifth conception is Kelley’s own theory, which makes the standard of care depend on the community’s preexisting specific safety conventions.⁸⁴ Assuming that these conceptions of negligence are the only three theories left standing, Kelley and Wendt pose the contest among them as boiling down to whether the states’ pattern jury instructions, which generally focus on the “ordinary care” of a “reasonably prudent person,” are asking the jury to make a moral or a social judgment. Do the instructions ask the jury to make a moral judgment about the defendant’s conduct based on the community’s moral values or based on the virtuous or nonvirtuous nature of the defendant’s conduct, or do they rather ask the jury to determine whether there was an applicable preexisting community safety convention with which the defendant failed to comply?⁸⁵

Kelley and Wendt argue for the latter interpretation. They note that although Feldman’s virtue ethics might seem to be a plausible interpretation given its focus on the virtues of reasonableness, prudence, and carefulness—words that are featured in the pattern jury instructions—these words function in the pattern jury instructions (and in judicial opinions) to specify an objective standard of *ordinary* or *reasonable* prudence or care, which if not complied with will result in a finding of negligence even if the person exercised her best virtuous efforts to behave prudently and carefully.⁸⁶ In other words, negligence liability, like tort liability overall, is a matter of objective justice or right, rather than a matter of subjective virtue.⁸⁷ The same argument applies even to the virtue of justice, as Kelley and Wendt seem to state: from the standpoint of legal liability, of justice and right, what matters is not whether one is a just person—i.e., acts with the ethically proper just motives or disposition—but rather whether one simply does what is just, by complying with the objectively

83. *Id.* at 592 (citing Heidi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 CHI.-KENT L. REV. 1431 (2000)).

84. *Id.* (citing JULES L. COLEMAN, *RISKS AND WRONGS* 358–59 (1992); Patrick J. Kelley, *Who Decides? Community Safety Conventions at the Heart of Tort Liability*, 38 CLEV. ST. L. REV. 315 (1990); Steven D. Smith, *The Critics and the “Crisis”: A Reassessment of Current Conceptions of Tort Law*, 72 CORNELL L. REV. 765, 781 (1987)); *see id.* at 620–21.

85. *See id.* at 620–21.

86. *Id.* at 621–22.

87. *See* Wright, *Standards of Care*, *supra* note 12, at 258–59.

specified right standards of conduct, regardless of one's motives for doing so.⁸⁸

However, it seems to me that Kelley and Wendt go too far in claiming that neither the pattern jury instructions nor negligence liability call for any sort of moral judgment—that the standard being applied is social in nature, based simply on preexisting community conventions, and makes no reference to fault, improper conduct, or right or wrong.⁸⁹ Although the phrases “ordinary care” and “reasonably prudent” do not ask for judgments regarding actors’ virtuous disposition, they do invoke notions of morally proper conduct, objective right and wrong (“legal fault” or moral responsibility rather than moral fault), and justice. So Wells’s conception of conduct being negligent if it was “morally wrong according to the prevailing community moral values,”⁹⁰ interpreted as referring to objectively specified morally proper conduct rather than ethically proper subjective dispositions for conduct, seems at least as plausible, indeed more plausible, than Kelley’s conception of conduct being negligent if and only if it fails to conform to some preexisting community safety convention. The notion of a collection of preexisting specific community safety conventions, sufficiently detailed and comprehensive to resolve the negligence issue for any accident that might happen to arise, seems highly implausible. Yet, apparently, if there is no applicable preexisting community safety convention, a person cannot be held negligent no matter how unsafe her conduct may have been. In addition, the community safety conventions, which are merely conventional customs (if acted upon), may well fail to comply with what would be deemed reasonably prudent conduct. For example, there may be a custom or practice in the community of driving down Main Street drunk on Friday night, of jaywalking, of speeding, of running red lights, and so forth.

Yet I think Kelley and Wendt are right to object to the “free-floating” moral judgments implicit in Wells’s reference to “the community’s prevailing moral values.”⁹¹ Such prevailing moral values in a particular community may be just as objectionable, just as imprudent or disrespectful of the rights of others, as Kelley’s and Wendt’s

88. See Kelley & Wendt, *supra* note 10, at 621–22; Wright, *The Principles of Justice*, *supra* note 25, at 1875–83.

89. See Kelley & Wendt, *supra* note 10, at 620–21.

90. See text accompanying note 82 *supra*.

91. See Kelley & Wendt, *supra* note 10, at 620–21.

community customs or practices—indeed, they are likely to go hand-in-hand. Both standards are “free floating” in the sense that they are not anchored in the law and its underpinning principles of justice. We want juries to invoke those abiding principles of justice, as embedded and elaborated in the law, rather than the particular community’s currently prevailing moral values, customs, or practices.⁹² And there is evidence, discussed by Kelley and Wendt, that jurors do indeed try to do “total justice” within the framework of the judge’s instructions.⁹³

IV. RON ALLEN AND ROSS ROSENBERG: AMERICAN NEGLIGENCE CASES

Ron Allen and Ross Rosenberg employ a number of different methods to investigate the extent to which federal and state courts in the United States actually employ the Hand formula’s aggregate-risk-utility test, especially in the marginal, quantitative form of analysis required for a true determination of economic efficiency, but also in a less rigorous, rough, utilitarian form. They point out, as others have,⁹⁴ that the efficiency interpretation of the aggregate-risk-utility test is doomed from the start by courts’ and juries’ (or anyone’s) obvious inability, admitted even by the proponents of the aggregate-risk-utility test, to quantitatively measure and compare all (or any) of the many relevant risks and utilities in any particular situation.⁹⁵

They also reiterate that the aggregate-risk-utility test is almost completely absent in jury instructions.⁹⁶ However, they assume that the states’ pattern jury instructions reflect the “widespread” and “near universal” acceptance of the first and second Restatements’ definition of negligent conduct.⁹⁷ They apparently have in mind the “reasonable person” language in the prior Restatements (which, as Kelley and Wendt point out, does not appear in the pattern jury instructions, which instead generally refer to the “reasonably prudent person” or some variation thereof),⁹⁸ rather than the explicit risk-utility balancing definition of reasonable care in Restatement section

92. See Richard W. Wright, *Principled Adjudication: Tort Law and Beyond*, 7 CANTERBURY L. REV. 265, 269–74 (1999).

93. See Kelley and Wendt, *supra* note 10, at 614–16 (discussing NEIL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS (2000)).

94. See Wright, *Standards of Care*, *supra* note 12, at 250–52.

95. See Allen & Rosenberg, *supra* note 30, at 701–04, 708.

96. See *id.* at 704–06.

97. See *id.* at 701 n.64, 706 n.82 and accompanying text.

98. See text accompanying notes 68–70 *supra*.

291.⁹⁹ Yet it is the latter, risk-utility balancing definition that is assumed to be widely accepted by the courts in the article by Gilles that they cite.¹⁰⁰

While acknowledging that “the reasonability standard of the First and Second Restatements explicitly asks courts to balance risk against harm,” Allen and Rosenberg note that the prior Restatements’ “risk-utility test is clearly meant to be an aspect of the reasonable person standard, rather than a replacement for it.”¹⁰¹ The draft Restatement Third has indeed been criticized by many, including Gilles, for eliminating the prior Restatements’ discussions of the reasonable-person aspect of the negligence standard.¹⁰² However, the reasonable-person sections in the prior Restatements focus on the objective versus subjective nature of the negligence standard¹⁰³ (a critical aspect of the negligence standard that is at best buried, and at times even implicitly denied, in the draft Restatement Third),¹⁰⁴ rather than the substantive criteria of “reasonable care,” which are defined exclusively in section 291.¹⁰⁵

99. See text accompanying note 2 *supra*.

100. See Allen & Rosenberg, *supra* note 30, at 706 n.82 (citing Gilles, *Hand Formula Balancing*, *supra* note 7); Gilles, *supra*, at 815–16; see also Gilles, *The Invisible Hand Formula*, *supra* note 10, at 1015–16 & nn.4–5.

101. See Allen & Rosenberg, *supra* note 30, at 696 (quoting Gilles, *Hand Formula Balancing*, *supra* note 7, at 824).

102. See Gilles, *Hand Formula Balancing*, *supra* note 7, at 822–25, 849–54.

103. See RESTATEMENT (SECOND) OF TORTS §§ 283–283 C, 289–290 (1965).

104. See DRAFT RESTATEMENT THIRD, *supra* note 17, § 3 cmt. g, at 45 (“[T]o establish the actor’s negligence . . . the likelihood [of harm] must be foreseeable to the actor at the time of the conduct.”) (emphasis added); *id.* § 3 cmt. k, at 50 (“[T]he balancing approach to negligence tends to assume that the actor is aware of [the] risk, but has tolerated [the] risk on account of the burdens involved by risk-prevention measures.”) (emphasis added). But see *id.* at 51 (“[T]he function of the jury is to consider what the reasonably careful person would have done in the particular factual situation. . . . The reasonably careful person is infallible in a way that ordinary people are not.”); *id.* § 12 cmt. b (noting and discussing the objective perspective). Unlike the prior Restatements, there is no explicit reference to the usual objective perspective for defendants in the blackletter sections of the draft Restatement Third; it is at best implied in sections 11 and 12. For a discussion of the varying perspectives applied to defendants and plaintiffs in different types of situations, see Wright, *Standards of Care*, *supra* note 12, at 257–59, 265–66, 271–74; text accompanying notes 164–229 *infra*.

105. Allen and Rosenberg state that the “negligence section of the proposed draft of the Third Restatement of Torts includes a strongly worded, explicit endorsement of the Hand formula [that] constitutes a significant departure from the negligence section of the Second Restatement of Torts.” Allen & Rosenberg, *supra* note 30, at 707. They cite section 283 of the Restatement Second, which states the objective “reasonable person” aspect of the negligence standard, rather than section 291, which states the substantive criteria of reasonable care, and they quote the blackletter definition of negligence in the draft Restatement Third, which seems to retreat from the risk-utility balancing test in the prior Restatements by describing the Hand formula factors as “primary” (not exclusive) factors that are not explicitly incorporated into a balancing formula. See *id.* at 707 & n.86. But see *id.* at 707 (noting “the temporizing of the Third Restatement[:] the Hand formula is a primary factor, but certainly not an exclusive

Allen and Rosenberg ran a computerized search of court references to the “Hand formula,” “Hand test,” or the *Carroll Towing* case in which Judge Hand set forth the “Hand formula.”¹⁰⁶ They found approximately 30 federal court of appeals cases (15 of which were from the Seventh Circuit after the arrival of Judge Posner, the leading proponent of the Hand formula) and 27 state court cases (21 of which were from a single state, Louisiana) that referred to the Hand formula. Citations to the *Carroll Towing* case were more numerous but still quite low: one time by the United States Supreme Court, approximately 50 times by federal courts of appeals, 38 times by federal district courts, and 47 times by state courts.¹⁰⁷ They do not indicate whether the citations to *Carroll Towing* include only those that refer to Hand’s formulation of the negligence standard, nor how many of the cases that cite *Carroll Towing* overlap those that explicitly referred to the “Hand formula” or “Hand test.”

The numbers that Allen and Rosenberg report are comparable to those that I came up with when I ran similar computerized searches in 1994 of all federal and state cases in the Westlaw database from 1945 through May 1994. I found only 46 state cases and only 72 federal cases that had cited *Carroll Towing* or explicitly referred to the “Hand formula” during the almost 50 years since *Carroll Towing* was decided in 1947. Almost all of the state cases were decided during the last ten years of the study period. Only three states had more than 2 cases: Louisiana (14, almost one-third of the total 46 cases), Idaho (4), and New Jersey (4). Thirty states had no cases; twelve (including the District of Columbia) had 1; and six had 2. Of the 72 federal cases, 13 were from the Second Circuit, the circuit in which *Carroll Towing* was decided. All but one of the Second Circuit cases were decided before 1960 and did not deal with the Hand formula issue, but rather cited *Carroll Towing* for unrelated issues. Of the remaining 59 federal cases, all but a handful were decided

one.”). It is the comments in the draft Restatement Third that reaffirm the risk-utility balancing formula in the prior Restatements and recast it as a reductionist cost-benefit test. See text accompanying notes 17–24 *supra*.

106. See text accompanying notes 3–4 *supra*.

107. See Allen & Rosenberg, *supra* note 30, at 701. They also Shepardized the “related” *T.J. Hooper* decision, which they report has been cited 8 times by the Supreme Court, 72 times by federal courts of appeals, 67 times by federal district courts, 185 times by state courts, and 323 times in law reviews, which they conclude “are not the numbers of a revolutionary or path-breaking decision.” See *id.* at 701 & n.68. Hand’s opinion in *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932), had nothing to do with the definition of negligent conduct, but rather is the leading case holding that compliance with custom is not conclusive evidence, but rather only some evidence, of lack of negligence.

after 1977. About a third (19) of these 59 federal cases came from a single circuit, the Seventh Circuit, and all but one of these 19 Seventh Circuit cases were decided after Richard Posner joined the circuit bench and began expounding the efficiency interpretation of negligence in his opinions.¹⁰⁸

In a similar search done at the same time (in 1994) of all federal and state cases in the Westlaw database both before and after 1945, supplemented by the citation lists in the Restatement Appendices, I found only 109 state cases and only 27 federal cases that had cited Restatement section 291 in the sixty years since Restatement section 291 was adopted in 1934. Of the 109 state cases, many were decided before 1970. Only 12 states had more than two cases: Louisiana (17), California (13, only 3 after 1967), Pennsylvania (8, none since 1975 and all but one before 1957), Wisconsin (7, only 4 since 1966, none since 1980), New Jersey (6, only 1 after 1965, and that one was critical of cost-benefit analysis), New York (6, only 3 after 1947), Michigan (5), Georgia (4, only 1 after 1965), Massachusetts (4, all prior to 1942), Oregon (4, none since 1981), Washington (4, none since 1959), and Missouri (3 cases, clustered between 1981 and 1983). Twenty states had no cases; eleven had 1; eight (including the District of Columbia) had 2.¹⁰⁹

The fact that these cases cited *Carroll Towing*, the “Hand formula,” or Restatement section 291 does not necessarily imply that they addressed the negligent-conduct issue or, if they did, that they applied the aggregate-risk-utility test to resolve that issue. Indeed, a few of the cases explicitly rejected the aggregate-risk-utility test. For example, the only Utah case, *Wagoner v. Waterslide Inc.*,¹¹⁰ that cited Restatement section 291 rejected the section’s apparent aggregate-risk-utility test, stating: “Unreasonable risks are those which society, in general, considers sufficiently great to demand preventive measures. . . . Restatement (Second) of Torts §§ 291 and 292 merely emphasize some factors as important in determining whether a risk is unreasonable,” and upheld a jury instruction that focused on the acceptability of the risk solely in light of its magnitude.¹¹¹ Similarly,

108. Richard W. Wright, *Paper Rules, Real Rules, and Moral Principles: An Empirical Investigation of the Standards of Reasonable Care in Negligence Law*, at 4 (unpublished paper presented at the annual meeting of the Law and Society Association in Glasgow, Scotland, July 1996) [hereinafter Wright, *Paper Rules*] (paper on file with author).

109. *Id.* at 4–5.

110. 744 P.2d 1012 (Utah Ct. App. 1987).

111. *See id.* at 1013.

the most recent of the two New Hampshire cases, after quoting Restatement section 291, stated, "More specifically, the issue is 'whether there [was] some probability of harm sufficiently serious that ordinary men would take precautions to avoid it.'" ¹¹² In few if any of the cases was the negligent-conduct issue actually resolved through application of the aggregate-risk-utility test. ¹¹³

The lack of credibility of the draft Restatement Third's claims that its aggregate-risk-utility "balancing approach to negligence has been accepted in judicial opinions in a large majority of jurisdictions" and that "what is of special interest is the inability to identify any jurisdiction whose cases explicitly (or by clear implication) reject the balancing approach" is exemplified by its citation of the *Wagoner* case (the only Utah case that it cites). The draft Restatement Third cites *Wagoner* as a case that allegedly supports the aggregate-risk-utility test and, moreover, lists *Wagoner* as one of a handful of cases that allegedly treat "[t]he balancing approach and the concepts of reasonable care or the reasonable person . . . as essentially interchangeable." ¹¹⁴

Of course, courts may apply an aggregate risk-utility test to determine reasonableness in negligence cases without any citation of *Carroll Towing*, the "Hand formula," or Restatement section 291. It is a much more difficult task to determine the extent to which this occurs, but I attempted to do so through another study initiated in 1994, which remains uncompleted. ¹¹⁵ I decided to take advantage of West's key number classification system and devised a (long) Westlaw search term that included all the Westlaw negligence keys (under topic 272, negligence) that seem to focus on the substantive negligence issue: subdivisions 1–55 (acts or omissions constituting negligence) and 65–88 (contributory negligence by persons injured in

112. *Morin v. Manchester Housing Auth.*, 195 A.2d 243, 245 (N.H. 1963).

113. See text accompanying notes 115–57 *infra*.

114. See DRAFT RESTATEMENT THIRD, *supra* note 17, § 3 cmt. d, Reporters' Note, at 55, 56, 59; cf. Gilles, *The Invisible Hand Formula*, *supra* note 10, at 1016 n.5 (finding, in a computerized search, "no cases directly rejecting Hand Formula negligence, although one appellate court affirmed the trial judge's refusal to give a risk-utility instruction defining unreasonable risk on grounds that arguably relegate the Hand Formula factors to a limited doctrinal role. See *Wagoner v. Waterslide Inc.*, 744 P.2d 1012, 1013 (Utah Ct. App. 1987)."). The late reporter for the draft Restatement Third, Gary Schwartz, persisted in citing the *Wagoner* case despite being informed at meetings of the members' consultative group and at the annual meeting that it was miscited.

115. The following discussion of this study and its initial results are taken from Wright, *Paper Rules*, *supra* note 108, at 5–11.

general).¹¹⁶ This key number search, applied to all the cases in the relevant Westlaw databases from 1945 through 1992, inclusive, retrieved almost 21,000 state cases (from the Allstates database) and almost 3,000 federal cases (from the Allfeds database). These cases constituted the negligent-conduct database for further analysis.¹¹⁷

After considerable trial and error, a search query was constructed to retrieve from the negligent-conduct database as many as possible of the cases that mention both risk and utility while addressing the negligent-conduct issue, and which thus might be engaged in the utilitarian balancing of aggregate risks and utilities, while avoiding retrieving reams of spurious or “garbage” matches (e.g., “John Risk vs. Utility Co.”). Based on analysis of samples of the complete negligent-conduct database, the constructed search query seemed to retrieve the vast majority of the relevant cases while minimizing (but not avoiding) the retrieval of irrelevant cases.¹¹⁸ Date limits were added to the search query to retrieve cases separately for each calendar year from 1945 through 1992.

Out of the almost 24,000 case opinions classified under the relevant negligent-conduct key numbers from 1945 through 1992, less than 7 percent had language matching the risk-and-utility search query. The percentages were generally below 5 percent until the mid-1970s, 5–10 percent until the early 1980s (federal cases) or mid-1980s (state cases), and 10–15 percent through 1992. Each of the query-match cases had to be read and analyzed to determine whether the query match was based on language that is relevant (e.g., “the defendant’s *burden* of taking precautions”) or spurious (e.g., “the donkey carried a heavy *burden*”). If the language was relevant, it had to be determined whether there was some sort of actual balancing or comparison of risk against utility to determine the reasonableness of a

116. I excluded subdivisions 56–64 (proximate cause), 89–93 (imputed negligence), 97–101 (comparative negligence), 102–143 (negligence actions), and 144 (criminal responsibility). The keyword search term was “(272K1* 272K2* 272K3* 272K4* 272K7* 272K5 272K6 272K8 272K9 272K50 272K51 272K52 272K53 272K54 272K55 272K65 272K66 272K67 272K68 272K69 272K8* % 272K89).”

117. I discovered, however, that initially West classified cases primarily by the nature of the activities involved. Thus, for old cases there might not be a negligence topic (272) key number assigned to a negligence case, but rather a negligence subdivision for an activity-based key number topic. For example, no negligence topic (272) key number was assigned to *Carroll Towing* itself, which rather was classified primarily under admiralty (shipping) key number topics.

118. The search query was “(risk (probabilit! likelihood /5 harm injur! danger) /15 utility benefit* burden* cost*)”. This might have been marginally improved by, e.g., adding to the risk list “accident*”.

party's conduct. If there was some sort of balancing or comparison, it finally had to be determined whether the balancing or comparison was utilitarian in nature, taking into account all risks and benefits to everyone (as specified by the aggregate-risk-utility test) or rather was more limited in terms of, e.g., the benefits taken into account or the way in which those benefits were taken into account. This time-consuming analysis was completed, by a research assistant under my supervision, only for the years 1989 through 1992. The results of his analysis are included in tables 1 and 2. The last two columns are labeled "possible balancing" and "possible utilitarian balancing" because, upon reviewing the research assistant's descriptions of the cases while preparing this introduction and commentary, I have doubts about whether many or any of the cases that he listed as involving balancing (utilitarian or not) actually involve such balancing, rather than mere consideration of the burdens of precaution in a non-balancing analysis.¹¹⁹

TABLE 1: NEGLIGENCE CASES YEAR-BY-YEAR SUMMARY

STATE CASES

YEAR	Total Cases	Query Match		Relevant Language		Possible Balancing		Possible Utilitarian Balancing	
		No.	Percent	No.	Percent	No.	Percent	No.	Percent
1992	745	103	14%	66	9%	20	3%	7	1%
1991	694	81	12%	52	7%	26	4%	7	1%
1990	580	62	11%	39	7%	18	3%	8	1%
1989	589	67	11%	39	7%	17	3%	10	2%
TOTAL	2608	313	12%	196	8%	81	3%	32	1%

119. See text accompanying notes 135-57 *infra*.

TABLE 2: NEGLIGENCE CASES YEAR-BY-YEAR SUMMARY

FEDERAL CASES

YEAR	Total Cases	Query Match		Relevant Language		Possible Balancing		Possible Utilitarian Balancing	
		No.	Percent	No.	Percent	No.	Percent	No.	Percent
1992	114	11	10%	3	3%	2	2%	2	2%
1991	112	11	10%	7	6%	1	1%	0	0%
1990	94	12	13%	6	6%	3	3%	1	1%
1989	47	5	11%	2	4%	1	2%	1	2%
TOTAL	367	39	11%	18	5%	7	2%	4	1%

As can be seen from tables 1 and 2, around three-eighths of the state query-matches and over half of the federal query matches were spurious. Of the query-match cases that had relevant (risk and utility) language relating to the negligent-conduct issue, only about two-fifths, comprising only 2 to 4 percent of the total negligence cases being studied, possibly involved some sort of actual balancing or comparison of risk and utility to determine reasonableness. Only about two-fifths of the possible balancing or comparison cases, comprising only one percent of the total negligence cases being studied, possibly involved a utilitarian (aggregate-risk-utility) type of balancing.

Two states, Illinois and Louisiana, produced over half of the 196 state relevant-language cases (Illinois 66, Louisiana 37) and almost four-fifths of the 71 possible-balancing cases (Illinois 35, Louisiana 20) and the 32 possible-utilitarian-balancing cases (Illinois 14, Louisiana 11). No other state came anywhere near these totals. The courts in Illinois and Louisiana often use boilerplate risk-utility language to begin their negligent-conduct analysis. Illinois's conceptually muddled approach incorporates the Hand formula factors (without identifying them as such, and without necessarily implying any Hand formula balancing) as boilerplate language in the duty analysis rather

than the breach-of-duty analysis. In both states, the boilerplate risk-utility language often is left behind in the courts' actual analysis of reasonableness, and the actual result rarely turns on a utilitarian (aggregate-risk-utility) balancing.¹²⁰

Through fortuitous coincidence, Allen and Rosenberg analyzed a sample of Illinois and Louisiana cases for their article in this symposium that overlaps for one year, 1992, the cases that were analyzed in my study. Allen and Rosenberg report that their "interest in the veracity of the economic explanation of negligence was sparked in part by the notorious and shocking case of *Lee v. Chicago Transit Authority*,"¹²¹ which was decided by the Illinois Supreme Court in December 1992 and which led them to focus their initial study on Illinois Supreme Court cases decided during the two years surrounding the *Lee* case.¹²² After describing the facts and holdings of the nine cases that they found that dealt with the negligent-conduct issue, they conclude (persuasively based on their exposition) that:

The Illinois [Supreme Court] cases in 1992 and 1993 provide no support for the economic [aggregate-risk-utility] theory of negligence. The cases do not attempt to impose the economic theory on the results of verdicts, and the facts of the cases cannot plausibly be reconciled with the theory, although the cases indicate the banal point that relative costs and benefits are not irrelevancies.¹²³

Two of the five 1992 cases—the *Lee* case and *DiBenedetto v. Flora Township*¹²⁴—were also turned up by the risk-and-utility search query in my 1994 study and were classified, consistently with Allen and Rosenberg's analysis,¹²⁵ as involving (at most) "possible balancing," but as clearly not applying the aggregate-risk-utility test. The

120. See text accompanying notes 121–28, 135–57 *infra*.

121. See Allen & Rosenberg, *supra* note 30, at 708 (citing *Lee v. Chi. Transit Auth.*, 605 N.E.2d 493 (Ill. 1992)). My colleague Ralph Brill, who participated in the appellate litigation in the *Lee* case, will be happy to explain to anyone why the result in the *Lee* case, while clearly inconsistent with the aggregate-risk-utility test, nevertheless was proper and just rather than shocking.

122. See *id.* at 708–09.

123. *Id.* at 716; see *id.* at 709–16.

124. 605 N.E.2d 571 (Ill. 1992).

125. Allen and Rosenberg note that "the Supreme Court of Illinois affirmed a jury verdict for Mr. Lee without anything remotely like an economic cost-benefit analysis. Although it mentioned some of the economic factors, the court explicitly disregarded the cost to the CTA rather than attempt to determine relative costs and benefits." Allen & Rosenberg, *supra* note 30, at 710. Similarly, they note the lack of any "obvious connection to the economic [cost-benefit balancing] arguments" in *DiBenedetto*, in which the holding for the defendant was based on the court's conclusion that roadside ditches are not meant to be driven in and need not be made safe for such purposes. See *id.* at 713.

other three 1992 cases that Allen and Rosenberg found¹²⁶ apparently did not have any references to risk and utility in any of the various permutations included in my search query. On the other hand, Allen and Rosenberg do not discuss one 1992 Illinois Supreme Court case¹²⁷ that was analyzed in my 1994 study and classified (incorrectly, I now think) as possibly involving utilitarian balancing.

Allen and Rosenberg carried their study of Illinois Supreme Court cases eight years further forward, to encompass all the relevant negligence cases decided between December 1991 and November 2001, inclusive. While not listing or describing these cases individually, they report:

In no case did the Hand formula, or any form of balancing consequences, form the sole basis of the rule or rationale of the case. At best, the Supreme Court of Illinois balanced the consequences flowing from the case at hand in the context of a variety of other prominent facts, including the reasonable person standard, the relevant precedent, and the expectations of the parties.¹²⁸

They contrast the Illinois cases with recent cases decided by the Louisiana Supreme Court and intermediate appellate courts. Louisiana, they state, “could not be more different from the Illinois cases,”¹²⁹ since “the appellate courts in Louisiana have both accepted the Hand formula as the meaning of negligence and attempted to employ it directly in their decisions, and it seems that it is the only state that does so.”¹³⁰ They treat Louisiana as “the exception that proves the rule.”¹³¹

126. See *id.* at 713–16 (discussing *Am. Nat’l Bank & Trust Co. of Chi. v. Nat’l Adver. Co.*, 594 N.E.2d 313 (Ill. 1992); *Hutchings v. Bauer*, 599 N.E.2d 934 (Ill. 1992); and *Wojdyla v. City of Park Ridge*, 592 N.E.2d 1098 (Ill. 1992)).

127. *Ralls v. Village of Glendale Heights*, 598 N.E.2d 337 (Ill. 1992). Since Allen and Rosenberg focus solely on Illinois Supreme Court cases, they also do not discuss the 22 Illinois intermediate appellate court cases decided in 1992 that were found to have relevant risk and utility language in my 1994 study, four of which (*Benjamin v. Atchison, Topeka & Santa Fe Ry. Co.*, 588 N.E.2d 378 (Ill. App. Ct. 1992); *Nat’l Bank of Bloomington v. Westinghouse Elec. Corp.*, 600 N.E.2d 1275 (Ill. App. Ct. 1992); *Rodriguez v. Norfolk and W. Ry. Co.*, 593 N.E.2d 597 (Ill. App. Ct. 1992); *Sparrow v. Talman Home Fed. Sav. & Loan Ass’n*, 592 N.E.2d 363 (Ill. App. Ct. 1992)) were classified as involving possible non-utilitarian balancing and three of which (*Klikas v. Hanover Square Condo. Ass’n*, 608 N.E.2d 541 (Ill. App. Ct. 1992); *McDermott v. Metro. Sanitary Dist.*, 607 N.E.2d 1271 (Ill. App. Ct. 1992); *Stemen v. Avon Prods., Inc.*, 599 N.E.2d 1140 (Ill. App. Ct. 1992)) were classified as involving possible utilitarian balancing. As I previously stated in the text, I now doubt that the results in any of these cases actually were based or depended on utilitarian (aggregate-risk-utility) balancing.

128. See Allen & Rosenberg, *supra* note 30, at 709 n.93; see *id.* at 717.

129. *Id.* at 717.

130. *Id.* at 709.

131. *Id.* at 719.

Louisiana, as a singular exception, would support the claim that American courts in general have not accepted and do not attempt to apply the Hand formula's aggregate-risk-utility test to resolve the negligent-conduct issue. However, even as a singular exception it would contradict their basic hypothesis: that issues such as the negligent-conduct issue, which are "ambiguous" (not completely specified in advance in terms of the proper result in specific situations), "unpredictable" (computationally intractable), and amenable to resolution through common sense (rather than requiring special expertise), are by their very nature not resolvable by general "top-down" theories of morality or law.¹³² For, if it is true, as they state, that the Louisiana experience not only "indicates that courts can, indeed, *attempt* to mold negligence cases into the economic form,"¹³³ but also that "the appellate courts in Louisiana routinely *apply* the Hand formula" to resolve the negligent-conduct issue,¹³⁴ then—contrary to their basic hypothesis—issues such as the negligent-conduct issue obviously *can* be resolved by resort to general theories of morality and law.

It is clear that the Louisiana courts (which clearly *have* been influenced—and misled—by academic theory¹³⁵) have *attempted* to employ the Hand formula's aggregate-risk-utility test to resolve negligent-conduct issues. However, the decisions by the Louisiana courts are not actually based on risk-utility balancing. Rather, as with the Illinois courts' boilerplate references to the Hand formula factors when discussing the duty issue, the references to the Hand formula in the Louisiana cases are mere window-dressing, with the cases actually being decided, explicitly or implicitly, on grounds that are quite distinct from the Hand formula.

132. See *id.* at 706–07; text accompanying notes 30–31 *supra*.

133. Allen & Rosenberg, *supra* note 30, at 709 (emphasis added); see *id.* at 719 ("[C]ourts are quite competent to *attempt* to apply the Hand formula analysis if they choose to do so. The Louisiana courts do so as directed by their supreme court.") (emphasis added).

134. *Id.* at 718 (emphasis added); see *id.* at 690 ("The significance of the Louisiana cases is that they show judges are capable of employing the economic approach directly, thus suggesting that those who do not – the rest of the nation, basically – are doing so because of choice rather than necessity.").

135. See, e.g., *Levi v. S.W. La. Elec. Membership Coop.*, 542 So. 2d 1081, 1086 (La. 1989) (adopting Judge Learned Hand's verbal formulation of the aggregate-risk-utility test in *Conway v. O'Brien*, 111 F.2d 611, 612 (2d Cir. 1940), and citing, inter alia, Posner, *supra* note 8; Guido Calabresi & Jon Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L. REV. 1055 (1972); HARPER ET AL., *supra* note 1, § 16.9; RESTATEMENT (SECOND) OF TORTS § 291 (1965)); *Dobson v. La. Power & Light Co.*, 567 So. 2d 569, 574–75 (La. 1990) (citing the same sources plus others and referring for the first time to the "Hand formula" or "Hand test").

For example, in *Dobson v. Louisiana Power & Light Co.*,¹³⁶ the Louisiana Supreme Court case that is quoted extensively by Allen and Rosenberg and apparently assumed by them as well as the reporters for the draft Restatement Third to be an example of the use of the Hand formula,¹³⁷ the court's holdings are not based on and cannot be explained by any aggregate-risk-utility analysis, but rather are based on the traditional high standard of care that is imposed on the operators of dangerous instrumentalities regardless of the relative risks, utilities, costs, and benefits in the particular situation.

The plaintiffs' decedent, Dwane Dobson, had been hired by Mrs. Davidge to remove a spindly pine tree in the rear of her lot adjacent to the defendant's power line right of way. The tree overhung the defendant's uninsulated high voltage (8,000 volt) distribution line. The 315-foot long distribution line, which served an apartment complex and carried much higher voltage than a premises service line, was partly buried but was above ground behind Mrs. Davidge's lot. Mrs. Davidge had complained to the defendant many times about hazards created by the distribution line, including transformers blowing up and limbs falling onto the wires and causing fires. She had asked the defendant to remove the tree, but it had refused to do so since the tree's base was on her property. Nor did the defendant send anyone to inspect the tree. At the time it had insufficient funds to properly trim trees in its rights of ways in the area, and it had no regular inspection team or program.¹³⁸

Dobson was electrocuted while taking down the tree when a safety rope, which he had reinforced with a metal wire to prevent the rope from being cut by his chain saw, contacted the distribution line. Dobson had started his tree trimming service only a few months earlier, had no formal training, and was learning by experience and by talking with other local tree trimmers. The trial judge found that, as a result of Dobson's previous damaging of a single-residence service line, a representative of the defendant had informed him that the defendant would lower such service lines to facilitate tree trimming and otherwise generally assist him in the future, but had not informed him that the distribution lines could also be lowered or de-energized or that the distribution lines, unlike the insulated service lines which

136. 567 So. 2d 569 (La. 1990).

137. See DRAFT RESTATEMENT THIRD, *supra* note 17, § 3 cmt. d, Reporters' Note, at 56; Allen & Rosenberg, *supra* note 30, at 717-18.

138. *Dobson*, 567 So. 2d at 570-72.

were similar in appearance, were uninsulated. Dobson had had a service line lowered the day before, but had not requested the defendant to lower the major distribution line serving the apartment complex. The trial judge found that Dobson was unaware that the distribution line was uninsulated or that it could have been lowered.¹³⁹

Applying Louisiana's comparative responsibility statute, the trial judge found Dobson free of fault but found the defendant negligently "failed to perform adequate inspections of its electric lines, trim or remove the tree or trees creating the hazard, provide insulated covering of dangerous parts of the lines, . . . place adequate warnings of the high voltage electricity on or near its uncovered wires [or] warn Dobson of the dangers associated with its high voltage distribution lines."¹⁴⁰ The court of appeal reversed in part, finding that Dobson had been contributorily negligent and reducing the plaintiffs' recovery by 70 percent.¹⁴¹ The Louisiana Supreme Court agreed with the court of appeals' conclusions that the defendant was negligent and that Dobson was contributorily negligent, stating that a reasonable person in modern America should know that any electrical line could be dangerous and that a tree trimmer "is under a peculiar obligation to acquire the knowledge and ability required to identify uninsulated power lines and to take precautions against the extreme dangers they pose."¹⁴² Although later in its opinion the court reiterated the current Louisiana boilerplate language—that the reasonableness of a risk is determined through Hand's risk-benefit balancing test¹⁴³—the court did not apply or even refer to the Hand formula when previously reaching its legal conclusions regarding the negligence of Dobson and the defendant.

The court purported to use the Hand formula to measure and compare the parties' comparative negligence, asserting that "[t]he Hand formula provides a method for accommodating and weighing all of [the factors in the Uniform Comparative Fault Act] including the more subjective factors, such as the existence of an emergency, a party's capacity, or his awareness of the risk."¹⁴⁴ The court assessed 60 percent of the comparative responsibility to the defendant and 40

139. *Id.*

140. *Id.* at 571.

141. *Id.* at 570.

142. *Id.* at 573–74 (citations omitted).

143. *Id.* at 574–75 (citations omitted). The court quoted Hand's verbal formulation of the test in *Conway v. O'Brien*, 111 F.2d 611, 612 (2d Cir. 1940). See note 135 *supra*.

144. 567 So. 2d at 575 (citation omitted).

percent to Dobson “in order to achieve substantial justice in this case.”¹⁴⁵ Even though the defendant’s failure to inspect its lines, trim trees, insulate wires, post warnings, and so forth endangered multiple persons and property while Dobson’s conduct endangered only himself, the court did not attempt to assess or even acknowledge the substantial difference in the risks created by the defendant and Dobson, but rather stated that it would concentrate on the precaution costs since “the magnitude of the danger caused by the conduct of either Dobson or LP & L was extreme.”¹⁴⁶ Similarly, ignoring the previously found fact that the costs of inspection and trimming were so substantial that they exceeded the defendant’s available funds, the court concluded, without any attempt to assess the actual costs, that “the power company had a number of relatively inexpensive, efficacious precautions available to it, e.g., inspection, maintenance, partial insulation, public education and visible warnings.”¹⁴⁷ The court added:

Moreover, there was one particularly effective way in which LP & L could have eliminated the risk at little or no cost—by explicitly warning Dobson about the uninsulated high voltage distribution lines and telling him how to distinguish them from the insulated dwelling service lines. On the other hand, the cost to Dobson, who was ignorant of the characteristics of the uninsulated distribution lines and therefore unaware of their special danger, exceeded the cost to a person with superior capacity and knowledge. An actor with “inferior” capacity to avoid harm must expend more effort to avoid a danger than need a person with “superior” ability. A person about to cause injury inadvertently must expend much more effort to avoid the danger than need one who is at least aware of the danger involved. For this reason courts have traditionally cited “awareness of danger” as a factor distinguishing mere negligence from the higher state of culpability commonly known as “recklessness” or “willful and wanton conduct.”¹⁴⁸

The traditional distinction between mere inadvertence and disregard of a known risk, upon which the court relies, has a moral rather than a cost basis. The court’s attempt to apply the distinction based on a difference in costs merely asserted that the distinction existed in this case and assumed rather than demonstrated a difference in costs. How costly would it have been for Dobson to inquire about the risks related to distribution lines (if indeed he was unaware of the risks),

145. *Id.* at 576.

146. *Id.* at 575.

147. *Id.* at 576.

148. *Id.* (citations omitted).

which are generally assumed to be high-voltage and quite dangerous? Moreover, the court's apparent assumption that an explicit warning to Dobson would have eliminated the risk is unsupported, even considering only the risk to Dobson and his workers, rather than to others in the area also put at risk. As the dissenting justices observed, it is at least equally arguable that Dobson, being on the scene and aware of the distribution line, was more aware of the specific risk than the defendant and could more cheaply have avoided it.

Justice Cole, dissenting, apparently would have absolved the defendant of any responsibility. He argued that the defendant had sufficiently warned Dobson, that Dobson was aware of the danger from any electrical wire, and that Dobson could easily have avoided the injury by adopting any one of a number of accepted precautions, including climbing on the side of the tree away from the wire, not putting a metal wire in his safety line, or making a brief telephone call to the defendant's service representative.¹⁴⁹ Justice Pro Tempore Shortess, also dissenting, agreed with the court of appeals' assessment of comparative responsibility: "Even a neophyte tree trimmer should have known that the use of a steel-and nylon-made safety line was extremely dangerous, especially when working near electric lines."¹⁵⁰ Neither justice made any attempt to engage in a comparative analysis of risks, utilities, costs, or benefits. Justice Hall, dissenting from the denial of the petition for rehearing, also agreed with the court of appeals' assessment of comparative responsibility. Although he agreed that "[t]he 'Hand formula' is a useful tool as is the . . . Uniform Act list of factors in determining relative degrees of fault," he argued that "the majority opinion in this case miscalculates and gives too much weight to the cost side of the formula and reverses the superior-inferior roles of the actors in the immediate events which resulted in this accident."¹⁵¹

Justice Lemmon, concurring only in the result, stated that he disagreed with the use of the Hand formula to assess comparative fault since he believed that it "may be more restrictive or confusing and less useful to juries" than the Uniform Comparative Fault Act factors in providing "the necessary balancing and flexibility for quantifying each party's deviation from the appropriate standard of care."¹⁵² The

149. *Id.* at 577, 578, 581.

150. *Id.* at 581.

151. *Id.*

152. *Id.* at 577.

various justices' fumbblings with the Hand formula factors in this case, none of which come close to any actual risk-utility analysis, comparative or otherwise, amply bear out Justice Lemmon's concern.

In the only other Louisiana case that Allen and Rosenberg discuss, *Pinsouneault v. Merchants & Farmers Bank & Trust Co.*,¹⁵³ the intermediate appellate court merely cites the Hand formula boilerplate and then conclusorily announces:

In the present case, where foreseeability of armed robbery at the night depository has been established, the likelihood that the bank's failure to provide security would lead to the shooting death of a night deposit patron far outweighs the cost of installing [and maintaining and monitoring?] surveillance cameras, cutting down shrubbery, upgrading lighting and/or extending a fence¹⁵⁴

Note the lack of any *analysis* of risks, utilities, costs or benefits. Despite the Hand formula window-dressing, the requirement of more precaution by the bank is not based on any Hand formula balancing of risks and utilities, but rather on an implicit non-balancing, prohibitive-cost assessment of the extent of care owed by a bank to its customers given a significant foreseeable risk.

Dobson was one of the 37 Louisiana cases decided between 1989 and 1992, inclusive, that were identified in my 1994 study as having employed risk-and-utility language in relation to the negligent-conduct issue. My research assistant, under my guidance, classified 20 of the 37 cases as engaging in some form of risk-utility "balancing" and 14 of those cases, including *Dobson*, as engaging in "utilitarian balancing." In preparing this article, I have reviewed the 37 cases and determined that, while many of them, like *Dobson*, recited boilerplate risk-utility balancing language, none of them actually engaged in aggregate-risk-utility balancing. At most, they engaged in a non-balancing consideration of prohibitive-cost, according to which defendants who put others at risk are deemed negligent unless the risk is not too serious, necessary for the obtaining of some benefit desired by those being put at risk or by everyone in society rather than merely a private benefit to the defendant, reduced to the maximum extent feasible without significantly impairing the desired benefit, and significantly outweighed by the desired benefit.¹⁵⁵

153. 738 So. 2d 172 (La. Ct. App. 1999) (quoted in Allen & Rosenberg, *supra* note 30, at 718-19).

154. *Id.* at 187-88.

155. See text accompanying notes 53-56 *supra*.

In fact, many of the 37 Louisiana cases, including many of those improperly classified in my 1994 study as having engaged in utilitarian balancing, contained explicit language rejecting reductionist aggregate-risk-utility balancing and insisting that proper resolution of the “unreasonable risk” issue, in both ordinary negligence cases and cases involving Louisiana’s so-called “strict liability” for injuries caused by “things,”¹⁵⁶ depends ultimately on considerations of justice and the respective rights positions of the defendant and the plaintiff. For example, in a case decided a year after *Dobson*, which also was misclassified in my 1994 study as being based on utilitarian aggregate-risk-utility balancing, the Louisiana Supreme Court stated:

Although courts, including this court, have described the unreasonable risk of harm criterion [for “strict liability” for things] as requiring the court to balance the likelihood and magnitude of harm against the utility of the thing, the balancing test required by the unreasonable risk of harm criterion does not lend itself well to such neat, mathematical formulations. In addition to the likelihood and magnitude of the risk and the utility of the thing, the [court] should consider a broad range of social, economic, and moral factors. . . .

In essence, the unreasonable risk of harm analysis is similar to the duty-risk analysis which is performed in a negligence case. . . . Just as in a negligence analysis . . . [t]he court must carefully consider all the circumstances surrounding the particular accident under review to determine whether allowing recovery to the particular plaintiff involved, for damages occurring in the particular manner in which the plaintiff was injured, is desirable from the standpoint of justice and the social utility of the conduct of the respective parties.¹⁵⁷

156. A great many of the 37 Louisiana cases were such so-called “strict liability” cases, which are treated by the Louisiana courts the same as “traditional” negligence cases, except for imputed knowledge of the particular condition of the “thing”:

The unreasonable risk of harm criterion . . . is not a simple rule of law which may be applied mechanically to the facts of every case. . . . [It is the judge’s] duty to decide which risks are encompassed by the codal [Louisiana civil code] obligations from a standpoint of justice and social utility.

Although a judge may be constrained by the concrete problem before him and the ambit of his limited authority, he nevertheless must consider the moral, social, and economic values as well as the idea of justice in reaching an intelligent and responsible decision. The judicial process involved in deciding whether a risk is unreasonable under Art. 2317 is similar to that employed in determining whether a risk is unreasonable in a traditional negligence problem, except that a landowner is not absolved from strict liability by a showing of ignorance of the condition or by circumstances that the defect could not easily be detected.

Maples v. Merrimack Mut. Fire Ins. Co., 567 So. 2d 1178, 1180 (La. Ct. App. 1990); *accord*, *Alexander v. City of Lafayette*, 584 So. 2d 327, 328 (La. Ct. App. 1991).

157. *Oster v. La. Dep’t of Transp. and Dev.*, 582 So. 2d 1285, 1289 (La. 1991); *accord*, *Sistler v. Liberty Mut. Ins. Co.*, 558 So. 2d 1106, 1112–13 (La. 1990) (“Reasonableness of the risk is determined by balancing the probability and magnitude of the risk against the utility of the thing. The unreasonable risk criterion cannot be applied mechanically. This criterion is a

Allen and Rosenberg should be pleased to discover that the Louisiana courts do not actually apply an economic (or any other) aggregate-risk-utility test, but rather explicitly reject reductionist aggregate-risk-utility balancing and instead insist that proper resolution of the “unreasonable risk” issue, in both “traditional” negligence cases and cases involving so-called “strict” liability for things, depends ultimately on considerations of justice and the respective rights positions of the defendant and the plaintiff. Their basic hypothesis is not contradicted by the Louisiana cases, at least with respect to the economic-efficiency theory of negligence liability. However, the Louisiana judges explicitly invoke considerations of justice and rights, and those considerations, rather than the risk-utility-balancing boilerplate window-dressing, seem to underlie and explain their decisions. Allen and Rosenberg’s basic hypothesis thus still may be (and I think is) false. As they themselves admit, it may well be that there is no fundamental incompatibility between issues like the negligent-conduct issue and “top-down” theorizing in general, but rather that there is merely an incompatibility between the negligent-conduct issue and theories such as the economic-efficiency theory that misconceive and are fundamentally in conflict with the basic principles that underlie negligence liability (and law in general).¹⁵⁸

The only evidence that Allen and Rosenberg offer to support their claim that interactive justice principles are not employed by the courts is their assumption that jury instructions on the negligent-conduct issue have remained essentially unchanged over the last

concept employed to symbolize the judicial process of deciding which risks are encompassed by the codal obligations from the standpoint of justice and social utility. Reaching an intelligent and responsible decision of whether a risk is unreasonable involves consideration of moral, social and economic values as well as the ideal of justice.”); *Jones v. Gillen*, 564 So. 2d 1274 (La. Ct. App. 1990) (same); *Bell v. State*, 553 So. 2d 902 (La. Ct. App. 1989) (same); see *Henshaw v. Audubon Park Comm’n*, 605 So. 2d 640, 641 (La. Ct. App. 1992) (“We must consider the moral, social and economic values. . . . The activities of man for which he may be [“strictly” liable] are to be determined after a study of the law and customs, a balancing of claims and interests, a weighing of the risk and the gravity of the harm, and a consideration of individual and societal rights and obligations.”); *Fox v. Hous. Auth. of New Orleans*, 605 So. 2d 643, 645 (La. Ct. App. 1992) (“A trial judge, in making her determination of whether the risk of harm was unreasonable, should weigh certain considerations including the gravity of the risk and the harm, the individual and societal rights and obligations, and the social utility involved.”); *Orleans Parish Sch. Bd. v. City of New Orleans*, 585 So. 2d 643, 646 (La. Ct. App. 1991) (same); *Socorro v. Orleans Levee Bd.*, 561 So. 2d 739, 750 (La. Ct. App. 1990) (stating that, in “strict liability” or traditional negligence actions, “the court must balance the probability of the harm posed plus the gravity of the harm which may ensue versus the utility of the thing,” but that “[t]he rights and duties of the parties must also be considered.”); *Hopkins v. Travasos*, 569 So. 2d 1056 (La. Ct. App. 1990) (same).

158. See Allen & Rosenberg, *supra* note 30, at 689.

several decades (or longer), and thus have not been changed in response to the outpouring of interactive justice scholarship over the last thirty years.¹⁵⁹ However, if the jury instructions already explicitly or implicitly invoke the interactive justice principle, there is no need for them to be changed in response to recent interactive justice scholarship. Indeed, given the misguided nature of much of the recent interactive justice scholarship,¹⁶⁰ there has been very good reason not to draw on such scholarship in drafting instructions or deciding cases. Nevertheless, the failure of much of the interactive justice scholarship, like the economic-efficiency scholarship, to understand either the actual content of negligence law or the basic principles that underlie that content, does not prove that a proper theory of interactive justice would be incompatible with and unable to explain, illuminate, and guide the resolution of negligence cases in the courts.

Allen and Rosenberg themselves acknowledge that the reasonable person standard employed by the Restatement and the courts invites resort to the “concepts of fairness or rights” that are embedded in the interactive justice theory, and that “numerous cases . . . depend on such considerations.”¹⁶¹ The same point can be made, more strongly, for the “reasonably prudent,” “reasonably careful,” and “ordinary prudence” standards that dominate the states’ pattern jury instructions. “Common sense” as applied to issues of legal responsibility incorporates deeply embedded notions of fairness and justice, and juries and judges applying their common sense to resolve negligent-conduct issues, especially when reminded to apply the perspective of the “reasonably prudent person,” draw, consciously or subconsciously, on the basic principles of justice.¹⁶²

I agree with Allen and Rosenberg that academic “high” theory is unlikely to have major impacts on the law of torts or any other basic area of the law of obligations, which generally (subject to sometimes conflicting interest-group politics) will be driven by basic notions of

159. See *id.* at 689, 699, 700, 700–01, 704.

160. See, e.g., Richard W. Wright, *Substantive Corrective Justice*, 73 IOWA L. REV. 625 (1992) [hereinafter Wright, *Substantive Corrective Justice*] (criticizing Ernie Weinrib’s formalist theory and Jules Coleman’s bifurcated annulment theory); Wright, *Standards of Care*, *supra* note 12, at 252–54 (noting several justice scholars’ erroneous treatment of the basic principle of utilitarianism, the impartiality principle, as a basic principle of justice); Wright, *Justice and Reasonable Care*, *supra* note 5, pts. IV & V (same); see generally Wright, *The Principles of Justice*, *supra* note 25.

161. See Allen & Rosenberg, *supra* note 30, at 696.

162. See text accompanying notes 87–93 *supra*.

fairness and justice that are shared by and accessible to all, whether or not the academic theory is on target.¹⁶³ However, I think that on-target theoretical expositions of the relevant principles of justice can be brought to bear on, and provide helpful illumination and guidance with respect to, specific doctrinal issues and the resolution of particular disputes, while also providing useful general reminders of what law has been and should continue to be all about. At least that has been the motivation for my scholarship.

V. ANITA BERNSTEIN: OBJECTIVE VERSUS SUBJECTIVE STANDARDS OF CARE

In her contribution to this symposium Anita Bernstein brings her customary creative intelligence to bear on a less-discussed aspect of negligence law. Rather than focusing, as the rest of the contributors have, on the substantive conceptions of reasonableness that are employed by the courts in negligence cases, she explores the different perspectives—objective or subjective—that the courts use when assessing whether a person’s conduct was in accord with the applicable conception of reasonableness, however it may be conceived. For example, while defendants are generally held to the objective standard of the “reasonably prudent” or “reasonably careful” person with ordinary mental and physical capacities and skills, regardless of their own individual physical and mental capacities and skills, exceptions are made for children and persons with physical disabilities, who instead are generally only held to the subjective standard of a “reasonably careful” person with the same physical and (for children) mental capacities and skills that are actually possessed by the particular defendant.¹⁶⁴

Bernstein claims that no one has offered a robust, comprehensive rationale for the generally applicable objective perspective, the subjective exceptions for children and persons with physical disability but not for mentally disabled adults, or the tendency of courts and juries to apply a more subjective perspective when assessing a plaintiff’s contributory negligence.¹⁶⁵ As Bernstein notes,¹⁶⁶ a frequently

163. I am an agnostic with respect to their claim that the law of antitrust has been colonized by economic efficiency theory. See Allen & Rosenberg, *supra* note 30, at 719–31. I know very little about the area, but I have some doubts about their claim based on their own exposition as well as the durability of notions of justice and fair play in every area of the law.

164. See RESTATEMENT (SECOND) OF TORTS §§ 283–283 C, 289(a) & cmt. n, 290 (1965); PROSSER & KEETON, *supra* note 1, at 169, 173–76, 179–82; Bernstein, *supra* note 34, at 745–47.

165. See Bernstein, *supra* note 34, at 740, 745–46 & n.37, 749–51.

mentioned rationale, which is favored by efficiency theorists and relied on in the draft Restatement Third, is administrative convenience—avoidance of the administrative expenses of trying to assess individuals' differing mental capacities and skills, which are assumed to be much higher than the administrative costs of assessing (significant) differences in physical capacities and skills.¹⁶⁷ However, this rationale fails to explain the exception for children, who, except when engaged in “adult” (dangerous) activities, are judged according to the very subjective perspective of “a reasonable person of like age, intelligence, and experience.”¹⁶⁸ It also fails to explain the use of the subjective perspective for persons with superior rather than inferior capacities and skills,¹⁶⁹ for defendants in certain “affirmative duty” situations,¹⁷⁰ and (often) for plaintiffs in general.¹⁷¹

A more descriptively plausible and normatively attractive rationale, which is partially adopted by Bernstein¹⁷² and also relied on at times in the draft Restatement Third, which however fails to fully understand its implications or to consistently apply it,¹⁷³ is that the objective standard for defendants (and plaintiffs who put others as well as themselves at significant risk) is necessary to assure sufficient

166. See *id.* at 750 n.65.

167. See DRAFT RESTATEMENT THIRD, *supra* note 17, § 11 cmts. a & e; text accompanying notes 176–77 *infra*.

168. RESTATEMENT (SECOND) OF TORTS § 283 A & cmt. c, § 464(2) (1965); see DRAFT RESTATEMENT THIRD, *supra* note 17, § 10(a) (“a reasonably careful person of the same age, intelligence, and experience”). The draft Restatement Third notes that children in Australia and England evidently are held to the intermediate (semi-objective or semi-subjective) perspective of a child of the same age, without taking account of the particular child's intelligence or experience. See *id.* § 10 cmt. c.

169. See text accompanying note 182 *infra*.

170. See text accompanying notes 183–84 *infra*.

171. See text accompanying notes 185–89 *infra*. Gary Schwartz once explained tort law's more lenient treatment of plaintiff's alleged contributory negligence on the ground that, while the defendant's exposing others to risks that exceed expected benefits can be viewed as egoistical or antisocial self-preference and hence morally objectionable on utilitarian or fairness grounds, “it is difficult to identify any clear moral principle that [plaintiff's foolishly exposing himself to excessive risk] contravenes.” See Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 701–02 & nn.31 & 33, 722–23 & nn.117 & 118 (1978) [hereinafter Schwartz, *Contributory Negligence*]. As he noted, however, this argument implies there should not even be a contributory negligence defense. See *id.* Fleming James argued that the objective perspective for defendants represents a victory for the alleged modern tort principle of compensating accident victims over the alleged traditional tort principle of basing liability on personal moral fault, while a more subjective perspective for plaintiffs is supported by both principles. Fleming James, Jr., *The Qualities of the Reasonable Man in Negligence Cases*, 16 MO. L. REV. 1, 1–2 (1951); see FLEMING, *supra* note 1, at 285. However, tort liability is not premised on either compensation per se or personal moral fault.

172. See Bernstein, *supra* note 34, at 736–37; text accompanying notes 232–33 *infra*.

173. See text accompanying notes 209–29 *infra*.

security of others' persons and property. Oliver Wendell Holmes, Jr., famously remarked:

[One rationale is] the impossibility [or difficulty] of nicely measuring a man's powers and limitations. . . . But a more satisfactory explanation is that, when men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. If, for instance, a man is born hasty or awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.¹⁷⁴

As I have previously discussed,¹⁷⁵ this rationale is an interactive justice rationale, rather than (as is sometimes assumed due to the reference to "general welfare"¹⁷⁶) a utilitarian efficiency rationale. According to the standard utilitarian efficiency analysis, a subjective perspective ideally should be applied to evaluate the reasonableness of all conduct. It would be inefficient to require all persons to attain the same level of risk reduction despite widely varying physical, mental, technical, and economic capacities to achieve such risk reduction. Instead, each person 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. Thus, ideally, assuming costless perfect information about individual capacities, a subjective perspective should be applied to evaluate the reasonableness of any person's conduct. However, in the real world, the high administrative costs of ascertaining and measuring individual capacities usually outweigh the theoretical efficiency gains of the subjective perspective. To avoid these high administrative costs, the objective perspective (which is assumed but not shown to be a second-best efficient solution) must be used, except for those (in)capacities that are easily ascertainable and measurable at low cost.¹⁷⁷

174. HOLMES, *supra* note 44, at 86–87 (partially quoted in Bernstein, *supra* note 34, at 745).

175. See Wright, *Standards of Care*, *supra* note 12, at 257–59.

176. See, e.g., Warren Schwartz, *Objective and Subjective Standards of Negligence: Defining the Reasonable Person to Induce Optimal Care and Optimal Populations of Injurers and Victims*, 78 GEO. L.J. 241, 266 (1989).

177. See, e.g., KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 54–55, 57–59 (2d ed. 2002); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC*

Some efficiency theorists have argued that if potential injurers' behavior were judged using the subjective perspective, potential victims would be unable to predict and hence efficiently react to the legally permissible risks to which they would be exposed.¹⁷⁸ But this is not correct. Any potential victim could calculate an expected risk exposure by averaging the (subjectively variable) legally permissible risks created by all the potential injurers. A potential victim with actual knowledge of these risks could explicitly calculate this average and then calculate his own efficient level of care. A potential victim without such actual knowledge (the real world situation) presumably would and should assume that the potential injurers' subjectively varying levels of efficient risk creation are fairly uniformly distributed above and below the efficient level of risk creation for the "typical" or "ordinary" potential injurer, and hence could and should calculate his own efficient level of care based on the level of efficient risk creation for the typical or ordinary potential injurer. Thus, the difficulties that potential victims face in estimating their risk exposure when the subjective perspective is applied to potential injurers are no worse than, and indeed are identical to, the difficulties that they face when the objective perspective is applied.

Under the interactive justice theory, on the other hand, a minimum level of care specified by the objective "reasonably careful person" standard is generally required, as a matter of justice, for persons (defendants or plaintiffs) putting others at significant risk. According to the basic moral premise of individuals' right to equal freedom, dignity, and respect, which underlies and gives substantive content to the principles of justice, the "common good" is not (as under utilitarian efficiency theories) the maximization of society-wide aggregate benefits minus aggregate costs, without regard to the distribution of the benefits and costs, but rather the concurrent, interdependent, and harmonious fulfillment of *each* individual's humanity. The principles of justice address the external conditions

STRUCTURE OF TORT LAW 123-26 (1987); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 167 (4th ed. 1992); Mark F. Grady, *Better Medicine Causes More Lawsuits, and New Administrative Courts Will Not Solve the Problem*, 86 NW. U. L. REV. 1068, 1085 (1992); Schwartz, *supra* note 176, at 278. Guido Calabresi has suggested (with reservations) that applying an objective perspective regardless of subjective (in)capacities will steer the "accident prone" away from activities in which their propensities create the greatest dangers. GUIDO CALABRESI, *IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM* 33-34 (1985); see Schwartz, *supra*, at 246-47. This argument, like the administrative cost argument, would apply to plaintiffs as well as defendants.

178. See, e.g., ABRAHAM, *supra* note 177, at 55.

that are properly specifiable by law for the attainment of this common good: providing for a fair distribution among the members of society of the instrumental goods that are necessary or useful for persons' exercise of their external freedom, which is the focus of the principle of distributive justice, and assuring sufficient security of individuals' persons and existing stocks of instrumental goods in their interactions with others, which is the focus of the principle of interactive justice.¹⁷⁹

The external exercise of one's right to equal freedom depends on sufficient security against interferences by others with one's person and property. As Holmes noted, regardless of measurement problems, using a subjective perspective to determine the negligence of defendants would make such security impossible, since the risks to which a person could permissibly be exposed by others would depend on the subjective capacities of the particular others with whom that person happens (often unpredictably) to interact. To have sufficiently secure (or any true) rights in one's person and property, those rights must be defined by an objectively specified maximum level of risk to which one's person and property can be exposed by others. This level, which may vary in different types of situations, must be specified so as to further the common good—i.e., the maximization of every person's *equal* external freedom—which may also be described as the level of risk that would be deemed reasonable by the reasonably prudent person who has a proper respect for the persons and property of others. A failure to adhere to this objectively specified level of care constitutes “legal fault,” for the adverse consequences of which you are *morally responsible*, whether or not you were also *morally at fault*—and thus subject to moral blame—because you did not do all you were capable of doing to try to adhere to the objectively specified level of care.¹⁸⁰ In sum, as we previously noted, the

179. See Wright, *The Principles of Justice*, supra note 25, at 1861–71, 1885–88.

180. See Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40, at 40 (1915) (“Negligence is conduct, not a state of mind.”); Warren A. Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1, 9–12 (1927); *id.* at 4 (“There is no subjective legal fault.”). William Rodgers agrees that tort liability should be grounded on respect for persons, but erroneously assumes that this requires basing liability on personal desert (merit or blame), which in turn allegedly requires that strict liability (for defendants) or the assumption of risk defense (for plaintiffs) should apply to persons who act “rationally” in the decision-theoretic sense of conscious cost-benefit analysis, while a subjective “best efforts” fault standard should apply to defendants and plaintiffs who act “nonrationally” (i.e., through biologically and socially determined responses). See William H. Rodgers, Jr., *Negligence Reconsidered: The Role of Rationality in Tort Theory*, 54 SO. CAL. L. REV. 1, 4–7 (1980). I find it difficult to follow Rodgers’ arguments. He implausibly assumes that (1) applying instrumental utilitarian efficiency analysis to “rational”

question of justice and legal liability is one of objective Right rather than subjective virtue.¹⁸¹

Unlike the administrative convenience rationale, which would not take into account (difficult to measure) subjective capacities, skills, or knowledge in order to raise or lower the required level of care, the interactive justice rationale matches actual negligence law by making the objective standard of care only a *minimum* required level of care. If a person has superior rather than inferior capacity, skill, or knowledge, that subjective capacity, skill, or knowledge morally should be and is taken into account by judges and juries in assessing whether that person has behaved reasonably in putting others' persons or property at risk.¹⁸² Conversely, unlike the administrative convenience rationale, the interactive justice rationale is consistent with the courts' use of a subjective perspective to *lower* the required level of care for defendants in situations in which it is the rights of the defendant, rather than the plaintiff, that are paramount. In cases involving the duty of care owed by land occupiers with respect to on-

actors is consistent with personal desert and respect for persons, (2) that "rational" defendants are always the cheapest cost avoiders, even when faced with "rational" plaintiffs, and thus should be subject to Calabresian strict liability, and (3) that it makes sense to apply a "best efforts" personal-desert fault standard to persons assumed to be behaving "nonrationally." His application of the "rational" versus "nonrational" actor distinction to the case law seems to me to be entirely ad hoc and result-oriented.

181. *Contra* Bernstein, *supra* note 34, at 735; David G. Owen, *The Fault Pit*, 26 GA. L. REV. 703, 716, 719, 723–24 (1992); Stephen R. Perry, *Loss, Agency, and Responsibility for Outcomes: Three Conceptions of Corrective Justice*, in TORT THEORY 24, 35–38, 40, 45 n.57 (Ken Cooper-Stephenson & Elaine Gibson eds., 1993); Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439, 452–55 (1990); *cf.* Grady, *supra* note 177, at 1082–85 (claiming that the strict liability aspect of objective negligence for those with subnormal capacities or skills, which has long been noted in the traditional tort literature, is a feature of tort law "that the law and economics literature has recently uncovered" that is inconsistent with interactive justice). These writers fail to note the distinction between justice and legal liability, on the one hand, and virtue and moral blame or merit, on the other, that has long been stressed in theories of justice. *See* Wright, *The Principles of Justice*, *supra* note 25, at 1876–82. For example, Kant's moral philosophy distinguishes between a doctrine of virtue and a doctrine of Right (justice and law). The doctrine of virtue, while specifying objective moral duties based on the categorical imperative, assesses the moral *blame* or *merit* of conduct in terms of the individual's subjective capacity and effort in attempting to ascertain and satisfy those duties. The doctrine of Right, on the other hand, directly applies the objective requirements of the categorical imperative in determining an individual's moral and legal *responsibility* for the adverse effects that she 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 the actor's internal subjective capacity and efforts to conform her conduct to the objective requirements of the categorical imperative, which grounds all duties of Right and virtue. *See* IMMANUEL KANT, THE METAPHYSICS OF MORALS *214, 218–32, 312, 379–80, 381–83 & n.*, 389–94, 401, 404–05, 446–47, 463 (Mary Gregor trans., 1991) (1797).

182. *See* RESTATEMENT (SECOND) OF TORTS § 289(b) & cmt. m (1965); *id.* § 298 & cmt. d; DRAFT RESTATEMENT THIRD, *supra* note 17, § 12.

premises risks to entrants on their land, the applicable perspective shifts from the usual objective perspective to an increasingly subjective perspective, which takes into account the capacities, knowledge, and financial resources of the land occupier, as the status of the entrant shifts from that of a lawful invitee to a mere licensee to a wrongful trespasser.¹⁸³ Similarly, the weaker the relationship between the parties, the more courts should and do take into account the subjective capacities and knowledge of the particular defendant in deciding whether she should have an affirmative duty to aid another whom she has not put at risk and in assessing, should such a duty be found to exist, whether she was negligent in her performance of that duty.¹⁸⁴

The interactive justice rationale, unlike the administrative convenience rationale, also explains and justifies judges' and juries' tendency (which is noted by Bernstein¹⁸⁵ and others¹⁸⁶ but not the

183. See Wright, *Standards of Care*, *supra* note 12, at 265–66; text accompanying notes 49, 57–58 *supra*. The Restatement Second phrases the limited duty that a land occupier owes to trespassers in terms of what he “knows, or from facts within his knowledge should know” and “has reason to believe” regarding a “constant” trespasser on a limited area, “knows or has reason to know/believe” regarding a current trespasser, and “knows or has reason to know” and “realizes or should realize” regarding a child trespasser. RESTATEMENT (SECOND) OF TORTS §§ 333–339 (1965). The land occupier’s limited duty to licensees is phrased in terms of what he “knows or has reason to know” and “should realize/expect.” See *id.* §§ 341 & 342. The land occupier’s general duty to invitees is phrased in terms of what he “knows or by the exercise of reasonable care would discover” or “should realize/expect/anticipate.” See *id.* §§ 341A, 343 & 343A. For the fine but significant distinctions between “from facts within his knowledge should know [without any further inquiry]” (least demanding), “has reason to know [after further inquiry in light of the known facts]” (intermediately demanding), and “should know” (most demanding, and the usual negligence standard), see *id.* § 334 cmt. c. Only “should know” implies an objective duty to inspect for possible dangers, in the absence of knowledge of facts indicating such a possibility.

184. See Wright, *Standards of Care*, *supra* note 12, at 271–74.

185. See Bernstein, *supra* note 34, at 750.

186. See, e.g., CALABRESI, *supra* note 177, at 25–26, 32–33, 46–54, 143 n.108, 147 n.131; FLEMING, *supra* note 1, at 285; 3 HARPER ET AL., *supra* note 1, § 16.2 at 392–93 & n.17, § 16.7 at 428–34; 4 HARPER ET AL., *supra*, § 22.10 at 334–38; PROSSER & KEETON, *supra* note 1, § 65 at 455 & nn.36, 37 & 41; VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE §§ 1–2(d), 1–2(d)(1), 13–2(a) (3d ed. 1994) [hereinafter SCHWARTZ, COMPARATIVE NEGLIGENCE]; Schwartz, *Contributory Negligence*, *supra* note 171, at 717 n.94, 722 n.117; Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 Yale L.J. 1717, 1743–47, 1750–52, 1759–63 & n.333 (1981); Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641, 661–66 (1989). Calabresi discusses, *inter alia*, the religious-belief cases, which dramatically illustrate the use of the dual perspective: objective for defendants, subjective for plaintiffs. See CALABRESI, *supra*, at 46–54. For example, in *Friedman v. New York*, 282 N.Y.S.2d 858 (1967), a 16-year old Orthodox Jewish woman was held not to have been contributorily negligent when she jumped off a ski lift, negligently shut down by the defendant, to comply with what she believed to be an absolute religious requirement that an unmarried woman should not be with a man after dark in a place where she could not readily be reached by others (she was with a 19-year-old male friend). The most common religious belief cases involve mitigation of damages, rather than contributory

Restatements) to apply a more lenient, subjective perspective to assessments of a plaintiff's alleged contributory negligence, at least in those situations in which the plaintiff's conduct created significant risks only to himself.¹⁸⁷ The rationale for adopting the objective standard of care as the minimum level of required care is the necessity of doing so to protect individuals' persons and property from risks created by others. That rationale does not apply to a plaintiff whose conduct only created significant risks to himself,¹⁸⁸ so the shift from the otherwise morally preferable subjective perspective to the rights-protecting objective perspective need not, indeed should not, occur.

The more clearly the risks created by the plaintiff were solely to himself, the more likely that a subjective perspective will be used.

negligence per se. See, e.g., *Lange v. Hoyt*, 159 A.2d 575, 577–78 (Conn. 1932) (plaintiff's Christian Science religious beliefs may be taken into account in determining the reasonableness of her failure to obtain medical treatment); *Christiansen v. Hollings*, 112 P.2d 723, 730 (Cal. Dist. Ct. App. 1941) (same); *Warren V. Ludlum, Jr., Plaintiff's Duty to Minimize Defendant's Liability by Surgery*, 17 TENN. L. REV. 821 (1943). Much less deference is paid to a person's religious beliefs which expose others to risk, especially outside but even within the parent-child relationship. For example, imagine that Ms. Friedman had landed on the head of a skier when she jumped off of the ski lift. The especially difficult cases are those in which a parent refuses to obtain medical treatment for a child due to the parent's religious beliefs. See *Hansen v. Bussman*, 549 P.2d 1265, 1276 (Ore. 1976) (citing numerous sources). In the absence of a statutory exception for spiritual treatment, parents are held criminally liable under child abuse and homicide statutes for failure to obtain proper medical treatment for their children, despite their religious beliefs. See *Washington v. Norman*, 808 P.2d 1159 (1991). Many states have enacted statutory exceptions, which, however, are thought to raise constitutional Establishment Clause problems if they are not absolute exceptions. See *Munn v. Algee*, 924 F.2d 568 (5th Cir. 1991) (tort liability); *Minnesota v. McKown*, 475 N.W.2d 63 (Minn. 1991) (criminal); *Hermanson v. Florida*, 604 So. 2d 775 (Fla. 1992) (criminal).

187. This qualification is a modification of my previously published argument, which did not distinguish situations in which plaintiffs put only themselves at risk from those in which they also created significant risks to others. See Wright, *Standards of Care*, *supra* note 12, at 257–59.

188. See, e.g., *Rossman v. LaGrega*, 270 N.E.2d 313, 317 (1971) (“[T]here is a qualitative difference, when it comes to imposing liability on such a theory as tort, between one whose negligent act does harm to others and one whose negligent act does harm to himself, and the same mechanistic standard ought not be applied undifferentially as to both.”). In his influential article on negligence, Henry Terry, after stating that “[t]here seems to be no difference in respect to its nature between contributory negligence and negligence toward others,” noted that while negligence toward others is “a breach of a perfect legal duty owed to someone else, for whose breach an action will lie,” contributory negligence, “when it has any legal effect, [is] a breach of an imperfect legal duty to use care for the safety of one’s self or one’s belongings in certain cases where some one else has an interest in such safety. The duty is a legal duty, but an imperfect duty only inasmuch as no action will lie for its breach. Its sanction consists in the refusal of a remedy which might otherwise have been had for the other party’s breach of duty.” Terry, *supra* note 180, at 40. Terry’s distinction between the “perfect” legal duty of the defendant and the “imperfect” legal duty of the plaintiff bears a marked resemblance to Kant’s distinction between the perfect duties of Right and the imperfect duties of virtue (with the latter encompassing all duties to oneself). See Wright, *Substantive Corrective Justice*, *supra* note 160, at 659–60.

The most dramatic example is the adoption of rules by a substantial majority of jurisdictions, by judicial decision or statute or both, that refuse to allow a plaintiff's failure to use an automobile seat belt to be used as evidence of the plaintiff's contributory negligence or, less frequently, allow it to be used to establish not more than a specified small percentage of comparative responsibility.¹⁸⁹ Numerous rationales have been offered for these rules—for example, maximizing manufacturers' incentive to design safer vehicles or maximizing injury compensation through automobile liability insurance, which is more widespread (although more costly to administer) than first-party medical, disability, or automobile-collision insurance. However, the only rationale that distinguishes the failure to use a seat belt from other causes of automobile-related injuries, such as (other forms of) inattentiveness or speeding, to which the contributory negligence defense fully applies, is that the failure to use a seat belt, unlike the other causes, puts only oneself at risk. As such, it gives rise to a justifiable, sympathetic, subjective response, based on the perception that the failure to use the seat belt usually or often is due to inadvertence rather than a deliberate choice and—the critical distinction—that it put only the plaintiff himself at risk.

Holmes implicitly set aside the “more satisfactory” interactive justice rationale and returned to the administrative convenience rationale when he “cautiously” argued for applying a subjective perspective to defendants as well as plaintiffs when they have “a distinct defect of such a nature that all can recognize it as making certain precautions impossible”:

There are exceptions to the principle that every man is presumed to possess ordinary capacity to avoid harm to his neighbors, which illustrate the rule, and also the moral basis of liability in general. When a man has a distinct defect of such a nature that all can recognize it as making certain precautions impossible, he will not be held answerable for not taking them. A blind man is not required to see at his peril; and although he is, no doubt, bound to consider his infirmity in regulating his actions, yet if he properly finds himself in a certain situation, the neglect of precautions requiring eyesight would not prevent his recovering for an injury to himself, and,

189. See, e.g., ILL. COMP. STAT., ch. 95-1/2, § 12-603.1 (Supp. 1985) (“Failure to wear a seat safety belt in violation of this Section shall not be considered evidence of negligence, shall not limit the liability of an insurer, and shall not diminish any recovery for damages arising out of the ownership, maintenance, or operation of a motor vehicle.”); *Swajian v. General Motors Corp.*, 559 A.2d 1041 (R.I. 1989) (same); RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 16 cmt. f, Reporters’ Notes, at 254 (1999) (surveying the state statutes); FLEMING, *supra* note 1, at 280–81; 4 HARPER ET AL., *supra* note 1, § 22.10 at 339–41 n.17.

it may be presumed, would not make him liable for injuring another. So it is held that, in cases where he is the plaintiff, an infant of very tender years is only bound to take the precautions of which an infant is capable; the same principle may be cautiously applied where he is defendant. Insanity is a more difficult matter to deal with, and no general rule can be laid down about it. There is no doubt that in many cases a man may be insane, and yet perfectly capable of taking the precautions, and of being influenced by the motives, which the circumstances demand. But if insanity of a pronounced type exists, manifestly incapacitating the sufferer from complying with the rule which he has broken, good sense would require it to be admitted as an excuse.¹⁹⁰

Holmes had reason to be cautious. Under the “more satisfactory” interactive justice rationale, the subnormal capacities and skills of a defendant should be taken into account only if this can be done without adversely affecting the security of others’ rights in their persons and property. This again matches actual negligence law.

A defendant with an obvious physical incapacity (e.g., lack of vision, hearing, or legs or substandard agility or skill due to inexperience or old age) is not required to do what she is incapable of doing (e.g., seeing, hearing, walking, or displaying the agility or skill of an experienced or younger person). However, she is required to take whatever additional precautions are necessary to reduce the foreseeable risks to others to the acceptable level specified by the objective standard of care. If she is able to do so, her physical incapacity will be taken into account in evaluating her conduct. If she is not able to do so, her physical incapacity will not be taken into account. Instead, she must avoid engaging in the particular activity (e.g., a blind person is not allowed to drive).¹⁹¹ As Bernstein states, the care required of the physically disabled is “[n]ot higher, not lower, just different”¹⁹²—different in terms of the specific required precautions, but not different in terms of the required minimum level of care to avoid putting the persons and property of others at excessive, unaccepted risk. The great majority of cases in which the subjective perspective is used involve plaintiffs, rather than defendants, with a physical incapacity.¹⁹³

190. HOLMES, *supra* note 44, at 87–88.

191. See RESTATEMENT (SECOND) OF TORTS § 283 C cmt. c (1965); DRAFT RESTATEMENT THIRD, *supra* note 17, § 11 cmt. b; FLEMING, *supra* note 1, at 112–13; 3 HARPER ET AL., *supra* note 1, § 16.7 at 421–24; KEETON ET AL., *supra* note 1, § 32 at 175–76.

192. See Bernstein, *supra* note 34, at 749.

193. See FLEMING, *supra* note 1, at 114; 3 HARPER ET AL., *supra* note 1, § 16.7 at 428 & nn.16 & 17.

As Bernstein discusses,¹⁹⁴ a dual standard clearly exists for persons with significant mental disability. As far back as 1915, Henry Terry stated in his leading article on negligence:

In the case of contributory negligence there is an exception to [the objective "standard man"] rule in the case of abnormal persons, such as children and persons of unsound mind. They are not required to act like a standard man, but only to use such judgment as they are capable of. But as to negligence which is not merely contributory, as to negligent wrongs against others, the standard man test applies to their conduct also.¹⁹⁵

As long as there was volitional conduct—which is the minimum requirement for moral and hence legal responsibility—a defendant will be held liable for negligence despite being unable to appreciate the risks that she creates to others as a result of her mental disability.¹⁹⁶ Like the self-described "limited intelligence" defendant in the classic case of *Vaughan v. Menlove*,¹⁹⁷ an insane or otherwise mentally deficient defendant will not have her mental incapacity taken into account, since, unlike significant physical disabilities, there is no way

194. See Bernstein, *supra* note 34, at 750–53.

195. Terry, *supra* note 180, at 47.

196. One court has indicated a willingness to take a defendant's unforeseeable supposed "temporary insanity" into account, analogizing it to epileptic seizures or heart attacks. The court stated that there should be no liability when there was no forewarning, but that a defendant who was aware of her susceptibility could be held liable for failing to take steps to guard against injuring others when such episodes occurred. See *Breunig v. Am. Family Ins. Co.*, 173 N.W.2d 619 (Wis. 1970). The court's analogy fails to note the lack of volitional conduct by the defendant overcome by an unforeseeable sudden onset of physical incapacity, in contrast with the deluded yet volitional conduct by the mentally impaired. Cf. *Roberts v. Ramsbottom*, [1980] 1 W.L.R. 823 (defendant who continued to drive after suffering partially disabling [heart?] attack held liable); *Broome v. Perkins*, [1987] R.T.R. 321 (defendant who knew he was diabetic and had disabling attack while driving held liable). A defendant subject to foreseeable, preventable occurrences of "temporary insanity," like those subject to pronounced physical incapacity, can take alternative precautions (for example, medicines to treat a chemical imbalance in the brain) to attain the specified objective level of care, thereby assuring the appropriate level of security for the persons and property of others. However, there seems to be little reason to treat a defendant overcome by unforeseeable permanent or temporary insanity any differently than a permanently insane defendant, and the *Breunig* court's statement to the contrary has not been followed by other courts. See DRAFT RESTATEMENT THIRD, *supra* note 17, § 11(c) cmt. e, Reporters' Note, at 161–62. Nor was it even followed by the *Breunig* court, which upheld a jury verdict that the defendant was liable although it is highly doubtful (1) that the defendant was aware of the irrationality of her beliefs and visions or (2) that she or anyone else had forewarning that her irrational beliefs might pose a risk of injury to others (or herself). The draft Restatement's assumption that the *Breunig* jury found that the defendant had adequate foreknowledge, *see id.*, is questionable. After beginning its deliberation, the jury asked, "If [the defendant] is found not negligent, will it mean Mr. Breunig will receive no compensation?," but received no answer, and two jurors dissented from the verdict for the plaintiff. "expressly stat[ing] they could find no evidence of forewarning." *Breunig*, 173 N.W.2d at 625.

197. 132 ENG. REP. 490 (C.P. 1837).

to do so that would be consistent with the security of others' rights in their person and property.¹⁹⁸ However, as numerous commentators and courts have stated, such mental disability should be and is taken into account in analyzing a plaintiff's contributory negligence.¹⁹⁹ The interactive justice rationale for applying the objective perspective to a mentally deficient defendant does not apply to a mentally deficient plaintiff, who therefore "may not be held to any greater degree of care for his own safety than that which he is capable of exercising."²⁰⁰ As one of the leading torts treatises states,

In the case of mentally defective or insane plaintiffs, . . . the policy arguments [for the objective standard for defendants] lose much of their force. . . . Because of the obviously different equities of the situation, the great majority of courts in the contributory negligence context apply a lower standard of care and consider the plaintiff's incapacity as only one of the "circumstances" to be considered in judging the quality of his conduct.²⁰¹

Some earlier opinions held the plaintiff who was not totally insane to the same standard of safety for his own protection as a normal person. Recent decisions have rejected such distinctions and permit the trier of fact to determine if the plaintiff's mental condition deprived him of the ability to perceive or avoid the harm.²⁰²

Even the dean of the defense lawyers, Victor Schwartz, agrees: "Because of the flexibility inherent in comparative negligence, it would seem appropriate to permit a plaintiff to present to the jury facts bearing on his mental capacity that might serve to diminish his fault."²⁰³

The Restatement Second acknowledged, in a backhanded manner, the propriety and possible existence of the dual perspective for insane persons, but not for those with less pronounced forms of

198. See DRAFT RESTATEMENT THIRD, *supra* note 17, § 11 cmt. e at 153.

199. See CALABRESI, *supra* note 177, at 25–26, 32–33, 143 n.108; FLEMING, *supra* note 1, at 114 n.80; 3 HARPER ET AL., *supra* note 1, § 16.7 at 428–34; KEETON ET AL., *supra* note 1, § 32 at 176–78; SCHWARTZ, COMPARATIVE NEGLIGENCE, *supra* note 186, § 13.3(a) at 278–79; Stephanie I. Splane, Note, *Tort Liability of the Mentally Ill in Negligence Actions*, 93 YALE L.J. 153 (1983); James, *supra* note 171, at 25–26.

200. *Banks v. United States*, 969 F. Supp. 884, 893 (S.D.N.Y. 1997) (citations omitted).

201. KEETON ET AL., *supra* note 1, § 32 at 178.

202. *Id.* at 178 n.39 (citations omitted); see *Snider v. Callahan*, 250 F. Supp. 1022, 1023 (W.D. Mo. 1966) (stating that Missouri and many other states apply a dual standard to defendants and plaintiffs, not only regarding the insane but also those with less serious mental incapacity); 3 HARPER ET AL., *supra* note 1, § 16.7 at 432 & n.34; Alison P. Raney, *Stacy v. Jedco Construction, Inc.: North Carolina adopts a Diminished Capacity Standard for Contributory Negligence*, 31 WAKE FOREST L. REV. 1215 (1996) (discussing cases from a number of jurisdictions and stating that a majority of states that have recently addressed the issue have applied the subjective perspective to persons of diminished mental capacity short of insanity).

203. SCHWARTZ, COMPARATIVE NEGLIGENCE, *supra* note 186, § 13.3(a) at 279.

mental deficiency. It stated that the objective perspective applies to defendants²⁰⁴ and, “[u]nless the actor is a child or an insane person,” to plaintiffs,²⁰⁵ and, in a caveat, it stated, “The Institute expresses no opinion as to whether insane persons are or are not required to conform for their own protection to the standard of conduct which society demands of sane persons.”²⁰⁶ In a comment, it claimed that “[n]o case has been found dealing with the question whether insanity will excuse conduct which would otherwise be contributory negligence, where the insane person himself suffers harm.” But it acknowledged that “[i]t is possible that the policy factors stated [for applying the objective perspective to mentally deficient defendants] may not have the same force as applied to contributory negligence. The question is therefore left open in the Caveat.”²⁰⁷ It asserted, however, that “[m]ental deficiency which falls short of insanity . . . does not excuse conduct which is otherwise contributory negligence.”²⁰⁸

Ignoring the apparently unanimous contrary consensus by past and present treatise writers and other commentators, as well as the case law that, since the Restatement Second was published, has increasingly recognized that a subjective perspective should be applied not only to insane plaintiffs but also to any plaintiff with a significant mental deficiency,²⁰⁹ the draft Restatement Third rejects even the qualified position stated in the Restatement Second and applies the objective perspective to mentally deficient plaintiffs as well as defendants.²¹⁰ The reporters apparently felt compelled to march in lockstep with the position that was previously prematurely adopted, without any consideration of the cases or substantive policies, in the Restatement Third on Apportionment of Liability as a result of that Restatement’s misguided insistence on uniform rules to ease apportionment calculations regardless of substantive differences between different types of situations.²¹¹

204. See RESTATEMENT (SECOND) OF TORTS § 283 B & cmt. c (1965).

205. *Id.* § 464(1).

206. *Id.* § 464 Caveat.

207. *Id.* § 464 cmt. g.

208. *Id.*

209. See text accompanying notes 194–202 *supra*.

210. DRAFT RESTATEMENT THIRD, *supra* note 17, § 11(c).

211. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 3 & cmt. a & Reporters’ Note (2000) [hereinafter RESTATEMENT THIRD: APPORTIONMENT].

The draft Restatement Third explicitly tracks the position and reasoning in the Restatement Third on Apportionment of Liability:

Restatement Third, Torts: Apportionment of Liability § 3, Comment *a*, concludes that the “[s]tandard for plaintiff’s negligence [is the] same as [the] standard for defendant’s negligence. The shift in tort doctrine from contributory negligence as a full defense to comparative responsibility as a partial defense weakens whatever argument there otherwise might favor a dual standard that would treat the mentally disabled plaintiff more leniently than the mentally disabled defendant (sic). Under comparative responsibility, that plaintiff, even if found contributorily negligent, may well encounter only a limited reduction in the award the plaintiff receives from the defendant found guilty (sic) of negligence. Moreover, even though the plaintiff’s mental disability is ignored in considering whether the plaintiff is contributorily negligent at all, under Restatement Third, Torts: Apportionment of Liability § 8, Comment *c*, that disability can be considered in the course of the more open-ended process of apportioning percentages of responsibility between the plaintiff and the defendant.”²¹²

There are several obvious flaws in this argument. First, given the modified comparative responsibility rules that exist in most states, a plaintiff will still be completely barred from any recovery if his comparative responsibility equals or exceeds the defendant(s)’ comparative responsibility. Second, it is analytically incoherent and unprincipled to recognize the “intuitive argument that imposing risks on oneself is morally different from imposing risks on others, even when tort law later shifts the financial consequences of those risks to others,”²¹³ so that “a plaintiff’s conduct that imposes risks on others may be valued differently from conduct that imposes risks only on the plaintiff,”²¹⁴ and thus to allow consideration of the plaintiff’s mental

212. DRAFT RESTATEMENT THIRD, *supra* note 17, § 11 cmt. e at 154; *see* RESTATEMENT THIRD: APPORTIONMENT, *supra* note 211, § 3 cmt. a & Reporters’ Note.

213. RESTATEMENT THIRD: APPORTIONMENT, *supra* note 211, § 3 cmt. a, Reporters’ Note, at 37. In both Restatements, the reporters attempt to employ the non-rights-respecting Coasian move of treating the defendant’s potential financial liability to the plaintiff, which is the just consequence of the defendant’s having negligently injured the plaintiff, as an imposition of a risk on the defendant by the plaintiff that is not morally distinguishable from the defendant’s having negligently put the plaintiff’s person or property at risk. *See id.*; DRAFT RESTATEMENT THIRD, Reporters’ Note, *supra* note 17, § 11 cmt. e at 155. Defense lawyers wisely avoid making this sophistic economic argument to judges and jurors. However, proper regard for the defendant’s equal freedom suggests that a plaintiff’s conduct perhaps should be deemed negligent and thus affect his right of recovery, even if it was subjectively reasonable in the light of his own physical and mental capacities and beliefs, if it was unforeseeably idiosyncratic—that is, if it fell outside the (broad) range of foreseeable behavior for the great mass of persons in similar situations. 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* note 186 *supra*.

214. DRAFT RESTATEMENT THIRD, *supra* note 17, § 3 cmt. a, at 29.

deficiency during the apportionment calculations, while refusing to allow consideration of it when determining whether the plaintiff was contributorily negligent.

Third, and most importantly, the primary (and only comprehensive) rationale for applying the objective perspective to mentally deficient persons, which the draft Restatement Third itself emphasizes after mentioning the administrative convenience rationale,²¹⁵ is the interactive justice rationale: the necessity of doing so to sufficiently secure individuals' rights in their persons and property. As commentators and courts have consistently stated in defending and applying the dual perspective for mentally deficient persons, both before and (increasingly) after the adoption of comparative responsibility, this rationale applies to mentally deficient defendants, but not to mentally deficient plaintiffs with respect to injuries they themselves suffer as a result of their mental deficiency. Contrary to the argument in the draft Restatement Third (and the Restatement Third on Apportionment of Liability), the shift to comparative responsibility does not weaken or in any way affect this conclusion. Bernstein makes this point more poetically:

Both judges and scholars have written that in evaluating the behavior of a mentally disabled actor they favor an objective standard when the actor has hurt others, and a subjective standard when the actor has hurt himself. Decisional law so holding comes from not only the era of full-bar contributory negligence but also the current climate of apportionment, suggesting that this tendency cannot be written off as mere pity for helpless (and bygone) wretches who would otherwise recover nothing even though their contribution to their own injury was slight.²¹⁶

Analyzing the cases cited in the draft Restatement Third, Bernstein reports that "[a]lthough the Reporters' Note obscured this point somewhat, most of the decisions mentioned do not support the *Third Restatement* view, and several of them relax the standard of care for plaintiffs."²¹⁷ She notes further that cited cases that ruled against the plaintiff declared in dicta that a relaxed standard will sometimes be proper.²¹⁸ The reporters' own discussion of the cases, which states that they could find only one case that held that even severe mental illness is not a relevant factor, strongly suggests, in

215. See *id.* § 11 cmt. e, at 151–53.

216. See Bernstein, *supra* note 34, at 751 (footnotes omitted).

217. *Id.* at 752 (footnote omitted).

218. *Id.* at 752 n.76.

accordance with findings by others, that almost all courts are willing to consider a plaintiff's verifiable significant mental deficiency when there is sufficient evidence that the mental deficiency contributed to the particular alleged negligent conduct.²¹⁹

A subjective perspective (a reasonable child of the same age, intelligence, and experience) traditionally has been applied to child plaintiffs in the United States. While a number of jurisdictions formerly employed a dual perspective, using an objective perspective for child defendants and a subjective one for child plaintiffs,²²⁰ most jurisdictions now also apply the subjective perspective to child defendants. However, almost all states shift to the objective perspective of a reasonable adult when the child is engaged in a dangerous "adult" activity.²²¹ While the Restatement Second focused unhelpfully on the adult nature of the activity, defining an "adult activity" as "an activity which is normally undertaken only by adults, and for which adult qualifications are required,"²²² the comments in the draft Restatement Third emphasize the relevant factors that were originally discussed in the leading case on this issue, *Dellwo v. Pearson*,²²³ without, however, citing *Dellwo*: the serious (hazardous or "distinctly dangerous") nature of the risk that the activity poses to others, especially when engaged in by a child, and the inability of those others, without significant burden, to recognize the child's involvement and avoid or acceptably minimize the risk.²²⁴ Unfortunately, however, rather than focusing the blackletter language in subsection 10(c) on both *Dellwo* factors, the draft Restatement Third only mentions the dangerousness of the activity and retains the unhelpful and indeed misleading reference to activities that are "characteristically undertaken by adults."²²⁵ The unhelpful and misleading nature of the "adult" activity terminology is indicated by the list of activities that have been held to

219. See DRAFT RESTATEMENT THIRD, *supra* note 17, § 11 cmt. e, at 160–61.

220. For example, the dual standard was stated in dicta in *Roberts v. Ring*, 173 N.W. 437, 438 (Minn. 1919), and reaffirmed in dicta in *Dellwo v. Pearson*, 107 N.W.2d 859 (Minn. 1961), before being rejected, without oral argument and without any exploration of underlying rationales, in *Miller v. State*, 306 N.W.2d 554 (Minn. 1981).

221. See DRAFT RESTATEMENT THIRD, *supra* note 17, § 10(a) & (c) & cmt. f; 3 HARPER ET AL., *supra* note 1, § 16.8; KEETON ET AL., *supra* note 1, § 32 at 179–82.

222. RESTATEMENT (SECOND) OF TORTS § 283 A cmt. c (1965).

223. 107 N.W.2d 859, 863 (Minn. 1961). Thus, Bernstein and Dan Dobbs are incorrect when they state that *Dellwo* merely provided an ill-fitting list of allegedly "adult" activities but no comprehensive analytic category or principle. See Bernstein, *supra* note 34, at 759 & nn.102 & 103 (quoting DOBBS, *supra* note 1, at 299–300).

224. DRAFT RESTATEMENT THIRD, *supra* note 17, § 10 cmt. f.

225. *Id.* § 10(c).

be so-called “adult” activities by the courts, which includes the operation of “minibikes, motorscooters, dirt bikes, and snowmobiles.”²²⁶

The bifurcated perspective applied to children, which is (once again) irreconcilable with the administrative convenience rationale, is consistent with and indeed obviously based on the interactive justice rationale. As with the general treatment of persons with physical or mental disabilities, a child’s lesser physical and/or mental capacity or skill is taken into account only when we are able to do so without undermining the security of others’ rights in their persons and property. The draft Restatement acknowledges this point: “Inasmuch as the concept of dangerous activities looks mainly to dangers running to third parties, the rule set forth in Subsection (c) incorporates elements of the dual-standard reasoning. . . .”²²⁷

The draft Restatement’s (and a minority of courts’) categorical treatment of defendants less than five years of age as being incapable of negligence²²⁸ is not consistent with the interactive justice rationale. It is true, as the draft Restatement states, that “the possibility is slight that the conduct of a child under five is either deserving of moral criticism or is capable of being deterred by the application of tort rules.”²²⁹ However, the same is true for insane adults and many children five years or older, as well as for the “legally faulty” behavior of many “normal” adults, all of whom the draft Restatement properly treats as being subject to liability as defendants under the objective perspective. It is also true for insane persons and infants who unwittingly commit and are held liable for intentional torts. Tort liability, as we have seen, is not based on moral fault or efficient deterrence, but rather on moral responsibility for injury caused by “legally faulty” behavior, which is behavior that creates socially unacceptable (not equal-freedom maximizing) risks to the persons and property of others.

Referring to my prior brief presentation of the interactive justice rationale for the various objective and subjective perspectives that are applied by the courts in different types of situations,²³⁰ which has been more fully elaborated above, Bernstein states:

226. *Id.* § 10(c) cmt. f, at 133.

227. *Id.* at 134.

228. *See id.* § 10(b).

229. *See id.* § 10 cmt. d at 131.

230. *See Wright, Standards of Care, supra* note 12, at 257–59.

This perspective, yet another scholarly conjunction of freedom and security, perceives invasions from the plaintiff's or victim's perspective. From that vantage point, however, strict liability would serve as well as negligence; Wright has not so much defended the objective standard as rejected excuses or defenses based on inability to fulfill its demands. He has, however, noted a significant distinction between negligence and contributory negligence.²³¹

Yet Bernstein bases her own "group-based constraint" theory on acceptance of the general need for an objective perspective to be applied to defendants to achieve the proper "mediat[ion] between freedom and security,"²³² with exceptions from the objective perspective being based on supposedly adequate substitution of nonlegal "group-based constraints."²³³ The interactive justice theory I elaborate does not focus solely on the plaintiff's perspective; it rather focuses on the nature of the rights that are defined by interactive justice to maximize the equal external freedom of everyone, both defendants and plaintiffs, and indeed it sometimes treats the rights of the defendant as paramount.²³⁴ I offer an affirmative interactive justice rationale for the general (but not universal) application of the objective perspective to defendants, explain why certain deviations from the objective perspective for defendants are consistent with that rationale, and point out that the rationale does not justify applying an objective perspective to plaintiffs unless, unusually, their relevant conduct puts others at significant risk as well as themselves. It is part of an interactive justice account of negligent conduct—of what constitutes reasonable or unreasonable behavior—which is a question that is irrelevant under strict liability.

Bernstein recasts negligence law's attempt to provide sufficient security of one's person and property against adverse risks created by others into a Machiavellian form. Asserting that negligence liability claims are "moralistic accusations" by plaintiffs against defendants and that a defendant determined to have been negligent "has been condemned as blameworthy,"²³⁵ she suggests that negligence law attempts to eliminate or at least shift away from itself some of the resentment created by such condemnation by creating subjective-perspective exceptions to the usual objective standard of care for

231. Bernstein, *supra* note 34, at 746 n.37.

232. *See id.* at 736, 756.

233. *See* text accompanying notes 235–39 *infra*.

234. *See* text accompanying notes 183–84 *supra*; *cf.* note 213 *supra*.

235. *See* Bernstein, *supra* note 34, at 735.

members of certain “communities,”²³⁶ which are defined by the presence of “*group-based constraint* with respect to behaviors that imperil the physical safety of others,”²³⁷ thereby “outsourc[ing]” to such “communities” the security-maintaining function that is usually performed by negligence law’s objective standard of care.²³⁸ The group-based constraint “can be any kind of characteristic shared with others that limits the freedom of an actor to exercise his freedom to inflict accidental harm—usually by incapacitating him in a verifiable way, but sometimes (as in the case of medical malpractice . . .) through social, peer-enforced judgments.”²³⁹

This is a creative and provocative theory. However, I don’t think it fits the actual contours of negligence law doctrine and practice. First of all, in no situation, except with respect to the (inappropriate) special treatment given to medical professionals regarding medical treatment decisions (but not decisions regarding provision of medical information to their patients), does tort law actually defer to the constraints that a particular group deems proper for itself, which rather are always subject to evaluation and possible repudiation as being insufficiently respectful of the rights of others.²⁴⁰ Second, I don’t think Bernstein’s criterion of group-based constraint can identify the particular exceptions from the objective perspective that are recognized in negligence law while excluding those that are not.

For example, Bernstein states that neither her being a woman nor her being a Jew would make her a member of a community of group-based constraint, since these affiliations “do not stop me much from hurting others by accident.”²⁴¹ Why not? If constraints imposed by parents on children make children a community of group-based constraint, despite children themselves being “heedless, feckless, and inattentive by nature . . . little accident-bombs likely to go off at any time,”²⁴² why are members of religious communities, especially the more fundamentalist or authoritarian ones, which attempt to inculcate and enforce moral strictures on their members, including moral strictures on adverse interactions with others, not members of communities of group-based constraint? Why are women, who

236. *See id.* at 736, 738–39.

237. *Id.* at 737.

238. *Id.* at 741–42; *see id.* at 738–39.

239. *Id.* at 741.

240. *See, e.g.,* *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932).

241. *See* Bernstein, *supra* note 34, at 741.

242. *Id.* at 758.

according to some are naturally disposed or socially conditioned (by a male-dominated society) into “caring and concern” for others,²⁴³ not members of a community of group-based constraint?

Conversely, why are those with significant mental deficiency, who surely are constrained by family or society at least as much as children, not members of a community of group-based constraint and thus entitled to employ a subjective perspective as defendants? Why are professionals other than doctors, despite being subject to similar professional regulation and disciplinary procedures, not members of communities of group-based constraint? (The doctors’ “culture of infallibility,” which Bernstein views as a source of constraint,²⁴⁴ many view as a barrier against constraint.) Why is a doctor a member of a community of group-based constraint, to whom negligence law “outsources” regulation, for purposes of medical treatment decisions, but not for purposes of providing medical information to their patients?

In the end, it seems to me that Bernstein’s theory of group-based constraints dissolves into and is more straightforwardly understood as focusing, consistently with the justice theory, on whether particular subjective characteristics can be taken into account without significantly undermining individuals’ rights to an equal-freedom maximizing level of security of their persons and property.

VI. CONCLUSION

Perhaps the best and most useful way to draw together my extended commentary is to set forth some proposed revisions of and additions to the relevant negligence sections in the draft Restatement Third, for consideration by the American Law Institute or, more likely, by individual courts:

§ 3 Negligence

A person’s conduct is negligent if the person does not exercise reasonable care under all the circumstances. Reasonable care is the care that would be exercised by the reasonably careful person, who has proper respect for the persons and property of others as well as

243. See, e.g., CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (1982); NEL NODDINGS, *CARING: A FEMINIST APPROACH TO ETHICS AND MORAL EDUCATION* (1984).

244. See Bernstein, *supra* note 34, at 764.

himself/herself. Primary factors to consider in deciding whether a person's conduct was reasonable are the foreseeable likelihood that it will result in harm, the foreseeable severity of the harm that may ensue, the burden (including foregone benefits) that would be borne by the person and others if the person takes precautions that eliminate or reduce the possibility of harm, the social value of the affected interests, and the relationships among and respective rights of the affected persons.²⁴⁵

§ 4 [formerly § 12] Capacities, Skills, and Knowledge²⁴⁶

The reasonably careful person is usually assumed to have:

- (a) the physical capacities and skills, mental capacities and skills, and knowledge of the ordinary adult person,²⁴⁷ and
- (b) such superior physical capacities and skills, mental capacities and skills, and knowledge that are actually possessed by the person whose conduct is at issue.²⁴⁸

§ 5 [formerly § 11] Disability

(a) If a person has a physical disability that contributed to the person's allegedly negligent conduct, that disability should be taken into account in deciding whether the person behaved as a reasonably careful person (with that disability) would have behaved.²⁴⁹

(b) If a plaintiff has a mental or emotional disability that contributed to the plaintiff's allegedly negligent conduct, that disability should be taken into account in deciding whether the plaintiff behaved as a reasonably careful person (with that disability) would have behaved.²⁵⁰

(c) If a person fails to behave as a reasonably careful person would have behaved solely as a result of sudden incapacitation or loss of consciousness brought about by physical illness that was not reasonably foreseeable by the person, the person's conduct was not negligent.

245. See text accompanying notes 50–63, 68–70, 91–93, 110–13, 123–57, 183–89 *supra*.

246. Cf. RESTATEMENT (SECOND) OF TORTS § 289 (1965).

247. See text accompanying notes 164, 172–74, 179–81 *supra*.

248. See text accompanying note 182 *supra*.

249. See text accompanying notes 191–93 *supra*.

250. See text accompanying notes 194–219 *supra*.

§ 6 [formerly § 10] Children²⁵¹

(a) If a child is a plaintiff, the child's age, intelligence, and experience should be taken into account in deciding whether the child behaved as a reasonably careful person (with the child's age, intelligence, and experience) would have behaved, except:

(b) If a child is a defendant or was engaged in an activity that posed a significant danger to others, which those others were not able without significant burden to discover and avoid, the child's conduct should be measured against that of the reasonably careful person as specified in § 4.

251. See text accompanying notes 220–29 *supra*.

